A debate continues on whether anticipatory self-defense is permitted in the era of the UN Charter. Two recent commentators say that States need not await the first blow but may react in self-defense, provided principles of necessity and proportionality are observed. They differ, however, on when States may claim anticipatory self-defense. This is not surprising, since others seem to change views. Still others take no clear position.

Most anticipatory self-defense claims since World War II have been asserted by States responding unilaterally to another country’s actions. Claims of this nature are more likely to be raised in the future. The UN Charter, Article 51, declares in part that “Nothing in the ... Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a [UN] Member ... until the Security Council has taken measures necessary to maintain international peace and security.” This article proposes to analyze the alternative to individual self-defense, i.e., collective security pursuant to treaty.

After examining nineteenth century international agreements and those of the first half of this century, the scope of collective self-defense in Charter-era treaties...
will be analyzed. The inquiry for these agreements is whether a right of anticipatory collective self-defense is stated in them, paralleling States' right to claim individual anticipatory self-defense. If there is a right of anticipatory collective self-defense, what is the scope of that right, and what are the limitations on it?

If the Peace of Westphalia (1648) began the nation-state system, the Congress of Vienna (1815) started the modern movement toward collective security. It is from this benchmark that Part I examines treaty systems through World War I. Part II analyzes treaty systems during the era of the Covenant of the League of Nations (1920–46), and the Pact of Paris (1928) through World War II. Part III examines the drafting of the Charter and court decisions, including the Nuremberg International Military Tribunal, immediately following World War II. Part IV examines collective self-defense treaties concluded since 1945. Part V offers projections for the future of anticipatory collective self-defense in the Charter era.

In terms of treaties and practice affecting the United States, between the alliance with France that helped support a successful Revolution and the Declaration of Panama, the United States did not ratify a single mutual self-defense agreement. The worldscale record has been different, but lack of U.S. participation in this kind of arrangement may explain why many in the United States are not familiar with the concept of collective self-defense, and particularly anticipatory collective self-defense. Because there has been a concept of anticipatory collective self-defense for nearly two centuries, including the 50 years that the Charter has been in force, this form of joint response by States appears to have attained the status of a customary norm.

I. From the Congress of Vienna to World War I

Within months after an ad hoc alliance defeated Napoleon I at Waterloo and established the Congress system, the principal powers began building alliances to assure peace. Austria, Prussia, and Russia pledged in the Holy Alliance (September 1815):

Conformably to . . . Holy Scriptures, which command all men to consider each other as brethren, the Three contracting Monarchs will remain united by . . . a true and indissoluble fraternity, and considering each other as fellow countrymen, they will, on all occasions and in all places, lend each other aid and assistance; and, regarding themselves toward their subjects and armies as fathers of families, they will lead them, in the same spirit of fraternity with which they are animated, to protect Religion, Peace, and Justice.16
Although at least six European states acceded to the Alliance, Great Britain's Prince Regent did not;\(^17\) the result was a Treaty of Alliance and Friendship in November 1815 to continue the earlier alliance's collective security policy.\(^18\) Besides confirming standing forces in France, the allies agreed to "concert together, without loss of time, as to the additional ... troops to be furnished ... for the support of the common cause; and they engage to employ, in case of need, the whole of their forces ... to bring the War to a speedy and successful termination, reserving to themselves to prescribe, by common consent, such conditions of Peace as shall hold out to Europe a sufficient guarantee against the recurrence of a similar calamity[,]" i.e., advent of another conquest. They also agreed to meet periodically to "consult ... upon their common interests, and for the consideration of the measures which at each of those periods shall be considered the most salutary for the repose and prosperity of Nations, and for the maintenance of the Peace of Europe.\(^19\)

The Alliance, to which France was admitted as part of the Concert of Europe in 1818,\(^20\) had two policies: periodic consultation to consider measures to help preserve peace, and commitment of forces to end any conflict that had ignited. The Alliance thus bespoke the collective self-defense concept and, depending on the nature of consultations and actions decided, a potential for anticipatory self-defense.\(^21\) An example of the latter occurred in 1848, when revolution in France accompanied transition to the Second Republic. Fearing a new war of French national liberation, Prussia put its Rhine troops on alert and Russia directed its armies to be ready for war. Tsar Nicholas was dissuaded from sending 30,000 to help Prussia, a move that might have resulted in war.\(^22\)

It was in this context that the right of anticipatory self-defense was formulated in the Caroline Case (1842), i.e., that a proportional anticipatory response in self-defense is admissible when the need is necessary, instant, overwhelming and admitting of no other alternative with no moment for deliberation.\(^23\) The final requirement—no moment for deliberation—is not inconsistent with consultation clauses in the early treaties. States then and now may consult and decide to employ anticipatory collective self-defense as an option to a threat. Moreover, States then and now might agree that those countries claiming a right of anticipatory self-defense might thus respond as part of collective self-defense.

The Crimean War. The potential for reactive and anticipatory collective self-defense was stated again during the Crimean War (1854).\(^24\) The war began when Russia occupied the Turkish principalities of Moldavia and Wallachia; Britain and France declared they
What the Treaties Have Said

... [had] concerted, and will concert together, as to the most proper means for liberating the Territory of the Sultan from Foreign Invasion, and for accomplishing the object ... [of reestablishing peace between Russia and Turkey and preserving the continent from “lamentable complications which ... so unhappily disturbed the general Peace”]. ... [T]hey engage to maintain, according to the requirements of the War, to be judged of by common agreement, sufficient Naval and Military Forces to meet those requirements, the description, number, and destination whereof shall, if occasion should arise, be determined by subsequent Arrangements.

They renounced “Acquisition of any Advantage for themselves” and invited other European powers to accede to the alliance. Austria and Prussia tried to avoid participation in the war “and the dangers arising therefrom to the Peace of Europe”; they concluded a Treaty of Alliance, which, inter alia, said that “a mutual Offensive Advance is stipulated for only in the event of the incorporation of the Principalities, or ... attack on or passage of the Balkans by Russia.” Later that year an alliance among Austria, Britain, and France attempted to protect Austria’s occupation of the principalities against return of Russian forces. If war broke out between Austria and Russia, the three countries pledged their “Offensive and Defensive Alliance in the present War, and will for that purpose employ, according to the requirements of the War, Military and Naval Forces. ...” Similar terms appeared in an 1855 allied convention with Sardinia. In 1855 Britain and France also pledged to “furnish ... Sweden ... sufficient Naval and Military Forces to Co-operate with the Naval and Military Forces of [Sweden to] ... resist ... Pretensions or Aggressions of Russia.” A treaty ring around Russia thus tightened.

Preparations for the Crimea expedition, noted in the Anglo-French treaty, were in the nature of anticipatory self-defense, and the Austro-Prussian alliance recognized a concept of “Offensive Advance,” i.e., anticipatory action, if Russia moved through the Balkans; the parties would attack Russia only if Russia passed through territory close to Austrian borders. Similar concepts were recognized in the Austro-Anglo-French alliance and the Sardinia military convention. The Swedish treaty also provided for anticipation of Russian action.

A verbal agreement between France and Sardinia preceded the Franco-Austrian war (1858–59). It included a “defensive and offensive alliance,” a French pledge to come to the aid of Sardinia if it or Austria declared war, and a statement that occupation of Italian territory, Austrian violation of existing treaties, “and other things of a similar kind” would cause a French war declaration. During the Franco-Prussian War (1870–71), the belligerents
agreed to cooperate with Britain to assure Belgian neutrality if it were threatened by an opponent. In both cases, the potential for action was great and could have included what would be considered anticipatory self-defense today. An example from the 1858-59 conflict was Napoleon III's hearing reports that Prussia was mobilizing six army corps "inclined him further to make peace. . .". The Franco-Sardinian understanding was also an example of an informal self-defense arrangement, made without benefit of a formal treaty. A similar instance came in the U.S. Civil War, when a Russian admiral confidentially advised U.S. Admiral David G. Farragut in 1863 that he had sealed orders to support the United States if it became involved in conflict with a foreign power (e.g., Britain or France) which supported the Confederacy, a war that never was. This form of informal collective self-defense is available under the UN Charter, as will be seen.

In Latin America there was a counterpart conflict, the War of the Triple Alliance (1865–70); Argentina, Brazil and Uruguay signed an "offensive and defensive" alliance, claiming Paraguay had provoked war. At the same time, however, other Latin American countries signed defense alliances pledging consultation and mutual defense against an aggressor or any acts to deprive them of sovereignty and independence. Western Hemisphere States, but not the United States, were thus negotiating the same kinds of treaties as in Europe.

The Treaty Map Up to World War I, 1871-1914. After the Franco-Prussian War ended, agreements leading to the Triple Alliance (Austria-Hungary, Germany, Italy), and those resulting in the Entente of France and Russia and ultimately Great Britain, had examples of reactive or anticipatory self-defense. The 1907 Hague Conventions, still in force, would impose rules for war declarations and forbid resort to war to collect contract debts, but do not apply to the collective self-defense issue. The alliance systems continued to provide for collective self-defense and sometimes explicitly recognized anticipatory self-defense, e.g., resort to self-defense if an opponent mobilized. Taylor makes the point that these treaties, along with economic development on the Continent, gave Europe 34 years of peace. Cannot the same be said about alliance systems and regional economic development treaties since World War II?

The Convention of Schönbrunn (1873) provided: if an "aggression coming from a third Power should threaten to compromise the peace of Europe, [the parties] mutually engage to come to a preliminary understanding . . . to agree as to the line of conduct to be followed in common." A special convention would be necessary to undertake military action. In 1878 Britain concluded a

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Defensive Alliance with Turkey aimed at Russian territorial interests in Turkey, promising to join Turkey to defend with force of arms. In 1879 Austria-Hungary and Germany negotiated a Treaty of Alliance aimed at Russia. If Russia attacked either party alone or "by an active co-operation or by military measures which constitute a menace to the Party attacked," the other had to assist "with the whole war strength of their Empire." It was "the first permanent arrangement in peace-time between two Great Powers since the end of the ancien régime." Two years later, the three empires were on the same side, pledging that if one party were at war with a fourth Great Power, the others would maintain "benevolent neutrality." At about the same time Chile fought Bolivia and Peru in the Pacific War, which resulted in loss of Bolivia's coast and Peruvian territory; the defensive alliance between the two States pledged defense against "all foreign aggression" or acts designed to deprive a party of sovereignty and independence.

Treaties to isolate France began with the Treaty of the Triple Alliance (Austria-Hungary, Germany, Italy, 1882), "one of the most stable and important of the European alignments," lasting until 1915. If France attacked Italy, France attacked Germany, or if one or two signatories were attacked "without provocation," and were at war with two or more other Powers, the other had to join the conflict. Articles 4 and 5 provided:

[If] a Great Power nonsignatory to the ... Treaty should threaten the security of the states of one ... Party, and the threatened Party should find itself forced on that account to make war against it, the two others bind themselves to observe towards their Ally a benevolent neutrality. Each ... reserves to itself, in this case, the right to take part in the war, if it should see fit, to make common cause with its Ally.

... If the peace of any ... Party should chance to be threatened under the circumstances foreseen by ... Articles [1-4], the ... Parties shall take counsel together in ample time as to the military measures to be taken with a view to eventual co-operation.

Secrecy was pledged; this was among many "secret" treaties of the era, which were not truly secret, being so only for specific terms. In their "secrecy" they were "engines of publicity."

In 1883, Romania and Austria-Hungary agreed that if the other were attacked "without provocation," an obligation would arise. If either were "threatened by an aggression under [these] ... conditions," the governments would confer, with a military convention to govern Operations. Germany acceded to this treaty, as did Italy.
The third Triple Alliance\textsuperscript{56} resulted in the beginning of the Entente Cordiale, whose exchange of notes stated a Franco-Russian agreement that if "peace should be actually in danger, and especially if... [a] part[y] should be threatened with an aggression, the two parties undertake to reach an understanding on measures whose immediate and simultaneous adoption would be imposed upon the two Governments by the realization of this eventuality."\textsuperscript{57} A Military Convention followed in 1892, providing that if Triple Alliance forces or an Alliance State should mobilize, France and Russia, "at the first news of the event and without the necessity of any previous concert, shall mobilize immediately and simultaneously the whole of their forces and shall move them... to their frontiers" to attempt to force a two-front war. Respective general staffs would cooperate to prepare and facilitate execution of these measures.\textsuperscript{58} These terms were generally not known, but most diplomats considered France and Russia partners.\textsuperscript{59} Britain joined the Entente by separate arrangement with France (1904)\textsuperscript{60} and Russia (1907)\textsuperscript{61} but signed no formal defense alliances, although Russia wanted them.\textsuperscript{62} Britain began unofficial military and naval conversations with France in 1906, however.\textsuperscript{63}

A 1904 Bulgar-Serb alliance "promise[d] to oppose, with all the power and resources at their command, any hostile act or... occupation" of four Balkan provinces; it was directed at Turkey. The alliance also pledged joint defense "against any encroachment from any source... on the present territorial unity..." If either event happened, the allies would conclude a special military convention.\textsuperscript{64} These countries negotiated the same arrangement in 1912, with a military convention.\textsuperscript{65} Bulgaria also negotiated an alliance with Greece; it provided that if either "should be attacked by Turkey, either on its territory or through systematic disregard of its rights, based on treaties or on the fundamental principles of international law," they would agree to assist each other.\textsuperscript{66} In 1913 Greece and Serbia signed an alliance and military convention; if "one of the two... should be attacked without any provocation on its part," the other would assist with all of its armed forces.\textsuperscript{67}

In 1911, despite reticence to commit in Europe,\textsuperscript{68} Britain concluded a defensive alliance with Japan; the treaty had the almost standard articles for prior consultation, armed common defense upon unprovoked attack or aggressive action by a third State, with a military and naval arrangement to follow, and periodic military consultations.\textsuperscript{69}

Analysis. This labyrinth of agreements did not prevent, and may have contributed to,\textsuperscript{70} the Great War. Neither the Hague ultimatum system,\textsuperscript{71} nor the language of these treaties, which pledged reactive self-defense but
occasionally contain a potential for anticipatory self-defense, could stop mobilizations and war declarations.\textsuperscript{72} It was applying military force and diplomacy, or failure to apply force and diplomacy properly through treaties,\textsuperscript{73} and not provision for self-defense in them, which resulted in the cataclysm.

The treaties of 1815–1914 were not drafted with today's concepts of self-defense, anticipatory self-defense, or collective self-defense in mind. They have been superseded by the Pact of Paris insofar as they justify resort to offensive war as national policy,\textsuperscript{74} and by the Covenant and the Charter as to their secrecy provisions.\textsuperscript{75} They were conditioned by the 1907 Hague Conventions.\textsuperscript{76} Nevertheless, several principles emerge. There was a concept of collective self-defense, multilateral and bilateral. Many treaties had general statements requiring prior consultation.\textsuperscript{77} Although most spoke of reactive self-defense, i.e., awaiting a first attack before responding, consistent with today’s restrictive view, some contemplated anticipatory response.\textsuperscript{78}

This is particularly true for the aftermath of the Napoleonic Wars, where the victors established the Congress system with a multilateral defense treaty incorporating consultation and anticipatory self-defense principles.\textsuperscript{79} The Crimean War illustrates response to a regional conflict. States opposing Russia agreed on terms among themselves for prior consultation and to try to contain the conflict by warning Russia, at least on paper, of consequences of widening the war. Peripheral treaties, e.g., that with Sweden, were anticipatory in nature, warning Russia of consequences of wider action.\textsuperscript{80} In a very rough sense, between the Congress and the Crimea systems, we have the forerunner of the treaty system in place since World War II—an overarching instrument like the Charter,\textsuperscript{81} regional multilaterals like the North Atlantic Treaty,\textsuperscript{82} and bilaterals\textsuperscript{83} elsewhere around the world.

Like Charter-era commentators,\textsuperscript{84} the record for anticipatory self-defense in the pre-World War I treaties is mixed. Unlike commentators who can only argue a position, treaty drafters who included anticipatory self-defense provisions laid groundwork for State practice\textsuperscript{85} in that they could be involved as a source of law\textsuperscript{86} if those treaties were carried out. If other agreements were fulfilled through anticipatory self-defense, a view that anticipatory self-defense was a feature of international law before 1914 was strengthened.

