NATO & THE THIN RED LINE
- THE EXPANDING BOUNDARIES OF INTERNATIONAL LAW ON THE
USE OF FORCE

being a Thesis submitted for the Degree of

MASTER OF PHILOSOPHY

in the University of Hull

by

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NOVEMBER 2014
DECLARATION

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Abstract

This study seeks to examine International law on the Use of Force. Specifically, I will attempt to explore the contention that there has been a change in the scope of understanding as to when force may be used. That is, the doctrine on the prohibition on the use of force, must be re-interpreted in light of the security challenges of the 21st century, and accordingly modified, by being expanded. It has been argued that there is a need to meet different and compelling circumstances, which could not have been envisioned at the time of the drafting of the UN Charter and therefore “a loosening of the constraints” to resort to use force is necessary. My thesis is that the law is indeed evolving and NATO is a major driving force in the development of International law. NATO will continue to be instrumental as to how the law meets pressing issues in the contemporary world –such as how far the extent of the prohibition against force applies in fighting a “war against terrorism”, the operation of drones and cyber warfare. This study concurs that, at times, only a thin red line has separated NATO actions, from falling outside of the International legal framework, as other scholars have observed.

The lawfulness of Humanitarian intervention is not yet established under International law, although, there are increasing calls for the International community to establish the Responsibility to Protect doctrine in order to act, when moral imperative calls for the use of force. It is NATO’s military power that often presents the best means by which to effectively do so, but this is far from the purpose for which NATO was designed by the Washington Treaty. Moreover, the basis upon which NATO could be held liable for internationally wrongful actions is not well established, and while possessing some degree of legal personality, but not yet fully developed, there is an increasing possibility that NATO could be sued as an International Organisation for an act that is attributable to it. Furthermore, NATO has become less connected to the UN and has developed outside the intention of its original role as a regional organisation, as set out in Chapter VIII of the UN Charter. In light of these factors, this study assesses to what extent NATO can be said to have transgressed a thin red line.
PART 1: INTERNATIONAL LAW ON THE USE OF FORCE

I. INTRODUCTION

There are a number of compelling reasons to want to sustain a peremptory approach to the law prohibiting the use of force, although it is sometimes difficult to reconcile this with the moral imperative to want to use force, in order to bring an end to conflicts, and relieve suffering in humanitarian catastrophe. Moreover, States cannot be denied their important and inherent right of self-defence, and there is merit in the argument that the applicable legal provision which recognises this right, in Article 51 of the UN Charter, is now out of date, or at least, somewhat antiquated by modern challenges.

Part 1 of this study attempts to set out what the current law on the use of force is, explaining why its history and definitions are important, the politics and principles that underpin it, objections against and moral philosophy concerning it. I have investigated the contemporary issues that challenge the original understanding of the law. Part 2 focuses on NATO and more recent events which concern how and why it can apply force in the world today. Particular note is taken of the Atlantic Charter and the Washington Treaty, which made clear that NATO was act as a regional organisation, in order to defend its members in the face of a palpable threat to their right of self-existence. The manner in which NATO operations have been conducted “out of area” today calls for concern. In conclusion, I examine whether the legal basis of Article 5 of the Washington Treaty remains sustainable, or justified.

A. Why NATO?

The manner in which the collective use of military force is exercised in the world today does not accord with the way it was planned. This is because the ambitious system that was originally set out by the United Nations Charter in 1945 envisioned an all-encompassing union of world military power, ready to take on any threat to International peace and security, contributed to by all the members of the United Nations, and being made available to the Security Council to direct and control.

This has not been done, although the applicable legal provision that sought to make it so is Article 43 of the Charter, which still remains in place. In reality, a rather different system of International security architecture is at play, which relies on delegations of power from the UN Security Council to a range of powers, namely the Secretary-General, groups of States, UN subsidiary organs, and regional arrangements, such as NATO.
Thus, NATO is the focus of this study because of its finds itself coincidentally at the forefront of having responsibility for International peace and security, on a massive scale and in circumstances which can be considered to be an accident of history (the dramatic fall of the Soviet Empire). Close regard must be paid to what NATO has done, and especially so since the historical invocation of Article 5 of its Treaty in the wake of the September 11th attacks. Furthermore, it is worthy to study what NATO believes about itself, whether it has distinctive doctrines and practices that might lead it to take certain positions on continuing debates as to when force can be legally employed.

I believe that NATO’s size and complexity as an organisation, it having to take account of a detailed command structure, the working together of a myriad of different commanders, yet wielding a collective power which is enormous, has not been factored into the legal regime that was created by UN Charter, and the general prohibition on the use of force. This means that NATO does not so easily fit within the confines of the legal construct intended to ban the resort to force, within all but the most limited of circumstances, and wherever it uses force inappropriately, it is very difficult to hold NATO legally accountable.

Thinking back to the foundation of the UN in 1945, the supremacy of NATO as a military power in our day, and its use of force in out of area operations, can be construed as an anomaly, which must have implications for the International legal framework which is still in force. In fact, NATO is caught up in the vicious circle concerning the problem whether the world should abide by a strict understanding of the UN Charter and its general prohibition on the use of force, or a more liberal interpretation of International law, which has been shaped by customary practice, and where force may be used in wider circumstances. NATO can issue the threat of using force without being sanctioned by anyone (which is illegal under International law) yet it is the centrepiece in safeguarding International peace and security, and it is continuing to grow in importance and influence.

This is despite a trend towards globalisation, the continued significance of national identity, falling political ideologies, and crashing economies. NATO is a global institution and is made

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1 NATO’s has not systematically codified its doctrines on when to use force, but it has released the NATO Legal Deskbook, which is intended to reflect, as closely as possible, the policies and practice of NATO in legal matters. However, the Deskbook is not a formally approved NATO document and therefore does not purport to reflect the official opinion or position of NATO. Thus, while the Deskbook is not intended to supplant national guidance on a range of issues, and is a refinement of working practices and experiences gained over the past few years (since its earlier 2008 edition), it can be deemed as a useful compilation for understanding the issues coming before NATO legal advisors. The Second Edition (2010) Deskbook is available at: [http://publicintelligence.net/tag/north-atlantic-treaty-organization/](http://publicintelligence.net/tag/north-atlantic-treaty-organization/)
up by democratic countries. NATO exists because its members can share a common outlook on security and defence matters, although, I attempt to identify several rising issues in International law that appear to be diverging legal opinion and receiving significant judicial attention. Among these are: the law applicable in Non-International Armed Conflict, the basis of self-defence in International law and how far it is extended to combating terrorism; the legal basis of Humanitarian intervention, including the doctrine of Responsibility to Protect; cyber warfare and the use of drones. There is no let up in sight as to fervency of diverse violent conflicts taking place in the world today and there are a range of possibilities as to how NATO will respond. Moreover, if NATO is to properly maintain a coherent approach to International law, among its range of constituent members and their various concerns, whilst respecting their fundamental autonomy, common law and civil legal codes; this will become increasingly difficult and remains to be seen in the face of its current, enlarged entity. Additionally, NATO’s relationship with the UN is vitally important, as are the mandates that it is given through any Security Council resolution because, this is the fundamental element of making its actions legal.

When NATO does respond with military power, or “force”, it must also decide how and what it will do, in Yugoslavia, it conducted a campaign and high aerial bombardment, and in Libya, it oversaw the overthrow of Colonel Gaddafi, by conventional targeting, which eventually resulted in the up rise of a violent mob that saw an ignominious demise to the dictator. Thus, NATO’s interpretation as to how it will “operationalise” various mandates given through the Security Council is not always entirely clear and depends much upon its construal of International law and its own military doctrine. Furthermore, the problem deepens in that while NATO has done much to standardise military terms, practices and equipment across its various members, it cannot issue authoritative statements on the law, and with such a mass of military power, a mistake as to the lawful use of force is not easy to remedy.

In this study, I therefore wish to address the issue of NATO’s unique legal personality and problems of the “ultimate control and authority” test in International law. There have been

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2 In Mohammed v Ministry of Defence; Qasim and others v Secretary of State for Defence [2011] EWHC 1369 Leggatt J held that the UK Armed Forces had breached art.5 of the ECHR by detaining a suspected Taliban commander for a total of 106 days, beyond the 96 hours permitted by ISAF policy and found that there was no legal basis, under International Humanitarian Law, of detaining an enemy captive.

3 The case of R (on the application of Khan) v Secretary of State for Foreign and Commonwealth Affairs [2014] EWCA Civ 24 concerned an unsuccessful appeal, when the High Court refused to grant Judicial Review; the Sovereign Act of State included passing on of information which would be likely to be used by the CIA in targeting drone strikes over Pakistan.

times at which it seems to have taken precedence, perhaps unwittingly, over the “effective control” test, and it remains very problematic how either test could properly be applied to NATO. The military operation in Afghanistan is waning, but the consequences over diverging understandings in which the prohibition on the use of force applies will abound into the future, and in particular, as to the attributability to NATO for drone strikes that have killed civilians.

When the European Court of Human Rights, as well as the United Kingdom’s Supreme Court handed down judgments in International law matters, there seemed to be an acceptance that the sending State must implement a meaningful observance of human rights and this must pertain to soldiers as well as civilians. Nonetheless, many remain dissatisfied with the ambiguous result which is arguably inconsistent with the work still emerging from the International Law Commission on the responsibility of International Organisations. Recent events have also brought diverging views as to when and to what standards of human rights are relevant on a battlefield, although there has been development of the rules of International responsibility, there is yet an arguable lacuna as to when NATO can be held liable for the wrongful use of force, which court it can be taken to, and how much it would have to pay.

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6 Smith v Ministry of Defence [2013] UKSC 41
7 In fact, these cases on liability for negligence and the scope of combat immunity, as well as the extra-territorial application of the ECHR, have made high-ranking military commanders fear that legitimate combat decisions may now be subject to the later forensic scrutiny by lawyers and judges in Courts, in civil actions for damages. The problem is compounded by the fact that, whilst British military personnel on active duty are bound by strict rules of engagement and the law on the use of force, the enemies that they face often do not hold any compunction in violating the laws of war. The predicament is such that these various and related issues have now been addressed by the Defence Committee of the House of Commons, by a report into the legal framework for the future of UK military operations: UK Armed Forces Personnel and the Legal Framework for Future Operations, Apr 2014) HC 931: http://www.publications.parliament.uk/pa/cm201314/cmselect/cmdfence/931/931.pdf
9 The select committee’s inquiry has been brought about by an increasing view that the applicable Law of Armed Conflict and legal cases are having damaging consequences for military effectiveness. The genesis of this issue was brought to fore in October 2013, when the policy exchange published a paper entitled: The Fog of Law: the legal erosion of British fighting power: Tugendhat, T and Croft, L: http://www.policyexchange.org.uk/publications/category/item/the-fog-of-law-an-introduction-to-the-legal-erosion-of-british-fighting-power cf Sari, A “Military Operations and the European Convention on Human Rights: 'Because It's Judgment that Defeats Us'” SSRN: http://ssrn.com/abstract=2411070 who argues civilian oversight over the actions of the Armed Forces is not objectionable and in fact, provides a useful check against the worst excesses of prisoner abuse by Soldiers, as has been witnessed in the death in custody of the Iraqi Baha Mousa. Moreover, although the military and civilian systems of law can be treated as discrete entities, the interaction between the two has increased, as the changing nature of the conflicts in which British troops have been deployed, has also evolved.
B. A thin Red Line?

This study is concerned with the contemporary state of International law on the use of force and at present, there is a fragile consensus that force can only be lawful when used by States within the legal paradigm of the UN Charter, and when it is not, the crime of aggression is being committed—but this is not always how States operate accordingly. The basic notions of law on the use of force have come under increasing attack over the past decade, particularly with the military interventions, led by a “coalition of the willing” into Iraq and Afghanistan respectively. It has been claimed that the legitimacy of those conflicts arose in circumstances that had not been originally envisioned by the UN Charter.

Thus, recent military interventions have been justified by the novelty in method, the potential greater degree of destruction that would be executed, if possible, by the perpetrators of the terrorist attacks of 11th September 2001, as well as the intentional sense of alarm spread by them, giving rise to reciprocal novel rights of States to use force. It is argued that doctrines of anticipatory self-defence, preventative self-defence, regime change, revival theory, humanitarian intervention, State responsibility, and pre-emptive strike, now have legitimacy because of the security challenges faced in the 21st Century.

So it goes, the applicable limitations originally imposed upon States, by International law, on the use of their military power (force) since the founding on the UN Charter, and as so eloquently set out in the seminal work of 50 years ago by Ian Brownlie QC FBA, in “International Law and the Use of Force by States” has moved on. Other authors have mapped the contemporary state of the law with parallel remarkable clarity: Christine Gray, “International Law and the Use of Force: Foundations of Public International Law” and Yoram Dinstein, in “War, Aggression and Self-Defence”.

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10 Clark, A & Beck, R “International Law and the Use of Force: Beyond the U.N. Charter Paradigm” Routledge (1993): the authors discuss the United Nations Charter which was adopted in 1945, establishing a legal paradigm for regulating the recourse to armed force. However, significant developments have challenged the paradigm’s validity, causing a paradigmatic shift and their ultimate conclusion is that although international law's intentions at the end of World War II were noble—and despite the fact that the Charter paradigm still exists on paper—a realistic assessment of the facts requires the conclusion that the paradigm has been rejected by states through their practices and thereby ceased to be international law.

11 For comprehensive analysis see: Weller, M “Iraq and the Use of Force in International Law” Oxford University Press (2010)

12 Lubell concurs with the view that a State can act in self-defence against non-State actors located in the territory of another state only when the host state is unwilling or unable to take effective measures against them: Lubell, N “Extraterritorial Use of Force against Non-State Actors” Oxford University Press (2010)

13 Oxford University Press (1963)

14 Oxford University Press (2008)

However, the starting point of this thesis is the paradigm that has arguably been created by the use of force by NATO. The model of international collective security is undoubtedly affected by NATO and its recourse to the resort to force. With its stunning array of military power and impressive diversity of forces and brigades, NATO has continued to expand and take on a new lease of life into the 21st Century. The central debates as to the use of force have tended to focus on State practice and doctrinal positions by scholars, rather than the fact and status of the world’s great military alliance.

Thus, Olivier Corten, in his considerable polemic on “The Law Against War: The Prohibition on the Use of Force in Contemporary International Law”\(^\text{16}\) (the title of that work being translated from the famous Latin expression “Le droit contre la guerre”) goes a considerable way to demonstrate just exactly how the prohibition on the use of force, and its peremptory nature, remains one of the cornerstones of International law. Furthermore, with considerable skill, Corten argues that the UN Charter was in fact founded on a genuine *jus contra bellum*, and not *jus ad bellum*, so that the restrictive, rather than extensive approach is the correct method to construing positive International law.

On the other hand, while Frank in his work\(^\text{17}\) (taken from the Hersch Lauterpacht Memorial Lectures Series in 2002), accepted that the United Nations Charter in 1945 prohibits all use of force by States, except in the event of an armed attack, or when authorised by the Security Council, he suggests that although the Charter is very hard to amend, its drafters agreed that it should be interpreted flexibly by the UN’s principal political institutions, and the text has undergone extensive interpretation. These changes in law relate to changing public values pertaining to the balance between maintaining peace and promoting justice.

The novel approach in my thesis is taking “A thin red line”—which is how Bruno Simma described the threat, or use of force by NATO without UN authorisation, in regard to the ensuing Kosovo crises in 1999. If the 1999 airstrikes against the then Federal Republic of Yugoslavia had breached the UN Charter, or taken the possibility of doing so unto a knife-edge (as most commentators say) it is prudent to ask, where are we now, and more specifically, whether any further erosion of the UN paradigm can be attributed to NATO.

Indeed, before the Washington Summit of 1999 had taken place, Simma had pointed out that the NATO’s ad hoc decision to resort to force had undermined the system of collective

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\(^{17}\) Frank, T “Recourse to Force State Action against Threats and Armed Attacks” Cambridge University Press (2009)
security. He went on to say that the NATO Treaty implies subordination to the principles and practice of the UN Charter and furthermore, that if repeated, there was a great potential for the actions of NATO to undermine International law. The NATO experience in Yugoslavia was unpopular with those that emphasise the importance of International law, and strong desires were expressed for a strategic program to be adopted for the future of NATO to conclude, as a general policy, to abide by the universal system of collective security, as embodied in the UN Charter.

Moreover, the point that Simma makes about the thin red line, is specifically that “hard cases” (such as the 1999 Kosovo humanitarian crises) involve terrible dilemmas in which imperative political and moral considerations leave no choice but to act outside the law. Simma seems to suggest that these are exceptional circumstances, whereby although the use of force may not be lawful (with no UN Security Council resolution authorising force having been obtained) this only by but a narrow margin, and the greater evil seems to be the possibility of NATO adopting this course of action as a matter of routine. However, in the same edition of the Journal in which Simma wrote, another noted International jurist and indeed a Judge of the International Criminal Tribunal for the Former Yugoslavia, Antonio Cassese, also commented on the Kosovo crises and took a rather different take on the ensuring debate, with much subtlety.

Cassese’s argument was that the apparent breach of International law, by the NATO military action which had been taken outside of the auspices of the UN Charter, was not a negligible one, but quite significant. His view nevertheless, was that rather than reference to exceptional circumstances, the NATO action was evidence of an emerging doctrine of the law on the use of force, which could develop into the use of humanitarian countermeasures (or intervention) in order to prevent large-scale atrocities. Cassese argues that where a number of stringent conditions are met, a customary rule may emerge which would legitimise the use of force.

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18 Simma, B "NATO, the UN and the Use of Force: Legal Aspects" EJIL (1999) 10 (1)

19 A view shared by Ronzitti concerning the action taken by Israel to rescue hostages by Operation Entebbe in Uganda during 1976, which contravened the existing rules of International law, but because the infringement is not regarded as a grave one, it should be seen as part of the creation of new norms on the use of force as well as a breach of the existing ones in: “Rescuing nationals abroad through military coercion and intervention grounds of humanity” Kluwer (1985)

20 Cassese, A. “Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?” EJIL (1999) 10 (1)

21 They are as follows:
(i) gross and egregious breaches of human rights involving loss of life of hundreds or thousands of innocent people, and amounting to crimes against humanity, are carried out on the territory of a sovereign state, either by the central governmental authorities or with their connivance and support, or because the total collapse of such authorities cannot impede those atrocities;
(ii) if the crimes against humanity result from anarchy in a sovereign state, proof is necessary that the central authorities are utterly unable to put an end to those crimes, while at the same time refusing to call upon or to allow other states or international organisations to enter the territory to assist in terminating the crimes. If, on the
by a group of States in the absence of prior authorisation by the Security Council. This is subject to various caveats, including the need to bear in mind the threat to global security which is inevitably involved in the use of force without such authorisation. Thus, whether the 1999 NATO airstrikes against FRY had transgressed the UN Charter regime by a thin line, or a wider margin, the bigger question that is still being argued, is what the wider implications are in regard to the future of the right to use force in *jus ad bellum*.

The thin red line identified by Simma is a good illustration of the difficult problem, because by any measure, there are supposed to be definite imperatives indentified by International law, and the rules on the use of force must lie somewhere. Moreover, it may well be the case that the operation in Kosovo was done by pushing the boundary of the law to limit in which it was unsafe to operate. My thesis attempts to define a doctrine of NATO intervention and how well it accords with the fundamental legal framework, and whether the significance of terrorist attacks being deemed as acts of aggression invoke novel rights for it to use force, through the inherent right of self-defence and collective self defence, in pre-emptive strikes, or measures taken in pursuit of Humanitarian intervention and the emerging doctrine of the “Responsibility to Protect”.

Meanwhile, the tour de force offered by Corten, raises further questions which ought not to be left unanswered, principally, what is the International community supposed do in the face of (current and substantial) threats to international peace and security, overwhelming human

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contrary, such crimes are the work of the central authorities, it must be shown that those authorities have consistently withheld their co-operation from the United Nations or other international organisations, or have systematically refused to comply with appeals, recommendations or decisions of such organisations;  
(iii) the Security Council is unable to take any coercive action to stop the massacres because of disagreement among the Permanent Members or because one or more of them exercises its veto power. Consequently, the Security Council either refrains from any action or only confines itself to deploring or condemning the massacres, plus possibly terming the situation a threat to the peace;  
(iv) all peaceful avenues which may be explored consistent with the urgency of the situation to achieve a solution based on negotiation, discussion and any other means short of force have been exhausted, notwithstanding which, no solution can be agreed upon by the parties to the conflict;  
(v) a group of states (not a single hegemonic Power, however strong its military, political and economic authority, nor such a Power with the support of a client state or an ally) decides to try to halt the atrocities, with the support or at least the non-opposition of the majority of Member States of the UN;  
(vi) armed force is exclusively used for the limited purpose of stopping the atrocities and restoring respect for human rights, not for any goal going beyond this limited purpose. Consequently, the use of force must be discontinued as soon as this purpose is attained. Moreover, it is axiomatic that use of force should be commensurate with and proportionate to the human rights exigencies on the ground. The more urgent the situation of killings and atrocities, the more intensive and immediate may be the military response thereto. Conversely, military action would not be warranted in the case of a crisis which is slowly unfolding and which still presents avenues for diplomatic resolution aside from armed confrontation.

22 The discussion was continued by prominent members of the American Society of International Law, in *Editorial comments: NATO's Kosovo Intervention*, 93 AJIL 824 (2000)
suffering, and a UN collective security mechanism which is all too easily “deadlocked”\(^{23}\) by political indifference and abstention from powerful States that are Russia and China, that are compromised in their observance of human rights, yet permanent members of the Security council?

This thesis shall attempt to set out the International law on the use of force, as it is commonly understood, setting out its historical evolution and the importance thereof; where NATO fits into the picture and how far the use of force in recent conflicts has brought us to the red line, (that is the limits of legality, or beyond), and attempt to devise what may be done so that International law can retain its integrity.

My belief is that rather than the doctrinal justifications given for extending the scope of the use of force\(^{24}\), such as to prevent nuclear capabilities from falling into the hands of those that would use them to cause atrocity, the foremost challenge to the legal regime set out in the UN Charter has been the use of force by NATO, and it has indeed tested the boundaries of International law by the sheer magnitude of its military power and determination to influence the world stage with it. It is arguable that concerned States have witnessed an ensuing use and abuse of Article 51, as a justification for the use of force. The problem is compounded by the fact that NATO’s original role was as a fundamental part of the collective security mechanism, no less as a regional organisation under chapter VIII of the UN Charter, and not primarily to be used as a means of carrying out States’ inherent rights of collective self-defence under Article 51, chapter VII.

The distinction is crucial, and furthermore is the intended subordination to the principles and practice of the UN by NATO as identified by Simma. The departure from the collective use of force by regional organisations is the biggest foe that the UN Charter regime and International law faces. It is best exemplified by the fact that NATO operates in theatres of war so far away from Europe and the US, as this cannot be the concept encompassing the principle of subsidiarity, which was envisioned under the UN Charter, by regional organisations having responsibility to provide for international peace and security in the

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\(^{23}\) Corten seeks to maintain a fiercely objective interpretation of Security Council vetoes, thus at the conclusion of his discourse, remarks that this is a rather subjective term used to describe the result of States that object to the use of force in a multifaceted and complex legal problem “The Law Against War: The Prohibition on the Use of Force in Contemporary International Law” Hart Publishing: Oxford (2010) p. 552

\(^{24}\) Tams considers whether the provisions of the United Nations Charter 1945 governing the use of force have been re-adjusted between 1989 and 2009 to allow a more lenient approach towards forcible responses to terrorism. He compares the restrictive approach taken by international law in 1989 with the current position, and discusses the expanded concept of self-defence under the UN Security Council’s new activism and the potential dangers it presents: Tams, C “The use of force against terrorists” E.J.I.L. 2009, 20(2), 359-397
territories of which they are located. But the debate must also be balanced by the shared desire to want to preserve world peace and reliance upon a solid foundation that protects against new and emerging threats to international peace and security. NATO is well placed to do so, and in practical terms the world order is best preserved by a policy of collective security.

Albeit, if Cassese were right, and that the 1999 Kosovo crises was the beginning of a recognised customary right for NATO to use force, (outside of authorisation given by the Security Council but within a humanitarian context) this remains to be set out in specific Treaty provision, or referenced to by stringent conditions, as was suggested by Cassese. I agree that this would be a sensible reform, and along with the better use of terminology for the use of force, will go on to suggest that the Article 51 right of self-defence, ought to be understood, so as to specifically encompass self-defence, to mean the defence of others in humanitarian intervention or the Responsibility to Protect (R2P).

This contention has the force of logic, in an inter-connected and increasingly globalised World, whereby the atrocities of governments that use their given responsibility to protect civilians, rather to persecute and maltreat them, is abhorrent to all, and has far-reaching consequences when refugees are forced to flee over international borders. Thus, it has been argued that pressing humanitarian concerns can be construed as threats to international peace and security, and therefore giving rise to obligations upon the UN and international

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25 Tsagourias has considered the relationship between the United Nations and its member states in view of the Security Council's assertion of legislative powers. He claims that the exponential growth in UN powers at the expense of the powers of its member states cannot be arrested by legal means, because of the nature of the UN system and the absence of legally enforceable criteria and compulsory dispute-settlement mechanisms. For this reason, it proposes a different approach to law-making in the area of international peace and security - one that is built around the principle of subsidiarity, as reflected in Article 2(7) of the UN Charter. Furthermore, he posits that the role of the principle of subsidiarity in this respect is to determine which authority is best suited to exercise legislative power and how such power should be exercised in order to attain the objective of peace and security more efficiently. It is thus contended that the principle of subsidiarity promotes co-operative relations between the United Nations and its member states by protecting the latters' jurisdictional authority from unnecessary interference: Tsagourias, N “Security Council legislation, Article 2(7) of the UN Charter, and the principle of subsidiarity” L.J.I.L. 2011, 24(3), 539-559

26 The contemporary assertion of a right of humanitarian intervention has been fiercely debated in the aftermath of the NATO intervention in Kosovo in 1999. The precedent had given rise to plethora of legal literature on the subject, most of the scholars agreeing that, even after Kosovo, no such right had emerged in positive international law; N. Krisch, 'Legality, Morality and the Dilemma of Humanitarian Intervention after Kosovo', (2002) 13 EJIL 323; J. I. Charney, ‘Anticipatory Humanitarian Intervention in Kosovo’ (1999) 32 Vand. JTL 1231; Chinkin, C “The Legality of NATO’s Action in Yugoslavia” 49 ICLQ 910 (2000) and J. M. Welsh, ‘Taking Consequence Seriously: Objections to Humanitarian Intervention’, in J. M. Welsh (ed.), Humanitarian Intervention and International Relations (2004), 52. However, in 2000 Professor Greenwood produced an opinion for the Foreign Affairs Committee of the UK House of Commons, on whether the resort to force by NATO was consistent with international law. He firmly concluded that the military action was based upon a right of humanitarian intervention which is applicable in a situation whereby there is an extreme and immediate threat of humanitarian disaster which the use of force is designed to avert and therefore was lawful: Greenwood, C “International law and the NATO intervention in Kosovo” I.C.L.Q. 2000, 49(4), 926-934
community to respond, with force, so as to counter the furtherance of human suffering. As well, there is ever strong opinion that there can be great moral authority to intervene in the affairs of other nations, with force, as when the circumstances dictate. Since the seminal work by Michael Walzer\(^{27}\) the post-Cold War era has seen the increased significance of moral argument in international relations. Orford\(^{28}\) suggests (with sentiments that are echoed by others) that arguments such as those developed by Walzer, have shaped debates about the relative weights to be given to non-intervention and human rights as core values of International law over the past three decades\(^{29}\).

