The Art of Article 5: The Utility of NATO's *Jus ad Bellum* in the Face of Ambiguous Warfare

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Air power practitioners can hold at their disposal such destructive, and indeed decisive power, so as to make pertinent, a broad strategic-level understanding of military operations. In the contemporary operating environment, this objective is usually translated as maintaining the International rules-based order, with the cooperation of other nations and within the framework of International law. Moreover, with the deepening complexity of relations between nations, the rapid pace of hostilities enfolding around the world, and the speed at which aircraft can easily move across jurisdictions; attention is continuously demanded as to what future conflicts may arise, how force might be lawfully employed, and air power remains the tool of choice to those in positions of authority that believe they can influence events for the better. Within this context is NATO, an International Organisation that is the greatest amalgamation of military power that the world has ever seen, and a vital element of defence and security strategy for many nations. Whilst the sheer magnitude of NATO's military power is seemingly indomitable, it may turn out to be that NATO's greatest challenge, is advancing a workable legal basis for its military operations, within our modern era.

This article examines the conditions which permit the use of force according to Article 5 of the NATO Treaty, in the light of the applicable International legal framework, as well as recent developments in political and military events. It identifies the legal basis under the NATO Treaty that authorises the use of force as compared to the contemporary threats faced by NATO. The article asks whether Article 5 remains relevant, and functional, or, is in need of reform. It argues that whilst NATO States continue to possess the legal right to engage in collective self-defence measures, the NATO Treaty's utility as an International instrument lies in legitimising the doctrine of deterrence, which has thus far prevented large-scale International aggression.

Introduction

NATO and the International Legal Framework

The legal construct which recognises the rights of States to use force is set out in legal terms in the UN Charter, a document which emerged from deep intergovernmental cooperation in the immediate aftermath of the Second World War. When efforts were renewed to deprecate the 'scourge of war', the rights of States to exist and resist attacks from International aggression were formally recognised and therefore, measures taken in pursuit of 'self-defence' can be deemed as lawful, falling within a relevant exemption to the general prohibition on the use of force. Moreover, the Charter sanctions measures in pursuit of 'collective security' taken by the International community, by authority vested in the UN Security Council. However, the UN was not the only International institution to materialise in the post-war world; through NATO, certain European States and the USA formed a military alliance that guaranteed they would assist each other in respect of acts of aggression against them. Article 5 of the NATO Treaty mirrors Article 51 of the UN Charter in that it decrees NATO States have the right to collectively use force, to defend each other from an armed attack in collective self-defence. Whilst NATO had been designed to protect against the specific threat of the expansion of the Soviet empire, NATO was never called upon in this regard, and its Treaty obligations had never been invoked until after the end of the Cold War, in the onset of the September 11th attacks. In one sense, the NATO Treaty can be deemed as a tremendously effective document, in that it gave a legal basis to the policy of deterrence (which seemingly succeeded in preventing a full scale Cold War) as well as recognising the inherent right of States to resort to the use of force on a collective basis. On the other hand, NATO forces have now been deployed for prolonged periods in order to combat the threat of International terrorism, when this had never been the intended purpose at the time of NATO's formation, thus prompting scepticism as to the legitimacy of NATO's use of force.

Since the establishment of the post-war International legal framework, the potentially catastrophic danger that the world faced through inter-State war has largely subsided, although in 2014, a threat to the interests and stability of European States became very apparent from a resurgent Russia and its seizure of the Crimea. The threat is however difficult to define and involves the use of next generation, or 'ambiguous' warfare, through the deployment of unconventional tactics, including asymmetric and cyber attacks, which may be hard to properly attribute and counter.[1] Concerns have been raised that Russian actions have been deliberately calculated so as to fall outside of a remit that would potentially trigger the collective self-defence principle as is understood by Article 5 of the NATO Treaty.[2] Meanwhile, amidst Russian military intervention in Ukraine and the regional instability posed by the onset of Islamic State in the Middle East, the most recent NATO summit was held in Wales in September 2014 and made clear that NATO States would abide by their Article 5 Treaty obligations, in order to assist each other in the face of an armed attack; NATO, International law and the use of force have new found relevance.[3]

