The Interpretation of the Right to Self-Defence Under the UN Charter Post 9/11

Using the Coalition’s actions in Syria to demonstrate that the law as set down by the International Court of Justice has not been followed, and proposing that 9/11 marks the point of departure.

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Methodology

The question approached in this dissertation was how 9/11 impacted the law on self-defence. The Coalition’s invocations of self-defence as regards their intervention in Syria are used as a useful reference point to demonstrate the nature of the proposed changes, as although the changes may have been instigated by 9/11, they required time to come to fruition.

The approach to the question was to set out the law as it stood before 9/11. Chapters 1 & 2 attempt this through teleological interpretation of the ICJ’s merits judgments in the Corfu Channel and Nicaragua cases. Given the greater volume of commentary, both contemporary and current, on the Nicaragua judgment, a range of commentaries are brought in to Chapter 2. These commentaries are brought in to highlight the criticisms of the judgment that the author attempts to refute with detailed good faith and contextual analysis of the Court’s judgment, as well as findings from studies on the international judiciary, and the publications of members of the bench.

Chapter 3 considers the impact of 9/11. The principle source used to gauge the international community’s view is records of UN Security Council meetings, alongside corresponding statements by MFAs. In order to counter the Western-dominant reporting on the international community’s view TWAILIAN scholars, are brought in, and the dichotomy between third-world states’ opinio juris and voting records is highlighted.

Chapter 4 attempts to distil a clear picture of the opinio juris of 3 Coalition states invoking self-defence in Syria, with an emphasis on Britain as this is the country to which the author is most closely affiliated (although not a national of). Records of debates in the British Parliament, French Assemble Nationale, and German Bundestag are analysed alongside speeches by Attorney Generals, Ministers of Foreign Affairs, and Presidents. The publicised opinio juris of Coalition states is also contrasted against the under-publicised UN Secretary General’s reports, UN Working Group on Counter-Terrorism’s reports, and the summit of the League of Non-Aligned states.
Introduction

The aim of this thesis is to demonstrate that the expansive interpretations of self-defence currently being invoked by Coalition states using military force in Syria are legally unjustified, and based instead on the political impact of 9/11. This goal is attempted in 3 ways. Firstly Chapters 1 & 2 attempt to to clarify and commend the law as it existed prior to 9/11. Secondly Chapter 3 endeavours to demonstrate the impact of 9/11 on the law, and to show that the dominant narratives that emerged did not represent the international community as a whole. This trend is further traced in Chapter 3 as far as 2018, when the opinions of the most outspoken states are being conflated with the view of the majority. Finally Chapter 4 brings together a wide range of the published opinio juris of 3 Coalition states – France, Germany, and Britain – and contrasts the claims made within with the law of self-defence as it stands, in order to show a divergence. There is a particular focus on the unwilling or unable doctrine, as Syria presents the first instance of its widespread invocation and, in the author’s opinion, the Nicaragua judgment offers the principal basis for refuting the doctrine, which demonstrates the continuity of the law, unaltered by 9/11.

It will be immediately apparent that the two ICJ cases that considered the law of self-defence after 9/11 – The Advisory Opinion on the Legal Consequences of the Construction of a Wall and the contentious DRC v Uganda (Armed Activities) – do not merit their own chapters. This is because they contributed little to the substantive law of self-defence. The Court opted to affirm previous judgments in both, as opposed to setting down new rules. Though the reasoning behind the Court’s decision has itself attracted a great deal of review, it was the author’s opinion that anything added on the topic would neither present new ideas, nor advance the consideration of the dissertation’s question. The cases are referenced, but only insofar as they demonstrate that the law as set down before 9/11 continued unaltered after it (see, for example, 2.1.1).
Chapter 1 (The Corfu Channel Case – Establishing the Primacy of Sovereignty and Territorial Integrity)

The ICJ Corfu Channel Case is often referred to as an informative judgment on the right of innocent passage in international and territorial waters, but of nominal value in terms of elucidating on the right of self-defence under the UN Charter.¹ The, prima facie, nominal value is especially apparent compared to judgments that are either more recent or directly address elements of self-defence. However, the importance of the Corfu judgment must be re-evaluated in light of both the contemporary and current interpretations of the conditions that must be satisfied for a state to successfully invoke self-defence.

By doing so it becomes apparent that in the Corfu judgment the Court clarified the law, and established a line of reasoning that would continue to appear throughout the 20th century, and into the 21st. By finding respect for territorial sovereignty to be the “essential foundation” of international relations, the Court set down precedent that will form the basis for refuting the unwilling or unable doctrine that is being invoked by Coalition states in Syria.

1.1 Chapter 1, section 1 (The primacy of sovereignty precludes invocations of the ‘unwilling or unable’ doctrine)

The judgment precludes an invoking state relying on a territorial state’s mere knowledge of wrongdoing in its territory to justify violating that state’s territorial sovereignty. This has far-reaching ramifications considering the current trend of increased reliance on the ‘unwilling or unable’ doctrine as legitimising the use of force on the territory of a state.² The ‘unwilling or unable’ doctrine essentially states that if a territorial state is either unwilling or unable to “prevent…threats emanating from its territory” it forfeits its territorial sovereignty as a result.³

The denial of the unwilling or unable doctrine is incrementally established in the Corfu judgment. The Court began by preventing control over territory conferring knowledge of,

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¹ Judgment of April 9th, 1949: ICJ Reports 1949, p.4 (hereinafter Corfu)
² Kenneth Watkin OMM, CD, QC, ‘Fighting at the Legal Boundaries: Controlling the Use of Force in Contemporary Conflict’, OUP, 2016, page 323
³ Letter dated 24 July 2015 from the Charge d’Affaires of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council
or responsibility for wrongdoing. Then the Court amended the threshold for satisfying the claimant’s burden of proof that the territorial state was responsible for the wrongdoing and in doing so refrained from doing away with the requirement that the territorial state was responsible. Finally, the Court held that even when the territorial state was responsible, use of force was not a permitted response.

1.1.1 Chapter 1, section 1, subsection 1 (Territorial control confers neither knowledge nor responsibility, and the burden for proving responsibility falls on the claimant)

The primary basis for the claim that the Court addressed, in its contemporary form, the unwilling or unable doctrine comes from page 18 of the judgment. Within that page the Court i) prevented mere control of territory conferring knowledge, ii) prevented mere control of territory conferring responsibility, and iii) amended the threshold for satisfaction of the burden of proof for the claimant state.

1.1.1.1 Control of territory confers neither knowledge of nor responsibility for wrongdoing. This affects the ‘unable’ strand of the ‘unwilling or unable’ doctrine

The Court held that it:

“...cannot be concluded from mere fact of control exercised by a state over its territory and waters that a state necessarily knew, or ought to have known, of any unlawful act perpetrated therein...”

As regards the second point the Court went on to hold that “by itself and apart from other circumstances” mere control over territory in which unlawful acts were perpetrated does not involve the “responsibility” of that territorial state. The refusal of the Court to equate lack of knowledge with responsibility confines the possible scope of the ‘unable’ strand of the ‘unwilling or unable’ doctrine. Inability to combat a threat cannot be derived from unawareness of that threat. Therefore victim states that suffer one-off (as opposed to continued) attacks have the burden of proving that the territorial state was aware of the threat within its

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4 Corfu, page 18
5 Ibid.
territory. This immediately faces the difficulty that if the rest of the world was caught unawares by a single attack, it is reasonable to presume the territorial state could have been equally unaware. Particularly as the mere fact of control does not mean the territorial state “ought to have known” of the threat – so there is no possibility of arguing that the territorial state was negligent to the point of constructive knowledge.

1.1.1.2 Court amended the threshold of the burden of proving responsibility

The Court’s remedy for the difficulty it foresaw for victim states attempting to prove territorial state responsibility was to amend the threshold for the satisfaction of the burden of proof. This remedy i) differentiated between knowledge and responsibility, and ii) upheld the primacy of territorial sovereignty.

Realising the difficulty the invoking state would face in proving “responsibility” (which it clearly differentiated from knowledge)\(^6\), the Court accepted that invoking states should be permitted “more liberal recourse to inferences of fact and circumstantial evidence”\(^7\). It has been argued that the unwilling or unable doctrine is a result of this ruling - that states consider themselves justified in equating unwillingness or inability with complicity due to the lowered standard, and thus satisfying the burden. However, further consideration of the Corfu judgment, and looking to later interpretations of the doctrine in the Nicaragua case, demonstrate that that is wrong.

1.1.2 Chapter 1, section 1, subsection 2 (Even responsibility for wrongdoing does not justify violating sovereignty)

The Court held Albania responsible for the loss of life and damage to British vessels caused by the mines located in Albanian waters, without needing to find that Albania had itself placed the mines. However, knowledge was equated with responsibility only because of the “obligations resulting for Albania because of this knowledge”.\(^8\) The knowledge of the mines (which was imputed to Albania after the assurances of the experts’ report) gave rise to Albania’s obligation to alert shipping traffic in general, and specifically the British - given the

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\(^6\) For example, at page 18 the Court held that the elements of fact upon which inferences may be drawn “differ” depending on whether they go towards proving “knowledge” or “connivance” i.e. knowledge and connivance are different standards with separate thresholds.

\(^7\) Ibid.

\(^8\) Corfu, page 22
2 hours in between the sighting of the British vessels and the explosion of the mines. Nevertheless, even though Albania was responsible for the explosions, the UK’s response, in the form of the minesweeping Operation Retail, was held by the Court, regardless of the “extremely extenuating circumstances”, to have “constituted a violation of Albanian sovereignty”.9

Furthermore, the Court refused to accept the UK’s justification of this violation, which it presented as “self protection or self help”.10 In doing so, the Court demonstrated the primacy of territorial sovereignty, which it held as the “essential foundation of international relations”, by stating that the actions of the British Navy constituted a violation of Albania’s sovereignty regardless of Albania’s “complete failure to carry out its duties”.11 If even a complete failure on the part of a territorial state cannot justify violation of sovereignty, it is exceedingly difficult to accept that a mere lack of ability or omission to act (unwilling or unable) could justify such.

Thus, the Court held that even when a territorial state is responsible for injurious events perpetrated from within its territory, this alone does not justify a subsequent violation of its sovereignty, even when that violation does not occur in the form of a use of force. This significantly undermines invocations of the unwilling or unable doctrine, which refrain from stating that the unwillingness or inability necessarily amount to responsibility, but are still relied upon as justifications for the use of force on the territory of a sovereign state which is not responsible for the injurious action.

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9 Ibid.
10 Ibid.
11 Ibid.
2 Chapter 2 (The Nicaragua Case – Confirming the Primacy of Sovereignty and Territorial Integrity, and Providing a Basis for Refuting the Unwilling or Unable Doctrine)

By setting out what the Court held in the judgment (2.1 & 2.2), and comparing this with current invocations of self-defence (2.2), it is shown that the current, expansive invocations of self-defence are in contradiction with the law. By dismissing current critics’ views to the contrary (2.3), and addressing the issues in the judgment that provided the basis for expansive interpretations (2.4), the law is clarified, strengthened, and demonstrably not that which is being invoked by coalition states in Syria. That the Nicaragua judgment is applicable to Syria is addressed at 2.3.3.

2.1 Chapter 2, section 1 (The Court upheld the primacy of territorial sovereignty)

The judgment of the Court in Nicaragua indirectly refuted future invocations of the unwilling or unable doctrine by confirming and developing the primacy of territorial sovereignty. This was done by unequivocally stating that the territorial state’s responsibility for wrongful acts was indispensable to a successful invocation of self-defence by the victim state. This is important to show that current state interpretations of the law deviate from the Court’s clear rulings to the contrary.