However, moral concerns are very far from NATO’s agenda and it is within the strict confines of self-defence, and collective self-defence, that NATO was established, and shall continue to be deployed. This feature of its existence will sometimes put it at odds with the principles and purposes of the UN and as world leaders are continuing to call for further and better ways in which to tackle humanitarian situations, they search for the resources and capabilities to do so. However, NATO is directed by the NAC (North Atlantic Council - NATO’s supreme decision making body) which has the much narrower interests of Western nations at stake, and then only in what is deemed to be in matters of security.

Now that the military interventions by NATO in Yugoslavia and Afghanistan have almost ended, the operation by NATO in Libya may also be critically examined and juxtaposed. My contention that NATO has interpreted its mandates (or lack of them) from UN Security Council Resolutions in a manner which hypothesizes an extensive view on the use of force; that is to say NATO has operationalised its mission in a manner which is marching right up to the thin red line\(^{30}\), and tiptoeing over it (as posited by Simma), and also after 67 years of the UN Charter, that thin red line (of the customary right to use force in self-defence) is becoming blurred with an emerging customary right to use force in humanitarian intervention

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\(^{28}\) Orford, A. “Moral internationalism and the responsibility to protect” E.J.I.L., 2013, 24(1), 83-108

\(^{29}\) Nardin, T “From right to intervene to duty to protect: Michael Walzer on humanitarian intervention” E.J.I.L. 2013, 24(1), 67-82; Nasu, H “Operationalizing the "responsibility to protect" and conflict prevention: dilemmas of civilian protection in armed conflict” JCSL 2009 (209)

\(^{30}\) Not to be confused with “red line diplomacy” of which President Obama declared that if Syria were to use large quantities of chemical weapons, it would “change [his] calculus,” (an implicit threat of force: http://www.nytimes.com/2012/08/21/world/middleeast/obama-threatens-force-against-syria.html) but, Sir Menzies Campbell CBE QC MP the Liberal Democrat politician and Advocate commented in April 2013 that the Syria situation was “a very good argument against so-called red line diplomacy”...because “It encourages your adversary to go as close to the red line as he can possibly manage... and you are prejudging the circumstances which might be months or even years down the line”: http://www.bbc.co.uk/news/uk-politics-22316517
(this perhaps ought to be styled as a “blue line” and undertaken within the full apparatus of the UN collective security system)\textsuperscript{31}.

Gazzini has also commented on NATO, its military activities carried out since the end of the Cold War, and how the great majority of these activities were conducted not under the provisions of the Washington Treaty, and in particular its provisions on collective self-defence under Article 5 of that Treaty, but rather on the basis of ad hoc decisions adopted by the NAC in accordance with the Alliance strategic doctrines\textsuperscript{32}. Gazzini says that these developments did not amount to a tacit revision of the Washington Treaty, nor rendered indispensable such a revision, although ad hoc decisions could be considered as international accords concluded in simplified form. Different legal grounds were invoked to justify, not always convincingly, these activities, which consisted of peacekeeping operations, implementation of peace accords, and military coercive measures\textsuperscript{33}. This is in line with my view that it is NATO which is now sub-consciously pushing back the boundaries on the law on the use of force, by its nature as an almighty amalgamation of nations’ military powers, and the happenstance of the conflicts it is now involved in. Serendipity, rather than constitutional design has dictated the nature of NATO’s relationship with the UN, which now plays a central part in the further debates on the use of force.

This is not a study into International Humanitarian law (\textit{Jus in bellum}), or an in-depth examination of the workings of Humanitarian intervention, rather, an investigation into such questions as when and why the use of NATO force is authorised by the UN and whether NATO force can yet be lawful, if not authorised. Following on from this, does a regional body (such as the African Union) a group of States (such as the UK, France and the USA) or the UN forces themselves apply it? NATO seems to be none of these and its earlier conflicts have never been officially declared as “war”, which was once waged between States and it is in the lesser established body of customary international law that the proponents of the conflicts have sought to base their legitimacy. In the case of military action against the former Yugoslavia, it was on the basis of humanitarian intervention and in the case of Afghanistan, by initially being an exercise of the \textit{implicit} inherent right of self-defence.

NATO must abide under International law and an examination of the framework under which it does so, informs us as to how it operates in practice. This will be the discussion of

\textsuperscript{31} This is the line of reasoning of writers such as Chomsky in: \textit{“A New Generation Draws the Line: Kosovo, East Timor, and the Responsibility to Protect Today”} Paradigm Publishers (2011)

\textsuperscript{32} \textit{The Use of Force in International Law} (Farnham: Ashgate, 2011, with N. Tsagourias)

\textsuperscript{33} Gazzini, T \textit{“NATO’s role in the collective security system”} JCSL 2003 (231)
subsequent chapters of this study and in conclusion, I will attempt to set out an alternative, that is, a system for enforcing international peace and security, by peace-keeping, peace support and peace-making operations under direct accountability to the United Nations. By reporting arrangements that are made by Regional Organisations, I believe that UN/NATO relations be conducted in the future, in the reformation of NATO as a Regional Organisation, to operate under Chapter VIII of the UN Charter, but with a legal basis to conduct R2P missions under given criteria\textsuperscript{34}, so that the International law on the use of force is improved.

Thus, with an International legal landscape that is changing (and not all of the academic commentators agree that there has been any fundamental change to the International legal framework) it is prudent to attempt to demark where the legality of NATO actions lie. But in articulating the legal standards which make war justified, not only must the public be convinced of the moral and legal arguments\textsuperscript{35} but importantly, so must the military themselves also\textsuperscript{36}. Wars must be worth fighting and every nation cannot fight any war at all. While NATO may enhances the ability of a nation to participate in conflict it deems it has a given interest, the public approval and quality of legal argument needed for war, is another exemplification of the law developing, and emerging with new principles and values.

As a result, whilst the challenges towards International peace and security that are faced in the 21\textsuperscript{st} Century are manifold, acute, and as potentially catastrophic as ever before, this study highlights the trepidation in that exactly where the thin red line (either of jus ad bellum, or indeed of a soldier’s life) is to be drawn. Furthermore, not only do wars have to abide by certain moral, philosophical, and humanitarian principles\textsuperscript{37}, but also the legal questions, and

\textsuperscript{34} See footnote 21

\textsuperscript{35} Farebrother, G & others “The Case Against War: The Essential Legal Inquiries, Opinions and Judgements Concerning War in Iraq” (Sep 2004) Nottingham. This work comprises an extensive collection of legal opinion on Britain's participation in the Iraq war. It covers the entire proceedings of a citizens' tribunal, held on the 11th October 2002 in London, on the legality, or otherwise, of the then forthcoming war on Iraq. Further opinions are also included from January, March, June and July 2003, as well as the full documentation of CND's case for a judicial review of the British Governments decision to go to war.

\textsuperscript{36} On its website, the British Army sums up the answer to the fundamental question of “why we are in Afghanistan” as “… because it became a source of terrorism”. Furthermore that: “The Taliban gave safe haven to Al Qaeda, which allowed terrorists to plan and carry out attacks around the world. That is why the United Nations authorised a NATO/ISAF-led military intervention. Getting rid of the Taliban regime and Al Qaeda was only the first part of the job. The second is to make sure they cannot return”: http://www.army.mod.uk/operations-deployments/22713.aspx

\textsuperscript{37} In 2006 the Red Cross published its “Customary International Humanitarian Law” the result of a major international study into current state practice in international humanitarian law in order to identify customary law in this area. Presented in two volumes, it analyzes the customary rules of IHL and contains a detailed summary of the relevant treaty law and state practice throughout the world. In the absence of ratifications of important treaties in this area, this is a publication of major importance, which identifies the common core of international humanitarian law binding on all parties to all armed conflicts. The results of research on customary humanitarian law conducted in 2005 are available in database form and provide rapid access to the rules of
Indeed the legitimate boundaries on the use of force may not always be as clear as first seems. Questions such as what is an “armed attack”, what is “force”, and indeed how to interpret International law itself have often arisen in this context, and hence, not only is there Simma’s Red Line (which refers to a right of humanitarian intervention), but several other important issues in International law that are affected by NATO which I shall try to identify.

II. What is the Problem?

In the midst of fierce debate as to the legality of the use of force, whether pre-emptive strikes, targeted killings, or attacks against non-State actors can be justified, or whether the war on terror gives rise to new, or inherent rights to use force, my contention is that there is an increasing need to understand the origins of the just war criteria, to incorporate the moral and ethical considerations into the International law and make proportionality assessments accordingly. After the haunting experience of World War II and in the spectre of the development of highly efficient nuclear weapons, another such World War is perhaps the greatest challenge that faces mankind. In his address before the General Assembly of the UN on 25th September 1961, and upon the onset of the death of the then U.N. Secretary-General Dag Hammarskjold, President John Kennedy espoused his hope in the UN, opposition to war, and remarked that:

“We meet in an hour of grief and challenge. Dag Hammarskjold is dead. But the United Nations lives. His tragedy is deep in our hearts, but the task for which he died is at the top of our agenda. A noble servant of peace is gone. But the quest for peace lies before us.

The problem is not the death of one man — the problem is the life of this organization. It will either grow to meet the challenges of our age, or it will be gone with the wind, without influence, without force, without respect. Were we to let it die, to enfeeble its vigour, to cripple its powers, we would condemn our future. For in the development of this organization rests the only true alternative to war — and war appeals no longer as a rational alternative. Unconditional war can no longer lead to unconditional victory. It can no longer serve to settle disputes. It can no longer concern the great powers alone. For a nuclear disaster, spread by wind and water and fear, could well engulf the great and the small, the rich and the poor, the

customary IHL, enabling users to examine practice around the world. Regular updates include further examples of national practice. The database can be accessed here: http://www.icrc.org/customary-ihl/eng/docs/home

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committed and the uncommitted alike. Mankind must put an end to war — or war will put an end to mankind.”

However, the possibility that States may yet engage in war or use of force in some sense is ever a pressing issue. Most religions include notions that there are fundamental tensions between good and evil, higher powers that play out predetermined affairs in the world today, and will do so until the final last days of all time. Whereas to a certain extent we see can this manifested in the present conflicts in the present day, protestant pre-millennialism believes (and several versions of all the great faiths have their analogies), that a literal last battle of Armageddon, will take place, being a war to end all war, and refer to the Revelation given to St. John in which he mentions it as the place where the kings of the earth (under demonic leadership) will wage war on the forces of God at the end of history. Even without this doctrine, there is prevailing orthodox belief that human behaviour will become worse during the approach to the last days, or final judgment day, as is apparent by the evil of war.

So, therefore a dilemma exists in how to reconcile the inevitable occurrence of military conflict, sometimes necessary to stop greater evils, yet necessarily evil in itself; with nobler and decently intended (but perhaps idealistic) attempts to want to prevent war, and promote peace. This catch 22 situation is played out in the legal provisions which exist in Article 2(4) and 51 of the UN Charter, and also presents a particular moral quandary in Christian thought. Whilst President George Bush could declare himself a believing Christian and followed in a theological tradition akin to that of President Reagan so that his personal religious belief and practice did mix with his political opinions and prompted him to engage in war, and while there may be biblical authority for his convictions; many other evangelical Christians do not embrace such a stark stance.


39 The phrase “evil empire” was applied to the Soviet Union notably by U.S. President Ronald Reagan, who took an aggressive, hard-line stance that favoured matching and exceeding the Soviet Union's strategic and global military capabilities, in calling for a rollback strategy that would, in his words, write the final pages of the history of the Soviet Union. The characterisation demeaned the Soviet Union and angered Soviet leaders; it represented the rhetorical side of the escalation of the Cold War. These remarks were made at the Annual Convention of the National Association of Evangelicals in Orlando, Florida March 8, 1983 and are available in full at: http://www.reagan.utexas.edu/archives/speeches/1983/30883b.htm

40 George Bush: 'God told me to end the tyranny in Iraq': http://www.guardian.co.uk/world/2005/oct/07/iraq.usa


Nevertheless, war is a reoccurring theme in human history, indeed since ancient times\textsuperscript{43}, which is perhaps best explained as linked to mankind’s inherent nature; the rising up of desires that he cannot easily control, such as survival, protecting loved ones and revenge; and yet must be contrasted with simultaneous technological advances; displays of self-sacrifice through extreme physical and mental endurance, and heightened moral awareness.

Besides this, the problem of how to reconcile the seeming inescapable responsibility of recourse to justified wars, with the strong yearnings to want to prevent war, has often resulted in the phenomena of States increasing their military power, in the belief that in doing so, they can deter a would be aggressor. It is especially so when States have amalgamated their military capabilities in collective security measures and the ultimate example is NATO, the focus of this study. However, there has been a certain danger in the circularity of this strategy, and particularly so when conflict begins. Whilst the UN Charter attempts to address the difficult question as to when it may be legitimate to employ the use of force, there is arguably a great lacuna as to when force must cease to be used, when begun, save for the customary obligation to use only proportionate measures to repel an “armed attack” –but who decides what is proportionate –the State that is using the force.

To put it succinctly, when wars happen, they are very difficult stop. The old adage that “the best defence is a good offence” often finds currency, but by its very nature, wars mean that a nation’s forces become entrenched in the fight for territory, and the problem is often that in order for circumstances to move on, greater effort has to be exerted and therefore greater damage and carnage ensues. NATO is now a great military force, the likes of which the World has never seen before. Nevertheless, the law, history and morality of the business in which it engages itself, is a long and profound one.

A. The Use of Force, examples from history and the security challenges of the 21st Century

There are many, varied, and serious security challenges in the 21st Century. The use of force is generally acknowledged as a last resort, and yet an inevitable consequence as a response to when force, or the threat of force, is used against a nation State. Moreover, in 2004 Kofi Annan, the United Nations Secretary-General, adopted a comprehensive concept of collective security after the “High-level Panel on Threats, Challenges and Change”\(^\text{44}\). This document is useful to gleaning what lies in store in terms of the type of peace enforcement, or full scale military operations that might be conducted by the UN in the future.

The high-level panel concluded that any event or process that leads to the large-scale death or lessening of life chances, may be regarded as undermining States as the basic unit of the international system, and poses a threat to international security. Furthermore, there are six main areas of threats identified, including economic threats, poverty, infectious disease, and environmental degradation, while the traditional threats concern State security, namely interstate and internal conflict.

Old issues that are concerned in law that governs armed conflict continue to arise with increasing importance, such as whether it is permissible to arm rebel fighters\(^\text{45}\), and new themes emerge, such as the military response that may be made to piracy on the High Seas\(^\text{46}\). Furthermore, it is becoming increasing more apparent that the threat of nuclear weapons, specifically by the manufacture of highly enriched uranium, may give impetus to further large scale military operations, NATO has in place the NPG (Nuclear Planning Group), to take decisions on its nuclear policy, and is to constantly review and modify such, in the light of new developments\(^\text{47}\).

These days, large-scale military operations are now more multi-national in nature than ever before, and formal declarations of war between one nation and another may be seen as an old fashioned formality, that have been replaced by the UN system of passing declaratory resolutions, after receiving reports from fact-finding observers, and the legitimacy in


\(^{45}\) http://www.guardian.co.uk/world/2011/mar/30/arming-libya-rebels-america-warned

\(^{46}\) http://www.asil.org/insights090206.cfm

\(^{47}\) http://www.nato.int/cps/en/SID-EF7A6640-5D1D3519/natolive/topics_50069.htm?selectedLocale=en
collective security measures. In any event, NATO continues to gain importance, as the world’s dominant military force. It will be used to enforce security in unstable nations, halt the aggressive acts of hostile nations, and increasing will be called upon to exercise the use of force.

Whilst the use of force is governed by International law and the relevant exemptions to the general prohibition are set out in apparently objective criteria, according to Article 51 of the UN Charter, the circumstances in which States will engage in the use of force is determined by highly subjective considerations. For example, of the present day conflicts and hot-spots around the World\(^48\), vary, but include many separatist, or protest movements, internal conflicts, and anti-insurgency operations. It is notable that acts which would give rise to a State considering itself having to need to defend itself may be dependent on their respective military capability, historical context, relations with neighbouring States, extent to which they can rely upon more powerful allies, associated regional hostilities and belligerents.

Therefore, while Israel has already justified an airstrike on the movement of weapons from Syria to Lebanon in the ensuing civil war there in May 2013, claiming that the effects from the war could destabilise the whole region\(^49\); Eritrea has fought a long war of independence against Ethiopia, and can justify the fortification of its borders\(^50\); India and Pakistan are both nuclear powers, and with their national rivalry, and ongoing dispute as to the Kashmiri territory, understandably want to protect intelligence as to their respective capabilities from each other\(^51\); it would nevertheless be very difficult to see how the British government could ever possibly argue that independence of Scotland, which would be regarded as a completely separate State under international law\(^52\), could be opposed by forceful measures.

Nevertheless, the British government was responsible for the constant recourse to the use of force, by way of the military measures that it employed in the Scramble for Africa; whereby it participated in the extensive invasion, occupation, colonisation, and annexation


\(^{50}\) In “Title, control, and closure? The experience of the Eritrea-Ethiopia Boundary Commission” I.C.L.Q. 2007, 56(4) Professor Malcolm Shaw examines the approaches of the Eritrea-Ethiopia Boundary Commission in delimiting and demarking the border between the states in its decision of April 13, 2002 and subsequent events.


of African territory, along with other European powers, during the New Imperialism period (1870–1914). In turn, this resulted in Britain deploying colonial troops in order to maintain its commercial interests and establish strong control over the coastal and other areas of Africa, and over the inhabitants of certain territories. The Anglo-Ashanti and Zulu wars were relatively large scale military campaigns\(^{53}\) fought by the British in 19\(^{th}\) Century Africa, epitomising the hegemony that ruled over one-quarter of the world’s land and population, at the zenith of the Empire’s existence.

In the 21\(^{st}\) Century, it is difficult to see how these conflicts\(^{54}\) could find any legal justification, or basis in morality under the just war theory\(^{55}\). Colonialism was by many accounts the most frightening abuse of military power upon indigenous people groups for the purpose of advancing the commercial interests of the wealthy and landed aristocracy. The revisionism of Britain’s 19\(^{th}\) Century military escapades throughout the world demonstrates a striking contrast with prevailing views of the Falklands War, a 1982 conflict between Argentina and the United Kingdom, resulting from the long-standing dispute over the sovereignty of the Falkland Islands, east of Argentina. The Falklands War began on Friday 2\(^{nd}\) April 1982, when Argentine forces invaded and occupied the Falkland Islands and South Georgia. The British government dispatched a naval task force to engage the Argentine Navy and Air Force, and retake the islands by amphibious assault.

The Falklands war between Britain and Argentina gives some indication of the high threshold of the degree and type of armed attack, which is needed to be suffered by a NATO member, before other States intervene. Despite Britain’s successful handling of the matter, the right established by Article 5 of the NATO Treaty for other NATO States to intervene in the conflict was not exercised, when perhaps, it could have been. In contrast, the US was rather more successful in establishing the broad coalition of the willing (inclusive of NATO) to participate in the war against terror following 9/11. The US is now the dominant power in International affairs, and the de facto head of NATO, which suggests that it is able to shape and influence NATO’s concepts and use of force.

Iraq, however, demonstrated that there was no agreement among NATO members on whether obtaining authorisation from the Security Council before resorting to force is a legal requirement, or a matter of political expediency. In our day, the British government has become very much embroiled in the legality of another conflict, namely the 2003 invasion of Iraq. Critics of the decision to go to war have argued that the US and UK have not treated the obtaining of authorisation from the Security Council before resorting to force as a legal


\(^{54}\) The same might also be said of the American and Canadian territorial acquisitions over native Americans, as well as the Australian Imperial exterminations of Aboriginal peoples

\(^{55}\) Nevertheless, Dr Ronzitti’s study concludes that the right of intervention to protect nationals abroad, had been a feature of international law before 1945, but was abrogated by the entry into force of the UN Charter: Ronzitti, N. “Rescuing nationals abroad through military coercion and intervention grounds of humanity” Kluwer (1985)
requirement, merely a matter of political expediency, and the escapade has demonstrated that agreement among NATO members on such issues cannot be taken for granted. The Chairman of the proceedings of the inquiry set up to examine the issues is Sir John Chilcot, who explained that it will:

"...consider the UK's involvement in Iraq, including the way decisions were made and actions taken, to establish, as accurately as possible, what happened and to identify the lessons that can be learned. Those lessons will help ensure that, if we face similar situations in future, the government of the day is best equipped to respond to those situations in the most effective manner in the best interests of the country."

The primary advocate of the legality of the Iraq war, both then and up to this day, is the Rt. Hon. Tony Blair, former Prime Minister (1997-2007). His articulation of the justification for the war in Iraq is captivating and furnished legal arguments with remarkable ingenuity, such as the “revival theory” of previous Security Council resolutions. Moreover, the Iraq war was supported by legal opinions by the chief government legal officer, then Attorney General Lord Goldsmith of 7th March 2003 and also a previous memorandum by Professor Christopher Greenwood addressed to the Select Committee on Foreign affairs of the House of Commons of 24th October 2002.

Nevertheless, the former Law Lord of English/South African origin, Baron Steyn has also recently released an opinion which addresses the legality of the 2003 invasion of Iraq and gives a critical analysis of the Iraq Inquiry, articulating the inevitable impotence that stems from its inability to address the issues of legality and International law. The opinion moves methodically through the various arguments that have been offered as justifications for the invasion of Iraq, although for each argument, Lord Steyn offers a cogent legal analysis to

56 When he announced in the House of Commons the setting-up of the Inquiry, Gordon Brown said, "Its scope is unprecedented."; http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090615/debtext/90615-0004.htm

57 Viewing of the Prime Minister’s oral evidence before the Inquiry is available at: http://www.iraqinquiry.org.uk/transcripts/oralevidence-bydate/110121.aspx


59 http://www.publications.parliament.uk/pa/cm200203/cmselect/cmfaff/196/2102406.htm
demonstrate its falsity, dismantling what he deems a shameful period of public deception on both sides of the Atlantic, and concludes that the invasion of Iraq was plainly illegal.\footnote{Steyn, J “The legality of the invasion of Iraq” E.H.R.L.R. 2010, 1, 1-7}

Thus, as the controversy of the Iraq war rages and continues on, there have been unparalleled implications for the law on the use of force, prompting a range of commentators to diagnose the death of the law on the use of force; to call for its adaptation to the globalisation of threats and the problem of so-called failed States, and assert the need to defend the UN Charter framework. On the other hand, others have examined the changes to legal institutions and structures that are required\footnote{Brunnee, J & Toope, S “The use of force: international law after Iraq” ICLQ (2004) 785}. While historians study the manner in which certain wars have bent the trajectory of world powers in times gone by, it is now the interplay between terrorism, International law and NATO that is likely to determine the balance of power between States into the future.

\textbf{B. What it is the difference between War and the Use of Force?}

War has been defined as the: “hostile contention by means of armed forces, carried on between nations, states, or rulers, or between parties in the same nation or state; the employment of armed forces against a foreign power, or against an opposing party in the state”\footnote{Oxford English Dictionary (online edition) Oxford University Press (2013)}. The war/peace dichotomy is a recurrent one in human thought, the range of opinions and experience as to its virtues are vast and:

“....images of war and peace permeate religion, literature and art. Wars, battles, pacts and covenants appear as outcomes and antecedents in historical narratives. Recurrent patterns of warlike and pacific behaviour invite scientific explanations in terms of underlying biological, psychological or economic processes. War and peace are also often matters of practical concern, predicaments or opportunities that call for individual or collective action. While philosophers have explored all these ways of looking at war and peace, they have paid most attention to the practical aspects of the subject, making it part of moral and political philosophy.”\footnote{Nardin, T War and peace, philosophy of. In E. Craig (Ed.), Routledge Encyclopedia of Philosophy. London: Routledge. (1998). Retrieved June 04, 2013, from http://www.rep.routledge.com/article/S066}
However, in the modern sense, it is not always strictly correct to speak of States “going to war”. The United Nations Charter coming into effect on 24th October 1945, does not use the term war, but rather the signatories refraining from the “use of force” –Article 2(4), and “self-defence” being permitted in order to response to an “armed attack” –Article 51. Indeed, the use of force in International law is a legal right that arises in certain defined circumstances, and there has long been a historical underpinning of this right as understood in natural law. In this regard, the notable 17th Century jurist and founding father of International law as we know it, Hugo Grotius articulates the precept of a just war, with words that echo with considerable relevance today:

“In the first principles of nature there is nothing which is opposed to war; rather, all points are in its favor. The end and aim of war being the preservation of life and limb, and the keeping or acquiring of things useful to life, war is in perfect accord with those first principles of nature. If in order to achieve these ends it is necessary to use force, no inconsistency with the first principles of nature is involved, since nature has given to each animal strength sufficient for self-defense and self-assistance.”

This study is involved with analysing when States (and a group of States acting under the auspices of NATO) can resort to use force under International law; yet the question is also intimately intertwined with moral, philosophical, and ethical considerations, which also necessarily inform the status of the law. Today, deliberations continue with fervour as to the nature, legality, and origin as of the right to use force, yet there are considerable differences in the means by which modern warfare is conducted.

The spectre of war and peace in a nuclear age represents an unparalleled potential tragedy for mankind. This is because of the instantaneous destruction of large numbers of human lives that are a near certainty by the use of a nuclear weapon, as well as the possibility that a temporary warming trend caused by a nuclear warhead could throw up smoke and dust into the upper atmosphere, not only to make it more difficult for sunlight to penetrate to the earth’s surface, but also to make it difficult for heat at the earth’s surface to escape into space.

Thus the mass destruction of human life and property is at hand, and also of the planet itself, for what would be forevermore, through the prospect of nuclear fallout. The lurking possibility of all-out nuclear war between the rival nuclear powers during the cold war is instrumental in understanding the exponential growth of NATO from its inception in 1948, to

64 De Jure Belli Ac Pacis, p. 52. Chapter Two of Book I taken from: http://www.historyofethics.org/022006/022006May.shtml
the breakup of the Soviet empire in 1989. Moreover, the problem of nuclear weapons falling into the hands of those that would use them irresponsibly has also been used as a means to justify the use of force in the 21st Century.

This is not far removed from the question of terrorism, which poses itself as another main justification for the use of force today. So whilst “war” is a state and condition, usually held to exist between two or more nations as a matter of formality, which encompasses extreme and organised violence on an industrial scale, the most devastating of actions, and regularly the fight for a State to continue to exist; “force” is another concept, which encompasses military action, but will be meted out in measure as a response to a given situation—all war must constitute the use of force, but not all applications of force will be considered to amount to a state of war. The difference between war on the one hand, and force on the other, is important because in modern times, force can find legality under the provisions of the UN charter, but war does not.