The International legal framework, under which States can lawfully employ force, has been of considerable interest to scholars. There is a range of opinion as to what circumstances are sufficient to qualify as an armed attack, thereby triggering the lawful use of force in rebuttal. Moreover, in the face of budgetary constraints on much of the world's defence spending, policy initiatives have looked to collective self-defence, as a means of ensuring protection from outside military aggression. Participation in NATO forms a central place in the UK's defence strategy. Against this background, this article aims to offer an original contribution to the debate by examining NATO's use of force and asking whether there is any need for the reform of Article 5. It will be argued that the NATO Treaty already makes clear that NATO will respond to acts of International aggression, so as to deter such, and prevent potential conflicts taking place; besides that, it is clear the prohibition on the use of force in International law already applies to 'indirect aggression', a state of affairs falling short of war, which is most likely to encompass ambiguous warfare. In summary, this article will examine the theoretical and legal doctrines as to the prohibition of the use of force and relevant exemptions; the rationale behind these positions and where the debates have reached thus far; the current defence policies concerning NATO and possible responses to Russia's ambiguous warfare; established critiques of NATO and collective self-defence; and discusses if the NATO Treaty might be amended to better achieve its aim. In conclusion, remarks are offered as to the direction of the continuing debate on the lawful use of force.

NATO and the Use of Force

A. The Academic Views

With its stunning array of military power and an impressive diversity of forces and brigades under its control, NATO is undoubtedly the world's most powerful military organisation[4] and remains important in the shaping of military doctrine.[5] NATO has continued to expand, taking on a new lease of life into the 21st Century, when it might not otherwise have done, and its efficacy in using force cannot be disputed. As well, NATO plays a significant role in shaping the understanding of the legal constraints on the use of force.[6] Meanwhile, the central debates and doctrinal positions taken by scholars on the legality of the use of force have tended to focus on State practice, including the pre-emptive use of force and responses towards terrorism, rather than the fact and status of the world's great military alliance. Whilst there is nothing inherently unlawful in the NATO Treaty and the obligation conferred upon its members, through Article 5, to use force in the face of an armed attack upon any of them, it ought to be remembered that the character of International law which prohibits the use of force is explicit – Article 2.4 of the UN Charter bans the use of force between States, save for the exceptions of self-defence, or Security Council authorisation, as is found in Chapters VII and VIII. At present, there is a fragile consensus that force can only be lawful when used by States within the legal paradigm of the UN Charter, although the peremptory nature of the prohibition on the use of force has come under increasing attack over the past decade, particularly with the military interventions, led by a 'coalition of the willing' into Iraq and Afghanistan respectively. It had been claimed by the US Administration that the legitimacy

of those conflicts arose in circumstances that had not been originally envisioned by the UN Charter and thus, these recent military interventions have been justified by the novelty in method and the potential degree of destruction that would be executed, if possible, by the perpetrators of the terrorist attacks of 9/11, as well as the intentional sense of alarm spread by them - giving rise to reciprocal novel rights of States to use force.[7]

Moreover, it is argued that doctrines of anticipatory self-defence, preventative self-defence, regime change, revival theory, humanitarian intervention, State responsibility, and pre-emptive strike, now have legitimacy because of the security challenges faced in the 21st Century.[8] So it goes, the applicable limitations originally imposed upon States, by International law, on the use of their military power (force) since the founding on the UN Charter, and as so eloquently set out in the seminal work of over 50 years ago by Ian Brownlie QC FBA, in '*International Law and the Use of Force by States*' ought to be viewed in light of contemporary State practice and therefore reinterpreted, in a more permissive light. However, when a UN high level panel came to consider the sufficiency of the International legal framework, and particularly, whether the rules on the use of force (including Article 51 of the Charter) are sufficient, the conclusion was that they were, and its recommendation was that there need be no reform.[9] Nevertheless, debates as to the sufficiency of the legal framework and the legacy of conflicts in Iraq and Afghanistan on the understanding of the lawful use of force have continued for sometime thereafter. In '*Reappraising the Resort to Force*'[10] Moir carefully examined the impact of the Iraq and Afghanistan conflicts. His observation was that while Article 51 of the UN Charter was drafted in a State-centric paradigm, which it seems States have reasonably moved on from, the UN Charter paradigm is not dead and it would be dangerous and premature to conclude that any enduring change to International law has occurred.[11] Moreover, that there ought not to be a loosening of the constraints on the use of force is a view forcefully espoused by Corten in his considerable polemic on '*The Law Against War: The Prohibition on the Use of Force in Contemporary International Law*'.[12] This scholar goes a considerable way to demonstrate just exactly how the prohibition on the use of force, and its peremptory nature, remains one of the cornerstones of International law. For Corten, the question of what suffices as an armed attack, according to Article 51, can be answered definitively by reference to the context and formal discussions at the time of the Charter's configuration.[13] Therefore, the term 'force' mentioned in Article 2.4 was deliberately chosen, as differing from what is an 'armed attack', the later denoting a military act, as opposed to adverse economic or political action.

