Imminence and States' Right to Anticipatory Self-Defence: Responding to Contemporary Security Threats and Divergence in Legal Diplomacy

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In an attempt to identify deficiencies in the current international law position, this article explores core themes surrounding states' inherent right to anticipatory self-defence and the notion of imminent threats. The changing nature of security threats, as well as the diverging legal diplomacy of states concerning anticipatory self-defence, warrants a re-examination of the international law position. Relying on reform-oriented analysis, in particular of legal diplomacy, the article proposes a refined position and, subsequently, considers how it could be implemented.

I INTRODUCTION

States' inherent right to self-defence is established under international law, yet both the legal content and scope of the right is subject to ongoing debate.[1] Consent of states is the foundation of modern international law.[2] States express their consent primarily through two mediums, those being treaties[3] and, more diffusely, custom.[4] Under the relevant treaty law concerning the use of force and self-defence, the *Charter of the United Nations* (the Charter),[5] United Nations (UN) member states are prohibited from using or threatening to use force unlawfully in international relations.[6] However, individual or collective self-defence is a recognised legal exemption to this prohibition. Article 51 of the Charter states 'nothing in the present Charter shall impair the inherent right of individual or collective self-defence … until the Security Council has taken measures necessary to maintain international peace and security'.[7] Whilst the Charter attempts to articulate a consensual position,

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[1] See, eg, Graham Melling, 'Murray Colin Alder: The Inherent Right of Self-Defence in International Law' (2015) 1(1) *Journal on the Use of Force and International Law* 198, 198: 'Whilst the principle of the right of self-defence is so clear and unchallenged, its legal definition and scope of application has been the subject of much debate and controversy'; David A Sadoff, 'A Question of Determinacy: the Status of Anticipatory Self-Defence' (2009) 40 *Georgetown Journal of International Law* 523, 531: Self-defence's 'lawfulness has long been the subject of spirited doctrinal debate'.

[2] *SS 'Lotus' (France v Turkey) (Judgment)* [1972] PCIJ (ser A) No 10, 18 [45]: 'The rules of law binding upon States… emanate from their own free will.'; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Rep 14 [269]: 'In international law there are no rules, other than such rules as may be accepted by the states' (*Nicaragua Case*).

[3] *Statute of the International Court of Justice* art 38 (a); *Vienna Convention on the Law of Treaties,* opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) arts 26, 34 ('*Vienna Convention*').

[4] Ibid art 38.

[5] *Charter of the United Nations ('The Charter*').

[6] *The Charter* (n 5) art 2(4).

[7] Ibid, art 51.

diverse interpretations regarding Article 51 and the 'inherent' right it seemingly enshrines have created uncertainty.[8] Tibori-Szabó articulates three divergent interpretations or groups which have emerged over time.[9] Firstly, a 'restrictive group'[10] claims Article 51 articulates that the only exception justifying self-defence is when it is responsive or interceptive[11] of an attack actually visited upon a state. Conversely, a 'middle group'[12] recognises the justification of anticipatory self-defence where an attack against a state is imminent. A final group[13] (which is fewer in numbers and support)[14] contends that self-defence can be implemented in response to potential attacks that are yet to crystallise, a notion referred to as pre-emptive self-defence.[15] Evidently, various temporal dimensions justifying self-defence exist, increasing the likelihood of legal contention when an Article 51 justification is relied upon by states.

Customary international law also recognises the right to anticipatory self-defence, particularly where the requirements of necessity and proportionality are fulfilled.[16] These requirements mean a state can only implement force where it is necessary, and any use of force must be proportionate to an offensive attack. Further, customary law acknowledges that states do not have to passively await an actual attack. Instead, states can act under self-defence, where the threat of attack is imminent, but not merely foreseeable.[17] That said, a definition of what amounts to an 'imminent threat' has not been codified in the context of a state responding to it in self-defence.[18]

In the case of *Gabčikovo-Nagymaros Project, Hungary v Slovakia*,[19] the International Court of Justice (ICJ) held that "imminent' is synonymous with 'immediacy' or 'proximity' and that it goes far beyond the concept of

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[8] See, e.g., Sadoff (n 1).
[9] Kinga Tibori-Szabó, *Anticipatory Action in Self-Defence: Essence and Limits under International Law* (Asser Press, 2011) 281.
[10] See, eg, Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, 2011) 194; Christine Gray, *International Law and the Use of Force* (Oxford University Press, 3rd ed, 2008); Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Cambridge University Press, 2010).
[11] Interceptive self-defence is characterised by military action in response to an attack that has not actually crossed the defending state's borders, but has commenced, meaning ostensibly irrevocable actions have been set into motion; see Dinstein (n 10) 175-76.
[12] See, eg, Dieter Fleck, 'Rules of Engagement for Maritime Forces and the Limitation of the Use of Force under the UN Charter' (1988) 31 *German Yearbook of International Law* 165; Oscar Schachter, *International Law in Theory and Practice* (Martinus Nijhoff, 1991) 151.
[13] See, eg, John Yoo, 'International Law and the War in Iraq' (2003) 97 *American Journal of International Law* 563; Government of the United States of America, Bush Administration, *The National Security Strategy of the United States of America: September 2002* (2002) 15 (*'NSS 2002'*).
[14] Tibori-Szabó (n 9) 6.
[15] Ibid.
[16] Lord Ashburton quoted in *The Caroline (Exchange of Diplomatic Notes between United Kingdom of Great Britain and Ireland and the United States of America)* Letter from Lord Ashburton to Mr Webster (28 July 1842) (1841–42) 30 *British and Foreign State Papers* 195 (*'Ashburton*').
[17] Ibid.
[18] See, eg, Michael N Schmitt, 'US. Security Strategies: A Legal Assessment' (2004) 27 *Harvard Journal of Law and Public Policy* 737; Dinstein, (n 10) 233.
[19] *Gabčikovo-Nagymaros Project (Hungary v Slovakia) (Judgment)* [1997] ICJ Rep 7.

'possibility." Whilst this case considered the term imminent in relation to treaty law unrelated to the Charter and use of force, it has been contended that the dictum can be applied to anticipatory self-defence.[20] Generally, imminence with respect to self-defence is understood in terms of threats that are immediate or otherwise temporally proximate.[21] Such threats are understood to include situations where 'a causal chain can lead from the status quo (no attack) to an undesired future (attack),'[22] even where the causal chain is not yet in motion. More specifically, it is recognised that anticipatory self-defence can be used against imminent threats in situations where a perceived aggressor is in its final preparations for an attack, and the defending state thwarts the attack before it commences by launching one of its own. In other words, the defending state's action is based on its belief that the aggressor's attack is about to be mounted, with immediacy.[23]

Despite advances in clarifying what imminence means with respect to anticipatory self-defence, international norms in this area remain open to interpretation, and a coherent position has not emerged. This article reflects on this shortcoming in light of two inter-linked developments: a) the emergence of contemporary security threats which are changing our understanding of what imminence may amount to in the use of force; and b) the emergence of divergent positions with respect to imminence and anticipatory self-defence as expressed through the public legal diplomacy of select states.

The origins of legal diplomacy stem from complex diplomacy that took place in the post-World War II era, in which states sought to 'make law, not war', and in which it emerged as both a political and legal process.[24] Ultimately, it was this form of legal negotiating balanced against states' national and geopolitical interests, termed legal diplomacy, that led to the foundations of European Human Rights law.[25] However, more recently the term legal diplomacy has been adopted to mean the diplomacy between states used to determine the exact meaning of international obligations, not least where these have not been clearly codified. Legal diplomacy seeks to bridge or manage differences amongst states' interpretations of international obligations to ultimately reach consensus through diplomatic channels.[26] The key difference between legal diplomacy and *opinio juris* (which shapes

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[20] Constantine Antonopoulos, 'Force by Armed Groups as Armed Attack and the Broadening of Self-Defence' (2008) 55 *Netherlands International Law Review* 159, 177.
[21] Sadoff, (n 1) 530.
[22] Dapo Akande and Thomas Liefländer, 'Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defense' (2013) 107(3) *The American Journal of International Law* 563, 564.
[23] Sadoff, (n 1) 530.
[24] Mikael Rask Madsen 'Chapter 3: "Legal Diplomacy" – Law, Politics and the Genesis of Postwar European Human Rights' in Stefan-Ludwig Hoffmann, *Human Rights in the 20th Century* (Cambridge University Press, 2010) 62, 63.
[25] Mikael Rask Madsen, 'The Protracted Institutionalization of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence' in Jonas Christoffersen and Mikael Rask Madsen (ed) *The European Court of Human Rights between Law and Politics* (Oxford University Press, 2011) 43, 44.
[26] Brian J Egan, 'International Law, Legal Diplomacy, and the Counter-ISIL Campaign' (Speech delivered at the American Society of International Law, Washington, 1 April 2016).

custom), is that legal diplomacy is founded in states' interests, rather than a belief of lawfulness. Whilst parts of legal diplomacy are naturally carried out confidentially, states' public explanations and statements make up a significant channel for the conduct of legal diplomacy. It is this aspect of legal diplomacy relied upon in this article. We contend that applying a legal diplomacy lens is particularly appropriate, given the disputed nature of imminent threats in anticipatory self-defence, along with the altruistic desire to reach a coherent legal position.

The article proceeds as follows: First, it outlines in more detail the international law position with respect to the use of force, self-defence and responding to 'imminent' threats. The article then considers the emergence of contemporary threats which challenge the temporal basis of imminence. It then assesses the nature and scope of the concept of legal diplomacy and its role in international law and relations. The legal diplomacy of select states with respect to anticipatory self-defence and imminent threats is also scrutinised extensively. The five permanent members of the UN Security Council (the Security Council) are the focus of this deliberation, not least because they remain the main diplomatic powers of the world given their extensive control of international relations and their veto-power in the Security Council. The article concludes with a proposal that represents a refined international law position regarding self-defence in light of imminent threats; one which accounts for both the nature of emergent security threats and the divergent positions arising from the public legal diplomacy of states.

II USE OF FORCE, SELF-DEFENCE AND IMMINENT THREATS

A Use of Force & Self-Defence

The international law governing the use of force has adapted over time. *Jus ad bellum* refers to the conditions under which states may resort to war or use armed force generally. Historically, state use of force was perceived as an attribute of statehood. *Jus ad bellum* recognised that conquest through force produced title.[27] However, over time there has been a distinct shift from this perception. Today, the prohibition of force through *jus ad bellum* is a fundamental tenet of the post 1945 world order, and the use of force to obtain title is strictly prohibited.[28] Article 2(4) of the Charter prevents member states from using or threatening to use force. There are certain exceptions, including acts pursuant to authorisations by the Security Council,[29] acts of individual or collective self-defence, [30] and humanitarian intervention under the responsibility to protect pillars.[31] The prohibition of unlawful use of force by

[27] Ian Brownlie, 'International Law and the Use of Force by States Revisited' (2000) 2 *Australian Year Book of International Law* 21, 21.
[28] Ian Brownlie, *The Use or Threat of Use by States' in Principles of Public International Law* (Oxford University Press, 8th ed, 2008) 744.
[29] *The Charter* (n 5) ch VII.
[30] Ibid art 51.
[31] *Implementing the Responsibility to Protect — Report of the Secretary-General,* 63rd sess, Agenda Items 44 and 107, UN Doc A/63/677 (12 January 2009).

states is considered a peremptory norm,[32] from which no derogation is permitted.[33]

Article 51 of the Charter stipulates that nothing in the Charter shall impair the 'inherent right' to individual or collective self-defence if an armed attack occurs.[34] Prior to the treaty, self-defence was governed by customary law which allowed anticipatory self-defence. However, the wording of Article 51 casts doubts on whether the Charter seeks to supersede previous customary law and only permit self-defence where an armed attack actually occurs; or, alternatively, whether it permits anticipatory self-defence as an 'inherent right'.[35] Neither the International Court of Justice (ICJ) nor the Security Council have authoritatively determined the precise meaning of Article 51,[36] leaving international treaty law in this area subject to speculation.

