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Pre-emptive Strike: an examination of International Law on the use of force

Research dissertation presented in partial fulfilment of the requirements of the degree of

LL.M in International Law

(QQI)

Law School, Griffith College Dublin

Simon D. Woods-Panzaru

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Candidate Declaration

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Submitted for the degree of: LL.M International Law

is the result of my own work and that where reference is made to the work of others due acknowledgment is given.

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Dedication

To my grandparents Aileen and Frank

Table of Contents

List of abbreviations

Charter	Charter of the United Nations
EU	European Union
ICJ	International Court of Justice
UN	United Nations
WMD	Weapons of Mass Destruction

Abstract

In this dissertation it was shown that until the emergence of the Bush Doctrine, Customary International Law and the Charter made up the framework for determining when the use of force was legal. The inherent right of a valid self-defence was embedded in customary international law in particular the *Caroline* case. Since 1945 and with the happenings of 9/11, warfare has taken on new directions which impact world peace and global security today. The Bush Doctrine responded to these changes taking on pre-emptive strike to include preventive and anticipatory use of force as an option against non-conventional warfare such as terrorism, WMD and cyberattacks in the absence of an imminent attack. The academic questions debated on preventive or anticipatory self-defence centred on whether the current law governing self-defence was able to deal with evolving modern warfare. This analysis examined under what circumstances and authority could a state use preventive and anticipatory self-defences notwithstanding the controversies surrounding them.

The aim and objective of the research was to understand the law under the Charter, Customary International Law and if the Bush Doctrine held any legitimacy for the extension of pre-emptive use of force. The results of the research showed that the UN Charter and Customary International law remain the foundations to determine when the use of force as a self-defence was legal. It also confirmed that the law cannot remain static to the changes happening in modern warfare. The research illustrated that extending pre-emptive strike to include preventive and anticipatory strikes caused uncertainty in the law. The conclusions in this study suggested it was essential to update Charter and Customary International Law with definitions of armed and imminent attacks by incorporating non-conventional warfare activities into the definitions, to re-examine the veto power of permanent members of the Security Council especially when a permanent member is involved in use of force against another state and that evidentiary standards need to incorporate non-conventional warfare so that the state having burden of proof was aware of the intelligence needed.

1. Chapter One

1.1 Introduction

Late sixteenth century jurisprudence gives an insight into how the use of force evolved and how the practice became a foundation for Customary International Law. The prominent philosophers and jurists at that time justified the colonists' use of force in the advancement of their commercial activities. This belief echoed in Franciscus de Vitoria's[1] writings in which he argued to treat foreigners in an unfriendly way or prevent them from trading in a host country was a violation and the state offended could attack the host country and wage a just war. Hugo Grotius,[2] saw the freedom of commerce and of navigation as legal principals and argued that an offense against the natural rights of commerce or hospitality entitled a sovereign to wage a just war on a local society. Emmerich de Vattel's view was that customary international law was created by the tacit consent of states. Law was neither universal nor mandatory, but binding only those states that chose to participate. He also held the view that to prevent evil a nation had the right to resist the injury another nation sought to inflict upon it and to use force against the aggressor. Fast forwarding to the transference of colonial territories into sovereign states and two world wars, the Charter was established in 1945 and enacted into force in 1946 with the purpose of maintaining and promoting international peace.

The 9/11 attack on the World Trade Towers in New York City in 2001, can be seen as pinpointing the extension of pre-emptive use of force. The U.S.' response, which has become known as the Bush Doctrine, is to broaden the meaning of pre-emptive strike to include preventive or anticipatory self-defence while justifying its use in the absence of an imminent attack. Extending pre-emptive strike to include preventive and anticipatory self-defence is causing confusion and uncertainty in the law. The questions debated centre on whether the current rules are able to deal with modern warfare as it is evolving, for example the use of drones, weapons of mass destruction and attacks by terrorists or if they need to be extended to include pre-emptive, preventive and anticipatory self-

[1] Franciscus de Vitoria (1483 -1546), was a Spanish Roman Catholic philosopher, theologian, and jurist. He is the founder of the tradition in philosophy known as the School of Salamanca, noted especially for his contributions to the theory of just war and international law. Wikipedia.

[2] Hugo Grotius (1583-1645), was a Dutch jurist and scholar whose masterpiece *De Jure Belli ac Pacis* (1625; *On the Law of War and Peace*) is considered one of the greatest contributions to the development of international law.

defences. A problem arises when a state unilaterally uses these self-defences without the Security Council's authorisation.

To understand the legal complexities involved it is necessary, as a starting point, to look at the nature of the law on the use of force as a self-defence and the legal authority on whether pre-emptive, preventive and anticipatory strikes are justified. To achieve this, this study choose doctrinal research as a research approach because it is best suited to uncover what the law is on this subject and it verifies existing knowledge on the legal issues researched.[3] The researcher can then discuss the legal meaning of the rules of law found within the statutes, the decisions reached in case law, as well as identifying the ambiguities and criticisms of the law. A literature review will be carried out by way of a desk research to provide critical evaluations.

The aim and objective of this study includes a review of the legal use of force in self-defence and an examination of how far the dimensions of the traditional rules are moving to deal with situations where there is a potential threat from terrorists, weapons of mass destruction and cyber-attacks. The focus of the research carried out is to examine the law on the use of force in self-defence, in particular if there is a legal role for preventive and anticipatory self-defences when a country is under threat or a potential threat. Under what circumstances might a state use the use of force as a self-defence and under what authority the use of force can be used as a self-defence are two questions the academic Colin Gray states need to be addressed. Under the Bush doctrine pre-emptive strike has been extended to include preventive or anticipatory attack and in doing so is causing uncertainty in the law. In addition under the Bush Doctrine the use of force is no longer restricted to territory but is now applied against terrorists and non-conventional uses of force which a state may be threatened with. Academics point out that the problem with the Bush Doctrine is that it is not limited to the traditional definition of pre-emption but includes prevention in the absence of a coming attack.[4] The academic Angus Martyn looked at this and concludes that the use of military force by the U.S. against terrorists and so-called state sponsors of

[3] 'Legal Dissertation: Research and Writing Guide', see heading titled 'Drafting the Methodology Section' Jerome Hall Law Library, Maurer School of Law. < https://law.indiana.libguides.com/dissertationguide#s-lg-box-22069151>.

[4] Olumide K. Obayemi, 'Legal Standards Governing Pre-Emptive Strikes and Forcible Measures of Anticipatory Self-Defence under U. N. Charter and General International Law', 23, (2006, Annual Survey of International and Comparative Law:Vol.12:Iss 1, Article 3.) .< https://core.ac.uk/download/pdf/233102637.pdf>.

terrorism in the 1990s has forced a change and influencing the boundaries of international customary law.[5]

Analysing academic and scholarly articles gives insight into the grey areas that have emerged and question if preventive and anticipatory use of force is legal. The traditionalist view, which is a strict approach, is that the use of force as a self-defence to an armed attack is legal as set out in Article 51 of the Charter. Under Article 51, the armed attack has to have occurred. Conversely a number of international lawyers argue that the text of Article 51 does not prevent unprovoked pre-emptive action. In addition, customary international law allows pre-emptive self-defence when there is a threat so grave and imminent that the victim cannot wait to act in self-defence until the attack has occurred. The concept of preventive or anticipatory self-defence when an attack is anticipated is controversial. The questions debated on preventive or anticipatory self-defence centre on whether the current rules governing self-defence and pre-emptive strike are able to deal with evolving modern warfare.[6] The study will discuss if the current rules governing the use of force as a self-defence are able to deal with modern warfare. An analysis of whether extending pre-emptive strike to include preventive and anticipatory strikes, causes confusion and legal uncertainty will be examined.

The aim of this dissertation is to have a firm understanding of pre-emptive strike including preventive and anticipatory use of force, and can they be legally used. It will aim to identify the grey areas and legal uncertainties in the legislation and if these uncertainties have contributed to the abuse by a state to justify its use of force through pre-emptive strike. It will examine customary international law and if it has clarified any of these legal uncertainties. Academics have determined, for example, Sanjay Gupta that before a pre-emptive strike is launched there is a self-imposed obligation on a state to ensure that all other means have been exhausted and that there are no alternatives available.[7] Michael Wood[8] approaches the controversy of anticipatory self-defence focusing on whether it has survived the Charter. He states that both the U.S. and the United Kingdom look to

[5] Angus Martyn, 'The right of Self-Defence under International Law- the Response of the Terrorist Attacks of 11 September', (January 2002, Information and Research Services, Current Issues Brief No. 82001-02). < https://www.aph.gov.au/binaries/library/pubs/cib/2001-02/02cib08.pdf>.

[6] Obayemi (n 4) 21.

[7] Sanjay Gupta, 'The Doctrine of Pre-Emptive Strike: Application and Implications during the Administration of President George W. Bush', 186. (March 2008, International Political Science Review, Mar., 2008 Vol 29, No 2, 181-196, Sage Publications Ltd.) < https://journals.sagepub.com/doi/pdf/10.1177/0192512107085611>.

[8] Michael Wood, 'International Law and The Use of Force: What Happens in Practice?', (Indian Journal of International Law, Vol 53, 345-367) 357. <https://legal.un.org/avl/pdf/ls/Wood_article.pdf>.

customary international law to support their position on anticipatory self-defence in particular to the *Caroline* case which held that force may be used in self-defence when there is an imminent attack.[9] He confirms that the ICJ has not addressed the issue of what is an imminent attack and has expressly left it open.

An examination of this topic is timely with the happening of the Ukraine War**.** The analysis of pre-emptive, preventive and anticipatory use of force as self-defences put forward by President Putin to justify the attack by Russia on Ukraine emphasis that the proposed threat was unilaterally assessed by President Putin. Therefore, these defences violate the Charter and customary international law and are illegal. The UN Security Council needs to find a way to curtail unilateral assessments as it is the core of the current problem in this area.

1.2 Methodology

Methodology refers to 'a plan of action'[10] a 'research design' which 'shapes our choice' of research and the 'desired outcomes' that the researcher hopes to achieve.[11] Methodology describes how the research was conducted and why it was conducted in that way.[12] Methods are the 'techniques' used in the research process.[13]

The research question posed in this dissertation covers a wide area of law namely, Pre-emptive Strike: an examination of International law on the use of force. This area of law is complex due to the extension of the use of force as a self-defence in situations where non-states are the attackers and non-conventional warfare is used resulting in states making a unilateral assessment to use force as a self-defence, which is illegal. The research question will be examined through the lens of doctrinal research, with an analysis of case law and a literature review to ascertain academic thinking on this subject.

To understand the legal complexities involved it is necessary, as a starting point, to look at the nature of the law on the use of force as a self-defence and the legal authority on whether pre-emptive strike is justified. This dissertation will choose doctrinal research as a research approach because it is best suited to uncover what is the law under research.

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[9] Ibid.

[10] Chia-Lin Yen, 'A Discussion of Paradigms and Research Methods'. Journal of WuFeng University, Vol 19, 358, < http://libwri.nhu.edu.tw:8081/Ejournal/AP01001928.pdf>, quoting from Michael Crotty (1998) 'The Foundation of social Research: Meaning and Perspective in the Research Process' Sage Publications.

[11] Ibid.

[12] n 3 see heading titled 'Drafting the Methodology Section'.

[13] Yen (n 1) 358 quoting from John W Creswell (2003) 'Research Design: Qualitative, Quantitative and Mixed Methods Approaches' Sage Publications.

Doctrinal Research focuses on the letter of the law sometimes referred to as the 'black letter law'.[14] In this type of research the researcher asks the question, what is the law in a certain area and carries out a detailed analysis of the development of the law and how it is applied.[15] This type of research verifies the existing knowledge on the legal issues under research.[16] The researcher then discusses the legal meaning of the rules of law found in the legal instruments and the decision making in cases, as well as identifying the ambiguities and criticisms of the law. One of the main purposes of doctrinal legal research is to maintain continuity, consistency and certainty of the law.[17]

One criticism of doctrinal research is that it does not challenge the law and to overcome this case law will be examined, in particular two predominant cases namely, *Military and Paramilitary Activities in and against Nicarag*ua (*Nicaragua v United States*),[18]and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (*Construction of a Wall*)[19] case involved the United States and the *Construction of a Wall Case* involved, the State of Israel. The *Nicaragua v United States* case is seen as a landmark case which clarified issues surrounding the use of force and the right of self-defence.

Transparency is important in research and a literature review will be carried out by way of a desk research using secondary sources such as scholarly articles which provide critical evaluations. The literature review will support the findings in this dissertation and allow readers to determine if the literature might be useful for further research.

1.3 Structure of the dissertation

Chapter One will have an Introduction and Methodology section followed by Chapter Two, which will analyse the development of the use of force tracing back to the philosophers Francisus de Vitoria, Hugo Grotis and Emmerich de Vattel, up to the

[14] Chrispother McCrudden, (2006) 'Legal research and the social sciences' *Law Quarterly Review*, *122*, 632-650, *Oxford Legal Studies Research Paper No. 33/2006*. < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=915302#>.
[15] Amrit Kharel, 'Doctrinal Legal Research', 3. (2018) SSRN Electronic Journal < https://www.readcube.com/articles/10.2139/ssrn.3130525>.
[16] Ibid, 4.
[17] Ibid, 6.
[18] I.C.J. Report 1986, 94 <https://www.icj-cij.org/public/files/case-related/70/070-19860627-JUD-01-00-EN.pdf>.
[19] (2004) ICJ Rep 1236 < https://www.icj-cij.org/public/files/case-related/131/131-20040709-ADV-01-00-EN.pdf>

establishment of the United Nations Charter in 1945. An in-depth analysis will examine the traditionalist view on the use of force as a self-defence.

Chapter Three, will aim to understand pre-emptive strike and how it has deviated from the traditionalist view on the legal use of force. 9/11 can be taken as a time line when terrorists used non-conventional means to attack the United States and this changed the thinking on the use of pre-emptive, preventive and anticipatory self-defence in response to these new forms of threat. It will examine the permissive view on the legal of the use of force as a self-defence when non-states use non-conventional means of warfare.

