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### Anticipatory action in self-defence: The law of self-defence - past, presence and future

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## 1 Introduction

### 1.1 Statement of purpose

The purpose of this research is to examine the conditions under which anticipatory action in self-defence is legal under public international law. The temporal dimension of self-defence has generated ample discussion among legal scholars and public officials alike. Claims of self-defence have often been criticised or condemned for transgressing the perceived limits of this temporal dimension. At the end of the first decade of the twenty-first century, the temporal boundaries of self-defence are still contentious and hard to pin down. The present book was written on account of the keenness of the present author to contribute to the contemporary debate on these temporal limits in general and on the legality of anticipatory action in particular.

#### 1.1.1 The right of self-defence in contemporary public international law

The right of self-defence is widely acknowledged today as one of the two exceptions to the prohibition to use force enshrined in the United Nations Charter (hereafter, ‘Charter’ or ‘UN Charter’).<sup>1</sup>

Article 2(4) of the Charter states that all Member States have to 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.<sup>2</sup> The customary nature of this prohibition was acknowledged by the International Court of Justice (hereafter, ICJ or ‘Court’) in 1986, in its *Nicaragua v. US* judgment.<sup>3</sup>

Article 51 of the UN Charter consecrated the right of self-defence as an exception to the prohibition to use force. It reads:

‘Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security

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<sup>1</sup> See, for instance, J. Brownlie, *International Law and the Use of Force by States* (Oxford, Clarendon Press 1963) p. 265; M. Dixon, *Textbook on International Law* (London, Blackstone Press 2000) p. 297; S.C. Neff, *War and the Law of Nations: General History* (Cambridge, Cambridge University Press 2005) pp. 316-317; B. Simma, *The Charter of the United Nations: A Commentary* (Oxford, Oxford University Press 1995) p. 663.

<sup>2</sup> According to Chapter VII of the UN Charter, the other main exception to the general prohibition to use force is the Security Council-controlled collective enforcement action. Also, there is a growing literature discussing humanitarian intervention as a possible third exception to the prohibition. See, for instance, G.J. Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (Washington, D.C., Brookings Institution Press 2008); R.B. Lillich, ed., *Humanitarian Intervention and the United Nations* (Charlottesville, University Press of Virginia 1986); F.R. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality* (Ardsey, N.Y., Transnational 2005).

<sup>3</sup> *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v. United States of America*), Judgment of 27 June 1986, ICJ Rep. (1986) paras. 185-186, 188, 292(4) (hereafter, *Nicaragua*). See *infra* 11.4.4 for main discussion. The major part of the literature agrees with the interpretation of the Court: Dixon, pp. 296-297; Y. Dinstein, *War, Aggression and Self-Defense* (Cambridge, Cambridge University Press 2005) p. 92; C. Gray, *International Law and the Use of Force* (Oxford, Oxford University Press 2008) p. 30; O. Schachter, *International Law in Theory and Practice* (Dordrecht, Martinus Nijhoff 1991) pp. 130-131.

Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.’

The Charter-based content of the right of self-defence allows thus states to undertake military action in case of an armed attack, provided that the endeavour is reported to the Security Council (hereafter, SC or ‘Council’) and as long as that action does not affect the Council’s authority to take measures.

Complementary to the treaty-based description of self-defence is the customary concept of the right that is often used to complement Article 51. The dual basis of the right of self-defence was recognized by the International Court of Justice in the *Nicaragua* case:

‘Article 51 of the Charter is only meaningful on the basis that there is a “natural” or “inherent” right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter.’<sup>4</sup>

On the basis of this complementary relationship, the vast majority of legal literature acknowledges the customary principles of necessity and proportionality as limits of the right of self-defence.<sup>5</sup>

Notwithstanding the recognition of such common grounds, many controversies arise from the wording of Article 51 and the consequences of its relationship with customary law.

### 1.1.2 Main controversies of the right of self-defence

The principal disagreements regarding the contemporary understanding of self-defence pertain to the definition of the term ‘armed attack’, to the temporal dimension of the defensive action and to the application of the principles of necessity and proportionality.

#### 1.1.2.1 ‘Armed attack’

Article 51 of the UN Charter does not provide a definition of the term ‘armed attack’. This lacuna has led to many questions being raised as to the form of the use of force that permits self-defence.<sup>6</sup> Some authors maintain that the term only has an illustrative role

<sup>4</sup> *Nicaragua*, ICJ Rep. (1986) para. 176.

<sup>5</sup> Dixon, p. 300; J.G. Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge, Cambridge University Press 2004); J.G. Gardam, ‘Proportionality and Force in International Law’, 87 *American Journal of International Law* (1993) p. 391; P. Malanczuk, *Akehurst’s Modern Introduction to International Law* (London, Routledge 1997) pp. 316-317; Simma, p. 677. Some authors have rejected these limitations: J. Kunz, ‘Individual and Collective Self-Defence in Article 51 of the Charter of the UN’, 41 *American Journal of International Law* (1947) p. 872.

<sup>6</sup> D.W. Bowett, *Self-Defence in International Law* (Manchester, Manchester University Press 1958) pp. 187-188; R. Higgins, *The Development of International Law through the Political Organs of the United Nations* (London, Oxford University Press 1963) pp. 204-205; M.S. McDougal and F.P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (New Haven, Yale University Press 1961) pp. 238-240.

and that also other – milder – forms of the use of force can trigger the exercise of self-defence.<sup>7</sup> Other commentators assert that armed attack denotes only the most serious forms of the use of force and that small incidents cannot serve as basis for the exercise of self-defence.<sup>8</sup> Some authors contend that self-defence can only be exercised against states.<sup>9</sup> A significant part of the legal doctrine disagrees with that contention.<sup>10</sup> Furthermore, the relationship between armed attack and ‘act of aggression’ is still not completely clarified, although the two have often been used interchangeably.<sup>11</sup>

### 1.1.2.2 ‘If an armed attack occurs’

The specific meaning attributed to the phrase ‘if an armed attack occurs’ (*dans le cas où un Membre des Nations Unies est l'objet d'une agression armée*, in the French version) used in Article 51 has brought about extensive controversy as to the temporal dimension of the defensive action. As of today, no consensus in international legal doctrine exists as to the point in time from which self-defence against an armed attack may be exercised.

Several opinion-groups have emerged in relation to this controversy. A part of the legal doctrine adopts the view that Article 51, as an exception to the general prohibition to use force, must be interpreted restrictively as forbidding anticipatory action.<sup>12</sup> Accordingly, it is maintained that, by the time the Charter was adopted, customary law allowed only a narrow right of self-defence.<sup>13</sup> Further, it is asserted that self-defence before an armed attack was outlawed by the negotiators of Article 51.<sup>14</sup> Likewise, it is contended that the adoption of the Charter was a crucial step forward for the regulation of the use of force and that many traditional norms were left behind.<sup>15</sup> It has also been

<sup>7</sup> Bowett 1958, pp. 187-188; C.H.M. Waldock, ‘General Course on Public International Law’, 106 *Recueil des cours* (1962) pp. 233-235.

<sup>8</sup> A. Cassese, *International Law* (Oxford, Oxford University Press 2005) p. 354; Higgins, pp. 204-205; Gray 2008, pp. 147-148; Kunz, p. 878.

<sup>9</sup> A. Cassese, ‘Terrorism Is also Disrupting Some Crucial Legal Categories of International Law’, 12 *European Journal of International Law* (2001) p. 997. He later changed his opinion: Cassese 2005, p. 355; Kunz, p. 878.

<sup>10</sup> T. Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (Cambridge, Cambridge University Press 2002) p. 67; Higgins, pp. 204-205; N. Lubell, *Extraterritorial Use of Force against Non-State Actors* (Oxford, Oxford University Press 2010) p. 31; S.M. Schwebel, ‘Aggression, Intervention and Self-Defence in Modern International Law’, 136 *Recueil des cours* (1972-II) p. 482.