Whilst international courts have reflected on the right to self-defence since 1945, they have not had jurisdiction to consider Article 51 of the Charter specifically. The Nuremberg Tribunal, instituted to try key Nazi leaders for events prior to and during World War II, noted that preventive action in foreign territory is justified in the case of an imminent threat.[37] However, as the Charter did not exist at the time that the relevant acts were committed, this reflected the law prior to the Charter. Additionally, in the case of *Nicaragua v United States*,[38] the threshold for an armed attack was determined to be 'the most grave forms of the use of force'.[39] In this case, the ICJ majority judgment made a point of noting that 'the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised… the Court expresses no view on the issue'.[40] That said, in his dissenting opinion, Judge Schwelbel noted that he did 'not agree with a construction of the [Charter] which would read Article 51 as if it were worded: 'nothing in the present Charter shall impair the inherent right of individual or collective self-defence if, and only if, an armed attack occurs."[41] For the time being, the matter as subject to treaty law remains unsettled.

Despite uncertainty arising from treaty law, it is recognised that a state's use of anticipatory self-defence against an imminent attack remains permissible under international customary law. The customary law subsequent to the Charter coming into force on 24 October 1945 can, amongst other things, be taken from post-Charter Security Council discussions, UN published

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[32] Jeremy Wright 'The modern law of self-defence' (Speech delivered at the International Institute of Strategic Studies, London, 11 January 2017).
[33] *Vienna Convention* (n 3) art 53.
[34] *The Charter* (n 5) art 51.
[35] Pierre-Emmanuel Dupont, 'Anticipatory Action in Self-Defence: Essence and Limits under International Law' 2017) 4(2) *Journal on the Use of Force and International Law* 419, 419-420.
[36] Anthony Clark Arend, 'International Law and the Pre-emptive Use of Military Force' (2003) 26 (2) *The Washington Quarterly* 88, 93.
[37] International Military Tribunal Nuremberg, *Trial of the Major War Criminals before the International Military Tribunal, 14 November 1945–1 October 1946* (IMT, 1947), vol 1, 170.
[38] *Nicaragua Case* (n 2).
[39] Ibid [91].
[40] Ibid [8].
[41] Ibid [173].

statements and states' accepted conduct. In post-Charter Security Council discussions, delegates have periodically considered the importance of whether a test or threshold for anticipatory self-defence had been met, rather than the permissibility of anticipatory self-defence in and of itself.[42]

For example, in discussions regarding the 1962 Cuban Missile Crisis, which primarily concerned Cuba, Russia and the United States (US), there was no clear consensus which emerged against application of anticipatory self-defence. Further, states which rejected the US proposal to use force to interdict a carriage of offensive weapons en route to Cuba, under the justification of anticipatory self-defence, did not focus on rejecting the doctrine of anticipatory self-defence itself. Instead, states questioned whether the criteria for necessity, founded in the *Caroline test*[43] (discussed further below) established under international law, were met in the circumstances.[44] The Ghana delegate to a Security Council meeting on 24 October 1962 probed whether there were 'grounds for the argument that such action is justified in exercise of the inherent right of self-defence'.[45] In response, the delegate himself commented that 'my delegation does not think so … it cannot be argued that the threat was of such a nature as to warrant action on the scale so far taken prior to a reference to this Council'. [46] Ghana's reasoning was not rejected by other states,[47] indicating overall acceptance of the notion of anticipatory self-defence.

In 1981, the Security Council refused to accept Israel's argument that it faced an imminent attack from Iraq justifying self-defence under Article 51 of the Charter. The Security Council rejected arguments that Iraq's construction of a nuclear weapon which would take up to five years to build, could substantiate an imminent attack for Israel.[48] However, in discussions, the Security Council did not refuse the legal justification to act under anticipatory self-defence against imminent threats, stating Israel's 'claim goes well beyond… an imminent threat'.[49] This discussion was supported by the fact that Israel's claim was unsubstantiated and improbable.[50]

The US' invasion of Iraq in 2003, on the justification to prevent Saddam Hussein from deploying weapons of mass destruction (WMD), was veiled with the concept of anticipatory self-defence. Whilst the US and its allies' main justification was that intervention was authorised by existing Security Council resolutions, they also detailed the need to disarm Iraq.[51] Alternatively, Iraq argued that the US publicly spoke of humanitarian issues, to misguide and

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[42] Anthony Clark Arend and Robert J. Beck, *International Law and the Use of Force: Beyond the UN Charter Paradigm* (Routledge, 1993) 71.
[43] See below Part II B.
[44] Arend (n 36) 94.
[45] UN SCOR, 17th sess, 1024th mtg, UN Doc S/PV.1024 (24 October 1962) [110].
[46] Ibid.
[47] Arend (n 36) 94.
[48] UN SCOR, 36th sees, 2283rd mth, UN Doc S/PV.2283 (15 June 1981) [25]-[27].
[49] Ibid [26].
[50] Ibid.
[51] United Nations, 'Security Council Concludes Two-Day Debate on Military Action in Iraq; Need for Immediate Humanitarian Aid, Protection of Civilians Stressed', (UN Press Release, SC/7077, 27 March 2003).

distract the world of the real issue – war.[52] Iraq contended that the US had intervened, 'despite the fact that Iraq had not crossed the Atlantic to attack the United States, had no link to the 11 September attacks and had no weapons of mass destruction, [and yet,] United States forces had crossed the Atlantic to control [its] region.'[53] Iraq's focus on not being a threat to the US suggests an acceptance of force where a threat is present. Subsequent to the intervention, the then Secretary General of the UN, Kofi Annan, commented, 'I have indicated [the intervention] was not in conformity with the UN Charter from our point of view, and from the Charter point of view it was illegal.'[54] Annan's finding hints that the intervention was not authorised by the Security Council, but it also did not substantiate the Article 51 exemption on the prohibition of force.

These discussions support the notion that, under certain conditions, the use of force against anticipated armed threats is permitted under international customary law, not least where a threat is imminent. Whilst there is limited debate into conditions or relevant thresholds to be met, the international customary law provides that states can lawfully act in anticipatory self-defence. As a result, the current provision provides a well-established broad exemption, which is not limited by certainty in scope or an evidentiary test. Simply put, the law provides anticipatory self-defence is lawful. However, it does not provide the exact elements of anticipatory self-defence in detail.

A 'Imminent' Threats

Whilst it is reasonably well-established, certainly as a matter of customary international law, that a state is not required to passively await an actual armed attack, interpretation of what amounts to an imminent threat of attack is varied. Importantly, state sovereignty remains the cornerstone of international law. As a result, any interpretation of imminence must be balanced against consideration of state sovereignty.[55] Where a violation of state sovereignty is put at risk by another state resorting to force on the justification of self-defence, it must be legally substantiated.

The modern antecedence for anticipatory self-defence dates back to the *Caroline* incident of 1837, where the United Kingdom (UK) attacked a US ship named *Caroline*. Following that attack, the US secretary of state Daniel Webster penned the first known statement of anticipatory self-defence. Webster articulated that the test for self-defence is two-fold: first, the 'necessity of the self-defence [must be] instant, overwhelming [and] leaving

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[52] Ibid.
[53] Ibid.
[54] Kofi Annan quoted in United Nations, 'Lessons of Iraq war underscore importance of UN Charter - Annan', *UN News* (online), 16 September 2004 < https://news.un.org/en/story/2004/09/115352-lessons-iraq-war-underscore-importance-un-charter-annan>.
[55] Michael J Glennon, 'The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter' (2001) 25(2) *Harvard Journal of Law & Public Policy* 540, 558.

no choice of means, and no moment of deliberation';[56] secondly, the defensive act cannot be 'unreasonable or excessive',[57] meaning it must be proportionate. The *Caroline* test was affirmed in the obiter dicta of the *Oil-platform Case* (ICJ),[58] which confirmed that self-defence by a state must be necessary in light of an imminent threat, and proportionate to the threat. However, in this case, the ICJ was only provided with jurisdiction by Iran and the US to address allegations regarding a breach of a bilateral trade agreement, in particular its 'freedom of commerce' provision. Iran did not base its application on a breach of the general international law prohibition of force, as the US's lack of consent to jurisdiction would have prevented the Court proceeding altogether.[59] This illustrates the political nature of international law, showing that states only look to identify the correct legal position where it is in their interest to do so. As a result, the ICJ could not authoritatively affirm or amend the international law governing anticipatory self-defence.[60] At present, the status of international law with respect to self-defence against imminent threats remains open to interpretation, relying on the *Caroline* test from 1837.[61]

In 2003, in the wake of the aforementioned Iraq invasion, then UN Secretary-General, Koffi Annan, commissioned a UN advisory group, labelled the 'United Nations High-Level Panel on Threats, Challenges and Change', to consider challenges to international security. As part of this process, in 2004, the panel released a report stating a 'threatened state, according to long established international law, can take military action so long as the threatened attack is imminent, no other means would deflect it and the action is proportionate.'[62] The statement did not provide a definition for 'imminent threat'; however, it touched on the notion that it is a proximate measurement. The statement compared self-defence 'against an imminent or proximate threat'[63] to self-defence 'against a non-imminent or non-proximate one';[64] claiming the later requires authorisation for enforcement action from the UN Security Council. The interchanging of the words imminent and proximate indicates a requirement that imminent threats are assessed as a temporal matter. The 2004 report further stated that 'the norms governing the use of force by non-State actors have not kept pace with those pertaining to States'[65] and went on to make a series of UN reform recommendations.

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[56] Ashburton (n 16).
[57] Ibid.
[58] *Oil Platforms Case (Islamic Republic of Iran v United States of America) (Merits)* [6 November 2003] ICJ (1 May 2004) [51].
[59] Andrew Garwood-Gowers, 'Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America) - Did the ICJ Miss the Boat on the Law on the Use of Force?' (2004) 5(1) *Melbourne Journal of International Law* 241, 242.
[60] Ibid 246.
[61] George Brandis 'The Right of Self-Defence in Imminent Armed Attack in International Law' (Speech delivered at the University of Queensland, Brisbane, 11 April 2017).
[62] *A More Secure World: Our Shared Responsibility*, UN GAOR, 59th sess, Agenda Item 55, UN Doc A/59/565 (2 December 2004) 54 [188] ('*Our Shared Responsibility*').
[63] Ibid 54 [189].
[64] Ibid.
[65] Ibid 48 [159].

In 2005, Annan followed up with a report explicitly confirming 'imminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign states to defend themselves'.[66] In this report imminent threats were compared to 'latent or non-imminent threats'.[67] According to the *Oxford English Dictionary,* latent means 'a state of existing, but not yet developed or manifest, being hidden or concealed.'[68] This suggests the interpretation of imminent threats should be based on the development and manifestation of the threat, which is closely aligned with a temporal understanding. While such statements do not reflect binding law codified through, for example, treaties, they can be relied on to determine existing customary law. Ultimately, the 2004 and 2005 reports can be seen as an attempt to formalise the existing international law, and to confirm the meaning of an imminent threat as a proximately close and developed threat.