Chapter Four, will discuss the position today, with respect to the use of force weighing up the traditionalist position covered in Chapter Two and the current position outlined in Chapter Three. In addition, Chapter Four will look at the criteria a state has to consider on the use of force in self-defence, and the lawfulness of the self-defence within the provisions of international law. This chapter will evaluate the viability of pre-emptive, preventive and anticipatory use of force as self-defences, in light of the attack by Russia on Ukraine and the self-defence justifications put forward by President Putin.

Chapter Five will have a conclusion which will summarise the findings and confirm that the United Nations Charter is still fundamental in maintaining world peace but that it does need to be updated. Suggested reforms to eliminate the vagueness and legal uncertainty in the use of force as a self-defence will be presented in this chapter.

2. Chapter Two

2.1 Introduction

> I want to understand much of the cruelty that was carried out in the name of law, in the name of progress, according to its own terms and how perpetrators forgave themselves, whatever horribleness they did, because of a perception that what had to be done was morally good.[20]

The legitimate use of force is set out in the United Nations Charter (Charter).[21] At the same time customary international law allows pre-emptive self-defence only when there is a threat so grave and imminent that the victim cannot wait to act in self-defence until the attack has actually started.[22] A majority of international lawyers argue that the text of Article 51 of the Charter has made it clear that Article 51 does not prevent unprovoked pre-emptive action.[23] The legal use of force is a complicated area of law and there is much confusion because today pre-emptive strike has been stretched to include prevention, anticipatory attack, and non-state actors, by the United States, which are seen as controversial.[24] When reviewing the use of force Colin Gray points out that there are two basic questions which need to be addressed: One, under what circumstances might one strike first?, and, two, on what authority might one strike first?[25]

Research shows that a state with sovereignty over a given territory has the right to act to exclude other States from acting upon that territory.[26] Today, the use of force is no longer restricted to territory and academics have debated the use of pre-emptive strike under the Bush Doctrine. The concept of pre-emptive strike is now applied against terrorists and

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[20] Abdulrazak Gurnah, Nobel Prize Winner, 'I write about what I know', *The Irish Times Arts & Ideas* (Dublin, 12 May, 2022,) 9.

[21] The Charter came into force on 24 October 1945, and was ratified by the five permanent members of the United Nations Security Council, namely China, France, the Soviet Union, the United Kingdom, the United States and together with a majority of the other signatories.

[22] Aylin Şeker Gőrener, 'The Doctrine of Pre-Emption and the War in Iraq under International Law', 33. < http://sam.gov.tr/pdf/perceptions/Volume-IX/summer-2004/AylinsekerGorener.pdf> accessed 30 May 2022.

[23] Ibid 35.

[24] Colin S. Gray, 'The Implications of Preemptive and Preventive War Doctrines: A Reconsideration', (2007). Monographs, Books, and Publications. 677. <https://press.armywarcollege.edu/monographs/677> accessed 16 October 2021.

[25] Ibid, 7.

[26] Constantinos Yiallourides, Markus Gehring, and Jean-Pierre Gauci, 'The Use of Force in relation to Sovereignty Disputes over Land Territory' 1, (May 2018, British Institute of International and Comparative Law). < https://www.biicl.org/documents/2_territorial_disputes_web_ready_version.pdf> accessed 19 2021.

extremists groups while justifying preventive and anticipatory attacks in the absence of the threat of imminent attack.[27] This will be looked at in Chapter Three.

As a starting point to understand the traditional use of force by a state, this chapter will focus on a review of how the law on the use of force developed.

2.2 Customary Law

Prior to the Charter, the right to use force was guided under customary international law and still is,[28] which regards the right to use force to go to war when a wrong had been committed, as a right of every state. This thinking can be traced back to the philosopher Franciscus de Vitoria's[29] writings in which he argued that *jus gentium*[30] was natural law administered by a secular sovereign and was not divine law.[31] In this period of history the Spanish were conquering the native lands of the New World and according to Vitoria to treat foreigners in an unfriendly way or prevent them from trading in a host country was a violation of *jus gentium* and the state offended could attack the host country and wage a just war.[32] Vitoria justified Spanish trading with the native Indians and the use of force against them.

The philosopher Hugo Grotius,[33] considered to be the father of international law, was a naturalist like Vitoria, who saw the freedom of commerce and of navigation as legal principals. He extended Vitoria's right to trade by claiming that the doctrine of

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[27] President George Bush's speech at West Point, (June 2002) < https://georgewbush-whitehouse.archives.gov/news/releases/2002/06/20020601-3.html>.

[28] *Nicaragua v United States* (n 18) 176].

[29] Franciscus de Vitoria (1483 -1546), was a Spanish Roman Catholic philosopher, theologian, and jurist. He is the founder of the tradition in philosophy known as the School of Salamanca, noted especially for his contributions to the theory of just war and international law.

[30] *Jus gentium* is the Latin for "Law of Nations". In legal theory it is law which natural reason established for all men as distinguished from *jus civile*, civil law peculiar to one state or people. Roman lawyers and magistrates originally devised *jus gentium* as a system of equity applying to cases between foreigners and Roman citizens. The concept originated in the Romans' assumption that any rule of law common to all nations must be fundamentally valid and just. Britannica. <https://www.britannica.com/topic/jus-gentium-Roman-law.>.

[31] James Patrick Kelly, 'Customary International Law in Historical Context: The exercise of Power Without General Acceptance' [2.2] (Widener University Delaware Law School Legal Studies Research Paper Series no. 17-06, April 2018)
<https://www.researchgate.net/publication/324503206_Customary_International_Law_in_Historical_Context_The_Exercise_of_Power_Without_General_Acceptance>.

[32] Ibid.

[33] n 2.

Providential Function of Commerce[34] was the source of the law of hospitality.[35] Grotius saw that an offense against the natural rights of commerce or hospitality entitled a sovereign to wage a just war on a local society. Grotius held that it was 'lawful to kill him who is preparing to kill'.[36] Like Vitoria, Grotius was justifying the Dutch commercial growth and adventures into the Indies.

The 1648 Treaty of Westphalia established the Law of Nations, and is credited with creating the current international legal order of independent sovereign entities known as nation states. Each of these nation states has equality of sovereignty regardless of its size and power, and is defined by the inviolability of borders and non-interference in the domestic affairs of sovereign states.

The philosopher Emmerich de Vattel[37] supported the law of nations and wrote that individual nation-states are equal, independent, and hold their own rights. Vattel was a positivist and saw law as valid if it was set by a sovereign state. In Vattel's view customary international law was created by the tacit consent[38] of states.[39] Law was neither universal nor mandatory, but binding only those states that chose to participate.[40] He also held the view that to prevent evil a nation had the right to resist the injury another nation sought to inflict upon it and to use force against the aggressor.[41]

In 1776, the U.S. obtained its independence from the United Kingdom. Piracy at this time was a problem for maritime shipping particularly with the Barbary States. The Barbary States of North Africa, were made up of Tunis, Algiers and Tripoli and they would attack and capture commercial ships and goods and enslave any surviving crew members who were not protected by Barbary peace treaties purchased by tribute. A tribute under a Barbary peace treaty required a nation to pay a large payment of money plus annual

34 Ilana M. Porras, 'The Doctrine of the Providential Function of Commerce in International Law: Idealizing Trade' in Matti Koskenniemi, Mónica Garcia Salmones Rovira and Paolo Amorosa (eds) *International Law and Religion: Historical and contemporary Perspectives*. (Oxford Scholarship Online 2007).
War produced enmity, whereas commerce encouraged friendship. By means of the providentialis doctrine, international trade became embedded in international law as a virtuous and presumptively necessary mechanism to promote friendship and peace among separated peoples.

[35] Ibid.

[36] Obayemi, (n 4) 27.

[37] Emmerich de Vattel (1714–67) was an international lawyer. He was largely influenced by Hugo Grotius. He is most famous for his 1758 work 'The Law of Nations'.

[38] Tacit consent is given by actions that imply consent, even though expressing consent is not the primary purpose.

[39] Kelly (n 31) [2.2].

[40] Ibid.

[41] Obayemi, (n 4) 27

payments. The annual payments might be cash, military supplies, or expensive presents for the ruler. The United Kingdom paid tribute to these Barbary States and after the U.S. obtained its independence from the United Kingdom it no longer had that protection. In 1784 the U.S. decided to pay tribute when its merchant ship Betsy and two other ships where attacked in a short space of time. In 1801 Thomas Jefferson became president of the U.S. Prior to becoming president Thomas Jefferson had advocated the non-intervention in the internal affairs of other states, collective security and defensive alliances and the importance of dealing decisively with acts of aggression.[42] He showed when confronted with aggression one way to peace was through unity and strength.[43] The Barbary Wars highlight this. There were two wars, the first covered the period from May 1801 to June 1805, four years, and was fought successfully by the U.S., Sweden and Sicily and the second war covered the period from 17 to 19 June 1815, three days, and was fought successfully by the U.S. It brought an end to the U.S. paying tribute to the Barbary States. Thomas Jefferson's belief in collective security and defensive alliances and the importance of dealing decisively with acts of aggression, were another key development in the legal use of force as a self-defence.

The emerging of non-Western nations such as Turkey and Japan, in international affairs, saw a common consent of nations developing binding new nations without their actual consent or participation in the expansion of the international community. The common consent approach was adopted by the Permanent Court of International Justice and its successor the International Court of Justice as well as the United States Supreme Court.[44]

By the end of the nineteenth century European Empires made sure that the entire world was surrounded by one European system of international law.[45] The transforming of colonial territories into sovereign states started after the First World War and at the same time there was the emergence of international institutions such as the League of Nations[46] as a result of the 1919 Peace Treaty. Japan and Italy subsequently withdrew from the League of Nations.

[42] Robert F Turner, 'State Responsibility and the War on Terror: The Legacy of Thomas Jefferson and the Barbary Pirates,' 121, (2003, *Chicago Journal of International Law*: Vol. 4: No. 1, Article 10). <https://chicagounbound.uchicago.edu/cjil/vol4/iss1/10>.
[43] Ibid 122.
[44] Kelly (n 31) [2.2]
[45] Ibid
[46] Ibid

In 1946 the International Court of Justice (ICJ) was established replacing The Permanent Court of International Justice which had been set up in 1921 at The Hague.

After the Second World War in 1946, the League of Nations was succeeded by the United Nations Organisation. This was the start of decolonisation, as the General Assembly of the United Nations increased its membership with new states from the third world .[47] The new states embraced the ideas of sovereignty and equality of states and the principles of non-aggression and non-intervention in their search for security within the bounds of a commonly accepted legal framework.[48] The ICJ reinforces this, '... in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured'.[49]

Today, each state has sovereignty which is the absolute power within its own territory to decide domestic and foreign policies. The *Nicaragua* case supported the principle of non-intervention when it defined it as involving the right of every sovereign state to conduct its own affairs without outside interference.[50] The ICJ further stated in this case that a state is prohibited from interfering either directly or indirectly in the internal or external affairs of another state whether through military, subversive, economic or diplomatic means.[51] It is accepted that although non-intervention is not spelt out in the Charter it has a connection with the principle of sovereign equality under Article 2(1) of the Charter and has the status of *jus cogens*.[52] The International Law Commission in its Report on the work of the seventy-first session (2019) which it submitted to the General Assembly of the UN suggested a draft text of *jus cogens* at Conclusion 2, as:

> A peremptory norm of general international law (*jus cogens*) is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only as a subsequent norm of general international law have the same character.[53]

In Conclusion 3, it states that:

> Peremptory norms of general international law (*jus cogens*) reflect and protect the fundamental values of the international community, are

[47] Malcolm N. Shaw, *International Law*, (6th edn Cambridge University Press, 2008) 31.
[48] Ibid 39.
[49] Statute of the International Court of Justice, Article 9 < https://www.icj-cij.org/en/statute>.
[50] *Nicaragua v United States* (n 18) [202].
[51] Ibid [205].
[52] Martyn (n 5) 31-32 also citing the *Nicaragua Case* at footnote 134.
[53] International Law Commission Annual Reports Report on the work of the seventy-first session (2019) Chapter V, 'Peremptory norms of general international law (*jus cogens*)',A/74/10, 142. < https://legal.un.org/ilc/reports/2019/english/chp5.pdf>.

> hierarchically superior to other rules of international law and are universally applicable.[54]

In the *Costa Rica v Nicaragua*,[55] case Judge Dugard explained that the prohibition on the use of force is directly related to the principle of respect for territorial integrity which is a norm of *jus cogens.*[56] The European Convention on the Peaceful Settlement of Disputes[57] states that disputing parties shall abstain from any sort of action which may aggravate or extend the dispute.[58] Case law shows that the obligation on the parties to a dispute is to exercise restraint, which is enshrined in the jurisprudence of the ICJ.[59] The *Nicaragua Case* is an example of where the ICJ ordered the disputing parties to cease all hostile activities and refrain from certain actions which might aggravate or extend the dispute.[60] In cases involving armed incidents between parties the ICJ sees itself as the principal judicial institution of the United Nations and has an important role to play in the maintenance of international peace.[61]

Institutions help keep a state stable. In addition it is worth noting that a state can be a democracy either a parliament or presidential. There are also states where totalitarian regimes use force to compensate for lack of legitimacy and military regimes that also lack legitimacy and are found in states that are not stable or have internal violence.

The inherent right of a valid self-defence stemmed from the *Caroline*[62] case which held that the right to self-defence had to conform to three criteria, namely, was the response necessary, was the response proportionate and was the response immediate. The then U.S. Secretary of State Daniel Webster argued that self-defence is confined to cases in which the necessity of self-defence is instant, overwhelming and leaving no choice of means and no moment for deliberation.

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[54] Ibid.

[55] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua*) (Provisional Measures) (Order of 8 March 2011).

[56] Ibid, Sep Op Judge Dugard, [15-18].

[57] The European Convention on the Peaceful Settlement of Disputes was signed on 29 April 1957 and came into force on 30 April 1958.

[58] Ibid, Article 31(3).

[59] Yiallourides, Gehring, and Gauci (n 26), 105 [206].

[60] *Military and Paramilitary Activities in and against Nicarag*ua (Nicaragua v United States)(Provisional Measures) (1984) ICJ Rep 169, [41.B. 1. and 3.] < https://www.icj-cij.org/public/files/case-related/70/070-19840510-ORD-01-00-EN.pdf>.

[61] Yiallourides, Gehring and Gauci (n 26) 107 [208]

[62] *U.S. v United Kingdom*, 30 BFSP [1837] 195-6.