In addition, Corten sees particular significance as to what qualifies as an armed attack, in the definition of 'aggression' appended to Resolution 3314 (XXIX), adopted by consensus by the UN General Assembly in 1974.[14] Thus, it is only by very stringent criteria, that unlawful force becomes an act of violence, which is necessary to meet the definition of aggression, or armed attack. However, in practice, while the Security Council does not abide by such a definition to guide it in determining situations of aggression, or whether an armed attack has occurred, the text also provides an informative basis as to the question of 'indirect aggression' – which

involves certain adverse measures taken by one enemy State against another, thus falling short of a direct military operation. Even so, according to Corten's (restrictive) view of International law, such forms of belligerent confrontation by States are not sufficiently recognised (by precedent or case law) as giving rise to the right of self-defence. Another major contribution to the literature comes from Yoram Dinstein in War, *Aggression and Self-Defence*. While Dinstein recognises a number of situations 'short of war' which involve the limited use of force, he contends that in legal terms 'there are only two states of affairs in international relations – war and peace – with no undisturbed middle ground'.[15]

Consequently, it would appear clear that Article 5 of the NATO Treaty is drafted in terms that are analogous to Article 51 of the UN Charter and means that nothing short of an actual armed attack, meaning a substantial and intentional, military incursion into the sovereign territory of a State, will entitle NATO to use force. Albeit, if an applicable situation which would activate the Article 5 obligation to resort to the use of force may be capable of evolving into novel circumstances that were not envisioned at the establishment of NATO, such circumstances must be determined carefully on a case by case basis, with utmost care being taken not to proliferate the use of force. However, the problem that has been identified by the UK Select Committee's report on recent Russian actions, is a profound one, and does not seem to have been adequately dealt with in academic opinion as yet. Essentially, in recent times, NATO has come to grapple with the threat of "ambiguous warfare", "asymmetric warfare", or "next generation warfare" and in particular, certain techniques posed by Russian forces in unconventional attacks upon its neighbouring States. The deliberate and sustained types of attacks by Russia against Estonia (2007), Georgia (2008) and Ukraine (2014) include substantial cyber attacks, information and psychological operations, attacks on the target economy and proxy attacks which have involved Russian Special Forces (Spetsnaz).[16] The Select Committee has concluded that Russian asymmetric tactics represent a new challenge to NATO; it would appear that events in Ukraine demonstrate that Russia has the ability to effectively paralyse an opponent and such operations may have been deliberately designed to come short of aggression, or an armed attack, so as to evade any potential invocation of Article 5.

B. Policy Positions

Despite the seeming end of the Cold War, the UK has recognised that there are a myriad of future threats which are relevant to the use of military force. In January 2010, the UK Ministry of Defence published the 4th edition of "*Strategic Trends Programme – Global Strategic Trends – Out to 2040*" which demonstrated the need for wide understanding of the possible future strategic environment and sought to place this into some form of context.[17] Likewise, the UK's National Security Strategy proclaims that *In a world of startling change, the first duty of the Government remains: the security of our country*[18] – thus, resort to collective self-defence, in the form of participation in NATO, forms a central part of the Strategy, as well as featuring prominently in British defence doctrine.[19] The US has similarly stated that it will work

closely with International allies, including NATO, further to the principle of collective security.[20] The current US National Security Strategy, promoted by President Obama, exhibits a notable departure from previous US Strategy – it is evident that later US foreign policy initiatives have sought to distance the Administration from the past approval of pre-emptive warfare under the Bush doctrine.

In the context of the Cold War, it is easy to see how the UK and US have viewed their policy positions, as to defence and national security, through recourse to NATO. The deterrence theory was made credible by NATO, as a major international actor with a substantial nuclear arsenal at its disposal. However, while Article 5 was drafted with the potential threat of Soviet aggression in mind, specifically in attempting to defend against any furtherance of its political control of Eastern Europe into other parts of the continent, it was not the Cold War which led to the invocation of the clause, rather the terrorist attacks upon the World Trade Center in New York City on 9/11. NATO therefore found relevance and a new lease of life into the 21st Century, when it might not otherwise have done, not through the policy of deterrence, but through its unforeseen participation in the International security architecture, and taking on a role of combating the phenomenon of global terrorism.[21]