The two reports just noted were addressed in September 2005 at a World Summit attended by many UN members. Debate focussed on the issues raised in the report; however, member states concluded 'that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security.'[69] The 2004 report recommendations were not included in the Outcome Document of the 2005 World Summit and no further legal reforms were proposed to respond to changing threats, other than the negotiating and finalisation of new treaties.[70] This can be seen as a short-coming in opportunity to address new threats and clarify unclear treaty law and is mostly attributable to resistance of a considerable number of UN members, whereby 'the crack in *opinio juris* among States has widened, without, however, identifying one approach or the other as the majority view.'[71] The implication is a baseline position in the Charter that is vague and irrelevant in particular to the current security environment.

III THE NATURE OF EMERGENT THREATS AND IMMINENCE

International threats of armed attack are evolving in nature and scope as a result of a range of factors; these include, in particular, greater access to weapons of mass destruction (WMDs), the growth of terrorist organisations, particularly Islamic State (IS), [72] and the escalation and increased sophistication of cyber warfare, amongst other technical advances. Each affects the nature of imminence in the use of force, as well as states' ability to respond.

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[66] *In Larger Freedom - Towards Development, Security and Human Rights for All: Report of the Secretary General,* UN GAOR, 59th sess, Agenda Items 45 and 55, UN Doc A/59/2005 (21 March 2005) 33 [124] (*'In Larger Freedom'*).
[67] Ibid 33 [122].
[68] Oxford University, *Latent* (17 October 2018) Oxford University Dictionary.
[69] *2005 World Summit Outcome*, GA Res 60/1, 60th sess, 8th plen mtg, UN Doc A/RES/60/1 (2005) [79].
[70] Donald R Rothwell, 'Anticipatory Self-Defence in the Age of International Terrorism Special Edition: The United Nations and International Legal Order' (2005) 24(2) *University of Queensland Law Journal* 337.
[71] Tom Ruys, *Armed Attack' and Article 51 of the UN Charter* (Cambridge University Press, 2010).
[72] For the purpose of this article, IS refers to the Islamic State and the Levant, the Islamic State of Iraq and al-Sham and Da'esh.

A Weapons of Mass Destruction

Imminent threats must be considered in light of contemporary developments regarding WMDs. Whilst WMDs, being a term used to encompass chemical, biological and nuclear weapons,[73] pre-dated the Charter, they were not considered as a prominent threat during its drafting. Chemical weapons were used during World War I. However, they were not particularly useful militarily. When nuclear bombs were dropped on Japan at the end of World War II, the world took the view that such weapons were a carefully guarded secret, not an accessible military instrument.[74] Further, the full consequences of the atomic bombing of two cities in Japan were not fully recognised until long after 1945. For this reason, the Charter has been labelled as a 'pre-atomic document' which 'fails to cope with new technology of mass destruction'.[75] If the Charter's drafters anticipated the future risks associated with WMDs, additional codification concerning both the inherent right to self-defence and imminent threats may have otherwise been included.

Article 51 of the Charter was first tested against WMDs during the Cuban missile crisis in October 1962, when the Soviet Union transported WMD instruments to Cuba and the United States established a naval blockade in response. The US threatened to use armed force in the event the Soviet Union delivered offensive weapons to Cuba.[76] Notably, the US did not use the justification of self-defence under Article 51, though it was carefully weighed and consciously rejected.[77] This was because the US recognised an imminent threat could not be construed broadly enough to cover threatening deployments or demonstrations which lacked a probable outcome.[78] However, the Cuban Missile Crisis still took the world to the brink of a nuclear war. The uncertainty at the time illustrated the need for international legal restraints to be clarified.

Following the Cold War, states generally sought to focus their attention on disarmament, rather than building WMD capabilities. Such efforts culminated in the *Chemical Weapons Convention,*[79] which came into force in 29 April 1997 and which has 193 states parties. Whilst this was effective in reducing weapons deployment by states, where WMDs are deployed by terrorist groups the international risk is heightened. For example, in April 2018, WMDs were reportedly used by IS in Douma (Syria) against civilians, with at least 60

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[73] Legal analysis generally follows this conventional definition, as neither treaty law nor customary international law contains an authoritative definition of WMD. See David P Fidler, 'Weapons of Mass Destruction and International Law' (2003) 8(3) *American Society of International Law* 1, 1.

[74] Arend (n 36) 97.

[75] John Foster Dulles, 'The Challenge of Our Time: Peace with Justice' (1953) 39(12) *American Bar Association Journal* 1063, 1066.

[76] A. Mark Weisburd, *The Use of Force: The Practice of States Since World War II* (Penn State University Press 1997) 216.

[77] Sadoff (n 1).

[78] Ibid 524.

[79] *Convention of the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction,* opened for signature 13 January 1993, 1974 UNTS 45 (entered into force 29 April 1997).

people dying.[80] This triggered a perilous international response, with the US, UK and France launching over one hundred missiles in retaliation.[81] The lawfulness of the action was questioned by Russia, which argued the Syrian regime flag was flying in Douma, meaning the government forces had taken back control and intervention was not lawful.[82] This could have led to Syria commencing armed force under the justification of self-defence which would have provoked an open war between the US and Russia, along with each of their allies.[83] Whilst Syria, along with Iran, have been singled out as rogue states which violate their non-proliferation obligations,[84] there has been limited success in legal deterrence. This highlights the need for clear legal obligations, where there is a complex interplay of powers, between both state and non-state actors to ensure compliance and to maintain peace.

Notably, the use of WMDs in self-defence is only justified under international law where another state has already deployed WMDs.[85] However, as evident through IS's use of WMDs, terrorist groups are not bound by this principle. Further, it can be difficult to determine whether a state, or terrorist group, holds WMDs, as such weapons can be 'easily concealed, delivered covertly and used without warning'.[86] As a result, by the time a threat is imminent, it can be extremely difficult to mount a defence that does not involve the use of WMDs.

The temporal understanding of imminent threats is too rigorous to be applied to a state faced with WMD threats, particularly one emanating from a rogue actor.[87] Sapiroa argues it would be 'foolish, if not suicidal, for a state that believed its fundamental security interests were at risk to wait until the first nuclear attack'.[88] For this reason, it has been suggested the 'catastrophic consequences of a WMD attack merit a very liberal interpretation of imminence.'[89] States may need to assess the impact of WMDs and damages likely to result from the absence of mitigating action, in addition to how proximate an attack is, to realistically combat threats.

B Terrorism

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[80] Cameron Stewart and Geof Chambers, 'The Australian Cold war face-off: Trump vs Putin in Syria', *The Australian* (online), 13 April 2018 <https://www.theaustralian.com.au/news/world/cold-war-faceoff-trump-vs-putin-in-syria/news-story/5ad48e6cd24e7f0b6aa71f2257639cab>.

[81] Luis Martinez et al, 'Trump Orders Strike on Syria in Response to Chemical Attack' *ABC News* (online) 14 April 2018 <https://abcnews.go.com/International/trump-orders-strike-syria-response-chemical-attack/story?id=54459378>.

[82] Stewart and Chambers (n 80).

[83] Ibid.

[84] Alexander Benard and Paul J Leaf, 'Modern Threats and the United Nations Security Council No Time for Complacency (A Response to Professor Allen Weiner)' (2010) 62(5) *Stanford Law Review* 1396, 1414.

[85] *Legality of Threat of Nuclear Weapons Case (Advisory Opinion)* [1996] ICJ Rep 1996, 226.

[86] *NSS 2002* (n 13) 15.

[87] Matthew C Waxman, 'The Use of Force Against States That Might Have Weapons of Mass Destruction' (2009) 31 (1) *Michigan Journal of International Law* 1, 11.

[88] M Sapiroa, 'Iraq: The Shifting Sands of Pre-emptive Self-Defense', (2003) 98 *American Journal of International Law* 599, 602.

[89] *NSS 2002* (n 13).

Terrorism presents states with a non-state enemy, which in turn raises issues for international law. Terrorist groups are not bound by *jus ad bellum*¸ meaning their actions can be rogue and unpredictable.[90] Whilst it is now recognised that states can implement armed force against terrorist groups under the justification of self-defence,[91] if implemented without sufficient justification such force could be interpreted as a direct attack on the territory of the sovereign state in which the defensive armed attack occurs.

In particular, the rise of IS presents a dangerous contemporary threat to international security, one which has been labelled an 'existential threat.'[92] In 2014, IS rapidly overtook more than thirty percent of Syria and Iraq, capturing billions of dollars' worth of assets in the process.[93] The rise of IS has fundamentally altered the concept of terrorism, creating an unprecedented challenge to the international community.[94] Historically, terrorism has seen non-state groups carry out serious, but relatively contained periodic attacks. However, IS has been successful in capturing and holding state territory through the use of sustained and extreme violence.[95] Whilst the US has claimed IS has been defeated and vowed to withdraw all troops from Syria, several US troops were killed in attacks in Syria claimed by IS in the aftermath of such pronouncements. This supports the argument that a hasty withdrawal by US will only reinvigorate IS, which is still very much holding territory in Syria.[96] The Security Council has deemed IS a threat to international security,[97] raising a legitimate expectation for the international community to legally response to the threat.

Terrorist groups should not be underestimated just because they are non-state actors. IS advocates for the commission of terrorist attacks worldwide. So far, IS has claimed attacks involving armed force in Europe, South East Asia, Africa and North America.[98] Further, thousands of foreign fighters have joined the movement, which aims to establish a caliphate in western Iraq, eastern Syria and Libya.[99] The 2017, attacks in Manchester and London (UK), were planned by a loose network of individuals alleged to have acted on behalf

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[90] Janne Halland Matlary, 'Cannon Before Canon: The Dynamics of Ad Bellum Rule Change' in Anthony F Lang and Amanda Russell Beatti *War, Torture and Terrorism: Rethinking the Rules of International Security* (Routledge 1st Ed 2009), 75.
[91] *Resolution 1368*, SC Res 1368, UN SCOR, 56th sess, 4370th mtg, UN Doc S/RES/1368 (12 September 2001).
[92] Daniel Bertrand Monk, "Who's Afraid of ISIS?' Security Doxa and the Doxa of Insecurity' (2018) 6(1) *Critical Studies on Security* 1, 2.
[93] Matthew G Olsen, 'National Counterterrorism Centre Director Remarks' (Speech delivered at the Brooking Institution, Washington, 3 September 2014).
[94] Emil Aslan Souleimanov and Katarina Petrtylova, 'Russia's Policy Toward the Islamic State' (2015) 22(3) *Middle East Policy* 66, 69-70.
[95] Comen Kenny, 'Prosecuting Crimes of International Concern: Islamic State at the ICC? (2017) 33(84) *Utrech Journal of International and European Law* 120, 120.
[96] Ian Bremmer, 'Trump's Pledge to Pull US out of Syria Meets Reality', *Time* (online) 18 January 2019 <http://time.com/5505452/donald-trump-syrian-war/>.
[97] *Resolution 2255*, SC Res 2255, UN SCOR, sess, 70th sess, 7590th mtg, UN Doc S/RES/2255 (22 December 2015).
[98] Kenny (n 95) 120.
[99] *Security Council Unanimously Adopts Resolution Condemning Violent Extremism, Underscoring Need to Prevent Travel, Support for Foreign Terrorist Fighters,* UN SCOR 7272nd mtg coverage, UN Doc SC/11580 (24 September 2014).

of IS.[100] However, technology made the exact role of the individuals and the role of IS difficult to trace. Given the inability of states to readily track a terrorist group's technological trail, identifying an imminent threat before it occurs is a challenge.