II. The Covenant of the League of Nations and the Pact of Paris

The League of Nations Covenant and the 1928 Pact of Paris, also known as the Kellogg-Briand Pact, were the principal governing instruments during the interwar years, 1920–39. These treaties, including the self-defense reservation
to the Pact of Paris and other agreements negotiated before World War II, and the views of commentators, demonstrate that anticipatory collective self-defense remained as a legitimate response under international law.

The Covenant of the League of Nations. The Covenant of the League of Nations, a part of the World War I peace treaties, was treaty law by territorial application to League Members' colonies and dependencies for much of the Earth from 1920 through 1945. Major exceptions were: Germany, a member from 1926–35; Japan, a member from 1920–35; the USSR, a member from 1934–39; and the United States, which was never a member.

The Covenant's relatively weak principles for regulating use of force did not address self-defense issues directly. Its preamble declared that parties to the Covenant, “to achieve international peace and security... accept[ed]... obligations not to resort to war... [and] Agree[d] to [the] Covenant...” Covenant Article 10 provided: “... Members... undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members. ... In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.” (The Council included the Principal Allied and Associated Powers from World War I—France, Great Britain, Italy, and Japan—and four more League Members.) Article 11 provided for League action in case of war or threat of war:

1. Any war or threat of war, whether immediately affecting any... Members... or not, is... declared a matter of concern to the whole League, and [it] shall take any action... deemed wise and effectual to safeguard the peace of nations. [If] any such emergency should arise the Secretary-General shall on the request of any Member... forthwith summon a meeting of the Council.

2. It is also... the friendly right of each Member... to bring to the attention of the Assembly or... Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends.

The Assembly included representatives of all Members; the Secretary-General had functions similar to the UN Secretary-General. Members also agreed to resolve disputes by arbitration, judicial settlement or resolution by the Council or the Assembly. If a Member resorted to war, disregarding these covenants, it was “ipso facto... deemed to have committed an act of war against all other Members...,” which would undertake economic and other sanctions, leaving
military options to Council recommendations. The offending Member could not invoke treaties it did not register with the League, and the Assembly was charged with examining registered agreements for risks to peace. The Covenant was silent on options if the Council did not recommend action, or if it did and Members did not comply.

The similarity of Covenant Articles 10–11 to Articles 1(1) and 2(4) of the UN Charter regarding threats to the peace or threats against any State might be noted:

**Article 1**

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace.

**Article 2**

The Organization and its Members, in pursuit of the Purposes . . . in Article 1, shall act in accordance with the following Principles:

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Besides providing for external aggression against Members' territorial integrity, Covenant Article 10 also referred to "threat or danger of such aggression." Article 11(1) declared of "war or threat of war, whether immediately affecting a Member as League concern, and the League could take "any action" deemed wise and effectual to safeguard the peace of nations." Article 11(2) allowed a Member to bring forward "any circumstance whatever affecting international relations which threatens to disturb international peace."

The Covenant drafters thus had in mind more than war declarations or outbreak of war. Like the Charter a quarter century later, the Covenant contemplated action against threats or dangers of aggression, or threats of war, or "any circumstance whatever . . . threatening to disturb international peace." Article 16(1) declared that a Member's resort to war in violation of certain Covenant obligations would automatically result in that Member's action being "deemed . . . an act of war against all other Members."
interpretation canons,96 the Covenant, weak as it was in terms of enforcement, contemplated collective action to counter hostile intent and hostile action.

Although the Covenant did not mention individual or collective self-defense, other Treaty of Versailles provisions declared that Germany was forbidden to maintain or fortify certain parts of the banks of the Rhine. Maintaining armed forces, whether permanently or temporarily stationed there, or permanent mobilization works, was forbidden. If Germany violated these provisions, she would "be regarded as committing a hostile act against the Powers signatory [to] the . . . Treaty and as calculated to disturb the peace of the world."97 This was a statement of a potential for anticipatory collective self-defense. Unratified bilateral agreements between France and the United States, and France and Great Britain ancillary to the Treaty, confirm this view. These would have provided for Great Britain's and the United States' coming immediately to the aid of France if Germany committed "any unprovoked movement of aggression against her[.]" Because these agreements were effective only if Britain and the United States ratified respective bilaterals with France,98 U.S. failure to ratify the Treaty99 torpedoed the bilaterals, including the France-UK agreement that was otherwise in force, as well.100 Nevertheless, use of "movement" in these treaties, and the Versailles Treaty language, shows that the treaty drafters considered anticipatory collective self-defense action as an option. Available evidence of the secret military convention between France and Poland (1921) could lead to a conclusion that it, too, contemplated anticipatory self-defense, as did the France-Czechoslovakia alliance (1924).101 On the other hand, eastern European States' alliances creating the Little Entente provided for reactive self-defense.102

In 1931 League Assembly reports (one of them adopted by the Assembly) confirmed that legitimate self-defense was not excluded in the Covenant prohibition on recourse to war.103 Principal League Members were unable to accept a proposed Treaty of Mutual Guarantee, open to all States, where any party attacked would receive immediate, effective assistance from other parties in the same part of the world, or the Protocol of Geneva, which would have branded any State choosing war over arbitration of a dispute as the aggressor, unless the Council decided otherwise.104 The right of self-defense became more explicit in reservations to the Pact of Paris and authoritative interpretation of the Pact.105

Locarno, the Pact of Paris, and the Budapest Articles; Other Treaties. In 1925 five powers—Belgium, France, Germany, Great Britain, Italy—signed the Locarno Treaties. Belgium and Germany, and France and Germany, pledged
that they would not attack, invade, or resort to war against each other. This core Treaty of Mutual Guarantee stated exceptions for these undertakings: "legitimate defense" and the parties' action to settle a conflict or stop an aggressor if the League did not. Legitimate defense was defined as "resistance to a violation of the undertaking" not to attack or invade, or resistance to flagrant breach of the Versailles Treaty's demilitarization provisions, "if such breach constitutes an unprovoked act of aggression and by reason of the assembly of armed forces in the demilitarized zone immediate action is necessary." The Locarno treaties also created a system in the nature of collective self-defense. The parties pledged to "collectively and severally guarantee . . . maintenance of the territorial status quo [of] . . . frontiers between Germany and Belgium and between Germany and France, and the inviolability of the said frontiers as fixed by" the Versailles Treaty. The parties agreed to come immediately to the assistance of the target State. To the extent that the Locarno parties agreed to act collectively for flagrant breaches of the Versailles Treaty, Locarno could be said to restate anticipatory collective self-defense, in that failure to maintain a demilitarized area or status could be a hostile threat to other states. Only five countries were formal parties, but when their colonial empires and associated states are considered, Locarno's territorial scope was quite great.

Parties to the Pact of Paris (1928) renounced war as an instrument of national policy, agreeing to settle disputes by pacific means. The Pact is still in force, partly superseded by the Charter, with 69 parties by 1997. Treaty succession principles may apply it to more states. The Pact's principles became part of the Nuremberg Charter and Judgment, they were affirmed as customary law by unanimous UN General Assembly Resolution 95(1). Although the Pact did not address self-defense, an understanding promoted by the United States, to which 14 major signatories including the colonial powers agreed, said the treaty did not affect the "inalienable" right of self-defense. The exchanged notes were "an authentic and binding commentary on and interpretation of the . . . Treaty." There was no specific reference to anticipatory self-defense or collective self-defense in the diplomatic correspondence, but Great Britain broadly claimed:

... [T]here are certain regions . . . the welfare and integrity of which constitute a special and vital interest for our peace and safety. His Majesty's Government have been at pains to make it clear in the past that interference with these regions cannot be suffered. Their protection against attack is to the . . . Empire a measure of self-defense. It must be clearly understood that . . . Britain accept[s] the new treaty upon the distinct understanding that it does not prejudice their freedom of action in this respect.
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Britain referred to parts of its Empire, probably Egypt and the Persian Gulf, and perhaps other areas. A few States objected to the UK note, the USSR stating that "the result would be that there would probably be no place left ... where the Pact could be applied." Since the Commonwealth system included colonies, self-governing Dominions, India, and the Irish Free State, the note may have reserved a right of self-defense for Britain to defend units of the Commonwealth and the Empire. Covenant provisions allowing League membership for colonies and Dominions underscored a potential for collective self-defense based on these relationships.

The U.S. note, to which states had responded in general agreement, spoke of the "inherent" and "inalienable" right of self-defense. That this continued the prior law, which included rights of anticipatory self-defense and collective self-defense, was apparent from treaties, State practice and judicial decisions between 1928 and World War II.

The Little Entente of Balkan states, following bilateral self-defense treaties in 1921, negotiated its Pact of Organization in 1930, declaring its governing Council's common policy would be inspired by, inter alia, the Covenant, the Pact of Paris, and the Locarno Treaties; the 1921 treaties were renewed indefinitely. Since the Pact incorporated the Pact of Paris with its widely accepted self-defense reservation, the presumption is that the Entente accepted the concept in its self-defense considerations. That the Entente may have contemplated anticipatory self-defense among its response options is further evidenced by its agreement with other area countries, which pledged reaction to "aggression," otherwise not defined, since the original 1921 agreements pledged joint reaction to "unprovoked attack." Whether aggression meant more, e.g., action short of attack, is not clear. However, citing the Pact of Paris indicates the Entente accepted anticipatory self-defense as a response option if it was part of that inherent right.

Although not forming an organization specifically for the purpose—the Pan American Union was in place at the time—Western Hemisphere States, including the United States, negotiated agreements in 1936 to "supplement and reinforce" League efforts in seeking to prevent war. These governments, besides reaffirming prior treaty obligations to settle international controversies between them by pacific means, also agreed to consult if there was a threat of war among them, subject to Member obligations under the Covenant. The Pact of Paris was among treaties whose obligations were confirmed. While these treaties—still in force—do not cover a Hemisphere country's war with a State outside the Americas, in reaffirming the Pact of Paris and its self-defense reservation, they reinforce that law.
The 1937 Nyon Arrangement and the Agreement supplementing it declared parties would defend merchant shipping and civil aircraft of any State attacked by surface ships, aircraft, or submarines in parts of the Mediterranean Sea. The Arrangement, besides announcing that a submarine attacking vessels contrary to the 1930 London naval armaments treaty and its 1936 Protocol would be attacked and if possible destroyed, also said parties’ forces would attack “any submarine encountered in the vicinity of a position where a ship not belonging to either . . . conflicting Spanish parties [in the Spanish civil war] ha[d] recently been attacked in violation of the rules . . . in circumstances which give valid grounds for the belief that the submarine was guilty of the attack.” Because of further submarine attacks on merchantmen, Nyon parties announced they would sink “any submarine found submerged” in Mediterranean Sea zones under their control.

The Arrangement as published and applied is an example of maritime anticipatory collective self-defense. Nine states—several with no Mediterranean coastlines—agreed to protect shipping and aircraft, including their own. These states declared they would attack a submerged submarine near an attacked merchantman and later broadened Arrangement coverage to include submarines found submerged in their patrol areas. (Today it would be said that a submarine’s being in the area is a manifestation of hostile intent, and the submarine is subject to destruction in anticipation of its potential for attacking merchant shipping in the future.) When Mediterranean maritime states cooperated under the Arrangement to suppress submarine attacks, they acted in anticipatory collective self-defense.

In 1934 the International Law Association had adopted the Budapest Articles of Interpretation of the Pact of Paris, which recited these principles:

(2) A signatory State which threatens to resort to armed force for the solution of an international dispute or conflict is guilty of a violation of the Pact.

(3) A signatory State which aids a violating State thereby itself violates the Pact.

(4) In the event of a violation of the Pact by a resort to armed force or war by one signatory State against another, the other States may, without thereby committing a breach of the Pact or any rule of International Law, do all or any of the following things:—

(a) Refuse to admit the exercise by the State violating the Pact of belligerent rights, such as visit and search, blockade, etc.;
(b) Decline to observe towards the State violating the Pact the duties prescribed by International Law, apart from the Pact, for a neutral in relation to a belligerent;

(c) Supply the State attacked with financial or material assistance, including munitions of war;

(d) Assist with armed forces the State attacked.\[144\]

Although some States and commentators noted when the Articles were approved that no State had adopted them as policy, it has been argued that the Articles and the 1939 Harvard Draft Convention on Rights and Duties of States in Case of Aggression\[145\] legitimated 1939–41 U.S. aid to the Allies in World War II before the United States entered the conflict.\[146\]

If Article 4 (c) supplied legal backbone for Lend-Lease and similar arrangements while the United States was not at war, Article 4(d) was a basis for collective self-defense and anticipatory self-defense in particular. Besides aiding the Allies materially, the United States began escorting war materials convoys to the middle of the Atlantic Ocean, turning over escort duties to the Royal Navy and other allied forces at that point. The USS Niblack prosecuted attacks when there was a submarine threat, the USS Reuben James was sunk, and the USS Kearney was damaged, during these operations.\[147\] Although no text of the UK-U.S. arrangement has been published, perhaps because it was an oral agreement or due to national security considerations, undoubtedly there was some sort of arrangement between the two countries.\[148\] States do not send their navies into harm’s way without agreeing on terms. If Article 4(d) restated customary and general principles norms, it was proper for U.S. warships to not only respond to submarine attacks on them, but also to anticipate attacks with appropriate force measures.

**Other Treaties Concluded before and during World War II.** Defense treaties signed before and during World War II support a concept of anticipatory collective self-defense. Because the League of Nations and its treaty registration and publication system collapsed,\[149\] the record of international agreements during 1935–45 is not complete. What is available supports a view that States believed treaties could provide for anticipatory collective self-defense.

The USSR’s pacts with France and Czechoslovakia (1935) pledged mutual assistance if either were subjected to “unprovoked aggression.” The parties pledged consultation if threatened with aggression.\[150\] The 1936 treaty with
Mongolia followed the pattern. When war clouds loomed for the USSR in 1939, and the war had begun for other countries, Soviet treaties with Estonia and Latvia pledged that each would come to the other's assistance if there was "direct aggression or threat of aggression" (Estonia), or "direct attack or threat of attack" (Latvia).

British and French eleventh-hour bilateral mutual assistance treaties with Poland provided for reactive self-defense, but also pledged support and assistance if a European Power "clearly threatened," by "any action," "directly or indirectly," a party's independence, and that party "considered it vital to resist it with its armed forces."

After the war began for France and Britain, they pledged aid to Turkey if it were involved in hostilities with a European power, or if an act of aggression were committed against it. Turkey agreed to observe "at least a benevolent neutrality" if Britain or France were engaged in hostilities with a European power and would aid them if they became involved in hostilities because of guarantees given Greece or Romania. The parties also pledged mutual consultation. The 20-year USSR-UK alliance (1942) pledged collective self-defense after the war if these States again became involved in hostilities with Germany or States associated with it. France's alliance with the USSR had similar terms. A USSR-UK alliance with Iran pledged defending Iran from "all aggression on the part of Germany," presumptively contemplating only reactive self-defense.

In the Western Hemisphere, the October 3, 1939, Declaration of Panama, negotiated while the American states were not at war, asserted:

As a measure of continental self-protection, the American Republics, so long as they maintain their neutrality, are as of inherent right entitled to have those waters adjacent to the American continent, which they regard as of primary concern and direct utility in their relations, free from the commission of any hostile act by any non-American belligerent . . . , whether such hostile act be attempted or made from land, sea or air.

The Declaration applied these standards to a 300-mile zone off the American coasts. Although the zone may have been unlawful in terms of territorial scope, because it was not proportional, the important point for this analysis is that the Declaration asserted a collective claim to freedom from effects of "attempted" hostile acts. To that extent, the Declaration implicitly declared a right of anticipatory collective self-defense. A 1941 Denmark-U.S. agreement for defending Greenland could also be said to be anticipatory in nature. When it was signed, the United States was not at war, although
Germany had overrun Denmark. This treaty said there was a perceived threat to the Western Hemisphere as stated in the 1940 Act of Havana, the latter “considered, in effect, an act of self-defense by the American republics.” The Act created an emergency committee, empowered to act pending ratification of a convention, to assume governance of a belligerent’s Western Hemisphere colony or possession that was “attacked” or “threatened.” If “the need for emergency action [was] so urgent that action by the committee [could] not be awaited,” an American republic, unilaterally or jointly, “[had] the right to act in the manner which its own defense or that of the continent require[d].” This broad language left open a potential for anticipatory collective self-defense responses, particularly in view of authority given to make “urgent . . . responses to threat[s] . . . .” The 1941 U.S. agreement to defend Iceland did not refer to the Act of Havana, but the president’s response in this executive agreement that Iceland’s defense was necessary to forestall a menace to Western Hemisphere security might be construed as collective self-defense anticipatory in nature. U.S. defense of Iceland would forestall menaces to American republics subject to the Act of Havana.