Thus, as the importance and use of NATO, as a means to enforce international peace and security grew exponentially, NATO deployed and sustained the world's most potent military forces in the far flung destinations of the former Yugoslavia, Afghanistan and Libya; it remains responsible for the defence of 900 million citizens around the world, and over 70% of the world's military expenditure; it is a strategic alliance that must face rapidly changing challenges, in terms of environments in which to operate, defending against the most difficult and dangerous potential armed attack (upon any of its members), being prepared to face unknown hostile aggressors and having the arrangements in place to meet the threat of other contingencies, such as nuclear warfare.[22] NATO's political purpose is commonly addressed through its biennial summits, which serve as a means for Heads of State and Heads of Government of member nations to consider the strategic direction of NATO activities. NATO summits frequently serve as a means of shaping new policies and initiatives.[23] Furthermore, NATO is an organization that uses International law to further its political purposes. In particular, when the detente between NATO and Russia started in 1991, there was a deliberate attempt to establish the footing between the great powers by International agreements, such as with the NATO-Russia founding Act[24] and NATO has been instrumental in the peace agreements that took place in the aftermath of the Bosnian conflict;[25] NATO has defined its International legal position, necessary for military operations, through the negotiation of certain privileges and immunities from potential legal suits, on a multi-lateral basis and throughout the various jurisdictions of the Alliance and outside it, by its Partnership for Peace (PfP)[26] and Status of Forces Agreements.

However, it is NATO's seeming success, through enlargement and posturing towards the concerns of Eastern European countries, which has been said to have triggered the apparent

Russian riposte. In the post Cold War world, Russia has attempted to re-assert its military prowess and in particular, Russian aspirations for grandeur have been expressed through the Putin Presidency. The Russian position is that NATO ought to have been disbanded at the end of the Cold War and its continuing accession of new allies has deliberately undermined Russian security interests. Moreover, Russia has been critical of the legality of NATO operations in Kosovo and more recently in Libya, suggesting that the deployment under the Responsibility-to-Protect doctrine and the operationalisation of UN Security Council Resolutions 1970 and 1973 was contrary to International law. Accordingly, Russia reckons that there are new threats to its national security, presented by an increased NATO and its global activity, such that in December 2014 Russian military doctrine was updated.[27] Russia sees its armed forces as a defensive tool, only to be employed as a last resort. The primary aim of Russia's nuclear forces is to serve as a deterrent against an attack on the Russian homeland, particularly against one which – whether using conventional or nuclear weapons – might threaten the nation's very existence.

NATO and the Thin Red Line?

A. Why Collective Self – Defence

Whilst there is considerable benefit for NATO members in the policy of collective self-defence, which is given a firm legal basis through Article 5 of the NATO Treaty, as well as Article 51 of the UN Charter, it ought to be remembered that NATO's relationship with International law has not been an entirely positive one. 'A thin red line' –is how Bruno Simma (a former Judge of the International Court of Justice) described the threat, or use of force by NATO without UN authorisation, in regard to the ensuing Kosovo crisis in 1999. If the 1999 air strikes against the then Federal Republic of Yugoslavia had breached the UN Charter, or taken the possibility of doing so unto a knife-edge (as most commentators say)[28] it is prudent to ask, where are we now, and more specifically, whether any further erosion of the UN paradigm can be attributed to NATO; Simma went on to say that the NATO Treaty implies subordination to the principles and practice of the UN Charter and furthermore, that if repeated, there was a great potential for the actions of NATO to undermine International law.[29] On the other hand, the widespread regional destabilisation in Ukraine and unlawful annexation of the Crimea, are well documented and can only be properly attributed to Russian indirect aggression.[30] The Eastern European and Baltic States that once feared for their existence are still protected by Article 5 of the NATO Treaty, as the Wales Summit has recently made explicitly clear, the principle of collective self-defence is the most logical and arguably the only, manner in which to ensure the continued existence of small States that are considerably weaker than Russia in military terms.

Nonetheless, the legality of collective self-defence remains contingent upon a response being made to an actual armed attack and throughout the Cold War, there seemed to be little doubt as to what an armed attack entailed. Then, in the wake of the War on Terror, the question became unsettled, through the targeting of non-State actors and the pre-emptive use of force.

Russia's recent military intervention into Ukraine has highlighted the question of whether force can be lawfully employed, as a result of indirect aggression. Despite massive developments in the manner and motivations for modern military operations,[31] NATO and the principle of collective self-defence endures as an effective means of protecting States against International aggression. However, there are definite criticisms that are in order: whilst NATO carries on with a renewed sense of purpose, it ought to be remembered that NATO is not a nation, nor cannot be properly understood as a collection of nations, or States with legal personality, such as the EU, or US. NATO's legal status has meant that it is difficult to hold accountable and NATO has never been successfully sued before any national court.[32] Neither is NATO an institution that is formally connected to the UN, such as the International Court of Justice, but NATO is an International Organisation that is supposed to be strongly allied to the principles and purposes of the UN (this includes the peaceful resolution of disputes and developing friendly relations among nations).[33] Moreover, NATO has yet to formally take on the promotion of human rights and recognise the jurisdiction of the International Criminal Court, which would be important objectives in the context of a mature International Organisation.

