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Silence within the process of normative change and evolution of the prohibition on the use of force: normative volatility and legislative responsibility[§]

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ABSTRACT

Focusing on the operations of the ‘Global Coalition against ISIL’ in Syria, this article examines whether the mere silence of states in view of state actions that challenge the established readings of Article 2(4) and Article 51 of the UN Charter might induce and consolidate a process of normative change (and, if so, under what conditions). The article argues that silent behaviour generates norm-evolutionary effects only under strict conditions. Such effects occur if other states and the international community can legitimately expect that a state will make its dissenting position known. The identification of such an expectation requires an overall assessment of numerous factors, including: the determinacy of the legality claims made by the acting states; the capacity of silent states to act; the specific circumstances in which a claim was made; the determinacy of reactive claims of other actors; and questions of time, as well as the nature of the affected rules. This article concludes by finding that mere passivity in light of the legal claims currently made with regard to Coalition airstrikes against ISIL positions in Syria does not amount to ‘acquiescence’.

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I. Introduction

Since the 9/11 attacks international law scholarship has engaged in a controversial debate over the normative dynamics of the prohibition on the use of force and the right to self-defence. This debate was (re)ignited by the legal claims put forward (most notably) by the US and UK with regard to interventions in Afghanistan and Iraq, but it has remained vibrant ever since and

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reached a second apex with the commencement of military operations by the ‘Global Coalition against the Islamic State and the Levant’ (Coalition) in Iraq and Syria in September 2014 (‘Operation Inherent Resolve’). As in 2001 and 2003,¹ the Coalition’s justificatory narrative revolves around the right to individual and collective self-defence. Discussions concerning a normative evolution of Article 51 of the UN Charter² focus on notions such as ‘pre-emptive self-defence’, ‘armed attacks by non-state actors’ and the ‘unwilling or unable’ standard. It has been frequently asserted that state practice has led to a reinterpretation,³ modification⁴ or even amendment of the prohibition on the use of force and its corollary, Article 51, or at least that these norms ‘have to be read differently’ in order to secure international law’s capability to deal effectively with terrorist threats. Sometimes a mere ‘relaxation of standards’ is asserted.⁵ All these different expansionist lines of argument arrive at their conclusion by referring to the (contested) practice and explicit contentions⁶ of a limited number of states, the verbal support of these actions and claims by few other states, and the fact that they are *not opposed* by the remaining majority of states.⁷

The purported significance of ‘non-opposition’ – i.e., silence – in the context of normative dynamics is in contrast to the considerable lack in its theoretical conceptualisation in international legal doctrine. Just as silence can have communicative content in conventional conversations, it is possible for it to yield legal effects within the discursive process of law formation and evolution.⁸ The aim of this article – itself a contribution to the general

¹It is worth noting that in 2003 the US ultimately decided to refer to Security Council resolutions, and an (untenable) interpretation of them, to justify its conduct. See n 337 and accompanying text.

²All norms cited without a specific identification are enshrined in the UN Charter.

³See Yutaka Arai-Takahashi, ‘Shifting Boundaries of the Right of Self-Defence: Appraising the Impact of the September 11 Attacks on *Jus ad Bellum*’ (2002) 36 *The International Lawyer* 1081, 1101.

⁴Kimberley Trapp, ‘Back to Basics: Necessity, Proportionality, and the Right of Self-Defence against Non-State Terrorist Actors’ (2007) 56 *International and Comparative Law Quarterly* 141, 156.

⁵Eric Heinze, ‘The Evolution of International Law in Light of the Global War on Terror’ (2011) 37 *Review of International Studies* 1069, 1094. On ‘expansionist strategies’, see Jörg Kammerhofer, ‘The Resilience of the Restrictive Rules of Self-Defence’ in Marc Weller (ed), *The Oxford Handbook on the Use of Force in International Law* (Oxford University Press, 2015) 627.

⁶See critique by Ulf Linderfalk, ‘Post 9/11 Discourse Revisited’ (2010) 2 *Goettingen Journal of International Law* 893, 931.

⁷See Arai-Takahashi (n 3) 1082, 1095; Mary Ellen O’Connell, ‘American Exceptionalism and the International Law of Self-Defence’ (2002–2003) 31 *Denver Journal of International Law and Policy* 1, 46; Steven R Ratner, ‘*Jus ad Bellum* and *Jus in Bello* After September 11’ (2002) 96 *American Journal of International Law* 905, 910; Michael N Schmitt, ‘Counter-Terrorism and the Use of Force in International Law’ (2002) 32 *Israel Yearbook of Human Rights* 53, 77; Antonio Cassese, ‘Terrorism is Also Disrupting Some Crucial Legal Categories of International Law’ (2001) 12 *European Journal of International Law* 993, 996; Ove Bring and David I Fisher, ‘Post-September 11: A Right of Self-Defence against International Terrorism?’ in Diana Amnéus and Katinka Svanberg-Torpman (eds), *Peace and Security* (Studentlitteratur AB, 2004) 177, 190. See Monica Hakimi, ‘The Two Codes on the Use of Force’ (2016) *European Journal of International Law* (forthcoming) (reading the widespread passivity of states in light of contentious conduct).

⁸Interpretation and the creation of meaning can likewise be seen as a process of discourse and negotiation. See Ingo Venzke, *How Interpretation Makes International Law* (Oxford University Press, 2012) 57 (referring to Robert Brandom, ‘Some Pragmatist Themes in Hegel’s Idealism: Negotiation and Administration in Hegel’s Account of the Structure and Content of Conceptual Norms’ [1999] 7 *European Journal of Philosophy* 164).

law-shaping communicative process⁹ – is not to develop a general theory of international normative dynamics, or to capture all ‘grey zones of (il)legality’ connected with norm-evolutionary processes. This article’s objective is merely to examine whether, and, if so, to determine the circumstances under which, the silence of states might contribute to an evolution of norms of international law, and specifically the prohibition on the use of force and the right to self-defence.

This article starts, in section II, by determining where normative silence might potentially become effective in doctrinal terms. Section III then elaborates the factors that are significant for attributing legal effects to silence. Ultimately, this article applies, in section IV, the pattern – developed in the previous sections – to the current normative discourse on the intervention of the Coalition against the Islamic State and the Levant (ISIL) in Syria focusing particularly on the legal claims made by participating and non-participating states.

II. Silence and the normative dynamics of Article 51 of the UN Charter

Article 51 is a treaty norm. While the right to self-defence is also rooted in customary international law (CIL),¹⁰ the present author submits that, with the adoption of the UN Charter, the CIL version of the right has melded with its conventional counterpart into one uniform norm. On the one hand, the customary right to self-defence solidified under the influence of the Charter and, on the other, Article 51 incorporated some pre-existent customary requirements (for example, proportionality) rendering them genuinely conventional elements.¹¹ Both emanations of the right establish congruent conditions for the legality of forceful counteractions.¹² This

⁹See Ingo Venzke, ‘Semantic Authority, Legal Change and Dynamics of International Law’ (2015) 12 *No Foundations* 1.

¹⁰*Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (merits) [1986] ICJ Rep 14 paras 178, 179.

¹¹See identical letters dated 5 April 1992 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed respectively to the Secretary-General and the President of the Security Council, UN Doc S/23786 (6 April 1992) 1; *Legality of the Threat or Use of Nuclear Weapons* (advisory opinion) [1996] ICJ Rep 226, 592, dissenting opinion of Judge Koroma; *Nicaragua* (merits) (n 10) 152, dissenting opinion of Judge Singh. For critique, see Raphael van Steenberghe, ‘State Practice and the Evolution of the Law of Self-Defence: Clarifying the Methodological Debate’ (2015) 2 *Journal on the Use of Force and International Law* 81, 88, 90.

¹²*Nicaragua* (merits) (n 10) paras 178, 179; Ian Brownlie, *International Law and the Use of Force by States* (Clarendon Press, 1963) 272 et seq.; Olivier Corten, *Law against War* (Hart Publishing, 2010) 411; Christine Gray, *International Law and the Use of Force* (Oxford University Press, 2nd edn 2004), 98 et seq.; Albrecht Randelzhofer and Georg Nolte, ‘Art. 51’ in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte and Andreas Paulus (eds), *The Charter of the United Nations: A Commentary* (Oxford University Press, 3rd edn 2012) paras 13, 63; Tarcisio Gazzini, *The Changing Rules on the Use of Force in International Law* (Manchester University Press, 2005) 121; Avra Constantinou, *The Right of Self-Defence under Customary Law and Article 51 of the Charter* (Ant. N. Sakkoulas, 2000) 204; Roberto Ago, ‘Add. to 8th Report on State Responsibility’ (1980-II) 32 *Yearbook of the International Law Commission*, Part 1, 63. *Contra*, Derek

article is deliberately limited to analysing possible normative change in the conventional emanation of self-defence, under Article 51.

i. Modes of normative change

The term *change* is used in this article in order to circumscribe the process by which different normative content is ascribed to a provision that then surfaces in its application and conflicts with its previous understanding.¹³ Two different processes can induce change: interpretation or amendment. Both are doctrinally distinct. A change by interpretation is within the scope of the normative force of the original provision, while an amendment derives its binding nature from a distinct ‘legislative’ act. Conservatively portrayed: interpretation clarifies law, amendments make law.¹⁴ An amendment can occur in a formal or informal manner. The former is governed by treaty-amendment procedures (such as those provided for in Articles 108 and 109 of the UN Charter). Going beyond that, the prevalent view is that treaties can also be amended informally – under more or less rigid conditions – by a tacit agreement¹⁵ (which will not be analysed further here) or subsequent CIL, binding the parties in accordance with the principle of *lex posterior derogat legi priori*.¹⁶ It should be noted, however, that Article 103 of the Charter, together with Articles 108 and 109, reflect a ‘major step towards constitutionalism’¹⁷ on the international legal plane, being emanations of the ‘constitutional character’¹⁸ of the Charter (which functions as the legal

W Bowett, *Self-Defence in International Law* (Manchester University Press, 1958) 185; Timothy L H McCormack, *Self-Defence in International Law* (Magness Press, 1997) 211; Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, 5th edn 2011) 96 et seq.

¹³See Robert Goodin, ‘Toward an International Rule of Law’ (2005) 9 *Journal of Ethics* 225, 230.

¹⁴See Venzke (n 8) 51 et seq.

¹⁵See Third Report for the ILC Study Group on Treaties over Time, Subsequent Agreements and Subsequent Practice of States Outside of Judicial or Quasi-judicial Proceedings, Conclusion 13, reprinted in Georg Nolte (ed), *Treaties and Subsequent Practice* (Oxford University Press, 2013) 307, 385.

¹⁶Antonio Cassese, *International Law* (Oxford University Press, 2nd edn 2005) 154; Michael Akehurst, ‘The Hierarchy of Sources under International Law’ (1974–1975) 47 *British Yearbook of International Law* 273; Mark Villiger, *Customary International Law and Treaties* (Nijhoff, 1985) 224 et seq. VCLT Draft, art 68 (1964) explicitly allowed a treaty to be modified by CIL. This provision was eventually deleted because it went beyond the scope of codification, although it was acknowledged that it reflected established law. See UN Convention on the Law of Treaties, Vol. I, UN Doc A/CONF.39/C.1/SR.53 (26 March–24 May 1968) 207 (Finland); *Ibid*, 211 (Poland); *Ibid*, 213 (Netherlands); Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Nijhoff, 2009), Issues of CIL, para 32; see Nancy Kontou, *The Termination and Revision of Treaties in the Light of New Customary International Law* (Clarendon Press, 1994) 139.

¹⁷Bardo Fassbender, ‘The United Nations Charter as Constitution of the International Community’ (1998) 36 *Columbia Journal of Transnational Law* 529, 579. See, generally on ‘constitutionalist’ schools of thought in international law, Bardo Fassbender, ‘The Meaning of International Constitutional Law’ in Ronald Macdonald and Douglas Johnston (eds), *Towards World Constitutionalism* (Martinus Nijhoff, 2005) 837; Stefan Kadelbach, ‘Völkerrecht als Verfassungsordnung? Zur Völkerrechtswissenschaft in Deutschland’ (2004) 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1.

¹⁸Fassbender, ‘UN Charter’ (n 17) 529; Randelzhofer and Nolte (n 12) para 4; Bardo Fassbender, *UN Security Council Reform*, 1998, 137 et seq. For critique, see Thomas Kleinlein, *Konstitutionalisierung im Völkerrecht* (Springer, 2012) 409 et seq.

foundation of the international community).¹⁹ It is a basic feature of constitutions that they ‘aspire[s] to eternity’ and contain procedural safeguards against procedurally uncontrolled or arbitrary amendments²⁰ thereby inserting a hierarchal moment into the legal order.²¹ Against this background, the possibility of amending the UN Charter in an ‘informal’ manner could very well be questioned.

Nevertheless, for the purpose of this article, such a theoretical possibility is presumed.²² Since states – as ‘masters of their treaties’²³ – are both legislators and interpreters, it has been frequently asserted that treaty amendment and interpretation tend to blur, and thus that normative change has to be seen as a continuum, or a ‘sliding scale’.²⁴ Besides attributing an ‘evolutive’ character to terms,²⁵ parties may also convey a different meaning to treaty provisions by way of an ‘interpretative agreement’, evidenced in their practice in the application of the relevant treaty (as established by Article 31(3) of the Vienna Convention on the Law of the Treaties

¹⁹Fassbender, ‘UN Charter’ (n 17) 589. See, with regard to the term ‘international community’, Andreas Paulus, *Die internationale Gemeinschaft im Völkerrecht* (Beck, 2001); Bruno Simma and Andreas Paulus ‘The “International Community”: Facing the Challenge of Globalization’ (1998) 9 *European Journal of International Law* 266.

²⁰Fassbender, ‘UN Charter’ (n 17) 578.

²¹Normative hierarchy is the key of the constitutionalisation thesis. See Giovanni Biaggini, ‘Die Idee der Verfassung – eine Neuausrichtung im Zeitalter der Globalisierung?’ (2000) Neue Fassung 119 *Zeitschrift für Schweizerisches Recht* 445, 473.

²²One might well argue that the modification of the counting modus concerning voluntary abstentions of Permanent Members in the Security Council without an express adaption of art 27(3), of the UN Charter amounted to an informal amendment. However, see *Legal Consequences for States of the Continuing Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 16, 22, para 22. See generally on this issue, Akehurst (n 16) 273 et seq.; Tom Ruys, *Armed Attack and Article 51 of the UN Charter* (Cambridge University Press, 2010) 23 et seq. Cp. Draft Conclusion 7(3) of the ILC stipulating that parties are presumed to interpret a treaty by subsequent agreements or practice in its application and not to amend it, Report of the International Law Commission, Sixty-eighth session, 2016, A/71/10, 122.

²³ILC, Draft Articles on the Law of Treaties with commentaries, *Yearbook of the International Law Commission* (1966) vol. II, 236; Wolfram Karl, *Vertrag und spätere Praxis* (Springer, 1983) 42, 204. Even the ICJ has not always regarded it as being necessary to distinguish between interpretation and modification. See *Territorial Dispute (Libyan Arab Jamuhiriyya/Chad)* (merits) [1999] ICJ Rep 6, 31, para 60.

²⁴Ruys (n 22) 23, 28. See Villiger, *Commentary on the VCLT* (n 16) art 31, para 25. Villiger, *CIL and Treaties* (n 16) 220, 344. See, regarding the blurring line between interpretation and modification, ILC, *Third Report on the Law of Treaties*, by Sir Humphrey Waldock, Special Rapporteur, A/CN.4/167 and Add.1–3, 60, para 25; Salo Engel, ‘Procedure for the De Facto Revision of the Charter’ (1965) 59 *Proceedings of the Annual Meeting of the American Society of International Law* 108, 113; Salo Engel, ‘Living International Constitutions’ (1967) 16 *International and Comparative Law Quarterly* 865, 909; Rebecca Crotoft, ‘Change without Consent: How Customary International Law Modifies Treaties’ (2016) 41 *Yale Journal of International Law* (forthcoming); Anthea Roberts, ‘Power and Persuasion in Investment Treaty Interpretation’ (2010) 104 *American Journal of International Law* 179, 201. See also Stuart Ford, ‘Legal Processes of Change: Article 2(4) and the Vienna Convention on the Law of Treaties’ (1999) 4 *Journal of Conflict and Security Law* 75, 105 (taking a very far-reaching view); Andrea Bianchi, ‘The International Regulation of the Use of Force: The Politics of the Interpretive Method’ (2009) 22 *Leiden Journal of International Law* 651, 659. See also Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press, 2008) 359; Richard Gardiner, *Treaty Interpretation* (Oxford University Press, 2nd edn 2015) 27; Gazzini (n 12) 120.

²⁵See, for example, Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Like Products, WT/DS58/AB/R (6 November 1998) paras 127–31.

(VCLT)).²⁶ Therefore, the mere fact of interpretation can also induce a significant evolution of normative content.²⁷ Interpretation is an important element of international law-making.²⁸ Some even characterise it as a means of informal ‘amendment’.²⁹ It is true that interpretative authority and control over semantics conveys authority to define the content of provisions.³⁰ Particularly powerful states frequently sell their *de lege ferenda* policies as mere ‘reinterpretations’ of norms, since it is onerous to collect sufficient support for their amendment.³¹ While the present author still takes the view that interpretation and amendment remain doctrinally distinct processes irrespective of the practical difficulties in separating them,³² it is important to note that even if we remain ‘technically’ in the realm of interpretation, one should remain sensitive to the accompanying dimension of normative change. This awareness should be reflected in the application of principles that guide processes of interpretative evolution. In any case, the requirements for establishing a normative change of Article 51 are strict irrespective of whether the relevant process is characterised as amendment or mere reinterpretation.³³

ii. Commonalities between the ‘interpretative agreement’ and CIL, and the role of silence

The discussion around a change to the normative command of Article 51 focuses either on its reinterpretation in light of subsequent state practice (as per Article 31(3)(b) VCLT) – the so-called ‘performance interpretation’³⁴ – or its change by subsequent, conflicting CIL. States argue either that the terms used in Article 51 have to be read differently or they invoke a customary right of self-defence that modifies the prerequisites of Article 51.³⁵ Although

²⁶Vienna Convention on the Law of the Treaties (1969) 1155 *United Nations Treaty Series* 331. Although the ‘interpretative agreement’ is only one factor amongst others (e.g., wording, purpose) to be taken into account within an interpretative operation, in practice it is of immense importance, Sean D Murphy, ‘Relevance of Subsequent Agreement and Subsequent Practice for the Interpretation of Treaties’ in Georg Nolte (ed), *Treaties and Subsequent Practice* (Oxford University Press, 2013) 82, 85.

²⁷See Christian Djeflal, *Static and Evolutive Treaty Interpretation* (Cambridge University Press, 2015) 193, 199 et seq.

²⁸Venzke (n 8) 18 et seq.

²⁹German Federal Constitutional Court (judgment of 12 July 1994) BVerfGE 90, 286, 362 et seq.

³⁰Jan Klabbbers, ‘Constitutionalism and the Making of International Law’ (2008) *No Foundations* 84, 87; Jan Klabbbers, ‘The Meaning of Rules’ (2006) 20 *International Relations* 295.

³¹Michael Byers, ‘Preemptive Self-Defence’ (2003) 11 *Journal of Political Philosophy* 171, 182.

³²See van Steenberghe (n 11) 81 et seq.

³³Regarding reinterpretation, see Randelzhofer and Nolte (n 12) para 4.

³⁴W Michael Reisman, ‘Necessary and Proper’ (1990) 15 *Yale Journal of International Law* 316, 323 et seq.

³⁵States tend also to invoke a customary right of self-defence existing parallel to art 51 but departing from its prerequisites. Such a customary right has – purportedly – remained untouched by art 51. This assumption is incorrect: as already argued at n 10 et seq. and accompanying text. A teleological interpretation suggests that one should regard art 51 – as it stands – as being identical to the customary right of self-defence. Assuming that Charter provisions can be amended by subsequent CIL (see n 13 et seq. and accompanying text), an evolution of the customary right of self-defence departing from the prerequisites of art 51 would have to be seen as an amendment of art 51.

these processes occur on distinct doctrinal levels, taking a pragmatic stance, it cannot be denied that the mechanisms of reinterpretation in light of state practice on the one hand and change of treaty provisions by subsequent CIL on the other are steered by prerequisites that display a parallel, although not congruent, structure. These commonalities are closely connected to the structure of international law.³⁶ Both derive their normative force from objective facts requiring general, consistent and concordant practice.³⁷ In the case of Article 31(3)(b) of the VCLT the practice of the treaty parties is decisive,³⁸ whereas in the case of general CIL a widespread practice of an overwhelming number of states has to be evidenced.³⁹ State practice in itself, however, is insufficient to establish specific normative content (in the case of a reinterpretation) or the formation of a new rule (in the case of CIL): Article 31(3)(b) requires that state practice reflects an established ‘interpretative agreement’ obliging the parties.⁴⁰ Therefore, the practice of the parties to a treaty has to mirror their ‘subsequent intention ... to interpret the treaty in a certain way’.⁴¹ In contrast, CIL emerges when a specific *opinio juris* is given, understood – in the case of general CIL – as the conviction of an overwhelming number of states⁴² that a certain practice is (or shall be⁴³) legally permitted or obligatory.⁴⁴ Whilst an ‘interpretative agreement’ implies a specific consent of each party, CIL emerges from a rather abstract consensus.