Echoing its judgement in Corfu, the Court in Nicaragua stated that the primacy of territorial sovereignty is the essential foundation of international relations. Firstly, the Court’s judgment held that a state could only suffer the consequences of retaliation for armed attacks for which it was directly responsible.12 Secondly, the Court stated that a state has no right to exercise collective self-defence on the basis of “its own assessment of the situation”.13

The Court’s application of the primacy of territorial sovereignty to both the territorial state (by precluding violations of a territorial state’s territory without responsibility) and victim state (by precluding collective self-defence on a victims state’s behalf if not consented to)
was important to demonstrate the Court’s impartiality. This contradicts claims, such as that by US Navy JAG Kraska, that the Court put “its thumb on the scale” in favour of “weaker” nations.\textsuperscript{14} Furthermore, as will be discussed, the unbiased adherence to this rule helps ameliorate the ‘Achilles’ heel’ of the judgment that came in paragraph 237 (see Section 2.3.3).

2.1.1 Chapter 2, section 1, subsection 1 (State responsibility is necessary for the acts of non-state groups to qualify as armed attacks)

The most significant contribution towards the primacy of territorial sovereignty comes from the condition attached to the Court’s finding that armed attacks can be carried out by non-state groups. The chapeau to the finding was that non-state groups must have been sent “by or on behalf of a state”.\textsuperscript{15} The importance of this caveat cannot be overstated, and yet the rule is rarely followed. It is a particularly important rule in the current era of self-defence invocations - as that they are mostly in relation to fully independent non-state groups. The most contemporary example being that of ISIS, which no state party to the coalition is claiming is acting (or ever acted) on behalf of the Syrian regime. The argument that 9/11 abolished the necessity of state attribution was dismissed by the Court in the Armed Activities judgment. The Court was clear that the attacks were not armed attacks, not because of their low-level gravity, but because there was “no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC”.\textsuperscript{16}

2.1.1.1 Gravity is not the only criteria for an armed attack, this strengthens the primacy of territorial integrity

The Nicaragua judgment clearly shows that the Court accepted that, in terms of the gravity of an attack, the distinction between states forces and non-state groups is moot. Limiting armed attacks to those carried out under the direction of a state is not based upon the gravity of the attack \textit{in any way}. The finding that non-state groups could be the direct perpetrators of armed attacks indisputably accepts that non-state groups are \textit{capable} of performing sufficiently violent acts. However, by imposing the requirement that those groups must have acted

\begin{footnotesize}
\begin{enumerate}
\item James Kraska, ‘A Social Justice Theory of Self-Defence at the World Court’, Loyola University of Chicago International Law Review, Volume 1 Issue 9, 7\textsuperscript{th} February 2012, p.19
\item Nicaragua, para.195
\item Armed Activities on the Territory of the Congo (DRC v Uganda) 2005 ICJ Rep 168, para.146
\end{enumerate}
\end{footnotesize}
“on behalf of” a state, the Court made it abundantly clear that there is both i) a gravity threshold, and ii) a necessity for state responsibility.

Therefore the Court had, long before 9/11, recognised that non-state groups were capable of committing acts that met the gravity threshold of an armed attack. That there were additional requirements than a sufficiently grave attack to enable reliance on self-defence was further demonstrated at paragraph 237. The Court stated that US intervention was illegal due to the fact that, in exercising collective self-defence, the condition of a request by the territorial state is “sin qua non [without which nothing]” i.e. indispensable. 17 Again, this shows that there are factors other than the mere severity of an act that must be satisfied in order for self-defence to be legally invoked. Consequently, there are more conditions to be met before a territorial state’s integrity is forfeited. This is important to establish as Coalition states are still labelling acts as armed attacks on the basis of gravity alone, and therefore incorrectly invoking self-defence in response (4.1.2.1).

2.2 Chapter 2, section 2 (Current invocations of the ‘unwilling or unable’ doctrine are in direct contravention of the Court’s findings in Nicaragua)

The Nicaragua judgment both clarified and strengthened the law on self-defence. In particular, the finding that a state’s complete inability to combat a threat in its own territory does not justify violation of its territorial integrity directly rejects the unable strand of the unwilling or unable doctrine.

2.2.1 Chapter 2, section 2, subsection 1 (Inability to combat a threat cannot confer responsibility)

The Court found that, if the arms traffic that the United States and El Salvador were alleging Nicaragua was “allowing…to transit through its territory” was in fact reaching El Salvador (despite El Salvador, Honduras, and the United States’ efforts to prevent it) it would clearly be “unreasonable” to demand of Nicaragua a “higher degree of diligence” than that achieved by the combined efforts of the other states. 18 The same logic can be applied to the most high profile and contentious current invocations of the unwilling or unable doctrine,

17 Nicaragua, para 237
18 Ibid.
namely those asserted by the coalition as justification for their use of force within Syria, and Turkey’s ‘Operation Olive Branch’ in the Afrin region.

For example, members of the Coalition have been relying upon Syrian unwillingness or inability to prevent the threat posed by ISIS as justifying violation of Syrian territorial sovereignty since at least 2014, and yet ISIS’ most deadly attacks on Coalition states began a year later and continue to this day. This suggests that the Coalition was equally unable to combat the threat (because it was a threat that emanated from the insidious ideology of the movement, rather than from the establishment of a caliphate). Thus, by its own reasoning, the Coalition has failed the test of unwilling or unable. It must not be forgotten however, that this test has never been accepted as a justification for infringing on sovereign territory. The Court in Nicaragua clearly stated this when they held that if the “exceptionally extensive resources” utilised by the US failed to stem the arms traffic, it decisively signifies how “powerless” Nicaragua was considering its vastly inferior resources. Crucially, though the Court accepted Nicaragua was powerless, and therefore unequivocally unable to act, there was never any suggestion that this inability constituted a justification to use force within Nicaragua. In fact, quite the opposite was held as the US was found to have violated Nicaragua’s sovereignty and Nicaragua was held not to be “responsible” for the flow of arms.

The Court clearly stated that inability (as demonstrated by Nicaragua’s powerlessness) did not give rise to responsibility. Therefore states cannot rely on it on the basis that the unwillingness or inability of a territorial state constitutes responsibility. And as has been demonstrated (Section 2.1.1) the Court unequivocally rejected the view that state responsibility was not necessary before a territorial state’s sovereignty was breached. Thus the unwilling or unable cannot justify use of force, as i) state responsibility cannot be bypassed, and ii) the unwillingness or inability of a territorial state does not constitute responsibility.

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19 Letter dated 23rd September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council (S/2014/695)
20 Ibid.
21 Ibid, para 160
A further point that must be addressed in light of the ruling of the Court is the incurable conflation of terms inherent in the doctrine. It is important to point out that, though it has been in some instances\textsuperscript{22}, the doctrine is frequently invoked not as ‘unwilling \textit{and} unable’ but ‘unwilling \textit{or} unable’\textsuperscript{23}. Considered through the lens of moral, as opposed to legal, legitimacy, the unwilling element of the doctrine has a prima facie rhetorical appeal. That a state which was fully aware of the, for example, terrorist group within its territory but obstinately refused to combat the group should be held to have forfeited the sanctity of its sovereignty so that the threat of the group could be extinguished makes sense.

However, that a state which was fully \textit{willing} to combat the threat, and was in fact occupied by doing just that, would have its territorial sovereignty equally violated because other states deemed its efforts insufficient lacks the same logic and equity, and suffers from even greater conceptual uncertainty. The Russian representative made this point to the Security Council, when he asked who would benefit from strikes against Syria, considering that it is “taking the brunt of the fight against terrorism and achieving major victories against it”\textsuperscript{24}. Thus posing the question – how does one determine contested allegations of unwillingness or inability? After all, given the length of time the Coalition has been undertaking actions in Syria, but the persistence and even escalation of terrorist attacks against their countries, the case could be made that they too have been unable. Furthermore, it has been noted that to attack an innocent, non-consenting state violates “each and every one” of the foundational principles of international law – prohibition on the use of force, territorial integrity, and sovereign equality of states\textsuperscript{25}.

Therefore it has been demonstrated that the principles espoused in the Nicaragua judgment provide a strong case for rejecting the unwilling or unable doctrine. Provided it can

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\textsuperscript{22} As with the above letter (fn 3) in which Turkey states that Syria is “neither capable of nor willing to” combat the threat

\textsuperscript{23} Examples include US’ September 2014 Article 51 letter, President Carter’s letter to the Speaker of the House April 1980, David Cameron’s statement before Parliament 26 November 2015, Application of the German Federal Government to the Bundestag 1\textsuperscript{st} December 2015 etc.

\textsuperscript{24} Representative of Russia to the UN Security Council, meeting of the 13\textsuperscript{th} April 2018

\textsuperscript{25} Dire Tlaidi, ‘The Non-Consenting Innocent State: The Problem with Bethlehem’s 12 Principles’, AJIL Vol 107, No 3, July 2013, p.574
be demonstrated that these principles survived 9/11 unaltered (Chapter 3), this will demonstrate that the Coalition does not have the legal justification for invoking self-defence in Syria.

2.3 Chapter 2, section 3 (The current views that the judgment was a reformulation of Article 51, or that it was incomplete, are wrong)

The view that the Court’s judgment in Nicaragua was not the natural progression of the view first expressed in the Corfu Channel case is wrong. Similarly, the view that the Court limited its pronouncement and left loopholes must also be rejected. Demonstrating that these current criticisms are unfounded clarifies the law, strengthens the enforceability of the judgment, and highlights that current invocations of self-defence by states are incompatible with the law.

2.3.1 Chapter 2, section 1, subsection 1 (The Court did not ‘reformulate’ Article 51)

Tams – a member of the ILA Committee on the Use of Force who has presented before the ICJ - states that the Court’s approach in Nicaragua depended on a “re-reading of the text of Article 51”. He argues that the insertion of a requirement to the application of armed attack (in this case the requirement of state involvement) effectively “reformulated” the provision from its textual understanding.

Two points overturn Tams’ argument. Firstly, holding that the requirement for state involvement constituted a reformulation betrays Tams’ misinterpretation that ‘armed attack’ is a merely descriptive term, rather than a legal term of art. A legal term of art is perfectly capable of having conditions that must be satisfied for application. Secondly, Tams takes an overly restrictive view of Article 51 as a standalone provision. It is not. It must be read in light of Article 2(4) to which it is an exception. Article 2(4) is limited to inter-state relations, and establishes the primacy of territorial sovereignty. To read self-defence as permissible against non-state groups would necessarily violate territorial integrity, hence why that is only permissible in the event of the territorial state’s responsibility.

27 Ibid.
2.3.2 Chapter 2, section 1, subsection 1 (Strikes targeting ‘only’ the non-state group still violate territorial integrity)

The view that the Nicaragua judgment did not pronounce on the legality of strikes targeting only a non-state group must also be rejected. Trapp, responding to Tams’ article, states that the Nicaragua judgment must be understood “in the context of its findings of fact” and that, by doing so, it is apparent that armed attacks by non-state actors need not be “attributable to a host state before defensive action can be used”, provided the defensive action combats the group only.\(^{28}\) However, there is simply no basis for this claim – self-defence, as per Article 51, is permissible only in the event of an armed attack, and the court clearly stated that non-state groups could only commit armed attacks when they were deployed by or on behalf of a state.

