Extraterritorial Use of Force against Non-State Actors: PS to Hague Academy Lectures

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Abstract

In July 2021, the author presented a Special Course for the Hague Academy of International Law Summer Courses on the Extraterritorial Use of Force against Non-State Actors. The course focused on two bases for the extraterritorial use of force against non-state actors, namely self-defence and intervention by invitation. The lectures came to a conclusion that may, at first glance, appear contradictory. With respect to the use of force in self-defence, the lectures adopted a restrictive (non-permissive) approach in which the use of force is not permitted save in narrowly construed exceptions. With respect to intervention by invitation, the lectures adopted a more permissive approach in which the use of force is generally permitted and prohibited only in narrowly construed exceptions. This article serves as post-script (PS), to explain the apparent contradiction. It concludes that the main reason for this apparent contradiction is the application of the fundamental principles of international law—sovereignty, territorial integrity and independence—which are consistent with intervention by invitation but are undermined by self-defence against non-state actors.

Keywords: Use of Force; Non-state Actors; Self-defence; Intervention by Invitation; Sovereignty; Self-determination

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Introduction*

There are few issues in international law as contentious as the law on the use of force. It is an emotive topic that evokes strong sentiments. This should come as no surprise. These rules are the lynchpin of modern international law's quest for a more secure world and are central to the United Nations' mission to 'save succeeding generations from the scourge of war.'[1] At the same time, the rules of international law on the use of force touch upon the most sensitive principle of international law: sovereignty. The sovereign right to act, but also the sovereign right to have territorial integrity respected.

In the July of 2021, I presented a Special Course at the Hague Summer Academy of International Law under the title *The Extraterritorial Use of Force against Non-state Actors*[2] There are several contexts within which the question of the extraterritorial use of force may arise. A State may, for example, use force in the territory of another State against non-state actors perpetrating atrocities, ie extraterritorial use of force against non-state actors for humanitarian purposes (humanitarian intervention). It may also use force against non-state actors extraterritorially, pursuant to a UN Security Council authorisation under Chapter VII. There may be countless other reasons, such as the protection of nationals, exercising influence, securing resources. However, in most cases nothing turns on the target of the use of force, ie the lawfulness of the extraterritorial use of force is not dependent on whether the target is the State itself or the non-state actor. Only in two cases would the target of extraterritorial use of force be determinative of its lawfulness. These are, first, where force is used, extraterritorially against non-state actors, in response to an attack by a non-state actor. The question whether the use of force in such circumstances, ie self-defence, is permitted turns on, principally, the target of the use of force.[3] The second case concerns the use of force by one State in another pursuant to an invitation. In such cases, intervention by invitation, whether the invitation is from a State or non-state actor and whether the target is a State or non-state actor, is central to the determination of the lawfulness or not of the use force. For this reason, the course focused on these two scenarios. The conclusion reached, was that in respect of the use of force against non-state actors in response to an armed attack from *the* non-state actor—the self-defence question—the prohibition on the use of force is to be interpreted and applied strictly. Therefore, the extraterritorial use of force in such circumstances is, as a point of departure unlawful. Conversely, in

* This article is a post-script to the Hague Academy Lectures by Dire Tladi, 'The Extraterritorial Use of Force against non-State Actors' (2021) 418 *Collected Courses of the Hague Academy of International Law* 223 (Brill 2021).

1 Preamble to the 1945 Charter of the United Nations.

2 The course, previously scheduled for 2020, was postponed, owing to the Covid pandemic, and was presented virtually by a recording.

3 Factors that normally take centre stage when determining the limits of self-defence, such as proportionality and necessity, questions which may be referred to as 'fact or circumstances specific' are usually put on the backburner when questions of non-state actors arise.

respect of the use of force pursuant to the invitation by the territorial state, the course concluded that such use of force was in general lawful.

The purpose of this article is to provide some thoughts on the apparent discrepancy between the approach adopted by the course in respect of the use of force on self-defence on the one hand and, on the other, the approach in respect of intervention by invitation—a discrepancy not addressed in the published lectures. In the following section, the difference in approaches between the two scenarios is briefly described. The sole purpose this section is to set out the discrepancy. There is thus no attempt at depth, either of analysis or description, of the issues described therein.[4] The following section then presents the reasons for the apparent discrepancy. The final section offers some concluding remarks.