³⁶See Orakhelashvili (n 24) 359 (‘precisely because State practice is an element of international law-making, its relevance in the process of treaty interpretation has to be considered on those very same conditions on which State practice can be part of international law-making in general’).

³⁷Rudolf Bernhardt, ‘Customary International Law’ in Rudolf Bernhardt (ed), *Encyclopaedia of International Law* (North-Holland, 1992) 901. With regard to art 31(3)(b) of the VCLT, the practice has to occur in the application of the treaty. See Ian M Sinclair, *Vienna Convention on the Law of Treaties* (Manchester University Press, 1984) 137; Oliver Dörr and Kirsten Schmalenbach, ‘Art. 31’ in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties* (Springer, 2012) paras 79, 80.

³⁸Karl (n 23) 345; Engel (n 24) 116. *Contra* Akehurst (n 16) 277 et seq.

³⁹Villiger, *CIL and Treaties* (n 16) 220. It is, of course, highly disputed as to how many states actually have to participate in a certain practice for a CIL norm to emerge, see Patrick Dumberry, *The Formation and Identification of Rules of Customary International Law in International Investment Law* (Cambridge University Press, 2016), 133 et seq.; Brian D Lepar, *Customary International Law* (Cambridge University Press, 2010) 153 et seq.; ILC, Second report on identification of customary international law, 2014, A/CN.4/672, para 53.

⁴⁰See Orakhelashvili (n 24) 356; Dörr and Schmalenbach (n 37) para 80; Karl (n 23) 268.

⁴¹Julian Arato, ‘Subsequent Practice and Evolutive Interpretation’ (2010) 9 *The Law and Practice of International Courts and Tribunals* 443, 452.

⁴²Obviously, disagreement also continues to exist over how many states have to display a concordant belief that a general state practice reflects what the law is or should be, see n 39.

⁴³Robert Kolb, ‘Selected Problems in the Theory of Customary International Law’ (2003) 50 *Netherlands International Law Review* 119, 139; Lepar (n 39) 8.

⁴⁴Hersch Lauterpacht, ‘General Rules of the Law of Peace’ in *Collected Papers*, Vol. I (Cambridge University Press, 1970) 79 et seq.; Olufemi Elias, ‘The Nature of the Subjective Element in Customary International Law’ (1995) 44 *International and Comparative Law Quarterly* 501; Maurice Mendelson, ‘The Subjective Element in Customary International Law’ (1996) 66 *British Yearbook of International Law* 177, 181, 195. Individual consent is, however, not required, see Andrew T Guzman, ‘Against Consent’ (2012) 52 *Virginia Journal of International Law* 747, 775. The contrary ‘tacit consent’ view is taken by Dionisio Anzilotti, *Corso di diritto internazionale* (Athenaeum, 1928) 68. For non-consensualist approaches, see Andrew T Guzman and Jerome Hsiang, ‘Some Ways that Theories on Customary International Law Fail’ (2014) 25 *European Journal of International Law* 553, 554. See, for the indeterminacy thesis,

Silence could potentially become effective within both operations – the ‘interpretative agreement’ as well as the formation of CIL – and within both processes in an objective and subjective dimension.⁴⁵ It is generally acknowledged that the practice of some treaty parties might become ‘practice’ in the meaning of Article 31(3)(b) VCLT if all others do not object to it.⁴⁶ International judicial bodies have, however, accepted this only under very strict conditions.⁴⁷ Correspondingly, the emergence of CIL does not require that all states participate in a certain practice⁴⁸ to render it generally binding, if corresponding actions of some ‘movers and shakers’ are broadly endorsed by inactive states.⁴⁹ Since the *Lotus* case, it has been established that non-protest in light of discernible state practice might be seen as evidence of *opinio juris*,⁵⁰ which also applies in the treaty context.⁵¹ However, it is likewise acknowledged that silence only issues legal effects if it evidences the ‘genuine belief’ of the treaty parties that a certain interpretation is binding,⁵² or the ‘genuine conviction’ of states that a certain conduct is commanded or allowed by law. A belief lacks genuineness if it is solely motivated by self-interest or coercion. It is also difficult to establish genuineness if it is highly likely that a state would reject a rule’s validity if it were held against it (‘hypothetical reciprocity’).⁵³ Obviously, it is challenging to deduce such a ‘belief’ – irrespective of how many states actually have to ‘believe’ that the state conduct in question reflects what is or should be legally permissible in the case at hand⁵⁴ – from mere inaction, due to its conditional character.⁵⁵ Since genuineness is particularly questionable in situations in which only a few states act,⁵⁶ it becomes the core problem in determining the possible norm-evolutionary effects of silence.

Martti Koskeniemi, *From Apology to Utopia* (Cambridge University Press, 2005). An intention of the states to depart from a conventional rule is not necessary for a new CIL norm to have amending effect, see Villiger, *CIL and Treaties* (n 16) 222.

⁴⁵With regard to CIL see ILC, Third Report on identification of customary international law, 2015, A/CN.4/682, para 19 et seq. Regarding subsequent practice see Draft Conclusion 10 (3), ILC, Report (n 22) 122.

⁴⁶ILC, Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, UN Doc A/CN.4/L.833 (3 June 2014) Draft Conclusion 9(2); Draft Conclusion 10 (3), ILC, Report (n 22) 122; Gardiner (n 24) 266; Dörr and Schmalenbach (n 37) para 83; Villiger, *Commentary on the VCLT* (n 16) art 31, para 22; Mustafa Yasseen, ‘L’Interprétation des Traités d’après la Convention de Vienne sur le droit des traités’ (1974) 151 *Recueil des Cours de l’Académie de Droit International de la Haye* 1, 48.

⁴⁷*People’s Republic of China/Republic of Philippines*, PCA Case N° 2013–19 (award) para 552; *Nuclear Weapons* (advisory opinion) (n 11) 66 et seq., paras 19, 27; *Kasikili/Sedudu Island (Botswana/Namibia)* [1996] ICJ Rep 1045, para 48 ff., 74.

⁴⁸Zdenek J Slouka, *International Custom and the Continental Shelf* (Nijhoff, 1969) 14. *Contra* Malgosia Fitzmaurice, ‘Treaties’ in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of International Law* (Oxford University Press, 2010) para 70.

⁴⁹See ILC, Third Report (n 45) para 20; Maurice Mendelson, ‘The Formation of Customary International Law’ (1998) 272 *Recueil des Cours* 155, 255 et seq.

⁵⁰*S.S. Lotus Case* [1927] PCIJ Rep 23.

⁵¹Draft Conclusion 10 (3), ILC, Report (n 22) 122.

⁵²See Bernhardt (n 37) 900 (acknowledging the role of silence within the subjective element).

⁵³See Goodin (n 13) 242 et seq.

⁵⁴See n 42.

⁵⁵See also Alexander Somek, ‘The Spirit of Legal Positivism’ (2011) 12 *German Law Journal* 729, 754.

⁵⁶Olivier Corten, ‘The Controversies over the Customary Prohibition on the Use of Force: A Methodological Debate’ (2005) 16 *European Journal of International Law* 803, 818.

Both reinterpretation by way of subsequent practice and amendment by subsequent CIL concern the basic conundrum of normative dynamics on the international plane: while norms are not invalidated by violations, each violation potentially carries the seed for the emergence of new law.⁵⁷ Since a violation of treaty or customary law is a potential way to amend it, and states violating international law might be seen as ‘norm entrepreneurs’,⁵⁸ the question arises whether a violator striving for normative change in fact might be respecting the rule of law and not acting ‘truly’ illegally (under certain conditions).⁵⁹ Not being able to answer this question sufficiently at this point, the present author accepts this paradox as a given, and, thus, this article focuses on the role that silence might play in this regard.

III. The legal implications of silence

Not ‘everything states do that goes unprotested by other states must be legal’.⁶⁰ Therefore, this section aims to determine the possible effects of remaining silent in light of emerging state practice that deviates from the established readings of Articles 2(4) and 51, and to delineate the circumstances under which silence could amount to legally relevant assent (‘acquiescence’). Silence is, first, a fact and a verbal omission accompanied by a certain *mens rea*.⁶¹ Silence, therefore, is devoid of content. Its potential ‘communicative substance’ – one might say ‘eloquence’ – is contingent on conventional patterns of conduct and communication, albeit highly circumstantial, and depends on external factors.⁶² Depending on the specific context, silence can mean opposition or acceptance, or may

⁵⁷*Nicaragua* (merits) (n 10) 98; Ruys (n 22) 28; Jörg Kammerhofer, ‘Uncertainty in the Formal Sources of International Law’ (2004) 15 *European Journal of International Law* 523, 531; Jonathan Charney, ‘The Persistent Objector Rule and the Development of Customary International Law’ (1985) 56 *British Yearbook of International Law* 1, 21; Michael Glennon, ‘How International Rules Die’ (2005) 93 *Georgetown Law Journal* 939, 957; Jacob Cogan, ‘Noncompliance and the International Rule of Law’ (2006) 31 *Yale Journal of International Law* 189, 196 (embracing ‘operational noncompliance’ as means to remain system operability). For critique, see Karol Wolfke, ‘Controversies Regarding International Customary Law’ (1993) 24 *Netherlands Yearbook of International Law* 1, 8; Michael Byers and Simon Chesterman, ‘Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law’ in Jeff L Holzgrefe and Robert Keohane (eds), *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (Cambridge University Press, 2003) 177, 188. On the function of law as stabilizer of normative expectations, see Niklas Luhmann, *Law as a Social System* (Oxford University Press, 2004) 149 et seq.

⁵⁸See Martha Finnemore and Kathryn Sikkink, ‘International Norm Dynamics and Political Change’ (1998) 2 *International Organization* 895.

⁵⁹See Goodin (n 13) 231. See Jean-Pierre Fonteyne, ‘The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the U.N. Charter’ (1974) 4 *California Western International Law Journal* 203 (regarding the so-called theory of ‘acceptable breach’).

⁶⁰Anthony A D’Amato, *The Concept of Custom in International Law* (Cornell University Press, 1971) 99. On the question of silence in general, see Gionata Piero Buzzini, ‘Le comportements passifs des Etats et leur incidence sur la réglementation de l’emploi de la force en droit international général’ in Enzo Cannizzaro and Paolo Palchetti (eds), *Customary International Law on the Use of Force* (Nijhoff, 2005) 79 et seq.

⁶¹Rein Müllerson, ‘The Interplay of Objective and Subjective Elements in Customary Law’ in Karel Wellens (ed), *International Law: Theory and Practice, Essays in Honour of Eric Suy* (Martinus Nijhoff, 1998) 165.

⁶²Karl (n 23) 279. See ILC, Fourth Report on Unilateral Acts of States, Victor Rodríguez Cedeño Special Rapporteur, UN Doc A/CN.4/519 (30 May 2001), 5–6, paras 26–7.

remain neutral (that is, convey no message whatsoever).⁶³ Establishing that silence ‘speaks’ and determining its content are interpretative endeavours. Since the core sources of international law rest on a consensual basis, scholars have frequently referred to principles of private law in order to fill this theoretical loophole of interpretation.⁶⁴ While the private law analogy is imperfect, some private law principles were indeed internalised by international doctrine – but not without going through a process of adaptation.

Since the reinterpretation of treaty norms in light of state practice and their amendment via CIL display – taking a rather pragmatic look at them – a parallel process-structure, it is submitted that in both cases similar factors separate legally irrelevant toleration⁶⁵ and ‘reluctant tolerance’⁶⁶ from silence as a legally relevant endorsement. In both cases, silence has law-formative effects only if it is qualified.⁶⁷

In order to determine possible law-changing effects of silence concerning Articles 2(4) and 51, subsection i will, first, illustrate some classical notions developed by international law doctrine in order to frame legally significant silence. Subsection ii will then display the decisive factors upon which its significance depends.

i. Silence in traditional international law doctrine: acquiescence and estoppel

Legally relevant silence is commonly conceptualised as ‘tacit agreement’, ‘acquiescence’ or ‘estoppel’ by scholarship and jurisprudence. These notions are often very difficult to distinguish and their interrelatedness has remained largely undertheorised.⁶⁸

A tacit agreement derives its force from an actual correspondence of specific expressions of will. In contrast, the focus of acquiescence is unilateral, although it is not acknowledged as a distinct unilateral legal act.⁶⁹

⁶³Sophia Kopela, ‘The Legal Value of Silence as State Conduct in the Jurisprudence of International Tribunals’ (2010) 29 *Australian Yearbook of International Law* 87, 90.

⁶⁴See Bettina J Meissner, *Formen stillschweigender Anerkennung im Völkerrecht* (Heymann, 1966) 14. See also, generally, Hersch Lauterpacht, *Private Law Sources and Analogies in International Law* (Longmans Green & Sons, 1927) 81.

⁶⁵*Jurisdiction of the European Commission of the Danube* [1927] PCIJ Series B, No 14, 37.

⁶⁶See Corten (n 56) 817; Gray (n 12) 20; Michael Byers, ‘The Shifting Foundations of International Law: A Decade of Forceful Measures against Iraq’ (2002) 13 *European Journal of International Law* 21, 36; Constantinou (n 12) 22.

⁶⁷See also Iris Breutz, *Der Protest im Völkerrecht* (Duncker & Humblot, 1977) 155; Herbert Günther, *Zur Entstehung von Völkergewohnheitsrecht* (Duncker & Humblot, 1970) 132 et seq., 139; ILC, Third Report (n 45) para 22.

⁶⁸See Koskeniemi (n 44) 362–64 (arguing that a distinction would be arbitrary). The role of silence in the formation of customary international law has been identified by Sir Michael Wood as one of the central questions to be covered by the ILC, see Report 2011, A/66/10, Annex, 307. Sir Michael Wood elaborated on inactivity as practice and/or as acceptance of law in the context of the formation of CIL in the ILC’s Third Report (n 45) paras 19 et seq.

⁶⁹ILC, Fourth Report (n 62) 7, para 31.

‘Acquiescence’ occurs when states can interpret the verbal non-action of another state as consent.⁷⁰ In the process of contract formation, acquiescence might operate as a contractual declaration of will, hence leading to the conclusion of an agreement (albeit a tacit one).⁷¹

Being a part of the legal communicative process, however, acquiescence goes beyond contractual relations and can lead to a waiver of rights, impose and create obligations, or generally alter the relationship between subjects of international law.⁷² Such a qualified silence emerges out of ‘the inaction of a State which is faced with a situation constituting a threat to or infringement of its rights’.⁷³ As such, it is closely connected to the protection of legitimate expectations, a function that is also served by the principle of estoppel.⁷⁴ Estoppel operates as a bar to certain claims and prohibits the disappointment of raised expectations to the detriment of the relying, and advantage of the disappointing, party.⁷⁵ Acquiescence might constitute the relevant representation that gives rise to the precluding effect of estoppel.⁷⁶ In contrast to the *inter partes* focus of estoppel, the international community as a whole – in the sense of a specific subject of international law endowed with norm-creative capacity⁷⁷ – can also acquiesce through silence⁷⁸ which is particularly relevant in cases of *jus cogens* norms, as will be examined in section III.⁷⁹

Whilst acquiescence has been predominately discussed in the context of territorial (acquisitive prescription⁸⁰) and jurisdictional questions, its relevance extends – with varying significance – to all questions of law, in particular to the formation of CIL (in contrast to estoppel).⁸¹ Some even assume that

⁷⁰Alfred Verdross and Bruno Simma, *Universelles Völkerrecht* (Duncker & Humblot, 3rd edn 1984) 437, footnote 1; Kopela (n 63) 87; Jörg Kammerhofer (n 57) 533.

⁷¹See Jean Barale, ‘L’acquiescement dans la jurisprudence internationale’ (1965) 11 *Annuaire Français de Droit International* 389, 418.

⁷²Karl (n 23) 278.

⁷³Iain C MacGibbon, ‘The Scope of Acquiescence in International Law’ (1954) 31 *British Yearbook of International Law* 143.

⁷⁴*Delimitation of the Maritime Boundary in the Gulf of Maine Area* (merits) [1984] ICJ Rep 246, 304 (Canada referring to estoppel in the oral proceedings as the ‘alter ego of acquiescence’).

⁷⁵*Land, Island and Maritime Frontier Dispute Case (El Salvador/Honduras)* (application by Nicaragua for permission to intervene) [1990] ICJ Rep 92, 118; Derek W Bowett, ‘Estoppel before International Tribunals and its Relation to Acquiescence’ (1957) 33 *British Yearbook of International Law* 176, 180 et seq.

⁷⁶Hersch Lauterpacht, ‘Sovereignty over Submarine Areas’ (1950) 27 *British Yearbook of International Law* 376, 395; Jörg P Müller, *Vertrauensschutz im Völkerrecht* (Heymann 1971) 38 et seq.

⁷⁷Mehrdad Payandeh, *Internationales Gemeinschaftsrecht* (Springer, 2010) 439 et seq.

⁷⁸Bowett (n 75) 200; Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press, 2008) 403; Christos L Rozakis, *The Concept of Jus Cogens in the Law of Treaties* (North-Holland, 1976) 128.

⁷⁹See n 211 et seq. and accompanying text.

⁸⁰Robert Y Jennings, *The Acquisition of Territory in International Law* (Manchester University Press, 1963) 38.

⁸¹Karl (n 23) 277; Günther (n 67) 132 et seq.; Günther Jaenicke, ‘Völkerrechtsquellen’ in Karl Strupp and Hans-Jürgen Schlochauer (eds), *Wörterbuch des Völkerrechts*, Vol. III (de Gruyter, 1962) 766, 769 et seq.; Ibrahim Sihata, ‘The Treaty as Law-Declaring and Custom-Making Instrument’ (1966) 22 *Revista Espanola de Derecho Internacional* 51, 76; Iain C MacGibbon, ‘Customary International Law and Acquiescence’ (1957) 33 *British Yearbook of International Law* 115; Müller (n 76) 54 et seq.; Myres McDougal, ‘Hydrogen Bomb’ (1955) 49 *American Journal of International Law* 353, 356 et seq.; Michael Wood, ‘Address to the ILC, Geneva, 30 July 2012’ (2013) 12 *The Law & Practice of International Courts and*

‘custom is mainly silence and inaction,⁸² Since acquiescence necessarily entails an objectification of a state’s will,⁸³ acknowledging its role within the process of law formation marks another departure from a purely will-based international order: it mitigates ‘the rigours of the positivist view and imparts a welcome measure of controlled flexibility to the process of formation of rules of customary international law’.⁸⁴

Notably, positivist-voluntarists only accepted the notion of acquiescence in the process of law-formation by installing the controversial persistent-objector doctrine as a counterweight.⁸⁵ According to this rule, states are not allowed to opt out of a CIL norm after it has emerged, but shall not be considered bound by it if they objected to it persistently in the process of its formation.⁸⁶ Conditions upon which legal effects of silence depend are the decisive screws that create an equilibrium between a voluntarist conception of international law and one based on a general consensus⁸⁷ within the international community. Mitigating disadvantages of ‘consensualist positivism’ – irrespective of whether the normativity of rules is derived from actual individual state consent or rather a general consensus – by acquiescence must (and this is the key problem) find its limits where normativity as such is called into question and becomes random. A rule only retains its normative nature if it does not merely ‘accommodate deviant practice’.⁸⁸

Tribunals 273, 278. See D’Amato (n 60) 98 et seq. (expressing scepticism). See also Orakhelashvili (n 78) 404 et seq (distinguishing acquiescence from the formation of CIL).

⁸²Robert Kolb, ‘Selected Problems in the Theory of Customary International Law’ (2003) *Netherlands International Law Review* 119, 136. See also Giuseppe Sperduti, ‘Prescrizione, consuetudine e acquiescenza’ (1961) 44 *Rivista di Diritto Internazionale* 3, 11 et seq.; Jonathan Charney, ‘Universal International Law’ (1993) 87 *American Journal of International Law* 529, 538 et seq.; Manley O Hudson, *The Permanent Court of International Justice, 1920–1942* (Macmillan, 1943) 609.