The ambitious system that was originally set out by the UN Charter in 1945, envisioned an amalgamation of world military power, ready to take on any threat to International peace and security, contributed to by all the members of the United Nations, being made available to the Security Council to direct and control. This has not been done, although the applicable legal provision that sought to make it so is Article 43 of the Charter, which still remains in place. In reality, a rather different system of International security architecture is at play, which relies on delegations of power from the UN Security Council to a range of powers, namely the Secretary-General, groups of States, UN subsidiary organs, and regional arrangements, including NATO.[34] Simma's critical observation that NATO is not subordinate to the will of the UN is a weighty one and NATO's autonomy to interpret the circumstances which will give rise to its collective self-defence obligations, does not yet bestow any corresponding obligations in International law.

B. Amendment of the NATO Treaty?

International law recognises a philosophical belief that the use of force (war) has brought terrible consequences to mankind and must only be permitted in situations of necessity, only then as a last resort, and then to a proportional extent. In the context of the total war, which was World War II, it is easy to see why.[35] However, the recent pursuit of Russian stealth tactics constitutes indirect aggression and ought to be addressed by the International community. If Article 5 can be interpreted in a manner that is set in motion by the type of behaviour from Russia, which has caused concern in the House of Commons Select Committee report, then this would signify a significant shift in International law. The report suggests this may be desirable and goes as far as to say that consideration ought to be given to amending the NATO Treaty, so as to remove the adjective 'armed' from the phrase 'armed attack', signifying that NATO would be entitled to respond to the full breadth of the Russian unconventional

threat, stretching into economic and energy policy.[36] The appeal in this proposed reform is that it would signify the obligations conferred upon States by the NATO Treaty are being taken seriously and reviewed against a relevant state of play in international affairs. However, because of the analogous relationship between Article 5 of the NATO Treaty and Article 51 of the UN Charter, any such re-interpretation of an armed attack, if adopted and exploited by other unscrupulous States, would be likely to have far reaching consequences for the concept of self-defence in International law altogether.

On the other hand, the Vienna Convention on the Law of Treaties requires that the words of a Treaty be interpreted in their context and in the light of the Treaty's object and purpose, and therefore, a good case exists that the NATO Treaty can already be used in a manner that means it can recognise and respond to measures that come short of an armed attack (with proportionate force). In fact, most commentators agree that whilst there is a particular threshold for an armed attack to cross,[37] NATO remains entitled to reply to any lesser use of force, against any of its members, if it so chooses. As of late, NATO's disposition in this respect seems to be very much reflected in its increased enthusiasm for Baltic air policing measures, and upping of military training exercises in Eastern Europe.[38] Moreover, on a practical level, very little has been established in terms of an alternative model to NATO and the collective self-defence doctrine, save for pursuing a policy of pacifism. So, while the NATO Treaty is not a comprehensive instrument comprising all existing and foreseeable aspects of military defence and security policies (and was not meant to be), it could, with sufficient political impetus, be followed by the conclusion of further subject-specific instruments which would set out in more precise terms, exactly what NATO deems to be sufficient to trigger its Article 5. An obvious example would be the conclusion of an international accord to formalise the NATO position on its stance relating to Cyber attacks, although, the apparent disadvantage in stating anything more than NATO's decision-making process is done on a case by case basis, is that it may lead to criticism that it has acted irrationally, when not demonstrating such discretion as could be expected of it.

Either way, if the NATO Treaty is amended or not, the point has been made clear: NATO continues, and it will safeguard its members' right of self-determination. Thus, as NATO's deterrence factor may continue to prevent a full-scale world war occurring again and so far as appropriate measures are taken, falling short of force, to censure Russian indirect aggression, then there is no need to reform Article 5, as there has been no need to reform Article 51. A thorough examination of the law provides that it remains functional and relevant and does not inhibit the use of lawful military force when necessary. Indeed, to counter the behaviour of Russia, such a fundamental structural change to International law is radical and unnecessary; rather, the more pressing concern is the practical matter of military preparedness and ability to show that the NATO deterrence factor is a credible one. If this can be achieved, then the present International rules based system will be preserved – a departure into an unknown, contradictory world at Russia's behest could prove very difficult to reverse and have cataclysmic consequences.