Continued attempts have been made to ban war, as a great evil of mankind, whereas force is more easily recognisable as a necessary and frequent occurrence. There is another reason for the fading occurrence of inter-State war as a natural and repeated consequence. The emphasis of the UN Charter was to recognise the principle of the self-determination of peoples to belong to particular nations. Wars were usually led in order to capture, or defend a disputed geographical territory, and therefore troops were required to carry out the fight in this regard. Nowadays, while raging disputes between peoples and factions, as to ideology, religion, or resources continue to go on, if violence occurs, a lawful countermeasure can be accurately termed as a “use of force” which carries connotations of the last resort to restore, or prevent wrong.

Nevertheless, force is also subject to a general prohibition, as set out by Article 2(4) of the UN Charter and other matters which must then be addressed, are how much force can be used, by whom, and in what circumstances, in order to meet the test of legality. This is known as the principle of proportionality and various answers to these questions, including methods and manners in which they can be answered, have been set out in a myriad of academic literature. Semantics are also important because it was in the face of the September 11th terrorist attacks on New York City, that President George W. Bush

proclaimed that the United States would retaliate with a “war against terror”. This phenomenon has also been termed “Global War on Terrorism” finding itself taking up a prominent place in the US national military strategy, and justified as the natural response to ensure security, the protection of citizens from the face of extremists, spurred on by corrupted ideologies of the Islamic religion.

The problem in using the term “war” in response to terrorism is that not only does the so-called war include military measures, but it is all encompassing in the territory covered, with frontiers extending to not only Afghanistan and Iraq, but also Pakistan, the Horn of Africa, Yemen, Kashmir, Libya, and Mali, but potential others as well. The war on terror also includes immigration measures, such as the US Patriot Act of 2001, and whilst its opponents express their dismay that this amounts to a state of illegal, perpetual war, where there is very little respect for the rule of International law, others such as Amnesty International are also at pains to argue the misfortune that the respect for basic human rights has been diminished.

In April 2007 the then Secretary for International Development Hilary Benn announced that the British government was abandoning the use of the phrase “War on Terror” when he said:

“In the UK, we do not use the phrase ‘war on terror’, because we can’t win by military means alone, and because this isn’t us against one organised enemy with a clear identity and a coherent set of objectives.”

Moreover, the former head of the security service MI5, Lady Eliza Manningham-Buller, stated in her 2011 Reith lecture, that the 9/11 attacks were “a crime, not an act of war”.


69 Powerful intellectual reasoning for the President’s position was latterly provided in systematic argument in “Just War Against Terror: The Burden of American Power in a Violent World” where Elshtain advocates for “just war” in times of crisis, demonstrating how the current operations can meet the time honoured criteria and mounts a reasoned attack against the anti-war contingent in American intellectual life.

70 See Chomsky, N “Interventions” City Lights Open Media (2007) where, as in a number of his other books, Chomsky has published numerous essays aimed at attacking various aspects of US power and politics in the post-9/11 world. Characteristically, he is critical of US military interventions around the globe and aims at raising public ire about the consequences of the use of US power at home and abroad.


72 http://news.bbc.co.uk/1/hi/uk_politics/6562709.stm

73 http://www.bbc.co.uk/programmes/b0145x77
But to think that the war on terror is an illegal rampage, instigated and prosecuted by President Bush and without any let of hindrance or scruples, is wrong. In December 2012, Jeh Johnson, the General Counsel of the US Department of Defense, stated that the military fight will be replaced by a law enforcement operation when speaking at Oxford University, predicting that al Qaeda will be so weakened to be ineffective, and has been “effectively destroyed”, so that the conflict will not be an armed conflict under International law. Moreover, US President Barack Obama has rarely used the term, but in his inaugural address on 20 January 2009, he proclaimed: “Our nation is at war, against a far-reaching network of violence and hatred.” However, Johnson has warned against “over-militarizing” the U.S. government’s approach to counterterrorism, because:

“There is risk in permitting and expecting the U.S. military to extend its powerful reach into areas traditionally reserved for civilian law enforcement in this country.”

Indeed, Johnson may be accredited with refining the tone and logic of the US approach to the war on terror. At a speech at Yale Law School in February 2012, Johnson defended targeted killings but also stated:

“As a student of history I believe that those who govern today must ask ourselves how we will be judged 10, 20 or 50 years from now. Our applications of law must stand the test of time, because, over the passage of time, what we find tolerable today may be condemned in the permanent pages of history tomorrow.”

Following on from this, at the Oxford Union in November 2012, shortly before his resignation, Johnson delivered a widely acclaimed address entitled “The conflict against al Qaeda and its affiliates: how will it end?” in which he predicted a “tipping point” at which the US government’s efforts against al Qaeda should no longer be considered an armed conflict, but a more traditional law enforcement effort against individual terrorists. Johnson stated:

“War must be regarded as a finite, extraordinary and unnatural state of affairs. War permits one man – if he is a “privileged belligerent,” consistent with the laws of war -

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74 For Dinstein’s theory of extraterritorial law enforcement, see Y. Dinstein, War, Aggression and Self-Defence (2005), 244-51.
75 http://abcnews.go.com/Politics/Inauguration/story?id=6689022&page=1#Ua-9UdJayKw
76 Peter Finn, “Pentagon lawyer warns against over-militarizing anti-terror fight”. The Washington Post, October 19, 2011.
- to kill another. War violates the natural order of things, in which children bury their parents; in war parents bury their children. In its 12th year, we must not accept the current conflict, and all that it entails, as the 'new normal.' Peace must be regarded as the norm toward which the human race continually strives.”

These later sentiments, that the war on terror can be effectively fought within the paradigm of criminal law and enforcement, were originally espoused by Ken McDonald as the Director of Public Prosecutions and head of the Crown Prosecution Service in the UK, in regard to the 7th July 2005 London bombings. The perpetrators were not “soldiers” in a war, but “inadequate” who should be dealt with by the criminal justice system. He added that a “culture of legislative restraint” was needed in passing anti-terrorism laws, and that a “primary purpose” of the violent attacks was to tempt countries such as Britain to “abandon our values”. He stated that in the eyes of the UK criminal justice system, the response to terrorism had to be “proportionate, and grounded in due process and the rule of law”:

“London is not a battlefield. Those innocents who were murdered...were not victims of war. And the men who killed them were not, as in their vanity they claimed on their ludicrous videos, 'soldiers'. They were deluded, narcissistic inadequates. They were criminals. They were fantasists. We need to be very clear about this. On the streets of London there is no such thing as a war on terror. The fight against terrorism on the streets of Britain is not a war. It is the prevention of crime, the enforcement of our laws, and the winning of justice for those damaged by their infringement”.

Whilst the notions of war and force are well-established, the various positions as set out in the quotations cited above, seem to vacillate between a natural law understanding of the right to resort to war (or the use of force) widespread in the common law tradition; and a positivist understanding, based on the consent of civil laws. Either way, war invariably inflates significant challenges as to the International rule of the law, and palpable concerns were raised by Britain’s senior Law Lord shortly before his demise, moreover, because of moral and ethical considerations, many will always object to notions that force may ever be lawfully used at all: “War is something absurd, useless, that nothing can justify”. On the other hand, the powerful states that want to have, throughout history, tended to resort to use

77 http://www.guardian.co.uk/world/2012/nov/30/us-war-against-al-qaida
78 http://www.telegraph.co.uk/news/uknews/1540399/There-is-no-war-on-terror-says-DPP.html
79 Robinson, P “Affirming the international rule of law” E.H.R.L.R. 2012, 1, 32-45
force on a unilateral basis, and outside of the constraints of International law, or the UN Charter.\(^{82}\)

NATO has been instrumental in the ensuing war against terror, and instances of cross-border use of force against non-state actors are not new, but what is new is their frequency and intensity, particularly after 9/11. Whether by fault or by design NATO has already made a significant contribution to the legal debate on “force” by its continued deployment in the Afghanistan. NATO has impliedly taken positions on the threshold of severity for an “armed attack” to be met with “self-defence”, whether the conduct to non-State actors can be attributable to a State, and what legitimate self-defensive measures are. There are further and deeper questions brought about by NATO's use of force, such as, whether there are any boundaries to the Non-International Armed Conflict (in which the US says it is involved in against Al-Qaida)\(^{83}\) and what acts amount to participation in the conflict and entitle combatants to be targeted. In view of these new tracks being laid, we turn to the International legal framework in order to examine whether it remains sufficient to deal with purposes for which it might now be needed.

### III. The International Legal Framework

The International legal framework under the UN Charter and NATO’s Washington Treaty are fundamental to gaining an understanding of the means by which NATO has operated in its military operations in the past, and to how it might conduct itself looking into the future. As a major and highly sophisticated military organisation made up from many nations, NATO maintains a degree of independence from the UN, yet NATO is limited in its use of force by the concepts as embodied in the UN Charter. These fundamental concepts set out in the UN Charter recognise that States are sovereign and therefore, a principle of non-interference prevents a State from entering or influencing other with military force. Despite this, there are


\(^{83}\) The US Department of Justice has developed a white paper outlining the specific circumstances under which the United States can conduct a lethal drone strike against an American citizen, the full text of the US Department of Justice Whitepaper is available at: [http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf](http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf); the British military doctrine on the use of drones has also been published, and concludes drone strikes are a legitimate use of force, for reason of their precision and proportionality, the report is entitled “The UK Approach to Unmanned Aircraft Systems”: [https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/33711/20110505JDN_211_UAS_v2U.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/33711/20110505JDN_211_UAS_v2U.pdf)
limited basis in with force may be lawfully employed within the International legal framework, and with the involvement of NATO.

A. The Prohibition on the Use of Force and exemptions

The prohibition on the use of force is a concept which has gained universal acceptance in International law. Since the armistice that brought about the end of World War I, there was a consistent understanding in the international community, that aggressive war cannot be pursued by a State as a legitimate foreign policy. Therefore, in the framing of the Versailles Treaty of 1919, the Covenant of the League of Nations stated that its signatories would:

Promote international cooperation and to achieve international peace and security [and would accept] obligations not to resort to war\(^{84}\)

The preamble of the League’s Covenant also stated that States ought to submit disputes to arbitration or judicial settlement, or review by the League Council. However, it was also implicit throughout the peace negotiations which took place that anything agreed to would not replace the customary norm of international law, in that a State could always defend itself if attacked. Therefore, to be more precise, war was to be considered illegal if it was being waged in violation of the Covenant. Furthermore, by the Kellogg-Briand Pact of 1928\(^{85}\) almost all nations of the world renounced war as an instrument of national policy and a clear dividing line was drawn between unlawful war, that which was aggressive, and that which could be considered as lawful, when done in self defence.

The seeming downfall of the League of Nations and Kellogg-Briand Pact was that there were no formal mechanisms within which breaches of the covenants could be enforced, so that their stated objectives remained as mere aspirations, rather than laws which would bring about adverse consequences if transgressed. Thus, with much dismay from the international community, Germany’s aggressive stance in the 1930s left the peace treaties in tatters and the League’s continued existence had to be abandoned.

\(^{84}\) [http://www.firstworldwar.com/source/versailles.htm](http://www.firstworldwar.com/source/versailles.htm)

\(^{85}\) [www.yale.edu/lawweb/avalon/imt/kbpact.htm](www.yale.edu/lawweb/avalon/imt/kbpact.htm)
The reaction of the Allied powers was to make a declaration of a general state of war\(^{86}\) against Germany and the ensuing mass toll of death and destruction was as the world had never seen before. It is against this background that the current law was framed, which is embodied in the formation of the United Nations in 1945 in San Francisco, and with another universal acknowledgment that powerful legal obligations must be set in force to deter nations from spreading the scourge of war\(^{87}\). The United Nations Charter\(^{88}\) includes a general prohibition against the use of force under Article 2(4), whereby States agree that:

\[
\text{All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations}
\]

The effect of the general prohibition is again to outlaw the use of force in States’ relations with each other, and particularly in the face of territorial, or disputes as to political independence. Moreover, even the threat of the use of force would constitute a breach of article 2(4) and the intended result is to bring States into peaceful dialogue with each other, and utilise the International Court of Justice if they cannot agree. With the catch all phrase “any other manner inconsistent with the Purposes of the United Nations”, it is likely that article 2(4) is also intended to be broad enough to prohibit States from using force in so many other situations that they could not all be spelt out.

The various resolutions\(^{89}\) passed by the UN General Assembly have elaborated the provisions of the UN Charter and the “Purposes of the United Nations” are clearly set out in article 1.1 of the Charter as:

\[
\text{To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;}
\]

\(^{86}\) [http://avalon.law.yale.edu/subject_menus/gbmenu.asp](http://avalon.law.yale.edu/subject_menus/gbmenu.asp)

\(^{87}\) Paragraph 1 of the Preamble to the UN Charter


\(^{89}\) Resolution on the Essentials of Peace (1949); Declaration on Friendly Relations GA Res 2625 (1970); Definition of Aggression GA Res 3314 (1975); Declaration on the Non-Use of Force GA Res 42/22 (1988)
Thus, the notion of maintaining a continual state of international peace and security and the prohibition rule set out in article 2(4) are a radical departure from the previous attempts that were made to ban war. The UN Charter set forth a comprehensive legal mechanism that was intended to be applicable and binding to all States, in all given situations. However since the drafting of the Charter, some 67 years ago, there have been some significant developments in the manner and means by which “force” and aggression are construed in International law, and the various non-State actors which are now crucial to understanding the current state of play.

Furthermore, the prohibition on the use of force is intended to be enforced by the very limited circumstances when States may be used allowed to use force. These are set out in Chapter VII of the Charter and are applicable in one of two instances, firstly when the UN Security Council authorises the use of force, when it “determines the existence of any threat to the peace, breach of the peace, or act of aggression” and therefore exercises collective measures under articles 39-50, or by article 51, when a State may resort to exercise its inherent right of self-defence, or collective self-defence when joined by others.

However, while the inherent right of self-defence provision of article 51 was recognised as codifying the generally accepted norm of customary international law, the precise scope of when such a situation occurs, so as to allow a State to defend itself militarily, is subject to interpretation and there remain continuing debates as to when a State can legally resort to force (jus ad bellum). While collective security measures are less controversial, as they are authorised by the unanimous vote by the UN’s Security Council, the lawfulness of all NATO actions must be determined through the scope of these two exceptions.

1. Collective Security

Collective security has been referred to as “a system, regional or global, in which each State in the system accepts that the security of one is the concern of all, and agrees to join in a collective response to threats to, and breaches of, the peace”\(^{90}\). The expression collective security belongs to the discipline of international relations and the notion encompasses a wider and more ambitious concept than that of a mere military alliance, providing a pooling of resources for security and defence.

Collective security is a means by which the UN may respond to a threat to the peace, or a breach thereof, as a measure involving the use of armed force, under Article 42 of the UN Charter. The term collective security is however not explicitly found in the UN Charter, although it is often used to refer to the system for the maintenance of international peace and security, pursued by the UN according to its Charter, and found in the corresponding provisions of Regional Organisations’ treaty documents. The Security Council must initially make a determination that a threat to the peace, breach of the peace, or act of aggression exists, according to Article 39 of the Charter and non-forceful measures that may be applied in response under Article 41, include the use of economic sanctions and are specifically defined to include oil embargoes, travel bans, asset freezing, or any such combination.

When it is authorising states to use force on its behalf by the means of collective security measures, the Security Council does not normally specify the article upon which it relies for legality and instead, it authorises the use of “all necessary means”, or “by all necessary measures” after reference to the fact that it is “acting under Chapter VII”. Chapter VII also gives the UN Military staff Committee responsibility for strategic coordination of forces placed at the disposal of the UN Security Council\textsuperscript{91}. States acting together in taking military action under Chapter VII have been known as a “coalition of the willing” and despite numerous proposals that have been made over the years\textsuperscript{92}, the UN does not have any regular standing forces in order to undertake collective security operations.

The principle behind a true collective security system is that members of a group bring together their respective forces, to make up a superior force, independent of any of the members of the group, and it is normally used to take defensive measures only. It can protect its members by not only removing aggressors, but also situations that threaten peace, by collective measures, or enforcement action. However, in order for any collective security system to be successful, it must have teeth, and be sufficiently robust in terms of the forces it can comprise, and the speed in which it can muster them to be effective.

The collective security measures that are undertaken by the UN may take the form of peace support, peace enforcement, or full scale military operations. In practice, while the mandate which authorises such action may provide legal authority to a lead State, as a group of States

\textsuperscript{91} Made up of the chiefs of staff of the five permanent members of the Council

are undertaking collective military operations under Chapter VII, the Security Council will retain political control. Alternatively, the UN may create forces for a particular mission\textsuperscript{93}, although command and practical arrangements in decisions involving such forces will be dictated very much by the nations that have supplied them. Moreover, the UN may delegate authority and control of a mission over to NATO, and it is apparent that in practical terms, while the UN, the Security Council and the forces it controls, does not have the capacity to sustain large-scale military operations, NATO does.

Therefore, the UN’s collective security measures are relevant to the consideration of NATO because, although NATO is not a body of the UN, nor under legal obligation to perform the UN’s duty to uphold international peace and security, the Security Council can, and does, effectively delegate military command to NATO. In Afghanistan in 2001, the Security Council established ISAF under SC Resolution 1386 (2001) which has now been extended and modified in various subsequent resolutions, and as of today, the operation in now firmly placed in the hands of NATO to direct, in terms of both strategy, objectives, and method.

Furthermore, NATO’s contribution to the UN’s collective security apparatus continues to be relevant, because it has recently been deployed under UN resolution 1972 authorising force in Libya, in operation “Unified Protector”, and it seems likely that it will continue to be utilised in further peace enforcement, or large scale military operations, into the future. NATO’s effectiveness, in terms of its operational efficiency, is seldom questioned, which is in sharp contrast to the international institution of the Security Council on the other hand. The terms of the Security Council’s composition of its membership are often debated\textsuperscript{94} and cited as a ground for necessary reform of the UN\textsuperscript{95}.

\textsuperscript{93} Such as IFOR (Implementation Force Bosnia-Herzegovina and Croatia) ISAF (International Security Assistance Force Afghanistan) KFOR (Kosovo Force)


The Security Council’s permanent and elected members are distinguished by Article 23 of the UN Charter and criticism has often centred on its actual, or perceived, lack of democracy, transparency, accountability, and inclusiveness. Schrijver has argued that the changing nature of threats to international peace and security mean that regional, rather than nation States’ representation on the Security Council would be more appropriate, and that this can be perceived from the various resolutions passed by the Security Council, which refer to threats from weapons of mass destruction, terrorism and “non-military sources of instability in the economic, social, humanitarian and ecological fields.”

2. **Self-Defence & Collective Self-Defence under Article 51**

The term collective self-defence refers to the provision made in Article 51 of the Charter, which means that a State may always engage in self-defence, including with the assistance of other States, in order to repel an armed attack made against it, or them. Article 51 states:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

What is envisioned is that if a State, or States experience an unexpected armed attack, they may retaliate, and the significant difference to the Chapter VII collective security procedure is that Security Council authorisation need not be sought as a prerequisite. This requires the State to immediately report the attack to the Security Council, and such measures, taken in

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97 Schrijver, N “Reforming the UN Security Council in pursuance of collective security” *JCSL* 2007 (127)


99 S/RES/1467, 18 March 2003

100 S/RES/1368 and 1373 12 & 28 September 2001

101 UN Doc. S/23500
retaliation under Article 51, may provide a right to attack, even if a Security Council resolution is being sought and the outcome is yet awaited\textsuperscript{102}. The inherent right of self-defence has been affirmed by the International Court of Justice (ICJ) in the \textit{Nicaragua Case} on the use of force, whereby The ICJ attempted to clarify what level of force is necessary to qualify as an armed attack.

Since the court opined that not every act of violence will amount to an armed attack, and in any retaliation measure pursued by a State, it must abide by the International humanitarian law principles of military necessity, proportionality, and distinction of legitimate targets, NATO must be alert that to the right of self defence would only qualify a limited extent of force to propel an armed attack\textsuperscript{103}. It is difficult to see circumstances in which a small scale attack, say by an armed militia against a NATO State, could justify the invocation of its Article 5 and cross threshold needed in order to justify the colossal military apparatus NATO is able to muster.

Moreover in the \textit{Nicaragua} case, the use of “indirect force” by the US was found to be unlawful, and there is a likewise a binding impediment to prevent NATO ever training and equipping armed forces to interfere in the affairs of another State. This may be a particular issue in countries that seek NATO membership, such as Georgia, and if there was to be a sharp political division between potential governments that would be hostile to NATO interests. NATO’s blatant support for armed rebels, as in Libya, could well be deemed as the indirect use of force, but as that conflict transpired, NATO moved from a mission to protect civilians, to the direct use of force in order to remove the established regime –prompting analysis of the mandate it was given and raising the questionable legality of its actions.


\textsuperscript{103} In “Self-defence in response to attacks by non-state actors in the light of recent state practice: a step forward?” L.J.I.L. 2010, 23(1), 183-208 Steenberghge analyses the recent State practice (the Turkish incursion into Iraq and Israeli intervention in Gaza) in which the right of self-defence has been invoked in order to justify the use of force in response to attacks by non-state actors. The main purpose of this analysis is to determine whether the law of self-defence has evolved through this practice. He submits that the latter confirms the tendency, evidenced by the US operation ‘Enduring Freedom’ in Afghanistan in 2001, towards allowing states to respond in self-defence to private armed attacks, that is, attacks which are committed by non-state actors only. The article also aims to shed some light on other fundamental conditions of the law of self-defence which played a significant role in the legal assessment of the recent state practice. It is argued in this respect that this practice confirms that any armed attack must reach some level of gravity - which may be assessed by accumulating minor uses of force - in order to trigger the right of self-defence, and that proportionality of the action taken in self-defence may be assessed in quantitative terms, but only as a means of making a prima facie judgement about the necessity of this action.
While it is widely accepted in international law that Article 51 mirrors the common law right of self-defence, so that “inherent” may also be understood as “natural”, needs no further extrinsic proof, and means that a State has an absolute right to ensure its own survival, debate has however continued as to whether Article 51 was adopted in 1945 as a summary of customary international law as it then was, or whether the legality of States taking measures in self-defence is contingent upon the provisions of the Charter, given the intention of an absolute prohibition on the use of force envisioned by Article 2(4)\textsuperscript{104}.

Such arguments are significant, because proponents of the Charter have pointed to it as being sacrosanct in nature and holding together world public order at the height of the Cold War\textsuperscript{105}. Whereas other commentators\textsuperscript{106}, and moreover governments, have continually suggested that the right to use force is not subject to a narrow interpretation of the Charter, and the ban may be properly understood as to not encompass as many situations as is commonly suggested. As such, the UK government put forward the argument in the Corfu Channel case\textsuperscript{107} that its forcible intervention into Albanian waters, without its consent, was allowed because it was limited to recovering evidence of mines to indicate who was responsible for destroying two British warships, and therefore did not threaten its territorial integrity or independence.

Article 51 has been cited by the United States as giving it a legitimate basis to engage in the Vietnam War (1965-75), stating that it was entitled to participate in its collective defence, upon the request being made by the South Vietnamese. On the other hand, a resolution was passed under Article 42, cementing the legality of the Korean War. The measures taken in Afghanistan in response to the September 11 attacks were also said to be made in self-defence and legitimate in International law\textsuperscript{108}.

The predominant, “special relationship” between the USA and UK, was cited as the reason that lead to the withdrawal from NATO by France in 1958. President De Gaulle protested


\textsuperscript{105} Franck “Who Killed Article 2(4)?” 64 AJIL (1970) 809

\textsuperscript{106} Henkin “The Reports of the Death of Article 2(4) are Greatly Exaggerated” 65 AJIL (1971) 544

\textsuperscript{107} Corfu Chanel case (United Kingdom v Albania), ICJ Reports (1949) 4

\textsuperscript{108} Whilst Professor Christopher Greenwood warned that the danger in responding to an armed attack that was over, might be that it was no longer necessary, and hence an unlawful reprisal, he nevertheless concluded that the use of force in both Afghanistan and Iraq was lawful: Greenwood, C “International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq” 4 San Diego Int’l L.J. 7 (2003) p.23 ; others vehemently disagree: Williamson, M “Terrorism, War and International Law: The Legality of the Use of Force against Afghanistan in 2001” Ashgate Publishing Limited (2009)
against the US’ strong role in its organisation, while France was attempting to wage counter-insurgency operations in Algeria and sought NATO assistance. France eventually showed open support to NATO throughout the Cuban missile crises of 1962, and abandoned its attempts to form a separate independent defence force. Throughout the Cold War, NATO’s stance against the former Soviet Union did not lead to direct military conflict, and the Nuclear Non-Proliferation Treaty became effective in 1970, although NATO members entered into secret agreements to share their nuclear weapons in pursuance of collective self-defence policies, but with questionable legality

3. Anticipatory and pre-emptive self-defence

The legal scope of Article 51 has been a matter of contention and whether force can legally be used in an anticipatory, or pre-emptive manner, in response to an “imminent” attack, has been a particular matter of controversy, for some time. This is because the Caroline affair, an early diplomatic incident stemming from a clash between the United Kingdom and the United States, over disputed territory in the failed Upper Canadian Rebellion (1873) had arguably determined that there could be a limited right to use pre-emptive force, in self-defence, under International law. In the litigation that followed during the 19th Century, the case has established a test, also known as the “Webster formula”, and sets out that there must be an imminent threat to the State proposing the use of pre-emptive force, “imminent” being described as “instant, overwhelming, and leaving no choice of means, and no moment for deliberation”. The course of events instituted a doctrine that a State does not need to actually wait for an armed attack to begin, before it takes retaliatory action, which has been relied upon many years later.

However, the Caroline Affair and subsequent codification of the law in the UN Charter, has in turn led to debate about the interpretation of the words “occurs” in Article 51. Thus, an expanded interpretation of the doctrine of self-defence has been developed to distinguish between “preventive” self-defence and “interventionary” or “anticipatory” self-defence; while the former term describes a situation where an armed attack is merely possible or foreseeable, the latter addresses that which is imminent and inevitable. In the days of enhanced technological means in conducting warfare, the pressing of a button may put events in motion that may lead to the total devastation of a nation. Again, the September 11 attacks and the impact of the so-called “war on terror” have had much to do with the development of the legality of anticipatory self-defence.

On the other hand, an alternative, restrictive approach argues for a much more limiting interpretation of Article 51 and in particular, points out the qualified nature of Article 51. This is because of the manner in which the Charter gives precise conditions for the use of force to be recognised as lawful, “if an armed attack occurs” in an attempt to prohibit the use of force, unless and until the circumstances necessitate it. The restrictive approach which opposes anticipatory, or pre-emptive force, finds support in the fact that the Charter was primarily designed to maintain International peace and security, the prohibition of the use of force has a long and substantial history and there are very practical reasons as to why an expansive use of force could not be sustainable\(^{110}\). Indeed, the self-defeating nature of anticipatory force has been encapsulated in the pithy saying that:

“Preventive war is like committing suicide out of fear of death.”\(^{111}\)

In addition to this, today the debate is nuanced in the manner that commentators have continued to suggest that the circumstances in which a State may exercise its right to resort to force, by the self-defence exemption under the Charter, have expanded because Article 51 can be said to provide an “additional” right to use force, apart from the measures and procedures set out in the rest of Chapter VII. Nothing ought to ever prevent a State from responding to a threat to it, which has been said to include its territory, citizens, vessels, aircraft and military personnel, whether stationed abroad, in international sea, or airspace.