⁸³*Gulf of Maine Case* (n 74) 305. However, see the distinction made by Hugh Thirlway, ‘The Law and Procedure of the ICJ, 1960–1989 Part I’ (1989) 60 *British Yearbook of International Law* 29–30.

⁸⁴MacGibbon (n 73) 145; Thomas J Lawrence, *The Principles of International Law* (Macmillan, 7th edn 1925) 101. See, for critique, Karol Wolfke, *Custom in Present International Law* (Kluwer Academic Publishing, 2nd edn 1993) 135.

⁸⁵Mendelson (n 49) 227 et seq.; Prosper Weil, ‘Towards Relative Normativity in International Law’ (1983) 77 *American Journal of International Law* 413, 470; Patrick Dumberry, ‘Incoherent and Ineffective: The Concept of Persistent Objector Revisited’ (2010) 59 *International and Comparative Law Quarterly* 779, 792 et seq. Furthermore, see Curtis A Bradley and Mitu Gulati, ‘Withdrawing from International Custom’ (2010) 120 *Yale Law Journal* 202, 233 et seq.; Klabbers (n 30) 91. For an excellent in-depth analysis of this issue see James A Green, *The Persistent Objector Rule in International Law* (Oxford University Press, 2016).

⁸⁶Gerald Fitzmaurice, ‘The Law and Procedure of the International Court of Justice, 1951–54: General Principles and Sources of Law’ (1953) *British Yearbook of International Law* 26; American Law Institute, *Restatement of the Law Third: the Foreign Relations Law of the United States, Vol. 1, Ch. 1* (1987) para 102; International Law Association, *Statement of Principles Applicable to the Formation of General Customary International Law, Final Report of the Committee*, London Conference (2000) 14, principles 15, 27. See also critique by Chrisitan Tomuschat, ‘Obligations Arising for States Without or Against Their Will’ (1993) 241 *Recueil des Cours* 284.

⁸⁷Louis Henkin, ‘International Law: Politics, Values and Function: General Course on Public International Law’ (1989) 216 *Recueil des Cours* 57.

⁸⁸Jason A Beckett, ‘Behind Relative Normativity’ (2001) 12 *European Journal of International Law* 627, 646.

ii. Conditions for normative change induced by silence: ‘qui tacet consentire videtur si loqui debuisset ac potuisset’ vs. ‘quo tacet neque negat neque utique fatetur’⁸⁹

The criteria that transform ‘tolerance’ into law-generating acquiescence have not been coherently elaborated by either scholarship or jurisprudence, and remain highly controversial.⁹⁰ In this regard, the present author rejects the general assumption that ‘in view of the growth in international relations and the growing knowledge of the consequences of tolerating international practice, the presumption of a practice having been accepted as law has become increasingly justified.’⁹¹ A party that is claiming a normative change bears the burden of establishing that the purported change has occurred. It has to be determined in each case why silence amounts to acquiescence within the ‘lawmaking discourse’,⁹² which is ‘a process of communication in which the mobilisation of authority ... creates and sustains expectations about what types of behavior ... shall be deemed lawful and unlawful’.⁹³

It is submitted in this subsection that law-generating effects of silence do not depend on the intentions of the silent state (a), but on the legitimate expectations of other states, and the international community as a whole, that a state should speak (b).

(a) The intention of the silent state

In most cases, states remaining silent in view of a novel and/or contentious practice of others will not *intend* to facilitate a normative change by conveying the message: ‘the state believes that this practice conforms with treaty rules’, ‘the state believes that this practice is a result of a binding customary rule’, or even ‘the state believes that this practice should be a binding rule’ with their silence. In the reality of world politics silence might be a part of a diplomatic strategy, and protests might even evidence a failure of diplomacy.⁹⁴ Objections might be interpreted as unfriendly acts,⁹⁵ and silence may occur as a

⁸⁹‘He who keeps silent is held to consent if he must and can speak’ vs. ‘he who keeps silent neither rejects nor affirms.’

⁹⁰One attempt was made by Gennady Danilenko, ‘The Theory of International Customary Law’ (1988) 31 *German Yearbook of International Law* 33, 40. For critique, see Günther (n 67) 139. See also ILC, Third Report (n 45) paras 19 et seq.

⁹¹Wolfke (n 57) 8 et seq.; Malcolm Shaw, *International Law* (Cambridge University Press, 6th edn 2008) 89; Nicholas J Wheeler ‘Reflections on the Legality and Legitimacy of NATO’s Intervention in Kosovo’ (2000) 4 *The International Journal of Human Rights* 144, 155.

⁹²Charney (n 82) 544.

⁹³Michael Reisman and James Baker, *Regulating Covert Action* (Yale University Press, 1992) 13; Michael Reisman, ‘International Law-Making: A Process of Communication’ (1981) *Proceedings of the Annual Meeting of the American Society of International Law* 102.

⁹⁴D’Amato (n 60) 100.

⁹⁵Andrew T Guzman, ‘Saving International Customary Law’ (2005) 7 *Michigan Journal of International Law* 115, 143; Mendelson (n 44) 187; Shaw (n 91) 90; Daniel P O’Connell, *International Law Vol. 1* (Stevens & Sons, 2nd edn 1970) 18.

matter of courtesy or convenience.⁹⁶ The failure to condemn might also evidence that the silent state regarded a certain action to be politically or morally justified, notwithstanding an awareness of its (current) illegality.⁹⁷ States might also refrain from protesting, fearing that their explicit opposition might endow an illegal act with undue significance (and thereby ultimately initiate a process of normative change).⁹⁸ Furthermore, a silent state might merely not ‘feel that the norm is changing into custom ... or it may simply not be sufficiently affected by the rule to bother objecting’.⁹⁹

However, do motives behind silence matter at all for its legal effects? A voluntarist approach would regard the *will* of the state as the source of any legal effects of silence, whereas an objectivist treats it as a mere fact,¹⁰⁰ thereby shifting the focus from possible intentions of the silent actor to the protection of legitimate expectations of other actors.¹⁰¹ Other objectivist approaches trace legal effects of silence back to state responsibility,¹⁰² general principles,¹⁰³ legal certainty¹⁰⁴ or the necessity to ensure peace under law.¹⁰⁵ Scholarship and jurisprudence tend toward an attenuated, voluntarist approach by objectifying silence within certain limits.¹⁰⁶ Scholars, judges and arbitrators concentrate on the identification of conduct, which according to international conventions has to constitute a declaration of will irrespective of the true intentions of the state.¹⁰⁷ This theory of (the rather fictitious notion of) ‘inferred consent’¹⁰⁸ has obvious flaws.¹⁰⁹ Still, the assumption that secondary rules of law formation furnish silence with law-creating effects in certain circumstances has merit.¹¹⁰ This is true regardless of whether a mere private law analogy is applied or a more ‘constitutionalist’ stance is taken understanding international law as a ‘body of rules and principles defining, in form and in substance, the basis of the international

⁹⁶*North Sea Continental Shelf Cases* (merits) [1969] ICJ Rep 3, para 77; Antonio Cassese, ‘The Role of Legal Advisers in Ensuring that Foreign Policy Conforms to International Law Standards’ (1992) 14 *Michigan Journal of International Law* 139, 158.

⁹⁷Gray (n 12) 20.

⁹⁸D’Amato (n 60) 101 et seq.

⁹⁹Guzman and Hsiang (n 44) 556.

¹⁰⁰Jacques Bentz, ‘Le silence comme manifestation de volonté en Droit international public’ (1963) 67 *Revue Général de Droit International Public* 44, 45.

¹⁰¹ILC, Guiding Principles Applicable to Unilateral Declarations of States (2006) 11(2) *Yearbook of the International Law Commission*.

¹⁰²Barale (n 71) 422.

¹⁰³See Charles de Visscher, *Les effectivites en droit international public* (Pedone, 1967) 156 et seq.

¹⁰⁴Wolfke (n 84) 137.

¹⁰⁵Sperduti (n 82) 5, 8, 14.

¹⁰⁶Kopela (n 63) 111, 134.

¹⁰⁷Müller (n 76) 60; Karl (n 23) 276.

¹⁰⁸Michael Byers, *Custom, Power and the Power of Rules* (Cambridge University Press, 1991) 142 et seq.; Jost Delbrück, ‘Prospects for World (Internal) Law?’ (2002) 9 *Indiana Journal of Global Legal Studies* 401, 415.

¹⁰⁹See Guzman (n 95) 143; Guzman and Hsiang (n 44) 556. Cf. Kammerhofer (n 57) 533; Mendelson (n 49) 256.

¹¹⁰See also Wolfke (n 57) 8 et seq.

community' and not merely a legal scheme regulating individual interstate relationships.¹¹¹

If we regard the legal ties between states as comparable to private relations between individuals (in spite of the deficiencies of the idea of the state as 'a moral person'), and, thus, consult private law principles, it becomes apparent that even contract law, which is to a much greater extent consent-based than CIL, objectifies silence in order to establish a fair balance of responsibilities.¹¹² CIL should *a fortiori* allow for the idea of an 'objectified' consent in the sense that consent is derived from facts – perceivable conduct – as they present themselves to an objective observer, irrespective of what the true intentions of the state in question actually are. This makes sense since silence will never reveal the true beliefs of an actor: 'belief' will necessarily be constructed merely from the contextual setting.¹¹³ If one attributes to states the capacity to conclude a treaty or to create customary law that obliges and entitles themselves and others, this capacity requires them to show consideration toward the expectations of their co-actors.¹¹⁴

We arrive at the same conclusion by looking at the international legal order through a 'constitutionalist' lens. International law is not solely a network of bi- or multilateral relationships between states; it also constitutes the normative framework of the international community as such (including the individual).¹¹⁵ Against this background, it is submitted that states have a 'legislative responsibility'¹¹⁶ towards the effectivity of norms shaping this community. What is understood herein by the term 'legislative responsibility'? First of all, international law-making is identified as a legislative process. Although it is true that the international legal system lacks 'sophisticated techniques for change that typically exist in domestic legal systems',¹¹⁷ the creation and evolution of international norms is a conscious¹¹⁸ and procedurally guided operation and not a 'savage' process in the current international setting.

Secondly, rules on the creation of international law and its interpretation endow states with an eminent role: they are still the predominant interpreters of treaties and creators of CIL within the international community. It is

¹¹¹Fassbender, 'UN Charter' (n 17) 589.

¹¹²See Parviz Owisa, 'Silence Efficacy in Contract Formation – A Comparative Review of French and English Law' (1991) 40 *International and Comparative Law Quarterly* 784 et seq.; Jan Busche, '§ 147 BGB' in Franz Jürgen Säcker (ed), *Münchener Kommentar zum BGB*, Vol. I (Beck, 7th edn 2015) para 7.

¹¹³Cf. Günther (n 67) 134.

¹¹⁴Danilenko (n 90) 40.

¹¹⁵Anne Peters, *Beyond Human Rights* (Cambridge University Press, 2016).

¹¹⁶The term 'legislative act' with regard to CIL has been employed previously by Jost Delbrück, 'Structural Changes in the International System and its Legal Order' (2001) 11 *Zeitschrift für Internationales und Europäisches Recht* 1, 29; Delbrück (n 108) 418. See also Charney (n 82) 540; Ted L Stein, 'The Approach of the Different Drummer' (1985) 26 *Harvard International Law Journal* 457, 465; Buzzini (n 60) 117.

¹¹⁷Christine M Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 *International and Comparative Law Quarterly* 850, 866.

¹¹⁸*Contra* Hans Kelsen, *Principles of International Law* (Holt, 2nd edn 1967) 441.

precisely this capacity, conveyed by the legal rules of norm interpretation and creation, which endows states – together with the very concept of ‘law and order’¹¹⁹ – with a specific responsibility towards the effectivity of the international legal system. This responsibility is to be understood primarily as a soft obligation (in German legal terminology: *Obliegenheit*¹²⁰) and is closely connected with the paradox of normative dynamics characterising international law: while singular contentious behaviour does not invalidate norms, it might be a decisive factor for the emergence of new norms. When normative contestations reach a certain quality and frequency, a state of normative volatility emerges, inducing indeterminacy. A rule’s potential to constrain and direct behaviour,¹²¹ however, depends on its clarity, and its legitimacy is contingent on its concreteness.¹²²

Determinacy is also an instrument to foster an equal, and to prevent an overly biased, application of law,¹²³ which is the cornerstone of the rule of law. Accordingly, situations of enhanced normative volatility might undermine a norm’s compliance-pull,¹²⁴ and put the legal order’s objectivity in question. States have the capacity to eradicate such a state of volatility, and so bear responsibility in this regard. This responsibility is not only triggered by specific normative contestations but also arises if norms are vague in their very nature. Rules such as the prohibition on the use of force only gain normative shape within the process of their application. In this respect, state conduct, accompanied by the normative claims of those acting, as well as reactive claims of non-acting states, ensures the operability of vague norms and a minimal level of transparency in the law-formative process.¹²⁵ This is a key reason why states should speak up. Furthermore, explanations and reactions are necessary to divide law from non-law, and an illicit from a legal use of force, since they potentially evidence a ‘sense of legal obligation’.¹²⁶ Since the use of force regime is an element of the UN

¹¹⁹Linderfalk (n 6) 932.

¹²⁰Reimer Schmidt, *Die Obliegenheiten* (Verlag Versicherungswirtschaft, 1953).

¹²¹Beckett (n 88) 646.

¹²²Lon J Fuller, *The Morality of Law* (Yale University Press, 2nd edn 1964) 102; Carlos M Vázquez, ‘Withdrawing from International Custom: Terrible Food, Small Portions’ (2011) 120 *Yale Law Journal Online* 269, 286; Harold H Koh, ‘The Legal Adviser’s Duty to Explain’ (2016) 41 *Yale Journal of International Law* 186, 198, 201; Alexandra H Perina, ‘Black Holes and Open Secrets: The Impact of Covert Action on International Law’ (2015) 53 *Columbia Journal of Transnational Law* 507, 544. See, with regard to the relevance of Fuller’s concepts for a theory of sources of international law, Klabbers (n 30) especially at 103 et seq.; Jan Klabbers, ‘The Commodification of Law’ in *Select Proceedings of the ESIL* (2006) 341, 353.

¹²³Byers (n 31) 176 et seq.

¹²⁴Cassese (n 96) 154; Thomas M Franck, *The Power of Legitimacy among Nations* (Oxford University Press, 1990) 50 et seq. See Hakimi (n 7) 9 (with regard to the confusion surrounding the use of force regime and its negative effects).

¹²⁵Perina (n 122) 566. See Franck (n 124) 52, 54; Ken Kress, ‘Legal Indeterminacy’ (1989) 77 *California Law Review* 283, 285; Koh (n 122) 200; Alexander Orakhelashvili, ‘Changing *Jus Cogens* through State Practice’ in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015) 157, 169; Arato (n 41) 460; Buzzini (n 60) 117 (with regard to the uncertainty induced by silence).

¹²⁶Koh (n 122) 197 et seq.; John R Stevenson, ‘Statement of the Legal Adviser’ (1970) 64 *American Journal of International Law* 933, 935.

Charter (as the constitutive act of the international community as a whole¹²⁷), a ‘legislative responsibility’ to explain conduct and to react to legal claims exists not only towards other states, but also to the international community whose interest states serve.¹²⁸

The responsibility to speak up – although not a ‘hard’ obligation – entails also a substantive dimension, and requires that states consider the long-term effects of normative change, especially in extraordinary times: ‘The responsible treaty-maker, or lawmaker in general, will resist the urge to live solely from day to day and to be inspired solely by the needs (and the madness) of the day.’¹²⁹ The objectification of silence should be viewed in this broader context of preserving normative effectivity: it is a safety mechanism installed by secondary rules of law formation in light of the softness of the obligation to speak up and the possibility that states remain silent. Normative effectivity and certainty can only be ensured in such constellations if a state’s omission to react and the mere opportunity to articulate *opinio juris* is endowed with legal effects.¹³⁰

In fact, CIL would be to a large part non-existent if its emergence required that each state or even the majority of states actually wilfully and individually consented to the emergence of a norm. Rigorous consensualism would render a functioning international legal order largely impossible. If this safety mechanism depended on the true intentions of silent states, whose determination would require speculative assumptions, it would be void of any certainty-enhancing effects. However, and this is an important restriction to the ‘objectification’ of silence, the *conditio sine qua non* for law-creating acquiescence is that states can be legitimately expected to speak up: something that certain circumstances might prevent. To be clear, it is *not* being suggested herein that silence amounts to acquiescence in every case within the process of normative dynamics, but that intentions actually underlying a state’s silence will not hinder acquiescence if certain conditions are met. These will be examined in the next subsection.

(b) The expectation to act

While international law requires states not to acknowledge situations created by violations of its rules, it does not principally oblige them to protest actively against such infringements.¹³¹ Practice contravening international norms is per se illegal, irrespective of whether or not other states object to it.¹³²

¹²⁷See Stein (n 116) 465.

¹²⁸Delbrück (n 108) 417.

¹²⁹Klabbers (n 30) 104.

¹³⁰Delbrück (n 108) 421; Delbrück (n 116) 30.

¹³¹Eric Suy, *Les actes juridiques unilatéraux* (Libr. Générale de Droit et de Jurisprudence, 1962) 68; Breutz (n 67) 156.

¹³²*Case concerning the Temple of Preah Vihear (Cambodia v Thailand)* (merits) [1962] ICJ Rep 6, 70, dissenting opinion of Judge Moreno Quintana.

Non-protest, however, might have a legal-communicative effect if international law *expects* a state to react.¹³³ Such a normative expectation that a state ‘speaks up’ is frustrated if it remains silent, in circumstances where protesting would be the natural reaction: ‘qui tacet consentire videtur si loqui debuisset ac potuisset.’¹³⁴ While silence does not constitute a violation of international law in such situations, non-objection might have a legal effect – corresponding with the already mentioned ‘legislative responsibility’ of states – that could be detrimental to the position of the silent state.¹³⁵ In the case of the UN Charter as the constitutive document of the international community, it is not (only) the expectations of other individual states that matter. The expectations of the international community as a whole have to be taken into account as well.

Determining whether a ‘legitimate’ expectation to speak exists in light of contentious state practice requires an overall assessment of different factors. These might include: the nature of the state practice itself; the claim(s) made by the acting states; the capacity of the silent state to react; the circumstances in which the relevant claim was made; the reactions of other actors to the state practice in question; the impact on rights and interests of states remaining passive; the impact on rights and interests of the acting states; considerations of time; and the nature of the affected rules in question. Each of these possible factors will be considered in this section. As will be shown, not all of these factors will prove (equally) significant in the end, and not all should be seen as *conditiones sine qua non* for an expectation to react to arise. Factors that will be identified as relevant are, rather, to be understood as individual ‘weights’ on a scale eventually pointing or not pointing towards an expectation to react: meaning that they can potentially reinforce or neutralise each other. Aspects strongly suggesting an expectation to react may counterbalance factors that remain relevant within the overall assessment but fail to point towards such an expectation in a definitive manner.

Conduct. Obviously, the first element to be taken into account is the state practice that might potentially give rise to a novel interpretation of an international treaty norm or its amendment via newly emerged CIL.

It is particularly relevant to consider whether the contentious action appears to be a singular event or materialises frequently. The more commonplace and consistent it becomes, and the closer it moves towards a ‘general’ practice,¹³⁶ the more the silence of inactive states might accelerate the

¹³³See ILC, Third Report (n 45) para 23.

¹³⁴*Temple of Preah Vihear Case* (n 132) 23; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v Singapore)* (merits) [2008] ICJ Rep 51, 121; Lauterpacht (n 76) 376; Meissner (n 64) 15.

¹³⁵Alfred Verdross, ‘Regles generales du droit de la paix’ (1929-V) 30 *Recueil des Cours* 271, 437. See also Franz Pflüger, *Die Einseitigen Rechtsgeschäfte im Völkerrecht* (Schulthess, 1936) 52, 213; Breutz (n 67) 156.

¹³⁶See Bianchi (n 24) 665.

process of law-formation. In this context, time also becomes decisive. The longer states act congruently – continuously, or with intermissions but repeatedly – the more that an expectation to react arises. Both the frequency of practice and the existence of antecedent similar precedents need to be considered. The practice in question has to be discernible – also in light of the awareness-prerequisite discussed later on¹³⁷ – which confirms the general presumption against ‘secret law’.¹³⁸ This might be particularly problematic in the context of military operations, due to their classified nature (for example, drone operations).