C. Lawfare

Consequently, another observation is in order: whether by fault, or design, and with surprising success, the framers of the NATO Treaty encapsulated a legal means to provide for the implementation of an established military strategy: the doctrine of deterrence. Whether the law can ensure that other strategic objectives and principles are provided for, in an evermore unstable and dangerous world, is now a fitting question. In the aftermath of the conflicts in Iraq and Afghanistan, there is an increasing concern from not only the public, but also from senior military commanders, down to the junior ranks, that the full range of military operations, from influence, to coercion, through to intervention, and full-scale invasion, are legal.[39] The NATO Treaty proves that a certain aspect of military strategy can be contained coherently within a legal document and accordingly, further research would be welcome on which other aspects of military doctrine would lend themselves to being enshrined in legal statute, such as ensuring that certain percentages of GDP must be spent on defence spending, or that International Humanitarian Law (IHL) is applicable over International Human Rights Law (IHRL) in a non-International armed conflict.[40]

Indeed, whilst deterrence is a long established defence policy, and military alliances are found throughout history, certainly in Biblical times,[41] the growing resort to litigation over the use of force - 'lawfare', is a phenomenon that now deserves serious attention. Lawfare has been defined as 'the *abuse* of Western laws and judicial systems to achieve strategic military or political ends' and 'the exploitation of real, perceived, or even orchestrated incidents of law-of-war violations being employed as an unconventional means of confronting a superior military power'; so that from this perspective, lawfare consists of 'the negative manipulation of international and national human rights laws to accomplish purposes other than, or contrary to, those for which they were originally enacted'.[42] Thus, whilst States remain legally entitled, either individually, or collectively, to deploy armed forces (and use force), in a range of circumstances that classify as self-defence, another aspect of the difficulty in doing so comes not from violent conflict that their Servicemen may face in an operational theatre, but the damage that can be done by the very accusation (real or imaginary) that their mission, or conduct, is unlawful.[43] The logic of deterrence does not apply in these circumstances and much damage would be done if the NATO model could be fragmented by such an indictment.

Conclusion

The range of circumstances that will trigger Article 5 of the NATO Treaty is renewing the debate on the lawful use of force; the UN Charter paradigm does not seem a good fit for current challenges from the Russian political agenda and the utility of the law is again, under scrutiny. International law has long been used to contain the use of force and there ought to be considerable caution attached to the calls to broaden the definition of armed attack, so as to permit a response to a wider ambit of hostile acts; the danger in an extensive interpretation remains that it may result in unintended consequences, such as States using force on a more

regular basis to settle disputes. Moreover, debates concerning NATO are unique because of the sheer scale of the International Organisation and what is at stake if mistakes are made (the spectre of nuclear war has not gone). Whilst there remains a lawful basis upon which States will continue to defend each other militarily, it seems likely that the enlarged NATO will exhibit a propensity for divergent views, as to the immediacy and level of seriousness, of any given threat posed.

As the practical basis of what military force is used for changes, it is inevitable that there will be further paradigm shifts and further questions raised about the functionality and relevance of International law on the use of force. Into the future, NATO's relationship with International law will be defined by how it reacts in such, as yet unforeseen circumstances, and utilises increasing developments in technology.[44] However, there are also important lessons for NATO that can be learned from history and in particular, the causes of the First World War. The Great powers that fought each other had formed ad hoc defensive alliances, when it was unclear that they would do so, giving rise to unpredicted and catastrophic consequences.[45] It is argued that the success of the NATO Treaty has been that it makes clear which States will react to outside aggression and where the balance of military power ultimately lies.[46] The absence of a full-scale conflict with the Soviet Union - the Cold War going 'hot' - would seem to support this view and it is therefore to be welcomed that debate has not stopped on how the Treaty is to be understood, and can continue to play an important role in maintaining International peace and security.

NATO has become less connected to the UN and has developed outside the original intention of its role as a regional organisation, as set out in Chapter VIII of the UN Charter.[47] Continued debate as to NATO's relationship with the UN is therefore also due and attention ought to be paid to understanding why UN forces have seemingly failed, where NATO succeeds, that is, in implementing sustainable peace keeping and peace enforcement missions. Thus, while debate continues as to when force can be legally used in the modern world, it ought to be remembered that relevant legal doctrines on the definition of indirect aggression have existed for longer than a generation; defining how force can be deployed effectively, and legally, in a contemporary environment, seems to be an endeavour of continuous effort, requiring rigorous and systematic analysis.[48] Moreover, what seems to be needed, in a world that enjoys only fragile condition of peace, is further debate as to how the national, and International, legal systems[49] can successfully categorise and permit appropriate countermeasures to combat ambiguous warfare (within the confines of proportionality and novel circumstances). The principle of the International rule of law remains relevant to influencing the behaviour of States and the application of air power; it must be employed within an existing International security architecture that, like the Royal Air Force itself, may have to fight, to ensure the continuance of its very own existence.