Recent technological advances, driven by globalisation, facilitate the instant exchange of information, people and money across the globe, which is of benefit to terrorist groups. Social media forums have been recognised as fertile grounds for recruiting and assembling extremists, which has been exploited particularly well by IS.[101] The internet provides an unregulated medium for terrorism. Online radicalisation can enable a person to develop an intent to commit an act of terrorism within a few weeks.[102] The internet also reduces the logistical obstacles of planning an attack. Previously, planning and sourcing weapons could take months for terrorists. Now, through online video sharing platforms such as YouTube terrorists can quickly prepare for an armed attack from their home.[103] Evidently the technology available to terrorist groups now allows armed attacks to eventuate quickly.

This temporal reduction to the causal chain in eventuating a threat reduces the opportunity to detect a temporally imminent threat. If temporally imminent threats cannot be detected in time, states leave themselves open to armed attacked with no justification to protect themselves prior to the attack.

C Cyber Warfare

Adding to the growing threat of WMD and terrorism, a cyber-operation could amount to armed force,[104] evoking the right to self-defence under Article 51 of the Charter. Where cyber-attacks, being attacks launched by computer networks or systems,[105] result in death or physical destruction of sufficient scale, it is broadly agreed that the element of 'armed attack' is satisfied.[106] An international cyber incident has not yet been unambiguously legally recognised as an armed attack, with no state claiming to be a victim of cyber armed force.[107] However, as the following sections illustrate, technology is becoming more available for use by states and terrorist groups to orchestrate armed attacks. Additionally, cyber-operations can be set up to take place

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[100] Brick Court Chambers, David Anderson Q.C, *Independent Assessment of Attacks in London and Manchester* (2017) 3.
[101] Wright (n 32).
[102] Brownlie (n 28).
[103] Wright (n 32).
[104] Michael N Schmitt (ed), *Tallinn Manual on the International Law Applicable to Cyber Warfare* (Cambridge University Press, 2013) 45.
[105] Oona A. Hathaway and Rebecca Crootof, 'The Law of Cyber-Attack' (2012) 100 (4) *California Law Review* 817, 822.
[106] See, eg, Charles J. Dunlap Jr., 'Perspectives for Cyber Strategists on Law for Cyberwar' (2011) 5 *Strategic Studies Quarterly* 81, 85: ('Of course, a cyber technique can qualify as an armed attack') and Matthew C. Waxman, 'Cyber-Attacks and the Use of Force: Back to the Future of Article 2(4)' (2011) 36 *Yale Journal International Law* 421, 431: ('[T]here is considerable momentum among … that some cyber-attacks . . . could constitute an 'armed attack,' at least insofar as those terms should be interpreted to cover attacks with features and consequences closely resembling conventional military attacks or kinetic force.').
[107] Ran J Hayward, 'Evaluating the 'Imminence' of a Cyber Attack for the Purpose of Anticipatory Self-Defence' (2017) 117 *Columbia Law Review* 399, 399.

instantly, with the click of a button. This again, questions the effectiveness of imminent threats being assessed solely based upon timing.

International cyber warfare has become increasingly likely, with cyber-attacks proliferating in different forms. In April and May 2007, Estonia was the first state to be subject to cyber violence, in the form of large-scale distributed denial of service (DDoS) attacks,[108] lasting over three weeks.[109] This, amongst other things, seriously impaired the daily operations of government communications to Estonians, emergency services and Estonian businesses.[110] Estonia's parliament commented that 'look[ing] at a nuclear explosion and the explosion that happened in our country in May, [we] see the same thing'[111] and, in an address to the United Nations, warned that governments must develop 'concrete technical and legal measures for countering cyber-attacks.'[112] This illustrates the destructive power inherent to cyber warfare.

In 2010 Stuxnet, a highly destructive computer worm, took control of Iranian computers involved in Iran's nuclear program, destroying the centrifuges on which the computers operated. Stuxnet has been variously attributed to the US and Iraq; however, neither state has formally claimed responsibility.[113] It is estimated that Stuxnet completely halted Iran's uranium enrichment operations, setting the country's nuclear arms development program several years back.[114] Stuxnet was a 'closer case'[115] for classification as an armed attack, as it resulted in actual physical damage. However, it was still classified as a DDoS. This may be attributed to the fact that Iran downplayed the events, with the President at the time commenting that Stuxnet was only 'able to cause minor problems to some of [the] centrifuges.'[116] Iran had policy incentives to downplay the extent to which its nuclear program was compromised. It also may have wished to preserve its ability to launch similar attacks without substantiated armed force.[117]

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[108] A distributed denial of services is substantiated by viruses which overwhelm servers to systematically visit designated sites, meaning the server cannot perform its normal services. See, Hathaway and Crootof (n 105) 837.

[109] Ian Traynor, 'Russia Accused of Unleashing Cyberwar to Disable Estonia', *The Guardian* (online), 17 May 2007 <www.theguardian.com/world/2007/may/17/topstories3.russia>.

[110] John Murray, 'Marching off to cyberwar', *The Economist* (online), 4 December 2008 <www.economist.com/node/ 12673385>.

[111] Scott J. Shackelford, 'From Nuclear War to Net War: Analogizing Cyber Attacks in International Law' (2009) 27 *Berkeley Journal International Law* 192, 195.

[112] Toomas Hendrik Ilves, *Address by the President of Estonia*, UN GAOR, 62nd sess, (25 September 2007).

[113] Matthew C Waxman, 'Cyber-Attacks and the Use of Force: Back to the Future of Article 2(4)' (2011) 36 *Yale Journal of International Law* 421.

[114] Thomas N Chen, Army War College Strategic Studies Institute *Cyberterrorism After Stuxnet* (2014).

[115] Schmitt (n 104) 58.

[116] Jordan Peagler, 'The Stuxnet Attack: A New Form of Warfare and the (In)applicability of Current International Law' (2014) 31 *Arizona Journal International & Comparative Law* 399, 426.

[117] Ryan Fairchild, 'When Can a Hacker Start a War?', *Pacific Standard* (online), 6 February 2015 <http://www.psmag.com/nature-and-technology/ when-cyber-attack-constitutes-act-of-war>.

More recently, between 2014 to 2016, Ukraine became victim to a series of large-scale cyber-attacks targeting the Ukraine Army's Rocket Forces and Artillery. The virus took control of Ukraine artillery and posted the content onto online military forums. It is reported that the attack infected 80% of the Ukraine army's artillery pieces, which had to be destroyed.[118] This significantly reduced Ukraine's ability to defend itself against an armed attack. Further, on 23 December 2015, malware was used against Ukraine's power grid, leaving 200,000 of its inhabitants temporarily without power. The attack, which was also able to turn back-up sources offline, hit at the end of winter, leaving 20 per cent of the capital without electricity, lights and, in some cases, heat. This shows the shift from cyber attacks seeking to disrupt systems, to cyber-attacks seeking to harm targets by causing physical damage to, or corruption of, a system or significant infrastructure.[119]

Technology will continue to develop, advancing the threat of armed force through cyber and similar mediums. This threat is increasingly recognised around the world. In 2018, the World Economic Forum labelled cyber-attacks as the third most likely global risk.[120] Dinstein has argued that '[s]hat looked at the end of the twentieth century to be a sci-fi fantasy is increasingly becoming a realistic script in the twenty-first century.'[121] US military leaders have warned of the need to defend against 'cyber Pearl Harbour' or 'cyber 9//11'. In terms of use of cyber weapons, under US domestic policy, only the President can order a cyberattack.[122] Likewise, in regards to use of WMD, only the President can order a WMD attack. This illustrates the seriousness of cyber warfare as it juxtaposes the potential consequence to that of a WMD attack.

The growth of cyber threats in recent years led to the production of the Tallinn Manual, which is a research compilation by a prominent group of cyber experts on the application of international law to cyber warfare. In assessing whether a cyber-threat could be detected as an imminent threat substantiating the use of self-defence, the Tallinn Manual uses an example of a logic bomb. A logic bomb is a malicious computer code that can be virtually inserted into a computer system. Once activated, a logic bomb can take full control of the device, meaning the system could in effect be used to cause an armed attack. This Tallinn Manual scenario states that where a logic bomb is inserted into a computer system ready for activation, the time of activation cannot be precisely determined. If a strict temporal test of imminent threats was to be applied, a state would be restrained from acting under self-defence until the logic bomb was activated. By this time, it would likely be too late to gain

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[118] Tim Heath and Alfred Rolington, 'Deaths From Cyber Attacks', on Tim Heath and Alfred Rolington, *Cyber Security Intelligence* (15 June 2018) <https://www.cybersecurityintelligence.com/blog/deaths-from-cyber-attacks--3448.html>.
[119] Ibid.
[120] World Economic Forum, *The Global Risks Report 2018* (No 13, 17 January 2018).
[121] Yoram Dinstein, 'Cyber War and International Law: Concluding Remarks at the 2012 Naval War College International Law Conference' (2013) 89 *International Law Studies* 276, 281.
[122] David E. Sanger & Thom Shanker, 'Broad Powers Seen for Obama in Cyberstrikes', *New York Times* (New York, 3 February 2013).

control of the system. Again, this illustrates the shortfalls in a temporal assessment of imminent threats.[123]

It has been suggested, alternatively, that imminent threats could be substantiated as a test of the imminent last feasible opportunity to take effective self-defence action. In the context of a logic bomb, given that a state must immediately act to stop the kind of attack, this approach would allow a state to act before the logic bomb is activated.[124] The last feasible opportunity test considers whether a failure to act at a certain moment in time could reasonably be expected to result in the state being unable to defend itself effectively when an armed attack actually commences.[125] That said, as intriguing as this position may appear, there is currently no scope in the existing legal position to apply this test, further illustrating why the applicable legal framework needs to evolve in light of rapid technological developments.

IV LEGAL DIPLOMACY, SELF-DEFENCE AND IMMINENCE

Emerging security threats do not represent the only challenge in an environment where states' ability to legally respond to imminent threats of attack is uncertain. Further risk stems from the differing understandings of their legal responsibilities expressed by states in their legal diplomacy. Legal diplomacy, which includes states' public expressions of their interpretation of international obligations, can help shape the application of international legal obligations, particularly where their content is far from determinative. We rely on a legal diplomacy lens here because analysis based on it can be utilised to overcome perceived gaps and diversions in the law.[126] Further, using a legal diplomacy lens provides insights into the types of amendments to obligations that states may be willing to consent to. Differing interpretations of international obligations (not only in relation to self-defence) are inevitable. However, legal diplomacy can be consulted to identify and sometimes to overcome difference.

More specifically, we investigated the public legal diplomacy pertaining to imminence and self-defence (Article 51 matters) of the five permanent members of the Security Council states, because doing so allowed us to chart a way forward which respects the positions held by those five states which, arguably, hold significant diplomatic power in global politics and international relations and without whom change with respect to Article 51 matters cannot be achieved.

We outline their respective positions in the following sections.