The claim made. Whether an expectation to react arises is to a large extent dependent on the claim made by the acting state as to the legality of its conduct and its specific qualities, since conduct as such is not auto-interpretative and is not per se law-creating.

The legal claims made in relation to a specific action might emerge in different ways, and may be explicit or implied. In the most obvious form, a state will expressly state that it regards its action to be legal. It might either argue that its conduct is legal because it does not fall within the scope of a prohibitive rule (claim of rule conformity) or it might contend that it is covered by an exception to a rule (claim of justification). In the case of the former, a state would declare that its conduct does not infringe Article 2(4), in the latter, that it is justified under Article 51. Furthermore, states claiming that their conduct is justified might develop their argument within the limits of an existing justificatory framework or purport a novel justifying norm.

States claiming the legality of a novel practice prefer to invoke justifications,¹³⁹ and almost every unilateral use of force is justified by reference to Article 51.¹⁴⁰ Indeed, it has been argued that the burden of proof for evidencing a modification of an overarching rule or the emergence of a new rule is considerably higher than for the invocation and applicability of a justification.¹⁴¹ In this writer’s view, this is doubtful: if the invocation of a justification requires its reinterpretation or even amendment, both the substantive and evidentiary threshold concerning the assertion of normative change have to correspond with the standards applicable to a modification of the overarching rule. While reference to justifications might strengthen the rule,¹⁴² in situations in which an exception is inextricably linked with a rule – as in the

¹³⁷See n 164 et seq. and accompanying text.

¹³⁸Dakota S Rudesill, ‘Coming to Terms with Secret Law’ (2015) 7 *Harvard National Security Journal* 241; Perina (n 122); Koh (n 122) 198 et seq.

¹³⁹Antonio Cassese, *Violence and Law in the Modern Age* (Polity, 1988) 35 et seq.; Anthea E Roberts, ‘Traditional and Modern Approaches to Customary International Law’ (2001) 95 *American Journal of International Law* 757, 786.

¹⁴⁰Randelzhofer and Nolte (n 12) para 2.

¹⁴¹See, for critique, Corten (n 12) 47.

¹⁴²*Nicaragua* (merits) (n 10) para 186.

case of Article 2(4) and Article 51 – a changed understanding of the justification, or the advancement of a ‘new’ justification, inevitably affects the rule itself. A state might, in a third variant, act, and explicitly argue that it does so, to foster normative change (claim *de lege ferenda*). Such claims – although potentially law-formative under some modern theories of *opinio juris* – are unlikely in practice, since they presuppose that a state admits to be *presently* acting *contra legem*.¹⁴³

Alternatively, a state might, perhaps, acknowledge that its action neither is covered by international law nor should be considered legal, and merely argue that it is justified by extra-legal factors (legitimacy claim).¹⁴⁴ The question of consequences would in this case be one of mitigation and not exculpation.¹⁴⁵ States might also declare their actions to be legal without referring to a specific legal framework: for example, most actors intervening in Kosovo in 1999 refrained from stating a clear legal rationale for their operation.¹⁴⁶

Furthermore, legality claims can be accompanied by an ‘exceptionalist’ line of argument (exceptional legality claims). Again, several statements surrounding the NATO intervention in Kosovo in 1999 can act as an example.¹⁴⁷ Such declarations might be interpreted as ‘caveat claims’ intended to hinder the emergence of a new norm and to limit the precedential character of such practice. In these cases claims remain rather indeterminate. Ambiguity surfaces particularly when a state does not explicitly comment on its actions. Its conduct might be accompanied by a general, unspecified, implied legality claim or legitimacy claim. However, states might also just intend to ‘get away’ with a violation for strategic reasons, without any legal aspirations.¹⁴⁸ In any case, no legally relevant claim is advanced in situations where the

¹⁴³Goodin (n 13) 235.

¹⁴⁴Legitimacy claims surfaced in some statements surrounding the 1999 NATO intervention in Kosovo. See Secretary-General of NATO, NATO press release (1999) 041 (14 March 1999); Tony Blair, ‘A New Moral Crusade’, 133 (24) *Newsweek* (14 June 1999) 35; Independent International Commission on Kosovo, Kosovo Report (Oxford University Press, 2000) 289. See also Antonio Cassese, ‘*Ex iniuria ius oritur*: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the International Community?’ (1999) 10 *European Journal of International Law* 23.

¹⁴⁵Byers (n 31) 186; Thomas M Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (Cambridge University Press, 2002) 184. For critique, see Anthea Roberts, ‘Legality vs. Legitimacy: Can Uses of Force be Illegal but Justified?’ in Philip Alston and Euan MacDonald (eds), *Human Rights, Intervention, and the Use of Force* (Oxford University Press, 2008) 179, 191 et seq.

¹⁴⁶See Ian Brownlie and Christine J Apperley, ‘Kosovo Crisis Inquiry: Memorandum on the International Law Aspects’ (2000) 49 *International and Comparative Law Quarterly* 878, 882; Roberts (n 145) 204; Thomas Franck, ‘Lessons of Kosovo’ (1999) 93 *American Journal of International Law* 857, 859. Within the ICJ proceedings regarding the legality of the use of force by NATO in Kosovo only Belgium justified the action referring to a legal right to humanitarian intervention. See *Legality of Use of Force (Serbia and Montenegro v Belgium)* (oral proceedings) CR 1999/15, 10.

¹⁴⁷German Minister of Foreign Affairs Kinkel stated in the Bundestag that the ‘decision of NATO must not become a precedent. As far as the Security Council monopoly on force is concerned, we must avoid getting on a slippery slope,’ BT-Plenarprotokoll 13/248, 23129 (translation by the author). Similarly, see Jeremy Greenstock, UK Permanent Representative to the UN, 24 March 1998, cited in Brownlie and Apperley (n 146) 881.

¹⁴⁸Orakhelashvili (n 125) 169.

state in question denies the facts underlying the potential breach of international law.¹⁴⁹

It is submitted here that an expectation to react generally requires a claim that is legal in nature.¹⁵⁰ Furthermore, the emergence of an expectation to react largely depends on a claim's determinacy.¹⁵¹ This is true for several reasons. First, silence can only accrue legal-communicative content in relation to claims that refer to specific occurrences and rules. The claim made must be phrased in a way that requires a mere 'yes' as an answer. Hence, the position of the acting state has to be 'coherent and consistent so that other States can identify the parameters of the offer made'.¹⁵² A legitimate expectation to react can only arise in accordance with good faith¹⁵³ if it is clear to the objective observer what is actually being claimed.¹⁵⁴

Secondly, in order to establish normative change a high burden of proof must be met.¹⁵⁵ There is a general presumption in favour of the continued validity of an international norm.¹⁵⁶ Therefore, the initiation of a process of normative dynamics requires a claim that has the potential to unsettle normative stability. An indeterminate claim does in general not suffice in that regard.

Thirdly, attributing norm-creative effects to silence is a means to reinstate certainty and ensure normative determinacy if states remain silent in phases of normative volatility contrary to their responsibility. If mere silence to ambiguous claims issued norm-formative effects, normative indeterminacy would be enhanced contrary to the objective that acquiescence is intended to serve.

Fourthly, it would be misguided to regard law-making and norm-evolution as uncoordinated and unconscious processes in light of the constitutionalist elements that can be evidenced within the international legal order.¹⁵⁷ Law-creation is a very conscious process, embedded in a specific normative context that states are very aware of. Within this legal discourse, generally only determinate speech-acts can be regarded as relevant.

¹⁴⁹Corten (n 12) 30. Russia claimed in the beginning of the Ukrainian conflict that no soldiers were actively involved in Crimea. See Vladimir Putin, 'Vladimir Putin Answered Journalists' Questions on the Situation in Ukraine' (4 March 2014) <http://en.kremlin.ru/events/president/news/20366>.

¹⁵⁰See Roberts (n 145) 198; *North Sea Continental Shelf Cases* (merits) (n 96) para 30; *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)* (merits) [1985] ICJ Rep 13, para 25 ('[The Court] is however unable to discern any pattern of conduct on either side sufficiently unequivocal to constitute either acquiescence or any helpful indication of any view of either Party as to what would be equitable differing in any way from the view advanced by that Party before the Court').

¹⁵¹Clarity and specificity have been also identified by the ILC as factors that determine the weight of subsequent practice, see Draft Conclusion 9 (2), ILC, Report (n 22) 122.

¹⁵²Orakhelashvili (n 125) 160 set seq.

¹⁵³Swiss Federal Tribunal, *Canton of Valais v Canton of Tessin*, 75 ILR 118–119.

¹⁵⁴Cf. Charney (n 82) 538.

¹⁵⁵Brownlie and Apperley (n 146) 904.

¹⁵⁶Michael Akehurst, 'Custom as a Source of International Law' (1974/75) 47 *British Yearbook of International Law* 1, 19 (assuming that there is a 'very strong presumption against change').

¹⁵⁷See n 17 et seq. and accompanying text.

Accordingly, the usual position is that only claims of rule conformity, justification and rule-specific claims *de lege ferenda* might evidence a certain legal conviction requiring a reaction.¹⁵⁸ Legitimacy claims lack the legal dimension that is essential for both an ‘interpretative agreement’ and for *opinio juris* as a constitutive element of CIL norms. A *prima facie* determinate claim might, however, be obscured if a state refers to contradictory ‘legal narratives’. Contradictory attitudes prevent norm evolution not only because of the indeterminacy of a possible claim, but also because they cast ‘doubts on the validity of all related claims’ and undermine ‘the continuity of practice’.¹⁵⁹

In this regard, determinacy might become particularly problematic in cases of exceptional legality claims. Whether a general legal claim suffices depends on the overall circumstances. Ultimately, it is impossible to elaborate an abstract determinacy-standard. Rather, the relationship between the precision of claims and a possible expectation to react should be seen as a sliding scale in several respects: the more precise the claim accompanying a certain novel state practice is, the more likely it is that an expectation to react will arise. The more elaborated and established a specific reading of a norm is (by ways of continued undeviating state practice or international adjudication), the more determinate the claim has to be. The more a novel practice departs from the traditional understanding of the norm in question, the more contentious its legality becomes, and, thus, the higher the level of precision has to be for an expectation to react to arise. The more ‘essential’ a norm is for the preservation of a peaceful legal order and a fair balance of conflicting interests, the stricter the determinacy criterion’s interpretation has to be.¹⁶⁰ However, exceptional circumstances can be envisaged – for example, when a contentious state conduct is concordant and becomes ubiquitous – in which indeterminate claims (or even the lack of an explicit legal claim) might not *per se* hinder the emergence of an expectation to react.¹⁶¹ In light of the significance of the determinacy criterion¹⁶² such circumstances must not lightly be assumed.

Capacity to react and knowledge of conduct and claim. A legitimate expectation to react only arises if a state is capable of reacting (‘potuisset’). Therefore, for example, no such expectation will arise in situations where there is a breakdown of state authority.¹⁶³ Another generally accepted subjective criterion is awareness.¹⁶⁴ international tribunals insist that states must have known of

¹⁵⁸Linderfalk (n 6) 930.

¹⁵⁹Orakhelashvili (n 125) 169.

¹⁶⁰See n 211 et seq. and accompanying text.

¹⁶¹See Roberts (n 145) 198 (arguing that normative evolution will, in any case, take more time).

¹⁶²See n 151 and accompanying text.

¹⁶³*Territorial Sovereignty and Scope of the Dispute (Eritrea and Yemen)* (award of 9 October 1998) Reports of International Arbitral Awards XXII 209, para 70; *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* (merits) [2005] ICJ Rep 168, para 301.

¹⁶⁴See Allan J Simmons, *Moral Principles and Political Obligations* (Princeton University Press, 1979) 80. Furthermore ILC, Third Report (n 45) para 24.

the contentious state action in question.¹⁶⁵ This includes the knowledge of the basic facts underlying a legal claim,¹⁶⁶ as well as an awareness of the legal claim itself. This does not conflict with the objective notion of acquiescence in view of the concept of ‘constructive knowledge’.¹⁶⁷ The formula of ‘aware or *ought to be aware*’,¹⁶⁸ which introduces a due diligence standard,¹⁶⁹ can be found frequently in the jurisprudence of the International Court of Justice (ICJ) – most notably in the *Fisheries* case.¹⁷⁰ Consequently, the ICJ has accepted pleas of ignorance only rarely.¹⁷¹ Acts carried out publicly, and notified claims, are considered as being ‘known’. Claims do not necessarily have to be public, however, if they are communicated via diplomatic channels, and thus have become known to the silent state.¹⁷² Furthermore, the actor must be aware of the fact that it might be expected to speak and its silence might have the effect of an acceptance.¹⁷³ Although the conditions under which silence becomes legally eloquent are scholarly disputed and not easily deductible from international jurisprudence, it is generally well established in the theory of sources – which all seem to originate from a (more or less abstract) consensual basis – that silence might have legal implications. If confronted with a determinate and comprehensible legal claim, states cannot be ignorant of the fact that law could potentially be in the making¹⁷⁴ or in the process of change and law formation possibly fostered by their silence.

Circumstances in which the claim was made. Firstly, a claim’s relevance depends on the international significance of the forum in which it is made and on the audience addressed.¹⁷⁵ Concerning a normative change of UN Charter rules, obviously UN organs serve as crucial forums for this process. Due consideration has to be given, for example, to letters sent to the UN Secretary-General or the Security Council. The same applies to statements made on the occasion of the adoption of Security Council resolutions or General Assembly declarations.

Secondly, as already intimated,¹⁷⁶ a soft obligation is incumbent on states to declare their views in situations of enhanced normative volatility, thereby either

¹⁶⁵D H N Johnson, ‘Acquisitive Prescription in International Law’ (1950) 27 *British Yearbook of International Law* 347; Pfluger (n 135) 144; Karl (n 23) 279; Kopela (n 63) 113; Goodin (n 13) 234.

¹⁶⁶Koh (n 122) 203.

¹⁶⁷Kopela (n 63) 115; Karl (n 23) 279.

¹⁶⁸*Anglo-Norwegian Fisheries Case* (merits) [1951] ICJ Rep 166, 152, separate opinion of Judge Alvarez (emphasis added).

¹⁶⁹*Temple of Preah Vihear Case* (n 132) 55, dissenting opinion of Judge Fitzmaurice; *Sovereignty over Pedra Branca/Pulau Batu Puteh* (n 134) 75.

¹⁷⁰*Anglo-Norwegian Fisheries Case* (n 168) 139; *Gulf of Maine Case* (n 74) 304.

¹⁷¹One rare example is *Case concerning Sovereignty over certain Frontier Land* (merits) [1959] ICJ Rep 209, 229. See Kopela (n 63) 117; MacGibbon (n 73) 181.

¹⁷²Cassese (n 96) 158.

¹⁷³Simmons (n 164) 80.

¹⁷⁴Charney (n 82) 538.

¹⁷⁵Orakhelashvili (n 125) 169.

¹⁷⁶See n 115 et seq. and accompanying text.

conserving the normative status quo or contributing to its change. The more unsettled and contested a norm becomes because of contentious state conduct accompanied by legal claims, the more reasonable it is for states to expect that their co-actors will position themselves in a legally relevant manner. In this regard, the frequency of a novel state practice and its consistency, as well as the quality of the claims, have to be considered. Controversies in scholarship and inconsistencies in jurisprudence as to the content of rules are additional indicators. If a regime is in flux, states can be expected to speak up.

Thirdly, while the ICJ did not rule out the possibility that an error could excuse silence,¹⁷⁷ such considerations are in fact remnants of a voluntarist approach. It therefore does not come as a surprise that the more that international tribunals have taken an objective approach to silence, leaving aside the ‘true intentions’ of the silent state,¹⁷⁸ the more reluctant they have become to accept pleas of excusable silence.¹⁷⁹ However, it would be a contradiction if a state were bound by its silence in a stronger way than by its actual wilful consent. Rules of the VCLT on coercion and fraud¹⁸⁰ should, therefore, be considered *per analogiam*. Since their invocation is contingent on narrow conditions, they are of little help in answering the question whether attention has to be paid to factual power interdependencies between states in evaluating silence.¹⁸¹

Having said this, fourth, power discrepancies are circumstances to be considered within the overall assessment of possible legal implications of silence. Military or economic ties might *de facto* limit a state’s freedom to react. Stern, for example, has illustratively shown that the acquiescence of weaker states is more due to discrepancies of power than to their ‘free choice’.¹⁸² The ICJ is nevertheless reluctant to consider such imbalances: for example, it ignored the implications of colonisation when evaluating silence.¹⁸³ Such aspects of ‘political reality’ and the ‘true’ reasons behind a state’s silence are usually discussed within the notion of the ‘genuineness’ of a state’s belief in the normativity of a rule. On the one hand, a doctrine explaining legal effects of silence has to be based – just as is the case for secondary rules of law formation – on the sovereign equality of states. Considering factual power dependencies furthermore appears to conflict with the objective approach towards silence and acquiescence. If the effect intended by a state in remaining silent is irrelevant, the true reasons for its silence should likewise be irrelevant.

¹⁷⁷*Temple of Preah Vihear Case* (n 132) 23. See also *Case Concerning the Location of Boundary Markers in Taba between Egypt and Israel* (award of 29 September 1988) RIAA Vol. XX 1, 235.

¹⁷⁸See n 94 et seq. and accompanying text.

¹⁷⁹Kopela (n 63) 122 et seq.

¹⁸⁰Vladimir Duro Degan, *Sources of International Law* (Martinus Nijhoff, 1997) 354.

¹⁸¹Kopela (n 63) 123 et seq.

¹⁸²Brigitte Stern, ‘La coutume au coer du droit international. Quelques réflexions’ in Daniel Bardonet (ed), *Le droit international: unité et diversité, Mélanges offerts à Paul Reuter* (Pedone, 1981) 479.

¹⁸³*Temple of Preah Vihear Case* (n 132) 91, dissenting opinion of Judge Wellington Koo.

On the other hand, the objective notion of ‘legitimate expectations’ assessed from the perspective of an ‘objective observer’, and the principle of good faith, allow the incorporation of the reality of world politics into the evaluation of silence to a certain extent, without comprising the objective approach favoured here. Severe factual dependencies arguing against a ‘genuine’, normative conviction might prevent legitimate expectations from arising irrespective of the formal equality of states. If a state is a vassal of the acting state, other states or the international community might not legitimately expect it to protest even if it actually opposes a contentious practice of its ‘protector’.¹⁸⁴ Conversely, if an economically and politically independent state, which has been a loyal ally of an acting state for a long time, is reluctant to support the contentious state practice (verbally or by deed), although explicitly requested by the acting state, its silence must not be treated as acquiescence without further consideration. Since the international community cannot expect such a state explicitly to protest, its silence signals opposition rather than acquiescence.

Reactions of other states and international organisations: reactive claims. Normative dynamics can be accelerated or decelerated by the discernible reactions of other international actors like states or international organisations¹⁸⁵ – which will be termed here ‘reactive claims’ – towards the claims made by acting states (‘primary claims’). In this regard, normative change has to be seen as a multipolar discourse within a specific normative setting.¹⁸⁶ Therein each state plays a dual role: as an individual state and a part of the international community. In a similar manner to the scheme developed previously,¹⁸⁷ reactive claims can take the shape of abstract or specific legal claims, justification claims, legitimacy claims¹⁸⁸ or merely endorse a conduct without employing legal language.

The more that other relevant actors start to endorse a contentious practice, the more a reaction of ‘bystander states’ can be expected. Conversely, if a contentious state practice is ignored by all other states, one cannot so easily assume that there is an expectation to react. Since silence is inherently ambiguous, a mere non-protest might also be interpreted as reflecting the general opinion that a certain practice is not calling any established rules into question. In order to interpret the silence of third-party actors as support, the standards set up for legal claims above¹⁸⁹ have to be applied. Hence, the determinacy of reactive claims is particularly decisive, a factor that is, to a

¹⁸⁴See Linderfalk (n 6) 931.

¹⁸⁵See Elisabeth Schweiger, ‘The Risk of Remaining Silent’ (2015) 1 *Global Affairs* 269; Roberts (n 145) 197.

¹⁸⁶Basak Cali, *The Authority of International Law* (Oxford University Press, 2015) 26.

¹⁸⁷See n 139 et seq. and accompanying text.

¹⁸⁸Legitimacy claims were raised by some non-participating in the Kosovo intervention in 1999. See also Wheeler (n 91) 155. See, for example, UNSC Verbatim Record, UN Doc S/PV.3988 (24 March 1999) 9 et seq. (Malaysia).