The instances in which a belligerent nation may now conduct a military operation across borders, controlled, or originated in another jurisdiction, direct it from abroad, or done by a proxy State, or non-State actors, has meant that there must be greater capacity in the scope in which the defending State may respond. Moreover, because the right of self-defence is understood to mean that a State does not necessarily wait for an imminent and definite attack to have occurred, the State may halt, or forestall the occurrence of an attack, and may also direct force at the source from which a previous, illegal, attack has come from\(^{112}\).

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\(^{110}\) The debate has been examined thoroughly by Shah, who traces the distinction between self-defence, anticipatory self-defence and pre-emption, and argues against pre-emption. This is because in the presence of article 39 of the UN Charter the case for pre-emption is not convincing and the current international legal order is able to deal effectively with the threat of terrorism. He accepts that although certain acts of terrorism may amount to an armed attack, hence necessary and proportionate force may be used after meeting the outlined criteria: Shah, N "Self-defence, Anticipatory Self-defence and Pre-emption: International Law’s Response to Terrorism” JCSL 2007 (95)

\(^{111}\) Otto von Bismarck (1815-1898) a conservative Prussian statesman who dominated German and European affairs from the 1860s until 1890

\(^{112}\) Gill T.D. “The Temporal Dimension of Self-Defence; Anticipation, Pre-emption, Prevention and Immediacy” (2007) 113
Cheng has entered the arena of the International law debate, on the legality of pre-emptive self-defence, and raised the question of whether there is a case for tightening up the meaning of the term “self-defence” by calling it “legitimate self-defence”, on account of its relative ambivalence in ordinary usage. What’s more, he asks why self-defence in the territory of a State is different from self-defence in another area, with reference to the Caroline Incident, which is often invoked as legitimising pre-emptive self-defence. Cheng concludes that of the lessons to be learnt from the Caroline Incident as to the conditions governing self-defence and also of the relevant part of the Nuremberg judgment. The conclusion is that, while the verdict in the case concerned in the Nuremberg judgment is correct, the reasoning is open to question, and the Caroline Incident does not support the case of pre-emptive self-defence.

For as long as States see the responsibility to guard their national interests by deploying military forces, proponents of the UN seek a universal system for ensuring international peace and security, and academic writers closely follow how the doctrine on the use of force has evolved, there will be continued interest in the scope of International law on the use of force, and in particular how far and in what circumstances a State will be entitled to deploy self-defensive measures. The author Gazzini opines that the most striking feature of NATO involvement in the management of international crises, in any event, remains the progressive erosion of UN Security Council authority, which culminated with the intervention into Kosovo.

On the issue of pre-emptive self-defence, Gazzini, like several others, is particularly critical of the US attitude, and its stated position, that it has the right to resort to pre-emptive self-defence. The assertion contains a considerable challenge to the role of collective security, the joint use of force, and doctrine of the general prohibition on the use of force as contained in the UN Charter. Gazzini argues that the existing law affords the State an adequate opportunity to respond with measures necessary that afford for protection against threats to peace and security, and if a State is yet to participate in alternative measures that reject the exclusive authority of the Security Council in order to tackle situations that are susceptible to threaten international peace and security, there would be an end to the collective control of the use of the use of military force and ultimately of multilateralism.

While these arguments are logical, put forward the objective of upholding the pre-eminence of the International legal framework set out in the UN Charter, and therefore ought to be

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114 Gazzini, T “NATO's role in the collective security system” JCSL 2003 (231)
treated with respect, the fact is that there is very little by way of authoritative judgments from the ICJ with which to form cogent analysis on the matter of pre-emption in the last few years. If technology and world geopolitics are susceptible to such rapid change in the 21st century, then perhaps the need has come for the ICJ to issue an advisory opinion on the use of force and specifically dealing with the ambit of the doctrine of pre-emption. On the other hand, the sad fact of the matter is that, by the heated passions which are aroused in course of war, and the matters of self-defence, knowing what the law is doesn’t necessarily mean that States will indeed follow and abide by it. This is exemplified by the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory case and the reaction by Israel that it will not remove the barrier, despite strong exhortations to the contrary from the ICJ, UN and several other nations. Indeed, the debate as to whether there can be any, or to what extent, lawful use of pre-emptive self-defence continues to be highly relevant in the context of Israel and its perceived security situation.

The onset of reliance in a doctrine of pre-emptive force the right is highly relevant to NATO and may lead to it becoming deeply involved in future conflicts. Given the terms of NATO’s make-up as a predominantly US institution, yet with significant European support and bases, it could be easily engulfed into a spiralling regional conflict in the middle east if its resources were used in pre-emptive airstrikes in order to halt the development of a nuclear weapons programme in Iran, as some have called it to do. Alternatively, the NATO enlargement process has meant that many new smaller States have been admitted into the alliance and may be more inclined towards a decision to use force, even pre-emptive force, believing that in doing so they may find legal justification in the sight of the US and its military backing.

The intentions of those that would use force pre-emptively, in order to prevent grave danger to a nation, by the likes of a nuclear weapon, also bear merit, because it is the right of a State to protect its continued right of survival in which such an argument can be made. This happened to be the only issue which caused a significantly split decision in the Advisory

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115 ICJ Reports (2004) 135
116 For example, questions abound as to whether the 2006 armed conflict between Israel and Hezbollah was justified as a legitimate use of force by Israel in self-defence under the United Nations Charter 1945 art.51: Redsell, G "'Illegitimate, unnecessary and disproportionate: Israel's use of force in Lebanon’’ C.S.L.R. 2007, 3(1), 70-85 -explores key elements including the definition of armed attack, non-state actors, necessity and proportionality
117 Mook S “Is anticipatory self-defence lawful?” Cov. L.J. 2004, 9(1), 1-12: Assesses the legality under International law of the use of force in anticipatory self-defence. In particular, the problem of establishing a legal threshold for the imminence of an anticipated attack according to Article 51 is what makes it difficult to interpret it in a way that legitimises pre-emptive or anticipatory self-defence.
118 See: http://www.armscontrol.org/act/2006_11/StopIran ; but no support is currently forthcoming from the UK government: Iran military action not 'right course at this time', Downing Street says. Government reiterates its current opposition to military action against Iran after revelation US has requested use of UK bases: http://www.theguardian.com/world/2012/oct/26/iran-military-action-downing-street
Opinion on the Legality of the Threat or Use of Nuclear Weapons case\textsuperscript{119} on the matter of whether “the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict”, not including “in an extreme circumstance of self-defence, in which the very survival of a State would be at stake”.

Although, the Court’s opinion did not conclude definitively and categorically, under the existing state of International law at the time, that in an extreme circumstance of self-defence, and in which the very survival of a State would be a stake, the threat or use of nuclear weapons would necessarily be unlawful in all possible cases. Thus, the use of a nuclear weapon could be lawful, and the survival of a State was not a given factor to so justify its use. However, when the considered together with the fundamental legal principles from the UN Charter, such as self-determination, non-interference, and State sovereignty, as well as certain other moral and philosophical precepts, it is clear that a State must be rightly concerned, and can persuasively suggest that the law must permit it, to ensure that its demise does not result from an armed attack.

In the midst of debates as to what International law is, and ought to be, regarding pre-emptive self-defence, NATO may play a critical factor in establishing the correct position under international law. It ought to be remembered that the concept of imminence is not necessarily limited to attacks the State knows will occur in the immediate future. It may be that where a State or group is known to have an intention to attack, has the capability to do so and is taking active steps in preparation for an attack, this is sufficiently imminent. Thus setting out a very limited basis in which pre-emptive force may be lawful. Nevertheless, if NATO falls below this standard and is actively providing assistance for an unlawful attack, it would itself be a breach of the prohibition of the use of force, and probably also an act of aggression.

\subsection*{B. NATO and the Use of Force against Terrorism}

As the UN has outlined in its various resolutions, terrorism is a serious threat to international peace and security. From 2001, the “Bush doctrine” dictated that it was legitimate to target the Al-Qaida militants (non-state actors) who were responsible for the attacks on American soil, then being harboured by the Taliban in Afghanistan. It was argued that the passive support by the Taliban for the militants constituted a sufficient basis to make legitimate targets, and it has been generally accepted that an ad hoc consensus arose out of the particular circumstances of the 9/11 attacks. A majority of States approved of the initial intervention into Afghanistan under operation Enduring Freedom, and it was subsequently authorised by Security Council resolution 1386, deploying the International Security Assistance Force\textsuperscript{120},

\begin{footnotesize}
\textsuperscript{119} ICJ Reports (1996) 226
\textsuperscript{120} \url{http://www.isaf.nato.int/images/stories/File/official-texts/resolution_1386.pdf}
\end{footnotesize}
and has since involved NATO to present.

It has been set out that armed attacks by terrorists, as non-state actors, are tantamount to an “armed attack”, entitling a State to use force in response, as a legitimate measure according to Article 51 of the Charter. When it does so, a State must abide by the principles of customary International law, so that its responses are proportionate, necessary and discriminate military targets from others. Furthermore, the ability of a State to repel an armed attack by terrorists before it actually occurs (when it is “imminent”) will therefore also find legitimacy in the current understanding of Article 51 and self-defensive measures.

However, the threat faced from terrorism has led to a belief that a potential armed attack perpetrated by ideological extremists has resulted in a new permissive nature in which pre-emptive self-defence may be used and indeed that the United States is now engaged in a “war against terrorism”. Whereas most nations around the world may have reacted to the phenomenon of terrorism in some heightened manner since the terrorist attacks of 9/11, there is quite a marked difference between the US attitude and the rest of NATO to the use and permissibility of pre-emptive force. The threshold before an armed attack can be said to have occurred is a high one, although as with deeming what is a proportionate response, the law means that a State, or indeed NATO, has the discretion to determine what this is.

There has been no revision of the International legal framework in which NATO operates, and the UN high level panel has specifically considered, and then rejected, any rewriting, or reinterpretation on Article 51. This means that any involvement by NATO in military action, where it deems it must act to stop either an imminent attack by non-State actors, or defend against that which has already occurred, must be based upon sufficiently coherent evidence, and that it had good cause to do so within the limited exceptions on the use of force that exist.


122 Shah, N “Self-defence, Anticipatory Self-defence and Pre-emption: International Law’s Response to Terrorism” JCSL (95)

123 Reisman M “Self-defence in an Age of Terrorism” (2003) 97 American Society of International Law Proceedings 141-152


125 For Lubell, any use of force other than in self-defence, such as the use of force by way of reprisals is prohibited by international law. However, his restrictive view is toned down by the lack of precise definition of what constitutes an armed attack and his admission that a different threshold may apply to armed attacks by non-State actors compared to armed attacks by States, without indicating what that threshold is. As a result, it
The UN’s collective security system as has been outlined above, is the appropriate mechanism to ensure that hostile forces are contained and the same can be applied to combating the intentions of terrorist forces generally, although it has often been proclaimed that the speed, destructiveness, and consequences from terrorists with nuclear, or chemical weapons, make convention defence mechanisms ineffective and undesirable. While the need to react quickly is always retained by States under Article 51, and means that a State, or NATO, can repel an imminent attack by terrorists without having to resort to Security Council authorisation in such cases, the problem arises where an armed attack suspected, but not imminent, or unwanted nuclear capability is gained gradually, thus affording no opportunity to resort to force. In such instances, under the present legal framework, there is no legitimate basis to invoke NATO forces, and to do so would breach International law.

The purpose of the United Nations as an inclusive international body is to ensure that dialogue and exchanges of information are made between States, until the actual or unavoidable resort to force is absolutely necessary, but it has long been the case that nations are at enmity with each other by entertaining long-standing national rivalries and view their counterparts’ military capabilities with suspicion and resentment. In cases of an inter-State conflict, the consent of the State is not required before other NATO States would be entitled to participate in its defence, but these days, the more likely scenario is however that NATO may be mandated to perform anti-terrorism, or counterinsurgency operations within States with permission, or that of the UN, and for a prolonged period of time. This again marks a departure from the founding purpose of NATO and its original intention to guard against the expansion of Soviet frontiers in Eastern Europe.

Fighting terrorism remains high on NATO’s agenda¹²⁶ and the diffusion of military and political control between the UN and NATO means that NATO may seek to find implicit authorisation for military measures it wishes to take, after it has been initially engaged to use force against terrorism. The issue of combating terrorism is global, involving not only many countries in the developing world, but the most advanced nations, and other international organisations from the EU to the World Bank; engrossing related matters such as civil liberties, Human Rights, and policing. Moreover, the use of “force” in order to fight terrorism, is not necessarily the implementation of full-scale war, and may relate to small scale exchanges of arms. This is particularly relevant in the response that is made by the

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international community to the threat of piracy on the High Seas, where it has been stated\textsuperscript{127} that the distinct lack of acknowledgment of the International legal framework is a pressing challenge in combating maritime crime and security.

On the other hand, in May 2011, when AFRICOM (the Africa Command of the US Military) organised its second annual Africa Military Legal Conference in Mauritius, at which 50 officers, lawyers and legal experts from 22 African nations assembled together with representatives from NATO, the UN and the EU\textsuperscript{128} it discussed the use of force by NATO, in smaller scale, anti-piracy operations. It is worthy of note that the Royal Navy’s Commodore Neil Brown told delegates at the conference that:

“...the international legal framework, which addresses piracy and every other element of maritime security, is clear. We haven’t been suffering from a lack of law - we’re suffering from a lack of implementation and a lack of capacity”.

This statement may be useful in interpreting the current status of the International legal framework, as seen by military commanders. The prevailing perception that the law can be applied to situations on the High Seas is recognised by the military forces that must abide by it, and terrorism on the High Seas includes the circumstances in which they may do so. The increase in the size and global nature of terrorism may be met with the expansive capabilities and scope of NATO power, if only NATO has the necessary political direction and drive to be engaged in a wider remit.

It is likely that the broad and pervasive threat that terrorism can bring, the disturbing feelings planted by ideological extremist groups that operate in much in the Western world, as they do in the developing world, have brought enhanced feelings of insecurity and across the globe. Whilst this might result in instances where force can be justified, it ought to be remembered that the capacity of the use of force by NATO is of a different scale entirely to that of disparate and much weaker terrorist groups. Whilst terrorism can be accepted as a new reality, and within the remit that might engage a NATO response, there are great difficulties in ensuring that NATO’s is proportionate to the harm done by terrorism.

This is because by its very nature, terrorism prompts unconventional methods of warfare and attack, extremists often having no regard for the traditional legal barriers within which conflicts have been fought. Continuing terrorist outrages are prompting NATO to continue to

\textsuperscript{127} Commander William G Dwyer, Judge Advocate, Office of Legal Counsel, US Africa Command -Defence Management Journal, Issue 54

\textsuperscript{128} http://www.africom.mil/getArticle.asp?art=6557&lang=0
deliberate and cement its strategic concepts on terrorism. NATO powers possess vastly superior military might, than all other nations of the world, let alone against the various non-State actors seeking to terrorise, and who have widely varying and sometimes irrational objectives. Nevertheless, the disparity in power between NATO forces and the enemies it may seek to confront possess a challenge by placing a great degree of importance on the targeting, and intelligence assessments of potential enemies.

If NATO’s perspective on the legitimate use of force is to prosecute force against those groups it deems as “extremist”, those who’s ideological, or religious beliefs may be found to be offensive and in turn pose a potential security threat, hence a legitimate target, NATO will have ventured into taking a marked departure from its traditional position. The law is yet to develop a fully comprehensive framework in which the threat, or potential threat from terrorist groups, or non-State actors, is to be dealt with. Meanwhile, there has been a marked proliferation of dangerously mobilised terrorist groups in Africa, such as Al-Shabaab in Somalia, and Boko Haram in Nigeria, whose capacity to destabilise weak governments is apparent, as is their ability to act outside boundaries of countries in which they began. Further attacks by terrorist groups around the world will undoubtedly prompt US interest and foster its desire to base anti-terror operations in those countries.

But, as has been seen following the 1999 air-strikes on FRY, NATO actions have a huge potential, the ability to undermine the authority of the Security Council and the rule of International law altogether. Whilst NATO is not an outright opponent of the International legal framework within which it must operate, it is the degree of respect for the law that NATO sees fit to manifest, which is likely to confine the ambit of its actions. The language of self-defence can be easily misused, or manipulated, in order to justify measures which are reprisals in reality. In the years to come, the extent to which NATO relies on drone warfare, which mounting critics are beginning to lament over for sake of the lack of any International regulation\(^\text{129}\), and its desire to maintain a foot in the on-going conflict in Afghanistan, will mean that it treads a very thin line. Responding with measures that have the result of braking down traditional boundaries of legality will inevitably result in the weakening of International law and an even more unstable world where force is the norm. My analysis leads to the conclusion that several NATO actions are at the boundary of being lawful, and indeed because of the reluctance and outright difficulty there will be upon governments and courts to wholly condemn NATO, it will be able to push that boundary back further.

So, if NATO is to feature heavily in the post 9/11 security consensus, which encompasses a role of providing cooperative security through partnerships, crisis management, as well as

\(^\text{129}\) http://natowatch.org/node/785
collective defence, and in anti-terrorist operations that are completely outside the physical realms of Europe or America, then its success may well depend upon its ability to work with other nations, and understand indigenous forms of conflict management. Accordingly, great weight ought to be attached to the need to move from a geographical understanding of security to a more functional one. This is especially important in Africa, where it has been suggested that NATO could succeed by understanding hybrid forms of traditional conflict resolution and management, which could be the basis for new partnerships into the future.\(^{130}\)

C. NATO and Humanitarian Intervention

In the definitive Handbook of the Law of Military Operations, Humanitarian Intervention is defined as “military intervention, which is undertaken without authorisation of the UN Security Council by one or more States, or by a regional organisation, with the purposes of halting or preventing large-scale systematic and acute violations of fundamental rights of persons who are not nationals of the intervening State(s)”. Typical instances are given where there have been large-scale, systematic violations of fundamental human rights, especially the right to life, or mass rape and forcible expulsion, which result from either the governmental targeting of civilians or a general breakdown in governmental authority, as in Yugoslavia, Somalia and Rwanda.\(^{131}\) The Security Council may take measures, including authorising the use of force, for the purpose of ending the violations of rights, and preventing further atrocities. Thus, acting under Chapter VII of the Charter, States may have a legitimate basis to undertake military operations in other territories aside from the collective security and self-defence exemptions, examined above.

However, profound debates have ensued as to whether there can indeed be any legal basis for such interventions\(^{132}\) and especially so when Humanitarian Intervention has actually been undertaken without the authorisation of the Security Council, as a result of other political, and moral criteria, as in the Kosovo crises. Nevertheless, the doctrine of Humanitarian Intervention is relevant to the International legal framework under which NATO operates

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\(^{132}\) Another useful study on whether humanitarian intervention, without explicit Security Council authorization, can ever be lawful is presented within the context of international development: http://www.lawanddevelopment.org/articles/humanitarianintervention.html
because of the continuing relationship that endures between NATO and the UN. The UN has proclaimed as a general principle that it will not intervene in the internal affairs of States, according to Article 2.7 of its Charter, which upholds the strong principled basis of State sovereignty and says:

*Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.*

Although, it is argued by proponents of Humanitarian Interventionism that this provision self-evidently cannot be used by States to prevent them from consequences of violating human rights, in committing acts of genocide and large-scale ethnic cleansing. The case is put that when the UN has failed to be willing to utilise its forces and activate enforcement measures under Chapter VII, unnecessary human suffering and tragic consequences have occurred. If only a determination had been made that the right conditions were deemed to have arisen, so that military forces could have been deployed for peace keeping, or enforcement missions, this may not have been so. Thus, the argument that the use of force is legally justifiable in order to save human lives has found currency with the UN.

On the other hand, as to what level, or scale of deprivation, these circumstances must be at in order to reach a point of legal justification, remains a matter of disagreement. As a legal doctrine, the belief that human suffering can itself be a threat to International peace and security is a relatively new one and arguably at odds with the provisions of Article 2(4) of the UN Charter, although, the UN has gradually embarked upon a course which permits it to wield the ability to impinge States’ inherent sovereignty over their internal affairs. Meanwhile, the UN Charter is not entirely clear on when it will exercise Chapter VII powers to intervene in another State, although successive humanitarian situations show the level of the scale of disaster before it will do so: Somalia, Bosnia & Herzegovina, Rwanda, Kosovo and now Darfur.¹³³

¹³³ As it adopted resolution 1706 (2006) by a vote of 12 in favour with 3 abstentions (China, Qatar, Russian Federation), the Council invited the consent of the Sudanese Government of National Unity for that deployment, and called on Member States to ensure an expeditious deployment. It requested the Secretary-General to arrange the rapid deployment of additional capabilities to enable UNMIS to deploy in Darfur. The Council decided also that UNMIS would be strengthened by up to 17,300 military personnel and by an appropriate civilian component including up to 3,300 civilian police personnel and up to 16 Formed Police Units. It expressed its determination to keep the Mission’s strength and structure under regular review, taking into account the evolution of the situation on the ground. The resolution was co-sponsored by Argentina, Denmark, France, Ghana, Greece, Slovakia, United Kingdom, United Republic of Tanzania and the United States. In a statement after the vote, the representative of the United Kingdom said the tragedy in Darfur had gone on far too
A difficult question emerges when a State suggests that the conditions have been met, so that force must be used to prevent a State from committing atrocities against its people, but it does not find universal acceptance in the Security Council for such a proposition. The act of authorising force is embodied in the Security Council’s declaratory power, so that if a nation were to intervene with the use of force, unilaterally, it would be engaged in unlawful conduct, despite putting forth any strong moral arguments to the contrary. Therefore, the UN’s declaratory power is an especially important one and particularly when examining the legality of Humanitarian Intervention. By acceding to the provisions of the Charter, States have concurred that it is the UN only, which has the ability to undertake peace-keeping and peace enforcement operations in the situation where the conditions for the use of force, in a full-scale manner have not been met.

Furthermore, the importance of post-conflict, peace-building operations also ought not to be overlooked and there has been increased overlap and interconnectedness between the level and type of such operations. While the UN does have recourse to NATO forces and by extension NATO is already involved in the role of humanitarian operations, it is possible that NATO could be increasingly used to carry out the UN’s larger tasks of peace-building and policing as a matter of course, in order to put in place peace agreements and prevent further conflicts taking place.

The task of peacekeeping and enforcement is also envisioned in the role that regional organisations are to play in the UN. Although Chapter VIII refers to “regional arrangements and agencies”, the expression “regional organisations” is more often used in practice and relevant to humanitarian operations. The consensual nature of regional support operations has arisen as a norm of international law and during peacekeeping operations the Security Council has blurred the notional boundaries, in authorising NATO to use Chapter VII force, at the same time as peacekeepers were on the ground. There was a long and the transition to a United Nations operation was the only viable solution to the crisis. Based on conversations with Council members, even those countries that had abstained did not fundamentally disagree with the issues of the text -- it was more about the timing. The United Nations force remained the only vehicle to bring peace and stability to Darfur.

134 An SWP (German institute for International and Security Affairs) Research Paper on UN and NATO partnership is available at:


137 Resolution 770 in Yugoslavia
significant degree of cooperation between the UNPROFOR (United Nations Protection Force) and the express use of force by NATO in the operations conducted in Yugoslavia in 1999, so that the Secretary-General set out that the right to self-defence should only be used if the strict conditions are met\textsuperscript{138}.

Thus, the practical significance of NATO as a collective self-defence body means that there is a strong and increasing obligation upon NATO to protect the common interests and values of the International community and this includes taking steps to prevent breaches of International law, and to engage in operations of Humanitarian intervention. Be that as it may, the manner in which International law is developed is largely dependent the consent of sovereign States and their widespread recognition of accepted norms and values. This means that the use of NATO in Humanitarian Intervention, whether under the auspices of the UN or not, may continue to be held back, as it constitutes a move away from States’ sovereignty and the traditional legal paradigm. Whilst there may seem to be logical and sometimes compelling reasons as to the legality of Humanitarian Intervention, it ought to be remembered that the manner in which NATO comprises a number of nations that were formed as a defensive security pact. As the concept of lawful Humanitarian Intervention has struggled to mature into workable framework, attention was paid to a refinement of the principle, known as the “responsibility to protect”, or “R2P”.

\textbf{D. NATO and the Responsibility to Protect}

The principles originated in a 2001 report of the International Commission on Intervention and State Sovereignty and were endorsed by the United Nations General Assembly in the 2005 World Summit Outcome Document paragraphs 138, 139 and 140\textsuperscript{139}. In January 2009, the UN Secretary-General released a report on implementing the Responsibility to Protect. Following this, the first General Assembly Debate on the Responsibility to Protect was held in July 2009. At this debate UN Member States overwhelmingly reaffirmed the 2005 commitment and the General Assembly passed a consensus resolution (A/RES/63/308) taking note of the Secretary-General’s report.

The Secretary-General released three additional reports in July 2010, July 2011 and July 2012

\textsuperscript{138} Report of the Secretary-General on UNEF, A/3943, para 179.

\textsuperscript{139} R2P stipulates three pillars of responsibility -Pillar One: Every state has the Responsibility to Protect its populations from four mass atrocity crimes: genocide, war crimes, crimes against humanity and ethnic cleansing. Pillar Two: The wider international community has the responsibility to encourage and assist individual states in meeting that responsibility. Pillar Three: If a state is manifestly failing to protect its populations, the international community must be prepared to take appropriate collective action, in a timely and decisive manner and in accordance with the UN Charter.
in advance of the General Assembly Informal Interactive Dialogue on the Responsibility to Protect. The Security Council has invoked R2P in a number of resolutions: twice in 2006, once in 2009, six times in 2011 and then once in 2012; it has also referred to a government's Responsibility to Protect in one Presidential Statement and two Press Statements and the Human Rights Council has also invoked R2P in a number of resolutions, most recently on the situations in Syria.

There are a plethora NGOs springing up to support the principles and meaningful implementation of R2P around the world. Prominent among them is the Global Centre for the Responsibility to Protect an initiative, based in New York City, that seeks to transform the principle of the Responsibility to Protect into a practical guide for action in the face of mass atrocities. Founded by a number of supportive governments, leading figures from the human rights community, as well as by International Crisis Group, Human Rights Watch, Oxfam International, Refugees International, and WFM-Institute for Global Policy; the Global Centre engages in advocacy around specific crises, conducts research designed to further understanding of R2P, recommends strategies help states build capacity, and works closely with NGOs, governments and regional bodies which are seeking to operationalise the Responsibility to Protect.