A Expansive Interpretation - France

France's legal diplomacy must be considered in light of implications arising from translation. In English, Article 51 invokes the inherent right of self-

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[123] Schmitt (n 104) 351.
[124] Ibid, 352.
[125] Ibid.
[126] Ibid.

defence if an armed attack occurs. This wording creates scope for some ambiguity regarding whether the attack must have commenced or is instead imminent, being consistent with the *Caroline* test. In this vein, the French translation of Article 51 states 'dans le cas où un Membre des Nations Unies est l'objet d'une agression armée', which can be understood to allow a state to be the subject of an armed attack before the attack has taken place, rather than only if the attack is actually occurring or underway.[127] Whilst the ambiguity regarding Article 51 has been somewhat addressed through international customary law, this translation is important to consider, as it means France's interpretation is fundamentally bound to be more expansive.
Consistent with this foundation, France has a strong tendency to rely on the use of force as a solution to threats.[128] In support, its legal diplomacy evidences engagement with the use of self-defence extensively. A 2013 Defence and National Security White Paper commissioned by the then French President, François Hollande, pointed to the relative inadequacy of international global governance, referencing Article 51 and its failure to address cyber-attacks or terrorism.[129] The paper further noted that confirmation of the international law position 'emerges all too slowly in crisis situations.'[130] Additionally, France's recent Strategic Review on Cyber Defence, published February 2018, outlines a clear intention to be proactive against cyber threats.[131] The review states 'France cannot exclude the use of self-defence, in exceptional circumstances, against an armed attack that has not yet been unleashed'.[132] Such statements illustrate France is willing to apply an expansive definition of self-defence to overcome what it considers to be short-falls in the current state of international law regarding self-defence against imminent threats.

Further, legal diplomacy in defence of France's use of force applies the legal test for imminent threats loosely. For example, in 2015, Hollande relied on the justification of self-defence in response to Islamic State (IS) terror threats to justify the continued bombing of IS facilities in Syria,[133] despite the fact IS had not yet committed an armed attack directly against France.[134] In the same year, a French Representative to the Security Council stated that 'collective action could now be based on Article 51 of the United Nations Charter', whilst

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[127] David Kretzmer, 'The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum' (2013) 24(1) *The European Journal of International Law* 235, 242.
[128] Josef Mrazek, 'The Right to Use Force in Self-Defence' (2011) 2 *Czech Yearbook of Public & Private International Law* 33, 33. For example, France implemented armed force against Vietnam 1946, Egypt 1956, Republic of Zaire (Congo) 1978 and Chad 1978-1983. See Antonia Tanca *Foreign Armed Intervention in Internal Conflict* (Martinus Nijhoff, 1993).
[129] The Government of the French Republic, Parl Paper, *France, Defence and National Security White Paper* (2013) 31.
[130] Ibid.
[131] The Government of the French Republic, Louis Gautier, *Strategic Review on Cyber Defence* (2018).
[132] Ibid 89.
[133] François Delattre *Identical letters dated 8 September 2015 from the Permanent Representative of France to the United Nations addressed to the Secretary-General and the President of the Security Council* UN SCOR, UN Doc S/2015/745 (9 September 2015).
[134] Barcelona Centre for International Affairs, Diego Muro, *Why did ISIS attack France?* (2015).

sponsoring Resolution 2249.[135] Resolution 2249, called for states to act against IS, whilst complying with all their obligations under international law. France's statement was made despite the fact Resolution 2249 makes no reference to Article 51 of the Charter, or self-defence generally.[136] This can be seen as an attempt to tie Resolution 2249 to a broad understanding of imminent threats, promoting the idea that IS poses what should be considered an imminent threat without any evidence or lawful reasoning.[137]

B Restrictive Interpretation - China

China's interpretation of imminent threats and anticipatory self-defence is conversely relatively strict. China's legal diplomacy can be extracted from officially stated legal positions in the context of self-defence specifically, and on the law of *jus ad bellum* in general. China's legal diplomacy adopts a strict reading of the Charter's limitations on the use of force that brooks no exception for state-led humanitarian intervention, and narrowly construes the exception for self-defence.[138] This position is clearly at odds with France's legal diplomacy. Commenting further on China's position, Mincai contends it is China's view that merely planning an armed attack does not itself create an imminent threat.[139] This casts doubt on any right to self-defence before an armed attack has occurred and was illustrated in 1993, when China was the only permanent member of the Security Council to speak against the US's claims to anticipatory self-defence in Iraq in Security Council discussions.[140] It shows that even though states will continue to promote the justification of anticipatory self-defence, China will likely meet such justifications with condemnation.

As noted above, in 2005, the UN published a High-Level Panel report which confirmed that 'imminent threats are fully covered by Article 51'.[141] In response, China issued a position paper asserting that Article 51 should not be interpreted broadly, stating 'Article 51 should neither be amended nor reinterpreted'.[142] The position paper goes on to reference the Charter, stating it only permits force where the Security Council has provided authorisation or under 'the exception of self-defence under armed attack'. 'Whether an urgent threat exists should be determined and handled with prudence by the Security

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[135] United Nations, 'Security Council 'Unequivocally' Condemns ISIL Terrorist Attacks, Unanimously Adopting Text that Determines Extremist Group Poses 'Unprecedented' Threat', (UN Press Release, SC/12132, 20 November 2015).
[136] *Resolution 2249*, SC Res 2249, UN SCOR, 7565th mtg, UN Doc S/RES/2249 (20 November 2015).
[137] Brian Barder, 'Does Security Council Resolution 2249 (2015) of 20 November make bombing ISIL in Syria legal?', on Brian Barder, *Ephems* (22 November 2015) <http://www.barder.com/does-security-council-resolution-2249-2015-of-20-november-make-bombing-isil-in-syria-legal-yes/>
[138] Julian Ku, 'How China's View on the Law of Jus ad Bellum Will Shape Its Legal Approach to Cyberwarfare' (2017) *Hoover Institution Stanford University* Aegis Paper Series 1707, 5.
[139] Xu Mincai, 'The Legal Issues in the Application of the Right of Self-Defense' (2003) 3 *Faxuejia* 145, 145.
[140] UN Security Council, *Provisional Verbatim Record of the 3245 Meeting*, 3425 mtg, UN Doc S/PV 3245 (27 June 1993) 21.
[141] *In Larger Freedom* (n 66) 33 [124].
[142] Ministry of Foreign Affairs of the Peoples Republic of China, 'Position Paper of the People's Republic of China on the United Nations Reforms' (Press Release, 7 June 2005) [7].

Council'.[143] This can be understood as China stating that it is the Security Council which should assess imminent threats, rather than states self-assessing and responding to imminent threats.

China's position is evidently founded in long-standing historical principle. In 1939, Mao Zedong, the leader of the Chinese communist revolution and founding father of the People's Republic of China, stated; 'If people do not attack me, I won't attack them. If people attack me, I will certainly attack them. They attack me first, I attack them later'.[144] This statement was targeted at Zedong's political rivals. However, the People's Liberation Army, referring to China's armed forces as a group, has adopted the slogan as a more general guiding principle.[145] This principle is echoed through China's Five Principles of Peaceful Co-existence (FPPCs) as outlined in the Chinese *Constitution*.[146] The FPPCs, first stated in 1953, emphasise:

1. mutual respect for sovereignty and territorial integrity;
2. mutual non-aggression;
3. non-interference in each other's internal affairs;
4. equality and mutual benefit; and
5. peaceful coexistence in developing diplomatic relations and economic and cultural exchanges with other countries.[147]

These principles indicate a clear hostility towards interference through armed force for any reason.

C Use of Force by China and France in Practice

Despite differences notables in the legal diplomacy of France and China, both states have similarly applied the use of force under laxed interpretations of international law. In attempts to justify France's assistance in air-strikes in Syria in April 2018, the French President, Emmanuel Macron, released a statement which spoke against the 'the trivialization of chemical weapons.'[148] This statement attempted to legitimise the attack for the purpose of 'collective security'; however, did not offer a clear legal justification. The language used failed to provide a clear argument linking collective security and the legal basis of self-defence.[149] Instead the language hinted at the notion of armed reprisal which is not considered lawful under international law.[150] Even if

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[143] Ibid.
[144] Mao Zedong quoted in *Selected Works of Mao Tse-Tung: Vol VIII* (Kranti Publications 1990).
[145] Ku (n 138) 11.
[146] Constitution of the People's Republic of China, Preamble.
[147] Ibid.
[148] President Emmanuel Macron, 'Press release of the President of the Republic on the intervention of the French armed forces in response to the use of chemical weapons in Syria', (News Release, Présidence de la République française – Élysée.fr, 14 April 2018).
[149] Marko Milanovic, 'The Syria Strikes: Still Clearly Illegal', on Dapo Akande, Diane Desierto and Marko Milanovic, *Blog of the European Journal of International Law* (15 April 2018).
[150] *1979 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States,* GA Res 2625, UN GAOR, 25th sess, UN Doc A/8028 (1970) 123: ('States have a duty to refrain from acts of reprisal involving the use of force.').

France considered the action to be consistent with the justification of self-defence, states must articulate their legal views and provide a justification, as was held in the case of *Nicaragua v United States*.[151] The reason for this is to allow other states to respond, so if a novel rule or exception to an existing rule is contended it can be consented to by states.[152] Without such articulation, acts cannot be considered lawful. As such, France's legal diplomacy following the use of force can be seen as an attempt to distort the international law, promoting an interpretation that is inconsistent with established custom.

Similarly, China's legal diplomacy following the use of force is questionable. China claims that it 'has been compelled to use force, and it has used its rights under the rules of self-defence in the UN Charter each time'[153] against India in 1962, the Soviet Union in 1969 and Vietnam in 1978.[154] However, the use of force in these instances does not align with a strict interpretation of imminent threats. China defended its actions by applying factually weak territorial arguments, instead of relying on the justification of anticipatory self-defence, to avoid policy inconsistency.[155]

More recently, China's Foreign Minister, Wang Yi, has claimed that the military build-up in the South China Sea is a 'resort to self-preservation and self-defence of its territorial integrity',[156] and should not be confused as acts of militarisation.[157] This was subsequent to a note sent to the UN in May 2009 in which China claimed islands in the south China Sea and adjacent waters within the area bounded by nine short lines which have subsequently become known as the nine-dash line. The note asserted 'China has indisputable sovereignty over the islands and the adjacent waters and enjoys sovereign rights and jurisdiction over the relevant waters'.[158] However, it is contended these claims are an 'unclear denotation of a claimed maritime zone or region, and are not legally authoritative'.[159] Further, 'China has never controlled the sea-lanes or impaired the freedom of navigation in the South China Sea.'[160] Whilst China purports to rely on strict provisions regarding self-defence, in practice its actions are more similar to states that apply an expansive definition of imminent threats as China extends its territorial claims to enable the justification of strict self-defence.

D Extending the Temporal Dimension of Imminence – United Kingdom

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[151] *Nicaragua Case* (n 2) [207].
[152] Ibid.
[153] Ku (n 138) 13.
[154] Ibid.
[155] M. Taylor Fravel, 'Power Shifts and Escalation: Explaining China's Use of Force in Territorial Disputes' (2008) 32(3) *International Security* 44.
[156] Charissa Yong, 'China's militarisation of South China Sea done in self-defence: Foreign Minister Wang Yi' *The Straits Times* (Singapore, 4 August 2018).
[157] Ibid.
[158] *Notification to the UN from China,* CML/18/2009 (7 May 2009) (Note Verbale).
[159] Rodolfo C Severino, 'ASEAN and the South China Sea' (2010) 6(2) *Security Challenges* 38, 38.
[160] Captain Agus Rustandi, 'The impact of China's Nine-Dash Line' (2015) *Indo-Pacific Strategic Digest* 55, 57.