Notes

[1] See Justin Bronk "Russia Outflanks the West" RUSI Defence Systems, 7 Nov 2014: www.rusi.org.
[2] See Defence Committee of the UK House of Commons -Third Report 'Towards the next Defence and Security Review: Part Two-NATO': http://www.publications.parliament.uk/pa/cm201415/cmselect/cmdfence/358/35807.htm.
[3] The 'Wales Declaration' set out the various agreements that were reached at the NATO Summit Wales 2014 and further actions for NATO: https://www.gov.uk/government/publications/nato-summit-2014-wales-summit-declaration/the-wales-declaration-on-the-transatlantic-bond.
[4] See the Institute for Strategic Studies The Military Balance for the figures from which this assertion is derived.
[5] NATO's definition of doctrine, used unaltered by many member nations, is: '*Fundamental principles by which the military forces guide their actions in support of objectives. It is authoritative but requires judgement in application*' see: AJP-01(D) ALLIED JOINT DOCTRINE (December 2010) available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/33694/AJP01D.pdf.
[6] NATO has not systematically codified its doctrines on when to use force, but it has released the NATO Legal Deskbook, which is intended to reflect, as closely as possible, the policies and practice of NATO in legal matters. However, the Deskbook is not a formally approved NATO document and therefore does not purport to reflect the official opinion or position of NATO. Thus, while the Deskbook is not intended to supplant national guidance on a range of issues, and is a refinement of working practices and experiences gained over the past few years (since its earlier 2008 edition), it can be deemed as a useful compilation for understanding the issues coming before NATO legal advisors. See the Second Edition (2010) of NATO Legal Deskbook is available at: http://publicintelligence.net/tag/north-atlantic-treaty-organization/.
The deskbook reflects the policies and practices of NATO members, but is not a formally approved document and is more a compilation to enable understanding of the issues which NATO legal advisors face.
[7] A primary advocate for the legality of the Iraq War also became the Rt. Hon. Tony Blair, his evidence before the Iraq Inquiry can been seen at: http://www.iraqinquiry.org.uk/transcripts/oralevidence-bydate.aspx.
[8] The debate is explored by C Chinkin in 'Rethinking Legality/Legitimacy after the Iraq War' pp. 219-247 in R Falk, M Juergensmeyer and V Popovski (eds) *Legality and Legitimacy in* Global *Affairs* (OUP 2012).
[9] United Nations High-Level Panel on Threats, Challenges and Change '*A More Secure World: Our Shared Responsibility*' (2 December 2004) UN Doc A/59/565. Available at: http://www.un.org/en/peacebuilding/pdf/historical/hlp_more_secure_world.pdf.
[10] Moir, L *Reappraising the Resort to Force* (Hart Publishing 2010).
[11] Ibid. pp. 150-6.
[12] The title of that work being translated from the famous Latin expression 'Le droit contre law guerre' Corten, O *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing 2012).

[13] Ibid. pp. 402 ff.
[14] Article 3(g) of the Definition of Aggression and its interpretation includes a provision which holds a State responsible for the sending of irregular forces according to certain stringent conditions, thus concerning the matter of State attribution.
[15] Y Dinstein, War, Aggression and Self Defence 5th Edition (Cambridge: CUP, 2005). p. 16
[16] See fn. 2, p.12-17.
[17] The document is available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/33717/GST4_v9_Feb10.pdf.
[18] A Strong Britain in an Age of Uncertainty: The National Security Strategy (Oct. 2010) p. 3. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/61936/national-security-strategy.pdf.
[19] Joint Doctrine Publication 0-01 UK Defence Doctrine (Nov. 2014): https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/389755/20141208-JDP_0_01_Ed_5_UK_Defence_Doctrine.pdf.
[20] US National Security Strategy (May 2010): http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.
[21] See Chicago Summit Declaration, by the North Atlantic Council 20 May 2012: http://www.nato.int/cps/en/natolive/official_texts_87593.htm?mode=pressrelease.
[22] The Strategic Concept adopted at the 1999 Washington Summit described future threats as 'multidirectional and often difficult to predict'.
[23] Medcalf, J *NATO* (Oneworld Publications 2005).
[24] See discussion in: '*NATO enlargement and the NATO-Russian Founding Act: the interplay of law and politics*' International & Comparative Law Quarterly 1998, 47(1), 192-204.
[25] '*The role of NATO in the Peace Agreement for Bosnia and Herzegovina*' European Journal of International Law 1996, 7(2), 164-175.
[26] http://www.nato.int/cps/en/natolive/topics_50086.htm.
[27] http://rt.com/news/217823-putin-russian-military-doctrine/.
[28] Chinkin, C '*The Legality of NATO's Action in Yugoslavia*' 49 ICLQ 910 (2000).
[29] Simma, B '*NATO, the UN and the Use of Force: Legal Aspects*' EJIL (1999) 10 (1).
[30] "Amnesty International considers the war to be "an international armed conflict" and presented independent satellite photos analysis proving involvement of regular Russian army in the conflict. It accuses Ukrainian militia and separatist forces for being responsible for war crimes and has called on all parties, including Russia, to stop violations of the laws of war. Amnesty has expressed its belief that Russia is fuelling the conflict, 'both through direct interference and by supporting the separatists in the East' and called on Russia to 'stop the steady flow of weapons and other support to an insurgent force heavily implicated in gross human rights violations'. See - http://www.amnesty.org/en/region/ukraine.
[31] So says the highly experienced military practitioner, General Sir Rupert Smith, in *The Utility of Force: The Art of War in the Modern World* Allen Lane; First Edition edition (2005) p. 269.
[32] An excellent take on the unfruitful attempts by the former FRY to sue NATO is provided by Olleson, S in '*Killing Three Birds With One Stone'? The Judgments of the International Court of Justice in the Legality of Use of Force Cases*", Leiden Journal of International Law, vol. 18 (2005), p. 237.