¹⁸⁹See n 139 et seq. and accompanying text.

certain extent, also dependent on the precision of the primary claims. Again, it is not possible to delineate an abstract determinacy standard. Such a standard depends on the circumstances of the specific case at hand. In general, abstract verbal support for another state's action would lack determinacy if the primary claim failed to refer to particular rules. Abstract verbal endorsements are similarly problematic if the acting state presents a multitude of legal claims that are mutually exclusive or potentially conflicting. Inversely, a mere reactive claim might also obscure the primary claim if it adduces a justification that contradicts the primary contention. States might also react by materially supporting the acting states but refraining from making verbal claims. In such circumstances, it cannot be generally assumed that a silent (but supportive) state accepts the initial claim unconditionally. What becomes crucial here is the overall *context* of silence, which allows considering factual power dependencies within certain limits.

Generally, one can argue that the more a state practice is positively endorsed by other states and relevant international organisations, and the more that it is met with determinate reactive claims, the more reasonable it is to expect other states to react. The synergy between primary and reactive claims might facilitate normative volatility, which enhances 'legislative responsibility'.

Impact on the interests of the silent state. In the context of individual interstate relationships (for example, acquisitive prescription), specially affected states are deemed to have acquiesced if they do not protest.¹⁹⁰ It has been asserted that the more that the rights of the silent state are affected, the more reasonable it is to assume that state's (constructive) knowledge of the practice in question, increasing the expectations of acting states with regard to protest.¹⁹¹ Furthermore, it has been suggested that a duty to react is also triggered merely when the *interests* of a state are severely affected.¹⁹²

It is questionable whether the 'impact on rights or interests' can also be decisive for determining the effects of silence in the context of a normative change of Article 51. Obviously, the state directly affected – for example, by a use of force justified by an expansive interpretation of the right to self-defence – will be likely to protest explicitly. 'Bystander states', in contrast, will be likely to display different behaviour. One could argue that states that could potentially become targets of non-state-actor terrorist attacks should be expected to speak up within the current discourse. The same

¹⁹⁰*Anglo-Norwegian Fisheries Case* (n 168) 138 et seq.; *Legal Status of Eastern Greenland (Norway v Denmark)* [1933] PCIJ, Ser A/B No. 53, 92; Villiger *Commentary on the VCLT* (n 16) Issues of Customary International Law, para 15; MacGibbon (n 81) 119; MacGibbon (n 73) 143; Karl (n 23) 98. See also Danilenko (n 90) 40; Grigorij I Tunkin, *Theory of International Law* (Allen Unwin, 1974) 129.

¹⁹¹Karl (n 23) 280.

¹⁹²*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)* (merits) [2007] ICJ Rep 659, 782 et seq., para 156, dissenting opinion of Judge Torres Bernandez; *Anglo-Norwegian Fisheries Case* (n 168) 139.

would then have to apply to states that could with high probability become platforms for terrorist activities. However, all states could potentially fall into this category. Terrorism transcends national borders and knows no singular enemy. In that sense, all states are equally affected.

This thought could be taken one step further, doctrinally speaking, by contending that state action potentially infringing *erga omnes* rules affects all states 'because the claim is a brick in the edifice of a (new) customary rule'.¹⁹³ The special status of *erga omnes* rules, which oblige states towards the international community as a whole,¹⁹⁴ is also reflected by the principles governing state responsibility. The International Law Commission (ILC)'s State Responsibility Articles allow uninjured states to invoke the responsibility of others if they breached an 'obligation ... owed to the international community as a whole'.¹⁹⁵ The prohibition on the use of force qualifies as an *erga omnes* norm.¹⁹⁶ To assume that potential violations of Article 2(4) affect all states might yield, however, significant repercussions if it correlated with an increased expectation to react. *Erga omnes* obligations are of eminent importance to the international legal order and can be seen as emanations of its constitutionalist structure. They 'represent a subset of international constitutional law'.¹⁹⁷ The very purpose of *erga omnes* norms would appear to be undermined if the non-protest of bystander states in light of their violation might more easily have a law-altering effect than in the case of 'ordinary' rules. Obviously, it is incompatible with legal intuition that a mere non-protest towards (unfortunately frequent) violations of human rights amounts to acquiescence.¹⁹⁸ The reason for this is that such norms depart from a purely consent-based concept of international law by creating an objective regime (*traités loi*)¹⁹⁹ and introducing a 'constitutional' element into the international legal order. Hence, it would be unconvincing to assume their derogation by the mere 'inferred consent' of other states towards a violation. The *erga omnes* dimension of norms creates a – rather fictitious – *locus standi*, but only to the benefit of a norm's enforceability and not in order to enhance its alterability. Doubts regarding the tenability of the 'impact criterion' in the context of normative dynamics also find some support in the

¹⁹³Mendelson (n 44) 186; Mendelson (n 49) 257.

¹⁹⁴*Barcelona Traction, Light and Power Company Limited (Belgium v Spain)* (merits) (second phase) [1970] ICJ Rep 3, 32.

¹⁹⁵ILC, Draft Articles on State Responsibility for Internationally Wrongful Acts, with Commentaries (2001) *Yearbook of the International Law Commission*, arts 48(1)(a) and 48(1)(b).

¹⁹⁶Kopela (n 63) 107. See also Danilenko (n 90) 40.

¹⁹⁷Fassbender, 'UN Charter' (n 17) 591.

¹⁹⁸See Roberts (n 139) 778. *Contra* Arthur M Weisburd, 'The Effect of Treaties and Other Formal International Acts on the Customary Law of Human Rights' (1995–1996) 25 *Georgia Journal of International and Comparative Law* 99, 107 et seq. See also David A Colson, 'How Persistent Must the Persistent Objector Be' (1986) 61 *Washington Law Review* 957, 968 et seq. (recommending a pattern of strong protest if norms of general interest are affected).

¹⁹⁹Delbrück (n 108) 416.

ICJ's *Fisheries* case. Here, the Court established a general toleration of the international community with regard to the baseline applied by Norway without assessing whether the interests of silent states were in any way affected.²⁰⁰

Impact on the interests of the acting state. The notion of the 'specially affected state' is sometimes employed in order to establish a special standing for certain states in the process of law formation. At its core lies the assumption that particular international norms will affect some states to a greater extent than others, and, hence, greater weight should be given to the practice of those states.²⁰¹ To give an example, the delimitation of the continental shelf primarily affects states that possess a coastline. Therefore, it is contended that their practice should be more influential in the formation of relevant norms.²⁰²

Inversely, the objection of specially affected states might hinder the evolution of a norm. As the *Nuclear Weapons* opinion evidences, the US (as well as some other states) successfully claimed that their objection hindered the evolution of a rule preventing the threat or use of nuclear weapons.²⁰³ Taking this thought a step further, the mere silence of 'lesser affected states' could possibly be interpreted more easily as 'inferred consent'. The crucial question here is, again, which states should be regarded as 'specially affected' by an extension of the right to self-defence. Firstly, one could focus on states that have the potential to strike back with forceful means. However, to argue that powerful states with the military capabilities to act abroad should have a greater influence over the regime on the use of force is not tenable. This would severely conflict with the sovereignty of states and the (legally) non-hegemonic international legal order.²⁰⁴ The purpose of Article 2(4) is to eradicate force as an instrument of interstate relations and to restrict forceful actions between states. Its focus necessarily, therefore, is directed at the protection of (militarily) weaker states.

An extension of the right to self-defence is quite low-risk for militarily strong states since only they are able to use force, and need not fear that weaker states will invoke the extended right against them.²⁰⁵ The argument could therefore very well be inversed by claiming that militarily weaker states are likely to be more affected by modifications of Articles 2(4) and 51

²⁰⁰*Anglo-Norwegian Fisheries Case* (n 168) 138 et seq.; Kopela (n 63) 107.

²⁰¹See Bianchi (n 24) 665.

²⁰²See Statement of Australian Delegation, 6 *Official Records*, 28; Tullio Treves, 'Customary International Law' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of International Law* (Oxford University Press, 2006) para 36; Lawrence (n 84) 101.

²⁰³*Nuclear Weapons* (advisory opinion) (n 11) dissenting opinion of Judge Schwebel, 312.

²⁰⁴Corten (n 56) 820; Corten (n 12) 44; Byers (n 31) 175 et seq. See *Brdanin Case* (judgement) ICTY IT-99-36-A, para 247 (3 April 2007); *Barcelona Traction, Light and Power Company, Limited* (merits) [1979] ICJ Rep 3, 300, dissenting opinion of Judge Ammoun.

²⁰⁵Byers (n 31) 179.

(i.e., that it is weaker states that may be considered ‘specially affected’ in this context).

Secondly, one could regard the position of states that have already become the victims of transborder terrorist attacks (for example, Israel, the US, France, the UK, Ecuador and Russia) as particularly significant in the process of law formation. This neglects, however, that an extension of the right to self-defence has major implications for all states, since potentially every state might become unintentionally a ‘host’ to terrorist organisations. Since terrorism is not limited by state borders, every state has an equal interest in giving the right to self-defence and the *grundnorm* of the international legal order – the prohibition on the use of force – normative shape.

Timeliness. The longer that a state takes to protest while another is making a – in the given circumstances sufficiently determinate – legal claim, the more pertinent an expectation to react becomes, and the easier it is to argue that the state’s passivity amounts to acquiescence.²⁰⁶ In this regard, the ICJ has stressed that a protest has to occur within a reasonable time²⁰⁷ and should be repeated during a longer period of time.²⁰⁸ The more affected a state is by a certain action, the shorter the ‘reasonable’ timeframe.²⁰⁹ In the case of Articles 2(4) and 51, the state against which force is used can be expected to react quickly. A less stringent standard will apply to states that are only ‘indirectly’ affected bystanders. The frequency of reactive claims in support of the contentious state action might shorten the period in which a protest can reasonably be expected. The relevant period commences when a state attains knowledge of the legal claim made by the acting state. Given that the channels of communication are highly developed in the modern world, and a state is deemed to have knowledge if any state organ receives the relevant information, the time period begins at the point when a claim is publicly made.²¹⁰

The nature of the rule in question. The prohibition on the use of force enshrined in the UN Charter qualifies as *jus cogens*.²¹¹ The present author argues that the inextricable link between Article 2(4) and Article 51²¹²

²⁰⁶See *Land, Island and Maritime Frontier Dispute Case (El Salvador/Honduras)* (merits) [1992] ICJ Rep 351, 577; Pfluger (n 135) 144; Frederick A Mann, ‘Reflection on the Prosecution of Persons Abducted in Breach of International Law’ in Yoram Dinstein and Mala Tabory (eds), *International Law at a Time of Perplexity. Essays in Honour of Shabtai Rosenne* (Nijhoff, 1989) 409 et seq.; ILC, Third Report (n 45) para 25.

²⁰⁷*Temple of Preah Vihear Case* (n 132) 23.

²⁰⁸Robert Jennings and Arthur Watts (eds), *Oppenheim’s International Law* (Oxford University Press, 9th edn 2008) 706. See, in relation to the concept of ‘acquiescement instanté’, Karl (n 23) 280; Barale (n 71) 404 et seq.

²⁰⁹Slouka (n 48) 14, 172.

²¹⁰See Karl (n 23) 280.

²¹¹*Nicaragua* (merits) (n 10) 100 et seq. For critique, see James A Green, ‘Questioning the Peremptory Status of the Prohibition of the Use of Force’ (2010–2011) 32 *Michigan Journal of International Law* 215, 243.

²¹²Ruys (n 22) 27. See, concerning interrelated nature of arts 2(4) and 51, Bowett (n 12) 184; Marcelo G Kohen, ‘Use of Force by the United States’ in Michael Byers and Georg Nolte (eds), *United States Hegemony and the Foundations of International Law* (Cambridge University Press, 2003) 197, 228.

conveys *jus cogens* nature onto the right of self-defence as well. It is beyond the scope of this article to examine whether Articles 2(4) and 51 constitute *jus cogens* in toto or – as appears to be more arguable – only at their substantive core. In any case, questions like pre-emptive self-defence or the so-called ‘unwilling or unable’ doctrine conflict – as argued by this author in an earlier piece²¹³ – with the ‘strong textual presumption against the use of force’²¹⁴ underlying the UN Charter, and touch the very heart of the prohibition on the use of force by redefining the concept of ‘armed attack’ (as well as the justificatory scope of Article 51). At the same time, Articles 2(4) and 51 qualify as *erga omnes* norms, as previously noted.²¹⁵

Amendments to *jus cogens* norms require the emergence of contradictory norms of the same nature (as per Article 53 of the VCLT). This presupposes near-universal state practice and a belief on the part of the international community as a whole in a norm’s binding nature, combined with its belief that the norm in its amended form has attained *jus cogens* status (*opinio juris cogentis*). On the one hand, the very concept of *jus cogens* norms is rooted in their resilience to change in light of their fundamental importance. On the other hand, ‘it would be clearly wrong to regard even rules of *jus cogens* as immutable and incapable of modifications in the light of future developments.’²¹⁶

While *jus cogens* norms are not immune from normative evolution, it is submitted that silence can only under very limited circumstances issue law-formative effects in cases in which peremptory norms are at stake if the very concept of *jus cogens* is to be kept doctrinally intact. Theoretically, a distinction has to be made between normative change by way of an ‘interpretative agreement’ reflected by state practice and amendment via subsequent CIL: only an amendment requires the emergence of a contradictory *jus cogens* norm. Nevertheless, in light of the far-reaching evolutionary potential of interpretation in the realm of international law, and the practical difficulties in distinguishing interpretation from amendment delineated in section II.i, it is submitted that the *jus cogens* nature of potentially affected norms has to be taken into account within both processes – albeit on a different doctrinal level and possibly to a different extent.²¹⁷ Article 51 creates a sensitive balance between the interest of the attacked state in the effective preservation of its

²¹³See Paulina Starski, ‘Right to Self-Defence, Attribution and the Non-State Actor’ (2015) 75 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 455. See also Olivier Corten, ‘The “Unwilling or Unable” Test: Has it Been, and Could it be, Accepted?’ (2016) 29 *Leiden Journal of International Law* 777.

²¹⁴Jessica Liang, ‘Modifying UN Charter through Subsequent Practices’ (2012) 81 *Nordic Journal of International Law* 1, 19. See also Bianchi (n 24) 665.

²¹⁵See n 190 et seq. and accompanying text.

²¹⁶ILC, Draft Articles on the Law of Treaties (n 23) para 4. See also Malgosia Fitzmaurice, ‘Dynamic Evolutionary Interpretation of Treaties’ (2009) 22 *Hague Yearbook of International Law* 3, 17 (with regard to *erga omnes* norms).

²¹⁷See also Djefal (n 27) 200 (obviously limiting this finding to literal change and not a specification of meaning, at footnote 558).

rights, and the interest of the state that may become the target of a self-defence action not to be subjected to force. Even minor adjustments affecting the understanding of an ‘armed attack’ and its attributability to a state – the crucial parameters for determining the legality of a self-defence action – transform the use of force regime considerably. In particular, it must be stressed that even mere ‘re-interpretative’ endeavours have the potential to alter the international legal order significantly.

Jus cogens (and *erga omnes*) rules reflect fundamental interests of the international community²¹⁸ and represent emanations of the constitutionalisation of the international legal order by inducing a hierarchical normative structure.²¹⁹ Norms of a *jus cogens* nature bind even states that persistently object,²²⁰ hence departing from the idea of consent-based normativity. They are neither bilateral nor reciprocal in nature.²²¹ Consequently, the private law analogy set out in section III fails to account for the possible law-formative effects of silence. If we regard law-formative acquiescence as a safety mechanism in order to end a state of normative volatility as suggested in section III, we need to take into account that all actions in violation of *jus cogens* norms are *per se* invalid²²² and constitute ‘objective wrongs’.²²³ Only the international community as a whole can validate violations of *jus cogens*²²⁴ leaving no room for a process of ‘legalization’ through the acquiescence of some individual states.²²⁵ Hence, the potential for violations to induce a state of normative volatility is limited, and the level of uncertainty in the case of *jus cogens* norms is not the same as for ‘ordinary’ norms. States may rely on the continued validity of *jus cogens* norms. The doctrinal safety mechanism of acquiescence, which helps to end a state of normative volatility if states do not speak up, therefore loses significance.

Consequently, the factors pointing towards acquiescence having a law-forming effect in relation to contentious state practice must be overwhelmingly compelling. Firstly, the contentious state practice has to be frequent and, most importantly, consistent. Furthermore an exceptional level of clarity of the primary claim as well as the reactive claims is required. If factual circumstances hinder the emergence of legitimate expectations on the part of other states, or the international community, silence cannot have a norm-evolutionary effect.

²¹⁸Delbrück (n 116) 28; Charney (n 82) 538 et seq.

²¹⁹Fassbender, ‘International Constitutional Law’ (n 17) 845; Kadelbach (n 17) 11.

²²⁰For critique, see Weil (n 85) 481. See for an extensive analysis Green (n 85) 189 et seq.

²²¹Kleinlein (n 18) 337. See, similarly, Orakhelashvili (n 78) 399.

²²²Hersch Lauterpacht, ‘Sovereignty over Submarine Areas’ (1950) 27 *British Yearbook of International Law* 395, 397 et seq.

²²³Orakhelashvili (n 78) 401; ILC, Report of the International Law Commission on the work of its fifty-third session (2001), *Yearbook of the International Law Commission*, Vol. II, Part 2, art 45, para 4.

²²⁴Orakhelashvili (n 78) 403; Rozakis (n 78) 128.

²²⁵James Crawford, *Brownlie’s Principles of Public International Law* (Oxford University Press, 8th edn 2012) 595 et seq.; Antonio Cassese, *Self-Determination of Peoples* (Cambridge University Press, 1995) 179 et seq.

The same standard should apply with regard to deducing an ‘interpretative agreement’ – in the sense of Article 31(3)(b) of the VCLT – from contentious state practice of some states and a mere silence on the part of their treaty partners, in light of the severe practical difficulties in distinguishing mere reinterpretations from amendments via subsequent CIL norms delineated in section II.i. States can rely on the established reading of a *jus cogens* norm even if some states advance conflicting interpretative claims. The bar for a state of ‘interpretative volatility’ that would give rise to legitimate expectations of the claiming and acting states that their treaty partners would explicitly protest against the ‘re-interpretative practice’ in question is set very high. Furthermore, *jus cogens* norms – even in their treaty emanation – rest on the belief of the ‘international community as a whole’ in their binding nature. Hence, their ‘contractual embedding’ within a treaty must not obscure the fact that it is eventually the ‘international community as a whole’ that is the reference point for a particular ‘interpretative agreement’ within the meaning of Article 31(3)(b) of the VCLT.²²⁶ This diminishes the significance of any individual ‘re-interpretative’ state practice.

At this point, the following preliminary conclusion can be stated: the emergence of a specific expectation to react is contingent on factors such as the frequency of the conduct in question, the determinacy of the claims made, the capacity of a state to react, the general context of the claims, supportive reactions of other bystander states, and the timing of any reactive claims, as well as the nature of the rule(s) in question. Not all of these factors will necessarily point in the same direction. However, all of these factors have to be considered as part of an overall assessment, keeping in mind that they may counterbalance or reinforce each other.

IV. Syrian intervention and evolution of the prohibition on the use of force?

Drawing upon the findings in previous sections, this article now assesses whether the states not actively taking part in Coalition operations in Syria can be expected to protest. If this question is answered in the affirmative, states that remain silent run the risk of consolidating a change in the use-of-force regime. First, the contentious conduct in question is addressed in subsection i. Secondly, subsection ii. illustrates the discourse, which is composed of primary claims raised by the acting states and the reactions of other actors to these claims. Given the central role that the present author attributes to a claim’s determinacy, there will be a particular focus on this aspect. The aspects that are significant for an overall assessment of the legal

²²⁶See Djeflal (n 27) 200 (arguing that the non-derogable nature of an interpretation has to be derived from the object and purpose of the treaty).

effects of silence are identified. Finally, in subsection iii, it is argued that it is difficult to attribute a law-altering effect to silence in relation to the circumstances surrounding the Coalition's intervention. While an extensive analysis will not be possible, the aim here is to highlight particular points that should be given due consideration within the wider debate.

i. Contentious conduct: the facts

In autumn 2014 the US (which contributed the major initiative), Bahrain, Jordan, Saudi Arabia, and the UAE began airstrikes on ISIL positions, as well as those of the al-Qaeda offshoot Khorasan and the al-Nusra Front in Iraq and Syria. Strikes continued on a regular basis throughout 2015. On 23 November 2015, 64 states considered themselves to be members of the Coalition.²²⁷ At the time of writing, the US lists 66 participant states.²²⁸ It is worth noting that, unlike the Coalition, Russia's operations in Syria are based on Syrian authorisation (i.e., the 'intervention by invitation' doctrine).²²⁹

As of 11 January 2017, the US and its partners have conducted a total of 17,370 strikes, 6520 of which having taken place in Syria. The US undertook 7358 forceful air operations in Iraq and 6191 in Syria; the rest of the Coalition is directly responsible for 3821 strikes in these countries (3492 in Iraq and 329 in Syria).²³⁰ Therefore, only 5.0% of the Coalition's strikes affecting Syria were conducted by states other than the US. The states operating in Iraq, besides the US, have been Australia, Belgium, Canada, Denmark, France, Jordan, the Netherlands and the UK. Russia and 11 other states have – according to data provided by the US government – intervened in Syria together with the US, namely Australia, Bahrain, Canada, Denmark, France, the Netherlands, Jordan, Saudi Arabia, Turkey, the UAE and the UK. Fifty-four member states of the Coalition remain reluctant to operate in Syria.²³¹

²²⁷Memorandum to the Foreign Affairs Select Committee (November 2015) 17.