Moreover, the Global Centre has recently been proactive in convening a meeting, which resulted in a joint statement by the governments of Ghana and Denmark as they co-hosted the third annual Meeting of the Global Network of National R2P Focal Points, whereby it noted: “It is important to de-dramatize the concept of R2P to pave the way for a global acceptance and strategic implementation of R2P.” The theme of the meeting was that the focus on prevention and capacity building, that the concept of national R2P Focal Points should necessarily lead to either activating national and regional mechanisms or creating

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140 Since 2007, the Global Centre has received generous financial support from various parties and many European Governments. It boasts of a distinguished International Advisory Board that provides advice on strategy, policy and management. Its members include policymakers, diplomats and academics, as well as leaders from the international human rights community: http://www.globalr2p.org/

141 This is somewhat similar to, and possibly overlapped by, the International Coalition for the Responsibility to Protect, also based in New York City, which states its founding purposes are to:

1. Strengthen normative consensus for RtoP at the international, regional, sub-regional and national levels. 2. Push for governments, regional and sub-regional organizations and the UN to strengthen capacities to prevent and halt genocide, war crimes, ethnic cleansing and crimes against humanity. 3. Further the understanding of RtoP among governments, NGOs, and the public. 4. Help build and fortify a like-minded group of governments in support of RtoP. 5. Mobilize NGOs to push for action to save lives in RtoP country-specific situations.

See: http://responsibilitytoprotect.org/

them where they do not already exist as interagency, state and non-state partnerships. The meeting brought together senior government officials as well as high-level representatives from the AU, ECOWAS, EU and UN signifying the growing acceptance of the concept that the international community is entitled to intervene to protect the threatened populations.

In order to buttress its legal basis, those that affirm of a conventional and long-established basis to partake in intervening in the internal affairs of another State, have suggested that there is an a contrario interpretation of Article 2(4) of the UN Charter. According to this argument, Humanitarian Intervention does not fall within the scope of the prohibition on use of force because the latter is considered as prohibiting only uses of force directed against the territorial integrity or political independence of a state or exercised in a way that is incompatible with UN purposes, and that Humanitarian Intervention is not per definition either directed against the territorial integrity or political independence of any state or incompatible with UN purposes, such purposes including the protection of Human Rights.

Corten is particularly convincing in his arguments that such a right for States to engage in Humanitarian Intervention does not yet exist in the current state of International law. Referring in this regard to the preparatory works of Article 2(4) of the UN Charter, and the major UN General Assembly resolutions on the use of force, it is indeed well known that the final wording of Article 2(4) was included at the request of ‘small’ states in order not to reduce the scope of the prohibition on the use of force, but rather to make it as general as possible. He also refers to a series of declarations in which states expressly reject the a contrario argument. Furthermore, Corten convincingly demonstrates that, although some States proposed to consider the objectives of a military operation as a relevant criterion for qualifying the operation as an aggression, during the debates preceding the adoption of UN General Assembly Resolution 3315 (XXI), this criterion was not accepted by the other states. It is indicative in this respect that the resolution expressly provides that ‘[n]o consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression’.

143 An argument from the contrary, in that if the UN Charter did not prohibit the use of force in Humanitarian Intervention, it must allow it.

144 Such as the Universal Declaration of Human Rights (UDHR); a declaration adopted by the United Nations General Assembly on 10 December 1948 and arose directly from the experience of the Second World War. The full text is available at: http://www.un.org/en/documents/udhr/

145 The penultimate chapter of “The Law Against War: The Prohibition on the Use of Force in Contemporary International Law” Hart Publishing: Oxford (2010) asks fundamentally whether the is a such a thing as a “right” of humanitarian intervention, giving rise to legal obligations; he sets out the context in which it has not been recognised in classical texts, or recent debates, and persuasively dismisses the a contrario interpretation of Article 2(4) of the UN Charter with comprehensive quotations from the context of the UN debates on the use of force (1945-1999) pp. 505-511

146 Thus, for example according to Madagascar the words “against the territorial or political independence” in no way limited the scope of the prohibition (A/AC.119/SR.9, 3 September 1964, 17-18)
In addition, Corten mounts an attack on the case that R2P has emerged as a novel right to use force. This is because neither the declarations made by the States in relation to that notion before and after the report of the Commission, nor the report and the 2005 World Summit Outcome, which briefly refers to the R2P, involves any recognition of a right of Humanitarian Intervention - only very few States declared themselves in favour of such a right, while the Commission was working on the R2P. Besides, those declarations were apparently made de lege ferenda\textsuperscript{147} and even fewer states maintained such a position in their declarations expressed in the context of the World Summit. More fundamentally, the report of the Commission itself and the World Summit Outcome do not in any way entail the recognition of a right to use force beyond the traditional conception of the matter - that is, a general prohibition on the use of force with only two exceptions: self-defence and force authorised by the UN Security Council. This new concept and the debates surrounding it even seem to have reinforced such traditional conception.

However, NATO was to be the means through which a major military operation was conducted in Libya during 2011. The legal basis referred to R2P and the official objective was to protect civilians against attacks. Authorisation came with UN Security Council Resolution 1973 (2011). While it is sometimes difficult to reconcile the concepts of Human Rights protection and State sovereignty, it may be the case that R2P becomes apparent as the primary conceptualisation by which the International community finds a legitimate mechanism by which it can undertake military interventions, in extreme cases. It is difficult to argue against the useful criterion offered by Cassesse\textsuperscript{148} as a legitimate basis for intervention, although where exactly any threshold will be drawn, remains a matter of interpretation and political consideration. In the Rwandan genocide between 500,000 to 1,000,000 lives were lost\textsuperscript{149}, with very little appetite for intervention, but during the Libyan Civil war, the UN Human Rights Council\textsuperscript{150} estimated that between 10-15,000 people were killed, (including protesters, armed belligerents, and civilians\textsuperscript{151}) and yet NATO was deployed within a relatively short space of time.

Corten is at pains to point out that even if there has been a steady progression of the International community to accept a responsibility to intervene in the internal affairs of other

\textsuperscript{147} An expression meaning an interpretation of the law as it may be evolving

\textsuperscript{148} See footnote 15 above

\textsuperscript{149} \url{http://www.hrw.org/legacy/reports/1999/rwanda/}

\textsuperscript{150} This is however one estimate among several others, with the Libyans themselves estimating there were at least 30,000 killed: \url{http://www.theguardian.com/world/featalticle/9835879}

\textsuperscript{151} Between 5\textsuperscript{th} February 2011-9\textsuperscript{th} June 2011: \url{http://www.reuters.com/article/2011/06/09/us-libya-un-deaths-idUSTRE7584UY20110609}
nations since 1945, it must still be accompanied by a Security Council resolution; the application of force outside of UN authorisation is totally illegitimate and there is no emergence of a right outside of the Charter system. Nevertheless, by any account R2P must be accepted as an *emerging* concept, which is growing in importance, and gaining impetus from the profusion of NGOs that support it.

Moreover, by the very fact that diplomatic pressure may always be exerted upon members to vote for a resolution in the Security Council, R2P can be said to be as limited in its extent as passing such a resolution allows, and therefore the doctrine ought not to be easily overlooked as the future justification by which NATO is deployed. Commentators have long discussed the possibility of NATO taking on the permanent work of the UN’s peace enforcement and peace support operations, and R2P would now provide the theoretical basis in which the two could more effectively work together.

As the NATO action in Libya has now drawn to a close, a number of emerging views on the effectiveness and desirability of R2P have become apparent. When in early 2011, Gaddafi unleashed terrible violence against the Libyan people and had begun a brutal crackdown, it was his abhorrent rhetoric, in that he possessed firepower far superior to opposition elements, and made direct threats to exterminate the protesters like “rats”, that was said to have created a clear and present danger to innocents. Whilst US Ambassador Richard Williamson spoke out at the NATO 2012 summit in Chicago, in terms that the NATO campaign in Libya was a “success on many levels”, he is also able to recognise that NATO’s air assault faced severe criticism for the imprecision in much of their targeting. Furthermore, he suggests that if R2P is to have any meaningful impact on the prevention of crimes against humanity (as it did in Libya), then it is NATO which ought to be promoted as the primary means through which the pledge of “never again” can be realised.

On the other hand, Ulfstein and Christiansen also offer a take on the NATO action in Libya, R2P, and the Security Council Resolution 1973, which was adopted on 17th March 2011. Thus while acting under Chapter VII, the Council authorised the use of “all necessary measures”, commonly understood as a licence to use military force, “to protect civilians and civilian populated areas under threat of attack” in Libya and to secure a no-fly zone; when NATO actions went on to ensure the overthrowing of Colonel Gaddafi, it violated its mandate and was steeped in military overreach.

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152 Ibid, p. 547

153 His commentary is available at: [http://2012summits.org/commentaries/detail/williamson_1](http://2012summits.org/commentaries/detail/williamson_1)

154 Uffstein, G & Christiansen H “The legality of the NATO bombing in Libya” ICLQ 2013, 62(1) 159-171

155 This is however at odds with the view reached by Henderson, who considers the controversies over how to interpret the UN Security Council resolutions of 2011. When authorisation was given to NATO to use of “all
Moreover, the result is that the fragile creation of R2P may have already been lost, as soon as it was born; the authors also described a “fine line” and this was between the lawful destruction of capabilities used to threaten civilians against attack, and general impairment of the regime’s army. The force of this submission is obvious and best explain why as yet, no military action has been taken to end the continuing violation of human rights by the regime in Syria\textsuperscript{156}. NATO determined the scope of Security Council Resolution 1973 and did so to mean that regime change would be effected by taking the side of rebel fighters. This was a wide interpretation of permissible action and compromised NATO’s impartiality. The fundamental divergence in construing the action needed, as discussed by various diplomats at the UN in New York, and then what was actually planned by NATO military Generals in Brussels, may well occur again in the future. Nevertheless, there is a gaining momentum for the belief that it is NATO which ought to be charged with preventing genocide and mass atrocities, that it should be a priority for NATO, thus not merely an idealistic add-on to the core collective defence agenda\textsuperscript{157}.

Therefore, if NATO was to implement the UN R2P agenda and direct its resources towards the development of a comprehensive approach to genocide prevention, NATO would again be at the forefront of the limits of the International legal framework, as it is. This is because the legal analysis by Corten holds sway, despite certain moral and strategic imperatives NATO may have to the contrary. It is understandable that many wish NATO to move towards a human security approach, contributing to the protection of every individual human being and not focus merely on the defence of territorial borders, yet this is only one-side of the argument, as at the moment, the principles of State sovereignty and non-interference are firmly enshrined in the UN Charter.

\textsuperscript{156} Russia, China as well as Brazil, India and South Africa have been opposed or reluctant to adopt strong Security Council resolutions against Syria. Speaking in a council meeting on Syria on 4 October 2011, the representative of Russia stated that the Syrian situation cannot be considered separately from the Libyan experience, worrying that the NATO interpretation of the Security Council Resolutions on Libya is a model for future actions of NATO in implementing the responsibility to protect and that NATO ‘may begin to apply this “exemplary model” in Syria’. The representative of South-Africa has also highlighted that Security Council resolutions recently have ‘been abused’ and that ‘their implementations have gone far beyond the mandate of what was intended’. South Africa was concerned that the draft resolution on Syria was ‘aimed at once again instituting regime change’, with a clear reference to Libya: UNSC 6627th meeting, 4 October 2011, UN Doc S/PV.6627

\textsuperscript{157} See: http://www.natowatch.org/rtp
R2P is an emerging concept to which it is likely the UN will make further recourse and a consensus seems to be forthcoming from those concerned in the International community. Thus, NATO may be used to take on specific missions at the UN’s behest, but there are matters which ought to be of chief concern to those who watch how NATO operates, and whether again, it will result in implications concerning the status of International law. NATO planners and decision makers deliberately effected a regime change in Libya, as it was perceived that this was the only manner in which the authorising resolution from the UN could be fulfilled. This would suggest that it is very difficult to expect NATO to transform from a military alliance, whose primary basis for existence was to wage defensive war, into a humanitarian based organisation. Hence, whilst there may be somewhat of a resurgence in the legality of Humanitarian Intervention, through R2P, NATO is relevant as a primary driver in the context in which this has occurred. This is a finding which supports my conclusion that NATO is more than a simple collective of States, with a theoretical interest in International law. NATO is deeply involved in facing the threats posed to International peace and security and the use of force by NATO in Libya in 2011, reminds us that NATO actions develop International norms and therefore International law itself. However, there seems to be very little, by way of a corresponding check, on this very important power.

E. NATO and Cyber warfare

The questions of International responsibility and accountability between the UN, NATO, and member States, become even more difficult to determine with the modern weapons of war, particularly in cyber warfare158. Although scholars began to assess how International law applies in the cyber context during the late 1990s, it was not until the 2007 cyber operations directed at Estonia that the international community became fully sensitised to the subject. For the first time, it became publicly clear that cyber operations are a powerful tool for conveying political or strategic messages by States, non-State groups and individual hackers. The operations also made the International community aware of how cyber operations could

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158 In January 2010, the UK Ministry of Defence’s Development, Concepts and Doctrine Centre (DCDC) published the 4th edition of “Strategic Trends Programme –Global Strategic Trends –Out to 2040” which confirmed the long-term nature of defence planning and the need for a wide-ranging understanding of the future strategic environment. Moreover, Global Strategic Trends provides a measure of context and coherence in an area characterised by transition, risk, ambiguity and change and moreover addresses subjects such as: the shifting global balance of power; emerging demographic and resource challenges; as well as climate change and societal changes. The document is available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/33717/GST4_v9_Feb10.pdf; furthermore, a fascinating account of what futuristic warfare will entail is capsulated by Sutherland, B in “The Economist: Modern Warfare, Intelligence and Deterrence: The technologies that are transforming them” Economist books (2011)
be used to dramatically disrupt life in a country and the NATO Policy on Cyber Defence, ‘Defending the Networks’ was developed. This states that:

The 2010 NATO Strategic Concept highlighted the need to “develop further our ability to prevent, detect, defend against and recover from cyber-attacks...”. Threats are rapidly evolving both in frequency and sophistication. Threats emanating from cyberspace – whether from states, hacktivists or criminal organisations, among many others – pose a considerable challenge to the Alliance and must be dealt with as a matter of urgency.

A NATO Concept on Cyber Defence was first drafted for Defence Ministers in March 2011, which formed the conceptual basis of the revised NATO Policy on Cyber Defence. The Policy itself was then developed and approved by the NATO Defence Ministers on 8 June.

Cyber threats transcend state borders and organisational boundaries. Their vulnerabilities and risks are shared by all. Recognising the truly global nature of cyberspace and its associated threats, NATO and Allies will work with partners, international organisations, academia and the private sector in a way that promotes complementarity and avoids duplication. NATO will tailor its international engagement based on shared values and common approaches. Cooperation in the field of cyber defence could encompass activities including awareness-raising and sharing of best practices.

Moreover, the 2007 Estonia cyber attacks, which are widely thought to have been conducted by Russia in retaliation for the relocation of an old soviet statue, in part have led to the establishment of the NATO Cooperative Cyber Defence Centre of Excellence (NATO CCD COE), an international military organisation located in Tallinn, the capital of Estonia. In late 2009, NATO CCD COE invited a group of twenty international law scholars and operational legal advisers (the International Group of Experts), under the directorship of Professor Michael Schmitt of the United States Naval War College, to conduct a three year research

159 The NATO Defence Ministers, tasked by the 2010 Lisbon Summit of NATO Heads of State and Government, have adopted their revised NATO Policy on Cyber Defence on 8th June 2011. It is coupled with an Action Plan as a living document, claiming that NATO’s emphasis will be prevention and resilience, rather than reaction. As highlighted in that document, 'NATO does not pre-judge any response and therefore maintains flexibility in deciding a course of action that may or may not be taken.'
project examining the norms applicable during cyber warfare. The product of this effort is the “Tallinn Manual on the International Law Applicable to Cyber Warfare”\textsuperscript{161}, and as declared by the Centre, this work is:


\begin{quote}
“intended to lead to a restatement and manual on the international law applicable to cyber warfare, similar to the manuals on the law applicable to armed conflicts at sea (1994) and air and missile warfare (2010)”.
\end{quote}

Nevertheless, applying “extant legal norms” to cyberspace, most commentators have already agreed that the Tallinn Manual convincingly shows that existing International law is not silent on new technological developments\textsuperscript{162}. On the contrary, the \textit{jus ad bellum} protects the sovereignty of States against cyber attacks, and the \textit{jus in bello}, although its rules were developed prior to the invention of cyber weapons and their possible employment in future wars, applies in armed conflict to the effect that means and methods of cyber warfare are not unlimited. Hence, any claim that cyber operations were subject to International legal regulation only on the basis of new treaty law has been convincingly proven by the International Group of Experts as being legally unfounded.

Whilst it is to be appreciated that NATO\textsuperscript{163} has been proactive in setting out the law on cyber warfare and seeks to be at the front the so-called 5\textsuperscript{th} dimension of where war now takes place (besides land, sea, air, and space), it is not the only party to have attempted to map out the rules\textsuperscript{164} on continuing and expanding International efforts to further develop and preserve cyber security. Moreover, there is still a basis to believe that NATO will inevitably come to a position that pushes back the International legal framework. In basic terms, NATO can be judged by how well it applies the existing law on the use of force, by the extent of the response it makes to what is considers to be an armed attack. Nevertheless, it is the ability of NATO members to carry out cyber attacks, against prohibition of the use of force, which is most poignant.

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\textsuperscript{161} Schmitt, M Cambridge University Press (2013)
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\textsuperscript{163} Nevertheless, the Tallinn Manual is ‘not meant to reflect NATO doctrine. Nor does it reflect the position of any organization or State’, although it was sponsored by the NATO CCDCOE. The Manual is ‘an expression solely of the opinions of the International Group of Experts, all acting in their private capacity’.
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\textsuperscript{164} See Dinniss, H “\textit{Cyber Warfare and the Laws of War}” Cambridge University Press (2012) whereas Michael N Schmitt is by now working on a book (not manual) addressing the subject of International rules on state responses to cyber attacks falling below the armed attack threshold, also to be published by CUP
\end{flushright}
When in 2010, the Iranian nuclear enrichment programme was attacked by the Stuxnet worm, the level of complexity and sophistication of the computer virus was such that it is thought the “cyber missile” – as it has been termed by some\textsuperscript{165}, was most likely launched by the US, or Israel, despite them never having claim official responsibility for doing so. Thus, whilst the law does entitle a State to protect itself from an armed attack, and Article 5 of the NATO Treaty entitles other State to participate in those means of protection, the equally important aspect of the law is to afford protection to States, so that they are not attacked at all. Given the range of cyber expertise on the side of NATO powers, and the vivid example given in the Stuxnet worm attack, it is actually more likely that a cyber war would be started by a NATO State first, than NATO having to protect itself from an attack. Equally troubling is the ability that NATO has to escalate cyber warfare if engaged, how it is able to keep its actions within the confines of proportionality, is all down to its own assessment of actions and the extent of harm that has been done.

In this regard, cyber warfare has brought into focus how difficult it may so as to reach consensus on the state of an armed conflict, and especially when it is exclusively being waged by cyber force. While many insist that an 'armed attack' (as is meant by Article 51 of the UN Charter) requires a use of force on a relatively large scale and with substantial effect, the USA and others take the position that any significant attack might qualify and trigger the right of self-defence\textsuperscript{166}. The consequences of all out cyber warfare have also been fiercely debated and while some have predicted a cyber Armageddon, with the melt down of all computer networks, causing societal breakdown and catastrophe, in much the same way as would be the result from a strike by a nuclear missile, others have been quick to point out that military has long had to grapple with the advent of new technologies, nothing is essentially new by using computers to attack others, and devices such as the Stuxnet will only serve as a convenient add-on, in the midst of conventional weaponry.

The recurring problem that plagues NATO is whether it will be subsumed by the dogmatism of a proactive American view on the use of force. That is, an eagerness to classify threats to national security as “imminent”, so that pre-emptive strikes are justifiable. Moreover, because there are difficult questions in modern International law and the context of modern conflicts, such as the extent to which civilian participation in a conflict, vitiates entitlement to protection from becoming a legitimate target, and when acts of force can be attributed from non-State actors to a State, NATO has to be extremely careful of being drawn into the open-ended, and sometimes ill-defined, war against terror. If this is repeated in the context of cyber space, then in the targeting of military objectives by NATO, there is little to guarantee that its


\textsuperscript{166} US 2011 International Strategy for Cyberspace
http://www.whitehouse.gov/sites/default/files/rss_viewer/international_strategy_for_cyberspace.pdf
actions would be within the ambit understood to be permissible by the law, since – positions still differ widely, and even between those authors of the Tallinn manual\textsuperscript{167}.

Furthermore, Boothby\textsuperscript{168} recounts how the design of the controlling software, that data fed into the mission control equipment, the settings applied to the algorithm-based technology, and any other information which would demonstrate what the persons planning and commanding the mission intended the machine should attack, will be factors that could still potentially make an individual liable under International law for war crimes, if done deliberately. In order to keep in track with obligations under the Geneva Convention, States will have to pay increased attention on what information has been fed to autonomous platforms in order to apply the established principles and rules as to distinction, discrimination, precautions just as they are applicable to modern attack methods.

The degree to which NATO countries take into account of International Humanitarian law is perhaps best illustrated in the case of the use of cluster munitions, in which some 109 signatories, including most NATO members, have signed a convention in Oslo that comprehensively bans their production, use, stockpiling or sale and transfer, but the US has not. A particular dilemma for NATO is to what extent its members can agree to participate in a mission that will involve the use of cluster bombs, or likewise, to share information that will be used by planners and commanders to attack prohibited persons or objects in a cyber attack.

Whilst NATO has attempted to examine and consider the International legal framework in which cyber warfare takes place, according to the ICJ’s Oil Platforms judgment, the fundamental principle of International law remains that a limited degree of military force in countermeasures is permissible once the use of force threshold has been crossed, so long as they are proportionate. The assessment of what is “proportionate” is usually found by examining State practice and existing norms, so that States must be sensitive to the fact that their actions and pronouncements regarding cyber conflict have normative significance. The pronouncements on cyber warfare by NATO may influence State practice and drive forward a distinct dogma, leaving little room for other reasoning, even where matters of controversy exist.

Therefore, although no such “cyber-war” has ever occurred, it is well established that the onset of a major cyber attack, sufficient to reach a threshold of causing strategic damage, or of taking military advantage against an unsuspecting State, is likely to meet the conditions

\textsuperscript{167} Defining a “cyber use of force” proved especially challenging, nevertheless, relying on the Nicaragua judgment, the Tallinn Manual concludes that merely funding a hactivist group that is conducting cyber operations as part of an insurgency would not qualify as a use of force, whereas arming and training an organised armed group to carry out cyber operations against another State would.

\textsuperscript{168} Boothby, W “The Law of Targeting” Oxford University Press (2012)
which would enable a State to use force, further to its right of self-defence. Moreover, if it was to be categorised as broadly analogous to an “Armed Conflict”, then the standing rules and over-arching principles of International humanitarian law would apply. Nevertheless, there is a continuing debate as to what exactly is meant by the term “attack” and the ensuing proportionate degree of force that may be made response to it. For some time, it has been beleived that interference with the Internet is not sufficient serious to qualify as an attack, but nevertheless, the extent of the damage done by such interference would certainly be relevant to the lawfulness of a response made. In any event, there is firm authority for the proposition that conventional rules on targeting would apply so that military measures taken in response against a civilian population would be forbidden169.

Perhaps a further and deeper question would be whether the onset of Cyber warfare would justify the invocation of Article 5 of the Washington Treaty. The legal mechanism that underpins NATO’s collective defence policy means that States are legally obliged to participate in the defence of a member, if any one of them is attacked. However, any sensible rendering of this legal obligation must be contingent, not only upon such an attack crossing a threshold of severity, but also, upon identifying and making it possible to know how to respond in counter measures in pursuit of collective defence and against whom. It was traditionally so that “an armed attack” on a NATO State, of sufficient severity, would be straight-forward to verify and categorise as such; if the attack was sufficiently serious, the obligation under Article 5 would be activated, if not, then the State would be expected to use measures short of military action to defend itself. However, the onset of Cyber warfare raises the deep legal complexities in the possibility that a NATO State may be attacked from known, as well as unknown sources, from a traditional State adversary, as well as non-State actors, receiving support from States, or elements of a State.

In recent times, NATO has come to grapple with the threat of “ambiguous warfare” and in particular, certain techniques posed by Russian forces in unconventional attacks upon its neighbouring States. The trepidation created by this phenomenon is such that the UK Parliament has published a report into the UK and NATO’s capability to respond170 and whether the Article 5 obligation to smaller NATO States, offers a sufficient guarantee of protection. The document makes clear that NATO remains militarily superior and arguably has the most developed principles of warfare, strategies, tactics and doctrines ever devised in the history of warefare. Even so, the success of NATO’s Treaty as an effective document, lies in the fact that it achieved what it set out to do, that was, to provide a legal basis to the policy of deterrence; no armed attack occurred during the Cold War when it was clear that to do so, would mean that the full force of the Alliance would be entitled, indeed would be obliged, to


170 http://www.publications.parliament.uk/pa/cm201415/cmselect/cmdfence/358/35807.htm
respond. Today, the applicable standard that would activate the Article 5 obligation may be capable of evolving into novel situations not envisioned at the establishment of NATO, such as Cyber warfare, but if NATO holds that there has been a change in the applicable legal standard of an Article 5 situation, this would undoubtedly weaken the legal authority that the Washington Treaty once possessed altogether.

PART 2: THE EXPANDING BOUNDARIES OF INTERNATIONAL LAW ON THE USE OF FORCE

IV. NATO - FROM FOUNDATION TO RECENT ACTIVITY

NATO’s founding document is the Washington Treaty of 1949 which brought the North Atlantic Treaty Organisation into existence; a military alliance comprising of 12 original signatories\textsuperscript{171}, although there are now 28 members\textsuperscript{172} with Croatia and Albania officially joining on 1\textsuperscript{st} April 2009 and the door remains open\textsuperscript{173}. As mentioned above, the significance of the Washington Treaty is that in Article 5, the members agree to treat an armed attack upon a single state, as an armed attack upon all (mutual self-defence). The Article was drafted with the potential threat of Soviet aggression in mind, specifically in attempting to defend against any furtherance of its political control of Eastern Europe into other parts of the continent. However, it was not the Cold War which led to the invocation of this clause, rather the terrorist attacks in upon the World Trade Center in New York City on September 11\textsuperscript{th}, 2001.

Thus, on 9\textsuperscript{th} October 2001, the NAC determined that NATO would undertake Operation Eagle Assist and 13 nations executed 360 operational sorties over the skies of America to help defend against any further attacks, until 16\textsuperscript{th} May 2002\textsuperscript{174}. The significance of the operation was that it represented the first time in Alliance history that NATO assets were deployed in support of the defence of one of its member countries, after the Treaty being in

\textsuperscript{171} The United Kingdom, The United States, The Netherlands, Portugal, Norway, Luxembourg, Italy, Iceland, France, Denmark, Canada and Belgium


\textsuperscript{173} Talks are underway with Georgia and Ukraine

\textsuperscript{174} http://www.nato.int/docu/awacs/html_en/awacs04.html

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existence for over 50 years and in circumstances that were totally unforeseen at the founding of the Treaty.