<sup>11</sup> For instance, the Tokyo Tribunal held that the Netherlands was entitled to defend itself against a Japanese war of aggression (see *infra* 7.2.2.2). Likewise, in the *Nicaragua* case, the ICJ equated ‘armed attack’ with the notion of an ‘act of aggression’ employed in Art. 3 of GA Res. 3314 (XXIX), Definition of Aggression, 14 December 1974 (hereafter, Definition of Aggression, GA Res. 3314). For main discussion see *infra* 11.3.1.

<sup>12</sup> G.M. Badr, ‘The Exculpatory Effect of Self-Defence in State Responsibility’, 10 *Georgia Journal of International and Comparative Law* (1980) p. 25; Brownlie 1963, pp. 275-278; Cassese 2005, pp. 361-362 (Cassese offers *de lege ferenda* proposal for a possible future regulation of ‘anticipatory self-defence’, *ibid.*, pp. 362-363); C. Gray, *International Law and the Use of Force* (Oxford, Oxford University Press 2004) pp. 98-99; L. Henkin, ‘The Use of Force: Law and US Policy’, in L. Henkin et al., eds., *Right v. Might: International Law and the Use of Force* (New York, Council on Foreign Relations Press 1991) pp. 44-46; Kunz, p. 878.

<sup>13</sup> Brownlie 1963, pp. 257-261; Gray 2004, p. 98.

<sup>14</sup> Brownlie 1963, p. 275; Gray 2004, p. 98; Kunz, pp. 877-878.

<sup>15</sup> See *infra* 11.3.2.1. Summary Record of the 1627<sup>th</sup> ILC mtg., UN Doc. A/CN.4/SR.1627 (1980) para. 3 (comment by Tsuruoka).

asserted that because the actual invocation of the right to ‘anticipatory self-defence’ is rare in post-Charter state practice, such a legal basis for the use of force can hardly be maintained under customary international law.<sup>16</sup> Consequently, it is argued that even if the drafters of the Charter did not intend to outlaw anticipatory action, subsequent state practice, under the influence of the prohibition to use force, has done so.<sup>17</sup>

Relying on the customary basis of self-defence, other authors justify anticipatory action in self-defence against an imminent threat on the basis of the 1841 ‘Webster-formula’.<sup>18</sup> In a series of correspondence between the US and Britain, then US Secretary of State, Daniel Webster, called upon the British government to show ‘a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation’<sup>19</sup> in order to justify the exercise of self-defence in the *Caroline* incident of 1837.<sup>20</sup> The meaning of these conditions, applied to contemporary reality, has given rise to many discussions and a continuous debate about the content of the customary right of ‘anticipatory self-defence’.<sup>21</sup>

Another part of the literature promotes the legitimacy of ‘preventive self-defence’ against a threat that is rather potential than immediate.<sup>22</sup>

The wording of Article 51 has also had an impact on remedial action in self-defence. Accordingly, some authors have maintained that self-defence ceases as a right when the armed attack has achieved its purpose and can only be exercised while the attack is still in

<sup>16</sup> Brownlie 1963, p. 260; Gray 2004, p. 130; L. Henkin, *International Law: Politics and Values* (Dordrecht, Martinus Nijhoff 1995), pp.121-122.

<sup>17</sup> Brownlie 1963, p. 260; Gray 2004, pp. 98, 130; E. Zoller, ‘The Law Applicable to the Preemption Doctrine’, 98 *American Society of International Law Proceedings* (2004) pp. 333-337.

<sup>18</sup> Bowett 1958, pp. 188-189; R.N. Gardner, ‘Commentary on the Law of Self-Defense’, in L.F. Damrosch and D.J. Scheffer, eds., *Law and Force in the New International Order* (Boulder, Westview Press 1991) p. 51; Higgins, p. 199; McDougal and Feliciano, pp. 231-236; Schachter 1991, pp. 150-152; Schwebel, p. 481; C.H.M. Waldock, ‘The Regulation of the Use of Force by Individual States in International Law’, 81 *Recueil des cours* (1952-II) pp. 497-499.

<sup>19</sup> Letter from Daniel Webster, US Secretary of State, to Henry Fox, British Minister in Washington, 24 April 1841, in *British and Foreign State Papers, 1840-1841*, Vol. 29 (London, James Ridgway and Sons 1857) p. 1138 (hereafter, Webster, *BFSP*).

<sup>20</sup> See *infra* 3.2.2.1 for main discussion.

<sup>21</sup> Bowett 1958, pp. 188-189; T. Gazzini, *The Changing Rules on the Use of Force in International Law* (Manchester, Manchester University Press 2005) pp. 149-152; C. Greenwood, ‘International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida and Iraq’, 4 *San Diego International Law Journal* (2003) pp. 12-16; Higgins, pp. 199-200; Lubell, pp. 43-44; McDougal and Feliciano, pp. 231-240; Waldock 1952, p. 498; Schachter 1991, pp. 150-152.

<sup>22</sup> C. Hill, ‘The Bush Administration Preemption Doctrine and the Future of World Order: Remarks’, 98 *American Society of International Law Proceedings* (2004) pp. 329-331; C. Pierson, ‘Preemptive Self-Defence in an Age of Weapons of Mass Destruction: Operation Iraqi Freedom’, 33 *Denver Journal of International Law and Policy* (2004) pp. 154-155; W.H. Taft and T.F. Buchwald, ‘Preemption, Iraq, and International Law’, 97 *American Journal of International Law* (2003) pp. 557-563. R. Wedgwood, ‘The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense’, 97 *American Journal of International Law* (2003) pp. 584; J. Yoo, ‘International Law and the War in Iraq’, 97 *American Journal of International Law* (2003) pp. 571-574.

progress.<sup>23</sup> That view was contested by other commentators as untenable in interstate relations.<sup>24</sup>

### 1.1.2.3 Necessity and proportionality

Although both the principle of necessity and that of proportionality are acknowledged today as regulating the right of self-defence, their precise application is still disputed.<sup>25</sup> The controversies regarding the definition of an armed attack and the temporal dimension of the defensive response lead to great ambiguity in applying the principles of necessity and proportionality to the exercise of self-defence. Necessity is constantly – ‘almost as an incantation’<sup>26</sup> – mentioned in relation to post-Charter self-defence, but its meaning is rarely analysed. It is acknowledged that when it comes to self-defence, necessity is closely linked to the immediacy or imminence of the defensive response. Nonetheless, its exact content and significance is by no means clear.<sup>27</sup>

Proportionality has been discussed both from a more quantitative and a more qualitative perspective. In other words, both the scale and effect of the armed attack suffered (or expected) and the force needed to ward off the danger have played a role in assessing a proportionate action.<sup>28</sup>

Consequently, without clarity over the concept of armed attack and the timing of defensive action, conclusiveness on the application of necessity and proportionality is hard to be achieved.

### 1.1.3 Layers of focus of the present research

The controversies depicted above are *intrinsically connected to each other*. Anticipatory action in self-defence is intrinsically connected to the content and temporal dimension of the right of self-defence *per se*. The temporal dimension of self-defence is further contingent on what constitutes an armed attack and on how necessity and proportionality are understood. It is thus very difficult to analyse them in isolation.

Because of the interconnectedness of the above-mentioned controversies, the present research uses several layers of focus. Its general emphasis is on the *temporal dimension* of self-defence together with the other, interrelated controversies presented above (armed attack, necessity and proportionality). Within that spectrum, the *legality of anticipatory action* in self-defence will be scrutinized. More specifically, the status and limits of such action will be identified and demarcated.

<sup>23</sup> Badr, p. 25; P.J. Myjer and N.D. White, ‘The Twin Towers Attack: An Unlimited Right to Self-Defence?’, 7 *Journal of Conflict and Security Law* (2002) p. 7.