Recent legal diplomacy from the UK clearly rejects a solely temporal determination of imminent threats. This is attributed to the fact that its government considers the highest priority to be the safety and security of their people.[161] On 11 January 2017, the UK Attorney-General, Jeremy Wright, presented a speech outlining the UK's position regarding how 'imminence' should be interpreted in assessing a state's use of force under the principle of self-defence.[162] It reflects a clear acceptance of anticipatory self-defence and refers to the 'Bethlehem Principles,' which are a set of factors for determining imminence as outlined by Daniel Bethlehem, former principal legal advisor to the UK Foreign and Commonwealth Office. The Bethlehem Principles call for assessment of five different factors when determining imminent threats.

These factors are:

1. the nature and immediacy of the threat;
2. the probability of an attack;
3. whether the anticipated attack is part of a concerted pattern of continuing armed activity;
4. the likely scale of the attack and the injury, loss, or damage likely to result therefrom in the absence of mitigating action; and
5. the likelihood that there will be other opportunities to undertake effective action in self-defence that may be expected to cause less serious collateral injury, loss, or damage.[163]

These factors provide a more expansive framework for determining imminence than just a temporal understanding. With reference to the security threats outlined in the above section, factor three seeks to cover ongoing terrorist attacks, factor four covers weapons of mass destruction, and the factor five covers cyber warfare. These factors, not least factor five, support a shift away from assessing imminence as a matter of when an armed attack will occur, towards imminence being a matter of when defensive action must be taken for it to have a reasonable chance of success.[164] This seemingly applies the legal principle expansively, arguably stretching the imminence doctrine beyond its intended purpose under the *Caroline* test. Whilst this may be justified, there has been no formal legal consent from states to amend the position.

The UK has sought to reaffirm the established rules of international law regarding self-defence whilst shaping understanding of the applicable framework to apply to new threats. Wright confirmed in 2017 that whilst the fundamental principles of law remain the same, the way law is applied does

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[161] See, Her Majesty's Government, Prime Minister David Cameron, *National Security Strategy and Strategic Defence and Security Review 2015* (2015) 11.
[162] Wright (n 32).
[163] Daniel Bethlehem, 'Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Non-State Actors' (2012) 106 *American Journal of International Law* 769, 771.
[164] Adil Ahmed Haque, 'The United Kingdom's Modern Law of Self-Defence Part 1' on Ryan Goodman and Steven Vladeck, *Just Security* (12 January 2017) <https://www.justsecurity.org/36235/united-kingdoms-modern-law-self-defence-part/>.

not stand still.[165] The meaning of imminence has changed in the context of modern threats compared to the 1830s, when the customary international law *Caroline* test was formulated. The *Caroline* test implies that a threat is 'instant, overwhelming, leaving no choice of means, and no moment of deliberation'. [166] The Bethlehem Principles are starkly more expansive; however, arguably this shift 'is only [to be] expected, given both passage of time and changes in the nature of armed conflict'.[167] Notably, the UK has articulated clearly that it does not support acts of self-defence for threats which have not crystallised but which might materialise in the future.[168] This distinguishes its position from the doctrine of pre-emptive self-defence, which has been labelled a 'destabilising and dangerously permissive approach'.[169]

Nevertheless, the UK's position has not been without some criticism. Hakimi has argued that without explanation of how the factors 'relate to one another, or how much weight any particular one carries',[170] the position may be open to abuse by states. Factor three, in particular, reflects the pin-prick doctrine which permits defensive uses of force in response to a continuing pattern of attacks. This ultimately means multiple small-scale attacks could be considered collectively as armed force, for the purpose of justifying defensive armed force.[171] This could result in self-defence being justified as responsive to numerous small attacks, rather than preventative of future attacks.[172] It is for this reason that greater transparency over how the factors will be considered is required to ensure an adequate threshold or standard is reached before self-defence is implemented.[173] Another strong criticism has been that the UK position fails to identify an adequate burden of proof, meaning a required evidentiary standard. [174] Whilst the position deeply assesses different evidentiary issues to be considered when implementing armed force against an imminent attack, it does not consider what standard of evidence is required. The lack of an evidentiary burden promotes a subjective test, which may further dilute the already hazy international law restraint.[175]

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[165] Wright (n 32).
[166] Ashburton (n 16).
[167] Wright (n 32).
[168] Ibid.
[169] Brandis (n 61).
[170] Monica Hakimi, 'The UK's Most Recent Volley on Defensive Force', on Dapo Akande, Diane Desierto and Marko Milanovic, *Blog of the European Journal of International Law* (12 January 2017)
[171] Abhimanyu George Jain, 'Rationalising International Law Rules on Self-Defence: The Pin-Prick Doctrine' (2014) 14(2) *Chicago-Kent Journal of International and Comparative Law* 23, 23.
[172] Hakimi (n 170).
[173] Abigail Watson, 'The devil is in the detail: the problem with the UK's legal basis for self-defence' on OpenDemocracy *Open Democracy Free Thinking for the World* (30 June 2017) https://www.opendemocracy.net/abigail-watson/devil-is-in-detail-problem-with-uk-s-legal-basis-for-self-defence>.
[174] Adil Ahmed Haque 'Imminence and Self-Defense Against Non-State Actors: Australia Weighs In' on Ryan Goodman and Steven Vladeck, *Just Security* (12 January 2017) <https://www.justsecurity.org/41500/imminence-self-defense-non-state-actors-australia-weighs/>.
[175] Ibid.

This issue has recently been considered in light of the *DCR v Uganda* case,[176] which has been censured for failing to set out an evidentiary standard for legal assessment when considering the international law governing self-defence.[177] The decision has been criticised for not only 'fail[ing] to clarify the existing situation with regard to evidentiary standards… [further] in several passages, [but] it contradicted the standard that appeared to have been tentatively developing in the preceding jurisprudence of the Court: a standard that was employed in other parts of the same judgment'.[178] The existence and attribution of an imminent armed attack is a question of fact, and one that should be subject to proof.[179] However, the evidentiary standard applicable remains unclear, like many other international obligations.[180] Without a level of required evidence it is easy for states to purport to justify the use of force on a range of different factors, without any real evidence.

Finally, the UK's position should be limited by a secondary test that prevents pre-emptive self-defence.[181] Whilst the UK contends it would not follow the principle of pre-emptive self-defence, this should be formalised in their suggested test and factors to be considered. Without such a limitation, whilst there is a material difference between the description of the UK's position, in comparison to pre-emptive self-defence, there may be no real difference when applying the doctrines.[182] This would mean that even though states claim to be acting in anticipatory self-defence, they are really acting against threats that have not crystallised, and more importantly, may never crystallise.

A Extending the Temporal Dimension of Imminence – United States

The United States has historically played a leading role in broadening interpretations of imminence with respect to self-defence, including claims to the right to exercise pre-emptive self-defence.[183] Some claims have been made in veiled terms, whilst others have been more explicit.[184] The series of US National Security Strategies (NSS), amounting to documents periodically prepared by the US President's administration on security issues, and public statements by both the US presidents and legal advisors since 9/11[185] provide insight into state policies which seemingly support self-defence which veers towards the pre-emptive..

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[176] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Merits)* [2005] ICJ Rep 168.
[177] James Green, 'Fluctuating Evidentiary Standards for Self-Defence in the International Court of Justice' (2009) 58(1) *The International and Comparative Law Quarterly* 163.
[178] Ibid 163-164.
[179] ME O'Connell, 'Rules of Evidence for the Use of Force in International Law's New Era' (2006) 100 *American Society of International Law Proceedings* 44, 46.
[180] CN Brower, 'Evidence Before International Tribunals: The Need for Some Standardised Rules' (1994) 28 *International Law* 47, 49.
[181] Haque (n 164).
[182] Ibid.
[183] Sadoff (n 1) 574.
[184] Robert Kolb, 'Self-Defence and Preventive War at the Beginning of the Millennium' (2004) *Austrian Journal of Public International Law* 111, 130-132.
[185] *NSS 2002* (n 13).

The administration of former President George Bush established the foundation of the US's arguably rather open approach to self-defence in the post 9/11 era. In Bush's 2002 NSS, he promulgated the US's stance, claiming the US 'will, if necessary, act pre-emptively' in self-defence against 'potential adversaries.'[186] The 2002 NSS went on to confirm the US will 'eliminate a specific threat'[187] 'even if uncertainty remains as to the time and place of the enemy's attack'[188] and even 'before [such threats] are fully formed.[189] The 2006 NSS again confirmed the US 'will, if necessary, act pre-emptively in exercising our inherent right of self-defence.'[190] Undoubtedly this latter statement conflicts with the generally accepted international law approach to imminence in self-defence.

Former President Obama's administration later sought to restrict the position advanced by Bush. However, President Trump's public statements have more recently sought to continue extending the interpretation of imminence. President Obama restricted the US's legal diplomacy in the 2010 NSS, confirming the US will continue to comply with existing international law. However, he failed to directly address self-defence in the 'Use of Force' section.[191] In the most recent 2017 NSS, President Trump also neglected to address self-defence and imminence.[192] These omissions may be interpreted as an abandonment of the pre-emption doctrine. However, they could also mean the position was deliberately left open so interpretations of imminence can be extended.[193] On 1 April 2016, Brian Egan, a US legal advisor, outlined President Obama's interpretation on imminence. Egan noted an armed attack may be imminent 'provided that there is a reasonable and objective basis for concluding that an armed attack is imminent' despite 'the absence of specific evidence of where an attack will take place or the precise nature of an attack'.[194]

In the meantime, President Trump has actively promoted the US's legal diplomacy through his statements and administration documents. For example, President Trump has explicitly canvassed the prospect of armed war with North Korea, Iran, Russia and China.[195] Trump hinted at pre-emptive self-defence against North Korea if diplomacy failed, stating the US is 'ready, willing and able' to 'totally destroy North Korea'.[196] This would stretch

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[186] Ibid.
[187] Ibid 16.
[188] Ibid 15.
[189] Ibid v.
[190] Government of the United States of America, Bush Administration, *The National Security Strategy of the United States of America: March 2006* (2006), 18.
[191] Government of the United States of America, Obama Administration, *The National Security Strategy of the United States of America: May 2010* (2010).
[192] Government of the United States of America, Trump Administration, *The National Security Strategy of the United States of America: December 2017* (2017).
[193] Christine Gray 'President Obama's 2010 United State National Security Strategy and International Law on the Use of Force' (2011) 10 *Chinese Journal of International Law* 35, 50
[194] Brian J Egan, 'International Law, Legal Diplomacy, and the Counter-ISIL Campaign' (Speech delivered at the American Society of International Law, Washington, 1 April 2016).
[195] John Torpey, 'Pinker and progress' (2018) 47(4) *Theory and Society* 511, 516.
[196] Donald Trump, 'Statement by H.E. Mr. Donald Trump, President of The United States Of America at the 72nd Regular Session of The United Nations General Assembly' (Speech delivered to the United Nations Headquarters, New York, 19 September 2017).

imminence to a situation where North Korea has not yet mounted any form of attack against the US. In February 2018, the Trump Administration released Trump's Nuclear Posture Review[197] (henceforth the NPR). The NPR states that the purpose of the US nuclear capabilities includes the 'hedging against prospective and unanticipated risks'[198] and to ensure the US can 'respond to possible shocks of a changing threat environment'.[199] These vague principles support the extension of imminence beyond any temporal-based legal reasoning.