Furthermore, Trapp’s view ignores supporting law on the use of force. The Geneva Conventions clearly state that an international armed conflict exists from the moment of any “armed conflict” between two state parties.\(^{29}\) The ICRC commentary on such provides that the use of armed force directed “only against the enemy’s territory” or its “population” (as opposed to state organs) constitute an international armed conflict.\(^{30}\) Though the Geneva Conventions are concerned solely with \textit{jus in bello}, and do not pronounce on the legality of the \textit{jus ad bellum}, they serve to reinforce the point that a strike targeting only a non-state group would nonetheless necessarily be a strike against the territorial integrity of the territorial state. Furthermore, the ICRC commentary references the decision of the ICC Pre-Trial Chamber in Bemba that an international armed conflict exists in the event of armed hostilities between states’ armed forces or “other actors acting on behalf of the state” [emphasis added].\(^{31}\) The ICRC commentary states that the reasoning for this is to prevent states bypassing the application of IHL by using non-military agencies, as to allow such would “defeat the protective goal” of the Geneva Conventions.\(^{32}\) Trapp’s suggestion that states could bypass the primacy of territorial sovereignty by striking targets other than the armed forces or other gov-

\(^{28}\) Kimberley Trapp, ‘Reply to Tams’ article’, EJIL, volume 20 issue 4, 1\(^{st}\) November 2009, p.277
\(^{29}\) Common Article 2, Geneva Conventions 1949
\(^{30}\) International Committee of the Red Cross, Commentary to the Geneva Conventions, 2016, para.224
\(^{31}\) ICRC Commentary para.229, \textit{The Prosecutor v Jean-Pierre Bemba Gombo}, Decision on the Confirmation of Charges, 15\(^{th}\) June 2009, ICC-01/05-01/08-424, para.223
\(^{32}\) ICRC Commentary, para.230
ernment organs of a state would result in an equally “manifestly unreasonable” outcome.33 Though it must be recognised that Trapp’s view - that targeting the non-state groups alone constitutes no violation - appears to resemble very closely that of Coalition members conducting strikes against IS in Syria.

2.3.3 Chapter 2, section 1, subsection 1 (The findings of the Court are applicable outside of the Nicaragua judgment)

Trapp’s argument relies on the rule that ICJ “decisions” are binding only in respect of the parties in the case at hand.34 However, when holding that, to commit armed attacks, non-state groups must be state-affiliated, the Court was not making a decision on the facts of the case, but stating the law as it is set down in the Charter.

As the Court itself stated, findings set down prior to paragraph 226 merely established “the applicable treaty law”.35 Whereas from paragraph 226 onwards the court was “apprais[ing] the facts in relation to the legal rules applicable” i.e. it is from this point onwards that the findings become specific to the case at hand. Therefore the finding of the necessity of state-affiliation is binding on other states and in subsequent cases, hence why it has been reiterated in subsequent cases.36 The Court had clearly set out its procedure and function in this way in a previous case in which it emphasised that it is “not a legislative body. Its duty is to apply the law as it finds it, not to make it”.37 Moreover, in Nicaragua it stated that in reaching a decision on the lawfulness of the US actions, it was necessary to first determine “whether such an [armed] attack has occurred”.38 Therefore the decision in this case was whether an armed attack had occurred, the conditions for an armed attack to have occurred are simply the law, and thus generally applicable.

33 Ibid.
34 Statute of the International Court of Justice, Article 59
35 Nicaragua, para.226
36 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9th July 2004, para.139 – court held armed attacks are those committed by one state against another or by a group “imputable” to a state
37 South West Africa Cases (Ethiopia v South Africa, Liberia v South Africa), second phase, ICJ Reports 1966, para.89
38 Nicaragua, para.35
2.4 Chapter 2, section 3 (The problems with the Nicaragua Judgment)

The Nicaragua judgment was not flawless. There were problems that undermined its legitimacy. However, the problems are not as drastic as many claim, and the important findings of the Court are unaffected.

2.4.1 Chapter 2, section 2, subsection 1 (The creation of the ‘force gap’)

The Court created a ‘force gap’ by finding that it was “necessary” to distinguish between the “most grave” and “less grave” uses of force.39 The importance of this distinction was that the Court held that only the most grave uses of force constituted an armed attack, thus permitting the exercise of self-defence. Therefore states could not exercise self-defence against ‘less grave’ uses of force, regardless of whether the action in response would be proportionate.

2.4.1.1 Criticisms of the force gap

2.4.1.1.1 The contemporary view that the force gap made the law arcane

Hargrove, whose view is informative as he was writing contemporaneously, was damning in his criticism of this element of the Nicaragua judgment. He stated that the Court had left the law of self-defence “highly arbitrary, intricate and technical, but at the same time more uncertain”.40 In doing so, he therefore asserts that the Court has exceeded the bounds of its mandate - to apply the law - and has delved into the territory of developing the law, as otherwise his criticism would concern only the law itself and not the Court’s interpretation of such (see 2.4.1.2.1 for rebuttal of this view). He does not clarify whether he believes that the Court developed the law through objective interpretation or more purposefully. He is, however, very clear on the impact this will have on the law, as he predicts that states will abuse the uncertainty by “finding still more exceptions to the prohibition” on the use of force.41 This claim underlines the hypocrisy inherent in Hargrove’s argument – he gravely predicts states’ expanded interpretations of the exception to the prohibition, but laments the Court’s attempt to restrict such.

39 Nicaragua, para.191
41 Ibid.
2.4.1.2 The current view that force gap is obsolete, as armed attacks should not be the criterion for judging the legality of self-defence invocations

Green, writing with the benefit of hindsight, supports Hargrove’s view that the force gap was an error in the judgment. However, Green differs from Hargrove in that he does not dispute that interpretation and articulation were required, or at least, unavoidable. He recognises that the distinction between application and development is often “blurred” in practice, because the Court has to “impose clarity” on the law “simple to be able to apply it”.42 His view is that the Court “erred” in deciding upon armed attack as the criterion for assessing the legality of self-defence invocations.43 He proposes proportionality and necessity as the correct standards to apply as he claims they “posses demonstrable content” and are “defined and applicable in practice”.44 This is disputed by Lieflander and Akande (the latter having consulted and advised the UN) who note that, despite their constant invocation, the concepts are “fraught with conceptual ambiguity” and therefore “notoriously difficult” to apply.45 This has been demonstrated by the markedly different standards of proportionality applied by the Court. In Nicaragua and Oil Platforms proportionality was applied as a comparison between the original attack and the responding use of force in self-defence.46 Whereas in the Nuclear Weapons Advisory Opinion and DRC v Uganda proportionality was applied as a comparison between the harm done and objective pursued.47

2.4.1.2 The force gap is not a flaw in the judgment

The force gap was not a flaw in the judgment because it was neither the Court exceeding the bounds of its mandate (2.4.1.2.1), nor the creation of an arcane technicality (2.4.1.2.3). It is necessary to consider and reject the criticisms of the Nicaragua judgment in order to demonstrate that the findings of the judgment remain applicable to this day.

2.4.1.2.1 The creation of the force gap was the Court exercising its power of interpretation

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43 Ibid, p.208
44 Ibid.
45 Akande and Lieflander, ‘Clarifying necessity, imminence, and proportionality in the law of self-defence’, AJIL volume 107, No 3, July 2013, p.311
46 Nicaragua, para.237; Oil Platforms (Iran v US), 2003 ICJ Rep, 161, para.77
47 Legality of the Threat or Use of Nuclear Weapons Advisory Opinion, 1996 ICJ Rep 226, para.41-44; Armed Activities on the Territory of the Congo (DRC v Uganda) 2005 ICJ Rep 168, separate opinion Judge Koojimans, para.34
The creation of the force gap did not come from a purely textual interpretation of Article 51, but that was not the exercise the Court was performing. The Court’s interpretation was contextual – in line with its jurisdiction under Article 36(2)(a) of its statute to interpret treaties, and its obligation under the Vienna Convention on the Law of Treaties to interpret the Charter in good faith, giving the ordinary meaning to the terms used in light of its object and purpose.\(^{48}\) Once again, it is therefore essential to keep in mind that Article 51 cannot be interpreted without regard for its purpose - as the only permissible unilateral derogation from the purpose of the Charter; the prohibition on the use of force. Thus the court ensured that its strict construction of the terms of Article 51 would not have the effect of, as Tladi puts it, “overwhelming the general rule”.\(^{49}\) Hence the Court’s reasoning that, as the prohibition applies exclusively to states, so should the ability to commit an armed attack. And that, owing to the very real risk of escalation, self-defence should not be permissible in response to “less grave” uses of force.\(^{50}\) The logic for this is immediately apparent – minor uses of force by one state could otherwise be met by vastly more grave uses of force by the responding state, acting under the unclear concept of proportionality.

2.4.1.2.2 *The Court’s primary intention is to uphold and strengthen the prohibition*

The preservation and strengthening of the prohibition was the motivation behind the court’s narrow interpretation of armed attack. This claim is demonstrated by a study comprising interviews with 37 judges. It found that the most crucial principle underpinning decisions was the “prevention of war and violence” i.e. the foundational principle of the UN Charter.\(^{51}\) The limitation of forcible responses to attacks, requiring that they fulfil stringent criteria, has undoubtedly upheld this principle by restricting the possibilities for unilateral action. Moreover, Green’s findings commended the court for interpreting the law on the basis of the ‘Dworkian’ principle (the law as integrity) and dismissed claims that judges are motivated by political loyalties. This is further supported by Judge Higgins, who claimed that the alignments of the bench are “not those of a national bias”, but adherence to conservative or liberal

\(^{48}\) Vienna Convention of the Law of Treaties, Article 31(1)
\(^{49}\) Tladi, p.574
\(^{50}\) Nicaragua, para.191 & 210
approaches.\textsuperscript{52} Self-defence is therefore a less divisive concept to interpret, as it is rooted in the preservation of the prohibition on the use of force.

This is demonstrated by the dissenting opinions to the Nicaragua judgment, notably that of Judge Sir Robert Jennings. His principle point of contention was the finding that the provision of support short of instruction would not constitute an armed attack. However, this was because he believed the availability of self-defence in response to an attack of any gravity would, as a deterrent, uphold the prohibition more effectively. He was also in support of holding that collective self-defence should be restricted, requiring that a state exercising collective self-defence was, in some measure, “defending itself”.\textsuperscript{53} Therefore Jennings’ dissent was not over the fundamental principle that formed the basis for the Court’s interpretation, but how that principle could be best served. Thus whilst there will be differing opinions over how to implement the prohibition on the use of force, that the prohibition should form the base of the Court’s reasoning is an almost uniquely unanimous point of agreement amongst the bench.

\textbf{2.4.1.2.3 The Court strengthened the prohibition}

This agreement amongst the bench serves to strengthen the authoritative nature of the Court’s judgments, and further undermines i) Hargrove’s criticism of the judgment, ii) Green’s view of the inherent unsuitability of the Court to adjudging use of force disputes, and iii) states’ expansive interpretations of the right to self-defence since 9/11. Hargrove’s opinion was that once the rules begin to “deviate” from the “essence of the Charter principles” states will take the rules “less and less seriously”.\textsuperscript{54} However, if the creation of the force gap was actually the Court’s attempt to adhere more closely to the fundamental principle of the Charter, this argument fails to explain states nonetheless moving away from the constraints of the rules. Green’s accepts that the law, and thus the ICJ as the UN’s judicial organ, should regulate self-defence, as it is a legal right. However, he claims that self-defence “cannot be adequately regulated by the law alone” [emphasis added] and therefore the ICJ is not suited to dealing with it.\textsuperscript{55} Green’s mistake is that he sees the current inadequacy of the law as a permanent failing of the ICJ as a forum for use of force disputes. But given his previous com-

\begin{itemize}
\item \textsuperscript{53} Nicaragua, Dissenting Opinion of Judge Sir Robert Jennings, p.544
\item \textsuperscript{54} Hargrove, p.855
\item \textsuperscript{55} Green, p.194
\end{itemize}
mendation of the Court for relying upon general principles of international law to plug the statutory gaps, there is no reason why self-defence could not continue to be regulated by the Court on that basis. Particularly given the aforementioned evidence that the Court is committed to acting in line with the fundamental rule of the UN Charter, and principle peremptory norm of international relations.