<sup>24</sup> T.D. Gill, ‘The Temporal Dimension of Self-Defence’, in M. Schmitt and J. Pejic, eds., *International Law and Armed Conflict: Exploring the Faultlines: Essays in Honour of Yoram Dinstein* (Leiden, Martinus Nijhoff 2007) pp. 152-154; Schachter 1991, p. 153.

<sup>25</sup> Gardam 1993, p. 404; Gardam 2004, pp. 149, 155; J.A. Green, *The International Court of Justice and Self-Defence in International Law* (Oxford, Hart 2009) p. 75; Higgins, pp. 198-199; O. Schachter, ‘Implementing Limitations on the Use of Force: The Doctrine of Proportionality and Necessity’, 86 *American Society of International Law Proceedings* (1992) p. 39.

<sup>26</sup> Gardam 2004, p. 149.

<sup>27</sup> *Ibid.*, pp. 149-153.

<sup>28</sup> *Ibid.*, pp. 156-159; Gray 2004, p. 121; Henkin 1995, p. 121; Higgins, p. 201; McDougal and Feliciano, p. 242; Schachter 1991, pp. 153-155; Waldock 1952, p. 464.

### 1.1.4 Explanation of central terms

Before embarking on the methodological aspects of the present research, some preliminary terminological explanations are necessary. First and foremost, the notion of ‘self-defence’ employed in this book refers to the right of *states* to use *armed force* in their defence. It does not refer to the right of self-defence of private persons under criminal law, unless that is explicitly specified (as it will be done mostly in Part I). Likewise, the notion of self-defence employed in this research does not refer to non-forceful means of defending oneself. Furthermore, it is not identical to the notion of unit self-defence employed in military law.

The terms ‘anticipatory’ and ‘pre-emptive’ will be used interchangeably to denote defensive action against so-called imminent threats. These terms will thus be used in the sense given to them by authors justifying self-defence under the Webster-formula.<sup>29</sup> ‘Remedial’ or ‘reactive’ action in self-defence will pertain to measures taken against an ongoing attack and after an armed attack has occurred. ‘Preventive self-defence’ or preventive use of force will refer to those instances where states employ the use of force against so-called potential threats.<sup>30</sup> It is important to note that the present author does not consider that anticipatory/pre-emptive action is synonymous with preventive action.

## 1.2 Main research questions

As said above, the purpose of this research is to examine the conditions under which anticipatory action in self-defence is legal under international law. The controversies depicted above demonstrate that prime reliance on Article 51 of the Charter would not be practical for that purpose. Since the International Court of Justice acknowledged that the right of self-defence had a strong customary basis, it is self-explanatory that the conditions under which anticipatory action in self-defence is legal can only be examined under contemporary customary international law. Accordingly, in order to assess the legality of anticipatory action under international law, prime reliance should be on the relevant customary rules.

With that view in mind, two main research questions are identified:

1. Is anticipatory action in self-defence part of contemporary customary international law? (RQ1)
2. If an affirmative answer to the first question is established, what are the limits of anticipatory action in self-defence under contemporary customary international law? (RQ2)

It is important to reiterate that, although both research questions refer to anticipatory action, the analysis required for the purpose of this research will look at the right of self-defence as a whole and will analyse anticipatory action together with that right.

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<sup>29</sup> See *supra* 1.1.2.2. Bowett 1958, pp. 188-189; Higgins, p. 199; McDougal and Feliciano, pp. 231-236; Schwebel, p. 481; Waldock 1952, pp. 497-499; Schachter 1991, pp. 150-152.

<sup>30</sup> See *supra* 1.1.2.2. Hill, pp. 329-331; Pierson, pp. 154-155; Taft and Buchwald, pp. 557-563. Wedgwood 2003, pp. 584; Yoo, pp. 571-574.

## 1.2.1 First research question

The first research question explores whether anticipatory action in self-defence is part of contemporary customary international law. In other words, the first research question inquires whether anticipatory action is part of the contemporary customary right of self-defence. In order to address that question, the most effective methods of research have to be identified as well as the way conclusions will be drawn from the employment of those methods.

### 1.2.1.1 Choosing the best methods of research

In order to answer the first research question, one has to look at the development of customary international law on self-defence. The right of self-defence within the international society of states has long been acknowledged as the basic, fundamental right of every member.<sup>31</sup> Therefore, contemporary customary law on self-defence is not the result of an instant creation; it is the product of centuries' of state practice and doctrine.<sup>32</sup> The present research does not rely on the contention that the passage of a considerable amount of time is always needed for the formation of a customary rule.<sup>33</sup> It is rather maintained that the time needed to form a custom varies 'according to the nature of the case.'<sup>34</sup> The regulation of war (and, implicitly, self-defence) has for long been at the centre of the legal process and some of its aspects are deeply embedded in contemporary principles.<sup>35</sup> For that reason, in order to understand the underlying concepts in the current understanding of self-defence, attention has to be given to the development of the relevant customary rules.

For the current content of the customary right of self-defence, the adoption of the UN Charter is seen as a key moment. It was then that the right of self-defence was expressly acknowledged as the only legal exception to the unilateral use of force.<sup>36</sup> At the same time, as shown above, the adoption of the Charter gave rise to several controversies affecting the customary right of self-defence. For those reasons, it proves to be pertinent to trace the evolution of customary law on self-defence in two phases: pre-Charter customary law and post-Charter customary law. For following the development of pre-Charter customary law on self-defence, the method of *legal-historical research* is the most practicable. For examining the evolution of post-Charter customary rules on self-defence, *comparative case studies* will be conducted based on different themes.

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<sup>31</sup> Bowett 1958, pp. 3-4; T. Twiss, *Law of Nations Considered as Independent Political Communities*, Vol. 1 (Oxford, Oxford University Press 1860) p. 11.

<sup>32</sup> For the nature and origins of self-defence, see Bowett 1958, pp. 4-8. See also Schachter for a succinct portrayal of the historical schools of thought regarding self-defence. Schachter 1991, pp. 135-136.

<sup>33</sup> This assertion can be deduced from the materialistic approach to customary law. See *infra* 1.3.2.1. For criticism of this school of thought, see M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki, Lakimiesliiton Kustannus 1989) pp. 401-402.

<sup>34</sup> Waldock 1962, p. 44. See also A.A. D'Amato, *The Concept of Custom in International Law* (Ithaca, Cornell University Press 1971) pp. 57-59; G.I. Tunkin, 'Co-existence and International Law', 95 *Recueil des cours* (1958) pp. 9-10.

<sup>35</sup> Brownlie 1963, pp. 1-2.

<sup>36</sup> *Ibid.*, p. 265; Simma, p. 663; Neff, pp. 316-317; Dixon, p. 297.

### 1.2.1.2 Rationale of legal-historical research

Pre-Charter customary law on self-defence is necessary to be examined in order to shed light on the content as well as the temporal dimension of self-defence and to assess whether anticipatory action was seen as part of it.

An important question that must be answered is how far back in time should the pre-Charter customary law be traced. Examining the state of customary law at the time or just before the adoption of the Charter would not offer a clear picture on the content and temporal dimension of the customary right of self-defence. It is therefore necessary to trace how the relevant customary rules were formed over time and became accepted by sovereign rulers.

Apart from that, the reference made in Article 51 of the Charter to the ‘inherent’ (*naturel* in the French version) right of self-defence also serves as basis for reaching far back in time with the analysis of pre-Charter customary rules. The International Court of Justice acknowledged, as mentioned above, that the reference to ‘inherent’ denotes the customary basis of the right.<sup>37</sup> In other words, the right of self-defence referred to in Article 51 is that inherent, natural right that has always been available to the sovereign ruler or, in modern times, to the state. Consequently, in order to fully understand the concept of self-defence referred to in Article 51, one has to go back to its natural law roots and trace its evolution up to the moment of the adoption of the Charter. Only this way can a comprehensive picture be drawn on the content and temporal dimension of the pre-Charter customary right of self-defence. The natural law roots of self-defence can be traced back to ancient Greece, Rome and medieval Christianity. For that reason, the starting point of the analysis will be the natural law concept in ancient Greece that will be followed through the centuries until the adoption of the UN Charter.