The Potential for Anticipatory Collective Self-Defense. When the Covenant, the Locarno Treaty, and the Pact of Paris as interpreted by the Budapest Articles are considered together, there is strong argument for a view that they articulated the potential for anticipatory collective defense, perhaps not with precision. The Nyon Arrangement, and practice under it, was a clear example of anticipatory collective self-defense in action. The thrust of the Declaration of Panama and some international agreements before and during World War II were to the same effect. To be sure, the notion of self-preservation as equated with self-defense may have been discounted by then, but an anticipatory collective self-defense claim remained admissible.

III. Drafting the Charter and Winding Up World War II

Research and drafting for a new international organization to replace the League of Nations began during World War II. The UN Charter was signed during the last year of that war, with original Members’ ratifications often coming after hostilities ended. Agreements to prosecute war criminals, i.e., the Nuremberg Charter in 1945, were also signed during the war, but judgments came down years later. The UN’s beginnings are, therefore, necessarily intertwined with the end of the war and the war crimes trials.
The drafting of the Charter as it related to collective self-defense is first analyzed. Trials of the major war criminals as those proceedings related to the issues of self-defense and anticipatory self-defense are then discussed.

The Charter Drafting Process and Collective Self-Defense. The draft emerging from discussions and preparations for the San Francisco Charter conference did not provide for self-defense, then considered inherent in nature. The Act of Chapultepec, signed a month before the conference, included pledges of collective measures, including use of force, to meet threats or acts of aggression against a Western Hemisphere country. Like the interwar agreements and practice, the Act in effect declared a right to anticipatory collective self-defense.

Because of Latin American States' concerns, the San Francisco conference included Article 51 in the Charter. Although some argue that the Charter confers a new right of collective self-defense in Article 51, States had been practicing collective self-defense, or had stated the right in so many words, in treaties long before the Charter was ratified. A related problem is whether there is a variant of self-defense apart from the standards of Article 51. Most say there is not.

Exercising a right of collective self-defense need not be pursuant to a multilateral arrangement; a country may assist another under a bilateral treaty or without any previous treaty or other arrangement:

[T]he travaux preparatoires . . . [for the Charter support this view. While it is true that it was for purposes of fitting regional arrangements, and particularly the inter-American System, into the general international organization that Article 51 was added at San Francisco. However, the discussions at San Francisco not only by members of regional arrangements in the proper sense of that term, but also by parties to bilateral treaties governing their joint security, as well as assistance by one State to another without any treaty obligation. Article 51 was deliberately transferred . . . from Chapter VIII to Chapter VII with the result that the right of collective self-defense had become "entirely independent of the existence of a regional arrangement." Collective self-defense does not depend on "the degree of organization or of treaty relationship" of states. "Collective" covers more than contractual systems of self-defense. "Any Member . . . is therefore authorized by the
Charter to assist with its armed force an attacked State, whether or not there has been any previous arrangement to that effect.\textsuperscript{180}

Although it has been argued that an assisting State must have substantive rights or interests affected by an attacking State’s action,\textsuperscript{181} or that an assisting State must have an individual right of self-defense,\textsuperscript{182} neither is a prerequisite for coming to the aid of a target State. Any assisting State acts out of general interest in international peace and security, and can do so without a formal treaty as long as the target State consents.\textsuperscript{183} A State assisting a target State need not be subjected to armed attack, i.e., to invoke the right of self-defense for itself.\textsuperscript{184} However, “collective self-defense has in any event always to be based ultimately upon the right of an individual State to take action in self-defense. . . . If . . . not linked by a previous arrangement with the attacked State [e.g., a bilateral or multilateral treaty, assisting states] have the right to use force to provide assistance on the basis of an explicit request by the [target] state.”\textsuperscript{185} The political truth in today’s information age may point to use of treaties instead of informal collective self-defense arrangements. Nevertheless, such informal arrangements are lawful in the Charter era.

The foregoing analysis has not responded to the problem of States with divergences of views on the scope of self-defense, i.e., where some State’s policy espouses anticipatory self-defense and the other State(s) has or have a more restrictive, reactive (“take the first hit”) policy,\textsuperscript{186} or where States may share the same general policy, e.g., that of anticipatory self-defense, but differ as to situations and circumstances when the norm applies.\textsuperscript{187}

Where an assisting State with an anticipatory self-defense policy comes to the aid of a State with a restrictive view, it will be presumed in the case of prior treaty or other arrangements or a request in the absence of these that the restrictive view State negotiated the treaty or other arrangement, or made the request, with knowledge of the assisting State’s policy, and that the assisting State is free, but is not obliged, to employ anticipatory self-defense to fulfill its treaty or arrangement obligations. In the reverse situation, where a restrictive view State assists a State with a policy of anticipatory self-defense, the same principles should obtain. The assisting State may, but is not obliged, to invoke anticipatory self-defense; the anticipatory self-defense State knew or should have known of the self-imposed limitations on the assisting State. In either case, there is no need, as a matter of law, for the target State to request a kind or degree of assistance from the assisting State. However, as a matter of policy, the target State may request, and the assisting State should consider, a certain kind or degree of assistance for the target State. Thus, a target State might ask for self-defense help that amounts to reactive and not anticipatory action; in that
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case, the assisting State must consider whether it can, as a matter of policy, stop at that line, commensurate with the perceived need to assure safety of its contributed forces or perhaps its municipal governance limitations, e.g., action taken by its parliament. In the reverse situation, where an anticipatory self-defense country asks for what amounts to anticipatory self-defense help from a State espousing a restrictive view, the same principles should apply.

There is a critical difference between a treaty relationship and a more informal request or arrangement when a situation develops. Failure to comply with a treaty term as perhaps understood by prior interpretive practice carries with it risk of denunciation or claims of breach, fundamental change of circumstances, impossibility of performance, etc.

The foregoing assumes a bilateral relationship, by treaty or otherwise. The problem is more complicated in circumstances of multilateral relationships.

If a State or States with the same anticipatory self-defense view aid a group of States, all of whom have the same reactive view, or if a reactive view State or States aid a group of States, all of whom espouse anticipatory self-defense, the result is the same as in the bilateral context.

Suppose, however, some assisting States have anticipatory self-defense positions and others have a reactive self-defense policy, and target States have similarly differing views. Second, suppose some assisting States have differing anticipatory defense views, and others have differing reactive self-defense policies, and the same is true for target States. The same, and perhaps greater, risks of denunciations or claims of treaty breach, fundamental change of circumstances or impossibility, might be lodged. One solution to this problem might be the Vienna Convention on the Law of Treaties approach on reservations, i.e., that anticipatory self-defense applies only as to those states that mutually agree on principles and that otherwise the lowest common denominator, perhaps a diminished scope for anticipatory self-defense or only reactive self-defense, applies as between parties. In a multinational military operation, this could create the kind of legal nightmare that Vienna Convention analysis promises for multilateral treaties. Alternatives might be an analogy to the traditional rule for treaty reservations, i.e., all States must concur or assistance will end. Another alternative is consultation in a given situation, with a treaty term to that effect if a multilateral agreement is negotiated, instead of relying on arrangements or target State request(s). That appears to be the direction of mutual defense treaties.

There are two more issues involved with claims of self-defense. First, States may change policies after ratifying a treaty, perhaps moving from reactive self-defense to an anticipatory self-defense posture. A State may declare a shift
within policy, e.g., what was not considered a proper circumstance for claiming anticipatory self-defense yesterday is today within the scope of a proper claim. Might such a shift in policy at the least cause discomfort among treaty partners, and at worst trigger denunciations or claims of treaty breach, fundamental change of circumstances, or impossibility of performance?\(^{199}\)

The second involves the attacking State’s posture. If an attacking State, a target State and an assisting State share common self-defense positions, this would tend to legitimize assisting State operations as a manifestation of local, or special, custom.\(^{200}\) If the assisting and target States take one view of the issue, and the attacking State has another, this might be grounds for a claim that an opponent has not engaged in legitimate action. Thus, if an assisting State would wish to assert that it is acting within the law, it could more safely do so if it acts according to its allies’ or opponents’ views. Where a State has an anticipatory self-defense view, this might mean employing military force in only a reactive self-defense mode, or at least claiming to do so, if the opponent or target State has adopted the restrictive view. This is a policy decision and not a question of law; it is akin to rules of engagement (ROE) more restrictive than actions the law permits. ROE for combat forces may provide for wartime and peacetime scenarios, in which rights to individual or collective self-defense, including anticipatory self-defense, may be more circumscribed than the law would allow.\(^{201}\)

Many of these issues do not find responses in reported practice or decisional law.

**The War Crimes Trials and Self-Defense.** The Nuremberg International Military Tribunal relied on the Pact of Paris in its findings of guilt.\(^{202}\) The Tribunal rejected defense claims that Germany had acted in self-defense.\(^{203}\) Admiral Erich Raeder’s theory was that Germany occupied Norway as a necessary act of self-defense to forestall Allied landings there. Citing the Caroline Case,\(^{204}\) the Tribunal recognized a right of anticipatory self-defense: “[P]reventative action in foreign territory is justified only in the case of an instant and overwhelming necessity for self-defense, leaving no choice of means and no moment for deliberation.” This was not true for German invasions of Denmark and Norway, the Tribunal ruled.\(^{205}\) The defense was unable to demonstrate “an intention formed in good faith and honesty of conviction to protect one’s safety, that safety being immediately threatened.”\(^{206}\)

In the Tokyo trials involving Japanese accuseds, a defense was that because the Netherlands had declared war on Japan before Japan had made a formal
war declaration, attacks against Dutch Asian territories were in self-defense. The Tribunal held the Netherlands had acted in anticipatory self-defense:

The fact that the Netherlands, . . . fully apprised of the imminence of the attack [by Japan], in self-defense declared war against Japan on 8th December and thus officially recognised the existence of a state of war which had been begun by Japan, cannot change that war from a war of aggression [by] . . . Japan into something other than that.

There was strong evidence of Japan’s preparations to invade the Dutch East Indies, and the Netherlands chose to declare war before Japan’s formal declaration. The Netherlands did not then have self-defense treaties with the Allies, insofar as the published record shows. However, her acting in concert with the Allies immediately afterward is some evidence of informal collective self-defense, a concept recognized before and after ratification of the Charter.

These decisions, coming just after the General Assembly had confirmed the Nuremberg Charter as customary law, strongly evidence a right of anticipatory self-defense and perhaps, for the Netherlands, the practice of informal collective self-defense arrangements.

Anticipatory Collective Self-Defense at the Creation of the UN System. The record during and just after World War II does not show that the law of collective self-defense, including anticipatory collective self-defense, was anything other than what had gone before. The Charter drafters included a right of collective self-defense, largely at the behest of parties to the Act of Chapultepec, but they did so in the context of the Pact of Paris, the Locarno Treaties, and other agreements, e.g., Nyon and bilateral treaties in 1935 and thereafter. Invoking collective self-defense under the Charter could come through formal treaty, informal arrangement, or by target State request. Problems of varying views on the scope of self-defense within these modalities were not resolved when this norm was written into the Charter. The Nuremberg and Tokyo judgments were not handed down until after the Charter was in force, but they confirm a right of anticipatory self-defense.

IV. Collective Self-Defense Treaties during the Charter Era

Bilateral and multilateral defense agreements have been concerned with collective self-defense since 1945. Article 51 states a right and not a duty of self-defense; however, the right is transformed into a duty in self-defense
treaties. Part IV.A discusses these arrangements, and Part IV. B argues that national decision makers should be bound by what they knew or should have known at the time the decision to respond in anticipatory self-defense was made, the standard used in the law of armed conflict, i.e., the *jus in bello*.

**Treaties Providing for Collective Self-Defense.** The Act of Chapultepec, instrumental in shaping Article 51 of the Charter, was replaced by the Rio Treaty (1947), Article 3(1) of which provides that armed attack on an American State is considered an attack on all American states and that each party undertakes to assist in meeting the attack “in the exercise of the inherent right of individual or collective self-defense recognized by Article 51. . . .” Article 3(1) is nearly identical with Part I(3) of the Act. Undoubtedly, the Treaty drafters wished to carry forward the meaning of the inherent right of self-defense incorporated in the Act in 1945, which had been adopted in Article 51.

The Treaty also declares that “[o]n the request of the State or States directly attacked” and until there is a decision by the Inter-American System’s Organ of Consultation, each party may determine “immediate measures” it may take to fulfill the collective self-defense obligation. These self-defense measures can proceed until the UN Security Council takes measures necessary to maintain international peace and security. If any American State’s inviolability, territorial integrity, sovereignty, or political independence is affected by aggression that is not an armed attack, by a conflict, “or by any other fact or situation that might endanger the peace of America,” the Treaty’s Organ of Consultation must meet immediately to agree on measures to be taken, in case of aggression, to assist a victim of aggression, or on measures that should be taken for common defense and the maintenance of peace and security.

Article 4 of the 1948 treaty creating the Western European Union (WEU) provides similarly that if a party is “the object of an armed attack in Europe, the other . . . Parties will, in accordance with . . . Article 51 . . . , afford the party so attacked all the military and other aid and assistance in their power.” The Treaty provided for a Consultative Council “[f]or consulting together on all the questions dealt with in the . . . Treaty, which shall be organized as to be able to exercise its functions continuously.” (In 1955 the Council was renamed the Council of Western European Union, but otherwise its functions remain the same.) The 1948 agreement also provides for reporting to the Security Council and ending WEU action when the Council takes measures necessary to maintain or restore international peace and security. Nothing in the Treaty
"prejudice[s] in any way the obligations of the . . . Parties under the . . . Charter... There is nothing in the Treaty to indicate that its drafters did not consider that they were carrying forward the understanding of the Charter drafters, i.e., that WEU States can invoke the inherent right of self-defense; the Treaty's explicit reference to Article 51 tends to confirm this. The 1954 WEU Protocols provide for forces to be contributed for self-defense. Protocol I declares that parties "shall work in close co-operation" with NATO, and that the Council and its agency will rely on NATO military authorities for information and advice. The WEU, inactive for more than a decade, was revived in 1984 in connection with European Union integration; the 1980–88 Tanker War also spurred action.

In 1949 the North Atlantic Treaty was signed; Article 5 provides in part that

... [A]rmed attack against one or more of [the parties] in Europe or North America shall be considered an attack against them all; and consequently [the parties] agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 . . . will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

Specific reference to Article 51 carries forward an understanding that parties have inherent rights to individual and collective self-defense. Article 7 adds that the Treaty "does not affect, and shall not be interpreted as affecting, in any way the rights and obligations under the Charter of the Parties which are [UN] members . . . , or the primary responsibility of the Security Council for the maintenance of international peace and security." States also agreed to "consult together whenever, in the opinion of any of them, the territorial integrity, political independence or security of any . . . Part[y] is threatened."

In 1950 the Arab League signed a Joint Defense Treaty, whose Article 2 provides:

. . . Contracting States agree that an armed aggression, directed against any one or more of them or against their forces, shall be considered as directed against all . . . [T]hey agree, in virtue of the right of legitimate self-defence, both individual and collective, to assist at once the State or States so attacked and to adopt immediately, both individually and collectively, all . . . measures and means at their disposal, including . . . employment of armed force, to repulse the aggression and restore peace and security.
The Security Council must be informed immediately of an aggression and steps and measures taken. Although it does not refer to Article 51 specifically, the Treaty could not contravene individual and collective self-defense rights proclaimed in the Charter. Article 3 also pledges:

... States shall consult together at the request of any one of them, whenever the integrity of the territory, independence or security of any one of them is exposed to danger.