2.4.2 Chapter 2, section 2, subsection 2 (The admission of additional motives)

The Court held that the existence of an “additional motive”, other than self-defence, “could not deprive” a state of its right to resort to self-defence. The reasoning behind the finding is clear, as to hold that when the conditions for exercising self-defence have been met, it may not be allowed because of a states’ ancillary interests would be illogical and unfair, not to mention an exercise in subjective speculation.

2.4.2.1 Ancillary motives may in fact be primary motives

However, the court provided scope for abuse when it held that the additional motive need not be additional, but may in fact be “more decisive”. Removed from any context this, again, is understandable, as self-defence should have an entirely objective threshold. However, the Court should have foreseen the self-serving interpretation states would subject this finding to. As Hargrove predicted, it was an “invitation to venture into…rich territory”. This is borne out by subsequent practice. For example, British Prime Minister David Cameron, responding to a Select Committee’s questioning of the purposes of the UK’s actions in Syria, stated that the UK’s motivations were not only to “degrade ISIS’ capabilities” but also to “generate negotiations on a political settlement” whilst “preserving the moderate opposition” and even “forestalling further migratory flows towards Europe”.

The Prime Minister’s response contains two problems. Firstly, action being taken in Syria, under the aegis of self-defence, had far more objectives than merely self-defence. Therefore the strikes most certainly exceeded what was proportionate and necessary to repel

56 Nicaragua, para.127
57 Ibid.
58 Hargrove, p.855
59 David Cameron, ‘Memorandum to the Foreign Affairs Select Committee, Prime Minister’s Response to the Foreign Affairs Select Committee’s Second Report of Session 2015-16: The Extension of Offensive British Military Operations to Syria, November 2015’, p.22
and imminent or on-going armed attack (see 4.3.2). Secondly, Britain’s intention to use the strikes to force the Syrian regime to the negotiating table further demonstrates how strikes targeting only a non-state group will necessarily violate a state’s sovereignty and territorial integrity, contra Trapp’s aforementioned separation of such (2.3.2). Even on a purely military front, defensive action was surpassed, evidenced by the Prime Minister’s stated intention to “take the fight to ISIL”.\(^\text{60}\)

That Coalition states candidly admitted the overtly political basis for their intervention, and the lack of publicised, overt condemnation of such, was the basis for Tams’ claim that the “real normative drift” in the law of self-defence has not been the conditions under which self-defence can be exercised, but the scope of the right. Recent practice such as that of the UK demonstrates that “functional understanding” of self-defensive as a means of repelling attack has been “largely abandoned”.\(^\text{61}\) This has largely been due to the “paucity of guidance” on what states can seek to accomplish through self-defence, with this paucity naturally being exploited by states.\(^\text{62}\)

2.4.3 Chapter 2, section 2, subsection 3 (The suggestion that US action could have been necessary even if not requested by El Salvador)

The Court rejected the US’ invocation of collective self-defence as the condition that assistance must have been requested by the victim state was not fulfilled. However, the Court went on to state that “even if” US activities had been carried out “in strict compliance with the canons of necessity and proportionality” they would still have been illegal.\(^\text{63}\)

The error here is that, on a prima facie reading, the Court is suggesting US action could have been necessary despite the lack of request for assistance. This would mean that even when self-defence is necessary and proportionate the Court may still find it illegal on procedural grounds alone. This would, in Hargrove’s words, “offend the rough institutions” of states that are concerned with the “physical safety” of their countries, and would rightly dis-

\(^{60}\) Ibid. \\
\(^{61}\) Tams, p.115 \\
\(^{62}\) Akande & Lieflander, p.311 \\
\(^{63}\) Nicaragua, para.237
miss such an “arcane technicality”. Had this been the Court’s finding, it would have led to greater apathy towards Court judgments and a lack of subsequent enforcement.

What the Court neglected to explicitly state, but is apparent from the judgment as a whole, is that US action could not have been necessary or proportionate in the absence of a request. If El Salvador did not request assistance from the US such assistance was not necessary (regardless of whether or not it was welcome). Furthermore, the Court had previously stated in the judgment that there was no rule permitting the US to exercise collective self-defence “on the basis of its own assessment of the situation”, thus precluding the US from acting upon its own opinion that intervention was necessary. This finding reinforces the primacy of sovereignty, as otherwise states subject to armed attack could also have third states using force on their territory without their consent. It was a only the wording of the paragraph made it seem as though US action could have been necessary, not the reasoning. This is supported by the fact that the Court found that it was neither necessary nor proportionate.

Therefore the criticisms levelled at the Nicaragua judgment, whilst certainly not baseless, do not overrule the crucial findings of the Court. The crucial findings – the necessity of state responsibility and conditions of an armed attack – are therefore still applicable to the situation in Syria (2.3.3) and so provide the basis for refuting the claims of self-defence by Coalition states.

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64 Hargrove, p.854
65 Nicaragua, para.195
66 Nicaragua, para.237
Chapter 3 (The Impact of 9/11 – Purposeful Misinterpretation by the US and a Misreporting of International Community’s Views)

This Chapter will show that 9/11 was not the supervening event that it has been portrayed as. The consequent US invocation of self-defence was not the recognition of new customary law, but should be seen in light of the Court’s finding in Nicaragua that breaches of a rule are not recognition of a new rule (3.1.3). Furthermore, the claim that the international community accepted the US’ actions comes from a misreporting of their views (3.2). This is linked to the misreporting of the April 2018 missile strikes, which demonstrate the post 9/11 tactic of western delegitimising rhetoric to justify illegal behaviour, and the challenge this poses to Article 51 as the sole permissible unilateral derogation from Article 2(4) (3.3).

3.1 Chapter 1, section 1 (9/11 does not justify expansive interpretations of the right of self-defence)

States and academics alike portray 9/11 as a supervening event justifying departure from the law reaffirmed in the Nicaragua judgment. To do so takes advantage of the emotional reaction to the terror attack, and ignores the legal opinions that can be distilled from the numerous expressions of sympathy and solidarity issued by the majority of states in the days following.

3.1.1 Chapter 1, section 1, subsection 1 (9/11 portrayed as a cataclysmic event justifying expansion)

The general consensus amongst states and academics that attempt to reconcile current state practice with the Nicaragua ruling is that the international reaction (or lack thereof) to the US’ response to the 9/11 attacks constituted “instant customary law and an authoritative re-interpretation of the charter”.67 Invariably, support for this statement is drawn from post-9/11 UN Security Council Resolutions 1368 and 1373, both of which recognised the right to

self-defence in their preamble and defined any international terrorist act as a “threat to international peace and security”.

As an example of this view, Gray states that UN Security Council Resolution 1373 was the first time the Security Council had “implicitly recognised the right to use force in self-defence against terrorist action” [emphasis added].

Herein lies the problem, Gray – a widely published Cambridge lecturer - is stating that what she interprets the Security Council as having implicitly stated (self-defence can be invoked against non-state-affiliated terrorists) overrules what the court has explicitly stated (state responsibility is indispensable).

The view that the Security Council implicitly accepted non-state groups as being capable of performing armed attacks overlooks both what it explicitly held (Charter conformity is paramount) and what it refrained from holding (that the attacks were armed attacks). Firstly, though the Security Council reaffirmed the right to individual or collective self-defence, it stated that self-defence exists only to the extent “as recognised by the Charter” - with the Charter holding that self-defence is lawful only in response to an armed attack. Secondly, the Security Council branded international terrorist acts threats to international peace and security. Thus it refrained from labelling terrorist attacks in general, and 9/11 in this instance, as armed attacks. The significance of this is further highlighted by the fact that the Security Council had previously been explicit in recognising acts that amounted to armed attacks, as with Resolution 661 (1990) in which it stated that self-defence was available to Kuwait in response to the “armed attack by Iraq”.

It must also be noted that the assertion of ‘instant’ customary law falls foul of the generally accepted rules on the formation of customary law, as laid out in the ICJ’s findings on such in the North Sea Continental Shelf case.

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68 UN Doc. S/Res/1368 (2001)
69 Gray, p.263
70 UNSC Res.1368
71 United Nations Security Council, Resolution 661 (1990), preamble
72 ICJ Rep 1969. For example, at para.74 the Court declined to impose a necessary time period for the formation of customary law, but held that state practice as well as being “virtually uniform” must be “extensive” – thus suggesting it could not be instantaneous.
3.1.2 Chapter 1, section 1, subsection 2 (Security Council Resolutions do not support reliance on self-defence in response to 9/11, or expansion more generally)

A straightforward textual interpretation of the Security Council’s resolutions demonstrates that the reference to self-defence was the “preservation”, rather than authorisation, of the doctrine. This is further supported by the context of the resolutions, particularly 1368, which was issued within 24 hours of the terrorist attack at which time no one was sufficiently certain to confirm the perpetrators. The “legal craftsmanship” of resolution 1368 should be recognised, as it satisfied the American desire for action whilst refraining from “sanctioning the view that private acts of violence could be answered with self-defence”. However, the craftsmanship was too subtle and did not stand up to continued American pressure. Hence Cassese’s criticism that the “ambiguous and contradictory” resolution “waivered” between the desire of the Security Council to take matters into its own hands and its “resignation” to the US’ use of unilateral force.

This lack of decisiveness was evident in the implications of the Security Council’s omission, in resolution 1373, to include “its” readiness to take all necessary steps to respond to the terrorist threat. Admittedly, one ought really refrain from ever stating that the ‘UNSC did’ anything, as to do so insinuates a level of “autonomy which the council does not posses”. However, the omission was nonetheless interpreted by many, Cassese, Fassbender, and apparently the American government amongst them, to signify the Security Council’s acceptance of America’s “unwillingness” to subject its forcible response to the “rules and procedures” of the Security Council. Here then is the emergence of the issue that will plague use of force disputes for the next two decades – the highly-politicised decisions of the UN are being relied upon as more authoritative, and thus capable of overruling, the legal judgments of the highest court of international law.

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75 Antonia Cassese, ‘Terrorism is Also Disrupting Some Crucial Legal Categories of International Law’ EJIL (2001), Volume 12, No.5, p.996
76 Fassbender, 441
77 Fassbender, Cassese, p.996-997
The problem with the misinterpretation, purposeful or not, of 9/11 as an armed attack against which self-defence could be exercised is not merely conceptual. It has expanded the boundaries of state’s views of self-defence well beyond merely repelling attacks towards waging years long wars against threats that shift in gravity, location, nature, and identity. As Cassese, writing in 2001, optimistically put it; 9/11 could have a “potentially shattering” effect on international law. Never one to downplay the situation, he bluntly predicts that “anarchy could ensue”. However, his doom saying was not as overstated as one would have hoped. He foresaw with unnerving accuracy the problems that arose from post 9/11 interpretations of the right to self-defence, predicting that the possibility of self-defence being exercised against non-state targets challenged the conditions relating to permissible targets, timing, duration, and admissible means.