Extending the Temporal Dimension of Imminence – Russia

Russia's recent legal diplomacy, revealed in particular through President Vladimir Putin's public statements, show a distinct pivot from anticipatory self-defence to pre-emptive self-defence. That said Putin's comments regarding self-defence under Article 51 of the Charter are at times contradictory. Nevertheless, they have confirmed Russia's view that states have a right to self-defence pre-emptively. In 2003, Russia denounced the US's attack in Iraq, claiming it was pre-emptive and lamented the 'replacement of the international law with the law of the jungle'.[200] However in September 2004, following the seizure of a Russian school by Chechen militants, Putin confirmed Russia was 'seriously preparing to act preventively against terrorists'.[201] This was followed by a public statement from the then Russian Defence Minister indicating Russia has the 'right of pre-emptive strikes against terrorists anywhere in the world'.[202] This clarifies Russia's changing view of imminence, as a result of its security interests.

This pre-emptive logic is continuing to be applied, albeit in a veiled articulation. In 2015, Putin commented that Russia intervened in Syria 'preventatively, to fight and destroy militants and terrorists on the territories that they already occupied, not wait for them to come to our house.'[203] This stretches imminence to a potential prospective rather than current imminent threat. Further, Putin suggested to the Russian Parliament that Russia's Crimea intervention in 2014 was an act of self-defence. Whilst self-defence was not directly articulated, Putin framed the requirements stating Russia had to respond to 'the threat to the lives of citizens of the Russian Federation, our compatriots, the personnel of the military contingent of the Armed Forces of the Russian Federation deployed in the territory of Ukraine.'[204] Similar

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[197] Government of the United States of America, Department of Defense, *Nuclear Posture Review* (2018).
[198] Ibid xiv.
[199] Ibid.
[200] Christian Caryl, 'Balancing Act' *Newsweek* (online) 19 March 2003 <https://www.newsweek.com/balancing-act-132359>.
[201] W. Michael Reisman and Andrea Armstrong 'Chapter 4: Claims to Pre-emptive Uses of Force: Some Trends and Projections and Their Implications for World Order' in Michael Schmitt and Jenal Pejic *International Law and Armed Conflict: Exploring the Fault lines* (Martinus Nijhoff, 2007) 79, 105.
[202] Ibid.
[203] Helene Cooper et al 'Russians Strike Targets in Syria, but Not ISIS Areas', *The New York Times* (New York, 30 September 2015).
[204] Veronika Bikova, 'The Use of Force by the Russian Federation in Crimea' (2015) *Heidelberg Journal of International Law* 75, 38.

references were made by representatives of Russia during debates on the intervention in the UN organs.[205] However, Putin subsequently reversed this position, and instead claimed Russia had acted for humanitarian purposes.[206]

Risk of Abuse and International Instability

Whilst it may be necessary to broaden the interpretation of imminence past a temporal understanding in light of existing legal diplomacy, there is a fine distinction between anticipatory self-defence and pre-emptive self-defence.[207] The legal diplomacy of the US and Russia reveals the current state of international law regarding the use of self-defence against imminent threats is open to abuse by states, to the extent that pre-emptive self-defence. This promotes violence and risks the fundamental international law principle of maintaining international peace. If pre-emptive self-defence was to be implemented, international tension would escalate immensely.[208] This threat is amplified where allied states are concerned, as the threat of open armed war could become a reality. The reason for this is that any loose interpretations of international law could easily be perceived by a state as offensive use of force. If one state was to implement self-defence pre-emptively, being an illegal use of force, any subsequent armed force against that state would be lawful under the responsive self-defence justification. This could spark ongoing lawful self-defence attacks, with certain states allying together against others.

The US and Russia have never relied on pre-emptive self-defence as a justification for the use of force internationally, even though they have domestically articulated it. This may be because whilst state-specific policy tends to extend beyond international law constraints, states are not willing to promote their legal exceptionalism on the international stage.[209] However, if either state was to implement pre-emptive self-defence in practice, the UN would have limited ability to condemn the violation given both states hold veto power on the Security Council.[210] Use of veto power would be further justified by the UK's position, which if loosely applied, would also allow pre-emptive self-defence in practice. Whilst use of the veto power carries strong diplomatic implications, the current state of international law regarding self-defence against imminent threats is open to exploitation. This is because use of the veto power, following pre-emptive self-defence would be challenged less seriously, given other states promote similar interpretations of imminent threats.

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[205] UN SCOR, 69th sess, 7124th mtg, UN Doc S/PV.7124 (1 March 2014) 3: (Churkin commented Russia deployed armed forces 'with respect to the extraordinary situation in Ukraine and threats against the lives of Russian citizens').

[206] Bikova (n 204) 45.

[207] Pre-emptive self-defence refers to the use of force preventively, to defend against latent or non-imminent threats; whilst, anticipatory self-defence refers to threats that have materialised but are yet to happen. See *Our Shared Responsibility* (n 62).

[208] Johannes van Aggelen, 'The Consequences of Unlawful Preemption and the Legal Duty to Protect the Human Rights of its Victims' (2009) 42(21) *Case Western Reserve Journal of International Law* 21, 37.

[209] Brian Sang, 'The Limits of Targeted Killing in Counter-Terrorism Operations: An International Law Perspective' (2017) 3 *Strathmore Law Review* 1, 3.

[210] Andrew Garwood-Gowers, 'Self-Defence Against Terrorism in The Post-9/11 World' (2004) 4(2) *Queensland University of Technology Law and Justice Journal* 167, 181.

Russia and the US's open encouragement of pre-emptive self-defence, in particular, can be seen as a Kriegraison attempt to undermine Article 51 of the Charter. The doctrine of Kriegraison contends that necessity knows no law.[211] Whilst this position is recognised in domestic criminal law regarding the use of self-defence by humans, its implementation in the case of war is distinguished.[212] Emphasis on the importance of necessity, through the broadening of imminence, which postulates that it is necessary for states to respond to threats that have not crystallised,[213] is reminiscent of Germany's military doctrine of necessity during World War I.[214] This doctrine was strongly disputed in *US v List* (the *Hostage* case)[215] which stated that, whilst the defendant's 'considered military necessity, a matter to be determined by them, a complete justification of their acts, we do not concur in the view that the rules of warfare are anything less than they purport to be. Military necessity or expediency does not justify a violation of positive rules.'[216] The US and Russia's legal diplomacy should be recognised as an application of a legally discredited doctrine.

This aspect of Russia and the US's legal diplomacy can be attributed to their hegemonic nature. Hegemony refers to the belief by a state that its military power makes it a dominant state, above the usual constraints imposed by international law and within international relations. This position may be well sustained, particularly in terms of the US's nuclear power. However, reliance on this doctrine in expanding the interpretation of imminent threats has been criticised. This 'one-sided approach to the global balance of power' has been labelled 'the core of international instability',[217] undermining the strategic stability and security of a number of other states. In contrast, Professor Koh has commented that in light of contemporary threats, the international community must respond 'in the spirit of the laws… applying principles, not merely power.'[218] Pre-emptive self-defence is legally flawed as it applies a retroactive consideration of lawfulness, excluding any possibility of an ex post facto judgment of lawfulness.[219] Pre-emptive self-defence is a step away from lawful reasoning, threatening international peace.

I. CHARTING A WAY FORWARD

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[211] Y Sandoz et al (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12th August 1949* (International Committee of the Red Cross, 1987) [1386].

[212] Catherine Connolly "Necessity Knows no Law': The Resurrection of Kriegsraison through the US Targeted Killing Programme' (2017) 22(3) *Journal of Conflict & Security Law* 463, 473.

[213] Ibid 463.

[214] Isabel Hull, *A Scrap of Paper: Breaking and Making International Law during the Great War* (Cornell University Press, 2016) 25-26.

[215] *Hostage Case* (*United States v List (Wilhelm) and ors*) (1948) 8 LRTWC 34.

[216] Ibid 1255-1256.

[217] Mostafa Azrian, "US Hegemony is Over': Russia Can Give Devastating Response to Attack - Observer' on *Sputnek International* (4 March 2018) <https://sputniknews.com/analysis/201803041062200765-iranian-expert-us-hegemony/>.

[218] Harold Hongju Koh, 'The Spirit of the Laws' (2002) 43 *Harvard International Law Journal* 23, 39.

[219] F Berman et al, 'The Chatham House Principles of International Law on the Use of Force in Self-Defence' (2006) 55 *International and Comparative Law Quarterly* 963, 964-68.

Prevailing uncertainty surrounding the current state of international law regarding self-defence against imminent threats under both the Charter and customary international law undermines the international rule of law. Relying on the above analysis, in this section we propose a re-articulated international law position which attempts to resolve the shortfalls in the current law. We also propose formal and informal mechanisms to implement the proposed changes and suggest the most viable one. Ultimately, any change to an international law requires consent. Accordingly, we provide justification as to why a change is in the long-term interests of states, in particular of the five permanent members of the Security Council, along with the rest of the international community.

A Proposed Refined Position on Self-Defence and 'Imminent Threats'

It is evident the current state of international law regarding self-defence against imminent threats presents serious shortcomings. Firstly, the emergence of new threats has created a need to move beyond a temporal understanding of imminent threats (above III). However, under current international law, if a state was to take an abiding approach and avoid the use of illegal force until a threat is temporally imminent, there are limited prospects of addressing the kind of threats states now actually face. Secondly, existing legal diplomacy illustrates diverse interpretations, with some states attempting to legally justify their position of imminent threats, even where it arguably extends beyond a lawful justification (above IV). This has seen an emergence of reasoning said to be 'illegal but justifiable'.[220] Such reasoning brings into question the viability of the international regulatory framework.

The following Table provides an overview of the issues presently surrounding the current state of international law regarding self-defence against imminent threats, and proposes a solution of how this position should be refined:

B Table of Proposed Redefined Position

<table>
<tr><th colspan="2">CURRENTLY</th></tr>
<tr><td colspan="2">Anticipatory self-defence: Threatened states can act in self-defence, pursuant to Article 51 of the Charter, where a threat is imminent.[221]
Imminent Threats: Imminent threats are 'instant, overwhelming, leaving no choice of means and no moment of deliberation;'[222] they are proximate[223] and non-latent.[224]</td></tr>
<tr><td>ISSUE 1: Contemporary international threats – Weapons of Mass Destruction (WMD), Terrorism, Cyber-attacks</td><td>ISSUE 2: Diverse legal diplomacy – France, China, UK, US and Russia</td></tr>
</table>

[220] Carsten Stahn, 'Terrorist Acts as 'Armed Attack': The Right to Self-Defense, Article 51(1/2) of the UN Charter, and International Terrorism' (2003) 27 *Fletcher Forum of World Affairs* 35, 38.
[221] Ashburton (n 16).
[222] Ibid.
[223] *Our Shared Responsibility* (n 62) 54 [189].
[224] *In Larger Freedom* (n 66) 33 [124].