There are obvious difficulties with mapping out such developments. The most apparent problem is the long time-span that needs to be examined. Secondly, because of the long time-span, the unavailability of primary sources is also a setback. Thirdly, it is admittedly difficult to map out the myriad of political, religious and intellectual trends that shaped history for more than 2000 years. For these reasons, the most suitable method for tracing the evolution of pre-Charter customary law on self-defence is legal-historical research.

The method and structure of the legal-historical research will be described in section 1.3.3 of this chapter. At this point, it is necessary to note that the primary objective of this legal-historical study of the pre-Charter concept of self-defence is to shed light on the content and temporal dimension of that right at the time of the adoption of the Charter. On the basis of that finding, it will be assessed whether anticipatory action was seen as part of the pre-Charter concept of self-defence.

### 1.2.1.3 Rationale of comparative case studies

Post-Charter customary law will be analysed in a very different way from its pre-Charter equivalent. After establishing a pre-Charter content and temporal dimension of the right of self-defence, further analysis will be conducted to assess if and how that content

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<sup>37</sup> *Nicaragua*, ICJ Rep. (1986) para. 176.

altered under the influence of the UN Charter. For this purpose, several themes that characterized the post-World War II use of force will be used as basis for comparison. Accordingly, besides the classic state-to-state conflicts, the novel security threats will be considered. The role of nuclear, chemical and biological weapons as well as the impact of non-state actors on the law governing the use of force will serve as specific themes on the basis of which state practice and doctrine will be presented. Likewise, the work of various UN organs connected to the right of self-defence will also be treated as a separate, influencing theme of the twentieth- and twenty-first-century law on the use of force.

As a result, post-Charter customary law will be analysed on the basis of different, old and new themes of the twentieth and twenty-first centuries: state-to-state conflicts, weapons of mass destruction, non-state actors and UN work. Within these themes, several instances of state practice related to self-defence will be examined and compared. The analysis of these instances of state practice will be complemented with contemporaneous doctrine and, if relevant, judicial decisions. The structure and method of this comparative case study will be further described in section 1.3.4 of this chapter. The primary aim of the comparative study is to shed light on the content and temporal dimension of self-defence after the adoption of the Charter. On the basis of that finding, it will be assessed whether any new customary rule altering the pre-Charter temporal dimension of self-defence has emerged since 1945 and if that has affected the status of anticipatory action.

#### **1.2.1.4 Objectives of the first research question**

The primary objective of the analysis of pre-Charter customary law is to assess whether anticipatory action was seen as part of the pre-Charter concept of self-defence. The examination of post-Charter customary law is primarily aimed at concluding whether any new customary rule affecting the status of anticipatory action has emerged since 1945. On the basis of these two findings, the answer to the first research question will be put forward: whether anticipatory action in self-defence is part of contemporary customary international law.

#### **1.2.2 Second research question**

The second research question is very much dependent on the first. Whereas RQ1 explores whether anticipatory action in self-defence is part of contemporary customary international law, RQ2 is put forward on the assumption that an affirmative answer to the former can be established. If that is not the case, RQ2 ceases to be a valid query. Accordingly, the second research question explores the limits of anticipatory action in self-defence under contemporary customary international law. As with the first question, it is necessary to identify the most effective methods of research as well as the way findings will be deduced from the employment of those methods.

### 1.2.2.1 Choosing the best methods of research

Since RQ2 is dependent on RQ1, the research methods employed to address the latter are bound to be suitable solutions for the former as well.

If it can be established that anticipatory action was seen as part of the pre-Charter customary right of self-defence, it will be necessary to assess what were its perceived limits. In order to demarcate those limits, the legal-historical research conducted for addressing RQ1 will also be employed to shed light on RQ2. Accordingly, if anticipatory action is found to be part of self-defence in the various, pre-Charter historical periods analysed, attention will be given to its acknowledged limits. If a recognizable pattern of such limits can be identified in pre-Charter customary law, then it will become evident how these limits were perceived at the time of the adoption of the Charter. Likewise, in the case of post-Charter customary law, the comparative case study will continue to trace that recognizable pattern or will shed light on new factors affecting the limits of anticipatory action.

Consequently, both the method of legal-historical research and that of comparative case study will be employed to answer the second research question.

### 1.2.2.2 Rationale of legal-historical research

The reasons for choosing the method of legal-historical research have been put forward in sections 1.2.1.1 and 1.2.1.2 of the present chapter. Without any doubt, the difficulties of reaching as far back in time as enunciated in section 1.2.1.2 will have an even greater impact on the research directed at identifying the limits of anticipatory action. It will be difficult to identify a recognizable pattern of such limits over such a long time-span involving a multitude of intellectual, political and religious trends. Furthermore, the unavailability of primary sources will greatly restrict the scope of the research. The way these challenges will be addressed and the methods employed for identifying the limits of anticipatory action will be further elaborated in section 1.3.3 of this chapter. At this point, it is important to note that the secondary objective of the legal-historical research of the pre-Charter concept of self-defence is to demarcate a recognizable pattern of the limits of anticipatory action, if it is established that such action was indeed seen as part of the pre-Charter concept of self-defence. That pattern will highlight *the conditions under which* anticipatory action was seen as part of self-defence before and at the time of the adoption of the Charter.

### 1.2.2.3 Rationale of comparative case studies

As already mentioned in section 1.2.1.3, post-Charter customary law will be analysed in a very different way from its pre-Charter equivalent. Once a pre-Charter content and temporal dimension of the right of self-defence is established, further analysis will assess if and how that content altered under the influence of the UN Charter. That analysis will follow several, old and new themes of the twentieth century.<sup>38</sup> Within these themes, several instances of state practice connected to self-defence will be examined in a

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<sup>38</sup> See *supra* 1.2.1.3.

comparative manner, with contemporaneous doctrine and relevant judicial decisions taken in consideration.

Since RQ2 is dependent on RQ1, the answers of the comparative case study relevant for the latter will also be pertinent for the former. If it is established that anticipatory action was indeed seen as part of the pre-Charter concept of self-defence and if a recognizable pattern of the limits of anticipatory action is also demarcated, the comparative analysis of post-Charter customary law will simultaneously examine whether anticipatory action continued to form part of the right of self-defence and if yes, under what limits. In other words, if the analysis of the content and temporal dimension of post-Charter self-defence (RQ1) will show resort to anticipatory action, the conditions under which such action was accepted, criticized or condemned will shed light on its limits (RQ2). The comparative analysis will assess whether the pattern of limits of anticipatory action identified in pre-Charter customary law has been altered since 1945 and if yes, to what extent.

The structure and method of this comparative case study will be further described in section 1.3.4 of this chapter. It is important to state at this point that the secondary objective of the comparative case study is to assess *whether the pre-Charter limits of anticipatory action have been altered* in the post-Charter understanding of the temporal dimension of self-defence.

#### **1.2.2.4 Objectives of the second research question**

The secondary objective of the legal-historical research is to identify a recognizable pattern of limits of anticipatory action and thus to highlight the conditions under which such action was seen as part of self-defence before and at the time of the adoption of the Charter. Furthermore, the secondary objective of the comparative case study is to assess whether that pattern has survived the Charter (and if yes, in what form). On the basis of these two findings, the answer to the second research question will be put forward: what the limits of anticipatory action in self-defence are under contemporary customary international law.

### **1.3 Structure and methods of research**

The previous sections were intended to familiarize the reader with the topic and focal points of this research. The following sections will elaborate on the structure of the book and the methods of research used.