²²⁸US Department of State, 'The Global Coalition to Counter ISIL', www.state.gov/s/sect/.

²²⁹See identical letters dated 17 September 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2015/719 (21 September 2015) 1.

²³⁰US Department of Defense, 'Operation Inherent Resolve: Targeted Operations against ISIL', www.defense.gov/News/Special-Reports/0814_Inherent-Resolve.

²³¹*Ibid.* Belgium announced, in May 2016, its willingness to participate in airstrikes in Syria from July onwards, see Julian E Barnes, 'Belgium Plans to Carry Out Airstrikes in Syria Against Islamic State', *Wall Street Journal* (13 May 2016) www.wsj.com/articles/belgium-plans-to-carry-out-air-strikes-in-syria-against-islamic-state-1463153908. Belgium reported on 27 June 2016 that it had taken over airstrikes from the Dutch, see Alex Hopkins, 'International Airstrikes and Civilian Casualty Claims in Iraq and Syria', *Airwars* (22 July 2016) <https://airwars.org/news/international-airstrikes-and-casualty-claims-in-iraq-and-syria-july-2016/>. Syrian and Russian media alleged recently that Belgium conducted airstrikes against a Syrian village in October 2016 killing six civilians see 'Belgian Air Force Killed 6 in Outskirts of Aleppo, says Russia', *Russia beyond the Headlines* (20 Oct 2016) rbth.com/news/2016/10/20/belgian-air-force-killed-6-in-outskirts-of-aleppo-says-russia_640701. This has been denied by Belgium, see Andrew Osborne and Katya Golubkova and Denis Pinchuk, 'Russia Summons Belgian Envoy in

Considering that the UN lists 193 member states,²³² at least 180 states are not currently operating in Syria.

ii. The discourse of legal claims and reactions

This subsection divides the discourse concerning the Syrian operations into three phases of claims and reactions. September until November 2014 marked the first phase (considered in (a)). This was followed by the second phase lasting until the Paris attacks on 13 December 2015 (b). The third phase started with the Paris attacks (c).

(a) First phase of claims

Obviously, the leading voice purporting a claim as to the legality of the Coalition's intervention in the first phase was the US. Together with the US, only Bahrain, Jordan, Saudi Arabia and the UAE operated directly in Syria at this point. These claims will be examined in the first part of this subsection. All other states were merely in a reactive position (examined in the second part of the subsection).

*The primary claims of states involved in military operations in Syria.*²³³ On 23 September 2014, the UN Secretary-General received a letter from the US Ambassador to the UN justifying military actions in Syria and Iraq *stressing that*

[S]tates must be able to defend themselves, in accordance with the inherent right of individual and collective self-defence, as reflected in Art. 51 UNC, when ... the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks.²³⁴

Obviously, the US made two claims of justification²³⁵ here by invoking individual and collective self-defence. Further government statements clarified that individual self-defence was invoked concerning the al-Qaeda offshoot, Khorasan, and collective self-defence – in protection of Iraq – was advanced in relation to ISIL.²³⁶

Row Over Syria Air Strike', *Reuters* (21 October 2016) www.reuters.com/article/us-russia-belgium-diplomacy-idUSKCN12L0S1. Norway has sent a notification letter to the Security Council invoking collective self-defence, Letter dated 3 June 2016 from the Permanent Representative of Norway to the United Nations addressed to the President of the Security Council, UN Doc S/2016/513 (3 June 2016). However, at the time of writing, it has not yet conducted any airstrikes in Syria.

²³²See UN, 'UN Member States on the Record', www.un.org/depts/dhl/unms/whatisms.

²³³The claims made by states forming part of the Coalition but limiting their military activities to Iraqi territory are considered as 'reactive claims' for the purposes of the subsequent analysis. The term 'involved states' is used to denote those states that are acting militarily on Syrian territory, states directly contributing to operations on Syrian ground or states that have officially indicated their willingness to do so.

²³⁴Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, UN Doc S/2014/695 (23 September 2014).

²³⁵See n 139 et seq. and accompanying text.

²³⁶US Department of Defense, News Transcript, 'Department of Defense Press Briefing on Operations in Syria by Lt. Gen. Mayville in the Pentagon Briefing Room, Press Operations', Lieutenant General

The US claims depart from a restrictive reading of Article 51 in different ways. The reliance on individual self-defence particularly refers to the notion of anticipatory self-defence. In this regard, the purported line of argument is extensive since the letter not only speaks of an (imminent) attack but also of a mere ‘threat’ which goes even beyond the standard advanced by most propagators of an anticipatory right to exercise self-defence²³⁷ into the direction of pre-emptive self-defence in view of a temporally more remote and abstract threat.²³⁸

Furthermore, the US claim assumes that armed attacks by non-state actors allow for counteractions infringing the territorial sovereignty of the ‘host state’ without its consent if it is ‘unwilling or unable’ to avert the threat.²³⁹ This aspect is also relevant in the context of the collective self-defence claim. While the letter’s use of the term ‘must be’ could be interpreted as having a *de lege ferenda* focus, the subordinate clause, ‘in accordance with’, evidences that the US assumed the legality of its actions *de lege lata*. The ‘unwilling or unable’ claim has been further specified in statements by government representatives, contending that the US neither coordinated actions with the Syrian government nor provided ‘advance notification to the Syrians at a military level’.²⁴⁰ Hence, operations were considered legal by the US even where the ‘unwilling or unable’ state was not even *asked* for its consent first. Notably, it appears that no government statements were issued specifying the factual grounds on which the US assumed Syria’s unwillingness or inability.

Obviously, the claims were announced in a way that guaranteed the international community’s awareness of them (a letter to UN Secretary-General, press briefings by the Pentagon).²⁴¹ The US has been transparent regarding the fact that forceful actions were undertaken, although the details of each operation have not been openly communicated.²⁴² It is likewise relevant that the US was not making such claims of justification for the first time.²⁴³ In fact, the notion of anticipatory self-defence has been frequently employed by the US in the aftermath of 9/11, while the ‘unwilling or unable’ line of argument has been an element of US foreign policy for decades.²⁴⁴

William Mayville, director of Operations J3 and Press Secretary Rear Admiral John Kirby (23 September 2014) www.defense.gov/News/News-Transcripts/Transcript-View/Article/606931.

²³⁷See, for example, Bowett (n 12) 104.

²³⁸See James A Green, ‘The *Ratione Temporis* Elements of Self-Defence’ (2015) 2 *Journal on the Use of Force and International Law* 97, 102 (discussing the issue of terminology).

²³⁹The term ‘as reflected in Art. 51 UNC’ seems to imply that the US intended to invoke the customary right to self-defence. See van Steenberghe (n 11) 89.

²⁴⁰See Jen Psaki, cited by Martin Chulov, Spencer Ackerman, Paul Lewis, ‘US Confirms 14 Air Strikes against Isis in Syria’, *The Guardian* (23 September 2014) www.theguardian.com/world/2014/sep/23/us-launches-air-strikes-against-isis-targets-in-syria. See also Rear Admiral Kirby (n 236).

²⁴¹See n 163 and accompanying text.

²⁴²See US Department of Defense (n 230, 236).

²⁴³See George P Shultz, ‘Low-Intensity Warfare’ (1986) 25 *International Legal Materials* 204, 206; Ruys (n 22) 422. See, generally, Starski (n 213) 457.

²⁴⁴See, however, Liang (n 214) 19.

The other Coalition partners directly engaging in strikes in Syria from the beginning of the intervention refrained from commenting on their operations and did not make explicit legal claims. Furthermore, they did not notify the Security Council that they were acting in self-defence, as required by Article 51. While reporting is generally considered a procedural element, its role in the process of law formation must not be underestimated, since the 'absence of a report... may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence'.²⁴⁵

As early as autumn 2014, Turkey's parliament authorised incursions to counter the threat of attacks of various different terrorist groups operating from Syria.²⁴⁶ From the outset, its line of argument was distinct because it combined the ISIL narrative with its justification in relation to its operations against the Partiya Karkerên Kurdistanê (PKK).²⁴⁷

The reactive claims of states not involved in military operations in Syria. Several US allies – especially Australia, Canada, France, Turkey and the UK – commenced operations in Iraq but avoided taking military action in Syria. While praising the US-led operations generally, most of them particularly stressed that Iraq had given its consent, implying that this was a legal requirement.²⁴⁸ Canadian Prime Minister Stephen Harper announced in October 2014 that Canada would strike in Syria if asked by the Assad government.²⁴⁹ On 26 September 2014, the British parliament approved operations in Iraq²⁵⁰ while not 'ruling out' the option to act in Syria.²⁵¹ France's President, François Hollande, explicitly justified the French intervention in Iraq with its request, and emphasised that France lacked a similar mandate for Syria.²⁵² Belgium, Denmark and the

²⁴⁵Nicaragua (merits) (n 10) para 199. For an extensive analysis of the reporting requirement see James A Green, 'The Article 51 Reporting Requirement for Self-Defense Actions' (2015) 55 *Virginia Journal of International Law* 563.

²⁴⁶Liz Sly, 'Turkish Parliament Authorizes Potential Military Action in Syria and Iraq', *Washington Post* (2 October 2014) www.washingtonpost.com/world/middle_east/turkish-parliament-authorizes-military-action-in-syria-iraq/2014/10/02/cca5dba8-7d0c-4e70-88bb-c844bbdca6d2_story.html.

²⁴⁷Ayla J Yackley and Alexander Dziadosz, 'Turkey Steels for Action as Islamic State Advances on Syrian Border Town' *Reuters* (2 October 2014) www.reuters.com/article/2014/10/02/us-mideast-crisisidUSKCN0HR0RL20141002.

²⁴⁸Letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council, UN Doc S/2014/691 (22 September 2014).

²⁴⁹Michael Bolen, 'Harper Says Canada Will Bomb ISIS in Syria If Murderous Despot Asks Him To', *Huffington Post* (3 October 2014) www.huffingtonpost.ca/2014/10/03/harper-syria-airstrikes-isis-canada_n_5929436.html.

²⁵⁰Andrew Sparrow and Claire Phipps, 'UK Parliament Approves Air Strikes against Isis in Iraq – As It Happened', *The Guardian* (26 September 2014) www.theguardian.com/politics/blog/live/2014/sep/26/mps-debate-and-vote-on-air-strikes-against-islamic-state-politics-live-blog.

²⁵¹Howard Koplowitz, 'Obama Isis Speech Reaction', *IB Times* (9 November 2014) www.ibtimes.com/obama-isis-speech-reaction-germany-turkey-wont-join-airstrikes-syria-uk-wont-rule-them-out-1685828.

²⁵²Daniel Bases and Arshad Mohammed, 'France Sees No Legal Hurdle to Attacking IS in Syria', *Reuters* (22 September 2014) www.reuters.com/article/2014/09/23/us-france-fabius-airstrikes-idUSKCN0HH28920140923. However, French Foreign Minister Laurent Fabius – contrary to rather

Netherlands likewise engaged solely in Iraq. Whilst Belgium and Denmark praised the US offensive unconditionally, the Netherlands was more hesitant and merely expressed understanding for the Syrian part of the operations,²⁵³ and consequently limited its activities to Iraq.²⁵⁴ The Dutch Deputy Prime Minister contended that '[f]or military operations in Syria, there is currently no international agreement on an international legal mandate.'²⁵⁵ The words and deeds of the Coalition's members thus remained disparate. Their preference for stressing Iraq's 'invitation to intervention' raises doubts as to whether their general verbal support concerning the US-led initiative can be seen as a confirmation of the legality of the Syrian part of the operations. It is crucial in this regard that only the UK – though quite late, in November 2015 – notified the Security Council of its self-defence actions at that stage.²⁵⁶ Belgium discontinued its airstrikes in Iraq on 30 June 2015.²⁵⁷

Most of the remaining states that commented on the operations were reluctant to acknowledge the legality of the ongoing strikes in Syria, or even to 'legitimize' them 'with legal language'. Israel, for example, declared rather generally to be supportive of Barak Obama's anti-ISIL campaign before the airstrikes of the Coalition commenced, but provided no legal opinion.²⁵⁸ The UN Secretary-General Ban-Ki-Moon confirmed that the strikes were not authorised by Syria, but observed that they concerned areas not under effective Syrian control,²⁵⁹ indicating a possible alternative pattern of argument ('ungoverned space').

careful assertions of President Francois Hollande – called their legality out of question. See Tom Ruyss and Nele Verlinden (eds), 'Digest of State Practice: 1 July–31 December 2014' (2015) 2 *Journal on the Use of Force and International Law* 119, 140 et seq.

²⁵³Colin Freemann, 'Who is in the Anti-Islamic State Coalition and What They are Contributing?', *The Telegraph* (26 September 2014) www.telegraph.co.uk/news/worldnews/middleeast/syria/11124070/Who-is-in-the-anti-Islamic-State-coalition-and-what-they-are-contributing.html; Thomas Escritt, 'The Netherlands is Joining the Fight against Isis in Iraq', *Business Insider* (24 September 2014) www.businessinsider.com/the-netherlands-is-joining-the-fight-against-isis-2014-9?IR=T.

²⁵⁴The Netherlands, *Brief van de Ministers van Buitenlandse Zaken, van Defensie en voor Buitenlandse Handel en Ontwikkelingssamenwerking*, (2014–2015) 27925 No. 506, 4–5 (24 September 2014).

²⁵⁵Cited by Ryan Goodman, 'Australia, France, Netherlands Express Legal Reservations about Airstrikes in Syria', *Just Security* (25 September 2014) www.justsecurity.org/15545/australia-france-netherlands-express-legal-reservations-airstrikes-syria/

²⁵⁶Identical letters dated 25 November 2014 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2014/851 (26 November 2014).

²⁵⁷Sputnik, 'Belgium's Exit from Anti-ISIL Coalition's Bombing', *Global Research* (4 July 2015) www.globalresearch.ca/belgiums-exit-from-anti-isis-coalitions-bombing-campaign-in-syria-and-iraq/5460409. It has been contended that this was merely due to financial reasons: see Kathleen J McInnis, *Coalition Contributions to Countering the Islamic State*, Congressional Research Service, R44135, Table 1, www.fas.org/spp/crs/natsec/R44135.pdf.

²⁵⁸Netanyahu: Israel Fully Supports U.S. Action against Islamic State', *Jewish News Service* (11 September 2014) www.jns.org/news-briefs/2014/9/11/netanyahu-israel-fully-supports-us-action-against-islamic-state#.Vxiadf5f3DA=.

²⁵⁹Remarks at the Climate Summit Press Conference', *UN News Centre* (23 September 2014).

The operations were also openly criticised. Counterclaims to the Coalition's airstrikes were made by Argentina,²⁶⁰ Iran²⁶¹ and Russia, which was unwilling to support any operations without authorisation by the Security Council.²⁶² The Ecuadorian Foreign Minister emphasised that the intervention lacked Syrian consent.²⁶³ China – albeit rather equivocally – stressed its concerns about the preservation of state sovereignty.²⁶⁴ Cuba, Venezuela and Chad likewise emphasised the need to respect Syrian sovereignty.²⁶⁵ Several states particularly accentuated the need for a coordinated action: Algeria in particular favoured a negotiated political solution instead of the use of force.²⁶⁶

Syria, as the directly affected state, did not protest formally against the airstrikes conducted by the Coalition and even indicated its willingness to cooperate in their initial stages.²⁶⁷ Some weeks later, however, President Assad declared the Coalition's actions to be illegal.²⁶⁸

(b) Second phase: 2015 until Paris Atrocities

It is notable that, during 2015, there was evident development in the legal claims and reactions of those involved (and not involved) in the intervention in Syria.

The primary claims of states involved in the contentious state conduct affecting Syria. Both Canada and Australia found clear words of support for the

²⁶⁰'CFK Blasts US Terror Fight', *Buenos Aires Herald* (25 September 2014) www.buenosairesherald.com/article/170607/cfk-blasts-us-terror-fight.

²⁶¹Secretary of Iran's Supreme National Security Council, Ali Shamkhani, cited by *Agence-France Presse* (13 September 2014) www.ndtv.com/world-news/iran-accuses-us-of-violating-sovereignty-in-anti-is-fight-663445. Cf. Dina Esfandiary/Ariane Tabatabai, 'Iran's ISIS Policy' (2015) 91 *International Affairs* 1 et seq. The Iranian position is, however, inconsistent, see Letter dated 29 July 1996 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General, UN Doc S/1996/602 (29 July 1996).

²⁶²Ian Black and Dan Roberts, 'ISIS Air Strikes', *The Guardian* (12 September 2014) www.theguardian.com/world/2014/sep/11/assad-moscow-tehran-condemn-obama-isis-air-strike-plan; Kevin Lamarque, 'Russia Condemns US Strikes on Islamic State without Syria's Approval', *The Moscow Times* (25 September 2014) www.themoscowtimes.com/news/article/russia-condemns-u-s-strikes-on-islamic-state-without-syria-s-approval/507784.html.

²⁶³Cancillería ecuatoriana califica como "inaceptable" la ofensiva contra Siria', *El Comercio* (25 September 2014) www.elcomercio.com/actualidad/onu-ricardo-patino-julian-assange.html (Chancellor Ricardo Patiño).

²⁶⁴Shannon Tiezzi, 'US Air Strikes in Syria', *The Diplomat* (24 September 2014) <http://thediplomat.com/2014/09/us-air-strikes-in-syria-chinas-conundrum>.

²⁶⁵UNGA General Debate (24–30 September 2014) www.un.org/en/ga/69/meetings/gadebate (statement of Cuban Representative Parrilla: 'The US government is infringing upon International Law when it launches, [...] unilateral bombings with complete disregard for national borders or sovereign States, even if it dissembles them under doubtful coalitions').

²⁶⁶*Ibid.*

²⁶⁷A Quinn, 'Russia Slams U.S. Air Strikes against Islamic State in Syria', *Moscow Times* (23 September 2014) www.themoscowtimes.com/news/article/russia-slams-u-s-air-strikes-against-islamic-state-in-syria/507661.html.

²⁶⁸See Interview with *Paris Match* (3 December 2014) www.parismatch.com/Actu/International/Our-Interview-with-Syrian-President-Bashar-al-Assad-661984.

operations in Syria and decided to engage actively. On 26 March 2015, the Canadian House of Commons voted in favour of an extension of military operations to Syria.²⁶⁹ Minister of National Defence Kenney stated on this occasion:

We therefore believe, pursuant to legal advice received from our own Judge Advocate General and the position taken by President Obama's administration, that we have every legal prerogative to pursue the ISIL targets in eastern Syria, in part at the invitation of the government of Iraq under article 51 ... to give practical expression to the collective right of self-defence.²⁷⁰

Canada informed the Security Council on 31 March 2015 of its self-defence operations, referring to Syria's unwillingness and inability to prevent ISIL attacks.²⁷¹ Besides collective self-defence, it also invoked individual self-defence. The first Canadian airstrike was conducted on 8 April 2015.²⁷²

Australia, which the US requested at the beginning of 2015 to extend its operations to Syria, hesitated at first to do so.²⁷³ It changed its position in August 2015 after Prime Minister Tony Abbott successfully urged the US to make a formal request for assistance.²⁷⁴ In this context, the Australian Foreign Minister, Julie Bishop, justified the action by stating that under 'the principle of collective self-defence of Iraq ... the Coalition has extended self-defence into Syria because the border between Syria and Iraq is no longer governed.'²⁷⁵ This statement modifies the initial justificatory claim made by the US and introduces the idea of an 'ungoverned space'. Going beyond this, the Prime Minister adduced a legitimacy claim²⁷⁶ by stating: 'While there is a little difference between the legalities of airstrikes on either side of the border, there's no difference in the morality.'²⁷⁷ In its

²⁶⁹Mark Kennedy, 'Parliament Votes 149–129 to Widen Canada's Mission against ISIS to Syria and Extend it for a Year', *National Post* (31 March 2015) <http://news.nationalpost.com/news/canada/canadian-politics/parliament-votes-149-129-to-widen-canadas-mission-against-isis-to-syria-and-extend-it-for-a-year>.