Events quickly unfolded, as on 20th December 2001 the International Security Assistance Force (ISAF) was established by the UN Security Council after several nations (“the Coalition of the willing”) quickly took part in sustained bombing campaigns and military action against the Taliban and Al-Qaeda in Operation Enduring Freedom in Afghanistan. In the beginning, the ISAF command rotated among different nations on a 6-month basis, but since there was difficulty securing new lead nations command was turned over permanently to NATO on 11th August 2003.

The NAC now provides overall coordination and political direction for ISAF in what is NATO's first deployment outside Europe or North America. As of June 2008, ISAF was made up of approximately 53,000 personnel from 43 different countries, concerning all 26 NATO partners and several world leaders have signalled the strategic importance of continuing operations in Afghanistan against the Taliban and Al-Qaeda militants. Therefore, NATO has ensured its continued existence in circumstances where it might have otherwise disappeared, with the purpose for which the Alliance was originally founded for having ceased altogether; rather than a conventional warfare role, NATO has been deployed in counter-insurgency operations.

The NATO summit is a summit meeting that is regarded as a periodic opportunity for Heads of State and Heads of Government of NATO member countries to evaluate and provide strategic direction for Alliance activities. NATO summits are not regular meetings like the more frequent NATO ministerial meetings, but rather are important junctures in the alliance’s decision-making process on the highest level. Summits are often used to introduce new policy, invite new members into the alliance, launch major new initiatives, and build partnerships with non-NATO countries. The Washington Summit of 1999 was NATO’s 15th summit and held at the time of the height of its bombing of the former Yugoslavia and the occasion of its 50th anniversary.

There, it adopted a new Strategic Concept, which reaffirmed its traditional purpose of providing “security and freedom” for its members, set out a Membership Action Plan, and also provided for the establishment of a European Security and Defence Identity (ESDI) the political framework under which it continues to operate. Relations between the EU and

175 Medcalf, J “NATO” Oneworld Publications (2005)
176 http://www.nato.int/docu/pr/1999/p99-064e.htm
177 http://www.nato.int/cps/en/natolive/official_texts_27433.htm?selectedLocale=en
NATO were developed in the “Berlin Plus” agreement of 2002, which allowed the EU to draw upon some of NATO’s assets for its own peacekeeping operations, although the relationship between the two has been described as “plagued by mistrust, unhealthy competition, and information sharing problems”\(^\text{178}\).

The relationship between the United Nations and NATO on the other hand has been set out formally in the Joint declaration on UN/NATO Secretariat Cooperation, proposed by the NATO Secretary General Jaap de Hoop Scheffer and done in New York in September 2008\(^\text{179}\). By this document, the bodies agree to establish a framework for consultation, dialogue and cooperation; however this has met with some controversy, with the UN hesitating to adopt it, then its circulation being limited and secretive. Furthermore, critics\(^\text{180}\) have argued that by signing the agreement, the UN Secretary General Ban Ki-Moon had impinged the integrity of the UN, a body established to prevent war, essentially making a pact to cooperate with a military alliance, with the Secretary Generals of each (as representatives of peace-keeping and war) standing on an equal footing. Also, it seems that members of the General Assembly, and in particular Russia, had been surprised to have not been consulted on any draft of the agreement\(^\text{181}\).

NATO biennial summits continue to be promoted as significant meetings of NATO and World leaders. Typically, the NATO summit will discuss the strategic direction of the Alliance and various International agreements and Treaties by which it seeks to further strategic objectives. As well, NATO summits are concerned with pressing International affairs and particularly, current matters concerning defence and International security. The most recent NATO summit took place in Newport, Wales from 4\(^{th}\) to 5\(^{th}\) September 2014, against a background of outward Russian aggression in the Ukraine and the mounting destabilisation of the Middle East, by the violent Islamic Caliphate in its midst. The Wales Summit was hailed as the most important for decades, as until these various crises had become as apparent as they are, the mood had been that NATO’s purpose was waning and its operation in Afghanistan had been very long and painful, with little corresponding benefit for its members. The Wales Summit resulted in a declaration that the “Transatlantic Bond” underpinning NATO remains relevant and strong; the Article 5 commitment of mutual self-

\(^{178}\) Smith, J. “Transforming NATO (...again): A Primer for the NATO Summit in Riga 2006” (Washington, DC: Center for Strategic and International Studies, 2006)


\(^{180}\) Among them are The International Peace Bureau: http://ipb.org/i/index.html and The Transitional Foundation for Peace and Future Research: http://www.transnational.org/Resources_Treasures/2008/TFFBoard_UN-NATO.html

\(^{181}\) http://en.rian.ru/russia/20081009/117635210.html
defence would be met and NATO sought to reassure the rest of the World that it truly remained the bedrock by which its members would safeguard their security interests.182

Previously, when NATO met in Chicago from 18th to 21st May 2012 it was the first time ever that a NATO summit had been held in the United States, outside of the nation’s capital, Washington, D.C. The 2012 Chicago Summit discussed the impact of recent events since the Arab Spring, Libyan civil war, as well as the global financial crisis, transition for NATO forces in Afghanistan, and a missile shield system for Europe to seek routes out. Furthermore, even then, NATO crafted specific resolutions concerning the Middle East and addressed issues including the organisation's continuing military support of active insurrections in the region, as well conflict with Iran.185

Before that, Lisbon was the venue for the NATO summit from 19th to 20th November 2010, with the Alliance determining to recognise the new security challenges, an evolving environment, re-affirming its fundamental principles and adopting a new Strategic Concept: “Active Engagement, Modern Defence”.186 However, it was unlikely that that meant anything new for the International legal framework in which it operates. NATO will continue to be concerned with the tasks of providing for its members’ collective defence, crises management and cooperative security. It must now deal with the added burden in that many members are seeking to drastically cut their defence spending and therefore contributions of military HQs and manpower.

Furthermore, there can be little doubt that without some major root and branch reform to its command structure and terms of membership, NATO will ever be able to rid itself of the criticism that it is an extension of US foreign policy and global dominance. Meanwhile, America complains European nations contribute too little, and European nations are disquieted in that their 27 various national military contributions are often used in a

183 http://www.nato.int/cps/en/natolive/events_84074.htm
186 http://www.nato.int/strategic-concept/index.html
187 Daalder, I. and Goldgeier, J. “Global NATO” Foreign Affairs 85, no. 5 (2006): 106
188 http://www.matei.org/research/nato.html

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dispersive way and fragmented with significant duplications, rival systems, capability gaps and incompatibilities.  

In July of 2012, the NATO Secretary General Anders Fogh Rasmussen delivered an address at the Chatham House in London, discussing NATO’s future priorities, as the mission in Afghanistan nears an end. This lecture is notable because the aspirations of NATO are laid bare and much can be gleaned on where NATO sees its position within the International legal framework, from NATO’s outlook on itself.

_In this time of uncertainty, a strong NATO is a source of confidence. It is an essential contributor to wider international security and stability. It means we can face today’s challenges from a position of strength._

_For over sixty years, NATO has guaranteed the security and stability that have allowed this continent to flourish. We are an Alliance of 28 democracies. A unique forum for transatlantic dialogue -and transatlantic action. We can launch and sustain complex joint operations in a way that no one else can. We can work effectively with partners in a way that no one else can. And at our recent summit in Chicago, we took important steps to make sure this Alliance can deal with security challenges despite the economic challenges, and remain fit for the future. At a time of global risks and threats, delivering security must be a cooperative effort. And this means NATO must continue to strengthen its connection with other countries and organisations around the globe._

_Our partners have been key to NATO’s success over the past two decades. Much has been already achieved and we have reason to be proud. Militaries around the world aspire to our standards and the ability of our forces to work together. Importantly, we can integrate other nations’ contributions into complex multinational operations like no other organisation._

It is correct that the importance and use of NATO as a means to enforce international peace and security has grown exponentially. NATO must now deploy and sustain the world’s most potent military forces in the far flung destinations of Afghanistan, Libya, and the former Yugoslavia; it is responsible for the defence of 900 million citizens around the world, and

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over 70% of the world’s military expenditure. It is a strategic alliance that must face rapidly changing challenges, in terms of environments in which to operate, defending against the most difficult and dangerous potential armed attack (upon any of its members), being prepared to face unknown hostile aggressors and having the arrangements in place to meet the threat of other contingencies, such as nuclear warfare. Nobody would welcome a NATO that was belligerent and too pro-active on its exercise of the right to use force, and yet at the same time, in not taking on a wider remit in the role that force, or police measures short of force, are to play in the global fight against terrorism, and within the confines of being a UN regional organisation, NATO can be judged critically for being very selective in the times and places that it chooses to use force.

In the sometimes difficult questions in regard to what is force, and the fine balance in determining what is proportionate, NATO may be found to have fallen short in several respects, but NATO does not have much room for meaningful self-evaluation, like a government would from public debate and inquiries. NATO is an International Organisation that is strongly allied to the principles and purposes of the UN, but it has yet to take on the promotion of human rights and recognise the jurisdiction of the International Criminal Court, which are also important aspects in regard to context in which NATO was established and the signing of the Atlantic Charter.

NATO is not a nation, nor cannot it be properly understood as a collection of nations, or States with legal personality, such as the EU, or USA. Neither is it an institution that is connected to the UN, such as the International Court of Justice. Rather, it is an International Organisation resulting from the formal agreement made between its signatories, that certain nations will aid each other in the face of an armed attack, and essentially defend each other with their respective military forces. However, this does not change the fact that the rules on the use of force, a doctrine that has been evolving in international law over the past 100 years, must be applied to NATO actions. The pooling together of military assets means that a NATO commander may command forces from several different nations, dictating their military tactics and strategy, although the sending nations maintain political control, to determine whether, or when, forces will be used, their rules of engagement and ultimate mission objective.

This means that when considering the international legal framework, set out in primary source materials, there are common themes that apply to States, NATO, and forces under the control of the United Nations. Therefore, given NATO’s importance, and prominence, on the

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191 The Strategic Concept adopted at the 1999 Washington Summit described future threats as “multidirectional and often difficult to predict”
international stage in the conduct of contemporary military operations, it will be particularly useful to set out an explanation of the Washington Treaty of 1949 which defines how NATO will operate.

V. THE WASHINGTON TREATY OF 1949

Following the Atlantic Charter, signed between US President Roosevelt and British Prime Minister Winston Churchill in 1941, the North Atlantic Treaty, was then ratified in Washington, D.C. on 4th April 1949, and otherwise known as the “Washington Treaty” is the treaty establishing NATO. It is closely modelled on the UN Charter and indeed, in its preamble “The Parties to this Treaty reaffirm their faith in the purposes and principles of the Charter of the United Nations and their desire to live in peace with all peoples and all governments.” Moreover, the concept of an “armed attack” giving rise to the “right of individual or collective self-defence as recognised by Article 51” is made explicit by the Treaty. Having looked at the general principles on the rules on the use of force, when it comes to interpreting what was intended to be established by the founders of NATO in the Washington Treaty of 1949, it is necessary to maintain the distinction between the concepts of the inherent right of individual, or collective self-defence, and collective security. The distinction is crucial, because it has been argued that a precise usage of the terms is needed to understand the ambit of military activity that may be authorised by a government in order to maintain international peace and security.

The Parties to this Treaty... are determined to safeguard the freedom, common heritage and civilisation of their peoples, founded on the principles of democracy, individual liberty and the rule of law. They seek to promote stability and well-being in the North Atlantic area. They are resolved to unite their efforts for collective defence and for the preservation of peace and security. They therefore agree to this North Atlantic Treaty:

The preamble to the NATO Treaty quoted above, refers to “collective defence” in that the parties are: “resolved to unite their efforts for collective defence and for the preservation of peace and security”. Furthermore, most importantly by Articles 3 and 5 of the NATO Treaty, it is set out that:
“In order more effectively to achieve the objectives of this Treaty, the Parties, separately and jointly, by means of continuous and effective self-help and mutual aid, will maintain and develop their individual and collective capacity to resist armed attack.”

“The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area”.

Thus, by Article 1 of its Treaty, NATO members also agree to settle disputes by peaceful means and to refrain from using the threat or use of force in international relations, that is, not acting in any manner inconsistent with the purposes of the UN Charter; however, what is made explicit, in its framing document from Articles 3 and 5, is that NATO was deliberately created in means by which it could act immediately in undertaking collective defensive measures, without pre-authorisation by the Security Council. Although by Article 5 of the NATO Treaty, in mirroring Article 51 of the UN Charter, any such armed attack made against a state and measures taken in response to it, must be immediately reported to the Security Council, and shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

Moreover, the concept of an “armed attack” is further defined by Article 6 of the NATO Treaty. Thus it includes on armed attack on the territory of any of the Parties in Europe or North America, and the forces, vessels, or aircraft of any of the Parties. The precision of language in the Treaty is highly important, as it has been suggested that there is a significant and deliberate difference between what is to be regarded as an “armed attack” made against a State, and the corresponding “force” which with it may legitimately respond. Given that there is the general prohibition on the use of force set out in Article 2(4) of the UN Charter, it is logical that the force with which NATO expresses it may respond to an armed attack, is a wider concept than that of the armed attack it may initially suffer.

In this regard, the practice of States in resorting to the use of force more generally, as a legitimate measure of self-defence, may vary widely and includes less aggressive, or non-
conventional means, such as the US’ naval quarantine on Cuba during the missile crises, and today could well amount to measures being taken to ensure access to resources such as oil in another State, or in cyberspace, so as to ensure information security can be maintained.

By Article 9 of the NATO Treaty, the members established a Council, for the implementation of the Treaty and in particular, to recommend measures to realise the objectives as set out by Articles 3 and 5. This Council and the type and extent of legal personality that NATO is established with generally by virtue of the Washington Treaty is also worthy of examination. NATO members undertake a wide range of types and various military activities, from over-watch operations, to rapid response attacks in hostile territory. NATO's military operations are directed by the Chairman of the NATO Military Committee, and split into two Strategic Commands, commanded by a senior US officer and a senior French officer, and they are assisted by staff drawn from across NATO.

The Allied Command Operation is responsible for the strategic, operational and tactical management of combat and combat support forces of the NATO members, and the Allied Command Transformation organization is responsible for the induction of the new member states’ forces into NATO, and NATO forces’ research and training capability. Thus, by its very nature, American and European forces from NATO are tasked to work and fight alongside each other, and do so under the direction of a single military command structure, yet when they are deployed in combat, with the political direction from various national governments.

Furthermore, by Article 12 of the NATO Treaty, after ten years of the Treaty being in force, or anytime thereafter, the members are to:

“...consult together for the purpose of reviewing the Treaty, having regard for the factors then affecting peace and security in the North Atlantic area, including the development of universal as well as regional arrangements under the Charter of the United Nations for the maintenance of international peace and security”.

Under Article 54 of the UN Charter, Regional Arrangements or Agencies are obliged to keep the Security Council informed at all times of activities undertaken, or in contemplation of the

maintenance of international peace and security. The purpose of Article 54 is said to be to ensure that military operations and the use of force is effectively controlled by the Security Council, although in practice compliance with Article 54 is not good\textsuperscript{193}. NATO and the UN have permanent High Ambassadors to each other and perhaps do already, or could quite easily, meet the reporting requirement of Article 54 of the UN Charter. Nevertheless, the 1999 New Strategic Concept further dissociated NATO from a Chapter VIII organisation, as its mandate was enlarged to operate out of area. Article 12 of the NATO Treaty clearly envisions that NATO will be adopted formally to become a Regional Organisation under Chapter VIII of the Charter.

The explanation as to why NATO is then not a Regional Organisation, is perhaps best explained by the fact that it has suited it not to be, principally because this means it is not reporting to the UN, in accordance with Article 54 and the possible close scrutiny this would bring in terms of its actions under International humanitarian law and the use of force generally.

In conclusion, the international legal framework that applies to NATO is embodied in the UN Charter, set out in the exemptions to the prohibition on the use of force, in collective security self-defence, and collective self-defence. The NATO Treaty envisions that it will be used to provide for the collective self-defence of its members and it is likely that Article 5 was originally drafted in order to add legitimacy to the military intervention and contribution in combat support one nation would give to another, if attacked. Furthermore, the international community, through diplomatic means at the UN Security Council, may call upon NATO to undertake peace support, or enforcement missions, or full-scale military operations, when it determines the conditions have been met in an attack, or imminent attack upon a State, or to act, when a humanitarian situation is sufficiently serious and so merits intervention\textsuperscript{194}.

The UN is prone to delegate operational command of a military operation to a lead State, and it makes logical sense that it also does so to NATO through its North Atlantic Council. Since the onset of the so-called war against terrorism, the range of military operations in which NATO may be employed has increased, is still increasing, and there has been an advancement of the argument that States have the right to use pre-emptive force. This


\textsuperscript{194}Tsagourias has assessed the extent to which the principles of consent, neutrality or impartiality and the use of force in self-defence in international peacekeeping law have constitutional status within the UN framework, and thus continue to apply even when the peacekeeping context changes radically. He considers whether the nature of contemporary peacekeeping operations has placed these principles under pressure, requiring them to be re-evaluated: Tsagourias, N “Consent, neutrality/impartiality and the use of force in peacekeeping: their constitutional dimension” J.C. & S.L. 2006, 11(3), 465-482.
contention runs contrary to the UN collective security system, and as NATO is currently being criticised for acts that have questionable legality, in particular its drone attacks against suspected insurgents in Pakistani sovereign territory, and airstrikes where targets have been misidentified. There is an apparent danger that NATO will become increasingly involved in operations that are preventative in nature, and completely outside the scope of the International legal framework. This brings us to consider whether there is any potential basis upon which NATO can be held liable in International law.

VI. NATO – POTENTIAL LIABILITY?

NATO has made clear that it will continue to be deployed in Afghanistan in its current fighting role until the end of 2014, and thereafter will remain concerned with providing a support role of advising, training and assisting the Afghan security forces. The task of combating the ensuing insurgency in Afghanistan was indeed a major theme of the Chicago summit of 2012 and Wales Summit of 2014; whether Afghanistan will ever again become a safe haven for terrorists that threaten her, the region, and the world is likely to be very much up to how successfully the newly invigorated national Afghan forces can fight. Nevertheless, NATO’s use of force in Afghanistan will have far reaching consequences. There are now a line of authorities from national courts and the European Court of Human Rights that touch upon International responsibility and accountability for wrongful actions, as well as useful cases from the International Court of Justice, the Dutch Supreme Court, the UK’s House of Lords and Supreme Court.

195 Lubell, N & Derejko “A global battlefield? Drones and the geographical scope of armed conflict” J.I.C.J. 2013, 11(1), 65-88: assesses the legal implications of how drone strikes directed at terrorist targets have been conducted outside of the recognised battlefields of Afghanistan and into remote regions of Pakistan, Yemen and Somalia where active hostilities are not taking place. Considers whether violence between a state and non-state actors crossing into the territories of more than one state can be deemed a “non-international armed conflict” (NIAC) under international humanitarian law and the geographical scope of international humanitarian law in respect of a non-international armed conflict.


Furthermore, in December 2011, the United Nations General Assembly adopted the International Law Commission’s articles on the responsibility of international organizations, bringing to conclusion not only nearly ten years of reflection by the Commission, governments and organizations on this specific topic, but also decades of study of the wider subject of international responsibility, which had initially focused on State responsibility.

Thus the understanding of International responsibility, in the context of peace operations, refers to the legal consequences arising from wrongful acts or omissions committed during such operations. International responsibility is part of the broader and emerging concept of accountability for wrongful acts and is relevant to NATO led missions. When NATO’s task became opposing the Taliban insurgency and targeting the militants among the general population, a difficult problem emerged as many Afghan civilians, even children, carry weapons, and could intermittently become hostile combatants by firing at NATO soldiers, making themselves legitimate targets in return, and then go back to a former status by laying down their arms, so as to beguile any would-be opponent. This meant that one of the problems in the NATO led mission in Afghanistan has been the fluidity of the Rules of Engagement (ROE) and lawful targeting of enemy combatants under the principles of International humanitarian law (IHL).

There is a pertinent problem illustrated in the ambiguities that remain in the definition of who may be considered to be directly participating in hostilities (DPH) between NATO States. Whilst the UK government has promoted a definition which is broadly akin to that codified in IHL by the International Committee of the Red Cross (ICRC) the US has a much narrower definition of who is a civilian, by conversely asking the question in opposite terms, that is, -who is not a civilian- and therefore open to attack. In this manner, the US has boasted of a lower civilian casualty rate, even though the definition of who is a civilian is not always a question that can be absolutely clear, and particularly in regard to the issue of whether they

200 When Lord Hylton asked Her Majesty’s Government what criteria they use to distinguish civilians from insurgents in Afghanistan when assessing deaths and injuries caused by United Kingdom forces; and whether the same criteria apply to casualties caused by drone aircraft. In a written answer, the Parliamentary Under-Secretary of State, Ministry of Defence (Lord Astor of Hever) relied:

“The Ministry of Defence does not, as a matter of course, monitor overall insurgent or civilian casualty figures. However, in all circumstances where a possible civilian casualty is reported, UK forces will investigate the circumstances. The presumption of that investigation will be that any casualty is a civilian unless it can be established that the individual was directly involved in immediate attempts or plans to threaten the lives of International Security Assistance Force personnel”;
http://www.publications.parliament.uk/pa/ltd201213/ldhansrd/text/121113w0001.htm#12111397000380

201 “Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities” Article 51(3) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating
pose an “imminent threat”\textsuperscript{202}. Understandably, forging a common consensus among NATO States would be extremely difficult, even with such aids as the Additional Protocol to the Geneva Convention.

Besides this, another significant arm in the combat operations in the war against terrorism is the use of drones, or UAVs (Unmanned Aerial Vehicles). Primarily, conducted by the United States is the use of drone attacks, and whereas President Obama has been keen to authorise their further use and development\textsuperscript{203} stressing such killings are “legal” and “just”\textsuperscript{204} severe criticism has been made of the manner in which their operation makes killing effortless and arguably outside the realm of traditional IHL\textsuperscript{205}. The US believes it has been able to decimate the senior leadership of Al-Qaeda by operating such attacks, which are controversially, often conducted by the Central Intelligence Agency (CIA), on US territory, rather than by the US military, and therefore, arguably, outside the scope of the US military’s domestic law of armed conflict\textsuperscript{206}. Moreover, NATO openly approves of the use of drones in operations, to the extent that the NATO Secretary General has recently gone on record to express views that are very explicit in supporting the use of drones, saying that European countries should:

\begin{quote}
“play their part in acquiring more drones” because “believe that European nations can, and should, do more, to match America’s commitment … [and] help to rebalance NATO”\textsuperscript{207}.
\end{quote}

Moreover,

\begin{quote}
“On the use of drones, if I understand you correctly, my answer to that is quite short because from a legal point of view I don’t see any difference between using an
\end{quote}

to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977:
http://www.icrc.org/ihl.nsf/7c4d08d9b287a421412567390003e636b/f6c8b9f2ee14a77fde125641e0052b079
\textsuperscript{202} See: Akande, D “Clearing the fog of war? The ICRC’s interpretive guidance on direct participation in hostilities” I.C.L.Q. 2010, 59(1), 180-192 where he analyses of the International Committee of the Red Cross publication of 2009 entitled ”Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law” (which seeks to clarify the principle that civilians are immune from direct attacks by parties engaged in armed conflict unless they are direct participants in the hostilities) and comments on the guideline that the use of force in response to a direct attack should not exceed what is necessary to achieve a legitimate military purpose.
\textsuperscript{203} http://www.nytimes.com/2009/03/18/world/asia/18terror.html
\textsuperscript{204} In his national security speech in Washington DC, Mr Obama said that an American overseas who was “actively plotting to kill US citizens”, as well as anyone else who posed a threat to US citizens, could be eliminated with a drone: http://www.bbc.co.uk/news/world-us-canada-22646446
\textsuperscript{205} Medea, B “Drone Warfare: Killing by Remote Control ” Verso books (2013);
\textsuperscript{206} See footnote 86
\textsuperscript{207} NATO wants EU countries to buy more drones: http://euobserver.com/defence/121506
unmanned aircraft and a manned aircraft. It is actually from a legal point of view exactly the same thing. So... the fact that a number of Allies use unmanned aircraft does not constitute a problem for NATO. Let me add to that that actually we try to promote the use of drones to improve gathering of information and intelligence, surveillance, reconnaissance; and the use of drones actually helped us to conduct what I would call a precision campaign in Libya with the aim to minimize the number of civilian casualties and minimize collateral damage. And I do believe that it is widely recognized that we succeeded in that respect”.

Nevertheless, targeted killings done in counterinsurgency operations by drone attacks, have also caused controversy and in particular because it is alleged that the US has failed to keep track of the true record of civilian casualties, causing deep disruption in Pakistani sovereign territory. Pakistani officials were said to be outraged, when a NATO drone attack killed 24 of its soldiers manning a checkpoint and described the event as “unacceptable aggression”. The UN Human Rights council has also become involved by appointing eminent Barrister Ben Emmerson QC as a Special Rapporteur on Counter Terrorism and Human Rights; launching an inquiry into the civilian impact, and human rights implications of the use drones and other forms of targeted killing for the purpose of counter-terrorism and counter-insurgency.

Aside from the current conflict in Afghanistan, the use of drones in modern warfare signals a significant shift in the greater use of technology, specifically artificial intelligence, and Singer predicts a dawn of robotic warfare, changing not just how wars are fought, but also the politics, economics, laws, and the ethics that surround war itself. NATO will undoubtedly be caught up in the emerging and difficult questions of whether rules of engagement for unmanned autonomous machines can be created and enforced, if artificial intelligence can commit war crimes, and the prospect that war itself will be redefined as technology creates increasing physical and emotional distance from combat.

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So what happens when a Major from the British Army, with authority over Italian and Australian troops, purposefully orders them to shoot at non-legitimate civilian targets, under a command structure which is tacitly approved of by an American General, who is ultimately responsible to a decision-maker from NATO? What difference does the fact make that NATO leads the ISAF mission, which was mandated\(^{213}\) by successive Security Council Resolutions? Or, what if civilians (providing logistical support to an enemy, but not taking up arms) are purposely killed by a NATO drone? The problem is not at all limited to the conflict in Afghanistan and further complicated by drones; which are now continually involved in highly sophisticated surveillance operations, as well as far-reaching air strikes, taking place all around the world, and by remote control.

NATO’s business is the use of force, and it is no secret that it has decades of building up its capabilities to apply the most effective airstrikes, teams of special forces, and the like. Military forces are highly trained and specialised in what they do, steeped in discipline and have a high respect for their superiors and given hierarchy. However, even but a small margin of error can result in grave mistakes and the loss of life through “collateral damage”. What’s more is that human rights violations, and in particular the rights to life and liberty can occur when things go wrong. The issue of who is liable for internationally wrongful acts is addressed in the developing doctrines of International responsibility and accountability among States and International organisations.