#### **1.3.1 Main structure**

Apart from the present Introduction, this book has three main parts. Part I will analyse pre-Charter customary law on self-defence and will coincide with the legal-historical research. Part II will examine post-Charter customary law on self-defence and will correspond to the comparative case study. Part III will address the two research questions on the basis of the findings of Part I and Part II.

Before elaborating on the structure and research methods used in the three main parts of the research, brief attention will be given to the difficulties arising from the examination of customary law and custom-formation.

### 1.3.2 Tracing the evolution of customary law

In order to trace the evolution of customary law, there has to be a clear understanding of what a customary rule is made of. It is not the purpose of this research to dwell into the controversies surrounding custom-formation and the various methods of analysing and tracing the development of customary rules. A brief review of these divergences is nevertheless necessary in order to explain the approach adopted by the present author.

#### 1.3.2.1 Main controversies regarding custom-formation

Although most international jurists agree that international custom has two elements – state practice and *opinio juris* –, there is ample disagreement on the definition of and relationship between the two elements.<sup>39</sup> The main controversies of the customary process relate to the character and continuity of state practice and to the determination of *opinio juris*.<sup>40</sup>

The ambiguity in what forms of behaviour constitute state practice has given rise to different groups of opinion.<sup>41</sup> Some authors have contended that only acts and not statements constitute state practice.<sup>42</sup> Others have adopted a more inclusive view and maintained that state practice covers not only acts, but also statements or even omissions.<sup>43</sup> Some authors went as far as to suggest that state practice was the only element that could be truly identified in the development of a custom (materialistic approach).<sup>44</sup>

Another difficulty relates to the continuity of state practice. The materialistic view suggested the need for a uniform state practice in order to discern the existence of a certain rule.<sup>45</sup> Other writers have adopted a different view.<sup>46</sup> Tunkin contended that

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<sup>39</sup> For elaboration on the difficulties and controversies surrounding customary international law, see M. Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge, Cambridge University Press 1999) pp. 129-146; D'Amato 1971, pp. 47-72; Koskenniemi 1989, pp. 342-410.

<sup>40</sup> Byers, pp. 130-142.

<sup>41</sup> *Ibid.*, pp. 133-136.

<sup>42</sup> D'Amato 1971, pp. 88; K. Wolfke, *Custom in Present International Law* (Dordrecht, Martinus Nijhoff 1993) pp. 41-44.

<sup>43</sup> M. Akehurst, 'Custom as a Source of International Law', 47 *British Yearbook of International Law* (1976) pp. 2-3; I. Brownlie, 'Comparative Approaches to the Theory of International Law: Remarks', 80 *American Society of International Law Proceedings* (1986) p. 156. Brownlie warned against what he called 'Rambo positivism': the view that it is only actual action or reaction that constitutes state practice; M.E. Villiger, *Customary International Law and Treaties* (The Hague, Kluwer Law International 1997) pp. 16-17.

<sup>44</sup> For instance, H. Kelsen, 'Theorie du droit international coutumie', 1 *Revue Internationale de la Theorie du Droit* (New Series 1939) pp. 264-265; H. Kelsen, *Principles of International Law* (New York, Holt, Rinehart and Winston 1966) pp. 450-451. For criticism of this approach, see Koskenniemi 1989, pp. 401-402.

<sup>45</sup> For instance, Kelsen 1939, p. 262.

discontinuity could not be decisive in destroying a rule of law.<sup>47</sup> As he observed, ‘not one norm of international law has appeared as a result of international practice that had no interruption.’<sup>48</sup> To support his statement, Tunkin analysed the state practice related to the principle of non-intervention and found that, although it had been forced at times to retreat under the pressure of reactionary forces (he mentioned, in particular, the many interventions of the nineteenth century), non-intervention had gradually become a generally recognized principle of international law.<sup>49</sup> A similar opinion was expressed by D’Amato, who contended that each deviation from a customary rule may contain the seeds of a new rule depending on a number of factors. Accordingly, the number of acts of the original rule, the number of the ‘discontinuatory acts’, their remoteness in time, the legal authoritativeness of the participating states and the frequency of articulations of the valid rule were the factors that decide whether the original rule was confirmed or a new rule was developing.<sup>50</sup> Koskenniemi took this reasoning one step further and contended that a fundamental change of circumstances that had taken place outside the law could make the old custom obsolete and the new one justified.<sup>51</sup>

Perhaps the most important difficulty of the customary process is the determination of *opinio juris*. If both acts and statements constitute state practice, it is very problematic to determine what constitutes *opinio juris*.<sup>52</sup> Some authors have sought to diminish the importance of practice by maintaining that there was no need for continuous and consequent usage to create a custom, the acceptance of the rule was enough (psychological approach).<sup>53</sup> According to this approach, the creation of ‘instant’ customary law was also possible by a common stipulation of states of a new rule.<sup>54</sup>

The difficulties in determining what *opinio juris* is, lead to a circularity of the argument about custom.<sup>55</sup> As Koskenniemi observed, in attempting to identify the presence of the psychological element (*opinio juris*), inferences are drawn on the basis of the material element (state practice). Likewise, to ascertain which acts of state practice are relevant for custom-formation, references are made to *opinio juris*. The two elements are defined by each other.<sup>56</sup>

After this succinct presentation of the main controversies regarding custom formation, the approach adopted in this research will be explained.

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<sup>46</sup> D’Amato 1971, pp. 97-98; Koskenniemi 1989, p. 403; Tunkin 1958, p. 10; G.I. Tunkin, ‘Remarks on the Juridical Nature of Customary Norms of International Law’, 49 *California Law Review* (1961) pp. 420-421.

<sup>47</sup> Tunkin 1958, p. 10.

<sup>48</sup> Tunkin 1961, p. 420.

<sup>49</sup> *Ibid.*

<sup>50</sup> D’Amato 1971, pp. 97-98.

<sup>51</sup> Koskenniemi 1989, p. 403.

<sup>52</sup> Byers, pp. 136-141; Koskenniemi 1989, pp. 362-363.

<sup>53</sup> D. Anzilotti, *Corso di diritto internazionale* (Roma, Atheneum 1928) pp. 73-76; K. Strupp, ‘Les règles générales du droit de la paix’, 47 *Récueil des cours* (1934) p. 263. For criticism of this approach, see Koskenniemi 1989, pp. 401-402.

<sup>54</sup> See, for instance, B. Cheng, ‘United Nations Resolutions on Outer Space: “Instant” International Customary Law?’, 5 *Indian Journal of International Law* (1965) pp. 35-36.

<sup>55</sup> Byers, pp. 136-140; Koskenniemi 1989, pp. 362-363.

<sup>56</sup> Koskenniemi 1989, p. 363.

### 1.3.2.2 Approach adopted regarding custom-formation

It is beyond the purpose of this research to offer general solutions to the problems of custom-formation outlined above. It is not the ambition of this project to formulate universally valid definitions for state practice and *opinio juris*. This section will merely explain how the concepts of state practice and *opinio juris* will be interpreted for analysing pre-Charter and post-Charter customary law on self-defence. In explaining the interpretation of this concept, the author relies on relevant doctrine and some of the assertions of the International Court of Justice in the *Nicaragua* case.<sup>57</sup>

#### 1.3.2.2.1 What constitutes state practice

For the purpose of the present research, the more inclusive view on state practice will be adopted.<sup>58</sup> Accordingly, state practice will be understood as encompassing acts and statements as well as omissions. For instance, for the examination of pre-Charter customary law, the way sovereign rulers conducted and justified their wars will be considered state practice. Likewise, diplomatic correspondence, the conclusion of bilateral or multilateral treaties will also be understood to reflect state practice. The practice of the Council of the League of Nations will have the same status. For the analysis of post-Charter customary law, not only the various instances of the exercise of self-defence will be considered state practice, but also the statements made by states before the Security Council or General Assembly (hereafter, 'GA'). Similarly, UN Security Council and General Assembly resolutions will generally be considered as state practice.