²⁷⁰Official Report, Volume 147, Number 190, 2nd sess., 41st parliament (26 March 2015) www.parl.gc.ca/HousePublications/Publication.aspx?DocId=7900476. Monica Hakimi, 'Defensive Force against Non-State Actors: The State of Play' (2015) 91 *International Law Studies* 1, 4.

²⁷¹Letter dated 31 March 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council, UN Doc S/2015/221 (31 March 2015).

²⁷²Ministry of Defense, News (9 April 2015) www.rcf-arc.forces.gc.ca/en/article-template-standard.page?doc=first-airstrike-conducted-in-syria-under-operation-impact/i89a1pdr.

²⁷³Tony Abbott to Spend at Least a Week Weighing up ISIS Syria Campaign', *The Guardian* (23 September 2015) www.theguardian.com/australia-news/2015/aug/23/tony-abbott-to-decide-on-joining-fight-against-islamic-state-after-us-talks.

²⁷⁴Mark Kenny and David Wroe, 'Tony Abbott Pushed for US Request to Join Syria Air Strikes', *Sydney Morning Herald* (26 August 2015) www.smh.com.au/federal-politics/political-news/tony-abbott-pushed-for-us-request-to-join-syrian-air-strikes-20150825-gj7kfh.html.

²⁷⁵Cited by John Kerin, 'Julie Bishop Claims Syrian Air Strikes Justified', *Financial Review* (23 August 2015) www.afr.com/news/politics/julie-bishop-insists-syrian-air-strikes-have-legal-backing-20150823-gj5k6f.

²⁷⁶See n 139 and accompanying text.

²⁷⁷Susan McDonald, 'Islamic State: Tony Abbott Hints Australia Will Join US in Carrying out Air Strikes in Syria', *ABC News* (21 August 2015) www.abc.net.au/news/2015-08-21/islamic-state-tony-abbott-hints-air-strikes-syria/6713720.

letter to the Security Council, Australia used both the terms ‘safe haven’ and ‘unwilling or unable’,²⁷⁸ but nonetheless only invoked collective self-defence.

Although Turkey praised the US-led offensive from the beginning, and despite the early parliamentary authorisation of possible Turkish operations, the first Turkish airstrikes in Syria were not conducted until the autumn of 2015.²⁷⁹ The Assad government objected to earlier Turkish operations taking place without Syrian consent.²⁸⁰ Overall, the justificatory argumentative line employed by Turkey differs from the general primary claims since it mostly refers to ISIL and the PKK simultaneously. Together with its strikes against ISIL, it resumed hostilities with the PKK, ending a ceasefire that had been in place since March 2013.²⁸¹ Prime Minister Ahmet Davutoğlu stated in September 2015 that by taking ‘necessary measures’ and ‘by mounting operations against [ISIL] and the PKK at the same time, we also prevented the PKK from legitimising itself.’²⁸² The atmosphere heated up when Turkey advanced its forces into Iraqi territory in December 2015, provoking opposition. In addition to the protests of Iraq,²⁸³ the League of Arab Nations adopted a resolution in December 2015 reacting to Turkish operations in Iraq, stating that it condemned ‘the Turkish Government for its forces’ incursion into Iraqi territory, which is a violation of Iraqi sovereignty and a threat to Arab security’.²⁸⁴

France began launching airstrikes in Syria in September 2015, notably before the Paris attacks, impliedly referring to its right to self-defence against an ‘armed attack’.²⁸⁵ President Hollande stressed that the strikes

²⁷⁸Letter dated 9 September 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council, UN Doc S/2015/693 (9 September 2015).

²⁷⁹AFP, ‘Turkey Joins Air Strikes against ISIL for the First Time’, *The Telegraph* (29 August 2015) www.telegraph.co.uk/news/worldnews/europe/turkey/11833358/Turkey-joins-air-strikes-against-isil-for-the-first-time.html.

²⁸⁰Syria: Turkish Incursion is “Flagrant Aggression”, *Al Jazeera* (3 February 2015) www.aljazeera.com/news/2015/02/syria-turkish-incursion-flagrant-aggression-150222113426208.html.

²⁸¹See, on Turkey’s recent incursion into Syrian territory, Nick Tattersall and Humeyra Pamuk, ‘Turkey Signals No Quick End to Syria Incursion as Truck Bomb Kills Police’, *Reuters* (27 August 2016) www.reuters.com/article/us-mideast-crisis-syria-turkey-idUSKCN1111F1. Turkey upholds parallel lines of argument with regard to both ISIL and the PKK.

²⁸²Cited by Semih Idiz, ‘Turkey’s Middle East Policy “Fiasco”’, *Al-Monitor Turkey Pulse* (28 September 2015) www.al-monitor.com/pulse/originals/2015/09/turkey-syria-usa-ankara-dream-to-set-up-three-cities.html. See Orhan Coskun and Dasha Afanasieva, ‘Turkey Stages First Air Strikes on Islamic State in Syria’, *Reuters* (25 July 2015) <http://in.reuters.com/article/mideastcrisis-turkey-davutoglu-idINKCN0PY13320150725>.

²⁸³Letter dated 11 December 2015 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council, UN Doc S/2015/963 (14 December 2015).

²⁸⁴‘Unified Arab Position on the Violation by Turkish Forces of the Sovereignty of Iraq’, Resolution No. 7987, adopted at the Ministerial Meeting of the Council of the League of Arab States (24 December 2015), annexed to Letter dated 7 January 2016 from the Permanent Representative of Egypt to the United Nations addressed to the President of the Security Council, UN Doc S/2016/16 (11 January 2016).

²⁸⁵Identical letters dated 8 September 2015 from the Permanent Representative of France to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2015/745 (9 September 2015).

aimed at ‘protecting our territory, cutting short terrorist actions, acting in legitimate defense’.²⁸⁶ Interestingly France had already invoked self-defence with regard to terrorism in Mali in 2013,²⁸⁷ but then dropped this narrative in favour of stressing Security Council authorisations as well as the invitation by the Malian president.²⁸⁸

Syria’s protest became clear in the course of 2015, although it continued to emphasise its willingness to coordinate with other states in order to combat the threat posed by ISIL.²⁸⁹ Stressing the lack of its consent to the airstrike operations of the Coalition within its territory,²⁹⁰ it accused the US of a ‘distorted reading’ of Article 51.²⁹¹

The reactive claims of states not involved in the contentious state conduct affecting Syria. Denmark, Belgium and the Netherlands refrained from engaging in Syria throughout 2015,²⁹² expressing, however, their general support for the endeavours of the Coalition without going into details. The Dutch government sent a memorandum to the parliament arguing that operations against ISIL on Syrian territory would be legal ‘since Syrian authorities are incapable of stopping these armed attacks’.²⁹³ An exceptionally detailed statement can be found on the Danish Ministry’s Foreign Affairs website: ‘ISIL has thus increasingly resorted to terrorist attacks outside of Iraq and Syria and increasingly constitutes a direct threat to countries like Denmark. For example, ISIL has taken responsibility ... for the terrorist attacks in France.’ Furthermore, this statement contends that the:

Iraqi Government requested assistance to fight ISIL from the international society through the UN Security Council. In resolution 2178 ... and resolution 2170 ... , the UN condemns ISIL and the serious attacks and human rights violations. The Danish contribution to the struggle against ISIL is deployed on the

²⁸⁶Elaine Ganley, ‘France Carries out Airstrikes in Syria against Islamic State’, *The Big Story* (27 September 2015) <http://bigstory.ap.org/article/122363e741934d4591c3d7abc2fd7348/france-fires-first-airstrikes-extremists-syria>.

²⁸⁷Laurent Fabius, Minister of Foreign Affairs, Press Conference (11 January 2013) www.diplomatie.gouv.fr/fr/IMG/pdf/conf_mali_1f_11012013_cle412e95.pdf. See also Joe Boyle, ‘Making Sense of Self-Defence in the War on Terror’ (2014) 1 *Journal on the Use of Force and International Law* 55, 61.

²⁸⁸Laurent Fabius, Minister of Foreign Affairs, Press Conference (14 January 2013) www.diplomatie.gouv.fr/fr/dossiers-pays/mali/http-publication-diplomatie-gouv-fr-fr-dossiers-pays-mali-evenements/article/situation-au-mali-17-01-13.

²⁸⁹Identical letters dated 9 November 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2015/851 (16 November 2015); UN Doc S/2015/719 (n 229); Identical letters dated 25 May 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc A/69/912–S/2015/371 (1 June 2015); ‘Syria’s President Speaks – A Conversation with Bashar al-Assad’, *Foreign Affairs* (March/April 2015) www.foreignaffairs.com/interviews/2015-01-25/syrias-president-speaks.

²⁹⁰UN Doc A/69/912–S/2015/371 (n 289).

²⁹¹See UN Doc S/2015/719 (n 229).

²⁹²US Department of Defense (n 228). See also Belgian Defence Ministry, ‘F-16’s vertrokken voor strijd tegen is’, www.mil.be/nl/artikel/f-16s-vertrokken-voor-strijd-tegen.

²⁹³See citation and translation by Tom Ruys, Nele Verlinden and Luca Ferro (eds), ‘Digest of State Practice: 1 January–30 June 2015’ (2015) 2 *Journal on the Use of Force and International Law* 257, 282.

basis of the UN resolutions and a US request to Denmark for support in the US lead effort.²⁹⁴

It is significant that Denmark at that point appeared to regard UN resolutions as the primary basis of its operations in Iraq.²⁹⁵ Hence, it has departed from the primary claims raised by the US and UK, since it stresses the role of the Security Council – which implies a ‘collective security component’ – and employs not only the self-defence narrative.

New Zealand joined ‘Operation Inherent Resolve’ in February 2015 but limited its activities to Iraq,²⁹⁶ specifically referring to Iraq’s request for aid.²⁹⁷ South Africa stressed Syrian independence.²⁹⁸ Venezuela remained critical by declaring that it denounced ‘the current attempt to apply the same formula in Syria as was done in Iraq and Libya’.²⁹⁹

Venezuela endorsed Russian operations against ISIL and criticised the Western strategy, emphasising that it cut off diplomatic channels with Assad. It stressed, in particular, the need to respect Syrian sovereignty.³⁰⁰

(c) Third phase: claims in the aftermath of the Paris Attacks and the adoption of Resolution 2249

The Paris attacks marked a decisive change in the battle of competing legal claims and responses.

The primary claims of states involved in the contentious conduct affecting Syria. As the leading voice advancing a justificatory claim – besides the US and UK – France came to the fore. In the immediate aftermath of the Paris attacks, President Hollande spoke of an ‘acte de guerre qui a été commis par une armée terroriste’ employing the ‘war topos’.³⁰¹ Turning, however, to the self-defence narrative, the French Representative to the UN stated, subsequent to the adoption of Security Council Resolution 2249, that France’s

²⁹⁴Danish Ministry of Defense, ‘The Effort against ISIL’, www.fmn.dk/eng/allabout/Pages/the-effort-against-isil.aspx.

²⁹⁵From October 2014 to October 2015, Denmark deployed a contingent of F-16 fighter aircraft for missions in Iraq. See Danish Ministry of Defense, ‘Denmark’s Comprehensive Approach to Counter ISIL’ www.fmn.dk/eng/news/Documents/denmarks-counter-isil-contributions.pdf.

²⁹⁶New Zealand Government, John Key, ‘PM Announces Contribution to Coalition against ISIL’ (24 February 2015) www.beehive.govt.nz/release/pm-announces-contribution-coalition-against-isil.

²⁹⁷Speech of Prime Minister Key (24 February 2015) www.beehive.govt.nz/speech/prime-minister%E2%80%99s-ministerial-statement-isil.

²⁹⁸Ambassador Hazem Sabbagh, ‘South African Ambassador: Syria is an Independent Sovereign State, Can Handle Its Own Affairs’, SANA (22 June 2015) <http://sana.sy/en/?p=45877>.

²⁹⁹UNSC Verbatim Record, UN Doc S/PV.7419 (27 March 2015) 24/78.

³⁰⁰Venezuela Supports Russian Airstrikes against ISIL in Syria – Envoy to UN’, *Sputnik* (1 October 2015) <http://sputniknews.com/politics/20151001/1027825410/Venezuela-Supports-Russian-Airstrikes-Against-ISIL.html> (quoting Venezuela’s Permanent Representative to the UN: ‘We support it because we believe that the Russian Federation and the Syrian Government have coordination to fight against the terrorism which is in a very terrible phenomenon in Syria’).

³⁰¹Hollande: ‘C’est un acte de guerre commis par une armée terroriste, Daech’, *France 24* (14 November 2015) www.france24.com/fr/20151114-attentats-paris-hollande-bataclan-stade-france-armee-daech-syrie.

‘military action, of which we informed the Security Council from the outset and which was justified as legitimate collective self-defence, can now also be characterised as individual self-defence, in accordance with Article 51’.³⁰² This claim is not merely a restatement of the US claim from September 2014, which France upheld in the course of 2015,³⁰³ but includes a new dimension: France’s invocation of individual self-defence presupposes that the Paris attacks specifically amounted to an armed attack justifying actions against ISIL on Syrian ground. This claim substantively modifies both the time restraints concerning an ‘armed attack’ as well as the ‘severity’ that it is conventionally required to reach in order to overcome the threshold of Article 51. However, France still did not employ the ‘unwilling or unable’ narrative. Furthermore, it invoked – rather experimentally – the hitherto largely dormant European ‘mutual defence clause’ of Article 42(7) of the Treaty on European Union (TEU), which refers to Article 51 (thereby incorporating its limitations while having only intra-EU legal effects).³⁰⁴

Resolution 2249 gave the discourse a significant shift since states acting or deciding to act in Syria frequently referred to it in order to substantiate the conformity of their endeavours with international law. The Resolution itself did not, however, amount to an authorisation to use force by the Security Council under Article 42 of the UN Charter, nor did it contain specific endorsement of any particular legal claims, due to its inherently ambiguous character.³⁰⁵ This ambiguity made it possible to argue that the Resolution supports essentially incompatible positions. Russia welcomed it, just like the US, irrespective of their conflicting views regarding the necessity of consent by the Assad government. Nevertheless, it altered the line of argument employed by states acting in Syria.

Based on its interpretation of the Resolution, the UK finally decided on 2 December 2015 to conduct airstrikes in Syria³⁰⁶ and notified the Security Council the next day.³⁰⁷ In that context, Prime Minister David Cameron endorsed the individual self-defence narrative:

³⁰²UNSC Verbatim Record, UN Doc S/PV.7565 (20 November 2015) 2 (France). See also The French Minister of Foreign Affairs, Laurent Fabius, speaking in September 2015, cited in ‘France Ready to Bomb Syria “in Self-Defense” – Foreign Minister’, *RT* (22 September 2015) www.rt.com/news/316163-france-bomb-syria-defense/.

³⁰³UN Doc S/PV.7565 (n 302) 4 (United States).

³⁰⁴Its applicability and the extent of the obligations it conveys is disputed, see Daniel Thym, ‘Art. 42’ in Hermann-Josef Blanke Stelio Mangiameli (eds), *Treaty on the European Union* (Springer, 2013) paras 41 et seq.; Sven Biscop, ‘The European Union and Mutual Assistance: More than Defence’ (2016) 51 *The International Spectator* 119.

³⁰⁵Dapo Akande and Marko Milanovic, ‘The Constructive Ambiguity of the Security Council’s ISIS Resolution’, *EJIL:Talk!* (21 November 2015) www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution.

³⁰⁶UN Doc S/PV.7565 (n 302) 2 (United Kingdom).

³⁰⁷Letter dated 3 December 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, UN Doc S/2015/928 (3 December 2015).

There is a solid basis of evidence on which to conclude, firstly, that there is a direct link between the presence and activities of ISIL in Syria, and their ongoing attack in Iraq ... and, secondly, that the Assad regime is unwilling and/or unable to take action necessary to prevent ISIL's continuing attack on Iraq – or indeed attacks on us. It is also clear that ISIL's campaign against the UK and our allies has reached the level of an 'armed attack' such that force may lawfully be used in self-defence.³⁰⁸

Interestingly, he cautioned with regard to Resolution 2249 to 'be clear about what this resolution means and what it says', only to continue by citing its phrases without specifying how he understood them.³⁰⁹ Although Cameron obviously attributed legal relevance to the Resolution, his general reference to it failed to establish a specific legal claim due to its ambiguity. Furthermore, it is particularly significant that the British letter to the Security Council of 3 December 2015 did not invoke the 'unwilling or unable' standard. The same is true for UK's earlier notifications.³¹⁰

Germany likewise decided to assist France and extend its operations to Syria in the aftermath of Paris. Departing from the initial claim of justification purported by the US, the German Foreign Office refers to Article 51, but only *in conjunction* with Security Council Resolutions 2170 (2014), 2199 (2015) and, especially, 2249 (2015).³¹¹ This becomes particularly clear within the opinion of the Scientific Service of the German parliament (Bundestag), which has been relied upon by the German government:³¹² it stated that 'Resolution 2249 may be interpreted as confirming that States can invoke the right of self-defence against the IS, without being obliged to refer to a (further) consent by the Iraqi or Syrian government.'³¹³ Furthermore, it refers to Article 42(7) of the TEU with regard to its support of France,³¹⁴ which, however, is not a valid justification for the use of force in international law. It continues to argue that

³⁰⁸David Cameron's Full Statement Calling for UK Involvement in Syria Air Strikes', *The Telegraph* (26 November 2015) www.telegraph.co.uk/news/politics/david-cameron/12018841/David-Camersons-full-statement-calling-for-UK-involvement-in-Syria-air-strikes.html. See also Memorandum to the Foreign Affairs Select Committee (November 2015) 17. See Claire Mills, Ben Smith and Louisa Brooke-Holland, House of Commons Briefing Paper No. 06995 (15 December 2015) 26; Arabella Lang, House of Commons, Briefing Paper, Number 7404 (1 December 2015).

³⁰⁹See excellent blog article by Marko Milanovic, 'How the Ambiguity of Resolution 2249 Does Its Work', *EJIL:Talk!* (3 December 2015) www.ejiltalk.org/how-the-ambiguity-of-resolution-2249-does-its-work.

³¹⁰UN Doc S/2014/851 (n 256); Letter dated 7 September 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, UN Doc S/2015/688 (8 September 2015).

³¹¹See Drucksache 18/6866 (1 December 2015).

³¹²Foreign Minister Frank-Walter Steinmeier explicitly refers to the Service's opinion on 4 December 2015 in the Bundestag www.auswaertiges-amt.de/sid_02499D384435245CBDAB93C154D7CB95/DE/Infoservice/Presse/Reden/2015/151202-BM_Bt_SYR.html?nn=721658.

³¹³Wissenschaftlicher Dienst, WD 2 – 3000 – 203/15, 21 (translation by the author).

³¹⁴Auswärtiges Amt, 4 December 2015 www.auswaertiges-amt.de/DE/Aussenpolitik/Laender/Aktuelle_Artikel/Syrien/151201-SYR-Mandat.html.

the state practice – especially of the USA, Great Britain and France, which refer to the argumentative pattern of the ‘unwilling and unable’ doctrine in order to justify military operations indicates a corresponding evolvement in customary international law. A consolidation of this state practice can also be observed in light of ... Resolution 2249 (2015).³¹⁵

Here the opinion acknowledges that the prohibition on the use of force is in a state of evolution (note however the phrase ‘unwilling and unable’ within the citation above). Particularly important are the formulations chosen by the German Foreign Office in its letter to the Security Council: after reiterating Resolution 2249, which declared ISIL as ‘a global and unprecedented threat’, and its call to ‘eradicate’ ISIL ‘safe havens’ in Syria and Iraq, Germany turned to the idea of ‘ungoverned space’ by stating:

ISIL has occupied a certain part of Syrian territory over which the Government of the Syrian Arab Republic does not at this time exercise effective control. States that have been subjected to armed attack by ISIL originating in this part of Syrian territory, are therefore justified under Article 51 of the Charter of the United Nations to take necessary measures of self-defence, even without the consent of the Government of the Syrian Arab Republic.³¹⁶

Germany’s justificatory claim at this point thus shifted the view from ‘unwillingness’ and ‘inability’ to a (partial) collapse of state authority.