3.1.2.1 UNSC Meeting prior to adoption of Res 1368 demonstrates that the international community did not intend self-defence to be invoked

The context of the resolution is invaluable in determining the ordinary meaning of the terms used within and reading them in good faith. The best evidence of the context comes from the minutes of the meeting on the 12th September at which resolution 1368 was adopted. It is illogical that states would make no mention of a response of self-defence immediately prior to the adoption of the resolution, but that the terms of the resolution that merely confirm the existence of self-defence should be taken as those same states authorising the invocation of self-defence. To do so is to consider the Security Council as a body distinct from the states that form it. The minutes of the UNSC meeting on the 12th September, at which Resolution 1368 was adopted, demonstrate that the USA’s subsequent reliance on such as permitting self-defence was purposeful misinterpretation. Every state representative that spoke at the meeting condemned the attacks but stated that the proper reaction was one implemented by the Security Council as a whole, not unilateral action. This was evident in the Secretary General’s address, when he stressed that a terrorist attack on one country is “an attack on humanity as a whole”. And that as a result, instead of a unilateral response, all nations must “work together” to identify the perpetrators and “bring them to justice”.  

78 Cassese, p.993  
79 Secretary General of the United Nations, 4,370th UNSC meeting of the 12th September 2001, S/PV.4370  
80 Ibid.
The two points the Secretary General made – i) the need for a multilateral, not unilat-
eral response, and ii) for the response to be one of law enforcement, not warmongering – were
echoed by each and every other state. All states viewed the attacks (which no state referred to
as an armed attack) as occurring in America, but targeting the democratic world as a whole.
Thus they emphasised that the response ought to be one entailing the “co-operation” of the
entire international community, with the Security Council playing the “leading role”.81 There
was no suggestion of or support for unilateral action by America. Secondly, there was reitera-
tion of the intention to bring the terrorist “criminals” to “justice” which demonstrates that
member states saw this as a criminal act which should be dealt with accordingly - on a co-
operative law enforcement basis, not an act of war requiring self-defence.82 However, Ameri-
ca, predictably, was the only nation that referred to the need for a “war”, and foreshadowed
the direction of its foreign policy for the next decade by stating that it “will make no distinc-
tion” between terrorists and states that “harbour” them.83

The commonality of the rhetoric present in the Security Council meeting, considered
alongside the law as set down in Nicaragua (see 3.1.4) demonstrates that the reaction to 9/11
should be treated as an exception to the rules of international law, not the formation of new
rules. Cassese, refuting Gray’s aforementioned suggestion of ‘instant’ customary law, stated
that the lack of explicit condemnation did not amount to “consistent practice and opinio juris
required for customary change”.84 Given the overarching importance of the prohibition, he
believes state practice would have to be more express and clear, and “covering more than one
instance”.85 The logic behind this is clear, because America’s invocation of self-defence, and
the lack of protestation from the international community, were “to a large extent motivated
by the emotional reaction”, as opposed to an objective determination to amend the law.86 This
sentiment was certainly true at the time of 9/11, which dominated news headlines for months,

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81 Permanent Representative of China, ibid.
82 e.g. Permanent Representative of Ireland, ibid.
83 Permanent Representative of the United States of America, ibid.
84 Cassese p.996
85 Ibid.
86 Ibid.
and even decades later there is an unspoken rule that the legality of the war in Afghanistan is “considered off-limits, not to be raised in polite company”. 87

3.1.3 Chapter 1, section 1, subsection 3 (Breaches of the prohibition can strengthen the law of self-defence)

Bianchi disputes the view of the reaction to 9/11 being treated as an exception to the rule, not the rule itself. He claims the current status of the prohibition “ought to be seriously reconsidered in light of recent practice”. 88 Given that this was written in 2004 the recent practice he was referring to is primarily 9/11. He further states that “unconditional adherence” to a formalistic and “no longer tenable” supremacy of the law of the Charter in this area ignores the “many failures that the system has incurred recently”. 89 However, this falls foul of the ICJ’s ruling in Nicaragua that “instances of state conduct inconsistent with a given rule” should be treated as “breaches of that rule, not recognition of a new rule”. 90 Therefore states’ invocations of justifications should be seen to “strengthen, rather than weaken, the rule”. 91

Though the Court was referring to the adherence to customary rules, the same reasoning can apply to Charter provisions. Particularly considering, as Bianchi noted, that attempts to “ground” military interventions in Kosovo, Afghanistan, and Iraq in the Charter were “scarcely persuasive”. 92 Though this prima facie supports expansive interpretation of the prohibition, the fact that states attempted to ground their interventions in the Charter demonstrates that they see it as the only justification for the use of force, as opposed to claiming new instances permitting use of force.

Finally, this view that self-defence should not be altered by 9/11 was most authoritatively echoed in 2004. The UN Secretary General, Kofi Annan, convened, with the backing of the General Assembly, a High Level Panel on Threats, Challenges, and Change that had a mandate to assess current threats to international peace and security and make recommendations for the strengthening of the UN and its functions. The Panel unanimously declared, “we

89 Ibid.
90 Nicaragua, para.186
91 Ibid.
92 Bianchi, p.389
do not favour the rewriting or reinterpretation of Article 51” [emphasis added]. This is immensely contemporarily significant given the invasions of Afghanistan and Iraq on ‘new’ principles. Furthermore, the legitimacy of the Panel is strengthened by the fact that both TWAILIAN (Ghana, Tanzania, Pakistan) and western (every P5 member) experts formed the Panel.

3.2 Chapter 1, section 1 (Lack of objection from international community should not permit formation of new customary rule)

Though he rejected the suggestion that 9/11 caused the formation of instant customary law, even Cassese was not fully immune to a reinterpretation of the rules of international law following the emotional impact of 9/11. He stated that “practically all states” had come to assimilate terrorist attacks to inter-state aggression. His reasoning for the widespread assent to the new view was the quantity of states that had “not objected to” the post 9/11 invocation of self-defence. To base opinio juris on a lack of objection both ignores the reasoning behind the lack of objection (which was emotionally and politically motivated) and falls short of the standard required for such a pronouncement on the law itself under Article 31(3)(b) of the VCLT. Bashar Ja’afari, the current Syrian permanent representative to the UN, supported this view that silence was insufficient in the Security Council meeting on the 13th April 2018 (the day before France, UK, and USA launched missiles against Syrian targets in response to chemical attacks they attributed to the Syrian regime) by stating that:

“The silence of the majority with respect to those aggressive policies does not constitute collusion with these states, but it does arise from fear of their arrogance and political blackmail, economic pressure and aggressive record”.

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94 Cassese, p.997
95 Vienna Convention on the Law of Treaties, Article 31(3)(b) – state practice should be “taken into account” but is not determinative in and of itself
3.2.1 Chapter 1, section 1, subsection 1 (Conflating lack of objection with assent in undemocratic in the international system)

However, the International Law Association challenges this view and submits that silence can be equated with acceptance. In its Final Report it stated that, when considering evidence of state practice in support of customary law, “it is not normally necessary for even a majority of states to have engaged in the practice” provided that there has been “no significant dissent”.

The condition to this statement is that the participation must be “sufficiently representative”. However, the “lack of availability and accessibility” of state practice of third world nations, as well as the focus on representation as regards specially affected states, means that the term ‘sufficiently representative’ continues to be equated with the practice of “powerful western nations” only. Though the Treaty of Paris in 1856 amended the criteria of inclusion of state views from ‘European’ to ‘civilised’ nations, the context of the 19th century meant the formation of customary law continued to be “embedded in a regional legal consciousness” that omitted the majority of the southern hemisphere and Asia.

The dominance of western narratives will favour a drift towards expansive interpretations. It is simply wrong to claim that the end of the colonial era ameliorated the hierarchy of state views. As recently as 2013 the International Law Commission lamented the “limited response” from third world nations to the Commission’s request for “relevant materials”. However, it is vital to bear in mind that the separation of formal and material sources of customary law (with only formal being relevant to formation) was “far from neutral”. The collection, archive, and production of such sources requires significant human and financial resources, which third world states assign to more pressing problems. Thus the ILA admitted that the international customary system is “far from democratic”, which supports Chimni’s criticism that the ILC’s gathered opinions possess only an “artificial commonality”, and as a

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98 Ibid.
100 Ibid.
102 Chimni, p.676
result the very idea of the ‘international community’ remains a “juridical fiction”\textsuperscript{103}. The affect the marginalisation of non-western states has had on the law on the use of force, and self-defence especially, is devastating. To favour the publicised opinio juris of ‘specially affected’ states over the majority of others will undoubtedly focus the trend of development on expansion. This is further compounded by the fact that, looking to invocations of self-defence over the past two decades, almost all of the territorial states can be considered third world countries, or certainly have had the characteristics of such whilst there is conflict on their territory.

3.3 Chapter 3, section 3 (April 2018 strikes demonstrate the post-9/11 erosion of 51 as the only unilateral exception to the prohibition on the use of force)

None of the states that conducted the April 2018 missile strikes against Syria attempted to justify their actions under Article 51. As such, the strikes do not affect the substantive conditions of Article 51, but rather the essence of what Article 51 is. Article 51 is the sole permissible derogation from the prohibition on the use of unilateral force. The April 2018 strikes are therefore significant as they demonstrate i) the continued misreporting of the international community’s view (in favour of western states), ii) the current challenge to Article 51 as the sole permissible unilateral derogation from Article 2(4), and iii) western states use of delegitimising rhetoric in an effort to justify their actions.

3.3.1 Chapter 3, section 1, subsection 1 (The dissent of the international community was not correctly recorded)

3.3.1.1 Academics misreported the response of the international community

Whilst many academics recognised the strikes as illegal, there was a concerning misinterpretation of their reception in the international community, just as with the aforementioned misinterpretation of the international community’s intention expressed in the Security Council meeting on the 12\textsuperscript{th} September 2001. Milanovic, an editor of the EJIL and academic whose publications are frequently relied upon by academics and even governments, did not waste words in labelling the 2018 strike unlawful.\textsuperscript{104} However, he made two telling mistakes in claiming that the “approval of the strikes or lack of condemnation” had “no bearing” on the

\textsuperscript{103} ILA Final Report, p.26; and Chimni, p.676

\textsuperscript{104} Milanovic has been relied upon by the UK government in the House of Commons Briefing Paper ‘Legal Basis for UK Military Action in Syria’, Number 7404, 1\textsuperscript{st} December 2015, p.7-10
formation of customary law.\textsuperscript{105} Firstly, as the aforementioned ILA report stated, such lack of condemnation \textit{can} influence the formation of a customary rule. Secondly, the strikes \textit{were} condemned. Nonetheless, Monika Hakimi, a former US Department of State legal advisor, reiterated this unjustified claim that “many states…once again condoned or supported” the strikes.\textsuperscript{106}

\textbf{3.3.1.2 It is necessary to look beyond the UNSC meeting voting record to get a clear picture of international opinio juris}