#### 1.3.2.2.2 Continuity of state practice

Regarding continuity in state practice, the present author upholds the view according to which perfect uniformity is not a *sine qua non* condition.<sup>59</sup> On this topic, the ICJ also stated that it was not necessary for state practice to be perfectly uniform.<sup>60</sup> It was sufficient if the conduct of states was, in general, consistent with the relevant rule. Instances of state conduct inconsistent with a given rule still confirmed that rule, if they had been treated as breaches of it and not as indications of the recognition of a new rule.<sup>61</sup> Accordingly, 'if a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.'<sup>62</sup>

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<sup>57</sup> The *Nicaragua* case offered, *inter alia*, an elaborate analysis of the theory of customary international law. It discussed the relationship between treaty and custom, as well as the elements of a customary rule. For the purpose of this section, only the assertion regarding the elements of customary law will be discussed. *Nicaragua*, ICJ Rep. (1986) paras. 183-186. See *infra* 11.4.4, for the discussion regarding the relationship between treaty and customary law as well as self-defence.

<sup>58</sup> Akehurst, pp. 2-3; Brownlie 1986, p. 156; Tunkin 1961, pp. 421-422; Villiger, pp. 16-17.

<sup>59</sup> D'Amato 1971, pp. 97-98; Koskenniemi 1989, p. 40; Tunkin 1961, pp. 420-421.

<sup>60</sup> *Nicaragua*, ICJ Rep. (1986) para. 186.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

Consequently, the present research will also take into consideration instances of state practice inconsistent with a certain rule in order to assess whether they weaken or confirm that rule.

### 1.3.2.2.3 ‘Opinio juris’

For the purpose of the present research, *opinio juris* will be discerned by corroboration.<sup>63</sup> By way of example, the repetition of certain acts and statements on the part of states (state practice) coupled with a specific reaction from legal literature and a possible substantiation by judicial bodies will be understood to reflect *opinio juris*. If some acts or statements will go against that perceived rule, the reaction by other states as well as by legal doctrine (or, if it is the case, judicial bodies) will be considered to assess whether those instances of behaviour weakened or confirmed the rule. Furthermore, certain multilateral treaties as well as specific UN Security Council or General Assembly resolutions will be interpreted as reflecting *opinio juris*. Such an approach was adopted by the ICJ as well in considering the effect of consent to the General Assembly Resolution 2625 (The Friendly Relations Declaration)<sup>64</sup> as an acceptance of the validity of the rule or set of rules declared by the resolution itself.<sup>65</sup>

The objective of this section was to explain how the two constitutive elements of customary law will be used in the legal-historical research and in the comparative case study. The following three sections will elaborate on the tools used by these research methods to address the two RQs.

### 1.3.3 Structure and methods of research for Part I

The objective of Part I is to trace the evolution of pre-Charter customary law on self-defence from its ancient Greek natural-law roots to the time of the adoption of the UN Charter. This tracing is needed to understand how the content and temporal dimension of self-defence was viewed in 1945. On that basis, Part I will conclude whether anticipatory action was part of self-defence at that time and, if yes, under what conditions.

The present section will elaborate on the way pre-Charter customary law will be examined and on the tools used for conducting the legal-historical research. Some preliminary attention will be given to the various forms in which legal-historical research can be conducted. Further, the tools used for carrying out the legal-historical research will be elaborated.

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<sup>63</sup> O. Schachter, ‘Entangled Treaty and Custom’, in Y. Dinstein, ed., *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Dordrecht, Martinus Nijhoff 1989) pp. 730-734. Schachter discusses the various sources from which *opinio juris* can be inferred, such as UN General Assembly resolutions, records of discussions, expert opinions as well as decisions of the ICJ and some treaty provisions can all contribute, under certain conditions, to infer *opinio juris*.

<sup>64</sup> GA Res. 2625 (XXV), Declaration on Principles of International Law Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations, 24 October 1970 (hereafter, Friendly Relations Declaration, GA Res. 2625).

<sup>65</sup> *Nicaragua*, ICJ Rep. (1986) para. 188.

### 1.3.3.1 What kind of legal-historical research?

As explained in section 1.3.1, Part I will coincide with the legal-historical research conducted on the evolution of pre-Charter customary law. Traditional legal-historical writing has taken so far three main forms: epoch-based, principle-based and individual-oriented research.<sup>66</sup> Accordingly, some writers have focused on the succession of ‘great historical epochs,’ picturing international law as the instrument of state policies.<sup>67</sup> Other authors have examined the application and development of great principles through successive periods.<sup>68</sup> A third group has concentrated on individual persons and their impact on the history of international law.<sup>69</sup> The disadvantages of these approaches were highlighted by Koskenniemi, who maintained that what was needed was a contextualisation of the legal ideologies or concepts within the intellectual, social and political environment in which they have operated.<sup>70</sup> The same need was highlighted by Hueck as well, who asserted that philosophical, theoretical and historical movements can be decisive in the formation of law and therefore history of law has to take them in consideration.<sup>71</sup>

The legal-historical research conducted in Part I will attempt to take in considerations these needs and to place the evolution of the pre-Charter customary law of self-defence in the relevant intellectual, political and religious context.

### 1.3.3.2 ‘Normative frameworks’

In order to depict the evolution of pre-Charter customary law on self-defence in the relevant context, the more general framework of rules in which self-defence developed as a concept must be highlighted. In other words, to understand how self-defence was viewed over time, the general framework in which war and the use of force were regulated must be considered as well.

When analysing the history of war regulation, many authors employ auxiliary concepts such as ‘war convention’,<sup>72</sup> ‘war tradition’,<sup>73</sup> ‘conceptions of war’,<sup>74</sup> ‘legitimacy

<sup>66</sup> Classification put forward by M. Koskenniemi, ‘Why History of International Law Today?’, *Rechtsgeschichte* (No. 4, 2001) pp. 61-66. On the state of methodology in the history of international law, see I.J. Hueck, ‘The Discipline of the History of International Law: New Trends and Methods on the History of International Law’, 3 *Journal of the History of International Law* (2001) pp. 194-217.

<sup>67</sup> Koskenniemi mentions: W.G. Grewe, *The Epochs of International Law*, trans. by M. Byers (Berlin, De Gruyter 2000), the first edition appeared in German in 1984, *Epochen der Völkerrechtsgeschichte* (Baden-Baden, Nomos 1984); C. Schmitt, *Staat, Grossraum, Nomos. Arbeiten aus den Jahren 1916-1969*, ed. by G. Maschke (Berlin, Duncker & Humblot 1995); K.-H. Ziegler, *Völkerrechtsgeschichte: ein Studienbuch* (Munich, Beck 1994). For an appraisal of Ziegler’s book, see C.G. Roelofsen, ‘History of the Law of Nations: A Few Remarks Apropos Some Recent and not so Recent Publications’, 13-14 *Grotiana* (1993-1994) pp. 52-58. Roelofsen contends that it would have been desirable that Ziegler’s excellent manual devoted more attention to international relations theory. *Ibid.*, pp. 55-56.

<sup>68</sup> See for instance: R. Redslob, *Histoire des grands principes du droit des gens depuis l’antiquité jusqu’à la veille de la grande guerre* (Paris, Rousseau 1923).

<sup>69</sup> See for instance: A.G. de la Pradelle, *Maîtres et doctrines du droit des gens* (Paris, Editions internationales 1950).

<sup>70</sup> Koskenniemi 2001, p. 65.

<sup>71</sup> Hueck, pp. 198-199.