2.3 The Charter of the United Nations

The Charter is the founding document of the UN .[63] The Charter is a treaty and recognised under the Vienna Convention on the Law of Treaties[64] which defines a treaty as:

> "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;[65]

and must be performed as stated under Article 26[66].

President Roosevelt in 1941 described the countries fighting against the Axis Powers as the United Nations and the name remained.[67] The UN was established after World War II in an attempt to 'maintain international peace and security and to achieve cooperation among nations on economic, social and humanitarian grounds'.[68] Article 2(4) of the Charter is seen as prohibiting the use of force and states that:

> 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.

Article 2(3) requires states to settle their disputes through peaceful means. Article 33(1) states that states involved in an international dispute are subject to a legally binding obligation to seek a peaceful solution and lists how to do this by: negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. The UN General Assembly Resolution 53/101 sets out guidelines for international negotiations, emphasising that the negotiations must be carried out in good faith.[69]

Article 2(7) states that there is nothing in the Charter that authorises the UN to intervene in matters which are essentially within the domestic jurisdiction of any state or require

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[63] *United Nations, 'United Nations Charter (1945)'*.< https://www.un.org/en/about-us/un-charter>.
[64] United Nations, Treaty Series, vol. 1155, p. 331.< https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf>
[65] Ibid, Article 2, 1(a)
[66] Ibid, Article 26, "*Pacta sunt servanda*", every treaty in force is binding upon the parties to it and must be performed by them in good faith.
[67] U.S. Department of State, 'The United States and the Founding of the United Nations, August 1941 - October 194' https://2001-2009.state.gov/r/pa/ho/pubs/fs/55407.htm.
[68] n 63, Article 1.
[69] United Nations General Assembly, 'Principles and Guidelines for International Negotiations', Resolution 53/101 (8 December 1998. UN Doc S RES.53/101), 2(a). <http://www.worldlii.org/int/other/UNGA/1998/177.pdf>.

member states to submit such matters to the UN for settlement, however, Article 2(7) shall not prejudice the application of enforcement measures under Chapter VII.

There are two exceptions to Article 2(4). The first exception refers to forcible measures which the Security Council may authorise under Chapter VII of the Charter,[70] and requires an affirmative vote from nine of the fifteen members including the concurrence or abstention of its five permanent members, namely China, France, Russia, United Kingdom and United States.[71]

The Security Council shall determine the existence of any threat to the peace or breach of peace or an act of aggression and shall make recommendations or decide what measures will be taken under Article 41 and 42 to maintain or restore international peace and security.[72]

Forcible measures are outlined in the Charter as '…demonstrations, blockade, and other operations by air, sea or land forces…'.[73] Article 41 of the Charter lists non-forcible measures that can be taken, namely complete or partial interruption of economic relations, and of rail, sea, air, postal telegraphic, radio and other means of communication, and severance of diplomatic relations.

In the *Construction of a Wall* case.[74] Israel argued that the construction of a wall in occupied Palestine was consistent with its inherent right to self-defence under Article 51, which they argued was necessary to stop terrorist attacks. The Security Council held that Israel was in violation of the Charter and customary international law because Israel had failed first to exhaust all peaceful means to resolve the matter.[75]

The second exemption refers to Article 51, which states that the 'inherent right of self–defence' may be used if an armed attack occurs. Article 51 further states that measures taken under this right of self-defence must be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council to take such action it deems necessary to maintain or restore international peace

[70] n 63.
[71] Sean D. Murphy, 'The Doctrine of Preemptive Self-Defense', (2005, 50 Vill. L. Rev. 699), 707. < https://digitalcommons.law.villanova.edu/vlr/vol50/iss3/9>.
[72] n 63 Article 39
[73] Ibid Article 42.
[74] *Construction of a Wall* (n 19)
[75] Security Council resolution 487 (19 June 1981).< https://www.cambridge.org/core/journals/american-journal-of-international-law/article/abs/united-nations-security-council-resolution-487-1981/C588CC97CA5EA5D8266B3F3315167870>.

and security.[76] The *Nicaragua v United States* case confirmed this when the ICJ ordered the disputing parties to cease all hostile activities and refrain from certain actions which might aggravate or extend the dispute.[77] This means that Article 51 allows member states to resort to the use of force if such use of force is a necessary self-defence to an armed attack or the Security Council has authorised such force as necessary to maintain or restore international peace or security.[78]

Article 53 of the Charter requires that no enforcement action shall be taken under regional arrangements or by regional agencies without the authorisation of the Security Council.

There are two views on the interpretation of Article 2(4), The permissive view, which the U.S. and Israel follow and will be discussed in Chapter Three, and the restrictive view which holds that Article 2(4) restricts the use of force unless it falls within the two exceptions under Article 51 and Chapter VII. The generally accepted legal view is that Article 2(4) only allows armed force, which is reinforced in the Preamble to the Charter[79] and Article 44,[80] which requires the use of force to be armed.

Under the traditionalist view Article 51 is seen as restrictive because a state has to be able to demonstrate that it has been the victim of an armed attack and that state has the burden of proof.[81] The ICJ has looked at the meaning of armed attack in the *Nicaragua v United States* case and held that it is only under the exceptions to Article 2(4) that the use of force can be legitimate for one state to lawfully use force against another state when the wrongful act provoking the response was an armed attack. The ICJ further stated that states do not have a right of collective armed response to acts which do not constitute an armed attack.[82] This case also looked at the meaning of force and held that indirect use of force was prohibited because it is an ultimatum having recourse to military measures if certain demands are not met.[83]

The necessity for the use of self-defence was looked at in the *Oil Platforms.*[84] case where the Court held that it was not satisfied that the U.S.' attacks on the oil platforms were

[76] n 63, Article 51.
[77] *Nicaragua v United States* (n 18) [289].
[78] n 63, Article 42.
[79] n 63.
[80] Ibid
[81] *Islamic Republic of Iran v. United States of America*, (*Oil Platforms*) ICJ Reports 2003, 161, [57] < https://www.icj-cij.org/public/files/case-related/90/090-20031106-JUD-01-00-EN.pdf >.
[82] *Nicaragua v United States*, (n 18) [195].
[83] n 63 , Preamble' https://www.un.org/en/about-us/un-charter/preamble.
[84] *Oil Platforms* (n 81)

necessary in order to respond to the attack on the Sea Isle City and the mining of the USS Samuel B. Roberts.[85]

There are three requirements to exercise self-defence: 1) self-defence can only be taken in response to an armed attack; 2) it must be directed against the state responsible for the attack; and 3) any act of self-defence must be carried out within the limits of necessity and proportionality.[86] A state which invokes a right of self-defence to justify the use of force against another state must prove that the conditions giving rise to the right of self-defence were met and the exercise of this right was both necessary and proportionate.[87]

In the *Oil Platforms* case, the ICJ focused on the scale and effect of an armed attack that caused U.S. to respond which included the destruction of two Iranian frigates and a number of naval vessels and aircraft to distinguish it from a mere frontier incident.[88] The ICJ noted that in establishing that an armed attack occurred the state invoking the right of self-defence must prove that it was the target of a large scale use of force. With respect to self-defence it must be proportionate to the means and the extent of the armed attack and should not be disproportionate to the gravity of the original attack against the state, the ICJ held in the *Nicaragua v United States* case.

The traditionalist view is that Article 51 is restricted in that self-defence can only be used when there has been an armed attack. The *Nicaragua v United States* case looked at what is meant by an armed attack and held an armed attack included not only action by regular armed forces but also included the sending by a state of armed bands, groups, irregulars or mercenaries which carry out acts of armed forces against another state of such gravity as to amount to an actual armed attack conducted by regular armed forces.[89] The Court also stated that an armed attack also included assistance to rebels in the 'provision of weapons or logistical or other support'[90] because it could be regarded as 'a threat or use of force or amount to intervention in the internal or external affairs of other states'.[91] The Court further stated that:

[85] Ibid [76].
[86] Yiallourides, Gehring, and Gauci (n 26) [145]
[87] *Oil Platforms* (n 81) [76].
[88] Ibid [74].
[89] *Nicaragua v United States* (n 18) [195].
[90] Ibid.
[91] Ibid.

> There is no rule in customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation.[92]

2.4 Pre-emptive Strike

Unlike the *Caroline* case where the attack has to be immediate Article 51 of the Charter, permits the right of self-defence only if an armed attack has occurred. The *Caroline* case[93] is seen as laying down the authority for pre-emptive strike because a nation facing immediate aggression from another state may pre-emptively act to protect itself. In this case, the British military in 1837, attacked the steamboat Caroline close by the Niagara Falls. The boat, which was a US boat, was suppling men and arms to a rebellion in Canada. Canadian rebels fled to an island in the Niagara River, in the ship Caroline. British forces crossed the Niagara River, to board and capture the vessel where it was moored in US territory. Shots were exchanged and one U.S. citizen, a watch keeper, was killed. British forces set fire to the Caroline and set it adrift in the Niagara River. The British justified the attack as self-defence and the U.S. Government declared that the attack on the vessel constituted an attack against the American territory. The case was resolved by negotiations that led to the Webster-Ashburton Treaty in 1842, in which both the U.S. and Britain admitted to wrongdoing. The incident led to the establishment of the Caroline test, which states that the necessity for self-defence must be instant, overwhelming, and leaving no choice of means, and no moment for deliberation which was formulated by Daniel Webster in his response to the British claims that they attacked the Caroline in self-defence.

The *Caroline* case confirmed that customary international law permits a pre-emptive self-defence strike. Legitimate self-defence requires the actual existence or occurrence of an armed attack.[94] Pre-emption has been defined as referring to the first use of military force when an enemy attack is already underway or is credibly imminent.[95] Pre-emptive strikes must meet a high standard of justification or they will be seen as acts of aggression, which violate international law.[96] In 1981, Israel used force pre-emptively when it attacked Iraq's Osirak nuclear reactor. Israel justified its attack on the basis that Iraq's nuclear programme was a grave threat to Israel's security and could destroy Israel. There was no imminent threat and no necessity to justify the attack. Israel pleaded its case to the UN

[92] Ibid.
[93] *Caroline* (n 62).
[94] n 63, Article 51.
[95] Gray (n 2), 8.
[96] Gőrener (n 22) 34.

Security Council and argued that it was using its legitimate right of self-defence under international customary law and the Charter. The Security Council unanimously condemned the attack by Israel in violation of the Charter and international customary law.[97] The Security Council were concerned by Israel's action as they saw this as a serious threat to the entire safeguard regime of the International Atomic Energy Agency.[98]

The traditionalists view is unwilling to expand Article 51 beyond that the attack must be imminent[99] because they rely on the ordinary meaning of Article 51.[100] In rejecting pre-emptive strike as a self-defence the traditionalists rely on customary international law that the use of force must only be used as a necessity and proportionately[101] and stress that self-defence is an inherent right under Article 51.[102] As to whether the self-defence was a necessity the traditionalists hold that the question needs to be asked if the self- defence action taken was solely to halt or repeal the armed attack or if there were peaceful alternatives that could first have been pursued.[103]

2.5 Aggression and the use of force

Aggression is a factor that has to be considered when there is a use of force because it can consist of an armed attack under certain circumstance which the UN has looked at. The UN General Assembly defines aggression as:

> … the use of armed force by a State against the sovereignty, territorial integrity or political independence of any other state or in any other manner inconsistent with the Charter of the United Nations.[104]

The Resolution further states that 'the first use of armed force by a State in contravention of the Charter shall constitute evidence of an act of aggression.[105] Examples of acts of aggression are given in Article 3 of the UN's Definition of Aggression, as:

> b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

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[97] n 76 [4.1].
[98] Ibid [4.3].
[99] Murphy (n 71) 713.
[100] Ibid, 721.
[101] Ibid, 714.
[102] Ibid, 722.
[103] Ibid, 714-715.
[104] 'Definition of Aggression', United Nations General Assembly Resolution 3314 (XXIX). Article 1 (14 December 1974). < http://hrlibrary.umn.edu/instree/GAres3314.html#:~:text=of%20the%20Charter.-,1.,a%20crime%20against%20international%20peace.>
[105] Ibid, Article 2.

> c) The blockade of the ports or coasts of a State by the armed forces of another State;
>
> d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
>
> (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
>
> (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
>
> (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein..[106]

Aggression by one state against another was subsequently looked at in the *Nicaragua v Costa Rica*[107] case, when Judge Robinson in his decision stated that armed actions of a lessor gravity can be caught by Article 2(4) of the Charter. Judge Robison stated that while no shots need be fired, no heavy armaments need be used and no one need be killed before a state can be said to have violated the prohibition, the non-violent measures would need to reach a certain gravity and have an unlawful purpose before they would qualify as a use of force.[108] He further stated that this needed to be assessed on a case by case basis.[109] The motivation, intention and purpose for the attack by the intruding state, Judge Robinson held, citing the *Oil Platforms* and *Nicaragua* cases, are factors that may be used to determine if there was an unlawful attack even when not an actual armed attack within Article 2(4) of the Charter.[110] Yiallourides, Gehring and Gauci, state that unintentional conduct, accidental trespass even if an armed unit would not without more indicate the relevant coercive intent.[111] They cite the *Corfu Channel*[112] case, which held that coercive intent was placing pressure on another state in relation to an unlawful

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[106] Ibid, Article 3

[107] *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* (ICJ, Judgement 16 December 2015). < *https://www.icj-cij.org/public/files/case-related/150/150-20151216-JUD-01-00-EN.pdf*>.

[108] Ibid, (Judgement) Separate Opinion Judge Robinson [43] < https://www.icj-cij.org/public/files/case-related/152/18862.pdf>.

[109] Ibid [49].

[110] Ibid [58-60].

[111] Yiallourides, Gehring and Gauci (n 26) [79].

[112] *United Kingdom of Great Britain and Northern Ireland v Albania (Corfu Channel)* (Judgement) [1949] ICJ Rep 4.

purpose[113] and the only intention to be considered is that of forcing the will of another state rather than the motives guiding the state's action.[114]

Colin Gray states that to pre-empt is to act on the basis of certain, absolutely contemporary knowledge.[115] By doing so it shows that an attack is either actually underway or has been ordered.[116] Pre-emption is therefore about self-defence.