### A. International Responsibility and accountability for wrongful actions

The UN and particularly by the responsibility that rests with the Security Council, is continually criticised when it fails to act in humanitarian situations. Stark examples are Srebrenica, Rwanda, Darfur, the Congo and now Syria. But at the same time, since the 1990’s, sad tales have emerged of peacekeepers themselves being involved in violations of International humanitarian law, when they are deployed. In recent times, the NATO led International peacekeeping force in Kosovo that is KFOR has been accused of wrongful acts committed on behalf of its peacekeepers. In principle, International organisations, such as NATO bear responsibility for internationally wrongful acts imputable to them. The attribution of international responsibility is capable of being imposed upon an International organisation in the same manner as it would be upon a State, and there must be an identifiable breach of an obligation, or comparable omission, in order to make this so. A spate of recent decisions from various courts has illustrated the difficulty of grappling with and applying the issues at stake.

\(^{213}\) 1386, 1413, 1444, 1510, 1563, 1623, 1659, 1707, and 1776
In 2007, the European Court of Human Rights (ECtHR) was called upon to determine whether the member states within KFOR could be held legally responsible for human rights violations under the European Convention on Human Rights (ECHR). In the *Behrami and Saramati*\(^{214}\) cases, the ECtHR dealt with issues of International responsibility arising from the administration of Kosovo by the International force which operated under the auspices of NATO. The claimants were Albanian nationals from Kosovo, and complained under Articles 2 & 5 of the ECHR respectively (the rights to life and liberty), after a son was killed by an undetonated bomb and, in an unconnected incident, another was detained in custody.

This related to the 1999 Security Council Resolution 1244 which had placed Kosovo under a transitional UN civil administration and had authorised a NATO-led peacekeeping force. The complaints were dismissed and the crux was not whether the claimants fell within the national State’s jurisdiction: it was that the ECtHR was not competent to examine the matter. Both the failure to deal with the unexploded bombs and the detention were attributable to the UN, but the UN had a legal personality separate from that of its member states, and was not a contracting party to the ECHR. Accordingly, the court was not competent to review the acts of the respondent State carried out on behalf of the UN.

The ECtHR has also considered the UK House of Lords’ decision on the similar question which was posed by the appeal of the *Al Jedda v United Kingdom*\(^{215}\). The *Al Jedda* case concerned the three-year internment in Iraq of a dual British and Iraqi citizen, who was suspected of terrorist activity, but who had never been charged with any offence, the House of Lords decided that it constituted an unlawful deprivation of his liberty and security, by British forces in Iraq, but the British Army could, where it was necessary for imperative reasons of security, lawfully exercise the power to detain authorised by the relevant United Nations Security Council Resolutions. Moreover, the British Army had to ensure that the detainee’s rights under Article 5 of the ECHR were not infringed to any greater extent than was inherent in such detention.

In *Al Jedda*\(^{216}\), the ECtHR reached the conclusion that the United Nations Security Council Resolution 1546 authorised the UK to take measures to maintain security and stability in Iraq, but its authority fell short of allowing indefinite detention without charge. Where possible, Security Council resolutions had to be interpreted in harmony with the ECHR. The exercise

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\(^{214}\) 22 B.H.R.C. 477


\(^{216}\) (2011) 53 E.H.R.R. 23
of jurisdiction was a necessary condition for a contracting state to be held responsible for acts or omissions imputable to it which gave rise to an allegation of the infringement of rights and freedoms set forth in the Convention. The conduct of an organ of a State placed at the disposal of an international organisation should be attributable under International law to that organisation, if the organisation exercised effective control over that conduct.

The result achieved in this case (the finding of a State’s obligations under the ECHR because of extra-territorial jurisdiction) was buttressed by the judgment handed down in another case, that of *Al Skeini v United Kingdom*[^217] which also held that a State's jurisdictional competence was primarily territorial; acts performed, or producing effects, outside their territories could constitute an exercise of jurisdiction only in exceptional cases. One such case was when, as a consequence of military action, a contracting state exercised effective control of an area outside its national territory, as this came within the meaning of jurisdiction, according to Article 1 of the ECHR.

Hence, whether a State had done so was a question of fact and was met by the UK’s involvement in Iraq, because, a jurisdictional link existed between the UK and Iraqi civilians killed by British soldiers during security operations in Iraq[^218]. In breach of Article 2 of the ECHR, the UK had failed to conduct an independent and effective investigation into the deaths of relatives of five of the six applicants. Furthermore, as a matter of completeness, in the case of *Smith v Ministry of Defence*[^219] the UK’s Supreme Court has ironed out any plausible anomaly by extending the UK’s obligations under the ECHR, by securing the protection of the ECHR to members of the Armed Forces when they were serving outside of UK territory. In those proceedings, the court held that the right to life, as guaranteed by Article 2 of the ECHR, had been violated by the failing to take reasonable steps to protect the soldiers’ lives from foreseeable risks, in relation to the procurement and deployment of appropriately armoured vehicles.

Thus, both courts (the European Court and both versions of the UK’s highest court – the House of Lords and Supreme Court) have had to focus on the question of the circumstances in which it will be appropriate to attribute liability for breaches of the ECHR to an International organisation (KFOR), or the TCN (troop contributing nation) of a multi-national force. While commentators have trumpeted the application of the extra-territoriality of the ECHR’s jurisdiction, and resulting visible display of an increased obligations upon States to take account of civilian and soldiers’ lives[^220], the different results between *Behrami* and *Al Jedda* has also caused consternation, and particularly because of the manner in which the

[^217]: (2011) 53 E.H.R.R. 18

[^218]: Paragraphs 138-139 of *Al Skeini*


ECtHR reasoned with International law principles. Behrami has been used as a precedent to dismiss several claims brought against European States for purported human rights violations\(^{221}\) and potentially leaves Kosovo as the only part of Europe where there is no independent and meaningful human rights supervision by the European convention\(^{222}\).

Another notable raft of litigation relating to the concept of accountability in International law relates to the “Mothers of Srebrenica” cases, stemming from the failure of the 150 troops of the Dutch contingent of the UN Protection Force in Bosnia, being responsible to protect the safe haven of the Bosnian town of Srebrenica in 1995. When the Dutch forces stood by, the massacre of approximately 8,000 Muslims men and boys took place, after Bosnian-Serb forces overran the town, under the command of General Ratko Mladic and the former leader Radovan Karadžić.

The Dutch cabinet resigned in 2002 after a report blamed politicians for sending the Dutch UN troops on an impossible mission, and several years later in 2007, solicitors representing 10 women from Bosnia and Herzegovina issued a writ of summons at the District Court of The Hague, commencing a civil procedure against the United Nations and the Government of the Netherlands. The Mothers of Srebrenica represent 6,000 women who lost family members during the Srebrenica genocide in 1995. They filed this civil suit to receive compensation and an acknowledgement from the Government of the Netherlands and the United Nations.

On 10th July 2008, the District Court of The Hague ruled that it had no jurisdiction to hear the case brought against the United Nations by the Mothers of Srebrenica, citing the immunity of the UN enshrined in Article 105 of the UN Charter and 30th March 2010, the Court of Appeal in The Hague (in Gerechtshof’s -Gravenhage) upheld the decision. The Mothers of Srebrenica subsequently went to the Supreme Court of the Netherlands. The Dutch Supreme Court rejected the appeal and decided that the UN’s immunity is absolute, but the story did not end there (and quite a different result was achieved in the Nuhanović judgment of the Dutch Supreme court –discussed below). When the Mothers then took the case to the ECtHR, the proceedings became styled as the Stichting Mothers of Srebrenica and Others v The Netherlands\(^{223}\) and the complainants continued their fight, not to seek to hold the UN responsible for the commission of genocide, but rather for the failure, of the UN’s duty to prevent genocide. The ECtHR agreed with the Dutch rulings on the immunity of the UN from domestic suits, even in the face of violations of jus cogens norms.

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\(^{221}\) See Gajic v Germany, App No 31446/02, Decision, 28 August 2007; Kasumaj v Greece, App No 6974/05, Decision, 5 July 2007. See also Beric v Bosnia and Herzegovina, App Nos 36357/04 (etc), Decision, 16 October 2007

\(^{222}\) According to Milanovic, M & Tatjana, P “As bad as it gets: the European Court of Human Rights's Behrami and Saramati decision and general international law” I.C.L.Q. 2009, 58(2), 267-296

\(^{223}\) (2013) 57 E.H.R.R. SE10
This result is concerning because, while the prohibition on the commission of genocide as a *jus cogens* norm goes without saying, it still remains unclear exactly what the obligation to prevent genocide actually requires and permits of the UN and of NATO, if anything at all. It is trite that a *jus cogens* (or peremptory norm) of International law, trumps other substantive norms of International law, and that one norm of *jus cogens* can only be modified by another norm of *jus cogens*, according to the Vienna Convention on the Law of Treaties. Moreover, that customary International law is developed by the practices of States and can be implied by conduct.

Despite NATO’s prominence and influence as an International Organisation, being very much involved in peacekeeping missions, and itself has the ability to shape and develop International law by customary practice, there is yet to be any formulation of an obligation under International law that provides it has a specific duty to prevent crimes against humanity, or any breaches of International law generally.

In this context, the International Court of Justice (ICJ) had not proved to be a source of momentum for the advancement of the application of International obligations. During the *Mothers of Srebrenica* litigation, the applicants relied upon Article I of the Genocide Convention as the basis for the obligation of the UN (and The Netherlands) to prevent the events in Srebrenica. As a State party to the Genocide Convention, it sounds perfectly reasonable with respect to The Netherlands and indeed, the ICJ recognised this treaty obligation in the *Genocide Convention Case*\(^{224}\). However in doing so, the ICJ was very careful in limiting its holding to the confines of the Genocide Convention only, explicitly refusing to step outside its boundaries\(^{225}\) and because the UN is not a party to the Genocide Convention (and indeed cannot be as it is only open to States, as per Article XI), it therefore cannot be bound to the duty to prevent genocide as per Article I of treaty law.

Thus, drawing upon this precept, and bolstered by Article 105 of the UN Charter, which is the UN’s provision for absolute immunity from suits in civil courts, the ECtHR’s judgment on the *Mothers of Srebrenica* case has left the strong impression that the UN will be able to effectively flout responsibility under International law, for even the gravest of derelictions of duty in humanitarian situations.

In a like manner, NATO not a party to any International conventions, or human rights treaties, and cannot be, because it is not a State. While it is an International Organisation

\(^{224}\) I.C.J. Reports 1996, p. 595

\(^{225}\) Paragraph 429
being subject to International law\textsuperscript{226}, and does arguably have some form of a legal personality (as discussed below) it is unlikely that this has developed to the extent that it could be sued in a national court. The NATO Treaty is somewhat lesser in its volume than the UN Charter, and it does not contain a provision equivalent to Article 105 of the UN Charter, expressly giving it immunity from suit in civil courts.

Although, since at least the case of Bankovic v Belgium\textsuperscript{227} complainants before the ECtHR have had immense difficulty in getting past even the admissibility stage of the proceedings, as there has been held to be no jurisdictional link between a person affected by military action and the NATO States. Whereas the harsher interpretation of Article 1 of the ECHR may now be mitigated by the Al-Jedda and Al-Sheini judgments, (in that the condition of the State exercising extra-territorial jurisdiction may be found to exist when it has sufficient control - either over a person or property), this was in the context of a full-scale military occupation (the 2003 invasion of Iraq) and not the likely nature and type of a NATO operation.

Furthermore, the issue of a partial transfer of authority from a UN mandate to regional organisation, overseeing peace operations, or enforcement, under a given mandate, can bring about a complex multilayered command structure, which in turn results in complicated legal and practical questions relating to the attribution of conduct. Most States and International Organisations have developed sophisticated and intricate command structures and control structures for the purpose of achieving specific objectives and ensuring that forces operate within designated legal and policy guidelines. Gill has helpfully set out the implications of full command, Operational Command and Control (OPCOM), and Tactical Command and Control (TACOM) structures and how these relate to the attribution of conduct\textsuperscript{228}. Whilst the usual practice in UN peace operations has been to specify the functional immunity of armed forces through Status-Of-Forces Agreements (SOFA), the provisions of a SOFA largely derive from established customary law in order to facilitate relations and improve cooperation with the host nation within which a force operates.

NATO has been instrumental in the International efforts to implement and further develop military partnership programs, which have stressed the need to elaborate clear status provisions for military and civilian personnel of foreign armed forces in a receiving State. In

\textsuperscript{226} To prove this, White quotes the International Court of Justice: “International Organisations are subjects of International law and, as such, are bound by obligations incumbent upon them under general rules of International law, under their constitutions or under International agreements to which they are parties” – Interpretation of the Agreement of 25\textsuperscript{th} March 1951 between the WHO and Egypt, ICJ Rep. 1980, 73 at 89-90. See: White, N “Collective Security Law” Ashgate (2003)

\textsuperscript{227} (2007) 44 E.H.R.R. SE5

\textsuperscript{228} In Dekker, I. F and Hey, E. (eds.) Netherlands Yearbook of International Law 2011, Chapter 2 Legal Aspects of the Transfer of Authority in UN Peace Operations
fact, the NATO Status of Forces Agreement of 1951 (NATO SOFA), was adapted more recently to regulate the status of the forces of States participating in the so-called Partnership for Peace, by the Status of Forces Agreement of 1995 (PfP SOFA), and the Paris Protocol of 1952 on NATO Military Headquarters. The immunity of foreign armed forces based is historic and has a long basis in customary International law.

However, Fleck\(^{229}\) has questioned whether the current rules of customary law are evolving in this respect and offers analysis in the legal situation of visiting forces in an operational environment. Whilst Fleck’s work evaluates existing experience in State practice and describes options for further legal development, Sari\(^{230}\) has paid attention to the conduct of EU military and civilian crisis management operations and suggests that the status agreements that have been negotiated directly by the EU confer more extensive privileges and immunities on EU operations and their personnel than current international practice in this area would warrant.

The only two NATO SOFAs are important documents because they form the basis of how NATO approaches liability. Covering all the NATO States, in principle there is an invariable status of all NATO personal throughout its operations, and moreover, the NATO SOFA is significance because it provides the only remedy for its potentially wrongful actions through the NATO claims policy. The NATO claims policy is effectively a compensation scheme which it has operated in order to provide some recourse for damages that are caused as an integral part of its activities and there has been a growing practice of NATO making such payments in order to maintain local support.

However, the policy admittedly has no legal force\(^{231}\) and is no more than a general policy, meaning that payments given for the wrongful conduct, or the disproportionate use of force, are made on an ex gratia basis, and are not legally binding commitments\(^{232}\). This practice cannot be desirable as a permanent feature of NATO operations. Judicial supervision brings legitimacy and whilst the academic writers have done much to map out the legal nature of such multinational forces, and relevant rules and principles of International law governing the attribution of the conduct of peace support operations, it is rather unfortunate that the possible establishment of a permanent juridical tribunal, in order to determine claims against NATO for potentially wrongful actions and breaches of IHL, has been little spoken of.

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232 It has been mooted that the practice may eventually give rise to a legitimate expectation: SHARES Expert Seminar Report “Responsibility in Multinational Military Operations: a Review of Recent Practice” (16 December 2010, Amsterdam), published in December 2011, available at www.sharesproject.nl
1. Finding the appropriate test

Much has already been written on the legal test that was applied by the ECtHR in Behrami and Saramati cases, the “ultimate control and authority test”, which can be distinguished from the “effective control test”, being later applied in the Al Jedda case. The result of the Behrami and Saramati cases was that the alleged breaches of human rights by KFOR were attributable to the UN itself and not the members States that had contributed the forces, who therefore could not be held liable accordingly. In turn, because the UN was not a party to the ECHR, it could not be held liable and the claims were dismissed at the admissibility stage of the proceedings.

There seems to be deep regret among scholars that in its Behrami judgment, the ECtHR did not give a fuller explanation as to why it had imposed an ultimate control test and departed from imposing an effective control test, which produced a result that is inconsistent with the ILC’s (International Law Commission’s) work on the responsibility of International Organisations. It can be postulated that the court had in mind that an International Organisation ought to have a very high degree of command over forces, before it would be appropriate to impose liability; and by this reasoning, in assessing the potential liability of peacekeeping missions, close attention must be paid to the particular command structure of a force such as KFOR, or ISAF, in different given situations and the chain of command under which they respectively operate.

The Behrami judgment was disconcerting because it does not envision a situation where NATO itself can be brought before the ECtHR, because NATO is not a member of the UN, or signatory to the ECHR, and the ECtHR seems to have taken an approach that does not promote the observance of human rights by peacekeeping forces. Whether this result was achieved by fault or by design is uncertain, however, the implication is that there is no effective, legally binding obligation upon NATO to protect human rights among those civilians that it seeks to protect, and the soldiers that serve under it. While this may not be true for the States that have contributed to a NATO force, it is generally accepted that responsibility may be attributed to the UN when peacekeeping forces are under the UN’s military command and effective control, and it is not thought that sending States by and large retain liability for wrongful actions, unless they promulgate contradictory orders.

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This is because the existence of the UN’s own legal personality is undisputable, which is separate from its member States, and a peacekeeping force is considered to be a subsidiary organ of the UN which sends it out. However, a causal link, such as a direct order, would be sufficient to establish the liability of sending State, and this may be so where operations are conducted under the scope of a command and control structure outside of the UN’s the chain of command. Whilst terms as “military command”, “effective control” and the liability of peacekeepers have been much discussed among academics and following the Srebrenica massacre, have been of particular interest to the Dutch, the problem of applying an effective control test in practice is a profound problem. This is primarily because States can exercise influence over the acts of their military forces in many various ways and the imposition of a UN command structure remains a novel invention in terms of military history.

Nevertheless, relatively little is known on whether there could ever be dual attribution for a particular act of wrongdoing by a peace-keeping force and even the DARIO come short by not addressing this issue. NATO can be engaged in peacekeeping, as well as all out combat operations; its strength lies in the degree of cooperation that it can muster from among its members, and it is trite that the success of any putative military operation depends much upon the scale of planning that can be done in advance of an attack; however, it is often bemoaned that any plan barely survives first contact with the enemy. In this regard, a situation may well arise where it cannot be clearly established which particular sending State (to a NATO force) was responsible for a wrongful act and the imposition of dual attribution would be significant in establishing a coherent basis of NATO liability.

Long before the Behrami judgment, Zwanenburg had bemoaned the lack of clarity concerning accountability of peace support operations and mapped out the essential problem—whether they can be considered an organ of the UN itself, or the States that send them. The practice of authorisation of force takes place through an operation of delegation and whilst Zwanenburg recognises that International Organisations are responsible for internationally wrongful acts imputable to them, yet the norms governing their responsibility are not clearly defined. This is because whilst the rules regarding the attribution of conduct to States can be applied to International Organisations by analogy and thus, International Organisations are responsible for the acts of their organs much in the same way as States are, the analogy leaves a number of questions unanswered, in particular, whether the responsibility of an International Organisation excludes the responsibility of its member States for the same conduct.


On the other hand, the position taken by d’Aspremont is that, inherent in the application of International responsibility mechanisms to situations of authorised regional uses of force, can be characterised as a “double institutional veil” that can frustrate the specific rules that were designed by the ILC to address these situations. These criticisms are relevant to NATO and were illustrated vividly in the Bankovic case. By analogy, the law of companies (also known as corporations in other jurisdictions) has developed the doctrine of “lifting the veil” and ascribing conduct to the controlling mind and will of another company, in order to mitigate the harsh consequences of deliberate wrong-doing.

There is as yet no equivalent of this doctrine in public International law, that would be used to attribute wrongful conduct to NATO (despite it being part of a UN mandated force) and how high the standard of wrongful conduct would have to be, in order to meet an appropriate threshold for liability – be it by negligent or deliberate failure and the extent of harm caused. However, collateral damage, incurring the loss of human life, is the all too frequent occurrence and often takes place as a result of imprecise airstrikes – a problem that NATO has already become known for. As NATO’s legal personality develops, and further litigation is brought, the prospect of courts having to develop a specific test towards NATO liability is highly likely.

The criticisms made by Zwanenburg still hold force and are perhaps illustrated by the memoirs of General Stanley McChrystal, the US Commander of forces in Afghanistan during the period of 2009-20, who recounted the difficulty of being given three different mission objectives from ISAF, NATO and the US. What’s more, is that the problem of secrecy, by the classification of documents, may also make it very difficult to actually know what orders were given by what commander, from what nation and when – the UN has a practice of only releasing classified documents after 20 years and there is no incentive for NATO to do otherwise.

A possible difficulty in proving which State is liable for which particular act in the fog of war is a formidable one, but Judge Simma has offered a plausible solution. In the Oil Platforms case, Judge Simma argued that the problems of attribution posed by the confusion as to which State had caused wrongdoing (in that case Iraq, or Iran) could be solved by the


238 McChrystal, S “My Share of the Task” Portfolio books (2013)

239 International Court of Justice, Judgment of 6 November 2003, “Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)”
imposition of *joint and several liability*, which is recognised by all major domestic legal systems. At paragraph 74 of his judgment, Simma opined that:

*On the basis of the (admittedly modest) study of comparative tort law thus provided, I venture to conclude that the principle of joint-and-several responsibility common to the jurisdictions that I have considered can properly be regarded as a "general principle of law" within the meaning of Article 38, paragraph 1 (e), of the Court's Statute. I submit that this principle should have been applied in our present case to the effect that, even though responsibility for the impediment caused to United States commerce with Iran cannot (and ought not, see infra) be apportioned between Iran and Iraq, Iran should nevertheless have been held in breach of its treaty obligations.*

The issue of joint and several liability is not yet established as a palpable concept in International law, yet seems highly relevant to the manner in which highly complex military operations can take place. As a matter of fact the question of joint and several liability has been raised in cases before national courts arising out of NATO’s bombing of FRY in 1999\(^{240}\). When the FRY brought cases against member States of NATO, for violations of the Genocide Convention and the right to life, it did so on the basis that the States were jointly and severally liable, and not against NATO as an International Organisation. The result was that the International Court of Justice decided that it did not have jurisdiction to decide the cases, primarily because FRY was not a party to the UN\(^{241}\), and therefore the merits of these cases have never actually been decided.

This is somewhat disappointing, since the legal criticism of NATO bombing of FRY was weighty\(^{242}\) and dismissal of the proceedings on purely jurisdictional matters has produced an unsettling judgment, to the extent that it has been suggested that it undermines the authority of the International Court of Justice itself\(^{243}\). Furthermore, the ICJ’s judgment is open to criticism because, in not having decided the merits of the case, we are nowhere nearer to knowing the true nature of a basis in which NATO could potentially be held liable for its wrongful actions.

\(^{240}\) *Legality of Use of Force (Yugoslavia v. United States of America/Spain) “* ICJ Rep. 1999


\(^{242}\) See Chinkin, C “The Legality of NATO’s Action in Yugoslavia” 49 ICLQ 910 (2000)

\(^{243}\) Grey, C “The Legality of the Use of Force” (2005) 54 ICLQ p794
The imposition of joint and several liability is apt to the manner and form in which NATO operates. This is because of NATO’s ability to field contingents of national forces, which may independently function, or integrate into each other, at various operational levels. NATO’s concept of collective security (in that an attack against one is considered an attack against all) could be interpreted to mean NATO members are prepared to share the derivative benefits from its organisation structure. Thus, in a like manner, NATO members ought to be prepared to share a proportionate degree of blame, if they are found to have participated in a conflict in which it is found that NATO had violated the Charter’s general prohibition on the use of force (*jus ad bellum*).

Importantly, there is a marked difference in attributing breaches of the Charter’s general prohibition, to that of attributing wrongful conduct for breaches of International humanitarian law (*jus in bello*). Whilst the former could be shared jointly and severally (equally) among NATO partners, it could not be prudent to deem one NATO member liable for the acts of another without more than acquiesce, because of the lack of control one State has over how another carries out a military operation, but the decision to initially participate is shared by all. Eventually, NATO itself could be vicariously liable for breaches of IHL, no matter by which State a violation is committed. This is exemplified in the 1999 conflict over FRY, when the later stages of NATO’s campaign saw the use of cluster bombs, strategic targeting of bridges and buildings, causing significant disruption and economic damage to concerned civilian Serb fatalities and widespread collateral damage to the city of Belgrade, which was a likely result of the action and known by NATO’s high command.

Notwithstanding this assertion, military conflict often confronts commanders with difficult tactical and operational decisions and it is in this context that difficult legal problems arise. It is understandable why the national, or indeed International Courts would be slow to want to interfere with situations that posed matters of professional judgment for military commanders on the ground. Indeed to open up the potential floodgates to claims for acts done, or not done, during the course of armed conflict would be a leap in the dark as there are many potential claimants who could assert that they have suffered adverse consequences from military blunders committed umpteen times throughout history244.

244 A case in point is the US decision not to invade Baghdad after the 1990-1991 Persian Gulf War resulted in Saddam Hussein being left in power, and to go on to commit genocide against thousands of Iraqi Kurds. Colonel Lawrence Montgomery Jr. has analysed the decision-making process used by President George H. W. Bush: available at: [http://www.dtic.mil/docs/citations/ADA493626](http://www.dtic.mil/docs/citations/ADA493626)
Moreover, as the different legal traditions of continental European countries, and the US, result in a myriad of differing applications of similar legal concepts\textsuperscript{245}, and there is as yet no definitive framework for NATO liability of its wrongful actions. There are no successful claims against NATO which have been brought before national or International Courts, and an appropriate test, or basis by which to impose liability, is yet to emerge. Whilst concepts of an ultimate control and authority test, dual responsibility, lifting the veil of Institutionalisation, joint and several liability, have been unsustainable as a system for imposing liability upon NATO, it is the effective control test that could be moulded to implement the most suitable model.

The concept of effective control was discussed as far back as the \textit{Nicaragua} case and it was there that the International Court of Justice thought that this entailed the formulation of strategy and tactics attributable to a State, which was nevertheless, a high threshold to have to prove. The ICJ’s \textit{Genocide} judgment is also worthy of note, because the ICJ discussed the question of whether the acts of genocide carried out at Srebrenica by Bosnian Serb armed forces ought to be attributed to the FRY, as claimed by Bosnia. It applied the ‘effective control’ test set out in \textit{Nicaragua}, reaching a negative conclusion.

The Court also held that the broader ‘overall control’ test enunciated by the International Criminal Court for the former Yugoslavia (ICTY) in \textit{Tadić}\textsuperscript{246} did not apply, on two grounds. First, the test had been suggested by the ICTY with respect to the question of determining whether an armed conflict was international and not with regard to the different issue of state responsibility; secondly, in any case the test would have overly broadened the scope of state responsibility. While Cassesse argues that the ICTY admittedly had to establish in \textit{Tadić} whether the armed conflict in Bosnia was internal or international, there were however, no rules of international humanitarian law of assistance for such determination. The Tribunal explicitly decided to rely upon international rules on State responsibility and thus advanced the ‘overall control’ test as a criterion, which is generally valid for imputation of conduct of organised armed groups to a particular state\textsuperscript{247}.