Denmark informed the Security Council on 11 January 2016 of its decision to extend its activities into Syrian territory, invoking self-defence for Iraq and relying on the notion of ‘safe haven’ at the same time referring to Resolution 2249.³¹⁷ The Folketinget approved a further extension of the Danish part of the operations on 19 April 2016.³¹⁸

The Dutch cabinet decided on 29 January 2016 to engage in Syria.³¹⁹ In its letter to the Security Council of 10 February 2016, the Netherlands invoked the collective self-defence of Iraq as a justification for its operations in Syria.³²⁰ Therein it mainly referred to Resolution 2249 and stressed that ISIL has established a ‘safe haven’. In official statements, however, Prime Minister Mark Rutte went beyond self-defence as the main justification by stating: ‘We are dealing with an armed conflict in Syria and Iraq. ... ISIS is our enemy

³¹⁵Wissenschaftlicher Dienst (n 313) 21 (translation by author).

³¹⁶Letter dated 10 December 2015 from the Chargé d’affaires a.i. of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council, UN Doc S/2015/946 (10 December 2015).

³¹⁷Letter dated 11 January 2016 from the Permanent Representative of Denmark to the United Nations addressed to the President of the Security Council, UN Doc S/2016/34 (13 January 2016).

³¹⁸See Resolution B108, www.ft.dk/Rlpdf/samling/20151/beslutningsforslag/B108/20151_B108_som_fremsat.pdf and Press Release of Ministry of Foreign Affairs, <http://um.dk/en/news/newsdisplaypage/?newsid=a8b901dc-845e-4690-930f-cdf5e4b5a130>.

³¹⁹Josh Varlin, ‘Netherlands to Begin Bombing Islamic State in Syria’, *World Socialist Web Site* (2 February 2016) www.wsws.org/en/articles/2016/02/02/nlsy-f02.html.

³²⁰Letter dated 10 February 2016 from the Chargé d’affaires a.i. of the Permanent Mission of the Netherlands to the United Nations addressed to the President of the Security Council, UN Doc S/2016/132 (10 February 2016).

and that is why we are at war.’³²¹ Doctrinally, of course, a state of ‘war’ (in the sense of an international armed conflict) is distinct from self-defence (which refers to singular forceful actions).³²²

After discontinuing its airstrikes in 2015 in Iraq, Belgium announced in the spring of 2016 that it intended to resume its operations and extend them into Syria.³²³ Interestingly, a spokesman for Prime Minister Charles Michel stated that ‘[i]n accordance with UN Resolution 2249, the engagement will be limited to those areas of Syria under the control of IS and other terrorist groups ...’³²⁴ What seems to come to the fore at this point is the idea of ‘ungoverned spaces’, which is distinct from the ‘unwilling or unable’ narrative. It seems to refer to a subcategory of a state’s inability based on an ineffective exercise of its territorial control in certain limited areas hence being narrower than the ‘unwilling or unable’ standard. Furthermore – at least within this statement – emphasis has been placed on the legitimising force of Resolution 2249 and not the right of self-defence. Norway – which has not yet conducted any airstrikes on Syrian territory – sent a notification letter to the Security Council in June 2016 reporting that it ‘is taking necessary and proportionate measures against the terrorist organisation Islamic State in Iraq and the Levant ... in Syria in the exercise of the right of collective self-defence’. Therein it referred mainly to Security Council resolutions, stressed the *safe haven* established by ISIL in Syria and emphasised that its ‘measures are directed against ISIL, not against the Arab Republic of Syria’. The latter assertion is problematic since generally established doctrine would suggest that forceful actions against ISIL necessarily encroach upon the territorial sovereignty of Syria absent its consent. Norway puts forward an alternative argumentative pattern here by seemingly suggesting a reduction of the protective scope of territorial sovereignty here.

The reactive claims of states not involved in the contentious conduct affecting Syria. Within the 7565th session of the Security Council, during which Resolution 2249 was adopted, most states present in the session (China, Spain, Russia, Lithuania, Jordan, New Zealand, Chile, Angola and Bolivia) made statements that share the ambiguity of the Resolution. These states expressed their support for the Resolution and stressed the importance of an effective fight against ISIL, without making explicit legality claims.³²⁵

³²¹The Netherlands is at War with ISIS, says Dutch Prime Minister’, *Dutch News* (14 November 2015) www.dutchnews.nl/news/archives/2015/11/the-netherlands-is-at-war-with-isis-says-dutch-prime-minister.

³²²Cassese (n 7) 993. For a deeper analysis of the interrelatedness between ‘war’ and self-defence see Christopher Greenwood, ‘The Concept of War in Modern International Law’ 36 *International and Comparative Law Quarterly* (1987) 283.

³²³See n 231.

³²⁴AFP ‘Belgium to Begin Air Strikes against ISIL’, *The Independent* (14 May 2016) www.theindependentbd.com/printversion/details/43782.

³²⁵See, generally, UN Doc S/PV.7565 (n 302).

It should be noted that 28 EU member states honoured President Hollande's request for assistance based on Article 42(7) of the TEU,³²⁶ however, they did so without making explicit statements on questions of applicable normative standards. Furthermore, it must be recalled that Article 42(7) of the TEU does not entail a supranational decision-making process, but instead envisages mere intergovernmental consultations between the member states that *can* be facilitated by the EU. In this context, the statement of the European Defence Ministers should be seen as a symbolic commitment in the spirit of solidarity in the general endeavour to fight terrorism. France deliberately did not invoke Article 5 of the Washington Treaty.³²⁷ In its general comments regarding Paris, the North Atlantic Council mentioned terms such as 'threat' and 'attacks', but omitted the legally relevant term 'armed attack'.³²⁸

Canada has discontinued its airstrikes in both Iraq and Syria since 22 February 2016 under the government of newly elected Prime Minister Justin Trudeau.³²⁹ It has refrained from stating legal reasons for this decision.

iii. Effects of silence in the context of operations in Syria: no acquiescence, but 'legislative responsibility'

The states operating in Syria – most of which are politically and militarily powerful, which does not endow them with a prerogative to shape law³³⁰ – have publicly advanced legal justifications for their military actions. These justifications entail a significant change concerning the normative content of Article 51 as it is traditionally understood. The claims of the Coalition states concern airstrikes against ISIL positions – a fact that is communicated openly, although details of the operations remain covert. Hence, it can be assumed that any other states with a basic functioning state apparatus have constructive knowledge of both the contentious actions in question as well as the claims accompanying them.³³¹ Several states have reacted to these occurrences: some with 'legal vocabulary', others using rather evasive language. Most states have remained silent.³³²

The question remains whether the recent actions and legal contestations of the established reading of Article 51 evoked a state of enhanced normative

³²⁶EU Defence Ministers Ready to Assist France after Paris Attacks', *EEAS* (17 November 2015) http://eeas.europa.eu/top_stories/2015/171115_fac_defence_france_en.htm.

³²⁷See NATO, 'Doorstep Statement by NATO Secretary General Jens Stoltenberg' (17 November 2015) www.nato.int/cps/en/natohq/opinions_124518.htm.

³²⁸NATO, 'Statement by the North Atlantic Council in Response to the Terrorist Attacks in Paris' (16 November 2015) www.nato.int/cps/en/natohq/official_texts_124647.htm?selectedLocale=en.

³²⁹Prime Minister of Canada, News Release (8 February 2016) <http://pm.gc.ca/eng/news/2016/02/08/prime-minister-sets-new-course-address-crises-iraq-and-syria-and-impacts-region>.

³³⁰See n 201 et seq. and accompanying text.

³³¹See n 163 et seq. and accompanying text.

³³²See also Corten (n 213) 787 et seq.

volatility, or whether earlier developments had previously initiated a process of normative change that recent occurrences merely consolidate.

The invocation of self-defence with regard to – not necessarily – ongoing terrorist attacks combined with – at least – an abstract narrative of ‘unwillingness’ or ‘inability’ of a host state is not new. It has been a particular element of US foreign policy (‘Schultz doctrine’) ever since, and especially in the aftermath of the 9/11 attacks.³³³ It has to be noted in this regard, however, that Afghanistan is distinct from the Syrian case and does not qualify as a precedent for the ‘unwilling or unable’ standard. The Taliban – as the *de facto* Afghan regime – was substantially involved in the terrorist activities of al-Qaeda. The US government itself contended that the 9/11 attacks were ‘made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation’.³³⁴ Hence, the US justificatory narrative concerning Afghanistan focused, rather, on the aspect of wilful harbouring than the ‘unwilling or unable’ standard. While NATO and the OAS seemed to confirm the existence of an ‘armed attack’, they likewise refrained from referring to the notion of ‘unwilling or unable’.³³⁵

With regard to pre-emptive self-defence in cases of a ‘latent’ threat, the US elaborated a line of argument comparable to its recent Syrian claims within the 2002 US National Security Strategy, which it then partly employed after the invasion of Iraq in 2003.³³⁶ In reaction to widespread criticism, however, it shifted its claim of justification to a ‘revival’ of past Security Council resolutions in that context.³³⁷

Of course, the ‘unwilling or unable’ idea extends beyond US foreign policy. Israel, for example, relied on this notion when justifying its operations against the Palestine Liberation Organization (PLO) in Lebanon in 1968³³⁸ and Tunisia in 1985.³³⁹ It employed that same line of argument with regard to its operations against Hezbollah in Lebanon in 2006.³⁴⁰ Iran – whilst presently objecting to the Coalition’s endeavours in Syria – justified its incursions into

³³³Shultz (n 243) 206; Ruys (n 22) 422.

³³⁴Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc S/2001/946 (7 October 2001).

³³⁵NATO, Statement by the North Atlantic Council, Press Release (2001) 124 (12 September 2001) www.nato.int/docu/pr/2001/p01-124e.htm; OAS Resolution of 21 September 2001, OEA/Ser.F/II.24. See also Buzzini (n 60) 114 (expressing doubt as to whether the silence of states in relation to the intervention in Afghanistan has any implications for changes in the interpretation of the use of force regime).

³³⁶Marc Weller, *Iraq and the Use of Force in International Law* (Oxford University Press, 2010) 182 et seq.

³³⁷Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc S/2003/351 (21 March 2003).

³³⁸Letter dated 29 December 1968 from the acting Permanent Representative of Israel address to the President of the Security Council, UN Doc S/8946 (29 December 1968).

³³⁹UNSC Verbatim Record, UN Doc S/PV.2611 (2 October 1985), 5–7 (Israel, statement by Benjamin Netanyahu).

³⁴⁰Identical letters dated 12 July 2006 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc A/60/937–S/2006/515 (12 July 2006). See Andreas Zimmermann, ‘The Second Lebanon War: *Jus ad bellum, in bello* and the Issue of Proportionality’ (2007) 11 *Max Planck Yearbook of United Nations Law* 99, 15 et seq.

Iraq in 1996 by referring to a lack of effective state control in certain parts of Iraqi territory.³⁴¹ It argued similarly in February 2014 when threatening to send forces into Pakistan if it failed to suppress terrorist activities.³⁴² In contradiction to its position regarding the Syrian case, Russia referred to self-defence, and a host state's unwillingness or inability, in 2002 and 2008 to justify its operations in Georgia,³⁴³ a claim that was widely rejected internationally³⁴⁴ (including by the US).³⁴⁵ In 2008, the Turkish military advanced into Iraq without its consent, claiming self-defence in order to arrest Kurdish rebels. This intervention was given no explicit verbal support by the international community of states; the US position remained unclear.³⁴⁶ In the same year, Colombia justified its actions against the Fuerzas Armadas Revolucionarias de Colombia (FARC) on Ecuadorian territory with reference to self-defence, which was rejected by the OAS³⁴⁷ and the Rio-Group of the Latin American States, and was only expressly supported by the US.

Scholarship has been discussing the evolution of Article 51 with great intensity since 9/11. However, taking into account that at least 193 states form part of the international community and most of these remained silent with regard to the abovementioned instances of contentious state conduct, possibly relevant legal claims heading into the direction of pre-emptive self-defence and/or an 'unwilling or unable' standard still have remained singular. Contestations of the established interpretations of Article 51 were met with reinstatements of the old reading. If we nevertheless assume that these actions and contestations indicate nascent normative dynamics with regard to Article 51, the process of norm evolution could have been potentially accelerated by the US initiative against ISIL starting in September 2014, which was tied to the US' post-9/11 legal narrative.³⁴⁸

Nonetheless, it is submitted that the silence of states in the current context of legal claims and reactions must not be interpreted as acquiescence. In light of the *jus cogens* character of Article 51, and its resilience to change,³⁴⁹ the

³⁴¹UN Doc S/1996/602 (n 261).

³⁴²See Iranian Minister of the Interior Rahmani-Fazli, cited in 'Iran Says May Send Forces to Pakistan to Free Border Guards', *Reuters* (17 February 2014) <http://news.trust.org/item/20140217131121-ixot6>.

³⁴³For Russia's invocation of self-defence in 2008, see Letter dated 11 August 2008 from the Permanent Representative of the Russian Federation to the United Nations addressed to the President of the Security Council, UN Doc S/2008/545 (11 August 2008); UNSC Verbatim Record, UN Doc S/PV.5953 (10 August 2008) 9.

³⁴⁴Gray (n 12) 231 et seq.

³⁴⁵*Ibid.*

³⁴⁶Ruys (n 22) 340.

³⁴⁷Report of the OAS Commission that Visited Ecuador and Colombia 10, OEA/Ser.F/II.25 RC.25/doc 7/08 (16 March 2008).

³⁴⁸A number of commentators have assumed that the actions in and discourse on Syria have modified the attribution requirement. See, for example, Michael P Scharf, 'How the War against ISIS changed International Law' (2016) 48 *Case Western Reserve Journal of International Law* 1; Michael Wood, 'Use of Force in 2015', *Hebrew University of Jerusalem Legal Studies Research Paper Series No. 16-05* (2015) 1; Hakimi (n 270) 14.

³⁴⁹See n 211 et seq. and accompanying text.

primary and reactive claims raised are too indeterminate and fail to establish a legitimate expectation to react. This conclusion is supported by the principles of legal certainty³⁵⁰ and transparency. The mere military strength of acting states claiming the legality of their actions does not grant them a prerogative in the process of law formation.³⁵¹ Since powerful states tend to take a strategic approach to law-making,³⁵² and arguments assuming normative change may be cornerstones of a new hegemonic world order if based on ambiguous claims, determinacy of the claims accompanying a certain state conduct should be seen as a decisive factor in determining the legal effects of the silence of other subjects of international law.

While the old reading of Article 51 is contested and new interpretations purported, it is significant that only a few states actually operate in Syria. Primary legal claims in relation to the intervention are therefore rare; they are also ambiguous and contradictory. Read together with the reactive claims of other states (to the extent that other states have reacted), they are rendered even more obscure. Both primary and reactive claims consist of different argumentative lines and multiple grounds of justification have been invoked. Each line of legal argument has different implications.

The invocation of collective self-defence departs from the requirement of a state's consent to operations against non-state actors whose actions are not attributable to the state from which they operate, thereby either lowering the attributability standards substantially or eliminating them entirely. In addition to this, the invocation of individual self-defence implies the legality of anticipatory action. Within the 'first phase', most US allies emphasised collective self-defence, but in the course of 2015 the UK and France turned to individual self-defence, assuming that an armed attack authored by ISIL against their countries was likely. Canada likewise stressed the threat that ISIL posed to Canadians.³⁵³ This line of argument became even more relevant in the aftermath of the Paris tragedy. France's repeated invocation of the individual right of self-defence raised questions as to the necessary quality of an 'armed attack'. Australia, on the other hand, merely invoked collective self-defence. Turkey's claim is distinct from the general line of argument since it focuses not only on ISIL, but also on the PKK, hence referring to two disparate cases.

Besides the US, only Australia, Canada (which has recently backed off from possible operations) and the UK have invoked the 'unwilling or unable' standard. However, the UK did not do so in its letters to the Security Council. Other states actively engaging in Syria have likewise refrained from doing

³⁵⁰See de Visscher (n 103) 156–157; Victor Rodriguez-Cedeno, *Fifth Report on Unilateral Acts*, A/CN.4/525, para 31.

³⁵¹See n 201 et seq. and accompanying text.

³⁵²Byers (n 31) 185.

³⁵³See n 272 and accompanying text.

so. Within the German debate, ‘unwillingness’ and ‘inability’ as possible grounds for the exercise of self-defence were mentioned in an opinion of the Scientific Service of the Bundestag. The Scientific Service, however, spoke of the ‘unwilling *and* unable’ standard altering the US narrative of ‘unwilling *or* unable’. Of great significance are the formulations to be found in Germany’s notification letter to the Security Council. Here it refers to a lack of ‘effective state control’ in certain parts of Syria. This tends towards the notion of ‘ungoverned spaces’ employed by Australia, which is also reflected in the initial statement of the UN Secretary-General made in September 2014.³⁵⁴ The notion of ‘ungoverned space’ seems to have been recently taken up by Belgium too. This idea of ineffective state authority differs considerably from the much broader ‘unwilling or unable’ concept.

Furthermore, Germany has stressed the legal importance of Security Council Resolution 2249, hinting at a kind of ‘authorized self-defence’.³⁵⁵ A similar position is also reflected in the statements of other states made directly after the adoption of that Resolution. The Danish line of argument likewise stresses particularly the legitimising force of Security Council resolutions for the engagement in Syria. The lines of argument employed by several states hence redirects the focus from self-defence to a UN-endorsed collective action. The Dutch government’s assertion that it is ‘at war’ makes it hard to establish its legal claim. Self-defence actions and interventions in ‘armed conflicts’ are two different claims. The line between *jus ad bellum* and *jus in bello* is blurred in the Dutch legal claims, which inevitably has an obfuscating effect on its position. Norway’s assertion that it would be attacking ISIL and not Syria (should it commence with its operations) seems to imply a limitation of the protective scope of territorial sovereignty putting another argumentative pattern on the plate of possible justifications.

The ambiguity inherent in all of the claims and reactions examined in this section points against treating the mere silence of inactive states as acquiescence.³⁵⁶ What, then, are the legal implications of silence (if one applies an objective approach to silence)? There could be a number of answers: a lowering of the threshold of force necessary for an armed attack (Paris); an abandonment of the requirement of an ongoing or at least imminent attack towards a latent threat (individual self-defence); the right to violate the territorial sovereignty of ‘harbouring’ states; the right to strike back against non-state actors acting within an ‘unwilling or unable state’ without asking for permission; the right to strike back against non-state actors within an

³⁵⁴See n 259.

³⁵⁵See Paulina Starski, ‘Legitimized Self-Defense’, *EJIL:Talk!* (10 December 2015) www.ejiltalk.org/legitimized-self-defense-quo-vadis-security-council.

³⁵⁶*Contra* Tom Ruys and Luca Ferro, ‘Divergent Views on the Content and Relevance of the *Jus ad Bellum* in Europe and the United States? The Case of the U.S.-led Military Coalition against ‘Islamic State’, (Book Chapter: International Legal Theory Interest Group) (2016) *SSRN*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2731597.

‘unwilling or unable state’ after requesting permission; the right to intervene against non-state actors conducting transborder attacks from ‘ungoverned spaces’ or ‘areas of limited statehood’, or in cases of a partial collapse of effective state control by the host state; a reduction of the protective scope of territorial integrity or, possibly, an acknowledgement of a self-defence action ‘legitimized’ by the Security Council. Or – paradoxically – does the silence of states support all of these possibilities at once? The contentious conduct as such is not uniform and not prevalent enough to indicate changes in interpretation or even an amendment, nor are the other indicative circumstances compelling enough to diminish the significance of the general ambiguity and indeterminacy of the relevant claims. Applying the factors identified as relevant for establishing law-formative effects of mere silence within this article to the Syrian conflict leads to the conclusion that mere silence on the part of non-acting states does not – in general – corroborate a possible reinterpretation or even amendment of Article 51 in the current setting of claims and counterclaims.

Assuming that silence does not amount to acquiescence in the given circumstances, states nevertheless should have already positioned themselves in the battle of primary and reactive *jus ad bellum* claims surrounding Syria. A clear positioning at this crucial point in time will preserve the legal certainty of a norm of great common concern: the prohibition on the use of force. The global terrorist threat is ever present and operations comparable to Syria are very likely to reappear in the future. The stronger the dynamics, the more compelling is the responsibility of states to end the state of volatility by speaking up in a legally relevant and determinate manner.