The Prohibition on the Use of Force in the Context of Non-state Actors

General

As described above, while the use of force against non-state actors can take place in different contexts, it is mainly in relation to two scenarios, namely self-defence and intervention by invitation, that the rules turn on the role of non-state actors. For that reason, it is those two scenarios that were the subject of the Hague Academy Lectures on the extraterritorial use of force against non-state actors, and that are therefore considered in this section. In each sub-section that follows, the main streams of arguments are evaluated in the context of sources and methodology of international law.

In relation to both the extraterritorial use of force in self-defence and intervention by invitation, policy positions and preferences often dictate the positions of protagonists. It is understandable that policy preferences play *some* role in the adoption and assessment of legal positions. The rise of armed non-state actors, whether rebel movements or terrorists, and the threat that terrorist movements pose to the safety and security of states, create difficult policy choices for states. The ability of terrorists to carry out large- scale attacks could, as a policy matter, induce states to seek to jettison the traditional rules restricting armed force against non-state actors in favour of what might be seen as a more effective responses—in other words a more expansive approach to the exceptions.

The question may well be asked why, for example, Nigeria should not be permitted to use force against Boko Haram if Boko Haram is operating from Cameroon or Central African Republic. Should Nigeria sit idly by while its population is victimised by a non-state actor operating from a third State?

4 Where relevant, references will be made to the published course where the necessary depth is provided.

I myself have policy preferences, and in the interest of full disclosure, it is only fair that I share those. My policy views are admittedly influenced by geopolitical considerations. Law should serve to constrain power and avoid the 'might is power' paradigm. The expansion of exceptions (at least in the context of the use of force) undermines this objective and permits the powerful to de-constrain themselves from the power of the law. Powerful states sometimes tend to seek to 'de-constrain' themselves from the shackles of law creating the illusion of the constraining power of law in order to constrain the less powerful.[5] Elsewhere, I have argued that expansive interpretations of the exceptions to the use of force permit the law to be in the eye of the beholder, and the militarily powerful to determine if, and under what circumstances to use force.[6]

However, none of these policy preferences constitutes law—although they might influence the law. To uncover the content of the rules of law, it is necessary to apply the accepted methodology of law. In the area of the use of force, assertions made about the state of the law are often based on either customary international law or the interpretation of a treaty in the form of the United Nations Charter (UN Charter). When the use of force in self-defence is at issue, the differences in the doctrinal approaches to the sources become even more evident.[7] It is therefore important to emphasise critical points which are often (sometimes on purpose) overlooked.[8] First, arguments based on State practice for the purposes of customary international law must show that the practice in question is widespread and consistent and that it is accompanied by an *opinio juris*.[9] Second, where practice for the purposes of treaty interpretation is relied on, that

5 A similar, though slightly different, point was made by Christian Marxsen, 'International Law in Crisis: Russia's Struggle for Recognition' (2015) 58 German Yearbook of International Law 11, 13, who argues that Russia cannot reasonably be described as 'less powerful.' But it is related because it seeks to show how arguments promoting permissiveness used by the 'more powerful' are resisted when used by the 'less powerful.'

6 Dire Tladi, 'The Use of Force in Self-Defence against Non-State Actors, Decline of Collective Security and the Rise of Unilateralism: Whither International Law?' in Mary Ellen O'Connell, Christian Tams and Dire Tladi, *Self-Defence Against Non-State Actors, Vol. 1 of Max Planck Trialogues on the Law of Peace and War* (Cambridge University Press 2019) 21.

7 For examples, see Michael Wood, 'International Law and the Use of Force: What Happens in Practice?' (2013) 53 Indian Journal of International Law 345; Oscar Schachter, 'The Extraterritorial Use of Force against Terrorist Bases' (1989) 11 Houston Journal of International Law 309; Leyla Nadya Sadat, 'Terrorism and the Rule of Law' (2004) 3 Washington University Global Law Review 135; Jordan Paust, 'Self-Defence Targeting of Non-State Actors and Permissibility of US Use of Drones in Pakistan' (2010) 19 Journal of Transnational Law and Policy 237; Paulina Starski, 'A Call for a Turn to the Meta-Level of International Law: Silence, the "Interregnum" and the Conundrum of *Ius Cogens*' (2017) 77 Heidelberg Journal of International Law 87. See for the discussion of the different ways that sources may be used, Christian Marxsen and Anne Peters, 'Conclusion – Self-Defence against Non-State Actors: The Way Ahead' in O'Connell, Tams and Tladi (n 6) 260.