[33] http://www.un.org/en/documents/charter/chapter1.shtml.
[34] Sarooshi, D *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers Oxford Monographs in International Law* (OUP 2000) p. 251.
[35] In *The War of the World: History's Age of Hatred* Penguin (2009) Niall Ferguson looks at why the 20th Century was the most violent in man's history, arguing that despite the globalisation, and booming economies married to technological breakthroughs that seemed to promise a better world for most people, it proved to be overwhelmingly the most violent, frightening, and brutalized in history; with fanatical, often genocidal warfare engulfing most societies between the outbreak of the First World War and the end of the Cold War. It was an age of hatred that ended with the twilight, not the triumph, of the West and, he warns, it could happen all over again.
[36] Ibid, p. 34.
[37] See above.
[38] See W. Boothby, *Weapons and the Law of Armed Conflict* (Oxford: OUP 2009).
[39] See Campbell McLachlan"*Foreign Relations Law*" (Cambridge: CUP, 2014).
[40] This was the position of the Ministry of Defence, that was argued unsuccessfully to the Court of Appeal, so that it held British Forces had had no right to detain the first appellant in Afghanistan for more than 96 hours, in *Serdar Mohammed v Ministry of Defence and Rahmatullah & the Iraqi Civilian Claimants v Ministry of Defence & Foreign and Commonwealth Office* [2015] EWCA Crim 843.
[41] In Genesis 14, Abram encounters kings and chieftains who not only are named, but also have territories and military associations that are spelled out in detail; Joshua, as Moses's successor, distinguished himself as a wise and courageous military leader, his successful campaigns against the inhabitants of Canaan, led them to forge alliances with other local populations and fight as a common front against Israel; cf. the Prophet Ezekiel's complaint against the unholy alliances that Israel created with the Egyptians and Assyrians (Ch. 16).
[42] The Lawfare Project: *What is Lawfare?* http://www.thelawfareproject.org/what-is-lawfare.html.
[43] The Policy Exchange have published a paper that is very critical of what it suggests has been 'sustained legal assault' on British forces, which could have 'catastrophic consequences' for the safety of the nation: Tugendhat, T., Morgan J. & Ekins, R'*Clearing the Fog of Law Saving our armed forces from defeat by judicial diktat*': http://www.policyexchange.org.uk/images/publications/clearing%20the%20fog%20of%20law.pdf.
[44] A fascinating account of what futuristic warfare will entail is capsulated by Singer, P.W. in *Wired for War: The Robotics Revolution and Conflict in the 21st Century* (Penguin books 2009); furthermore, see Sutherland, B. in '*Modern Warfare, Intelligence and Deterrence: The technologies that are transforming them*' Economist books (2011).
[45] MacMillan, M. *The War that Ended Peace: How Europe abandoned peace for the First World War* (Profile Books 2013).
[46] A recent and useful article has been published by Buckley, E and Pascu I on '*How to Avoid Wars: NATO's Article 5 and Strategic Reassurance*' http://www.atlanticcouncil.org/publications/articles/how-to-avoid-wars-nato-s-article-5-and-strategic-reassurance.

[47] Gazzini, T '*NATO's role in the collective security system*' JCSL 2003 (231).
[48] Boothby has offered a relevant and complete overview of the law of weapons in armed conflict. He makes out a compelling case that the law concerning the means of warfare (that is, weapons, or weapons systems, in an armed conflict) is arguably one of the most important areas of *ius in bello*: Boothby, W *Weapons and the Law of Armed Conflict* (OUP 2009).
[49] In *Foreign Relations Law* (CUP 2014) Campbell McLachlan QC has made a worthy contribution by examining the legal principles that govern the external exercise of the public power of States within common law legal systems (the United Kingdom, Australia, Canada and New Zealand). McLachlan concludes that the prime function of foreign relations law is not to exclude foreign affairs from legal regulation, but to allocate jurisdiction between the national and the international legal systems.