In the event of the imminent risk of war or the advent of a sudden international development believed to be dangerous, ... States shall at once hasten to coordinate their measures as the situation may require.

The latter clause directly supports a view that the inherent right of collective self-defense includes a right of anticipatory self-defense. That the League contemplated more than reactive collective self-defense is also supported by the Treaty’s Military Annex, Article 1(a); the Permanent Military Committee created by the Treaty is charged with “[p]repar[ing] ... military plans to meet all foreseeable dangers or any armed aggression which might be attempted against one or more ... Contracting States or their forces.”

In 1951 Australia, New Zealand and the United States concluded the ANZUS Pact. Similar to other mutual security agreements, and modeled on the North Atlantic Treaty, the Pact provides for consultation. There is “recogni[tion] that an armed attack in the Pacific Area on any ... Part[y] would be dangerous to [other parties’] peace and safety.” Parties will “meet the common danger in accordance with [their] constitutional processes.” Like earlier agreements, there is a pledge of reporting to the Security Council and ending self-defense measures once the Council takes necessary measures. Unlike the North Atlantic Treaty, however, there is no statement that attack on one is an attack on all. However, the “armed attack” provision should receive the same construction as the phrase in the Charter, Article 51.

The 1954 SEATO Treaty includes similar language on aggression by armed attack; consultation after a threat to a party’s territory, sovereignty or political independence; and reporting to the Security Council. The Treaty requires a government’s invitation or consent before action can be taken on that member’s territory. The Pacific Charter (1954) declares parties’ “determin[ation] to prevent or counter by appropriate means any attempt in the treaty area to subvert their freedom or to destroy their sovereignty or territorial integrity.” Although SEATO Treaty obligations remain in effect, its supporting organization ceased to exist in 1975. France, the United
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Kingdom and the United States are among the SEATO and Pacific Charter members.247

The Second Balkan Pact was signed in 1954, a partial successor to the 1933 Little Entente; its effective life was only a couple of years.248 Like its predecessor, Pact parties pledged consultation but "immediate . . ." collective defense against "armed aggression," invoking Article 51 of the Charter. Thus, if Pact parties asserted individual claims to anticipatory self-defense, they would have incorporated those claims by joining the Pact.249

In 1955 some Arab League members signed the Baghdad Pact; Article 1 declared: "Consistent with Article 51 . . . Parties will co-operate for their security and defence," perhaps through special agreements.250 Unlike the North Atlantic and other treaties, it did not provide for crisis consultation beyond agreement to determine measures to be taken once the Pact was in effect.251 Members included Iran, Iraq (1955–59), Turkey, and the United Kingdom. A political failure, it dissolved in 1979.252

In 1955 the USSR and its European satellites signed the now-defunct253 Warsaw Pact. Its Article 4 paralleled the North Atlantic Treaty:

In the event of an armed attack in Europe on one or more of the . . . Parties . . . by any State or group of States, each . . . Party . . . shall, in the exercise of the right of individual or collective self-defence, in accordance with Article 51 . . . , afford the State or States so attacked immediate assistance, individually and in agreement with the other . . . Parties . . . , by all the means it considers necessary, including . . . armed force. . . . Parties . . . shall consult together immediately concerning the joint measures necessary to restore and maintain international peace and security.

Measures taken under this article shall be reported to the Security Council in accordance with the . . . Charter. These measures shall be discontinued as soon as the . . . Council takes the necessary action to restore and maintain international peace and security.254

Pact parties pledged to consult immediately to provide for joint defense and maintaining international peace and security, if a member "consider[ed] that a threat of armed attack on one or more of the . . . Parties to the Treaty ha[d] arisen. . . ." The North Atlantic Treaty, it will be recalled, provides for consultations if a party believes a member State's territorial integrity, political independence, or security is threatened.255

Cold War era bilateral defense treaties also had similar language. Three binding the United States are typical. The Philippines Mutual Defense Treaty, Article 4, declares that "Each Party recognizes that an armed attack in the
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Pacific Area on either . . . Part[y] would be dangerous to its own peace and security and declares that it would act to meet the common dangers in accordance with its constitutional processes." In common with the multilateral treaties, the Philippines-U.S. agreement pledges reporting to the Security Council and ending defense measures when the Council takes measures necessary to restore and maintain international peace and security.\textsuperscript{256} Armed attacks are deemed to include attacks on metropolitan territories of either State, island territories under their jurisdiction, or their armed forces, public vessels, or aircraft in the Pacific.\textsuperscript{257} Like the multilaterals, the parties pledge to consult "whenever in the opinion of either of them the territorial integrity, political independence or security of either . . . is threatened by external armed attack in the Pacific."\textsuperscript{258} The Republic of Korea Mutual Defense Treaty\textsuperscript{259} and the agreement with Japan\textsuperscript{260} have similar terms. The USSR concluded bilateral agreements with its European satellites to defend against "aggression," sometimes naming Germany as the possible aggressor, or building on World War II arrangements; the Warsaw Pact was not intended to supersede these treaties.\textsuperscript{261} Similarly, Britain and France ratified the Treaty of Dunkirk (1947) before WEU was formed; the Treaty states it was designed to prevent Germany from again becoming a "danger to the peace," and like the abortive Versailles bilateral agreements promised mutual support if Germany committed aggression.\textsuperscript{262} Depending on how aggression might be defined,\textsuperscript{263} the plain language of these agreements could support a view that they contemplated anticipatory and reactive self-defense, despite some States' policy of reactive self-defense.

Each of these agreements requires consultation when there is a threat to a party's territorial integrity, political independence, security, or the like. Except for the ANZUS Pact, they say that armed attack on one is an attack on all. Without exception, they refer to Charter requirements of reporting to the Security Council, etc.

Do these terms leave room for anticipatory collective self-defense as a response to a threat? Under a restrictive view of self-defense, i.e., that a target State must await the first blow,\textsuperscript{264} Article 51 allows response by State A after State B, with whom State A has a mutual self-defense treaty, has suffered an attack. Assuming there is a right of anticipatory self-defense,\textsuperscript{265} State B could respond before receiving the first blow, subject to necessity and proportionality principles.\textsuperscript{266} The remaining question is whether State A, which has not been a target of attack, could respond to an attack on State B and successfully claim collective anticipatory self-defense.

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For reasons grounded in Charter law, the language of the collective self-defense treaties themselves, the history of collective self-defense agreement negotiations, and the practical realities of modern methods of warfare, there is a right to anticipatory collective self-defense in the Charter era. If there must be consultation before a self-defense response, as most agreements require, there is nothing in the agreements forbidding consultation before the first blow is struck. "The right of Members of the United Nations to prepare in advance for collective defence is implicit in their right to have recourse to collective defence." Since a right to collective self-defense is a customary norm, in terms of the treaties and practice before the Charter, it is implicit in that customary right as well. Consultation, or planning, can include measures to be taken in anticipatory collective self-defense. The Charter does not forbid planning for individual or collective self-defense, whether the response be reactive or anticipatory in nature.

Article 51 of the Charter, a treaty that has as its first and primary principle and purpose the maintenance of international peace and security, lists alternatives of the inherent rights of individual or collective self-defense. The same conditions applying to individual self-defense, e.g., necessity and proportionality, apply to collective self-defense. If this is so, a right of collective self-defense is coterminous with a right of individual self-defense, and if individual self-defense includes anticipatory self-defense as commentators and States argue, collective self-defense includes that option too.

Given the history of negotiations contemporaneous with the Charter (the Act of Chapultepec and running through the Rio Treaty (1947), the WEU Treaty (1948), the North Atlantic Treaty (1949), the Arab League Joint Defence Treaty (1950), and more recent agreements, there is evidence in the language of the agreements themselves to support a view that negotiators had anticipatory self-defense in mind, particularly with respect to consultations to deter aggression, including armed aggression. When the Charter's recognition of sovereignty is combined with the "inherent" right of self-defense and the supremacy of Charter law over inconsistent treaties, parties could not contract away an inherent right of self-defense, including collective self-defense, guaranteed by the Charter. And because the Charter negotiators operated against a background of prior treaty law, practice, judicial opinions, and commentators' views supporting a right of anticipatory self-defense, that right in the collective self-defense context carried forward into the Charter era.
The Temporal Problem: When Does Liability Accrue? Convictions at Nuremberg were based on what defendants knew, or should have known, when they decided to invade other States. Since then, there has been no authoritative statement on whether liability accrues based on what decision makers know, or should know, when a reactive or anticipatory self-defense response is contemplated. Commentators have been tempted to justify opinions, at least in part, on evidence available after a decision, perhaps years later.

The developing law for jus in bello confirms that the proper standard for establishing liability is what decision makers know, or should have known, when an operation was authorized. Hindsight can be 20/20; decisions at the time may be clouded with the fog of war.

Declarations of understanding of four countries to 1977 Protocol to the Geneva Conventions of 1949 state that for protection of civilians in Article 51, protection of civilian objects in Article 52, and precautions to be taken in attacks set forth in Article 57, a commander should be liable based on that commander’s assessment of information available at the relevant time, i.e., when a decision is made. Two of the 1980 Conventional Weapons Convention’s protocols have similar terms, i.e., a commander is only bound by information available when a decision to attack is made.

Protocol I, with its understandings, and the Conventional Weapons Convention protocols are on their way to acceptance among States. These treaties’ common statement, in text or declarations, that commanders will be held accountable based on information they have at the time for determining whether attacks are necessary and proportional has become a nearly universal norm. The San Remo Manual recognizes it as the standard for naval warfare. It can be said with fair confidence that this is the customary standard for jus in bello. It should be the standard for jus ad bellum. A national leader directing a self-defense response, whether reactive or anticipatory, should be held to the same standard as a commander in the field deciding on attacks. A national leader should be held accountable for what he or she, or those reporting to the leader, knew or reasonably should have known, when a decision was made to respond in self-defense.

V. Conclusions and Projections for the Future

Since the Congress of Vienna attempted to impose order on post-Napoleonic Europe, countries great and small have tried to preserve peace and promote national security interests through collective security systems. Some arrangements have been general, e.g., the alliance system after
Waterloo. Others have been regional, e.g., treaties negotiated during the Crimean War. Many have been bilateral. Although many had terms stating a reactive self-defense theory, others provided for anticipatory self-defense. Practice of those times reveals use of informal arrangements as well.\textsuperscript{292}

The new factor emerging after the Franco-Prussian War was defensive alliance systems, often in secret treaties, which could promote aggressive coalition warfare, but which provided for reactive and anticipatory collective self-defense. Arrayed against these alliances were bilateral and multilateral agreements that also bespoke reactive and anticipatory collective self-defense.\textsuperscript{293}

The Treaty of Versailles and other agreements ending World War I established the League of Nations. The Covenant of the League, Part I of the postwar peace treaties, did not address self-defense directly, although the Covenant can be read as not excluding self-defense, including anticipatory self-defense. The Pact of Paris and its reservation through diplomatic notes, while outlawing aggressive war as national policy, preserved an inherent right of self-defense. Based on the treaty record before the Great War, this inherent right included anticipatory collective self-defense as an option for preserving international peace and security. The Nyon Arrangement, practice under it, other international agreements, the Budapest Articles, and international military tribunal decisions after World War II confirmed continuation of a right of anticipatory collective self-defense. There is also evidence that more informal arrangements could be concluded.\textsuperscript{294}

Thus, when Charter Article 51 provided in 1945 for an inherent right of individual and collective self-defense in the context of the contemporary Act of Chapultepec, the right the Charter negotiators intended as inherent included a right of anticipatory collective self-defense.\textsuperscript{295} The record of multilateral treaties, bilateral agreements and State practice since 1945 confirms that right, which includes a right to conclude more informal arrangements. And while prior consultation may be a customary prerequisite to exercise of that right, consultation may include prior planning, including planning for anticipatory responses. There is nothing in the Caroline Case to forbid such.\textsuperscript{296} The inherent right to anticipatory collective self-defense, including a right to engage in more informal arrangements, continues today as it has existed since the Congress of Vienna. States can no longer adopt war as an instrument of national policy, but beyond that limitation, a right to self-defense, anticipatory or reactive, individual or collective, continues as before.\textsuperscript{297}
Anticipatory collective self-defense, like unilateral anticipatory self-defense, is always tempered by necessity and proportionality principles. Nevertheless, the treaty record since 1815, although tortured, occasionally obscurely phrased, and sometimes muffled through secret treaties or reservations not part of published agreements, demonstrates that international law has recognized, and continues to recognize, a right of anticipatory collective self-defense. If confidence and participation in the UN system through affirmative Security Council action continues, it is likely that there will be more, not less, use of anticipatory responses, followed by Council decisions on further methods to contain threats to the peace, breaches of the peace, threats to States' territorial integrity, aggression, or invasion. One issue that should be resolved in the future is the temporal problem. States and their leadership should be held to what they knew, or should have known, when a decision for anticipatory collective response is taken.

Some multilateral self-defense treaties negotiated since World War II have been abrogated (i.e., the Warsaw Pact) or have fallen into disuse (e.g., SEATO). Others, e.g., the Rio and North Atlantic treaties, remain in force. Bilateral agreements have come and gone. The surviving agreements' roles may be changing. New agreements, or perhaps informal arrangements, may be negotiated. What role anticipatory collective self-defense may play in these evolving developments is not clear. However, the terms of prior agreements, negotiated before and after 1945, and State practice, show that it would be appropriate, as a matter of international law, to include anticipatory self-defense as a response option until the Council acts pursuant to Article 51. How anticipatory collective self-defense as a peremptory norm (jus cogens) fits into this analysis, if at all, is also an inquiry for the future.

Notes

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2. ALEXANDROV, supra note 1, at 296; MCCORMACK, supra note 1, at 122–44, 238–39, 253–84, 302.


8. Act of the Congress of Vienna, June 9, 1815, 64 Consol. T.S. 453. Treaty of Alliance, Mar. 15, 1815, id. 27, was a linchpin of the Congress system; it was succeeded by Treaty of Alliance and Friendship, Nov. 20, 1815, 65 id. 296. See also infra notes 14–22 and accompanying text; EUGENE V. ROSTOW, TOWARD MANAGED PEACE 42–43 (1993).

9. Parties to Treaty of Peace, supra note 7, art. 123, 1 Consol. T.S. at 354, were “obliged to defend and protect all and every Article of this Peace against any one.” can be said to be an early statement of the collective self-defense principle. See also Gross, supra note 7, at 24.


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14. Treaty of Alliance, supra note 8; see also supra note 8 and accompanying text.
15. Act of the Congress of Vienna, supra note 8, which reorganized Europe. The coalition against Napoleon had pledged such a system in Treaty of Alliance, Mar. 14, 1814, 64 Consol. T.S. 27. See also ALAN PALMER, THE CHANCELLRIES OF EUROPE 6 (1983).
16. Holy Alliance, Sept. 11/26, 1815, art. 1, 65 Consol. T.S. 199, 201. Id., art. 2, also proclaimed:

... In consequence, the sole principle of force, whether between the said Governments or between their Subjects, shall be that of doing each other reciprocal service, and of testifying by unalterable good will the mutual affection with which they ought to be animated, to consider themselves all as members of one and the same Christian nation; the three allied Princes looking on themselves as merely delegated by Providence to govern three branches of the One family, namely, Austria, Prussia, and Russia, thus confessing that the Christian world, of which they and their people form a part, has in reality no other Sovereign than Him to whom all the treasures of love, science, and infinite wisdom, that is to say, God, our Divine Saviour, the Word of the Most High, the Word of Life. Their Majesties consequently recommend to their people, with the most tender solicitude, as the sole means of enjoying that Peace which arises from a good conscience, and which alone is durable, to strengthen themselves every day more and more in the principles and exercise of the duties which the Divine Saviour has taught to mankind.

The preamble asserted that the signatories

... declare that the present [Alliance] has no other object than to publish, in the face of the whole world, their fixed resolution, both in the administration of their respective States, and in their political relations with every other Government, to take for their sole guide the precepts of that Holy Religion, namely, the precepts of Justice, Christian Charity, and Peace, which, far from being applicable only to private concerns, must have an immediate influence on the councils of Princes, and guide all their steps, as being the only means of consolidating human institutions and remedying their imperfections. . . .
George K. Walker

Id., pmbl. See also PALMER, supra note 15, ch. 2.