<sup>72</sup> M. Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York, Basic Books 2006) pp. 44 et seq.

framework'<sup>75</sup> and 'legal framework'.<sup>76</sup> These auxiliary concepts are then employed to identify different phases in the history of war regulation. For instance, Neff, in his *War and the Law of Nations* (2005), gives an account of the 'history of the phenomenon of war, as viewed through the lens of international law.'<sup>77</sup> Neff notes that '[t]he interweaving of doctrine and practice in the area of war has been a complex and often untidy process through much (or rather all) of history – and never more than at the present day.'<sup>78</sup> For that reason, he chooses to concentrate 'on the deeper – and more elusive – general conceptions of war that lawyers have entertained over the course of some twenty-five centuries.'<sup>79</sup> Neff identifies four historical eras in his book. The first one looks at the natural-law dominated ancient and medieval times up to 1600. The second phase starts with 1600 and goes up to 1815 and is coined by the author as 'the great formative period of international law.'<sup>80</sup> The third era starts with the nineteenth century as the high tide of legal positivism with war seen as a clash of rival national interests. The last phase looks at the period after 1914, which, according to Neff, witnessed the reversion to the medieval just-war outlook and the metamorphosis of war.<sup>81</sup> Neff's research is a good example of how legal-historical research can focus on various intellectual and political trends in order to better illustrate the framework in which the examined rules have developed.

The present research will also attempt to focus on the 'deeper and more elusive' intellectual, political, cultural trends that influenced the development of pre-Charter customary law of self-defence. For that purpose, the notion of 'normative framework' will be employed to denote all those legal rules, social norms, religious, cultural and political principles as well as common practices that prescribed when, why and how to resort to war or any other use of force. It is important to note that this is not an exclusively legalistic framework – it also encompasses norms of non-judicial character as well as common practices. Moreover, the normative frameworks identified will be those that had a certain 'international' characteristic. In other words, the elements of the normative frameworks were acknowledged across jurisdictions in the Western tradition.<sup>82</sup> The normative framework will be used to highlight the main phases in the development of pre-Charter customary law on self-defence. First, the historical era and any key events or important intellectual, political, cultural or religious trends that had an impact on the interpretation given to war will be identified. Secondly, the main tenets of the normative framework will be described: how war was defined, how its nature was perceived and what its legitimate causes were. For that purpose, the writings of contemporaneous

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<sup>73</sup> A.J. Bellamy, *Just Wars: From Cicero to Iraq* (Cambridge, Polity Press 2006) pp. 2 et seq.

<sup>74</sup> Neff, pp. 2 et seq.

<sup>75</sup> Bellamy, pp. 8 et seq.

<sup>76</sup> Neff, pp. 3 et seq.

<sup>77</sup> *Ibid.*, p. 1.

<sup>78</sup> *Ibid.*, p. 2.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*, p. 4.

<sup>81</sup> *Ibid.*, pp. 3-5.

<sup>82</sup> For different historical phases of 'international law', see H. Steiger, 'From the International Law of Christianity to the International Law of the World Citizen: Reflections on the Formation of Epochs of the History of International Law', 3 *Journal of the History of International Law* (2001) pp. 180-193.

authors and, if available, the statements of public authority will be referred to. Thirdly, the concept of self-defence will be given attention.

As explained in section 1.1.3, several layers of focus will be employed in depicting the concept of self-defence. First, the content and temporal dimension of self-defence will be examined. Secondly, within that spectrum, the legality or justifiability of anticipatory action in self-defence will be scrutinized. Thirdly, the limits of anticipatory action will be demarcated.

The notion of normative framework will also aid the legal-historical research in identifying which elements of self-defence have been taken over from one phase to another and in what form.

### **1.3.3.3 Structure of Part I**

The notion of normative framework will be applied to identify three main phases in the development of pre-Charter customary law of self-defence. Accordingly, Chapter 2 will examine self-defence as a natural law concept (from ancient Greece to the 17<sup>th</sup> century). Chapter 3 will look at self-defence as a measure short of war (17<sup>th</sup>-19<sup>th</sup> centuries). Chapter 4 will discuss self-defence as an exception to the prohibition of war (19<sup>th</sup> century and early 20<sup>th</sup> century). Chapter 5 will analyse the way the customary concept of self-defence was enshrined in the United Nations Charter.

Part I heavily relies on the writings of jurists, historians and other publicists. Preference is, however, given to contemporaneous writings (primary sources). Because of the long time-span analysed, the availability of contemporaneous public statements and other official documents is problematic. Chapter 2 depicts very few instances of state practice. That is due to the difficulties in selecting representative instances of state practice over a considerable period of time (from ancient Greece to the 17<sup>th</sup> century). Therefore, the legal-historical research of Chapter 2 should be seen as an account of authoritative and representative writings (doctrine) of the different time periods analysed within it. Chapters 3 and 4 combine state practice with legal doctrine. In these chapters, diplomatic correspondence, treaty texts and other official documents are also used as primary sources. Chapter 5 mainly uses as sources the *travaux préparatoires* of the 1945 United Nations conference at San Francisco.

### **1.3.3.4 Findings of Part I**

As already stated above, the aim of Part I is to trace the evolution of pre-Charter customary law on self-defence from its ancient Greek natural-law roots to the time of the adoption of the UN Charter. On the basis of this legal-historical research, a comprehensive representation of the pre-Charter concept of self-defence, its content and temporal dimension will be offered (Chapter 6). If it is established that anticipatory action was part of that concept self-defence, a recognizable pattern of the limits of such action will be demarcated. The thus identified understanding of self-defence will be seen as the one taken in consideration by the drafters of the UN Charter in their negotiations on Article 51. The pre-Charter concept of self-defence will be further tested against the influence of post-Charter developments in Part II of this research.

### 1.3.4 Structure and methods of research of Part II

The aim of Part II is to analyse the development of post-Charter customary law on self-defence. On that basis, Part II will examine whether the pre-Charter status and limits of anticipatory action have been altered in the post-Charter understanding of the temporal dimension of self-defence.

The present section will elaborate on the way post-Charter customary law will be examined and on the tools used for conducting the comparative case study.

#### 1.3.4.1 Structure of Part II

Part II encompasses a considerably shorter period of time than Part I. Post-Charter developments in the regulation of war and the use of force will be treated as a distinct normative framework, in the sense explained in section 1.3.3.2. Within this framework, several themes will be identified in order to depict the main challenges of the twentieth and the twenty-first centuries. As outlined in section 1.2.1.3, the following themes will be given attention: state-to-state conflicts, conflicts involving weapons of mass destruction, conflicts involving non-state actors and the relevant work of UN organs. Within these themes, several instances of state practice will be analysed and compared.

To prepare the analysis of post-Charter customary law on self-defence, Chapter 7 will depict the understanding given to self-defence and the prohibition to use force in the immediate aftermath of the adoption of the UN Charter. Chapter 8 will examine state-to-state conflicts in which claims of self-defence were contemplated or used. Chapter 9 will look at the impact of weapons of mass destruction on the development of post-Charter self-defence. Chapter 10 will analyse the role played by non-state actors in shaping the content and temporal dimension of self-defence. Chapter 11 will examine the work of various UN organs (the Security Council, the General Assembly, the International Law Commission and the International Court of Justice) that affected in some way the post-Charter concept of self-defence. Chapter 12 of Part II will compare the findings of the previous chapters and will draw conclusions on the temporal dimension of self-defence.

#### 1.3.4.2 Selection of cases in Part II

The list of selected instances of state practice of Part II is not exhaustive. The main consideration in selecting the cases was to offer a representative illustration of the circumstances in which claims of self-defence were contemplated or used.

The common element in all cases examined is that a claim of self-defence (anticipatory, remedial or 'preventive') was at least contemplated by the government of the target state. The cases greatly differ in their outcome: acceptance, criticism or condemnation as apparent in the '(general) reaction'<sup>83</sup> of states and organizations. This outcome will be dependent on the variables of each case. Certainly, the factual circumstances of the individual cases will vary greatly. For the sake of the comparison, however, a fixed set of juridical variables will be identified to test and explain the outcome of each case. These variables will be deduced from the limits of the concept of self-defence as identified in the conclusions of Part I. The use of these variables and the

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<sup>83</sup> See *infra* 1.4 for details on the understanding given to the term.

conduct of the comparative case study will be further elaborated in the introductory remarks of Part II. At this point, it is sufficient to note that each case will be analysed on the basis of these variables and each theme-chapter will draw conclusions on their role. Furthermore, each theme-chapter will draw conclusions on the content and temporal dimension of self-defence, as well as the status and limits of anticipatory action.