2.6 Just War

Whether the attack happened in accordance with the Charter or under customary international law, there is the underlying ethical issue as to whether the use of force is just. Just War has a long history and St. Thomas Aquinas is often seen by scholars as outlining the traditionalist view on what justified war is and the kind of activity which was acceptable for Christians.[117] St Thomas Aquinas saw three requirements as having to be met for a war to be just: One, the war has to be ordered on the command of a rightful sovereign; two, a just war is one that avenges wrongs, when a nation or state has to be punished, for refusing to make amends or restore what it has seized unjustly, and, three, the soldiers must have the right intention to promote good and avoid evil.[118] From St. Thomas Aquinas to the medieval period the medieval just war theory was difficult to reconcile because its acceptance was in a struggle between two states one was at fault and the other state was not at fault.[119] During the sixteenth century the view was held that wars could be just on both sides.[120] By the eighteenth century a declaration of war concept developed where prior to the start of any hostilities a declaration of war was necessary for the justification of war.[121] A declaration of war was observed in the Frist World War, however, by the time of the Second World War, nations could be no longer trusted to justify their actions by declarations of self-defence and just wars.[122]

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[113] Yiallourides, Gehring and Gauci (n 26) [79].
[114] Ibid.
[115] Gray (n 24) 13-14.
[116] Ibid 9.
[117] Pieter Brits and Michelle Nel, 'Chapter 12 Military intervention justified? Contemporary challenges of the just cause theory', 203, in Thean Potgieter and Ian Liebenberg (eds) *Reflections on War: Preparedness and Consequences* < https://www.jstor.org/stable/j.ctv1nzg0p0.15?seq=>.
[118] Ibid.
[119] Joseph C. Sweeney, 'The Just War Ethic in International Law' (2003) Fordham International Law Journal, Vol 26, Issue 6, Article 2, 1871-1872. <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1945&context=ilj>.
[120] Ibid 1872.
[121] Ibid 1874.
[122] Ibid 1878.

While Article 2(4) of the Charter prohibits the use of force, force can be used justly as directed by the Security Council or under Article 51 in self-defence where there has been an armed attack. Modern thinking by Luban[123] states that Article 51 supports that a war is just if it is a war of self-defence against aggression,[124] and that any other war which does not fit into Article 51 by way of self-defence is unjust so that a war is unjust if and only if it is not just.[125]

2.7 Conclusion

Chapter Two, begins with a review of the development of the legal use of force as self-defence, first, by looking at the contributions of the philosophers and jurists, Francicus de Vitoria, Hugo Grotius and Emmerich de Vattel. Secondly, the birth of a sovereign state was looked at where the 1648 Treaty of Westphalia reinforced what a sovereign state was and established the Law of Nations, where each member state had equality of sovereignty. Today, sovereignty is seen as the absolute power that a state has within its own territory to decide domestic and foreign policies and to conduct its own affairs without external interference. The 1919 Peace Treaty established the League of Nations. After World War II, the United Nations, which is in effect today, replaced the League of Nations.

Customary International law, has played an important role in this area on the use of force for example, the *Caroline case,* the *Nicaragua* case and the *Construction of a Wall* case all of which focused on and clarified when the legal use of force could be used against a state which had been unlawfully attacked by another state. In conjunction with customary international law, the Charter is central to promoting international peace and when the use of force can be used. Customary International law, case law and the Charter, together make up the framework for determining when the use of force is legal.

The focus of this Chapter looked at the legal use of force from a traditionalist view, which takes a strict approach as to when the use of force can be used as self-defence, what is meant by the use of force and when is the use of force lawful or unlawful. Chapter Three, will look at how pre-emptive strike has deviated from the traditionalist view after the attacks of September 11, 2001, the controversy surrounding it, and what the position is today.

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[123] David Luban, 'Just War and Human Rights', (1980) Philosophy & Public Affairs, Vol 9, No 2, 160-181.< https://www.jstor.org/stable/2265110?seq=1>.
[124] Ibid, 163.
[125] Ibid.

3. Chapter Three

3.1 Introduction

Chapter Two, examined the traditional rules on the use of force under international law. This Chapter will review how the dimensions of those traditional rules of law have moved by extending them to situations where there is a potential threat of the use of force by non-states using non-conventional means of warfare instead of an armed attack. As a result, the concept of preventive or anticipatory self-defence when an attack is anticipated is developing and is controversial. The questions debated on preventive or anticipatory self-defence centre on whether the current rules governing self-defence and pre-emptive strike are able to deal with evolving modern warfare.

The happenings of 9/11, can be taken as a time line which highlighted this change in the use of force in response to a new type of attack, where terrorists used non-conventional means to attack the United States (U.S.). The U.S.'s response to this was to broaden the meaning of pre-emptive strike to include preventive or anticipatory self-defence while justifying its use in the absence of an imminent attack to ensure that a serious threat to the U.S. did not grow over time.[126] One consequence of extending pre-emptive strike to include preventive and anticipatory strikes is that it causes confusion and uncertainty in the law as to when and under what circumstances the use of force is legal. This chapter will examine this uncertainty and why it exists today.

3.2 Pre-emptive, Preventive, and Anticipatory Self-Defence

Three different terms are used when referring to the use of force in self-defence, namely, preventive, pre-emptive and anticipatory. It is helpful, therefore, as a starting point, to understand what these terms mean because in doing so it identifies the areas of disagreement among academics.

3.2.1 Pre-Emptive Self-Defence

A pre-emptive self-defence is defined as:

> …to strike first in the face of an attack that is either already underway or is very credibly imminent.[127]

Researchers such as Olumide Obayemi state that the requirements of timeliness and proportionality of the pre-emptive strike is based on imminent danger and is justified

[126] The Brookings Institution, Policy Brief #113. (December 2002).< https://www.brookings.edu/wp-content/uploads/2016/06/pb113.pdf>.
[127] Gray (n 25) v.

under the traditional notions of self-defence,[128] while anticipatory or preventive self-defence is the use of force 'against a more remote yet significant threat'.[129] Supporters of pre-emptive self-defence argue that to wait for an actual armed attack to happen or that is about to happen a state should be able to defend itself against the attacker who has the intent and capacity to attack.[130] These academics who support pre-emptive self-defence see the necessity to expand imminence to deal with new threats.[131] The foundation supporting this argument is that a threat could be so devastating that a state cannot sit around 'as grave dangers materialise'.[132] Today, such threats include the spread of weapons of mass destruction (WMD), transnational terrorist groups and cyber-attacks.

Sanjay Gupta argues that before a pre-emptive strike is launched there is a self-imposed obligation on a state to ensure that all other means have been exhausted and that there are no alternatives available.[133] He observes that in exhausting all possible alternatives, if the UN Security Council refuses to sanction the use of force because it does not agree with the state's self-assessment of the threat or the method of dealing with it, it would be difficult to classify the military action as imminent under the *Caroline* case. On the other hand he argues that if a resolution on the use of force is supported by a majority of the Security Council but defeated on the veto of a permanent member a case of necessity could be made depending on the circumstances.[134]

Those academics who look to the *Caroline* case for support argue that Article 51 of the Charter speaks of self-defence in response to an armed attack and does not impair or impose a condition on the inherent right of self-defence of a state under customary international law to defend itself not just against an existing attack but also against an imminent attack.[135]

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[128] Obayemi (n 4) 29.
[129] Ibid.
[130] Ashely Deeks, 'Part III The Prohibition of the Use of Force, Self-Defence, and other Concepts, Ch. 29 Taming the Doctrine of Pre-Emption', 663. In Marc Weller (ed) *The Oxford Public Handbook of the Use of Force in International Law* (Oxford University Press 2015). <https://www.ilsa.org/Jessup/Jessup18/Second%20Batch/OPIL_The_Oxford_Handbook_of_the_Use_of_Force_in_International_Law_Part_III_The_Prohibition_of_the_Use_of_Force_SelfDefence_and_Other_Concepts_Ch29_Taming_the_Doctrine_of_PreEmption.pdf >.
[131] Ibid.
[132] Ibid.
[133] Gupta (n 7) 186.
[134] Ibid.
[135] Murphy (n 71) 711.

Other academics who take a more strict view of Article 51 of the Charter, hold that in Article 51 the language 'armed attack' rather than 'use of force' limits the use of self-defence to situations where the victim state is exposed to a large-scale use of force.[136]

3.2.2 Preventive Self-Defence

A preventive strike has been defined where:

> The preventor chooses to wage war at least to launch military action because of its fears for the future should it fail to act now.[137] … a precautionary war is a preventive war waged not on the basis of any noteworthy evidence of ill intent or dangerous capabilities, but rather because of those unwelcome phenomena might appear in the future.[138]

It is not disputed that preventive use of force is lawful when the UN Security Council authorises it under Articles 39 and 42 of the Charter. The Security Council allows states to take forcible measures against a threat to peace.[139] The problem arises when a state unilaterally uses preventive self-defence without the Security Council's authorisation. The concern of those who oppose preventive self-defence is that it poses too great a risk to global order.[140]

Some traditionalist academics see preventive self-defence as a violation of international law because it allows preventive attacks in the absence of the threat of imminent attack.[141] They also argue that there is no basis in international law to authorise preventive strikes against states on potential threats arising from possession of weapons of mass destruction and links to terrorism.[142] In contrast, those academics who hold a permissive view argue that Article 51 does not restrict the right of preventive self-defence to an armed attack and that states have wider rights of self-defence under customary international law.

Preventive strike begins once a threat has been identified even if the extent of the threat is uncertain[143] and it has selected the timing for combat and therefore has the initiative.[144]

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[136] Ibid, 709.
[137] Gray (n 24) v.
[138] Ibid, 15.
[139] Deeks (n 130) 663.
[140] Ibid, 664.
[141] Gōrener (n 22) 37.
[142] Ibid, 38.
[143] Christopher Baker-Beall & Gareth Mott, 'The new EU counter-terrrorism Agenda: preemptive security through the anticipation of terrorist events', 716. (2021) Global Affairs, 7:5.) < https://www.tandfonline.com/doi/pdf/10.1080/23340460.2021.1995461?needAccess=true>.
[144] Gray (n 24) 49 [4].

According to Colin Gray, while pre-emptive action is where the decision for war is certain and is taken out of the state's hands, in comparison under preventive self-defence a state is able to detect and to anticipate an attack in the future.[145] This means a state considering preventive strike has a choice of timing as to when the future danger will happen which has not been chosen by the pre-emptor.[146]

3.2.3 Anticipatory Self Defence

Anticipatory action is defined as:

> 'To act before a threat has reached the point of irreversible damage'.[147]

It has been proposed that pre-emptive military strike can be defined as anticipatory use of force in the face of an imminent attack and has been accepted as legitimate under international law.[148]

The Leiden policy recommendations caution that an action to a threatened attack before a threat is definite is anticipatory self-defence and must be distinguished from pre-emptive strike or preventive force, which could only be lawful if authorised by the Security Council.[149] The Leiden Report also emphasis that any use of force in anticipatory self-defence should be justified publicly with reference to the evidence available to the state concerned.[150] It also states that 'whether an attack may be regarded as imminent falls to be assessed by reference to the immediacy of the attack, its nature and gravity'.[151]

While some academics point out that anticipatory strike may not have a clear definition and acceptance under contemporary customary international law because the danger posed may not be imminent. They argue that a nation that feels it may be subject to recurring terrorist attacks by another nation, does have the inherent right to carry out armed attacks against the offending nation or culprit.[152] Olumide Obayeni confirms that the UN Security Council supports this when it held its 2655th meeting in New York in the

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[145] Ibid, 11.
[146] Ibid, 17.
[147] Baker-Beall and Mott (n 143), 716.
[148] Obayemi (n 4) 21.
[149] Nico Schrijver and Larissaa van den Herik, 'Leiden Policy Recommendations on Counter-terrorism and International Law'[45] (1 April 2010, Universiteit Leiden, Campus Den Haag) <https://www.iipsl.jura.uni-koeln.de/fileadmin/sites/iipsl/Forschung/Anlagen/III_1.pdf>
[150] Ibid [48].
[151] Ibid [46].
[152] Obayemi (n 4) 30.

aftermath of military strikes on the Libyan cities of Tripoli and Benghazi in 1986.[153] In the record of this meeting the Security Council stated that when a state or citizens are subject to continuing terrorist attacks it may respond with 'appropriate use of force to defend itself from further attacks'.[154] The Security Council stated that the appropriateness of a particular action will always raise consideration of necessity and proportionality and that the state taking the action has a 'high burden of demonstrating that the particular decision was justified' and the manner in which such action is carried out is also significant.[155] Academics such as Michael Wood approach the controversy of anticipatory self-defence focusing on whether it has survived the Charter. He states that both the U.S. and the United Kingdom look to customary international law to support their position on anticipatory self-defence in particular to the *Caroline case* which held that force may be used in self-defence when there is an imminent attack.[156] He confirms that the ICJ has not addressed the issue of what is an imminent attack and has expressly left it open. Michael Wood cites the *Armed Activities on the Territory of the Congo* case[157] to support his view. The Court in this case held that the facts of that case did not warrant a pronouncement on whether self-defence would be available in the light of an imminent attack.[158] Other academics find it difficult to require a state to suffer an armed attack before it can respond and reply on Article 51 of the Charter and the *Caroline* case which they contend supports their position of the inherent right of self-defence.[159]

3.3 The Bush Doctrine

The Bush Doctrine is explained in the following extract from President Bush's speech in September 2002:

> The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater 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

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[153] Ibid.

[154] United Nations Security Council, 'Provisional Verbatim Record of the Two Thousand Six Hundred and Fifty-fifth Meeting', 112 (6 February 1986, Provisional S/PV.2655). <https://digitallibrary.un.org/record/112779?ln=en>.

[155] Ibid, 112-113.

[156] Wood (n 8) 357.

[157] *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)* (19 December 2005, International Court of Justice) [143]< https://www.icj-cij.org/public/files/case-related/116/116-20051219-JUD-01-00-EN.pdf>.

[158] Wood (n 8) 357.

[159] Deeks (n 130), 662.

> prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively.[160]

Academics point out that the problem with the Bush Doctrine is that it is not limited to the traditional definition of pre-emption but includes prevention in the absence of evidence of a coming attack.[161]

President Bush further developed pre-emption in his West Point speech by extending it to terrorists and rogue states that may have weapons of mass destruction and pose a danger to the U.S.[162]

Pre-emption and preventive strikes both require intelligence but often intelligence is flawed in warfare.[163] Colin Gray highlights this weakness in his comment that 'intelligence on the target state has to be ever less reliable the further into the future one is peering'.[164] A decision to take preventive action is a decision to act quickly and not to let time pass to allow for non-military intervention to be used in an attempt to persuade the adversary to mend its ways.[165] It is argued that the U.S. has taken upon itself the responsibility for maintaining world order justifying it as international security[166] and because world order is essential it therefore has a special licence to use force.[167] When a state has launched a preventive war it has the advantage in that it has selected the timing for combat and it has the initiative but these advantages can diminish when the attack loses momentum over time and the other side is able to regroup and counterattack.[168]

Olumide Obayemi suggests that in supporting the extension of the use of force as pre-emptive or anticipatory self-defence and for a more inclusive international action against terrorists who threaten international peace that there is a high burden to establish four elements with evidence beyond a reasonable doubt, namely,

1. The nation against which the military attack is being considered poses an actual or immediate risk to their neighbours, international people and international community of states.

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[160] President George W. Bush, 'The National Security Strategy of the United States of America', V, (September 2002, Washington, DC: The White House) < https://georgewbush-whitehouse.archives.gov/nsc/nss/2002/>.
[161] Obayemi (n 4) 23.
[162] Ibid, 22.
[163] Gray (n 24) 37.
[164] Ibid, 39.
[165] Ibid, 42.
[166] Ibid, 44.
[167] Ibid, 45.
[168] Ibid, 49.

2. The nation arguing for military invasion of a failed state must have suffered an injury in fact, which is concrete and particularised, actual or imminent and not conjectural or hypothetical.
3. There must be a causal connection between the actual or imminent injury or risk alleged and that the second nation has failed as a nation.
4. Number 1 above would be redressable through foreign intervention either by the UN or through international action authorised by the UN before extreme action of military invasion would be permitted.[169]

The U.S. and the coalition[170] engaged in acts in violation of the right to self-defence when it attacked Iraq in 2003. The aim of the coalition was to disarm Iraq of WMD and to end Saddam Hussein's support for terrorism and to free the Iraqi people. There was no evidence that an attack by Iraq on the U.S. was imminent as there were no WMD which the U.S. claimed amounted to an imminent threat. The U.S. failed to show how Iraq was an immediate threat to its security and the UN inspection team found no evidence of WMD just before the start of the invasion. Instead the attack by the U.S. coalition was seen as usurping the Security Council's role.[171]

Going back as far as 1967, the Six Day War between Israel and Jordan, Syria and Egypt, Sean Murphy states that some academics see the Israeli strikes as a precedent of anticipatory self-defence. Israel argued initially that it was the victim of an armed attack and had a right of anticipatory self-defence in the situation.[172] Tensions were high prior to 1967 and the Egyptian president at that time announced that the Straits of Tiran would be closed to Israeli shipping and mobilised the Egyptian military along the border with Israel. Israel launched a series of air attacks on Egyptian airfields killing international peacekeepers. The UN Security Council was seen as giving credence to Israel's argument of pre-emptive strike by not censuring Israeli's action.[173] Sean Murphy further states that some academics point out that in 1962 Cuban missile crises, the U.S. based its justification on a theory of regional enforcement action under Chapter VIII of the Charter

[169] Obayemi (n 4) 24-25.
[170] The coalition consisted of United Kingdom, Australia and Poland.
[171] Gupta (n 7) 186.
[172] Murphy (n 71) 728.
[173] Ibid, 729, footnote 105.

only to find that quarantine[174] is not a precedent for pre-emptive self-defence,[175] which he states supports those academics who argue that the U.S. government has supported a prohibition on pre-emptive self-defence.[176] He also points out that other academics have asserted that the U.S. government has claimed a right of pre-emptive self-defence starting in the 1980s.[177]

The scholar Sanjay Gupta, has highlighted some of the implications of the Bush Doctrine for international peace and security. He observes that the doctrine makes 'no distinction between justifiable pre-emption and unlawful aggression' 'giving leverage to any country to take action against an enemy state'.[178] He also states that the doctrine does not clarify the response or potential or actual issues such as the acquisition of WMD or the purpose and timing of a pre-emptive strike.[179]

3.4 Non-state terrorist attacks

A new dimension added to the right of self-defence is an attack by a non-state terrorist group. Angus Martyn looks at this and concludes that the use of military force by the U.S. against terrorists and so-called state sponsors of terrorism in the 1990s is forcing a change and influencing the boundaries of international customary law[180]. He observes that the UN has developed a comprehensive approach to combating terrorism with the International Convention for the Suppression of Terrorist Bombings.[181] Under this convention a person commits an offence if they unlawfully and intentionally use an explosive or lethal device against a public place, a government facility, infrastructure or transport system either with the intent to cause death or serious bodily harm or destruction resulting in major economic loss.[182] He points out that if the acts happen within the boundaries of a state and do not involve foreign nations these acts do not come under the convention nor do acts by armed forces involved in armed conflict.[183] The International Convention for the Suppression of Terrorist Bombings was followed with the

[174] President John F. Kennedy was given three options to respond to the missile threat and he chose a naval quarantine of Cuba to buy time to negotiate a missile withdrawal. The action was called a quarantine because a blockade is an act of war under the Charter.
[175] Murphy (n 71) 729.
[176] Ibid.
[177] Ibid.
[178] Gupta (n 7) 188.
[179] Ibid.
[180] Martyn (n 5)1.
[181] General Assembly Resolution A/RES/52/164 of 15 December 1997.< https://treaties.un.org/doc/source/docs/A_RES_52_164-E.pdf>
[182] Martyn (n 5) 5.
[183] Ibid.

International Convention for the Suppression of the Financing of Terrorism,[184] which provides that it is an offence where a person unlawfully provides or collets funds with the intention that the funds should be used or in the knowledge that are to be used to carry out various terrorist acts that would cause death or serious injury. Similar to the International Convention for the Suppression of Terrorist Bombings, if the acts happen within the boundaries of a state and do not involve foreign nations these acts do not come under the convention nor do acts by armed forces involved in armed conflict.[185]

Angus Martyn states that there are two elements required in the definition of terrorism which are:

> Actual or threatened violence against civilians or persons not actively taking part in hostilities, and
> The implicit or explicit purpose of the act is to intimidate or compel a population, government or organisation into some course of action.[186]

Prior to 1985, the UN Security Council refrained from using the term terrorism acts as threats to peace and security[187] but in 1985 the UN General Assembly adopted a resolution[188] condemning terrorism in which terrorism is defined as:

> …all acts, methods and practices of terrorism wherever and by whomever committed … upon all States to fulfil their obligation under international law to refrain from orgainizing, instigating, assisting or participating in terrorist acts in other States or acquiescing in activities within their territory directed towards the commission of such acts.[189]

Michael Wood introduces three questions which arise regarding the use of force against terrorist attacks. These are:

> Does the right of self-defence apply at all in response to attacks by non-state actors, including transnational terrorist groups? Is there a right of anticipatory self-defence? …how does the requirement of imminence apply in relation to attacks by terrorists or weapons of mass destruction?[190]

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[184] General Assembly Resolution 54/109 of 9 December 1999. < https://www.un.org/law/cod/finterr.htm>.
[185] Martyn (n 5) 5.
[186] Ibid 4.
[187] Ben Saul, 'Definition of "Terrorism" in the UN Security Council: 1985-2004', 143, (2005, Chinese Journal of International Law, Vol 4, No 1, published by Oxford University Press) < https://academic.oup.com/chinesejil/article/4/1/141/2365920?login=true>.
[188] United Nations General Assembly, 'Resolutions Adopted on the Reports of the Sixth Committee', Resolution 40/41 [1].
[189] Ibid [6].
[190] Wood (n 8) 355.

He confirms that the UN Security Council adopted resolutions 1368 (2001) and 1373 (2001)[191] after 9/11 confirming the inherent right of individual and collective self-defence as recognised by the Charter. He also asks a very relevant question concerning today's warfare as to what constitutes an imminent attach and when it involves transnational terrorist groups and weapons of mass destruction.[192] In answering this question he reverts to the *Caroline Case* holding that self-defence must of a necessity, instant, overwhelming, leaving no choice of means and no moment for deliberation.[193] The Chatham House Report looked at the use of force in self-defence against a threatened attack and concluded that there had to be an actual threat of an attack against the defending state,[194] The report states:

> To the extent that a doctrine of pre-emption encompasses a right to respond to threats which have not yet crystalized but which might materialise at some time in the future such a doctrine (sometimes called 'preventive defence') has no basis in International law… .[195]

The report suggests that the underlying factor for such action to be legal is whether it is necessary for the targeted state to take action.[196] Under international law if force is to be used in self-defence it must be imminent.[197] Ashley Deeks points out that the 'real problem' in this area of pre-emptive strike is applying the principles on the use of force to today's threats of WMD, terrorist groups and cyberattacks.[198] He further states that the law in this area will not remain static because of current technological changes, such as the speed of incoming cyberattacks or how drones and satellites can hover for a time over targets and acquire detail imagery of WMD.[199]

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[191] Resolution 1368 (2001) / adopted by the Security Council at its 4370th meeting, on 12 September 2001). < https://digitallibrary.un.org/record/448051?ln=en> and Resolution 1373 (2001) adopted by the Security Council at its 4385th meeting, on 28 September 2001.< https://digitallibrary.un.org/record/449020?ln=es>.

[192] Wood (n 8) 357

[193] Ibid

[194]Elizabeth Wilmshurt, ' Principles of International Law on the Use of Force by States in Self-Defence', 7 (October 2005, Chatham House International Law ILP WP 05/01).< https://www.chathamhouse.org/sites/default/files/publications/research/2005-10-01-use-force-states-self-defence-wilmshurst.pdf>.

[195] Ibid, 9.

[196] Ibid, 7.

[197] *Caroline* (n 62)

[198] Deeks (n 130) 667.

[199] Ibid, 668.

3.5 European Union

A thread underlining the area of preventive or anticipatory strike is that of security, which is evident in the EU Counter Terrorism Agenda.[200] After 9/11 the EU established the European Security Strategy (ESS) in December 2003, which focused on threats and threat management including conflict prevention, threat prevention or preventive engagement which the EU may conduct to deal with threats that the EU is faced with.[201] The EU approach to the prevention and management of conflicts is seen as closer to the UN's position rather than the U.S.[202] By the end of the Cold War conflict prevention acquired a new direction that conflicts must be prevented because wars are not inherent in human beings and can be prevented[203] but the means of prevention remain unclear.[204] The EU began to accept pre-emptive intervention when responding to security threats after the Madrid attacks in 2004 and London in 2005.[205] All of these threats were the result of terrorist attacks which resulted in the EU establishing broader security measures that went beyond the sole focus on counter-terrorism.[206] The EU Counter-terrorism Agenda is now focusing on the need to understand future terrorist threats to protect citizens[207] and anticipating blind spots to stay ahead of terrorists.[208] The EU is doing this with new computer based technologies such as the use of algorithms and artificial intelligence[209] with the aim of pre-empting and preventing terrorism from occurring in the first place.

3.6 State Sovereignty

A state is sovereign when no dynastic monarchy can claim authority over it. Sovereignty gives a state the ability to carry out actions or policies within its borders independently from interference from inside or outside forces. A state maintains a monopoly of violence i.e. the state alone has the right to use or authorize the use of force, over a territory and determines who can and cannot use force and sets out rules as to how violence is used.

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[200] Christopher Baker-Beall and Gareth Mott, 'The new EU counter-terrorism Agenda: preemptive security through anticipation of terrorist events', 714, (2021, Global Affairs, 7:5, 711-732) < https://www.tandfonline.com/doi/full/10.1080/23340460.2021.1995461?needAccess=true.>.
[201] Thierry Tardy, 'The European Union: From Conflict Prevention to "Preventative Engagement", Still a Civilian Power Lacking a Strategic Culture', (Summer 2007) International Journal, Vol 62, No 3, 539-555, 540 https://www.jstor.org/stable/40184859..
[202] Ibid,
[203] Ibid
[204] Ibid, 541
[205] Baker-Beall and Mott (n 201) 717.
[206] Ibid, 718.
[207] Ibid.
[208] Ibid, 719.
[209] Ibid, 724.

States sponsor armies, navies and air forces. Sovereignty is a recognition of each state's equal worth, a protection of their identities and their natural freedom and the right to shape and determine their own destiny, which are endorsed in Article 2.1 of the Charter. Under Article 2.7 of the Charter a state has the obligation to respect any other state's sovereignty. Membership of the UN is a symbol of independent sovereignty and acceptance into the community of nations.[210] In addition states owe a duty to citizens to protect them and the concept of human security has created additional demands and expectation in relation to the way a state treats its peoples.[211]

Sovereignty is at the core of a territorial dispute when two or more parties advance competing titles of sovereignty over a given land.[212] The ICJ has held that whether there is an international dispute depends on objective determination and the mere denial of the existence of a dispute does not prove its non-existence.[213] The ICJ held that it requires an examination of the facts and is one of substance and not form.[214] The critical point when a dispute is definite is when one side asserts its sovereignty and the other side protests for the first time or when the first protest by one state is rejected by the other state.[215]

Sovereignty, today, includes the concept of responsibility to protect with respect to humanitarian action, which aims to protect human dignity and save lives.[216] This has led to the foundation for military intervention for human protection purposes and is backed by the Universal Declaration of Human Rights, the Geneva Conventions, the Statue of the International Criminal Court and the human rights provisions of Chapter VII of the Charter.[217] In addition the responsibility to protect implies the responsibility to prevent.[218] This includes intervention by a third State or States to save people from their

[210] International Commission On Intervention and State Sovereignty, 'The Responsibility to Protect', (December 2001, Report), 13 [2:11]. < https://idl-bnc-idrc.dspacedirect.org/bitstream/handle/10625/18432/IDL-18432.pdf?sequence=6&isAllowed=y>.
[211] Ibid, 7 [1.33].
[212] Yiallourides, Gehring and Gauci (n 26) 6 [8].
[213] Ibid, 8 [11] see also footnote 37.
[214] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation*) (Preliminary Objections) (Judgement) [2011] ICJ Report 70, [30] < https://www.icj-cij.org/public/files/case-related/140/140-20110401-JUD-01-00-EN.pdf>.
[215] Yiallourides, Gehring and Gauci (n 26) 12 [18]
[216] Joelle Tanguy, 'Redefining Sovereignty and Intervention', (2003, Ethics & International Affairs, Vol 17(1) 141-148.) 148.< https://www.proquest.com/docview/200521906/fulltextPDF/BE4CB3087D9742EAPQ/1?accountid=12860>.
[217] n 211, 16 [2:26].
[218] Ibid, 19 [3.1].

own Government's action or inaction, for example in 2013 when Syria used chemical weapons. Michael Wood points out there is a right under customary international law to intervene to advert an overwhelming humanitarian catastrophe despite the silence of the Charter and the general prohibition on the use of force in the Charter.[219]

3.7 Ireland

Even though Ireland is a neutral country it has become involved in the operation of international human rights law. Ireland's position on human rights law will be examined first and then the position with respect to Ireland neutrality will be explained.