The Security Council meeting on the 14\textsuperscript{th} April portrays prima facie support for the legitimacy of the attacks. Only 3 states voted in support of a draft resolution labelling the attacks as an act of aggression. However, looking beyond merely the voting record reveals an opposing narrative. Of the 15 states that spoke at the meeting, only 2 (other than the US, UK, and France themselves) did \textit{not} condemn the strikes. Even the Secretary General criticised the attacks by reiterating that there is “no military solution” to the Syrian situation and, in more direct reference to the three permanent five states, “if the law is ignored, it is undermined”.\textsuperscript{107} The attacks were a clear Charter violation, and contradicted any semblance of multilateralism. Bolivia, speaking the day before the strikes, addressed the problem of western dominance by reiterating that the Security Council “is not representative of the permanent five…it represents 193 states”\textsuperscript{108}. Yet France nonetheless attempted to present the strikes as “in the interests of the entire international community”, despite the majority calling for restraint and preventative diplomacy to prevail. Thus it is concerning that academics would give the impression that the strikes were largely accepted. Though the misreporting of academics appears far detached from the interpretation of Article 51, there is a connection. Governments frequently rely upon academics’ opinions when they publish their legal positions. Academics’ interpretations are not restricted to the academic world; they can be seen in opinio juris, and thus shape state practice.\textsuperscript{109}

\begin{flushleft}
\textsuperscript{105} Marko Milanovic, ‘The Syria Strikes: Still Clearly Illegal’, EJILTalk, 15\textsuperscript{th} April 2018
\textsuperscript{106} Monika Hakimi, ‘The Attack on Syria and Contemporary Jus Ad Bellum’, EJILTalk, 15\textsuperscript{th} April 2018
\textsuperscript{107} Antonio Gueterres, UN Secretary General, 8,233\textsuperscript{rd} meeting of the UNSC, 14\textsuperscript{th} April 2018, S.PV/8233 (hereinafter UNSC meeting 14\textsuperscript{th} April 2018)
\textsuperscript{108} Representative of the plurinational state of Bolivia, UNSC meeting 13\textsuperscript{th} April 2018
\textsuperscript{109} e.g. see House of Commons Briefing Paper (fn.104)
\end{flushleft}
Hence the damage of Hakimi’s claim that the strikes were accepted, based solely on the voting record. Firstly, that states did not believe the acts to have constituted aggression does not necessarily lead to the conclusion that they did not condemn them. Secondly, Hakimi neglects to look into why states did not support the draft resolution. Ethiopia, for example, will not be listed as a state that considered the strikes illegal, as it abstained from the vote. However, the Ethiopian representative stated that it abstained not because the resolution wasn’t truthful or in line with its principles (“it was”), but out of “pragmatism” as “even if [the resolution] had received 9 votes in favour it would have been vetoed”.\footnote{Representative of Ethiopia, UNSC meeting 14th April 2018}

Looking beyond the voting record carries further significance with third world states. As noted in 3.2.1, relying only on formal material sources for the creation of customary law was not democratic. Though speeches made in the Council may be political parlance to some nations, for third world countries their brief tenure on the Security Council offers a forum for their underrepresented opinio juris to be publicised. This demonstrates that looking to the voting record alone will not offer a clear picture of opinio juris. Ethiopia clearly stated that the draft resolution was truthful and reflected its principles, and should therefore be considered a dissenting state. This demonstrates the challenges the non-aligned and third world states face in having their views counted – they are either underreported, misreported or, if taken into consideration, ineffective owing to the veto powers of the permanent five.

3.3.2 Chapter 3, section 1, subsection 2 (The adverse impact on the law of self-defence)

The adverse impact on the law of self-defence comes from the signal the UK, France, and US are sending that unilateral force can be used outside of the strict boundaries imposed by Article 51. This is further compounded by the fact that, contrary to many academics’ assertions, there is not such a clear-cut case for the strikes morally legitimate.

3.3.2.1 Powerful states no longer consider Article 51 the only exception to the prohibition

The erosion of Article 51 is evident in the Secretary General’s comment that the Cold War is “back with a vengeance” but without the “mechanisms and safeguards to manage the risks
of escalation” that used to exist. The mechanisms and safeguards he is referring to are those enshrined in the Charter, namely the prohibition in Article 2(4) and narrow exception to such in Article 51. These rules are of course still positive law, and so the Secretary General’s comment should be taken to reference their inefficacy.

This inefficacy was apparent in France’s statement, on the day preceding the strikes, that it would be a “terrible setback to the international order” if it were to “allow the normalisation of the use of chemical weapons”.

Thus, by implication, France neglected to consider the dangers of the normalisation of the unilateral use of force in violation of the Charter; suggesting that it views the prohibition as so eroded that its violation no longer requires justification, nor will it result in retribution (which it did not). The US likewise held that strikes would defend a “bedrock international norm that benefits all nations”, but failed to even offer an explanation as to why it was worth violating the bedrock of international relations – the prohibition on the use of force - which was previously considered the epitome of a peremptory norm. For its part the UK stated that the use of chemical weapons had “most probably” been the work of the regime, and so not only was Article 2(4) violated without justification, it was done so on the basis of mere probability.

3.3.2.2 The breach of the prohibition was not morally justifiable

Had the strikes been morally justifiable, the adverse impact on Article 51 would have been less. However, as the strikes were a highly capricious use of force, the violation of Article 2(4) is more arbitrary and thus more damaging.

Many academics and commentators considered the strikes “illegal but morally legitimate”. There was much citing of the view of American scholar Thomas Franck that “if the law prohibits that which is widely believed to be just and moral” then “it is not only persons,
but also the law that suffers”. The reliance on this view was predicated on the belief that inaction as regards the use of chemical weapons by the Syrian regime against its own populace (leaving aside the lack of any definitive proof for the 2018 allegations) was worse than a violation of the prohibition of the use of force. This argument is reasonable, but is vulnerable to two counter-points. Firstly, the reaction of the other Security Council member states, advocating “diplomacy” and emphasising that there is “no military solution”, suggests they did not share in the view that violation of the prohibition was justified. The Ethiopian representative surmised the sentiment by acknowledging that “we are all disappointed by the current deadlock” of being unable to unanimously condemn and act upon the use of chemical weapons. Nonetheless, he was sure to stress that that disappointment “should not justify overlooking the obligation to adhere to the principles of the Charter”. This also further demonstrates that Ethiopia’s abstention does not accurately reflect its opinio juris.

The second point that undermines the justification of the strikes is that there was no moral basis for them. Prima facie, preventing the use of chemical weapons against a civilian population with precise missile strikes is a wholly defensible position. However, it fails to take into account how arbitrary and capricious such a position was. By April 2018, approximately half the Syrian population had been displaced and 400,000 Syrians had died since the beginning of the conflict, at least half of them civilians. Furthermore, there had been numerous previous chemical weapons strikes, for example on 21st August 2013 a regime chemical strike in Eastern Damascus killed 800 civilians. Yet it was in response to an unconfirmed strike that had killed an estimated 65 civilians that three members of the Security Council opted to target numerous targets in Syria with missile strikes. Admittedly, the non-proliferation of chemical weapons is enshrined in international law, and their use against civilians is a crime against humanity. But not targeting civilians with any mean of warfare is also enshrined in international law, and to do so also constitute a crime against humanity. It is thus illogical that the three states should consider the supposed killing of 65 civilians as markedly different from other, much more reliably confirmed, instances of the gravest international crimes. The Boliv-

116 The use of Franck was apparently not intentionally ironic, despite Franck’s criticism of superpowers’ rationalisation of their actions creating dangerous precedents that would be followed by fellow superpowers and smaller nations alike
117 UNSC Meeting of the 14th April 2018
118 Representative of Ethiopia, ibid.
ian representative referenced this hypocrisy when he asked; “with what moral authority” will these states invoke the Charter in the future?120

Therefore there was a clear violation of the Charter. The violation undermined the very purpose of the Charter – to maintain peace. The violation challenges the prohibition on the use of force, and thus the efficacy of Article 51 as the sole permissible exception. The violation was widely reported as being accepted by the international community without justification. The violation went unpunished. All of these elements together serve to show the post 9/11 challenge to Article 51 comes not from its substantive conditions, but the political context of its operation.

120 Representative for the Plurinational State of Bolivia, UNSC meeting 14th April 2018
Chapter 4 (The problems with the invocations of self-defence by coalition states participating in the Syrian conflict)

There are three problems with the invocations of self-defence by Coalition states using force in Syria. Firstly, the legal base for action is either the unwilling or unable doctrine, and/or UN Security Council Resolution 2249. Neither of these justifies the use of force considering the unable/unwilling doctrine is not part of customary law (4.1.2.1), ISIL is not a Syrian state-affiliated group, and the Syrian government never invited the Coalition states. Secondly, many states’ opinio juris suggests pre-emptive self-defence is permissible, for which there is no legal basis. Thirdly, states are claiming force lasting years with an unclear purpose and extending far beyond the bounds of necessity and proportionality qualifies as self-defence.

4.1 Chapter 4, section 1 (It is inconsistent with the law to rely upon the unwilling or unable doctrine and resolution 2249 as authorising use of force in self-defence)

It has been demonstrated that ICJ jurisprudence prevents reliance on the unwilling or unable doctrine as authorising self-defence (Chapters 1 & 2). Yet some states continue to invoke it nonetheless. The silence of the majority of states as regards the legality of the unwilling or unable doctrine is problematic. Anne Peters – Director of the Max Planck Institute for Comparative Public Law and International Law and former President of the European Society of International Law – highlights the risk that silence may be interpreted as “implied acquiescence to an extensive interpretation of article 51”. The ignorance of, or apathy towards, third world opinio juris (3.2.1) exacerbates the problem, as the voices of dissent are not being heard or are unjustly discounted. However, as has been suggested (3.1.3) and will be shown (4.3.2) the dissent is not limited to third world states; many of the more powerful actors take issue with certain aspects of the expansion of the use of force. Absent publicised condemnation however, this significant dissent risks being overlooked.

Anne Peters, ‘German Parliament decides to send troops to combat ISIS – based on collective self-defence ‘in conjunction with’ SC Res. 2249’, EJILTalk!, 8th December 2015
4.1.1 Chapter 4, section 1, subsection 1 (Capricious and conflicting invocations of collective and individual self-defence)

Britain’s reliance on the unwilling or unable doctrine was first expressed by then Prime Minister David Cameron in November 2015. Addressing Parliament, he stated that the basis for the Coalition’s (of which Britain is a member) use of force in Syria was that the “Assad regime is unwilling and/or unable to take action necessary to prevent ISIL’s continuing attacks on Iraq – or indeed attacks on us”.122 This statement is one of the first examples of a balancing act the Prime Minister, and the heads of other states, would continue to play whenever justifying use of force in Syria – asserting both collective and individual self-defence at the same time. Moreover, regardless of its illegality, the logic behind Britain’s invocation of the unwilling or unable doctrine is flawed. Cameron claimed the Syrian regime was unwilling and unable to defeat ISIL, and that support would be given to opposition fighters because they are “capable” of “taking territory, holding it, and administering it”.123

4.1.1.1 Syrian government is neither unwilling nor unable

However, throughout the war the Syrian regime still held, controlled, and administered the majority of Syrian territory, and was regaining more than it lost even at this stage. Therefore Cameron’s support for opposition groups was thinly veiled support of the, in his own words, “political transition” the Coalition was seeking, rather than an objective determination of Syrian unwillingness or inability.124 The veracity of Syrian unwillingness or inability was later challenged by Russia in the Security Council, when it asked who benefits from strikes against Syria considering it is “taking the brunt of the fight against terrorism and achieving major victories against it?”125 The coalition’s additional political motives for action do not in themselves make action illegal (2.4.2), but when those additional motives determine the purpose and proportionality of the actions taken they become illegal, as the action can no longer be said to be in self-defence, collective or individual (2.4.2.1).