17. See Letter of Emperor Francis of Austria, King Frederick William of Prussia, and Tsar Alexander of Russia to George, Prince Regent of Great Britain, Sept. 26, 1815; letter of Prince Regent to Francis, Frederick William, and Alexander, Oct. 6, 1815, reprinted in 1 MICHAEL HURST, KEY TREATIES FOR THE GREAT POWERS 1814–1914, at 97–99 (1972), which collects and translates most treaties referred to in this Part; many are published in the CONSOLIDATED TREATY SERIES. The Holy Alliance continued to function, to a certain extent, until the crisis leading to the Crimean War. See generally PALMER, supra note 15, ch. 2; A.J.P. TAYLOR, THE STRUGGLE FOR MASTERY IN EUROPE: 1848–1918 chs. 2–3 (1954). The Alliance extended to the New World through family ties of the Austrian court to Brazil, a kingdom (1815) and an empire itself from 1822. The Alliance was a rationale for the Congress of Panama (1826) and the Monroe Doctrine. O. CARLOS STOETZER, THE ORGANIZATION OF AMERICAN STATES 7, 9, 14 (2d ed. 1993). COVENANT OF THE LEAGUE OF NATIONS, art. 21, declared that the Covenant would not “affect the validity of international engagements, such as . . . regional understandings like the Monroe Doctrine, for securing the maintenance of peace.” See also infra notes 36, 133–36, 158–63, 168–70, 218–23 and accompanying text.

18. Treaty of Alliance and Friendship, Nov. 20, 1815, pmbl., 65 Consol. T.S. 296, referring to Treaty of Alliance, Mar. 15, 1815, 64 id. 27. See also PALMER, supra note 15, at 6, 25–28.


20. Protocol of Conference, Nov. 15, 1818, 69 id. 365. The Concert of Europe “formed what was arguably the most successful European Settlement” and was a set of informal understandings in which European great powers acted to defuse problems that might lead to conflict among them. MICHAEL MANDELBAUM, THE DAWN OF PEACE IN EUROPE 106 (1996). See also DONALD KAGAN, ON THE ORIGINS OF WAR AND THE PRESERVATION OF PEACE 83 (1995); Gross, supra note 7, at 20.

21. A decade later Russia and Turkey concluded Treaty of Defensive Alliance, July 8/26, 1833, arts. 1, 3–4, 84 Consol. T.S. 1, 3–5, providing that Russia would furnish forces to Turkey for defense against attack. Final Act of Ministerial Conferences to Complete and Consolidate Organization of the Germanic Confederation, May 15, 1820, arts. 35–41, 47, 71 id. 89, 116–18, contemplated collective action for threatened attacks as well as invasions. Treaty of Peace, Aug. 23, 1866, Aus.-Pruss., art. 4, 133 id. 71, 82 dissolved the Confederation.

22. PALMER, supra note 15, at 81–82. Fearful of an attempted Spanish reconquest of South America’s Andean states, Bolivia, Chile, New Granada (now Colombia), and Peru signed the Treaty of Lima, Feb. 8, 1848, which established a confederation of the signatories to meet the perceived threat. The danger dissipated; the treaty was never ratified. STOETZER, supra note 17, at 9.

23. See generally NWP 9A, supra note 1, ¶ 4.3.2.1, citing Bunn, supra note 1, at 70; R.Y. Jennings, The Caroline and McLeod Cases, 32 AM. J. INTL L. 82, 89 (1938); Letter of U.S. Secretary of State Daniel Webster to UK Ambassador Lord Alexander B. Ashburton, Aug. 6, 1842, reprinted in Destruction of the Caroline, 2 MOORE, DIGEST § 217, at 411–12; Letter of Secretary Webster to UK Minister Henry S. Fox, Apr. 24, 1841, in 1 KENNETH E. SHEWMAKER, THE PAPERS OF DANIEL WEBSTER: DIPLOMATIC PAPERS 58, 67 (1983). NWP 1–14, supra note 1, 4.3.2.1 n. 32 departs from this language, saying that “the Webster formulation is clearly too restrictive today, particularly given the nature and lethality of modern weapons systems which may be employed with little, if any, warning.”

24. For analysis of wartime diplomacy, see PALMER, supra note 15, at 101–10; TAYLOR, supra note 17, ch. 4.


27. Later arrangements would determine forces' numbers, description, and destination. Prussia was invited to accede. Treaty of Alliance, Dec. 2, 1854, arts. 3, 6, 112 id. 295, 298.

28. Compare id. with Military Convention, Jan. 26, 1855, id. 453.

29. Common agreement would determine forces' numbers, description, and destination. Sweden pledged not to cede or exchange territory or give pasturage or fishery rights "or rights of any other nature whatsoever, ... and to resist any pretension ... by Russia ... to establish the existence of any ... Rights aforesaid." Treaty of Stockholm, Nov. 21, 1855, arts. 1-2, 114 id. 13, 15-16. The United States observed "benevolent neutrality," favoring Russia, during the war. JOHN LEWIS GADDIS, THE LONG PEACE: INQUIRIES INTO THE HISTORY OF THE COLD WAR 5 (1987).

30. General Treaty for Re-Establishment of Peace, Mar. 30, 1856, art. 8, 114 Consol. T.S. 409, 414, ending the Crimean War, provided for mediating future disputes before recourse to force and was a forerunner of U.N. CHARTER art. 33. Protocol of Conference, Apr. 14, 1856, 1 HURST, supra note 17, at 334, suggested the procedure be available for future disputes. In the Western Hemisphere, as a result of the William Walker filibustering expeditions, Chile, Ecuador, and Peru signed but did not ratify the Treaty of Mutual Assistance and Confederation, which provided that if the United States attacked one or more parties, all would unite against the aggressor. The treaty was never ratified. STOETZER, supra note 17, at 9-10.

31. Count Nigra, Notes on Results of Meeting between Napoleon III of France and Count Cavour of Piedmont, July 20, 1858, arts. 1, 3-4, 1 HURST, supra note 17, at 401.


33. PALMER, supra note 15, at 118.

34. The Russian fleets were then wintering in New York and San Francisco. JAMES P. DUFFY, LINCOLN'S ADMIRAL: THE CIVIL WAR CAMPAIGNS OF DAVID FARRAGUT 220-21 (1997). The Russian visit came at a low point in Union fortunes; the Russians were feted in New York, San Francisco, and Washington. Whether Russia and the United States discussed an alliance then or in 1861 has been debated; most assert that there were at least conversations toward that end. See D.P. CROOK, THE NORTH, THE SOUTH, AND THE POWERS 1861-1865, at 317-18 (1974); DONALDSON JORDAN & EDWIN J. PRATT, EUROPE AND THE AMERICAN CIVIL WAR 200-01 (1969); ALBERT A. WOLDMAN, LINCOLN AND THE RUSSIANS ch. 9 (1952). GADDIS, supra note 29, at 5-6, linked this proposed cooperation to U.S. "benevolent neutrality" during the Crimean War.

35. See supra note 17, infra notes 177-85 and accompanying text.

36. Treaty of Alliance Against Paraguay, May 1, 1865, art. 1, 131 Consol. T.S. 119, 120; Treaty of Union and Defensive Alliance, Jan. 23, 1865, art. 1, 130 id. 401, 402; Treaty of Alliance, July 10, 1865, 131 id. 305, 306; see also STOETZER, supra note 17, at 10, 266. A war with some of these States sputtered on until the United States mediated an armistice. See Armistice, Apr. 11, 1871, 143 Consol. T.S. 129, 132.


40. TAYLOR, supra note 17, at 255.

41. GADDIS, supra note 29, at 222, notes that the simpler alliance systems of the Cold War, coinciding with much of the Charter era, are more durable than those of the past century, which depended on skill of a Metternich or Bismarck to hold them together.

42. For analysis of alliance systems since World War II in the context of collective self-defense, see infra notes 216–78 and accompanying text. George K. Walker, Integration and Disintegration in Europe: Reordering the Treaty Map of the Continent, TRANSNAT'L LAW. 1, 12–24 (1993) surveys development of European economic systems, particularly the European Union.


46. TAYLOR, supra note 17, at 264; see also WILLIAM L. LANGER, EUROPEAN ALLIANCES AND ALIGNMENTS 171–96 (1931); PALMER, supra note 15, at 163–66, reporting talks between French and Russian staffs through the next decade.

47. This provision applied if a party were at war with Turkey, but only after previous agreement among the three States. League of the Three Emperors, June 18, 1881, art. 1, 158 Consol. T.S. 461. Treaty Concerning Prolongation of Treaty of 1881, Apr. 15, 1884, 2 HURST, supra note 17 at 634, extended and slightly modified the 1881 agreement. In Treaty of Alliance, June 16/28, 1881, Aus.-Hung.-Serbia, 159 Consol. T.S. 1, the parties pledged benevolent neutrality if either was at war; Treaty Prolonging the Treaty of 1881, Jan. 28/Feb. 9, 1889, Aus.-Hung.-Serbia, 171 id. 485, extended it to 1895. Declaration Affirming Engagement of Mutual Neutrality, Oct. 2/15, 1904, Aust.-Hung.-Russ., 196 id. 392, 394 pledged reciprocal "loyal neutrality" if either was involved in war with a third State; the treaty did not apply to the Balkans. For analysis of the League, see LANGER, supra note 46, at 196–212; TAYLOR, supra note 17, at 279–72, 304, who says the League was a "fair-weather system" that "worked only so long as there was no conflict."

48. Treaty of Defensive Alliance, Feb. 6, 1873, Bol.-Peru, art. 1, 145 Consol. T.S. 475, 484, and Protocol, May 5, 1879, id. 482; see also Treaty of Peace and Amity, Oct. 20, 1883, Chile-Peru, 162 id. 453; Armistice Convention, Apr. 4, 1884, Bol.-Chile, 163 id. 423; STOETZER, supra note 17, at 10, 266.

49. LANGER, supra note 46, at 246.


51. Id., arts. 4–6, renewed by Second Treaty of Triple Alliance, Feb. 20, 1887, art. 1, 169 id. 139, 141. Separate Treaty, Feb. 20, 1887, Aus.-Hung.-Italy, id. 143; Separate Treaty, Feb. 20, 1887, Ger.-Italy, id. 147, required Germany to go to war if Italy went to war to protect its African
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interests. Germany and Russia signed the Reinsurance Treaty, June 18, 1887, arts. 1–2, 169 id. 317, pledging that if either went to war with a third Great Power, the other would observe benevolent neutrality, and recognized Russia's interest in the Balkan peninsula and that the Straits of the Bosporus and Dardanelles should always remain open. An Additional Protocol, June 18, 1887, id. 323–24, provided that Germany would help Russia establish a regular government in Bulgaria, and that Germany would be a benevolent neutral if Russia had to defend the entrance to the Black Sea. The Reinsurance Treaty was allowed to lapse in 1890. PALMER, supra note 15, at 179. A third Triple Alliance was negotiated in Treaty of Alliance, May 6, 1891, 175 Consol. T.S. 105. Fourth Treaty of Triple Alliance, June 28, 1902, art. 14, 191 id. 286, 295, renewed the alliance for six years, with a possibility of a further six-year renewal. Agreement Explaining and Supplementing Article VII of Treaty of Triple Alliance of 1887, Dec. 15, 1909, Aust.-Hung.-Italy, 2 HURST, supra note 17, at 812, dealt with Balkan issues. Fifth Treaty of Triple Alliance, Dec. 5, 1912, 217 Consol. T.S. 311, renewed the alliance for the last time. The 1882 treaty's operative terms, arts. 1–5, remained the same throughout.

52. E.g., Secret Protocol, Nov. 15, 1818, 69 Consol. T.S. 369, among the victors of the Napoleonic wars, had a Military Protocol, id. 374, and was signed the same day as the published treaty; Protocol of Conference, supra note 30, admitted France to the Concert of Europe. See also supra notes 14–22 and accompanying text. COVENANT OF THE LEAGUE OF NATIONS art. 18 required that League Members' future treaties be registered with the League Secretariat and be published by it. No treaty would be binding until registered. This superseded terms like Treaty of Alliance, May 20, 1882, art. 6, 160 Consol. T.S. at 241, and State practice. "Open covenants of peace openly arrived at" had been the first of President Woodrow Wilson's Fourteen Points. Covenant Members soon ignored art. 18. FERRELL, supra note 38, at 54–61. U.N. CHARTER art. 102 admonishes Members to submit their treaties for registration; a consequence for nonfiling is that a treaty cannot be invoked before a UN organ. See also GOODRICH ET AL., supra note 5, at 610–14; SIMMA, supra note 1, at 1103–16. Security agreements are often not published. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 312 r.n.5 (1987) (RESTATEMENT (THIRD)).

53. TAYLOR, supra note 17, at 264.

54. Romania had to aid Austria-Hungary only if she were attacked in territory of States bordering Romania. Treaty of Alliance, Oct. 30, 1883, Aus.-Hung.-Rom., arts. 2–3, 162 Consol. T.S. 488, 491.

55. Germany accepted the treaty verbatim; Italy required consultation before action. Treaty Providing for Accession of Germany, Oct. 30, 1883, 162 id. 487, 493; Treaty Providing for Accession of Italy, May 15, 1888, 171 id. 61. Treaty of Alliance, July 13/25, 1892, Aus.-Hung.-Rom., 177 id. 273, renewed the relationship; Germany and Italy acceded. Treaty Providing for Accession of Germany to the Alliance, Nov. 11/12, 1892, 178 id. 17; Treaty Providing for Accession of Italy to the Alliance, Nov. 28, 1892, id. 39. Protocol, Sept. 30, 1896, 183 id. 379, extended the alliance to 1902. Germany and Italy acceded. Accession of Germany, May 7, 1899, id. 383; Accession of Italy, June 5, 1899, id. 389. The relationship was extended by Third Treaty Renewing Alliances of 1892 and 1896, Apr. 4/17, 1902, Aust.-Hung.-Rom., 191 id. 117; Treaty Providing for Accession of Germany to the Alliance, July 12/25, 1902, 2 HURST, supra note 17, at 729; Treaty Providing for Accession of Italy to the Alliance, Dec. 12, 1902, Aust.-Hung.-Italy, id. 730; and by Treaty Renewing the Alliances of 1892, 1896, and 1903, Feb. 5, 1913, 217 Consol. T.S. 384; Treaty Providing for Accession of Germany to the Alliance, Feb. 13/26, id. 390; Treaty Providing for Accession of Italy, Mar. 5, 1913, Aust.-Hung.-Italy, id. 393.

56. Treaty of Alliance, supra note 51; see also supra notes 49–53 and accompanying text.
57. Note of Russian Ambassador to France M. de Mohrenheim to French Foreign Minister M. Ribot, Aug. 15/27, 1891, annexing Letter of Russian Foreign Affairs Minister Nikolai Giers to de Mohrenheim, Aug. 9/21, 1891; Note of Ribot to de Mohrenheim, Aug. 27, 1891, 2 Hurst, supra note 17, at 662–65.

58. Draft of Military Convention, 1892, Fr.-Russ., id. 668, approved by Note of Giers to French Ambassador to Russia M. de Montbello, Dec. 15/27, 1893, id. 669. For diplomatic history analysis, see 1 WILLIAM L. LANGER, THE DIPLOMACY OF IMPERIALISM 1890–1912 chs. 1–2 (1935); TAYLOR, supra note 17, at 15.

59. PALMER, supra note 15, at 180.

60. Id. 203; TAYLOR, supra note 17, ch. 18, analyzing Declaration Respecting Egypt and Morocco, Apr. 8, 1904, Fr.-Gr. Brit., 195 Consol. T.S. 198; Convention Respecting Newfoundland and West and Central Africa, Apr. 8, 1904, Fr.-Gr. Brit., id. 205. See also KAGAN, supra note 20, at 177–78.