3.7.1 Human Rights

Ireland has a dualist approach to international law in keeping with the common law tradition. This is protected under Article 29.6 of the Constitution which states that:

> …no international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas.

Ireland is legally bound by the obligations set out in treaties that it has ratified.[220] however, those treaties are not directly applicable in Ireland unless they are domestically incorporated into Irish law through an act of the Oireachtas or as an amendment to the Constitution. The area of human rights law is protected under Articles 40-44 Bunreacht na hÉireann.[221] The European Convention on Human Rights (ECHR) formally the Convention for the Protection of Human Rights and Fundamental Freedoms**)** was ratified by Ireland in September 1953. In 2003 the European Convention on Human Rights Act 2003 was enacted and became part of Irish domestic law.[222].

The authority to conclude international agreements on human rights is carried out by the Minister for Foreign Affairs and Trade on behalf of the Irish Government. While none of the international agreements on human rights have been incorporated into Irish domestic law, Ireland is obliged to respect the terms of human rights treaties. In 1960, in *Re: Ó Laighléis,*[223] the Supreme Court held that it could not give effect to the European Convention on Human Rights because it granted rights and imposed obligations additional to those set out in domestic law, i.e. the constitution, and it was not part of

[219] Yiallourides, Gehring and Gauci (n 26) 362.
[220] Vienna Convention on the Law of Treaties (1969), Article 18.
[221] Bunreacht na hÉireann, will be referred to as the 'Constitution'.
[222] Irish Statute Book Number 20 of 2003. < https://www.irishstatutebook.ie/eli/2003/act/20/enacted/en/pdf>.
[223] [1960] IR 93.

domestic law.[224] In a later case *Foy v An tÁrdCláraitheoir*,[225] the High Court noted that the Oireachtas, had passed the European Convention of Human Rights Act 2003 (ECHR) and as a result the rights contained in the ECHR Act 2003 were part of Irish law but the European Convention on Human Rights, which Ireland ratified in 1953, was not part of Irish law.[226] This was upheld in 2010, in the Supreme Court case of *McD v L.*[227] when the Supreme Court stated that the European Convention on Human Rights does not require the parties to it to incorporate the provisions of it into domestic law.[228] In 2012, the Supreme Court in *M.D. (a minor) v Ireland.*[229] held once again that it was not possible for an administrative action of the State to be in breach of the European Convention on Human Rights because this would assume that it had direct effect in Irish law.[230]

3.7.2 Ireland's Neutrality

There is a mistaken confusion that Ireland's neutrality has constitutional protection. This error may stem from the fact that Article 49 of the 1922 Constitution of the Irish Free State did state:

> Save in the case of actual invasion, the Irish Free State (Saorstát Eireann) shall not be committed to active participation in any war without the assent of the Oireachtas.[231]

The High Court case of *Horgan v An Taoiseach*,[232] confirmed that this was not the case and that it is a matter of government policy. Mr. Justice Kearns held:

> Despite the great historic value attached by Ireland to the concept of neutrality, that status is nowhere reflected in Bunreacht na hÉireann, or elsewhere in any domestic legislation. It is effectively a matter of Government policy only, albeit a policy to which, traditionally at least, considerable importance was attached.[233]

There is one exception under the Constitution in Article 29.4 9°, which provides:

> The State shall not adopt a decision taken by the European Council to establish a common defence pursuant to Article 42 of the Treaty on European Union where that common defence would include the State.

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[224] Ibid. See also Oireachtas Library & Research Service, 'International human rights law: operation and impact, (2016, Spotlight No 2) < https://data.oireachtas.ie/ie/oireachtas/libraryResearch/2016/2016-09-28_spotlight-international-human-rights-law-operation-and-impact_en.pdf>.
[225] [2007] IEHC 470.
[226] Ibid [93].
[227] [2010] 2IR 199
[228] Ibid, 279.
[229] [2012] IESC 10
[230] Ibid, [59].
[231] https://www.irishstatutebook.ie/eli/1922/act/1/enacted/en/print.
[232] [2003] IEHC 64.
[233] Ibid, Decision (b) Neutrality.

Notwithstanding this, the Irish Defence Forces have been involved in UN peace keeping activities, for example, the Congo Crisis, Cyprus and the Lebanon and in 2017, Ireland joined the EU's Permanent Structured Cooperation (PESCO).[234] While Ireland holds itself to be neutral, PESCO allows states to opt in and out as their foreign policies allow. Ireland justified its membership as being beneficial to counter-terrorism, cyber security and peace keeping.[235] Many members of PESCO are members of NATO, however, Ireland does not have full membership of NATO. It is a member of NATO's Partnership for Peace (PfP) and NATO's Euro-Atlantic Partnership Council (EAPC).

The operation of international law in Ireland does not impact domestic law.

3.8 Conclusion

The objective of Chapter Three, is to understand pre-emptive strike and how it has deviated from the traditionalist view on the use of force while focusing on whether these deviations are a violation of international law. Academic positions with respect to the use of force as a self-defence are examined. The starting point in this chapter was to define the terms, pre-emptive self-defence, preventive self-defence and anticipatory self-defence and explain the Bush Doctrine. This was followed by reviewing pre-9/11 crises such as the Six Day War, the Cuban Missile crisis, the 2003 invasion of Iraq, as well as highlighting the position taken by the UN security with respect to each of these crisis. After 9/11, the Bush doctrine, the U.S.'s response to this tragedy, was, among other things, to broaden the meaning of pre-emptive strike to include preventive and anticipatory self-defence. A review of academic literature was carried out in an attempt to identify the controversies surrounding these self-defence issues which scholars raise, as well as examine how the ICJ in international case law has responded to these controversies. Ireland's position on neutrality which is not constitutionally protected but subject to government policy was examined.

The area of humanitarian rights has enveloped into the area of use of force because a sovereign state has a duty to protect its citizens from mass atrocities and the responsibility to protect human dignity and save lives.

Chapter Four, will discuss the research findings in Chapters Two and Three.

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[234] Council Decision (CFSP) 2017/2315 of 11 December 2017, establishing permanent structured cooperation (PESCO) and determining the list of participating Member States. < https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017D2315&from=DE>.

[235] 'Dáil votes to join European defence organisation' https://www.rte.ie/news/politics/2017/1207/925760-pesco/.

4. Chapter Four

4.1 Introduction

The aim of this chapter is to discuss the position today, with respect to the use of force by weighing up the traditionalist position covered in Chapter Two and the current position outlined in Chapter Three. In addition this chapter will look at the criteria a state has to consider on the use of force in self-defence, and the lawfulness of the self-defence within the provisions of international law. There are two sources covering the use of force in self-defence, namely, customary international law, and the Charter. On the side lines there is the Bush Doctrine which is controversial and does not have the force of law. While the theme in all of these is to use force legally in self-defence it is the determination reached by a state as to when the use of force may be used that is at the heart of the controversy. This chapter also evaluates the viability of pre-emptive, preventive and anticipatory use of force as self-defences, in light of the attack by Russia on Ukraine and the self-defence justifications put forward by President Putin.

4.2 Use of force

The use of force in self-defence is a complex area of law and research shows that two basic questions should be addressed: Under what circumstances might a state strike first? and, on what authority might a state strike first in self-defence?[236] International law holds that there are three requirements to exercise the use of force in self-defence:

> 1) Self-defence can only be taken in response to an armed attack;
> 2) Self-defence must be directed against the state responsible for the attack, and
> 3) Any act of self-defence must be carried out within the limits of necessity and proportionality.[237]

While this might seem to be straight forward, in reality this is not the case. The Charter was drafted after the Second World War with the aim of maintaining world peace and security. Since 1945 warfare has changed and taken on new directions having an impact on world peace and global security today, which were not contemplated at the time the Charter was drafted. Research highlights that while the Charter is a living document it is lagging behind these developments and in doing so is adding confusion as certain states appear to be acting unilaterally in justifying their decisions to use force as a self-defence. In doing so these states are seen to violate both the Charter and customary international

[236] Gray (n 24) 7.
[237] Yiallourides, Gehring, and Gauci (n 26) 74 [145].

law. Customary international law does not permit another state to exercise the right of these self-defences on the basis of its own assessment of the situation.[238]

4.3 Self-defence can only be taken in response to an armed attack and directed against the state responsible for the attack.

The conventional view under which a state might use force as a self-defence is covered under Article 51 of the Charter, which allows member states to resort to the use of force if such use of force is a necessary response to an armed attack or the Security Council has authorised such force as necessary to maintain or restore international peace or security.[239] The conventional view insists that under Article 51 the armed attack has to have occurred. Under customary international law, the *Caroline.*[240] case on the other hand, has opened the door for pre-emptive strike because the armed attack has to be imminent and does not have to have actually occurred.

If an armed attack is alleged to have occurred then the determination of what is an armed attack is important and this was looked at in *Nicaragua v United States.*[241] The ICJ held in this case that an armed attack included action by regular armed forces and indirect use of force was prohibited because it is a threat of force having recourse to military measures if certain demands are not met.[242] The ICJ further held in this case that an armed attack can include the sending by a state of armed bands, groups, irregulars or mercenaries which carry out acts of armed forces against another state of such gravity as to amount to an armed attack conducted by regular armed force.[243] The use of force in an armed attack will constitute an act of aggression the UN General Assembly has confirmed and has given examples of such acts of aggression, for example bombardments, and blockade of ports or coasts .[244]

When an armed attack has occurred a state has to be able to demonstrate that it has been the victim of an armed attack and the targeted state has the burden of proof. The state using self-defence must prove that it was the target of a large scale use of force. [245] Scholars again point to the fact that intelligence or evidence will be less reliable the further into the future one has to look with respect to threats.

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[238] *Nicaragua v United States* (n 18) [195].
[239] n 63, Article 42.
[240] *Caroline* (n 62).
[241] *Nicaragua v United States* (n 18) [195].
[242] Ibid.
[243] Ibid.
[244] n 104, Article 3.
[245] Yiallourides, Gehring, and Gauci (n 26) 82 [164]

The motivation, intention and purpose for the attack by the intruding state has to be considered on a case by case basis to determine if there was an unlawful attack, this was looked at in the *Costa Rica Case v Nicaragua*[246] by Judge Robinson who held that non-violent measures, such as no shots need be fired, no one killed nor heavy armaments used, could be held to be an unlawful use of force and these non-violent measures would need to reach a certain gravity and have an unlawful purpose.[247] The *Corfu Channel*[248] case held that coercive intent was the placing of pressure on another state in relation to an unlawful purpose and the only intention to be considered is that of forcing the will of another state.[249]

New forms of attacks such as terrorism, WMD and cyberattacks have emerged resulting in serious threats to a state. There is debate in academic circles over the use of force as a self-defence to these serious threats when they do not follow the conventional rules of an armed attack and if they can be considered an imminent attack and therefore lawful. This will be looked at in the next section.

4.4 Any act of self-defence must be carried out within the limits of necessity and proportionality.

Debates by academics in the international arena are ongoing and focus on whether the three evolving types of self-defence, namely pre-emptive, anticipatory and preventive with respect to the use of force are lawful. The starting point using the UN Charter as a benchmark is that an armed attack has to have occurred while under customary international law the armed attack has to be imminent, however, problems arise because modern warfare does not always fit into these criteria. The law cannot remain static to change and these evolving self-defences have emerged in response to modern warfare and do not fit into the conventional concept of what is an imminent attack. Commentators argue that pre-emptive use of force does not change the rule that an armed attack has to be imminent because a state practice which is inconsistent with a norm of customary international law does not establish a rule but is in violation of the doctrine of sources.[250] They support their argument with the *Nicaragua v United States* where the ICJ held that departures from a rule of international law 'should generally have been treated as a breach

[246] *Costa Rica v Nicaragua* (n 55)
[247] Ibid, separate opinion of Judge Robinson [43]
[248] *Corfu Channel* (n 112)
[249] Ibid.
[250] James Thuo Gathii, 'Assessing claims of a New Doctrine of Pre-Emptive War under the Doctrine of Sources' Osgoode Hall Law Journal 43.1/2 (2005) : 67-103, 70.
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol43/iss1/4>
Doctrine of Sources is referring to the origins of a rule of law.

of that rule'.[251] Supporters of the notion that there are three evolving defences dismiss these arguments completely in light of the fact that warfare has changed and taken on new directions which the existing rules on the use of force had not foreseen, such as WMD and drones.

Scholars argue that the requirements of timeliness and proportionality of pre-emptive strike are based on imminent danger and justified under customary international law[252] unlike anticipatory or preventive self-defence which is the use of force against a more remote but significant threat.[253].The core of the argument for those who support pre-emptive, anticipatory and preventive self-defence is that to wait for a state to defend itself until attacked is unjust. Opponents argue that the threat of an imminent attack is missing from these attacks to be lawful. [254] Threats in modern warfare are no longer confined to moving military and weapons to a state's borders but can involve the spread of WMDs, transnational terrorists groups and cyber-attacks. With respect to preventive strikes, the UN Security Council authorises the preventive use of force under Articles 39 and 42 of the Charter, therefore preventive use of force is lawful. The problem arises when a State decides on its own merits to use preventive self-defence without the Security Council's prior authorisation which renders the preventive self-defence unlawful.