8 For a more detailed assessment see Tladi (n *) 233–246.

9 UN International Law Commission, *Draft Conclusions on the Identification of Customary International Law* Draft Conclusion 2/3 (Seventieth Session, General Assembly Official Records (A/73/10).

practice must meet the requirements of Article 31(3)(b) of the Vienna Convention, ie it must establish the agreement of (all) the parties to the UN Charter as to the interpretation of the relevant provisions of the Charter.[10] The third important point to remember, is that the main rule at play, the prohibition on the use of force, is a *jus cogens* norm.[11] Thus, to show that the rules on the prohibition on the use of force have been modified, it is not enough to apply the normal rules for the identification of customary international law and treaty interpretation for the purposes of justifying shifts in the law.[12] It also has to be shown that the modified norm is accepted and recognised as one from which no derogation is permitted. That is a rather a high threshold.

The Right to Use Force against Non-state Actors in Self-Defence

Few other subjects have received as much attention in the last two decades as the question whether a State is entitled, in international law, to use force against non-state actors in the territory of a third in self-defence.[13] The traditional position has been that as a rule, a State cannot use force in self-defence against a non-state in the territory of a third State except where the attacks by the non-state actors are attributable to the territorial state.[14] Such use of force is not, as a matter of law, against the non-state actor but the territorial state. Yet, in recent years this position has come under severe strain as some states and scholars have been advocating for an expanded view that would

10 Vienna Convention on the Law of Treaties Art 31(3)(b). See also UN International Law Commission, *Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation* (Report of the UN International Law Commission, Seventieth Session, General Assembly Official Records (A/73/10).

11 See, eg UN International Law Commission, *Draft Conclusions on Peremptory Norms of General International Law Annex* (*Jus Cogens*) (Report of the UN International Law Commission, Seventy-First Session, General Assembly Official Records (A/74/10).

12 See, for example, the discussion on the modification of norms of *jus cogens*, Mehrdad Payandeh, 'Modification of Peremptory Norms of General International Law' in Dire Tladi (ed), *Peremptory Norms of General International Law (Jus Cogens): Disquisitions and Disputations* (Brill 2021).

13 In addition to the authorities cited below see Raphaël van Steenberghe, 'The Law of Self-Defense and the New Argumentative Landscape on the Expansionists' Side' (2016) 29 Leiden Journal of International Law 43; Paulina Starski, 'Right to Self-Defense, Attribution and the Non-State Actor: Birth of the "Unable or Unwilling" Standard?' (2015) 75 Heidelberg Journal of International Law 455; Dawood I Ahmed, 'Defending Weak States against the Unwilling or Unable Doctrine of Self-Defense' (2013) 9 Journal of International Law and International Relations 1; Jordan Paust, 'Self-Defence Targeting of Non-State Actors and Permissibility of US Use of Drones in Pakistan' (2010) 19 Journal of Transnational Law and Policy 237.

14 See, eg Marcelo Kohen, 'The Use of Force by the United States After the End of the Cold War, and its Impact on International Law' in Michael Byers and Georg Nolte (eds), *United States Hegemony and the Foundations of International Law* (Cambridge University Press 2003) 197; Hans Kelsen, 'Collective Security and Collective Self-Defence under the Charter of the United Nations' (1948) 42 American Journal of International Law 783 at 783.

permit states to exercise self-defence in the territory of third states without any attribution.[15]

The policy reasons for this are obvious: the increase in terrorism and the emergence of the 'fight against terrorism' has led some states (and those advocating for them) to seek more avenues and tools for their arsenal. Yet, as explained above, policy reasons cannot be a substitute for legal argumentation. The proponents of the expanded view of the right of self-defence have advanced three inter-related legal arguments, all of which are based on Article 51 of the UN Charter.[16] The first argument is that Article 51 refers to the '*inherent* right of self-defence' (emphasis added). The word 'inherent, it is argued, implies that the treaty rule in Article 51 does not displace existing customary international law.[17] This means that, to establish the applicable rules, it is not sufficient to look only at the Charter, but also at pre-existing customary international law. Without exception,[18] proponents of the pre-existing customary international law rule argument, point to the Caroline incident as the definitive statement on customary international law. The Caroline incident refers to an exchange in the nineteenth century between the United Kingdom and the United States concerning the sinking, by the United Kingdom of a vessel (the Caroline), purportedly in self-defence.[19] In that exchange neither State made anything of the fact that the Caroline was not state-owned or operated.