61. KAGAN, supra note 20, at 150–51; PALMER, supra note 15, at 209. DON COOK, FORGING THE ALLIANCE 33 (1989) claims Britain's first peacetime defensive alliance was Treaty of Dunkirk, Mar. 4, 1947, Fr.-U.K., 9 U.N.T.S. 187. However, the United Kingdom in effect allied with other States in Treaty of Alliance and Friendship, supra note 18, to enforce the Congress of Vienna system, the Nyon Arrangement, Sept. 14, 1937, 181 L.N.T.S. 135, and Arrangement Supplementary to the Nyon Arrangement, Sept. 17, 1937, id. 149, and with Poland just before World War II. See supra notes 14–22; infra notes 138–43, 153, 224–31, 262 and accompanying text. While Cook's statement is technically correct, the effect of these treaties was a defense alliance in each case.

62. TAYLOR, supra note 17, at 511. Only after the Great War began did Britain, France, and Russia sign the Pact of London, Sept. 5, 1914, 220 Consol. T.S. 330, pledging to continue the conflict until a satisfactory peace could be obtained. PALMER, supra note 15, at 232.

63. KAGAN, supra note 20, at 150–51; PALMER, supra note 15, at 209. DON COOK, FORGING THE ALLIANCE 33 (1989) claims Britain's first peacetime defensive alliance was Treaty of Dunkirk, Mar. 4, 1947, Fr.-U.K., 9 U.N.T.S. 187. However, the United Kingdom in effect allied with other States in Treaty of Alliance and Friendship, supra note 18, to enforce the Congress of Vienna system, the Nyon Arrangement, Sept. 14, 1937, 181 L.N.T.S. 135, and Arrangement Supplementary to the Nyon Arrangement, Sept. 17, 1937, id. 149, and with Poland just before World War II. See supra notes 14–22; infra notes 138–43, 153, 224–31, 262 and accompanying text. While Cook's statement is technically correct, the effect of these treaties was a defense alliance in each case.

64. Treaty of Alliance, Mar. 30, 1904, Bulg.-Serb., arts. 2–4, 2 HURST, supra note 17, at 752.


67. Treaty of Alliance, May 19/June 1, 1913, Gr.-Serb., art. 1, 218 Consol. T.S. 166, 167; Military Convention, May 19/June 1, 1913, id. 170; see also Protocol Concerning Conclusion of Treaty of Alliance, Apr. 22/May 5, 1913, id. 117. The Second Balkan War ended with Treaty of Peace, May 30, 1913, id. 159; Treaty of Peace, July 28/Aug. 10, 1913, id. 322.

68. See supra notes 60–63 and accompanying text.


70. KAGAN, supra note 20, at 128–29; but see TAYLOR, supra note 17, at 527–28.

71. Hague III, supra note 38, arts. 1, 3, 36 Stat. at 2251; see also supra note 38 and accompanying text.
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73. TAYLOR, supra note 17, at 527–28.

74. Pact of Paris, supra note 11, arts. 1–2. see also infra notes 111–27 and accompanying text.

75. See supra notes 51–53 and accompanying text.

76. Hague II, supra note 39, art. 1, 36 Stat. at 2251; Hague III, supra note 38, arts. 1, 3, id. at 2271.

77. See supra notes 19, 21, 25, 32, 36, 43, 51, 54-55, 57, 69 and accompanying text.

78. See supra notes 21-22, 24-33, 36, 46, 57-61, 64, 69 and accompanying text.

79. See supra notes 24-30 and accompanying text.

80. See supra note 29 and accompanying text.

81. See infra notes 165–277 for analysis of self-defense in the Charter era.


83. See infra notes 255–63 and accompanying text.

84. See supra note 1 and accompanying text.

85. E.g., supra note 22 and accompanying text.

86. Cf. I.C.J. STATUTE, art. 38(1); RESTATEMENT (THIRD), supra note 52, §§ 102–03.

87. See F. P. WALTERS, A HISTORY OF THE LEAGUE OF NATIONS ch. 4 (1952) for analysis of drafting of the Covenant; see also supra note 10 and accompanying text.

88. Vienna Convention on the Law of Treaties, May 23, 1969 art. 29, 1155 U.N.T.S. 331, 339 (Vienna Convention), (restating customary rule that unless a different intention appears from a treaty or is otherwise established, a treaty binds a party as to all its territory); IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 89–92 (2d ed. 1984); RESTATEMENT (THIRD), supra note 52, § 322 & r.n. 2 (noting colonial empires’ practice to specify territorial application).

89. COVENANT OF THE LEAGUE OF NATIONS art. 1 provided that original Members were States signatory to Treaty of Versailles, supra note 10, of which the Covenant was Part I, and other States named in the Covenant Annex, e.g., countries like the Netherlands, were neutral during the war. Other States, Dominions, or colonies could join if the Assembly approved. See also WALTERS, supra note 87, at 43–44. For the Assembly’s function, see infra notes 91, 94 and accompanying text. The United States signed the Treaty of Versailles, supra, but the Senate
never gave advice and consent. See WALTERS, supra, ch. 6; supra note 10 and accompanying text.

90. COVENANT OF THE LEAGUE OF NATIONS arts. 4(1), 10. For President Woodrow Wilson, Article 10 was the Covenant's key provision. KAGAN, supra note 20, at 299; WALTERS, supra note 87, at 48–49. The United States was also mentioned but never joined the League. See supra notes 10, 89 and accompanying text.

91. Id., arts. 3, 6, 11; see also U.N. CHARTER arts. 97–101; GOODRICH ET AL., supra note 5, ch. 15; WALTERS, supra note 87, at 44–47, 49.

92. COVENANT OF THE LEAGUE OF NATIONS arts. 12–13, 15; see also WALTERS, supra note 87, at 49–53.

93. COVENANT OF THE LEAGUE OF NATIONS arts. 16(1)–16(2); see also WALTERS, supra note 87, at 53.

94. COVENANT OF THE LEAGUE OF NATIONS arts. 18–19, countering treaty terms of the previous era, which often enjoined secrecy on parties; see also WALTERS, supra note 87, at 54–55; supra note 52 and accompanying text.


96. Vienna Convention, supra note 88, art. 31(1) (treaty interpreted in good faith in accordance with ordinary meaning given terms in their context and in light of its object and purpose); see also RESTATEMENT (THIRD), supra note 52, § 325(1); Eduardo Jimenez de Arechaga, International Law in the Past Third of a Century, 159 R.C.A.D.I. 1, 42–48 (1978).


99. See supra notes 10, 89–90 and accompanying text.

100. KAGAN, supra note 20, at 297–98; George A. Finch, A Pact of Non-Aggression, 27 AM. J. INT’L L. 525, 526 (1933). COVENANT OF THE LEAGUE OF NATIONS art. 21, also provided that nothing in the Covenant would be deemed to affect "validity of international agreements, such as treaties of arbitration or regional understandings like the Monroe Doctrine, for securing the maintenance of peace." Article 21 was inserted to try to assure U.S. Senate passage of the Treaty of Versailles, supra note 10. President Woodrow Wilson and British Prime Minister David Lloyd George agreed, in exchange, to the treaties, supra note 98, that pledged aid to France if Germany attacked her again. Latin American States were not happy with the Monroe Doctrine reference. WALTERS, supra note 87, at 55–56.


102. E.g., Alliance, Aug. 14, 1920, Czech.–Yugo., art. 1, 6 L.N.T.S. 209, 211; Alliance, Apr. 23, 1921, Czech.–Rom., art. 1, 13 id. 231, 233; Defensive Alliance, June 7, 1921, Rom.–Yugo., art. 1, 54 id. 257, 259 (collective self-defense from "unprovoked attack"; also providing for consultation); THEODORE I. GESHKOFF, BALKAN UNION: A ROAD TO PEACE IN SOUTHEASTERN EUROPE 62–63 (1940) (Entente’s weakness was that it did not provide for
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defense to unprovoked attack by a great power); 1 GRENVILLE, supra note 101, (Entente designed to maintain the Treaties of Neuilly and Trianon, supra note 10.). France and Italy also negotiated treaties with Entente States. Id. 114–15; L.S. STAVRIANOS, BALKAN FEDERATION 227 (1964).


105. See infra notes 111–26, 202–10 and accompanying text.

106. Locarno Treaty, supra note 101, art. 2, 54 L.N.T.S. at 293. See also ALEXANDROV, supra note 1, at 44–47; BOWETT, supra note 1, at 127–29; KAGAN, supra note 20, at 308–15, 335, 355–57, 378. WALTERS, supra note 87, at 285–94; id. ch. 54 (German denunciation of Locarno, 1936); C.G. Fenwick, The Progress of Cooperative Defense, 24 AM. J. INTL L. 118, 120 (1930) (France concluded guaranty treaties “of the old type” with Czechoslovakia and Poland besides signing Locarno Treaties); Fenwick, The Legal Significance of the Locarno Agreements, 20 id. 108 (1926); Finch, supra note 100, at 727–28 (failure of multilateral 1924 Treaty of Mutual Assistance); Quincy Wright, The Munich Settlement and International Law, 33 AM. J. INTL L 12, 18 (1939) (German denunciation of Locarno).

107. ALEXANDROV, supra note 1, at 45.

108. Locarno Treaty, supra note 101, art. 1 (italics in original).

109. A party claiming a violation had to bring the case to the League. Id., art. 4.

110. Id., art. 9, imposed no obligations on the British Dominions or India unless they assented. However, the Treaty said nothing about the then-extensive Belgian, French, or Italian possessions or British colonies. Cf. Vienna Convention, supra note 88, art. 29; see also supra note 88 and accompanying text. See WALTERS, supra note 87, ch. 24, for analysis of the Locarno treaties in the context of the Covenant. Germany ended the arrangement in 1936 by denouncing the Treaty. WALTERS, supra, ch. 54; Wright, The Munich, supra note 106.


112. U.N. CHARTER art. 103. See also Vienna Convention, supra note 88, art. 30; RESTATEMENT (THIRD), supra note 52, § 102 cmt. h; § 323 cmt. b; SINCLAIR, supra note 88, at 94–98, 184–85.


114. See generally Symposium, State Succession in the Former Soviet Union and in Eastern Europe, 33 VA. J. INTL L. 253 (1993); Walker, Integration and Disintegration, supra note 42.


117. G.A. Res. 95(1), U.N. GAOR, 1st Sess., U.N. Doc. A/236, at 1144 (1946). International Law Commission, Formulation of the Nuremberg Principles, 1950 2 Y.B. INTL L. COMM'N 193, 195 reiterated principles of the Pact, the Judgment and the Resolution. For further analysis of the war crimes trials and the 1946 Assembly resolution, see infra notes 202-10 and accompanying text. 2 OPPENHEIM, supra note 1, § 52fh, at 183, says resort to war is lawful as between Pact parties and non-parties, and presumably a fortiori between two States that are not Pact parties. However, principles of treaty succession, supra note 114 and accompanying text, and acceptance of Pact principles as a general customary norm make this claim dubious today. See supra notes 115-16, infra notes 165, 203-06, and accompanying text.

118. Multilateral Treaty for Renunciation of War: Identical Notes of the Government of the United States to the Governments of Australia et al., June 23, 1928, 22 AM. J. INTL L. 109 (Supp. 1928). See also MILLER, supra note 111, at 80-98; WALTERS, supra note 87, at 385-86. 119. The result was that the Pact applied to most of the Earth's territory. Cf. Vienna Convention, supra note 88, art. 29; supra note 88 and accompanying text.


121. FERRELL, supra note 38, at 193-200; 3 CHARLES CHENEY HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED BY THE UNITED STATES 1683 (1945); MCDougAL & FELICIANO, supra note 1, at 141; MILLER, supra note 111, at 111; 2 OPPENHEIM, supra note 1, §§ 52fh, 52g; see also ALEXANDROV, supra note 1, at 58; but see Quincy Wright, The Interpretation of Multilateral Treaties, 23 AM. J. INTL L. 94, 104, 106 (1929); Wright, The Meaning of the Pact of Paris, 27 id. 39, 43 (1933). The notes debate continued in the U.S. Senate. FERRELL, supra at 246-52.

122. Note of UK Ambassador Houghton to Secretary of State Kellogg, May 19, 1928, 1928(1) FOR. RELS. U.S. 67 (1942).

123. See ALEXANDROV, supra note 1, at 55-56; FERRELL, supra note 38, at 179-81; MILLER, supra note 111, at 68-69, 117-18, 121-22; WALTERS, supra note 87, at 386; Borchard, supra note 120, at 118.

125. See generally J.E.S. FAWCETT, THE BRITISH COMMONWEALTH IN INTERNATIONAL LAW (1963); States: British Commonwealth, 1 WHITEMAN, DIGEST § 30.

126. See supra note 88 and accompanying text.

127. U.S. Note of April 23, 1928, 1928(1) FOR. RELS. U.S. 34, 36–37 (1942); see also supra notes 118–21 and accompanying text.

128. See supra note 102 and accompanying text.


130. See supra notes 118–27 and accompanying text.


132. See 1 GRENVILLE, supra note 101, at 115; supra notes 101–02 and accompanying text; see also GESHKOFF, supra note 102, chs. 5–12; PADELFORD, PEACE, supra note 129, chs. 1–4, for history of negotiations.

133. Pan American Union, Apr. 14, 1890, Jan 29, 1902, Aug. 11, 1910, 1 Bevans 129, 344, 752; see also infra note 219 and accompanying text.


137. See supra notes 118–27 and accompanying text.

139. See generally Paelford, International, supra note 138, ch. 2, app. XV; Walters, supra note 87, at 721, 725-26, for descriptions of attacks.


141. Nyon Arrangement, supra note 63, ¶¶ 2-3.


145. Harvard Draft Convention on Rights and Duties of States in Case of Aggression, 33 AM. J. INT'L L. 819 (Supp. 1939). Bowett, supra note 1, at 161, writing in 1958, said the Draft Convention's principles were de lege ferenda. Query whether he would have come to the same conclusion after the relatively full historical record of World War II had been available.


147. 1 Samuel Eliot Morison, History of United States Naval Operations During World War II: The Battle of the Atlantic: September 1939 - May 1943, at 56-113 (1947). President Franklin D. Roosevelt chose the line on July 11, 1941, by ripping a map out of a National Geographic magazine and drawing a line for the U.S. Navy's policing area, which included seas east of Greenland and Iceland. Sherwood, supra note 146, at 308, 310-11.

148. See generally Sherwood, supra note 146, at 308, 310-11, which may recount details of the UK-U.S. arrangement, which was probably informal in nature; see also RESTATEMENT (THIRD), supra note 52, §§ 301 cmt. b & r.n. 4; 312 r.n. 5.

149. See Walters, supra note 87, chs. 66-67.


153. Agreement of Mutual Assistance, Aug. 25, 1939, Pol.-U.K., art. 2, 199 L.N.T.S. 57, 58. A Secret Protocol, Aug. 25, 1939, Pol.-U.K., arts. 1-2, 1 GRENVILLE, supra note 101, at 191, defined the Agreement's object as defense against Germany, included the Free City of Danzig within the meaning of contracting parties, and would include Belgium, Estonia, Latvia, Lithuania and the Netherlands once mutual assistance pacts with those States had been concluded. Protocol of Mutual Assistance, Sept. 4, 1939, Fr.-Pol., art. 1, 1 Grenville, supra at 192, employed similar language to the Poland-U.K. agreement but did not append a secret protocol, insofar as research reveals. See also 1 WINSTON S. CHURCHILL, THE SECOND WORLD WAR 397 (1948); 1 GRENVILLE, supra at 178-79; WALTERS, supra note 87, at 798-99.


156. Treaty of Alliance and Mutual Assistance, Dec. 10, 1944, Fr.-U.S.S.R., arts. 1, 3-4, 149 Brit. & For. St. Pap. 632, 633-34. See also Treaty of Friendship and Mutual Assistance and Post-War Cooperation, Dec. 12, 1943, Czech-U.S.S.R., art. 3, 145 id. 238, 239, which can only be interpreted as applying to reactive measures, since it spoke of a party's being in a future war with Germany. Treaty of Friendship and Alliance, China-U.S.S.R., art. 3, 1 GRENVILLE, supra at 237, had similar terms for future war with Japan. See also id. 226. Agreement, July 30, 1941, Pol.-U.S.S.R., art. 3, 144 Brit. & For. St. Pap. 869, could only be regarded as a defensive alliance; both States were then at war with Germany. See also 1 GRENVILLE, supra at 207, 209.