WMD - can be detonated quickly, catastrophic consequence, limited success in legal deterrence where used by terrorist groups **Terrorism -** growing rate, patterns of continued violence, armed attacks can eventuate quickly as a result of globalisation **Cyber-attacks -** technological developments enable cyber-attacks to equate to armed attacks; difficult to detect as can be activated without warning Accordingly, an extension of the current international law position is required as new threats are difficult to identify on a solely proximate assessment of imminence.	Analysis of existing legal diplomacy reveals: **Significant Divergence** - the lack of clarity regarding the current international law - the requirement for a consistent position, rather than an unwritten exception used by certain states **A Push to Extend the Meaning of Imminence** - requirement for states to be clear and transparent in their legal reasoning - the need for an adequate threshold/evidentiary standard of proof - the risk of exploitation and pre-emptive self-defence under the current international law - the risk of pre-emptive self-defence escalating international tension and sparking open armed war
NEW POSITION **Anticipatory self-defence:** Threatened states can act in self-defence, pursuant to Article 51 of the Charter, where beyond reasonable doubt, it is the last feasible opportunity to act against an imminent threat AND the threatened state is demonstrably not acting pre-emptively against a threat which has not crystallised. **Imminent threats:** Relying on the Bethlehem Principles, imminent threats are to be determined upon assessment of the following: (a) the nature and immediacy of the threat; (b) the probability of an attack; (c) whether the anticipated attack is part of a concerted pattern of continuing armed activity; and (d) the likely scale of the attack and the injury, loss, or damage likely to result therefrom in the absence of a mitigating action.	

C Formulation and Application of New Position

The proposed refined position (PRP) is simultaneously reflective of realities which have emerged from legal diplomacy alongside its criticism. The UK position, as should be apparent, forms the basis of the PRP, as it not only offers an effective constraint in light of contemporary security threats, but also prevents pre-emptive self-defence. The PRP includes consideration of the five factors detailed in the Bethlehem Principles,[225] which address the interlinked threats of WMD, terrorism and cyber-attacks. However, the PRP is further refined to emphasise assessment of the last feasible window of opportunity to respond to a threat. This prevents states from acting under self-defence excessively, which is considerably of the utmost importance. The other four

[225] Bethlehem (n 163) 771.

Bethlehem factors are still included in the PRP, being considered auxiliary for the purpose of determining an imminent threat.

The PRP significantly contrasts the aspect of the current international law which relies on 'no moment for deliberation'.[226] Whilst this seemingly expands the exception, meaning force could be used more often, this is balanced against the evidentiary requirement. Even though modern threats require action earlier, this does not mean standards should be lax.[227] Notably, it has been commented that whilst threats, such as cyber threats, can be detonated more quickly, detection technology has also improved, allowing states to detect potential threats.[228] This means it will be possible to meet the standard required when deliberating whether or not to use force. The criminal evidentiary test of 'beyond reasonable doubt' is used, instead of the civil test of 'on the balance of probabilities' given the criminal nature of armed attack.

In applying this position, it is likely that states will not share their evidentiary evidence until after the attack. This is reasonable considering it could risk their national security interests. However, there is no reason this information should not be required if the use of self-defence under Article 51 of the Charter is questioned through international court proceedings or by the Security Council. Notably, this is not a substantive change. Under the current position, states are required to still explain their justification of self-defence, subsequent to the attack. Requiring evidence beyond reasonable doubt simply implements a standard, instead of leaving states unaware of evidentiary requirements.

D The Challenge of Implementation

Whilst we conclude that a refined position concerning imminent threats in self-defence is required (as well as possible), the mechanism for implementing our PRP must be considered. *The Statute of the International Court of Justice*[229] specifies which primary materials should be used to determine international law, those being:

1. international conventions;
2. international customs, as evidence through general practice accepted as law;
3. the general principles of law as recognised by civilised nations;
4. … judicial decisions and the teachings of the most highly qualified publicists of the various nations.[230]

In light of this, the only way in which the international law can be altered through codification is by amending the relevant Charter provision or creating a subsequent treaty.

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[226] Ashburton (n 16).
[227] Ian Yuying Liu, 'The Due Diligence Doctrine under Tallinn Manual 2.0' (2017) 33(3) *Computer Law & Security Review* 390, 391.
[228] Christian Schaller, 'Beyond Self-Defense and Countermeasures: A Critical Assessment of the Tallinn Manual's Conception of Necessity' (2017) 95(7) *Texas Law Review* 1619, 1634.
[229] *Statute of the International Court of Justice*.
[230] Ibid art 38.

Amending the Charter provision or creating a new treaty is highly unlikely. Even though the Charter includes a mechanism for amendments, the consent threshold required is high. It is 'extremely difficult to attain the necessary express agreement of states on such [vital problems] and it requires sometimes decades'.[231] Any amendment must be adopted by two thirds of the members of the General Assembly, and subsequently ratified by two thirds of the members of the UN, including all permanent five members of the Security Council.[232] Since the Charter came into force, this has only occurred five times in relation to procedural matters,[233] which illustrates the power is rarely used and unlikely to be used to effect anything amounting to significant change.

The creation of a subsequent treaty is even more unlikely. A new treaty, being a substantial mechanism for change, would ultimately risk the veto power of the Security Council permanent five, as it could have a revolutionary flow-on effect. If a new treaty was considered, it would be necessary to reduce the veto power given the obstructing role it has played in addressing ongoing conflicts under the current treaty, being the Charter. Accordingly, there would be limited success in obtaining consent from the permanent five. As noted by James and Nahory, '[t]he P-5 are content with the present arrangement and oppose any changes that might dilute or challenge their power or expand their 'club'.'[234] This illustrates change through codification is not a viable solution.

Alternatively, the Security Council itself could use its position to amend and clarify the state of the current international law through a Security Council resolution. This option was used to effect change following 9/11.[235] Notably, the resolutions concerned then relied on the Security Council's power under Chapter XII of the Charter, meaning they were binding on all member states.[236] That said, whilst Chapter XII of the Charter allows the Security Council to address individual threats, it does not give the Security Council the power to amend concepts of international law.[237]

The Security Council can make resolutions not pursuant to Chapter XII. Such resolutions would not be binding on states, being only recommendations.[238] However, they would be of normative value. Resolutions 'can, in certain circumstances, provide evidence important for establishing changing or

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[231] Karol Wolfke, 'Treaties and Custom: Aspects of Interrelation', in Jan Klabbers, Rene Lefeber (eds), *Essays on the Law of Treaties: A Collection of Essays in Honour of Bert Vierdag* (Martinus Nijhoff, 1998) 38.
[232] *The Charter* (n 5) art 108.
[233] United Nations, *Introductory Note* (2018) United Nations http://www.un.org/en/sections/un-charter/introductory-note/index.html.
[234] Paul, James and Céline Nahory, 'Theses Towards a Democratic Reform of the UN Security Council', on Jens Martens et al (eds) *Global Policy Forum* (13 July 2005).
[235] See Government of the United States of America, National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* (2012).
[236] *The Charter* (n 5) art 25.
[237] Stefan Talmon, 'The Security Council as World Legislature (2005) 99(1) *The American Journal of International Law* 175, 179.
[238] *The Charter* (n 5) arts 10 and 14.

establishing custom.'[239] Further, the benefit of using a Security Council resolution, instead of codified means, is that any challenges to the position (which are bound to occur over time in practice) can be overcome through a series of additional resolutions, meaning the position can be continually assessed and improved. Additionally, clarification and guidance through a Resolution would likely lead to an uptake of the PRP by states in practice, as states could not rely on loose justifications based on ambiguous interpretations. This state practice could subsequently amend the customary international law position.

E Justification for Redefining 'Imminent Threats'

Whilst the state of the current international law position is open for exploitation, particularly by the permanent five themselves, the Security Council should not be devalued. It remains the authoritative global body tasked with conflict resolution and discussion pertaining to acceptable standards for the use of force.[240] Without it, there would be no comparable platform to drive global efforts at peace. Further, the very existence of international law, in spite of its limitations, not least concerning enforcement, still serves as a stabilising factor in the face of global threats.[241] Therefore it is within the international community's interests to redefine the international law on self-defence in order to avoid a serious conflict which risks the current international regulatory framework.

Ultimately the PRP would reduce the ability of permanent five to use the veto power to protect themselves when relying on Article 51 of the Charter unlawfully. Clarity means the permanent five could not exploit the current state of international law regarding self-defence for their own gain. However, the PRP would ultimately protect the veto power in some respects as it reduces the likelihood of large-scale conflict resulting from an ineffective constraint against pre-emptive self-defence. Such a conflict would likely be attributed as a failure of the Security Council and could jeopardise the protected status of the permanent five and possibly the international rule of law itself. However, uptake by the permanent five remains unlikely as states rarely risk their short-term interest for a future risk due to their tendency to prioritise current issues in international relations.[242] This illustrates an insurmountable inability to overcome transaction costs,[243] and persuade the

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[239] *Legality of Threat of Nuclear Weapons Case (Advisory Opinion)* [1996] ICJ Rep 1996, 253-255 [70].

[240] Leah Campbell, 'Defending against Terrorism: A Legal Analysis of the Decision to Strike Sudan and Afghanistan' (2000) 74 *Tulane Law Review* 1067, 1074.

[241] Marko Divac Öberg 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ' 2005 16(5) *European Journal of International Law* 879, 880.

[242] See, eg, Joseph M. Brown and Johannes Urpelainen 'Picking Treaties, Picking Winners: International Treaty Negotiations and the Strategic Mobilization of Domestic Interests' (2015) 59(6) *Journal of Conflict Resolution* 1043, 1044: ('There are compelling reasons to believe that time and the looming possibility of government turnover affect [international] negotiations').

[243] Andrew Guzman 'The consent problem in international law' (2011) *UC Berkeley: Berkeley Program in Law and Economics* 4, 22.

permanent five of the long-term benefits of amending the international law position.

F Conclusion

In conclusion, the international law on self-defence in light of imminent threats should be amended through a Security Council resolution that articulates the PRP. It is in the interests of the international community to have an effective clear constraint which contains contemporary threats. Additionally, it is in the permanent five's long-term interests, and undoubtedly part of their remit, to articulate a clear position which removes any possibility of pre-emptive self-defence to ensure the maintenance of international peace and security. Whilst the permanent five may be reluctant to alter the position, sound reasoning illustrates that the current state of international law regarding self-defence against imminent threats is ineffective and insufficient. A clearer position, which is effective in the contemporary international environment is necessary to promote international peace and security.

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Does the Common Law and Equity Provide an Adequate Framework for Digital Assets in Australia?

Joshua Mills*

This article explores the implications of a range of digital assets through a contemporary common law approach. It establishes the property status of digital assets by analysing historical concepts, in particular the juxtaposition between Blackstonian and Hohfeldian concepts of property. In establishing the potential of digital assets to be considered property it suggests new legal avenues for digital asset owners through application of traditional legal principles, causes of action and remedies regarding personal property. The article considers the potential of tort law and equity to provide an adequate legal framework striking a balance between digital asset owners, information technology service providers and third parties. It concludes with recommendations to encourage academic exploration of common law applications and endorses of legal mechanisms such as a tort of privacy, information fiduciaries and recognition of personal property rights in digital assets.

I INTRODUCTION

This article explores Australian law regarding 'Digital Assets', intangibles that are an artefact of digital technology and evolving social practice in our time but may be understood through reference to past law and principles.

The invention of the World Wide Web in 1989 by Tim Berners-Lee is a critical point in modern history and is recognised as a defining feature of the