This suggests that the ICTY was being pragmatic in order to find the best model in which to impose liability against an individual. Dannenbaum has argued that while effective control is

\textsuperscript{245} For example, the terms attributability, accountability, and imputability are used interchangeably and may be problematic in exchanges during litigation

\textsuperscript{246} International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991(ICTY) Case No. IT-94-1-T: 7 May 1997


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the correct governing principle, in terms of the standard for attributing liability to the UN for the wrongful conduct of peacekeepers, an alternative formulation of the test is desirable, and ought to be “control most likely to be effective in preventing the wrong in question” 248.

Despite the fact that these authors have addressed the different models of liability, circumstances in which they may be used to attribute wrongdoing, and distinctions that ought to properly be drawn between the UN, States, International Organisations, companies and people, there are still inherent difficulties as seen from the cases as discussed above when addressing NATO. Indeed, as time marches forward, and there are continuing operations which can result in the needless loss of human life, there is merit in devising a more flexible and practical nature of the appropriate test to establish potential liability for wrongful conduct to NATO. In addition, while being wary of the limitations that such a doctrine could impose, it is important to attempt to understand the particular nature of NATO’s legal personality in order to do so.

2. NATO’s legal personality

Despite its growth, size, budget, power and continuing operations, it is generally thought that NATO does not possess its own separate legal personality, to the extent that it is the individual liability of NATO members that is relevant under the laws of *jus ad bellum*, *jus in bello*, and in human rights obligations. This argument finds a basis in the degree of autonomy and control that States continue to possess over their forces 249 and perhaps best illustrated by the system of national caveats that NATO members are able to place over their forces, restricting the availability of certain of their military assets. This is a controversial practice as caveats may severely limit the operational effectiveness of a contingent force, leading the US to urge all NATO countries to lift caveats in a time of an emergency. However the definition of an emergency is debatable.

Moreover, the fact that during the accidental bombing of the Chinese Embassy in Belgrade in 1999, there was an outright acceptance of responsibility by the US and payment made of compensation, is indicative of it being the US, rather than NATO who was the party at fault. This phenomenon was repeated by the acceptance of responsibility and subsequent reparation payments, made by Germany for the Kunduz airstrike in the Northern region of Afghanistan.


249 See: Larsen, K. J. “Attribution of conduct in peace operations: the “ultimate authority and control” test” (2008) EJIL 509
in September 2009, as its commanders had mistakenly called for air support, and caused the death of many civilians. Thus, while organisations possessing separate International legal personality may be held internationally responsible for their actions, Judge Higgins has found that an “International association lacking legal personality and possessing no volonte distincte (separate will) remains the creature of the members States, who are thus liable for its acts”.

Whilst NATO is an International Organisation, it is not a Regional Organisation, as is understood by Chapter VIII of the UN Charter. This is because it is not formally defined as one and does not report to the UN Security Council as such. However, upon examining the historical context, and in particular Article 12 of the NATO Treaty, it is unclear why NATO has not established itself to be a Regional Organisation. NATO was designed to protect Europe from Soviet aggression in Europe and for its first 50 years, it could have little interest in involving itself in the rest of the world’s conflicts, such as the Vietnam War. In practice, NATO has been a Regional Arrangement, an agreement providing military protection to European States by the US, although it has never conveniently defined its areas of operations, or confined itself to conducting its actions upon the continent of Europe.

There has never been any explicit finding to the contrary, that would mean NATO has developed distinct legal personality, and as an International Organisation is liable itself for breaches of International law, or has distinct obligations under International treaties, other than its own. However, it has been suggested by Gazzini that the fact that NATO does have treaty making powers, may stand as a reason to suggest that it has the characteristics of an institution to potentially be liable under International law. The question is of particular significance, as judicial redress has been sought as a remedy against States and the EU, for

250 Although the full NATO investigation of the matter remains incomplete: 
http://www.spiegel.de/international/world/0,1518,714532,00.html


252 Gazzini, T “NATO’s role in the collective security system” JCSL 2003 (231)

253 In 1997 at the Paris NATO summit, sides for both Russia and NATO signed a “Founding Act on Mutual Relations, Cooperation and Security” essentially, a road map for future cooperation. Both sides stated that they did not see each other as adversaries, and have political commitment to cooperate at creating "lasting and inclusive" peace in Euro-Atlantic area. The full text of the Act is available at: 
http://www.nato.int/cps/en/natolive/official_texts_25468.htm

254 See also Mullerson on political reasoning behind enlargement of alliance and International law implications of non-binding agreement: Mullerson, R "NATO enlargement and the NATO-Russian Founding Act: the interplay of law and politics” I.C.L.Q. 1998, 47(1), 192-204
the alleged misplaced use of force in a number of high-profile international cases. Moreover, there is the added difficulty that NATO is not a single International legal person, as its Supreme Headquarters Allied Powers Europe (SHAPE) enjoys and relies on its own International legal personality and could therefore seek to be immune from the acts directed from the Allied Commander Headquarters located in the US (Norfolk, Virginia) or any other part of the rest of the organisation in any event.

All the same, if NATO did have personality, the most recent judgment from the Dutch Supreme Court in the case of Nuhanovic v The Netherlands provides a basis to believe that NATO could be held liable in a State court for wrongful conduct, if properly attributable to it. On 10th September 2008, the District Court of The Hague denied the claim brought by a former UN interpreter and family of one of the victims against the State of the Netherlands. The case is somewhat different to the Mothers of Srebrenica litigation on the facts, but in the same context, as the claimants had sought to hold the Dutch State liable for its role in failing to prevent the massacre in and around Srebrenica in July 1995, in which up to 8,000 Bosnian Muslims were killed.

The Court held that the Dutch Government could not be held responsible because the peacekeepers were operating in Bosnia under a United Nations mandate. When the case was filed by Hasan Nuhanovic and the family of Rizo Mustafic (the parents and brother of those who were among them that had lost their lives in the Srebrenica massacre) the Court at first instance determined that ‘operational command and control’ over the Dutchbat troops had been transferred to the UN and that the claimants had not submitted anything pointing to restrictions on this transfer of command. The Court of Appeal quashed the judgment of the District Court, finding that the conduct was indeed attributable to the Netherlands and that it had acted wrongly.

This has now been upheld by the Dutch Supreme Court, in two almost identical decisions of 6th September 2013, which attributed the conduct of the Dutchbat troops to the State and explained that public International law does allow conduct to be attributed not only to the UN (in charge of the peace mission) but also to the State, because the latter had effective control over Dutchbat’s disputed conduct. However, upon close examination of the judgment, it bears similarities to that of Al-Skeini, in that the Dutch seem to have been relying on the


257 Relevant documents from all proceedings are available at: http://www.asser.nl/default.aspx?site_id=36&level1=15248&level2=&level3=&textid=39985

258 At paragraph 135: “when, through the consent, invitation or acquiescence of the Government of that territory, [the foreign state] exercises all or some of the public powers normally to be exercised by that Government”.

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same kind of extraterritorial jurisdiction of the application of European human rights, because of the extent of the control that was exercised by Dutchbat over a specific geographic location and in particular, the compound that was supposed to be guarded. At this time, it is likely that the result of this judgment will be to affect the customary law and understanding of norms in the context in which wrongful can be attributed to a State.

B. Draft Articles on International Responsibility

And so, whilst the concept of immunity and difficulties in establishing liability for Internationally wrongful actions, have been used to prevent International Organisations, such as NATO, from being subject to outside scrutiny, the era of human rights and the developments as described above, have led to an increased interest in the study of accountability and responsibility of International Organisations and States involved in peace enforcement and peace support operations, and foremost has been the work of the ILC (International Law Commission).

In 2001, the ILC adopted the Draft Articles on Responsibility of States for Internationally Wrongful Acts (DARS), now Articles on the Responsibility of States for International Wrongful Act (hereafter ASR) and ten years later in April 2011, the ILC began its second reading of the draft Articles on the Responsibility of International Organisations for Internationally Wrongful Acts (DARIO). Indeed, the Commission has now adopted, on second reading, a set of 67 draft articles together with commentaries thereto, on the responsibility of International Organisations. In accordance with article 23 of its Statute, the Commission recommended to the UN General Assembly to take note of the draft articles in a resolution and to annex them to the resolution, and to consider, at a later stage, the elaboration of a convention on the basis of the draft articles. Chapter I covers the basic principles of the draft articles and sets out:

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Article 3

Every internationally wrongful act of an international organization entails the international responsibility of that organization.

Article 4

There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:

(a) is attributable to that organization under international law; and

(b) constitutes a breach of an international obligation of that organization.

Article 5

The characterization of an act of an international organization as internationally wrongful is governed by international law.

However, the criticisms of the DARIO are already several and it is well-known that the ILC has been continuously confronted with a lack of clear practice by International Organisations since it began its study on the law of their responsibility. As a result thereof, the Special Rapporteur has often been accused of yielding to the temptation to proceed on the basis of analogies with the 2001 ASR and having to justify whether the entire project on International Organisations is actually necessary.

Moreover, it is apparent that the diversity of the International Organisations that are being catered for by DARIO, being entirely dissimilar in their size, membership, powers and functions, and various International Treaty obligations, as they are complicated, makes them indeed difficult to regulate. Furthermore, from the World Bank to the EU, to NATO, establishing a causal link from harm done through their actions, or in-action, can be so radically different from the activities that they engage in and whether specific rules can ever effectively cater for the abuses of peacekeepers, as well as the consequences of negligent lending, is yet to be known.
Nevertheless, according to the ASR, the State is responsible for internationally wrongful acts, when it can be proved it has breached an International obligation and the act is properly attributable to it. Liability can originate from all actions of a State’s officials and organs, even if the organ or official is formally independent, and even if the organ or official is acting *ultra vires*, hence most rules on State responsibility involve private acts, which already arise under primary rules. For example, environmental and human rights agreements, as well as International Convention concerning arms control and International Humanitarian law require States to prevent unlawful acts by private parties and human rights abuses.

Even so, the principles that govern when and how a State is held responsible for a breach of an International obligation are easily transportable to become applicable to NATO. This is because acts by persons, States or entities of NATO may equally be attributable to NATO, if they in fact acted under the direction or control of the NATO and thereby the question arises as to whether any defences may be available to NATO as a result of unlawful use of force.

Thus, if the general elements to establish State responsibility are established, the defences to be considered under the draft articles include *force majeure* (Article 23), distress (Article 24), state of necessity (Article 25) and counter measures (Articles 49-52), self-defence (article 21) and consent (article 20). The breach of an International obligation entails two types of legal consequences. Firstly, it creates new obligations for the breaching State, principally, duties of cessation and non-repetition (Article 30), and a duty to make full reparation (Article 31). Article 33(1) characterises these secondary obligations as being owed to other States or to the International community as a whole. The ASR acknowledge, albeit indirectly in a savings clause, that States may owe secondary obligations to non-State actors such as individuals, or International Organisations. Second, the articles create new rights for injured States, principally, the right to invoke responsibility (Articles 42 and 48) and a limited right to take countermeasures (Articles 49-53).

These rights, however, are heavily State-centred and do not deal with how State responsibility is to be implemented if the holder of the right is an individual or an International Organisation. The principal element of progressive development in this area is Article 48, which provides that certain violations of International obligations can affect the International community as a whole such that state responsibility can be invoked by States on behalf of the larger community. This provision picks up on the ICJ’s celebrated suggestion in *Barcelona Traction* that some obligations are owed *erga omnes*, toward the international community as a whole.

On the other hand, some scholars have already been quick to proclaim that the DARIO will be effective, and even applicable when following Colonel Gaddafi’s repression of the civilian population in Libya, in the context of the United Nations Security Council approval of the use
of “all necessary measures” to protect civilians and civilian populated areas in Resolution 1973, and because of the circumstances when NATO took over the implementation of the Security Council’s resolution under Operation Unified Protector. Since several reports have emerged indicating that pilots have mistakenly bombed civilian targets and caused extensive damage, Boon\textsuperscript{262} has argued that the law of responsibility would apply to any actions by NATO or its Member States, that violated the laws of war or that exceed the Security Council’s authorisation for the use of force in Resolution 1973.

If the application of DARIO on attribution would determine which entity is responsible for the internationally wrongful act: the United Nations, NATO, or the armed forces of the countries carrying out the air strikes, it could be because the United Nations is not in command and control, and responsibility would likely be attributed to NATO or to Member States. The DARIO anticipate that responsibility can be held jointly and singly, meaning that NATO could be held responsible in its own right or it could be responsible along with one or more Member States that were involved in a given incident. Next, the law of responsibility would be applied to determine whether NATO or a Member State can invoke any excuses, such as self-defence, to avoid liability.

Whilst, both the Draft Articles and the ASR require full reparations, this suggests that if NATO or its Member States were responsible, they would both have a financial obligation to the victims. Nevertheless, the difficulty in proving which State is liable for which particular act in the fog of war is formidable and cannot be easily remedied by anything in the DARIO. Moreover, the height of the threshold for the legal test set out in Article 4, that is, a wrongful act which “is attributable to that organization under international law” -a question that is only likely to be fleshed out in time by the applicable case law and as mentioned above, territory in which NATO is distinctly unfamiliar.

Even with NATO’s prominence and influence as an International Organisation, that it is made up of the world’s most powerful States, designed to protect their various national interests and is involved in peacekeeping missions, there is yet to be any formulation of an obligation under International law that provides it has a specific duty to prevent crimes against humanity, or breaches of International law generally. Nevertheless, NATO’s tentative status is this respect, is arguably leading to a perception that its remit can be this broad. Moreover, when taking account the advanced state of NATO’s legal personality, its superior military capabilities, and indeed the concept of the “Responsibility to Protect”, which saw the use of NATO force successfully safeguard human rights in Libya; there can be little doubt as to NATO’s usefulness to fulfil political purposes, however, without taking conscious thought of the given constraints of the legal framework under which it is governed, there would be

little utility in a NATO (or any military force) that asserts itself over the rule of law\textsuperscript{263}. In spite of this, NATO Commanders ought to be aware that NATO itself has the ability to shape and develop International law by customary practice. Even though there appears to be a hard legal core restraining the use of force by NATO, we are yet to find out if there is a corresponding and coherent means by which NATO can be made accountable before an International court or tribunal for the wrongful use of force.

\section*{VII. NATO & THE UN}

“As I have outlined, NATO’s partnerships start at home, in the Trans-Atlantic area, and in our close neighbourhood. But they cannot stop there. Our economy is globalised. Our security is globalised. And if we are to protect our populations effectively, our approach to security has to be globalised too. This is why cooperative security is fundamental to the Alliance’s way of doing business. It means NATO must be able, and willing, to engage politically and militarily with other nations, wherever they may be, and with other international organisations, such as the United Nations and the European Union.”\textsuperscript{264}

The formal relationship between the UN and NATO has not been static and changed as the two organisations have developed\textsuperscript{265}. NATO has been subcontracted to undertake UN missions, but is not subsumed by the authority of the UN. In the debate as to the sufficiency on the International legal framework, and particularly, whether the rules on the use of force are sufficient, the UN High level panel concluded that they were and its recommendation was that there need be no reform.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{264} Delivering Security in the 21st Century -Anders Fogh Rasmussen NATO Secretary General, Chatham house, London (4\textsuperscript{th} July 2012). Available at: http://www.chathamhouse.org/sites/default/files/public/Meetings/Meeting%20Transcripts/040712rasmussen.pdf
\item \textsuperscript{265} For a full discussion see: Zwanenburg, M. “\textit{NATO, Its Member States, and the Security Council}”, in N. M. Blokker and N. J. Schrijver (eds.), \textit{The Security Council and the Use of Force} (2005) p.190
\end{enumerate}
\end{footnotesize}
Thus, it remains true that States themselves are the ultimate judges of the legality of the Security Council’s decisions. Although, in a decentralised system that lacks any compulsory and systematic means of judicial control and dispute resolution, achieving a consensus among NATO States on the ambit of certain issues that I have attempted to address, will prove problematic, and especially in situations demanding urgent action. It is by choosing to openly disobey (or more frequently, very narrowly interpret) decisions of the Security Council that States continue to pose a stumbling block to the ascendancy of UN power, and an unassailable view of the UN Charter.

All the same, UN/NATO relations remain very cordial as a matter of formality and it has been predicted that in the future, UN/NATO relations will either be highly institutionalised, or conducted as a matter of selective cooperation. The speed at which the Security Council is able to offer a resolution, authorising the use of force, the conditions in the country in which it will do so, and the so length of time in which it takes to bring adversities to a close, are down to matters of diplomacy, military judgment and unknown contingencies. However, since its 1999 airstrikes against FRY, and NATO coming very close to crossing a “thin red line” of legality as identified by Simma, there is a lurking possibility that NATO will be used void the desire to closely abide by the restrictive terms on the use of force, as set out in the UN Charter, if it is so found necessary.

Sarooshi points out that the delegation of enforcement powers by the UN infers a great deal of discretion to the States, in that power is given to determine what steps to take in the furtherance of the “restoration of peace and security”. This was typified in Security Council Resolution 678, which, for example, not only authorised member States to expel Iraq from Kuwait (according to Resolution 660) but also to restore peace to the region. The typical phraseology of “all necessary means” applied in Security Council Resolutions is well known as a mandate for the use of force, and also the application of NATO force. On the other hand, Rubin has been severely critical of the basis in which it could be believed the NATO action

266 As at September 2013, NATO celebrates 5 years of its strengthened cooperation with the UN, which proclaimed staff cooperation between the two organisations was now at a new level: http://www.nato.int/cps/en/natolive/news_103189.htm

267 Oertel, J. “The United Nations and NATO” paper presented to the ACNUS 21st Annual Meeting, Bonn, Germany, 5-7 June 2008


in FRY could be “illegal, yet legitimate” —what he describes as the logic that leads to imperialism.

More recently, as the internal armed conflict in Libya is over, another arose in Syria, with calls that the international community ought to intervene. It is how any mandate given to States and the “operationalisation” which would ultimately be done by NATO that caused trepidation. The International legal framework in which NATO can be engaged to exercise the use of force may be capable of being well-understood, and it ought to be remembered that the law is primarily meant to protect smaller States from outside attack, as well as recognising the right of States to use force, when they are attacked. This resulted in NATO firmly declining to undertake any action in Syria, whilst there was no Chapter VII mandate from the UN, despite claiming that a military option still remains open, since Syria’s confirmed use of chemical weapons270.

Nevertheless, whilst there is growing emphasis upon NATO to act in consort with the UN in protecting human rights, and as emphasis grows for a workable set of principles in which a sustainable basis for humanitarian intervention can be maintained, it ought to be remembered that the system of law which permits the NATO to use force, when necessary, has shown signs of development and recognition; we now live in a world where States are rarely the propagators of aggressive military force. At the same time, whilst it seems possible to set out the general status of NATO under International law, the exact contours of the circumstances will engage the Article 5, are not certain. The utility of the NATO Treaty is fraught by the changing purpose for which NATO might be used, as compared to that for which it was founded. The recognition of NATO as a legal person may help to improve States engage with it in difficult decision-making, although a NATO with such character and impetus of the UN direction and control, would indicate the diminishing contribution of that States’ can make for their various and particular national security interests.

Irrespective of this, NATO affects the standing of International law and particularly the issue of whether International law can be sufficiently versatile, so as to change and adapt to new standards and rights, as when it is appropriate to use force. The UN Charter has the ability to do this by being used as a “living instrument” and not only seen as a set of rules, but informative of a process and how to apply International law for the benefit of the world. Indeed, the interplay between NATO and the UN brings into focus one of the most intensely debated issues in contemporary international legal doctrine, that is, the “constitutionalisation”

270 Military option on Syria must remain open: NATO chief:

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of International law -a term is used to describe a number of features which can distinguish the present international legal order from its “classical” beginnings and a rising shift from unilateralism, to bilateralism, to unilateralism, to community interest, and from an inter-State system to a truly global legal order, committed not only to self-determination and State sovereignty, but also to a human rights based approach.\textsuperscript{271}

But if the Charter has the quality to become a truly significant document and perpetually relevant in the midst of the continued debate as to the lawful use of force, it must re-exert its supremacy and establish an enhanced working relationship with NATO, as a Chapter VIII regional organisation, in what must have been originally envisioned. The danger is that if it does not, Article 5 of the NATO Treaty has the potential to drag the entire alliance into a more violent world, where the perpetual use of force is employed whenever a member deems it has suffered an armed attack.\textsuperscript{272} The ever increasing sophistry of modern weaponry, not only by drones, but the new missiles, attached to supersonic aircraft, all-encompassing surveillance techniques (over the Internet, and reaching further into our personal lives); as well as the traditional, but now increased threat of nuclear warfare -is moving so fast that the moral and legal implications of their use is still playing catch up.

What’s more is that NATO has already deemed that Cyber attacks are a use of force, giving rise to the right of self-defence.\textsuperscript{273} If NATO fails to recognise the diverging views as to pressing legal issues, such as the lawfulness of drone strikes, and the intricacies of legitimate targeting, NATO runs the risk of taking a big step in setting out its own conceptions on fundamental issues on the use of force, before the UN and rest of the world. It would indeed be a worrying feature of International law, if NATO continues to succeed in drawing the red lines, knowing where it wants to cross before it does so.

\textsuperscript{272} This is to share the conclusion of Higgins in “Problems and Process: International Law and How We Use It” Oxford University Press (1995), chapter 14 on The Individual Use of Force in International Law pp. 238 & ff.
\textsuperscript{273} \url{http://www.washingtontimes.com/news/2013/mar/24/us-israeli-cyberattack-on-iran-was-act-of-force-nal/?page=all}
I have attempted to examine the central debates, on International law and the use of force, and how they apply in the context of NATO. Whilst NATO has been intimately involved in questions on the interpretation of the UN Charter’s Article 51, State Responsibility and by its involvement and continued deployment in Afghanistan, the advent of pre-emptive warfare; NATO is now also concerned with the controversial debates as to the continued scope of the war against terrorism, permissibility of humanitarian intervention under the guise of R2P, and cyber warfare. Furthermore, the extent of NATO’s liability and resulting legal personality is still in its infancy, and yet to develop a coherent basis by which it can be sued for wrongful actions.

Meanwhile, as political and international relations debates continue, on the future of NATO and whether it should become more of a global crises management organisation, or subject to the authority of the UN, the nature of NATO’s International legal framework remains to be of fundamental importance. There is a distinctive European view that the experience of NATO in Yugoslavia did not create a precedent and the role of the Security Council is still crucial as to the legitimacy of its use of force, however this is to be juxtaposed against the American perspective, which would deprecate the immobilisation that members of the Security council (Russia) could bring to any potential NATO action, if authorisation and consent remain a prerequisite for military action. Thus, even though the NATO of today is markedly different from years gone by, it is yet still subject to same International legal framework that is now over 60 years old.

As to what level of aggression directed at a State can be categorised as sufficiently serious enough to constitute an armed attack, so as to trigger a military response by the obligation under Article 5, will continue to be judged by States on a case by case basis. Commentators have predicted that there is nothing radically different to the applicable legal framework with the onset of Cyber warfare and a greater problem is perhaps the obligation under customary International law to respond to unlawful violence with proportionate force. There are already differing views between NATO itself, and NATO States, such as the UK, as to the appropriateness of Drone strikes, which identifies that there is yet to be a comprehensive means by which to construe proportionality in the context of the use of force. Thus, it is possible to detect a veering towards an extensive approach towards the use of force by NATO and pushing back the thin red line, by what has said about by itself. In its political alliances and expansion, there is a desire to project hard power, as well as soft power, in a world where

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274 In “Terrorism and the legality of pre-emptive force” E.J.I.L. 2003, 14(2), 227-240 Michael Bothe reviews the legality of pre-emptive action in regard to terrorist threats and considers whether the US National Security Strategy represents an unacceptable expansion of the right to anticipatory self defence
it is said NATO’s only “real obstacles are its own limited ambitions” –a phrase used by the NATO Secretary General himself275.

This is why the NATO Deskbook is important. While it is not a work of scholarship, and it is not meant to be, it carries the prevailing views on the use of force, that legal advisors within the NATO chain of command are likely to convey and in turn be heeded by NATO commanders. The Editors to the Deskbook say that it has been produced as a convenient means prompt discussion, and it is recognised that the increasing complexity of military operations brings with it not only legal questions on the use of force, but also great logistical, personnel, environmental and other legal matters, such as treaty interpretation, status of forces agreements, the law of armed conflict and EU issues. NATO’s legitimacy and thereby its utility, is enhanced by recognising the diversity of scholarly views and the deliberate constraints which have been placed upon the use of military power, by International law.

But NATO’s final place in history is yet to be known, and these are times in which the importance of the International legal framework is being constantly threatened by political aspirations to resort on the use of force, and by calling on NATO in order to solve global problems. It has long been feared that a full scale war involving NATO would bring about seismic consequences and it is the primacy of the legal advisors who can influence how high-level decisions are made276, and bring back NATO from the brink of stepping into new frontiers, which may otherwise cross the thin red line of legality. Whereas the NATO Deskbook is the common-denominator which can harness a consensus of NATO opinion on the International legal framework, NATO must be careful of adopting dogmas that would straightjacket legal doctrines on the use of force, which would be a great danger to the exchange of free thinking and debate within NATO itself.

My introduction was predicated on the nuances of a debate between Simma and Cassese in the midst of the 1999 Kosovo crises, of whether there had possibly been a breach of International law, (a negligible transgression over the “thin red line”, or by a greater margin); and whether this had meant that NATO ought to retract itself from projecting military force on an strict basis and confine its activities to the remit of the UN Charter, or alternatively,

275 “A Strong Europe for a strong NATO”, speech by Secretary General Anders Fogh Rasmussen at the Academy of National Defence in Warsaw: http://www.nato.int/cps/en/SID-9D1A0CBE-6FE4FEF9/natolive/opinions_101323.htm

276 A point stressed by A.P.V. Rogers in Gill T & Fleck D, “The Handbook of the Law of Military Operations” Oxford University Press: OXFORD (2010) promoting a rule that it is the “duty of legal advisors to provide advice that will enable the commander and his staff to carry out the commander’s military mission in accordance with the law”: p.543
that there was a new emerging standard of the customary right to engage in Humanitarian intervention. My analysis takes the stance that there is a thin red line, and it will continue to be tempered by NATO’s continued use of drones, what it has done to implement R2P, and the extent to which it engages in offensive cyber wars. I recognise that this is not the only view one could take, Corten can see a much brighter line that demarcates the International legal framework and a continuing transgression by the resort to force in International affairs.

Although, there is no debate that NATO can use force, it ought to be remembered that lines are drawn to protect the parties on both sides thereof. Thus, vulnerable States (and the International legal order) will benefit from a NATO that abides by a rigorous understanding and application of International law on the use of force, as will NATO gain acceptance and legitimacy, when its legal personality is better defined, ensuring that it can be held accountable for potential liability of wrongful actions before a court, or hybrid Tribunal; my finding is that NATO is very difficult to sue.

The Eastern European States that once feared for their existence are still protected by Article 5 of the Washington Treaty, as the Wales Summit has recently made explicitly clear. Therefore, the current status quo is highly susceptible to change and the debate as to when, how, the objectives and what level of force NATO may lawfully employ in future, could yet become very unsettled.
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