157. Treaty of Alliance, Jan. 29, 1942, art. 3(i), 36 AM. J. INT'L L. SUPP. 175, 176 (1942), 144 Brit. & For. St. Pap. 1017, 1018; see also 1 GRENVILLE, supra note 101, at 204.

158. Declaration of Panama, supra note 13, ¶ 1.

159. Belligerents refused to recognize the zone. Panama Minister for Foreign Affairs Narciso Garay cable to U.S. Secretary of State Cordell Hull, Jan. 26, 1940, enclosing Statement on Behavior of the British Government, Statement on behalf of the French Government, 1940(1) FOR. RELS. U.S. 689, 690, 693 (1959); Panama Ambassador Jorge E. Boyd cable to Secretary of State Hull, Feb. 16, 1940, enclosing note of German Charge d'Affaires Von Winter to Panama Minister for Foreign Affairs Garay, Feb. 14, 1940, id. 696. Situation III: Contiguous Zones, Airplanes, and Neutrality, in NAVAL WAR C., INT'L L. SITUATIONS 1939, at 59, 80 (1940) concluded that the Declaration, supra note 136, was not a part of international law. See also 1 GRENVILLE, supra note 101, at 246-47; ROBERT W. TUCKER, THE LAW OF WAR AND NEUTRALITY AT SEA 224-26 (50 Naval War C. Int'l L. Stud., 1957).


162. Act of Havana, supra note 161, at 2502, 2504, referring to Convention Respecting Provisional Administration of European Colonies and Possessions in the Americas, July 30, 1940, 56 id. 1273. The Convention, a permanent treaty, superseded the Act, an executive
agreement in U.S. practice but a treaty for other States, in part; the Convention did not assert self-defense rights stated in the Act. It must be presumed that these provisions remained in effect, being cited by Agreement Relating to Defense of Greenland, supra note 160, art. 1. See supra notes 160-61 and accompanying text.


164. McHugh, supra note 1, at 65.

165. See generally GOODRICH ET AL., supra note 5, at 1-12; RUTH B. RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER (1958); SIMMA, supra note 1, at 2-12.

166. Nuremberg Charter, supra note 115; see also supra notes 115-16 and infra notes 202-10 and accompanying text.

167. See generally ALEXANDROV, supra note 1, at 77-79; GOODRICH ET AL., supra note 5, at 44, 342-43; MCCORMACK, supra note 1, at 153-57, 167-68; RUSSELL, supra note 165, at 456, 688-712.


169. See supra notes 158-62 and accompanying text.

170. See generally ALEXANDROV, supra note 1, at 80-93; BOWETT, supra note 1, at 182-83; BROWNLIE, USE OF FORCE, supra note 1, at 270-71; GOODRICH ET AL., supra note 5, at 342-44; RUSSELL, supra note 165, at 690-99; STOETZER, supra note 17, at 28; Kunz, Inter-American System, supra note 168.

171. See ALEXANDROV, supra note 1, at 95; 2 OPPENHEIM, supra note 1, § 52aa, at 155; Robert W. Tucker, The Interpretation of War under Present International Law, 4 INT'L L.Q. 11, 29 (1951).

172. See supra notes 37-164 and accompanying text.


174. Nicaragua Case, supra note 1, at 94. See also id. at 152-53 (sep. opin of Singh, Pres.); Sohn, supra note 120, at 871.

175. E.g., self-defense principles to justify anti-terrorism and drug trafficking suppression. Geoffrey M. Levitt, Intervention to Combat Terrorism and Drug Trafficking, in LAW AND FORCE, supra note 1, at 224. Kolosov, supra note 1, at 234, proposed a treaty to define self-defense. Cf. I.C.J. STATUTE, art. 38(1); RESTATEMENT (THIRD), supra note 52, §§ 102-03, emphasize that treaty law, e.g., the Charter, must be balanced against customary norms, and that custom can develop contrary to treaty-based law and can outweigh treaty law. U.N. CHARTER art. 103 only applies to treaties inconsistent with the Charter. Moreover, jus cogens norms may outweigh custom or treaties. If a jus cogens norm develops on a track different from a


178. BOWETT, *supra* note 1, at 131; see also ALEXANDROV, *supra* note 1, at 102.


185. ALEXANDROV, *supra* note 1, at 103; Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BRIT. Y.B. INTL L. 189, 218–21 (1985); Waldock,
The right to assist another State is not an inherent right. Kelsen, Law of the United Nations, supra note 4, at 797. This is consistent with one view of the law of treaties, which declares that treaty parties cannot agree to confer a benefit (here, aiding a target State) without beneficiary consent. Restatement (Third), supra note 52, § 324(3). Under this view, if an assisting State and a target State are UN Members, the target state has a potential benefit if assisted under U.N. Charter art. 51, a treaty provision; the target must request help. Vienna Convention, supra note 88, art. 36(1), is the same as the Restatement view but adds that unless a treaty provides otherwise, assent is presumed. Under this approach, an assisting State could assume that a benefit—help against an attacking State—is presumed under the Article 51 collective self-defense. 1 Oppenheim’s International Law, supra note 1, § 627, at 1264, says the Charter is an exception to the rule that a treaty (the Charter) cannot impose benefits on a State not party, i.e., a State that is not a UN Member. However, this does not affect the Article 51 request rule among UN Members. Requiring a request is the safer course; otherwise an assisting State may be accused of violating U.N. Charter art. 2. See also 1 Oppenheim’s International Law, supra § 626; Sinclair, supra note 88, at 98–106.

186. See generally, e.g., supra note 1 for different views of the United States, which has an anticipatory self-defense policy and the USSR, which held a restrictive view.


189. Claim of a material breach, without notice and other procedures, does not entitle a claimant to say a treaty is terminated. See ILC Rep., supra note 188, at 253–55. Claims of breach must go to the heart of an agreement. Special rules apply to multilateral treaties. Vienna Convention, supra note 88, art. 60; Advisory Opinion on Namibia, 1971 I.C.J. 16, 46–47; Jurisdiction of ICAO Council (India v. Pak.), 1972 I.C.J. 46, 67; Brownlie, Principles, supra note 124, at 618–19; 1 Oppenheim’s International Law, supra note 1, § 649; Restatement (Third), supra note 52, § 335; Sinclair, supra note 88, at 20, 166, 188–90.

190. E.g., a State with a strong anticipatory self-defense policy assisting a reactive self-defense policy State insisting on reactive self-defense aid might claim that reactive aid only would endanger its forces, configured for anticipatory self-defense, and that this amounts to a fundamental change of circumstances because its self-defense preparations are keyed to use in an anticipatory mode. For further analysis of fundamental change of circumstances, see Vienna Convention, supra note 88, art. 62; Fisheries Jurisdiction (Ice. v. U.K.), 1973 I.C.J. 3, 18; Brownlie, Principles, supra note 124, at 620–21; Arie E. David, The Strategy of Treaty Termination, ch. 1 (1975); Elias, supra note 124, at 119–28; ILC Rep., supra note 188, at 257–58; 1 Oppenheim’s International Law, supra note 1, § 651; Restatement (Third), supra note 52, § 336; Sinclair, supra note 88, at 20, 192–96; Gyorgy Haraszti, Treaties and the Fundamental Change of Circumstances, 146 R.C.A.D.I. 1 (1975); Oliver J. Lissitzyn, Treaties and Changed Circumstances, 61 Am. J. Int’l L. 895 (1967).

191. E.g., a State with a strong anticipatory self-defense policy assisting a reactive self-defense policy State that insists on reactive self-defense aid might claim that reactive
self-defense aid would endanger its forces, configured for anticipatory self-defense, and that because this is the only way that these forces can operate, performance under the agreement is impossible. For further analysis of impossibility of performance, see Vienna Convention, supra note 88, art. 61; ELIAS, supra note 124, at 128-30; ILC Rep., supra note 188, at 255–56; 1 OPPENHEIM'S INTERNATIONAL LAW, supra note 1, § 650; SINCLAIR, supra note 88, at 190–92.

192. See, e.g., supra notes 3, 187 for differing views of commentators on the validity of claims of anticipatory self-defense claims for specific operations.

193. See supra notes 189–91 and accompanying text.


195. This is like the rule of regression to common denominator when States rely on custom and there are objectors. See generally BROWNLE, PRINCIPLES, supra note 124, at 10; 1 OPPENHEIM'S INTERNATIONAL LAW, supra note 1, § 650; supra note 52, § 102 cmts. b, d; Michael Akehurst, Custom As a Source of Law, 47 BRIT Y.B. INT'L L. 1, 23–27 (1974); C.H.M. Waldock, General Course on Public International Law, 106 R.C.A.D.I. 1, 49–53 (1962); but see Jonathan Charney, Universal International Law, 87 Am. J. INT'L L. 529, 538–41 (1993) (existence of persistent objector rule open to serious doubt). J. ASHLEY ROACH & ROBERT W. SMITH'S, UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS (2d ed. 1996), an exhaustive study of objections to law of the sea claims indicates that the persistent objector rule is alive and well, at least for law of the sea issues. Undoubtedly, there are thousands of protests filed annually on many issues in the chancelleries, few if any of which are published. It cannot, therefore, be assumed, as some commentators do, that the rule of the persistent objector is in disuetude.

196. Cf. BROWNLE, PRINCIPLES, supra note 124, at 611; RESTATEMENT (THIRD), supra note 52, § 313 cmt. b.

197. See, e.g., Genocide Reservations Case, supra note 124, 1951 I.C.J. at 32 (Guerrero, Vice Pres.; Hsu Mo, McNair, Read, JJ., dissenting); BROWNLE, PRINCIPLES, supra note 124, at 609; MCNAIR, supra note 124, at 169; 1 OPPENHEIM'S INTERNATIONAL LAW, supra note 1, § 616, at 1245; RESTATEMENT (THIRD), supra note 52, § 313 r.n.1; SINCLAIR, supra note 88, at 54–55.

198. See infra notes 216–63 and accompanying text.

199. See supra notes 189–91 and accompanying text. Although Iceland claims of fundamental change in law were rejected, Fisheries Jurisdiction, supra note 164, at 16–21, did not discount the possibility that a large enough change in law could be grounds for a change of circumstances claim.

200. Asylum (Colom. v. Peru), 1950 I.C.J. 266, 277; Right of Passage Over Indian Terr. (Port. v. India), 1960 I.C.J. 6; BROWNLE, PRINCIPLES, supra note 124, at 9–10; 1 OPPENHEIM'S INTERNATIONAL LAW, supra note 1, § 10, at 30; RESTATEMENT (THIRD), supra note 52, § 102 cmt. e.


202. See supra notes 10, 111-27 and accompanying text. MCCORMACK, supra note 1, at 253–61, has extensive, helpful analysis of the trials; see also ALEXANDROV, supra note 1, at 73–76.

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204. See supra note 23 and accompanying text.


206. BOWETT, supra note 1, at 143; see also MCCORMACK, supra note 1, at 254–56.


209. G.A. Res. 95(1), supra note 117.

210. I.C.J. STATUTE, art. 38(1)(d); RESTATEMENT (THIRD), supra note 52, § 103(2). Most municipal legal systems recognize a right of anticipatory self-defense. MCCORMACK, supra note 1, at 271. This adds more weight to a view that the right exists in international law. I.C.J. STATUTE, art. 38(1)(e); but see RESTATEMENT (THIRD), supra, § 103(2).

211. See supra notes 63, 138–43 and accompanying text.

212. See supra notes 149–63 and accompanying text.


214. See supra notes 167–85 and accompanying text.

215. See supra notes 202–84 and accompanying text.

216. Part IV does not examine practice under the agreements. Others have. See generally, e.g., ALEXANDROV, supra note 1, at 215–90; GOODRICH ET AL., supra note 5, at 345–48; MCCORMACK, supra note 1, at 211–39, and sources cited. These discuss better-known situations. JAMES CABLE, GUNBOAT DIPLOMACY 1919–1991 at 178–213 (4th ed. 1994) demonstrates that smaller incidents since 1945 that may involve bilateral or occasionally multilateral responses may supply more content to practice than is now available. Part IV does not consider the right, recognized under the Charter and in pre-Charter times, for States to use arrangements less formal than a treaty to assert collective self-defense, including anticipatory self-defense. See supra notes 17, 33–35, 83, 208, 213 and accompanying text.

217. ALEXANDROV, supra note 1, at 102; Tucker, supra note 171, at 33.

218. See supra notes 167–70 and accompanying text.

force for all members, including the United States. M.J. BOWMAN & D.J. HARRIS, 
history of inter-American relations in the Pan American Union, OAS and Rio Treaty contexts, 
see generally M. MARGARET BALL, THE OAS IN TRANSITION (1969); GORDON 
CONNELL-SMITH, THE INTER-AMERICAN SYSTEM (1966); STOETZER, supra note 17; ANN VAN 
WYNN THOMAS & A.J. THOMAS, JR., THE ORGANIZATION OF AMERICAN STATES (1963); 
Charles G. Fenwick, The Inter-American Regional System: Fifty Years of Progress, 50 AM. J. INT'L 
L. 18 (1956).

220. See supra notes 167-70, 218 and accompanying text.

221. Rio Treaty, supra note 168, art. 3(2). at 96-97; Act of Chapultepec, supra note 168, had 
no counterpart.

222. Rio Treaty, supra note 168, art. 3(4). at 97; see also id., art. 5, 62 Stat. at 1701, 21 
U.N.T.S. at 97; U.N. CHARTER, art. 51. Rio Treaty, supra, art. 1, pledges that parties will not 
threaten or use force inconsistent with the Charter. Cf. U.N. CHARTER, arts. 2(4), 103; supra 
notes 112, 176 and accompanying text.

223. Rio Treaty, supra note 168, art. 6. Id., art. 9, defined aggression as including 

a. Unprovoked armed attack by a State against the territory, the people, or the land, 
sea or air forces of another State; [and]

b. Invasion, by the armed forces of a State, of the territory of an American State, 
through the trespassing of boundaries demarcated in accordance with a treaty, judicial 
decision, or arbitral award, or, [absent] ... frontiers thus demarcated, invasion affecting a 
region ... under the effective jurisdiction of another State.

Compare Act of Chapultepec, supra note 168, Pts. I(3)-I(4).

224. Treaty of Economic, Social and Cultural Collaboration and Collective Self-Defence, 
for Collaboration in Economic, Social and Cultural Matters and for Collective Self-Defence, 
Oct. 23, 1954, 211 id. 342 (WEU Protocol I); Protocol on Forces of Western European Union, 
Oct. 23, 1954, id. 358 (WEU Protocol II); Protocol on Control of Armaments, with Annexes, 
Oct. 23, 1954, id. 364; Protocol on the Agency of Western European Union for Control of 
Armaments, Oct. 23, 1954, id. 376; and other protocols in 1990 and 1992, which do not amend 

225. WEU Treaty, supra note 224, art. 7.

226. Compare id. with WEU Protocol I, supra note 224, art. 4.

227. Nothing in the Treaty can be interpreted as affecting the Council's authority and 
responsibility under the Charter to take action it deems necessary to maintain or restore 
international peace and security. WEU Treaty, supra note 224, art. 5.

228. WEU Protocol II, supra note 224.

229. WEU Protocol I, supra note 224, art. 3. The WEU was moribund for more than thirty 
years, existing in the shadow of NATO, but it was revitalized in 1986 to meet issues arising out of 
the Iran-Iraq war in the Persian Gulf. Europe's Multilateral Organizations, 3 DEPT ST. DISPATCH 
351, 354 (1992). The European Union has recognized WEU's security role. See generally Walker, 
Integration and Disintegration, supra note 42, at 15-17.