122 Prime Minister David Cameron before Parliament (House of Commons), 26th November 2015, column 1491
123 Ibid. column 1491
124 Ibid. column 1494
125 Representative of Russia, meeting of the 13th April 2018
4.1.1.2 British government is inconsistent its reliance on resolution 2249

In the same debate, opposition leader Jeremy Corbyn asked Cameron whether resolution 2249 “clearly and unambiguously” authorised strikes in Syria. Cameron responded that he believed “the language in the resolution is very clear”. Either he was avoiding the question, in which case he knew 2249 did not authorise force, or he incorrectly interpreted the resolution. Within days of addressing Parliament, and asserting the right of self-defence, Cameron further invoked Security Council Resolution 2249 as justifying the UK’s military operation in Syria. In his response to the Foreign Affairs Select Committee’s report (tellingly titled ‘The Extension of Offensive [not Defensive] Military Operations to Syria’) Cameron stated that, because resolution 2249 had called upon member states to take ‘all necessary measures’ to prevent and suppress terrorist acts, there “is a clear legal basis for military action against Islamic State in Syria”. However, in the House of Commons briefing paper published just one month later, the finding is that resolution 2249 “does not clearly authorise states to use force”. These discrepancies, and outright contradictions, undermine the strength of Britain’s claim to self-defence, and demonstrate that the most publicised view (that of the Prime Minister) will not always reflect that of the government, let alone the country.

4.1.1.2.1 Resolution 2249 is not a basis for self-defence

Cameron’s reliance on 2249 undermines Britain’s legal position, as 2249 does not authorise self-defence. The Security Council learnt from the failings of resolutions 1368 and 1373. The vague phrasing of those resolutions is not seen in resolution 2249, and the recognition of the right to self-defence that appeared in 1368 and 1373, though it was never intended to authorise such, was taken out to ensure states could not interpret it expansively. Nonetheless, many states have come to see Security Council resolution 2249 as designating IS attacks permanently immanent, therefore relieving individual states from having to “fulfil the criteria for self-defence when considering armed action in Syria”. This view mirrors the mistaken interpretations of the post-9/11 resolutions in conflating the pronouncement of a threat to global peace and security with the finding of an armed attack. Furthermore it assumes that

126 Ibid. column 1496
127 Memorandum to the Foreign Affairs Select Committee, Prime Minister’s Response to the Foreign Affairs Select Committee’s Second Report of Session 2015-16: The Extension of Offensive British Military Operations to Syria, November 2015, page.15 (hereinafter Memorandum)
128 House of Commons Briefing Paper, p.3
non-state-affiliated groups are capable of launching armed attacks in the first place. This ignores not only ICJ jurisprudence, but the more recent report of the UN Special Rapporteur in which it was stated that the resort to force against a non-state-affiliated group “constitutes a violation of sovereignty” which will be an act of aggression “unless conducted with the consent of the host state or with the prior permission of the Security Council”. Resolution 2249 should therefore be taken merely as a reminder that IS will strike again, for the purpose of highlighting the need for the international co-operation that states have been continuously calling for (3.1.2.1).

4.1.2 Chapter 4, section 1, subsection 2 (Invocations of self-defence have become a ‘ritual incantation of a magic formula’)

David Cameron’s uncertainty in advancing a single legal basis for use of force demonstrates that the Britain is invoking as many grounds as it can to better strengthen the chances that one will be accepted. France has taken the same approach, and between 2013 and 2015 attempted three distinct justifications for use of force in Syria. Initially, in the aftermath of a chemical attack in 2013, Prime Minister Ayrault asked Parliament to consent to air strikes against Syria on the basis of a moral duty to protect Syrian citizens. The legality and morality of such a position have been countered already (3.3.2.2). In response to Ayrault’s assertions that whilst Security Council authorisation was “desirable” it was not necessary should France feel compelled to act, the Secretary General twice emphasised that the responsibility to protect was governed by Chapters 6 & 7 of the Charter, and there was no basis for it to be an alternative exception to the prohibition. In response to the rejection of this position, France’s justifications from then onwards relied in self-defence under Article 51. However, France copied Britain in interchangeably invoking individual or collective self-defence (see footnote for examples).

130 UN Special Rapporteur, ‘Promotion of the protection of the rights of man and fundamental freedoms in the struggle against terrorism’, A/68/389 18th September 2013, para.55
133 Letter from the Permanent Representative of France to the United Nations, addressed to the Secretary General, 8th September 2015
134 e.g. 8th September letter references Iraq’s request for assistance (over a year previously) but also alluded to attacks against France and so individual self-defence as well. 15th September 2015 French government, before Parliament, confirmed only its invocation of collective self-defence. 27th September 2015, before UN General Assembly France invokes pre-emptive individual self-defence.
By so readily invoking different forms of self-defence without clear and sustained reasoning, both states’ practice supports Gray’s observation that invocations of self-defence have become something of a “ritual incantation of a magic formula”. Rather than ensuring the threshold for self-defence has been met; states are invoking the term as a catchall for contentious uses of force and expecting little opposition. This was further demonstrated in Cameron’s response to the Foreign Affairs Select Committee report when he asserted that Britain “should not wait until an attack takes place here”. The providence of this claim was soon made painfully apparent, with numerous IS-affiliated attacks on the British capital in 2016. However, the fact that the Prime Minister noted there had yet to be an attack on Britain at that time undermines the invocation of individual self-defence that was made in the same report.

4.1.2.1 The unwilling or unable doctrine is not part of customary law

The final nail in the coffin for Britain’s ill-conceived reliance on the unwilling or unable doctrine comes from comparing the rules of customary formation with Britain’s reliance on the doctrine as customary law. The ICJ in the North Sea Continental Shelf case expanded on the two elements required for the formation of a customary rule – state practice and opinio juris. The Court stated that acts must be performed in such a way that they are evidence of a “belief that this practice is rendered obligatory by the existence of a rule of law requiring it” [emphasis added]. Further finding that states must consider themselves to be acting in accordance with a “legal obligation” as opposed to acts that, whilst frequent, are motivated by “courtesy” or “tradition”. Three points challenge Britain’s reliance on unwilling or unable as conforming with custom.

Firstly, David Cameron noted, “we do not publish our formal legal advice”. Therefore what Britain honestly considers to be its legal obligations cannot be definitively stated. The actual legal position of Britain is thus always filtered through the government, with the government selectively publishing extracts of the advice to its proposals. In the same House of Commons debate, the Attorney General stated that the reason for withholding the legal

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136 Memorandum, p.3
137 North Sea Continental Shelf Case, Judgment, ICJ Report 1969, para.77; confirmed in Nicaragua para.207
138 Ibid.
139 David Cameron speech before House of Commons, 26th November 2015, column 1490
advice is to enable it to be given “in a frank and open way”, which further supports the suggestion that there is often a dichotomy between what British legal advisors believe Britain to be obligated to do, and what the government attempts to justify.\textsuperscript{140} Secondly, considering the broad range of objectives Cameron gave for the strikes it cannot be said that Britain believes itself to be \textit{obligated} to “stem the migratory flow to Europe” or see a “new Government” installed in Syria.\textsuperscript{141}

Finally the timing of the proposal is telling – it was just weeks after the Bataclan attack in Paris. Referring to Britain’s “moral” duty to act, Cameron discloses that the support of France is not legally based, but is more accurately described, to borrow the phrase of the ICJ, as an act of ‘courtesy’ and ‘tradition’.\textsuperscript{142} This same rhetoric will be demonstrated to have also motivated Germany to send troops to Syria (4.3.1). Referencing the Bataclan attack, Cameron states this makes it “clear” that IS’ campaign “has reached the level of an armed attack”.\textsuperscript{143} In doing so, he betrays that he incorrectly considers the armed attack condition to have a gravity threshold only, as opposed to both gravity and state responsibility thresholds. Furthermore, it is notable that Cameron states that the “main basis” of Britain’s invocation of the unwilling or unable doctrine is to act in the collective self-defence of Iraq. This however neglects to state why collective self-defence is only being invoked now, considering Iraq has requested it over a year previously.\textsuperscript{144} Again, this demonstrates that the assertion of the collective self-defence of Iraq is being used as a cover for Britain’s numerous political objectives. These political motives would be acceptable if the conditions for self-defence had been met, but they have not, owing to IS’ lack of state affiliation.

\textsuperscript{140} Ibid.
\textsuperscript{141} Memorandum p.22; House of Commons speech Column 1490
\textsuperscript{142} House of Commons speech column 1490
\textsuperscript{143} Ibid. column 1491
\textsuperscript{144} Annex to the letter dated 20\textsuperscript{th} September 2014 from the Permanent Representative of Iraq to United Nations addressed to the President of the Security Council
4.2 Chapter 4, section 2 (Invocation of a right to anticipatory or pre-emptive self-defence violates proportionality)

4.2.1 Chapter 4, section 2, subsection 1 (Britain invokes contradictory bases for pre-emptive use of force)

Britain relies upon former government advisor Sir Daniel Bethlehem QC’s 12 principles that, it asserts, once satisfied, authorise pre-emptive force against non-state groups. However, despite directly quoting Sir Daniel’s principle expanding on the use of self-defence in response to an imminent attack, Britain also invokes the customary law of the Caroline incident. To reference both these sources as mutually supportive conveniently neglects to consider Sir Daniel’s criticism of the US’ reliance on the Caroline incident; stating that it “sits uneasily with virtually every circumstance other than the 1837 incident it addressed”. This further demonstrates the UK’s scattershot approach to legally justifying its military intervention, as opposed to a single, well-supported legal basis.

4.2.2 Chapter 4, section 2, subsection 2 (Expanding the scope of imminence violates proportionality)

Initially Britain asserts necessity as the determining consideration of the legality of pre-emptive self-defence against an imminent attack. However, it then expands this to the “more extended” concept of imminence set out by Sir Daniel. Whilst Sir Daniel’s consideration of immanence also starts with necessity, it expands the scope of immanence by reducing the base level of requisite knowledge when it holds that the “absence of specific evidence of where an attack will take place or of the precise nature of an attack does not preclude…the exercise of a right to self-defence”. Following this reasoning would lead to two unacceptable outcomes. Firstly, abandoning the need for specific evidence regarding the location or nature of the attack could well mean that, in practice, the less that is known about a potential attack the greater the scope for the use of force.

145 Sir Daniel Bethlehem QC, ‘Not By Any Other Name: A Response to Jack Goldsmith on Obama’s Imminence’, Lawfare Blog, 7th April 2016 – this is the most recent instance of his support of this view, which he had espoused before the publication of the UK legal basis

146 Briefing Paper, p.16 – referencing ‘Self-Defence Against an Imminent or Actual Armed Attack by Nonstate Actors’, AJIL volume 106 No 4, October 2012, p.775

147 Briefing Paper, p.16
Secondly, if the nature of the potential attack is unknown, there is no chance that the state exercising self-defence could knowingly act in conformity with proportionality and necessity (at the most, it may do so accidentally). Given the current trend of state practice, it is likely states would operate on a ‘worst case scenario’ basis, which could justify grossly disproportionate use of force, as it would skew proportionality in the invoking states’ favour. For example, the prevention of a co-ordinated suicide attack in a city centre would permit a significantly greater degree of collateral damage than a ‘lone wolf’ knife attack in a rural village. This issue is compounded by the UK’s recognition of the difficulties in applying proportionality in that it is “much easier” to formulate the principle “in general terms” than apply it in practice as the “comparison is often between unlike quantities and values”. Here however, the comparison would be not only between unlike, but also unknown quantities and values.