Part II will rely on the use of official documents (diplomatic correspondence, public statements, UN records and reports as well as other documents) and legal literature.

In reproducing the reaction of states to a certain claim of self-defence, the discussions before the Security Council will be given particular attention. For that purpose, records of the Security Council meetings as well as annual repertoires of Security Council practice will be used as primary sources.

### **1.3.4.3 Findings of Part II**

The aim of Part II is to assess whether the pre-Charter status and limits of anticipatory action have been altered in the post-Charter understanding of the temporal dimension of self-defence. Accordingly, Part II will examine whether any new customary rule affecting the content of self-defence has emerged since 1945 and will conclude on the state of the current debate on the temporal dimension of self-defence. On that basis, Part II will discern whether the status and limits of anticipatory action have been affected by post-Charter developments.

### **1.3.5 Rationale of Part III**

Part III will outline the findings of Parts I and II on the basis of the two research questions.

Regarding the first research question, Part III will look at the findings on the *status* of anticipatory action before the adoption of the Charter and will conclude whether that status has been changed after the adoption of the Charter. In this analytical exercise, the findings of Part II regarding the temporal dimension of self-defence will play a significant role. In relation to the second research question, Part III will examine if and how the recognizable pattern of *limits* of anticipatory action demarcated in pre-Charter customary law have been altered in post-Charter developments. Based on this analysis, Part III will conclude whether anticipatory action in self-defence is still part of customary international law, and if yes, what are its limits.

## **1.4 Notes on terminology**

Certain notions used in Part I need clarification. Accordingly, many times reference will be made to the ‘Western tradition’, ‘Western war tradition’ or Western (European) philosophy, history or politics in general. The use of these phrases stems from the Eurocentric perspective employed by the present research. Although analysis of non-European or non-Western normative frameworks would have certainly enriched the present legal-historical study, such additional perspectives would have considerably complicated and lengthened the conduct of this research and the timely accomplishment

of this project. Accordingly, the reference to ‘Western’ traditions, etc., will denote the various developments in the European and (North) American space.

Furthermore, in Chapters 2 and 3 use will be made of the concepts of ‘just war’ and ‘just cause’ to describe those circumstances and conditions under which Christian philosophers approved wars on the basis of natural law and divine law. Accordingly, a ‘just war’ will be understood as one sanctioned by the law of nature and a ‘just cause’ will be seen as a combination of circumstances that allowed war to be waged.<sup>84</sup>

Part I will also examine the work of ‘Christian legalists’. The authors discussed under this notion will be those late scholastics and reformer writers who devoted special attention to normative thinking about war between nations.<sup>85</sup>

Certain notions used in Part II need clarification. The term ‘(general) reaction’ will be often used to describe the various approaches taken as regards a specific instance of state practice. The use of the term will be based on the following sources: statements made by several states (both those affected and those neutral to the conflict) before the Security Council or the General Assembly and legal doctrine. If available, official (UN) reports on the legality of certain instances of state practice will also be used.

## 1.5 Disclaimers

Certain specifications are important to be made before embarking on the analysis of the customary law of self-defence. Part I will frequently refer to the natural law paradigm that was dominant over centuries in Europe. Nonetheless, it is not the aim of this book to offer a comprehensive portrayal of natural law theories and their evolution. It merely puts the subject of self-defence within that context to shed light on its evolution within the main intellectual and legal paradigm of the period analysed in Chapter 2. Likewise, it is not the purpose of this research to offer an exhaustive portrayal of the origin and evolution of the Christian just war tradition. Consequently, there will be no detailed analysis of conditions under which a war could be deemed ‘just’ under that tradition; what will be examined is the place and meaning of self-defence within that context.

Furthermore, this book does not aim to offer a comprehensive portrayal of realism and legal positivist approaches from the seventeenth to the nineteenth centuries. It merely illustrates the main tenets of these currents in order to place the subject of self-defence within their context.

Part II of the research will refer to many juridical controversies directly or indirectly connected to self-defence. Although care will be taken to offer an objective view of these issues, it is beyond the scope of this book to elaborate on all the intervening questions. Accordingly, the present research does not aim to offer an extensive elaboration on the controversies surrounding the notion of ‘armed attack’ and its relationship with other forms of the use of force. Likewise, there will be minimal analysis on the connection between the principle of proportionality and the rules of armed conflict. Furthermore, in

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<sup>84</sup> For a thorough analysis of the ‘just war’ tradition and the significance of ‘just causes’, see A. Vanderpol, *La doctrine scolastique du droit de guerre* (Paris, Pedone 1919); Bellamy, pp. 5-8, 15-29, 39-40, 126-134; P. Christopher, *The Ethics of War and Peace: An Introduction to Legal and Moral Issues* (Upper Saddle River, N.J., Pearson/Prentice Hall 2004); Neff, pp. 29-30, 49-57.

<sup>85</sup> G.M. Reichberg, H. Syse and E. Begby, eds., *The Ethics of War: Classic and Contemporary Readings* (Malden, Mass., Blackwell 2006) pp. 288, 339-340, 371-372, 385-386.

examining the arguments regarding self-defence against non-state actors, there will be no comprehensive representation of the contentions concerning the responsibility of sponsoring and harbouring states. Collective self-defence will receive some attention in the context of Charter-based rules on the use of force, but no elaborate analysis of the concept will be done. Likewise, protection of nationals will not be treated as a separate theme, although some relevant cases will be discussed as part of various chapters. Although many of these issues are interconnected, the aim of the research is to focus on the temporal dimension of self-defence. For that reason, many interesting and undoubtedly significant issues will only receive peripheral attention. Finally, the present research takes into consideration and analyses relevant events up to 1 June 2010.

## **1.6 Contribution**

The present book aims to participate in the current debate on the temporal dimension of self-defence and, in particular, in the discussion regarding the legality of anticipatory action.

There are several ways in which this research attempts to contribute to this debate. Part I of this book was written in the hope that the legal-historical research conducted will serve as basis for those interested in the pre-Charter legal history of self-defence. Likewise, Part II aims to complement those studies that focus on how state practice ‘in word, vote and deed’<sup>86</sup> has shaped the understanding of self-defence since the adoption of the Charter. This research attempts to offer a pragmatic and fact-specific analysis of the current controversies surrounding anticipatory action in self-defence. Rather than focusing on a literalistic analysis of legal texts, the arguments put forward in this book rely on a corroborated understanding of state and UN practice as well as legal doctrine on the concept of self-defence. Most importantly, perhaps, the present research attempts to highlight the need for a more inclusive perspective for the analysis of the right of self-defence. The controversies surrounding the content and temporal dimension of self-defence are interconnected. Focusing on an isolated number of instances of state practice in order to shed light on one or more of these controversies does not suffice for a comprehensive portrayal of the underlying questions. The present research attempts to offer a wider focus in which the interplay of various factors affecting the content and temporal dimension of self-defence can be more visibly discerned.

The present author believes that the complexity of the temporal dimension of self-defence can only be understood if the facts pertaining to various instances of state practice are thoroughly analysed. For that reason, this research is rich in factual descriptions that shed light on the particularities of the case. Although legal literature has produced numerous publications on the concept of (anticipatory) self-defence, a comprehensive analysis that focuses on both the legal arguments put forward and the underlying circumstances is needed to understand the way the centuries-old concept of self-defence has been shaped over time.

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<sup>86</sup> Franck 2002, p. 52.