230. See generally ALFRED CAHEN, THE WESTERN EUROPEAN UNION AND NATO 1016 
(1989); THE CHANGING FUNCTIONS OF THE WESTERN EUROPEAN UNION (WEU) xiii-xxx 
(Arie Bloed & Ramses A. Wessel eds., 1994); STANLEY R. SLOAN, NATO's FUTURE: TOWARD
A NEW TRANSATLANTIC BARGAIN 173–75 (1985). Treaty of Dunkirk, supra note 63, had been a WEU predecessor; other European States' desire to accede was a catalyst for WEU. COOK, supra note 63, at 116, 122, 259–60. Ironically, a European Defense Community had been contemplated as part of the then European Economic Community; it would have been "exclusively defensive," but would have allowed response to any "armed aggression" against a member State or European Defense Forces constituted under the Treaty. The Treaty pledged cooperation with the North Atlantic Treaty Organization. Treaty Constituting the European Defense Community, May 27, 1952, arts. 2, 5, reprinted in NAVAL WAR C., INTERNATIONAL LAW DOCUMENTS 1952–53, at 147, 148–49 (1954); Karl Lowenstein, Sovereignty and International Co-Operation, 48 AM. J. INT'L L. 222, 237–38 (1954). The Treaty failed of ratification.


231. WEU Statement on Recent Events in the Gulf, Apr. 19, 1988, in CHANGING, supra note 210, at 81; CAHEN, supra note 230, at 47–50.

232. Article 6 defined the territory of the parties covered by Article 5. North Atlantic Treaty, supra note 82, arts. 5–6, modified as to territory covered by Protocol on Accession of Greece and Turkey, supra note 82; Protocol on Accession of Federal Republic of Germany, supra note 82; Protocol on Accession of Spain, supra note 82. These protocols do not affect the substance of other terms of the North Atlantic Treaty, supra. Currently NATO is in the process of admitting new members in Eastern Europe. See supra note 82.

233. North Atlantic Treaty, supra note 82, art. 7; see also U.N. CHARTER arts. 2(4), 103; supra notes 112, 176 and accompanying text.


236. U.N. CHARTER art. 103; see also supra notes 112, 176 and accompanying text.


239. STARKE, supra note 183, at 77.

241. ANZUS Pact, supra note 183, art. 4. Like the Rio Treaty and the NATO Agreement, the ANZUS Pact, supra, art. 5, limits its territorial scope to attacks on parties' metropolitan territories, island territories under their jurisdiction, or their armed forces, public vessels or aircraft in the Pacific.

242. Compare ANZUS Pact, supra note 183, art. 4, with North Atlantic Treaty, supra note 82, art. 5. Similar to the Rio and North Atlantic Treaties, supra notes 82, 168. ANZUS Pact, supra, art. 5, limits its territorial scope to attacks on parties' metropolitan territories, island territories under their jurisdiction, and parties' armed forces, public vessels or aircraft in the Pacific. See also MCINTYRE, supra note 183, chs. 11–15; REESE, supra note 183, ch. 8; STARKE, supra note 183, chs. 1–2; Leiceste C. Webb, Australia and SEATO, in SEATO: SIX STUDIES 47, 50–57 (George Modelski ed., 1964). As of 1965, there had been no NATO-ANZUS liaison. STARKE, supra at 226–28.

243. STARKE, supra note 183, at 121.

244. It did not include application to parties' armed forces or public vessels or aircraft. Southeast Asia Collective Defense Treaty, with Protocol, Sept. 8, 1954, arts. 4, 8, 6 U.S.T. 81, 83–84, 209 U.N.T.S. 28, 30, 32 (SEATO Treaty); see also LESZEK BUSZYNSKI, SEATO: THE FAILURE OF AN ALLIANCE STRATEGY chs. 1–2 (1983); STARKE, supra note 183, at 221–26; George Modelski, SEATO: Its Function and Organization, in SEATO, supra note 242, at 8–45.


246. BOWMAN & HARRIS, supra note 219, at 196; BUSZYNSKI, supra note 244, ch. 6.


248. Treaty of Alliance, Political Cooperation and Mutual Assistance, Aug. 9, 1954, 211 U.N.T.S. 237 (Second Balkan Pact), partial successor to the Little Entente, supra note 129; a cooperation and friendship treaty among Greece, Turkey and Yugoslavia had been signed a year later. By 1956 the arrangement was in ruins; by 1962 it was a dead letter. See generally JOHN O. IATRIDES, BALKAN TRIANGLE (1968); see also J.A.S. GRENVILLE & BERNARD WASSERSTEIN, THE MAJOR INTERNATIONAL TREATIES SINCE 1945, at 390–91 (1987) (2 GRENVILLE); Gerhard Bebr, Regional Organizations: A United Nations Problem, 49 Am. J. Int'l L. 166, 182 (1955).

249. Obligations under the Pact were subject to those owed other alliances, e.g., the North Atlantic Treaty, supra note 82, for Greece or Turkey; the Pact required consultation among members for conflicts in these obligations. Compare Second Balkan Pact, supra note 248, arts. 2, 6–7, 10, with Pact of Organisation of Little Entente, supra note 129, arts. 10–11; Protocol, supra note 130, arts. 1, 3. Whether consultation was a prerequisite before action is debatable; a foreign minister for a party State said that consultation would not be an obstacle, since all joint plans had
been prepared and would be applied when joint measures were decided. IATRIDES, supra note 248, at 139.


251. There was no territorial limitation, although the treaty's being limited to Arab League members in effect excluded all but the Middle East and northern Africa. Baghdad Pact, supra note 250, arts. 2, 5.

252. The United States was a "de facto" member but not a Pact party. See Declaration Respecting the Baghdad Pact, supra note 250; BOWMAN & HARRIS, supra note 219, at 196; Reid, supra note 250, at 159-80; Manchester, supra note 250, at 336-45.


255. Compare Warsaw Pact, supra note 254, with North Atlantic Treaty, supra note 82, art. 4.


257. Id., art. 5.

258. Id., art. 3.


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China-U.S., Dec. 2, 1954, with U.S. Reservations, arts. 4-5, 6 U.S.T. 433, 436 248 U.N.T.S. 213, 215 included the same kind of terms as the Japan Treaty; the United States denounced it when it recognized the People's Republic of China. See generally Goldwater v. Carter, 444 U.S. 996 (1979). See also 2 GRENVILLE, supra note 248, at 109–113, noting U.S. Senate reservations to the China treaty forbade U.S. action unless China were forced to fight in self-defense or territorial extension of the U.S. commitment without Senate approval. If the United States negotiated formal agreements with Persian Gulf states other than Kuwait after Iraq's invasion of Kuwait in 1990, these bilateral treaties may provide for anticipatory collective self-defense. The Kuwait-U.S. agreement was a reactive defense treaty, since it had been invaded by the time the United States negotiated with Kuwait. These treaties have not been and may never be published for national security reasons. See George K. Walker, The Crisis Over Kuwait, August 1990 - February 1991, 1991 Duke J. Comp. & Int'l L. 25, 29–30; RESTATEMENT (Third), supra note 52, § 312 r.n.5; see also supra note 52.

261. See, e.g., Treaty of Friendship and Mutual Assistance, Mar. 18, 1948, Bulg.-USSR, art. 2, 48 U.N.T.S. 135, 144 (If either party is “involved in hostilities with a Germany which might seek to renew its policy of aggression or with any other State ... associated with Germany in a policy of aggression either directly or indirectly or in any other way, the other ... shall immediately extend to the ... Party involved in hostilities military and other assistance with all the means at its disposal[,]” subject to the Charter); Treaty of Friendship, Mutual Assistance and Cooperation, June 12, 1964, Ger. Dem. Rep.-USSR, art. 5, 3 I.L.M. 754, 756 (1965); (treaty subject to Warsaw Pact, supra note 254); see also FODOR, supra note 254, at 5–6, 188–91; 2 GRENVILLE, supra note 248, at 185; JAIN, supra note 254, at 13-14; Bowett, Collective Self-Defence, supra note 173, at 144; W.W. Kulski, The Soviet System of Collective Security Compared with the Western System, 44 AM. J. INT'L L. 453 (1950). Treaty of Friendship, Alliance and Mutual Assistance, Feb. 14, 1950, People's Rep. China-USSR, art. 1, 226 U.N.T.S. 3, 12-14, had language like the Bulgaria treaty, but said Japan was the potential adversary. See also 2 GRENVILLE, supra at 158–59. USSR satellites also negotiated agreements among themselves, subject to the Warsaw Pact, supra, e.g., Treaty on Friendship, Cooperation and Mutual Assistance, Apr. 5, 1967, arts. 4-5, Ger. Dem. Rep.-Pol., 6 I.L.M. 514 (1968).


263. See generally Walker, Maritime Neutrality, supra note 146, at 131-40.

264. See supra notes 1-4 and accompanying text.

265. See supra note 1 and accompanying text.

266. See supra notes 1-2 and accompanying text.

267. MCCORMACK, supra note 1, at 131; Mullerson & Scheffer, supra note 1, at 110–11, 2 O'CONNELL, supra note 4, at 1101, and O'CONNELL, supra note 1, at 3, recognized this; writing over two decades earlier, O'Connell had concluded, however, that navies were coming to a reactive view of self-defense. Id. at 83, 171. Perhaps O'Connell's view would be different today; he seems to say as much in 2 O'CONNELL, supra at 1101. See also supra note 4 and accompanying text.

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268. See supra notes 201–03, 205–06, 214, 217, 220, 224, 233, 236–38, 248–49 and accompanying text. The principal exception appears to be the now defunct Baghdad Pact, supra note 250; see also supra notes 250–52.

269. 2 OPPENHEIM, supra note 1, § 52aa, at 157.

270. See supra notes 109–15, 172–73, 202–10 and accompanying text. To be sure, most States are UN Members today. However, a customary collective self-defense right may be claimed if the Charter does not apply. See generally Nicaragua Case, supra note 1; supra notes 112, 174–76.


272. SCHACHTER, supra note 1, at 401.

273. See supra notes 1–2 and accompanying text.

274. See supra notes 167–70 and accompanying text.

275. See, e.g., supra notes 203, 215, 220, 223-24, 239 and accompanying text.

276. U.N. CHARTER arts. 2(1), 51, 103. See also supra notes 112, 176 and accompanying text.


278. See supra note 203 and accompanying text.

279. E.g., ALEXANDROV, supra note 1, at 163, appears to support his view that the 1981 Israeli raid on the Iraqi nuclear reactor could not be supported by self-defense because of the 1994 debate on imposing sanctions on North Korea, rather than using force, because of the danger of nuclear weapons. MCCORMACK, supra note 1, at 98–99, derides the claim that Israel had been given a necessary guarantee of security under the U.S. “Star Wars” program was a reason why it may not have been necessary for Israel to bomb the reactor.

280. See VON CLAUSEWITZ, supra note 111, at 117–21.

281. RESTATEMENT (THIRD), supra note 52, § 313 cmt. b analyzes declarations and understandings.
When signing or adhering to an international agreement, a state may make a unilateral declaration that does not purport to be a reservation. Whatever it is called, it constitutes a reservation in fact if it purports to exclude, limit, or modify the state's legal obligation. Sometimes, however, a declaration purports to be an "understanding," an interpretation of the agreement in a particular respect. Such an interpretive declaration is not a reservation if it reflects the accepted view of the agreement. But another... party may challenge the expressed understanding, treating it as a reservation which it is not prepared to accept.

... [For] a multilateral agreement, a declaration of understanding may have complex consequences. If it is acceptable to all..., they need only acquiesce. If, however, some... share or accept the understanding but others do not, there may be a dispute as to what the agreement means, and whether the declaration is in effect a reservation. In the absence of an authoritative means for resolving that dispute, the declaration, even if treated as a reservation, might create an agreement at least between the declaring state and those who agree with that understanding. See [RESTATEMENT (THIRD), supra, § 313(2)(c), dealing with reservations]... However, some... parties may treat it as a reservation and object to it as such, and there will remain a dispute between the two groups as to what the agreement means.

See also ILC Rep., supra note 188, at 189-90; Bowett, Reservations, supra note 124, at 69; supra notes 124, 197 and accompanying text for analysis on reservations.


284. Protocol I, supra note 282, art. 51. Article 51(2) and 51(5) prohibitions on attacks on civilians, absent other considerations, e.g., civilians who take up arms, restate customary law. MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICT 299 & n.3 (1982); DEPARTMENT OF THE AIR FORCE, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS AFP 110–31, ch. 14 (1976); SAN REMO MANUAL, supra note 5, ¶ 39; NWP 1-14, supra note 1, § 6.2.3.2. (noting protections also under Fourth Convention, supra note 238, art. 33, 6 U.S.T. at 3538, 75 U.N.T.S. at 310), 11.2 n.3, 11.3; NWP 9A, supra note 1, ¶¶ 6.2.3.2 (noting protections also under Fourth Convention, supra note 283, art. 33,
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285. Protocol I, supra note 282, art. 52. Article 52 states a general customary norm, except for its prohibition on reprisals against civilians in art. 52(1), for which there is a division of view. See generally BOTHE ET AL., supra note 284, at 320–27; COLOMBOS, supra note 138, §§ 510–11, 524–25, 528–29; NWP 1–14, supra note 1, § 6.2.3. & n.36, 6.2.3.2 (protections for some civilians from reprisals under the Fourth Convention, supra note 283, art. 33, 6 U.S.T. at 3538, 75 U.N.T.S. at 308-10, 8.1.1 & n.9 8.1.2 & n.12 (U.S. position that Protocol I, supra art. 52(1), 1125 U.N.T.S. at 27, “creates new law”); NWP 9A, supra note 1, ¶¶ 6.2.3 & n. 33, 6.2.3.2 (noting protections for some civilians from reprisals under Fourth Convention, supra note 283, art. 33, 8.1.1 & n.9, 8.1.2 & n.12 (noting US position that Protocol I, supra, art. 52(1), “creates new law”); 2 O’CONNELL, supra note 4, at 1105-06; 4 PICTET, supra note 284, at 131; CLAUD PILLOUD, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶¶ 1994–2038 (Yves Sandoz et al. eds., 1987); Matheson, supra note 284, at 426; Solf, supra note 284, at 131. Frank Russo, Jr., Targeting Theory in the Law of Naval Warfare, 30 NAVAL L. REV. 1, 17 n. 36 (1992) rejects applying Protocol I, supra, art. 52(2), to naval warfare.

286. Protocol I, supra note 282, art. 57. Rules of distinction, necessity and proportionality, with the concomitant risk of collateral damage inherent in any attack, in Article 57, are generally restatements of customary norms. See generally BOTHE ET AL., supra note 284, at 423.
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309–11; KALSHOVEN, supra note 284, at 99–100; McDougal & Feliciano, supra note 1, at 525; San Remo Manual, supra note 5, ¶¶ 39–42 & Commentaries; Stone, Legal Controls, supra note 168, at 352–53; Fenrick, The Rule, supra note 284, at 125 (questioning whether proportionality is accepted as a customary norm); Matheson, supra note 284, at 426; Results, supra note 262, at 170–71; Schmidt, supra note 284, at 233–38; Solf, supra note 284, at 131; van Hegelsom, supra note 284, at 18–19.


291. San Remo Manual, supra note 5, ¶ 46(b) & Commentary 46.3; see also Ben Cheng, General Principles of Law As Applied by International Courts and Tribunals 90 (1983); Dinstein, supra note 1, at 191; McDougal & Feliciano, supra note 1, at 220.

292. See supra notes 17, 33–35 and accompanying text.

293. See supra notes 37–69 and accompanying text.

294. See supra notes 87–164, 183, 208, 213, and accompanying text.

295. See supra notes 167–215 and accompanying text.
296. See supra note 23 and accompanying text.

297. See supra notes 216–77 and accompanying text.

298. Cf. Lowe, supra note 1, at 128.


300. See supra notes 278–91 and accompanying text.

301. See supra notes 253–55 and accompanying text.

302. See supra notes 244–47 and accompanying text.

303. See supra notes 218–23 and accompanying text.

304. See supra notes 232–34 and accompanying text.

305. E.g., in the case of the United States, its arrangement with Taiwan was ended by denunciation. The United States has withdrawn from the Philippines. The trilateral ANZUS Pact, supra note 183, has been suspended with respect to New Zealand. U.S. bilateral treaties with Japan and South Korea remain in full force, however. See supra notes 240–43, 256–60 and accompanying text.


307. E.g., the European Union, successor to the European Economic Community, has indicated a security role may be part of its agenda. See supra notes 229–30 and accompanying text; see also, e.g., supra note 183 and accompanying text.

308. See Kahgan, supra note 176; see also supra note 176 and accompanying text.