When evaluating anticipatory self-defence a state is acting in self-defence before a threat has reached the point of irreversible damage[255] but the assessment of the attack has to be decided on the immediacy of the attack, its nature and gravity,[256] Support lies with the use of anticipatory self-defence when a state may be subject to recurring terrorist attacks by another state and uses this self-defence as an inherent right.[257] The Security Council has confirmed that a state may respond with the appropriate use of force to defend itself from further terrorist attacks.[258] It has been pointed out by scholars that the ICJ has not addressed the issue on whether self-defence would be available in light of an imminent attack in the context of transnational terrorist groups and WMD.[259]

[251] Nicaragua v United States (n 18) [207].
[252] Obayemi (n 4) 29.
[253] Ibid
[254] Gorener (n 22) 37.
[255] Baker-Beall and Mott (n 143) 716
[256] Schrijver and van den Herik (n 149) [46]
[257] Obayemi (n 4) 30
[258] Ibid.
[259] Wood (n 8) 357.

Was the self -defence a necessity requires an examination as to whether the self-defence action taken was to halt or repeal an armed attached or if there were peaceful alternatives that first could have been pursued. With respect to the latter the ICJ in the *Construction of a Wall*[260] case held that a state had to first exhaust all peaceful means to resolve the matter otherwise that state was in violation of the Charter and customary international law.[261] In the *Nicaragua v United States* [262] the ICJ ordered the disputing parties to cease all hostile activities and refrain from certain actions which might aggravate or extend the dispute.[263] The Security Council looked at the necessity of a self-defence in 2003 when the U.S. and its coalition attacked Iraq to disarm the WMD they were alleged to have had, and to end Saddam Hussein's support of terrorism. There was no evidence to suggest that an attack by Iraq was imminent and therefore the use of force as a self-defence was necessary. The UN's inspection team found no evidence of WMD. The attack was deemed to be unlawful by the Security Council.[264]

4.5 United States

James Gathii states that U.S.' position today when it is faced with a terrorist threat is not to wait for the approval of the international community but to act alone to exercise a pre-emptive self-defence.[265] President Bush confirmed this position in his speech on September 2002[266] and extended it to include terrorists, rogue states and WMD.[267] In 2003, the U.S. with a coalition invaded Iraq to disarm Iraq of WMD, end Saddam Hussein's support for terrorism and free the Iraqi people. The UN found no WMD and there was no evidence that an attack was imminent nor any threat to U.S. security. The U.S with its coalition acted unilaterally in assessing the alleged threat which they ended up getting wrong. Under the Bush doctrine the U.S. is willing to bypass the UN and the EU to act against terrorist threats before they are fully formed.[268]

Academics note that the U.S. has taken upon itself the responsibility for maintaining world order justifying it as international security[269] and because world order is essential it therefore has a special licence to use force.[270]

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[260] *Construction of a Wall* (n 19)
[261] n 76.
[262] *Nicaragua v United States* (n 18)
[263] Yiallourides, Gehring and Gauci (n 26)108 {210].
[264] Gupta (n 7)186.
[265] Gathii (n 250) 91.
[266] n 160.
[267] Ibid.
[268] Gathii (n 250) 92.
[269] Gray (n 24) 44.
[270] Ibid, 45.

4.6 Israel

As far back as 1967 in the Six Day War between Israel and Egypt, Syria and Jordon, Israel argued that it had the right to use force in self-defence to stop an Arab attack. In this case Egypt moved its army toward Israel's borders, forced the UN peacekeepers to withdraw from the Sinai border and the port of Aqaba was closed to Israeli shipping. The rest of the Arab countries also began moving their armies towards Israeli borders. In response to this Israel launched a series of airstrikes against Egypt resulting in the killing of 15 international peacekeepers. Israel claimed that it had been attacked by Egypt first, but later stated that its airstrikes had been a pre-emptive use of force. Israel by the end of the war had seized the Golan Heights, the West Bank, East Jerusalem and the Gaza Strip, as well as the entire Sinai Peninsula. This resulted in the displacement of a large number of civilians who lived in these captured areas. In November, the United Nations passed UN Resolution 242, which called for Israel's withdrawal from the territories it had captured in the war, to terminate all claims and to acknowledge the territorial integrity and the right of every state in the region to live in peace. [271] The Security Council and the General Assembly rejected proposals to condemn Israel for its acts of aggression.[272] One academic notes that Israel's attack was not permissible under the *Caroline* case because it was not imminent and there was no overwhelming threat to Israel that justified the use of force in self-defence to ensure Israel's survival.[273]

Israel has endorsed pre-emptive strike to safeguard its security in the absence of an armed attack, for example the killing of four Hamas leaders in the Gaza strip in June 2002 following suicide bomb attacks associated with Hamas. This Israeli support for pre-emptive strike continued when in June 2003, Israel ordered seven helicopter attacks against Hamas targets in response to terrorist attacks committed on Israeli territory.[274]
In October 2003 Israel crossed its borders and fired missiles into Syria in retaliation to a restaurant suicide bombing in Haifa.[275] The Israeli Government acknowledges that it seeks peace and is committed to negotiations but that it will retain the right to defend itself against a threat that has not fully materialised[276]. The Israeli Government believes

[271] Yaroslav Shiryaev, 'The Right of Armed Self-Defense in Internaional Law and Self-Defense Arguments Used in the Second Lebanon War', 84, (2007/2008, Acta Societatis Martensis, 80-97< https://www.corteidh.or.cr/tablas/r30421.pdf >
[272] Ibid 85
[273] Gathii (n 250) 75.
[274] Ibid 83.
[275] Ibid.
[276] Ibid 84.

that continuous pre-emptive strikes will safeguard Israel in the long run against terrorist attacks because they weaken terrorist organisations.[277] This sentiment had the support of the British government when Tony Blair admitted that after 9/11 you no longer wait for the threat to happen instead you go and actively try to stop it.[278]

Israel is acting unilaterally in assessing its use of force as a self-defence and like the U.S. is by-passing the UN.

4.7 Russia

After 9/11 President Putin would appear to support the use of diplomacy based on existing UN Security Council regulations and compliance with customary international law.[279] In 2002 Russia threatened to launch pre-emptive strikes on Georgia if the authorities there were not able to crush the guerrilla bases there.[280] When terrorist attacks took place on Russian soil with the siege of a Moscow theatre by Chechen terrorists in October 2002, President Putin ordered his military to incorporate a pre-emptive doctrine into the Russian defence policy. Russia's position now is that whoever threatens Russia can expect a proportionate retaliation.[281] Commentators point out that in supporting pre-emptive self-defence President Putin acknowledges the importance of complying with international law and the UN Security Council resolutions, in contrast to the U. S. and Israel.[282] James Gathii points out that when Russia criticised the U.S invasion of Iraq in 2003, it argued that the U.S' unilateral use of force would only endanger international peace and security and undermine the UN's system of collective security.[283] Nineteen years later it is evident with Russia's armed attack on Ukraine that Russia has taken a unilateral decision to use force in self-defence.

4.8 Russia's armed attack on Ukraine

The 2022 invasion by Russia of Ukraine is the largest military attack in Europe since the Second World War and has been widely condemned throughout the world. This war gives a real time opportunity, first, to look at the alleged legal justifications propounded by President Putin for Russia's attack on Ukraine, and, secondly, to examine if these justifications comply with the criteria of the international rules governing the use of force.

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[277] Ibid.
[278] Ibid 85.
[279] Ibid 86.
[280] Ibid.
[281] Ibid.
[282] Ibid 85-86
[283] Ibid, 88.

It would appear that President Putin is testing international law with his perceived legal justifications for self-defence. The core of the Russian claim is that Russia is acting to defend itself in accordance with Article 51 of the Charter.[284]

Throughout President Putin's justifications to act in self-defence there is a pattern showing that Russia is allegedly complying with the law. A letter from the Permanent Representative of the Russian Federation to the UN's Secretary General, had enclosed President Putin's speech of 24th February 2022, which detailed the special military operation proposed by Russia. This was an attempt to meet the reporting requirements where Russia was reporting immediately its intent to take measures in the exercise of its right of self-defence to the UN Security Council as it is required to do under Article 51 of the Charter.

Russia's individual self-defence claim centres on the threat posed by NATO's potential eastward expansion when Ukraine joins NATO, which President Putin sees as a threat to Russia's existence and to its sovereignty.[285] President Putin indicated that Russia is facing future threats with NATO's expansion which Russia must respond to.[286] Fintan O'Toole, an Irish Times columnist, states that there could be some substance to President Putin's objection to NATO's eastward's expansion.[287] He reminds us with the support of the scholar Joshua Shifrinson[288] that assurances were given to Russia against a NATO expansion by the George H. W. Bush administration and Germany, to persuade Russia to agree to the unification of East and West Berlin in 1990.[289] Fintan O'Toole states that there has been a monumental breach of faith on the part of NATO with respect to its expansion towards Russia and the fact that NATO will not give any guarantees that its expansion will stop is in breach of those assurances and gives momentum to Russia's claim of a threat.[290] President Putin sees a pre-emptive self-defence as a response to this

[284] James A. Green, Christian Henderson and Tom Ruys 'Russia's attack on Ukraine and the *jus ad bellum*', 7 (2022) Journal on the Use of Force and International Law, 9:1, 4-30 < https://www.tandfonline.com/doi/full/10.1080/20531702.2022.2056803>.
[285] Ibid,8- 9.
[286] Ibid, 9.
[287] Fintan O'Toole, 'Putin may be a thug but he does have a point about Nato', (19 February 2022, Dublin, *The Irish Times*)
[288] Joshua R. Itzkowitz Shifrinson, 'Deal or No Deal? The End of the Cold War and the U.S. Offer to Limit NATO Expansion', (Spring 2016, International Security, Vol. 40, No. 4 (SPRING 2016), pp. 7-44). < https://www.jstor.org/stable/pdf/43828313.pdf?refreqid=excelsior%3A60f99dd2d12475f27d8a3b388703564d&ab_segments=&origin=&acceptTC=1>.
[289] O'Toole (n 287).
[290] Ibid.

threat[291] but under customary international law any action in self-defence must be necessary, proportional and imminent. Examining what is currently happening in Ukraine, Russia's response cannot amount to being a necessary or proportional response to the alleged threat posed by NATO,[292] even though President Putin refers to the threat as being permanent. Russia itself has not been a victim of a Ukrainian armed attack, which is fundamental under customary international law.[293]

President Putin further expanded his justification for Russia's self-defence to that of protecting Russian people abroad.[294] The responsibility of Russia to protect its nationals abroad would also require necessity and proportionality to be satisfied.[295] Green Henderson and Ruys point out that regarding proportionality, the Russian invasion is far removed from a targeted operation aimed at the evacuation of threatened nationals to Russia, nor is it confined to places where Russian nationals are under imminent threat.[296] They point out that between April 2019 and 2022, 720,000 passports were fast tracked to people in eastern Ukraine, suggesting that issuing a large number of passports to nationals 'who until recently were not nationals lacks credibility'.[297]

In addition to the individual self-defence claim Russia has is basing a collective self-defence claim on its recognition of the Donetsk and Luhansk Republics as sovereign states. These Republics have signed treaties of friendship and mutual assistance with Russia and requested military aid.[298] Russia had previously carried out a similar tactic when it annexed Crimea in 2014.[299] Under collective self-defence, the victim state must request military aid in response to the armed attack.[300] Even if these Republics could have requested military aid there has been no armed attack by Ukraine. Green, Henderson and Ruys point out even though there has been sporadic fighting in the Donbas Region, where these two republics are located, it is difficult to compare an internal conflict to an armed attack by one state against another.[301] The UN General assembly took this position, when it denounced Russia's recognition of these Republics as states, as a violation of the

[291] Green, Henderson and Ruys (n 284) 9
[292] Ibid 10.
[293] Ibid 13.
[294] Ibid 14.
[295] Ibid 16.
[296] Ibid.
[297] Ibid, 15.
[298] Ibid, 17.
[299] Ibid.
[300] *Nicaragua v United States* (n 18) [196].
[301] Green, Henderson and Ruys (n 284) 19

sovereignty and territorial integrity of Ukraine and inconsistent with the principles of the Charter.[302]

President Putin has also advanced anticipatory self-defence as a collective self-defence when he alleged that Russia had uncovered secret Ukrainian military documents that Ukraine was carrying out a special military operation in the Donbas region and this justified Russia acting to defend the alleged states of Donetsk and Luhansk at their request from imminent attack.[303] Green, Henderson and Ruys point out that the problem with this line of argument is that the attack would be in response to an imminent armed attack which Donetsk and Luhansk did not know was imminent and Donetsk and Luhansk are not states and therefore cannot make a collective self-defence request .[304] The requirement that the request must come from the government of a state was stated in the *Nicaragua* case,[305] which is not the case with Donetsk and Luhansk because these are not states and have no such governments.

President Putin has also claimed that millions of people in the Ukrainian republics of Donetsk and Luhansk were suffering genocide inflicted by Ukraine and that Russia was required to intervene suggesting that this intervention was a humanitarian intervention.[306] This claim was supported by the president of the Russian branch of the International Law Association who stated that the invasion was lawful and within the provisions of the UN Charter on self-defence and on the protection of human rights.[307] Ukraine instituted proceedings against Russia's allegation of genocide and as this case is ongoing the ICJ has not held in these proceedings any finding on whether genocide had taken place in eastern Ukraine[308]. Michael Wood points out that humanitarian intervention is used in two different ways, one way is the rescue by a state of its nationals abroad and more recently it refers to forceful intervention by a third state or states to save people from their own government's action.[309] The Charter itself is silent on the right to intervene when there is a humanitarian catastrophe but the UN Security Council in a resolution[310]

[302] Ibid, 18, and see footnote 95.
[303] Ibid 19-20.
[304] Ibid, 20.
[305] *Nicaragua v United States* (n 18) [246].
[306] Green, Henderson and Ruys (n 284) 23.
[307] Ibid 24.
[308] Ibid 24-25
[309] Wood (n 8) 360.
[310] Resolution 1674 (2006) adopted by the United Nations Security Council on 28 April 2006 at its 5430th meeting, on 28 April 2006 [4] < https://www.un.org/ruleoflaw/files/S-Res-1674%20on%20protection%20civilians%20in%20armed%20conflict%20(28Apr06).pdf>.

reaffirmed the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome[311] regarding the responsibility of each individual state to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity.[312] Paragraph 139 states:

> The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity… .[313]

Although a General Assembly resolution is not legally binding on UN member states,[314] a Security Council resolution is significant because under Article 25 of the Charter, 'The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'.[315] Under this resolution the members of the UN confirmed that enforcement action on humanitarian grounds can be addressed by the Security Council.[316] This would suggest that Russia's claim of genocide can be addressed by the UN Security Council which Russia has not approached.