4.2.3 Chapter 4, section 2, subsection 2 (Britain misleadingly presents itself as not expansively interpreting the law)

Britain condemns the US’ invocation of a right of pre-emptive self-defence “against attacks that have not yet materialised” in their immanency. The misleading implication of this, which is compounded by the theme of Sir Daniel’s subsequent criticism of the US’ view, is that Britain’s position is in line with an orthodox interpretation of use of force law. In reality, Britain should be seen as less expansive than the US, but expansive nonetheless. Sir Daniel’s reduction of the evidence threshold demonstrates Britain’s expansive approach, and yet it is he who states that in Britain-US relations from 2001 onwards, Britain sought to persuade the US “away from new rhetoric and new analyses” and back to “a legal framework we could all recognise”. However, in a 2017 speech, British Attorney General cast doubt on this dichotomy, and instead aligned Britain with the US by claiming that 9/11 “proved a catalyst” to new legal principles, amongst them the permissibility of self-defence against non-state groups that he believes was “confirmed” and “justified” by Security Council resolutions 1368 and 1373. As has been stated above, these resolutions did not authorise the use of force in self-

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148 Reference made to the Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, para.48-50, at p.17 of the Briefing Paper
149 Briefing Paper, p.16
150 Sir Daniel Bethlehem QC
defence Britain’s interpretation, along with the US’, was purposeful misinterpretation and taking advantage of the graphic attack and emotional reaction.

**4.2.3.1 Attorney General vastly expands Britain’s already expansive pre-emptive self-defence**

Wright supports Bethlehem’s criteria for determining the imminence of an anticipated attack, including the lowering of the evidential threshold. Worryingly, he goes even further by stating “our enemies will not always have fixed plans. They are often opportunists.” At least under Bethlehem’s principles there was certainty of a definite plan, if not the location or nature of such. However, under Wright’s formulation, the mere continuing sentiment to inflict harm, as ‘opportunists’, is sufficient to permit the use of pre-emptive force in self-defence. Again, the irony here is that nine months earlier Bethlehem stated that the US’ shift from pre-emption towards anticipation was them moving away “with deliberate thought and careful consideration, from established tenants of international law”, in what constituted a “fundamental challenge to the edifice” of international law. On the basis of the Attorney General’s speech, Britain can be seen to have made the same deliberate move and thus pose the same challenge, so the Attorney General is mistaken to base his argument upon Bethlehem’s.

Moreover, this move from anticipation to pre-emption entails two inherent flaws. Firstly, Reisman and Armstrong found in their study of contemporary state practice that imminence is interpreted “more flexibly in state responses to terrorist organisations”. The claim made in support of this position is that terrorist organisations do not publicise their intended attacks, but neither do states if they want to use surprise to their advantage, and states are much more capable of launching spontaneous attacks than non-state groups. Secondly, the fact that Britain, as demonstrated by Bethlehem’s statement, was privately urging the US to reduce their expansive interpretation, but was not doing so publically, demonstrates the potential for inaccuracy in allowing the formation of customary law absent significant dissent. Britain certainly was dissenting, but did so only directly to the Americans. The law commis-

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152 Ibid.
153 Sir Daniel Bethlehem QC
154 Reisman and Armstrong - [https://drive.google.com/file/d/0BwJiW6kOLfgiWgiWk1VOWxSVtRTFg/view](https://drive.google.com/file/d/0BwJiW6kOLfgiWgiWk1VOWxSVtRTFg/view)
155 President George Bush, 2003 State of the Union Address, “Some have said we must not act until the threat is imminent. Since when have terrorists and tyrants announced their intentions, politely putting us on notice before they strike?”
sion cannot have known this when gathering international opinio juris, and will thus have erroneously listed Britian as acquiescing to the US’ expansive interpretation (this misreporting echoes Ethiopia dissenting against the missile strikes 3.3.2.2).

4.3 Chapter 4, section 3 (The UK invoked self-defence as it recognised this was the only justification the international community would accept, not because it self-defence was necessary)

This doctrine of pre-emptive self-defence emerged with the invasion of Afghanistan. There was no specified threat the US was repelling, merely the possibility that another attack could occur, as well as retribution for 9/11. Given the scale of the terrorist attack in New York there was some support, at least on a moral basis, for this argument. However, as demonstrated (3.1) the international community did not intend self-defence to be exercised. Building on the lack of explicit condemnation that followed the US’ invocation of self-defence regardless, the US and Britain stretched the scope of pre-emption even further with the 2003 invasion of Iraq. As President Bush stated three days prior to the invasion “we are acting now because the risks of inaction would be far greater. In one, or five years, the power of Iraq to inflict harm on all free nations would be multiplied many times over”.

Acting to avert a threat that may arise five years down the line is clearly far beyond any reasonable interpretation of anticipatory self-defence. Consequently, the US and Britain did not seek to ground the legality of the invasion in self-defence. The international community protested against the invasion before it happened, and condemned it afterwards. The rationale behind the condemnation was clear. Should the right to pre-emptive use of force be accepted, the generalised opportunity for attack “would simply raise the expectation of violence” and therefore states would be forced to “attack sooner rather than later”. This would result in a complete reversal of the UN’s foundational purpose – to maintain peace.

Base pre-emption in the language of self-defence, however, and the international community’s condemnation becomes acceptance. This provides further support for Gray’s

156 President George W Bush, ‘President Says Saddam Hussein Must Leave Iraq Within 48 Hours’, Remarks by the President in an Address to the Nation, The White House, Office of the Press Secretary, 17th March 2003
157 4,721st Meeting of the UN Security Council, 19th March 2003, S.PV/4721 (the day before the invasion of Iraq). Neither the US nor UK representatives invoke the language of self-defence.
158 Ibid. see, for example, the positions of Germany, France, Mexico, Syria.
159 Fassbende, p.442
view of the right of self-defence as having become a “magic formula” that ameliorates the majority of protestation. The clearest example of the effect of the invocation of self-defence comes from comparing states’ reactions to the operation in Iraq in 2003, and the operation in Syria in 2015. Germany, for example, condemned the 2003 operation, stating that it “emphatically rejects” the use of force. This is despite the fact that Germany noted that efforts to disarm Iraq peacefully had “no chance of success” due to Iraq’s unwillingness to comply. Nonetheless, it asked, “can this seriously be regarded as grounds for war with all its terrible consequences?” Finally, Germany felt compelled to stress that the intended use of force had “no credibility” as it lacked the support of the Security Council, and that there was “no basis in the Charter for regime change by military means”. Fast forward to 2015 and Germany was a member of a Coalition, the actions of which were opposed by a majority of states, the precise aims of which were, in David Cameron’s words, the preservation of the opposition to the regime which it wanted to force to the negotiating table.

The actions taken on 2003 and 2015 did not differ only on the invocation of self-defence. There was always the possibility that the particular facts of the situations led to Germany’s condemnation of the use of force in the first instance and participation in the latter. However, looking to the Bundestag debate in which the legality of intervention was considered, this does not appear to be the case. The opposition asked whether Article 51 could be invoked, not against a state, but against “any terrorist act?” Astoundingly, rather than simply taking the view that customary law now permitted such, the Minister for Foreign Affairs avoided the question by stating that “We are not here in a seminar…this is not the hour to explain to the French…that they need not feel attacked”. This reasoning, or rather, avoidance of reasoning, was echoed by a fellow majority member, who called on the Bundestag to “put aside, in the sign of solidarity” considerations of a “differentiated analysis of the legal

160 Gray, p.114
161 Representative of Germany, 4.721st Meeting of the UNSC, 19th March 2003, S.PV/4721
162 Ibid.
163 Ibid.
164 Ibid.
166 Ibid, column 13879
question”. The explicit request thus being for the opposition to decline to challenge the legal basis of a highly contested governmental proposal so as not to insult the French. The German Select Committee had just held that the Bataclan attacks provided the catalyst for an “evolution of customary law”. The implication is that the proximity of the proposal to the Bataclan attacks was, as Cassese noted with 9/11, an ‘emotional response’ rather than an objective decision. The government was manipulating the outpouring of support to France – to have suggested French action was illegal would be an untimely insult that the opposition could not afford to make (hence the comments that ‘now is not the time’ to tell the French they need not feel attack which suggests there would be a suitable time later, and that the proposal was done in ‘solidarity’ with France, rather than on Germany’s own initiative).

4.4 Chapter 4, section 4 (The Coalition states’ actions are extending far beyond the scope of self-defence)

4.4.1 Chapter 1, section 1, subsection 3 (The UK invoked self-defence knowing its actions would extend far beyond the mere repulsion of imminent attack)

As already noted, Britain’s invocation of a right to self-defence served as an umbrella for numerous additional political objectives. David Cameron candidly admitted to Parliament that strikes in Syria were intended to “generate negotiations on a political settlement” whilst “preserving the moderate opposition”, and even prevent “further migratory flows towards Europe”. The problem with the permissibility of these additional objectives is that they undoubtedly lead to actions taken in violation of proportionality. A strike that will force the Assad regime to the negotiating table for example, will be unlikely to be one taken in self-defence against IS. A UN Policy Working Group accurately predicted the dangers of such a possibility. Reporting in the aftermath of 9/11, it warned against the “rubric of counter-terrorism” being used to justify acts “in support of political agendas”. In particular it noted the tendency for states to justify as counter-terrorism acts the actual intention of which was the “elimination of political opponents”, as the Assad regime is to the coalition.

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167 Ibid, column 13891
168 German Parliamentary Scientific Services Report, para.220
169 Memorandum, p.22
171 Ibid.
The intention of the Coalition to remove Assad was demonstrated by David Cameron’s comment that the “broader objective” of Coalition airstrikes was the creation of a “political process” for the installation of a “new Government”.172 The UN Working Policy Group found that labelling operations as counter-terrorist offered a “time-tested technique” to “delegitimise and demonise” the targets of the use of force and, more importantly, legitimise the use of force in the first place.173 The recommendation, therefore, was for the UN to be “aware of offering” or even being “perceived” to offer “blanket or automatic endorsement” of all actions taken in the name of counter-terrorism”.174

Despite this warning, the perception of endorsement has been particularly apparent in states’ misinterpretations of the UN Security Council resolutions 1368, 1373, and 2249. This resulted in the re-iteration of the protest against expansive interpretations of self-defence under the politicised justification of counter-terrorism. The Non-Aligned States, doubtless fed up of having their views discounted (3.2.1) stated that they “rejected” actions taken, in particular the threat or use of force in violation of the Charter “under the pretext of combatting terrorism”.175 This supports the aforementioned idea (3.2) that third world countries should be considered as specially affected by use of force customary interpretations, as they are frequently the victims of the more powerful states expansive urges.

4.5 Chapter 4, section 5 (The Coalition states’ invocation of self-defence is mistaken)

Therefore, it can be seen that the Coalition is not legally justified in invoking self-defence as justification for their use of force in Syria. Self-defence has become a catch-all for states that require justification for using force for political ends.

172 David Cameron, speech before House of Commons, 26th November 2015, column 1490
173 Report of the Policy Working Group on the UN and Terrorism [fn.33], para.14
174 Ibid.
Conclusion

The lineage of self-defence has been traced through its evolution, and demonstrated to have continued, unaltered, through 9/11 and its aftermath. The amount of space devoted to clarifying the law and proving it to have withstood western pressure after 9/11 shows that proponents of complete reform have much to rely on in support of their arguments. That such violations of the law have been blatantly carried out and gone unpunished prove that the law is far from perfect. However, it must be kept in mind that the violations have not gone without dissent; there is resistance in the international community. The problem is not the law itself, but the means of enforcement. After the Nicaragua case the US vetoed the enforcement of any punitive measures against it. That same culture exists to this day, with the US threatening justices of the ICC with prosecution should the continue their examination into war crimes committed by US soldiers in Iraq.

Problematic as this is, it must be kept separate from the substantive law. The law of self-defence is clear. The condition of an armed attack requires state-attribution. The unwilling in unable doctrine does not exist in customary law. This law in its current form is sufficient to uphold the foundational principles of international law - prohibition on the use of force, territorial integrity, and sovereign equality of states.
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