4.9 Sanctions

Article 41 of the UN Charter gives the Security Council the authority to apply sanctions which do not involve the use of force. When the Security Council issues sanctions it does so in response to what it interprets to be threats to international peace and security.[317] While sanctions are seen as political tools, under Chapter VII of the Charter they are binding resolutions on all the member states under Article 25.[318] In addition the Security

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[311] Resolution 60/1 (2005) World Summit Outcome adopted by The General Assembly on 16 September 2005 at its Sixtieth session on 24 October 2005 World Summit Outcome.< https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf>.

[312] Ibid [138].

[313] Ibid,.

[314] Wood (n 8) 364.

[315] n 63 Article 25

[316] Wood (n 8) 365.

[317] Kristen E. Boon, 'The legal Framework of Security Council Sanctions' 2 (International Peace Institute April 2014,) < https://www.ipinst.org/wp-content/uploads/publications/terminating_security_council_sanctions.pdf>.

[318] Ibid 3.

Council's enforcement provisions are an exception to Article 2(7) of the Charter, which prohibits intervention within the domestic jurisdiction of any state.[319] Sanctions are understood to be temporary and of limited duration and they must be necessary and proportionate to reverse the underlying threat.[320]

In response to Russia's invasion of Ukraine, the U.S., the EU, United Kingdom and other countries including Ireland[321] introduced sanctions targeting President Putin individually, as well as government members, and cutting off Russian banks from SWIFT. Assets were frozen on the Russian Central bank so that it could not off-set the impact of the sanctions. Multinational companies, such as Apple, IKEA, Exxon Mobil and McDonalds also decided to apply sanctions and in the case of McDonald's cease to trade in Russia.. The retaliation measures taken by President Putin of the suspension of the Nord Stream 2 gas pipeline has had serious implications for Europe resulting in a major move to reduce global energy dependency with Russia and replace this energy with liquid gas from the Middle East.[322] The EU also impounded oligarchs' yachts and has imposed a ban on the sale of aircraft and spare parts, as well as the requirement of lessors to terminate leases on aircraft with Russian airlines. Airspaces were closed to Russian airlines and Russian registered private jets. The consequences of these sanctions have had devastating impacts on the world, for example food shortages due to wheat not being able to be exported from Ukraine, increases in the cost of energy and cost of living for global citizens as a result of President Putin's reduction on the flow of gas from Russia. Sanctions are a two way stream not only affecting the offender but also global citizens, who are indirectly made victims of Russia's unlawful attack on Ukraine.

4.10 Conclusion

Chapter Four discusses the criteria that have to be considered when a state decides to use force as a self-defence especially if that use of force is based on a pre-emptive self-defence, preventive self-defence or anticipatory self-defence. The Charter remains the corner stone regarding the lawful use of force, although it is lagging behind when modern

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[319] Ibid

[320] Ibid 4.

[321] Department of Foreign Affairs, 'Information on sanctions in respect of the situation in Ukraine', < https://www.dfa.ie/news-and-media/publications/publicationarchive/2022/february/information-on-sanctions- in-respect-of-the-situation-in-ukraine.php>.

[322]BBC News, 'EU eyes Israeli natural gas in deal with Egypt', (15 June 2022)< <https://www.bbc.com/news/world-61817421>.

warfare is used, for example cyberattacks, because modern warfare does not fit into the traditional definition of what is an armed attack.

This chapter looks at arguments put forward for and against these self-defences. Scholars argue that an imminent attack is necessary for pre-emptive, preventive or anticipatory self-defence to be lawful. Other scholars suggest that the requirements of timeliness and proportionality of the pre-emptive or preventive self-defence are based on imminent danger while acknowledging that anticipatory self-defence is a response to a more remote but significant attack. For scholars who support these defences they argue that to have to wait for the attack to occur to be able to use force in a pre-emptive, or preventive or anticipatory way is unjust.

Case law has avoided addressing the issue of what is an imminent attack when anticipatory self-defence is used but has actively stated that in determining if the anticipatory self-defence was a necessity it has to be considered if alternative peaceful measures could first have been perused or whether the self-defence was used to halt or repeal an armed attack. It has also held that the self-defence must be proportionate to the means and extent of the armed attack and should not be disproportionate to the gravity. The core of the problem is when a state acts unilaterally on the basis of its own assessment of the situation.

Not only does the attack have to have be imminent, but the targeted state has the burden of proof to show that it was the victim of the attack. With regard to preventive self-defence the UN Security Council authorises preventive use of force under Articles 39 and 42 but in doing so a state cannot act on its own assessment to use preventive self-defence without the Security Council's prior authorisation. Without this authorisation the preventive self-defence is unlawful.

The U.S.' position under the Bush doctrine is that it will act unilaterally and not wait for approval of the international community to use a pre-emptive or preventive defence in situations of terrorist attacks. In addition the U.S. sees itself as the custodian of international security which gives it a special licence to use force.

The State of Israel's position is long standing in that it sees that it has the right to use force to stop an Arab attack. While Israel acknowledges that it is committed to peace and negotiations it will revert to pre-emptive strike even when a threat has not fully materialised. Their philosophy is that continuous pre-emptive strikes will safeguard Israel because they weaken terrorists' organisation. The controversy surrounding this is that

Israel is acting unilaterally in assessing the potential attack and the use of force and is by-passing the UN just like the U.S.

The analysis of pre-emptive, preventive and anticipatory use of force as self-defences, put forward by President Putin to justify the attack by Russia on Ukraine shows that the proposed threat was unilaterally assessed by President Putin, that these defences violate the UN Charter and customary international law and that they are illegal.

5. Chapter Five

5.1 Conclusion

This dissertation confirms that the Charter plays a major role in global security because under its provisions it determines when the use of force may be used legally against other states. The Charter continues to be a living document and has a central role to play as can be seen in the Ukraine War, however, the Charter is lagging behind in its applicability to modern warfare but this does not justify it being ignored. The 9/11 attack on the World Trade Towers in New York City in 2001, can be seen as pinpointing the extension of pre-emptive use of force. The U.S.' response to 9/11, which has become known as the Bush Doctrine, is to broaden the meaning of pre-emptive strike to include preventive or anticipatory self-defence while justifying its use in the absence of an imminent attack when terrorist attacks and non-conventional means of war are used. Extending pre-emptive strike to include preventive and anticipatory self-defence is causing confusion and uncertainty in the law. This dissertation proposes that UN Security Council needs to update the Charter to bring it in line with the strategies and techniques used in modern warfare.

This study finds that the Charter and Customary International law are still the foundations to determine when the use of force as a self-defence is legal, and also confirms that the law cannot remain static to changes which are currently happening in modern warfare. This research also confirms that one consequence of extending pre-emptive strike to include preventive and anticipatory strikes without updating the law is that it causes confusion and uncertainty as to when and under what circumstances the use of force is legal. New forms of attacks such as terrorism, WMD and cyberattacks have emerged resulting in serious threats to a state, which the law needs to address with clarity. Some states are by-passing the Charter and justifying their use of force because the attack is imminent. Academics such as Michael Wood[323] support this conclusion when he states both the U.S. and the United Kingdom look to customary international law to support their position on anticipatory self-defence in particular to the *Caroline* case which holds that force may be used in self-defence when there is an imminent attack[324]. The ICJ also needs to take a more proactive approach in clarifying what is an imminent attack, when cases come before it. ICJ has not addressed this issue and has expressly left it open[325]. The academics who support pre-emptive self-defence see the necessity to expand

[323] Wood (n 8)
[324] Ibid, 357
[325] Wood (n 8) 357.

imminence to deal with new threats.[326] The argument supporting this argument is that a threat could be so devastating that a state cannot sit around 'as grave dangers materialise'.[327]

Currently under the Charter, a problem arises when a state decides based on its own assessment of a threat to use preventive self-defence without the Security Council's prior authorisation rendering the preventive self-defence unlawful. Academics supporting the use of pre-emptive self-defence argue that to wait for an actual armed attack to happen or that is about to happen is unjust and a state should be able to defend itself against the attacker who has the intent and capacity to attack.[328] Sanjay Gupta observes that in exhausting all possible alternatives, if the UN Security Council refuses to sanction the use of force because it does not agree with the state's self-assessment of the threat or the method of dealing with it, it would be difficult to classify the military action as imminent under the *Caroline* case. On the other hand he argues that if a resolution on the use of force is supported by a majority of the Security Council but defeated on the veto of a permanent member a case of necessity could be made depending on the circumstances.[329]

5.2 Recommendations

The findings of this research show that the Charter and customary international law need to be updated. The following are suggested recommendations:

5.2.1 Decision of UN Security Council and Veto Power of Permanent Member

In taking a decision the UN Security Council under Article 27 of the UN Charter requires an affirmative vote from nine of the fifteen members including the concurrence or abstention of its five permanent members, namely China, France, Russia, United Kingdom and United States.[330] These states were granted special status of Permanent Member States at the Security Council, along with a special voting power known as the "right to veto". It was agreed by the drafters that if any one of the five permanent members cast a negative vote in the 15-member Security Council, the resolution or decision would not be approved.[331] The war in Ukraine has highlighted this problem when one of these

[326] Deeks (n 130) 663
[327] Ibid.
[328] Ibid.
[329] Gupa (n 7) 186
[330] n 63.
[331] United Nations Security Council,'Voting system: votes of majority required'< https://www.un.org/securitycouncil/content/voting-system>.

permanent member states is involved in the use of force where it is natural that such a permanent member state would veto any decision made against it.[332] The UN Security Council used a way around Russia's veto by referring the matter to the United Nations General Assembly under the "Uniting for Peace" resolution.[333] Another option which has been put forward by academics is to expel a permanent member from the UN, which can be done under Article 6, when a state is in persistent violation of the Charter. This would be a speeder option to take in these emergencies. An alternative option other than the current Uniting for Peace resolution needs to be put in place to prevent a permanent member being able to obstruct a Security Council decision in these type of emergency situations.

5.2.2 Armed and Imminent Attacks

This study found that the question of what is an armed attack has been looked at by academics especially when non-conventional means of warfare are used in the attack. If an armed attack is alleged to have occurred then the determination of what is meant by an armed attack is important. Article 51 of the Charter is restricted to the use of force in self-defence being used against an armed attack which has occurred. The *Nicaragua* case held that an armed attack included not only action by regular armed forces but also included the sending by a state of armed bands, groups, irregulars or mercenaries which carry out acts of armed forces against another state of such gravity as to amount to an actual armed attack conducted by regular armed forces[334]. The Court also stated that an armed attack also included assistance to rebels in the 'provision of weapons or logistical or other support' because it could be regarded as 'a threat or use of force or amount to intervention in the internal or external affairs of other states'[335].

Under customary international law the attack has to be imminent and does not have to have occurred but what is an imminent attack has not been addressed in case law. The academic Michael Wood confirms that the ICJ has not addressed the issue of what is an

[332] Russia's vote against the Security Council's Resolution 2623 (2022) on 27 February 2022 did not stand in the way of its adoption,

[333] UN General Assembly Resolution 377 A, states that in any cases where the Security Council, because of a lack of unanimity among its five permanent members fails to act as required to maintain international security and peace, the General Assembly shall consider the matter immediately and may issue appropriate recommendations to UN members for collective measures, including the use of armed force when necessary, in order to maintain or restore international security and peace. It was adopted 3 November 1950, after fourteen days of Assembly discussions, by a vote of 52 to 5, with 2 abstentions. < https://www.un.org/en/sc/repertoire/otherdocs/GAres377A(v).pdf>.

[334] Nicagura v United States (n 18) [195].

[335] Ibid.

imminent attack and has expressly left it open. He cites the *Armed Activities on the Territory of the Congo* Case[336] to support his view. The Court in this case held that the facts of that case did not warrant a pronouncement on whether self-defence would be available in the light of an imminent attack.[337] What constitutes an imminent attack when it involves threats in modern warfare are no longer confined to moving military and weapons to a state's borders but involve WMDs, transnational terrorists and cyber-attacks. Michael Wood answers this citing the *Caroline* case to support his answer that preventive or anticipatory self-defence must be of a necessity, instant, overwhelming and leaving no choice of means and no moment for deliberation.[338] In the *Oil Platforms* case[339] the ICJ held that the state using self-defence must prove that it was the victim of an armed attack.[340]

It is suggested that definitions of what an armed attack and imminent attack consist of incorporating non-conventional warfare activities into the definition is needed to clarify and eliminate confusion and therefore reduce the likelihood of a state making a unilateral assessment of what it determines is an armed or imminent attack.

5.2.3 Evidence

Pre-emption and preventive strikes both require intelligence but often intelligence is flawed in warfare[341]. The academic Colin Gray highlights this weakness in his comment that 'intelligence on the target state has to be ever less reliable the further into the future one is peering'.[342] He further states that to pre-empt is to act on the basis of certain, absolutely contemporary knowledge.[343] By doing so this evidence shows that an attack is either actually underway or has been ordered.[344]. In the cases of preventive and anticipatory self-defence Olumide Obayemi suggests that in supporting the extension of the use of force there is a high burden to establish with proof beyond a reasonable doubt that the targeted nation poses an actual or immediate risk to their neighbours, international people and international community of states. That the nation arguing for military

[336] *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)* (19 December 2005, International Court of Justice) < https://www.icj-cij.org/public/files/case-related/116/116-20051219-JUD-01-00-EN.pdf>.
[337] Wood (n 8) 357 and footnote 40.
[338] Ibid.
[339] Oil Platforms (n 81) [57].
[340] Ibid
[341] Gray (n 24) 37.
[342] Ibid, 39.
[343] Ibid 13-14.
[344] Ibid 9

invasion must have suffered an injury, which is concrete, actual or imminent and not conjectural or hypothetical. There must be a causal connection between the actual or imminent injury or risk alleged and that the second nation has failed as a nation.[345]

Evidentiary standards need to incorporate non-conventional warfare methods so that the state which has the burden of proof knows what evidence it will need when it brings its case before the ICJ.

[345]Obayemi (n 4) 24-25.

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