15 See for example, interesting policy documents supporting the expanded view: Daniel Bethlehem, 'Principles Relevant to the Scope of a State's Right of Self-Defense against an Imminent or Actual Armed Attack by Nonstate Actors' (2012) 106 American Journal of International Law 769; Principles of International Law on the Use of Force by States in Self-Defence (Chatham House Principles) 1 October 2005 <https://www.chathamhouse.org/2005/10/principles-international-law-use-force-states-self-defence> accessed 6 September 2021; Leiden Policy Recommendations on Counter-Terrorism and International Law (2010) 57 Netherlands International Law Review 531.

16 For a full description of the arguments for an expanded approach see Tladi (n *) 257–280.

17 The rule that the coming into being of a treaty rule does not supersede an existing customary international law rule that is well settled. See, for example, ICJ, *Case Concerning Military and Paramilitary Activities in and Around Nicaragua (Nicaragua v United States of America)*, Jurisdiction and Admissibility (ICJ Reports 1984) 392 para 73. See also ICJ *Case Concerning Military and Paramilitary Activities in and Around Nicaragua (Nicaragua. United States of America)*, Merits (ICJ Reports 1986) 14 para 179.

18 See, eg Martin A Rogoff and Edward Collins Jr, 'The Caroline Incident and the Development of International Law' (1990) 26 Boston Journal of International Law 493; Jordan Paust, 'Self-Defense Targetings of Non-State Actors and Permissibility of US Use of Drones in Pakistan' (2010) 19 Journal of Transnational Law and Policy 237, at 241 *et seq*. Kalliopi Chainoglou, 'Reconceptualising Self-Defence in International Law' (2007) 18 King's Law Journal 61, 62, arguing that the Caroline rules should be reconsidered. For a full description of the Caroline incident, see Abraham Sofaer, 'On the Necessity of Pre-Emption' (2003) 14 European Journal of International Law 209, 214–220.

19 The exchange between the US and UK governments is reproduced in full in John B Moore, *Digest of International Law as Embodied in Diplomatic Discussions, Treaties and Other International Agreements: Vol. II* (US Government Printing Office 1906) 409–413.

The second argument is that, on its terms, Article 51 applies as a response to any armed attack. It provides for the right of self-defence 'if an armed attack occurs'. It does not provide for a right of self-defence if 'an armed attack *from a state* occurs.' From a methodological perspective, this particular argument is based on an ordinary meaning of the words (or literal interpretation) of the Charter. The final argument is that the practice of states, subsequent to the adoption of the Charter, provides evidence that Article 51 applies also to self-defence in response to armed attacks from non-state actors. This argument is based on Article 31(3)(b) of the Vienna Convention, under which the practice of parties to a treaty constitutes authentic interpretation, which must be taken into account in the interpretation of a treaty. Under this argument, proponents advance a myriad of examples by states exercising the right to use force against non-state actors in the territory of third states. These include the incursion by Turkey into Northern Iraq in response to attacks by the Kurdistan Workers Party and the bombardment of Lebanon by Israel in response to attacks by Hezbollah. More recently (and perhaps more importantly), reference has been made to the so-called 9/11-related practice[20] and the use of force led by the United States- against ISIS in Syria.

It is unnecessary, for the purposes of this article, to describe in full the responses to these arguments.[21] Instead only a brief synopsis of these responses is provided. The problem with the existing customary international law-related arguments based on the Caroline incident, is that it was never a statement of customary international law, first because there was not, at the time, a rule of international law prohibiting the use of force, and second because customary international law cannot be made by an incident involving two states. Second, even if the Caroline incident were a statement of customary international law in 1842, the argument ignores that customary international law is dynamic and not static. To quote from Brownlie, the reliance on the Caroline incident is 'anachronistic and indefensible.'[22] The interpretation based on the ordinary meaning of the words fares no better than the pre-existing customary international law argument. First, it should be recalled that the International Court of Justice has consistently, over several decades, interpreted the phrase 'armed attack' to mean an armed attack from a state.[23] Second, while it is true that words 'from an armed attack' do not exclude the possibility that an armed attack emanates from a non-state, it is also

20 9/11-related practice includes, not only the US attacks against Afghanistan in response to the 9/11 attacks by Al Qaida in New York, Pennsylvania and Washington, DC, but also two UN Security Council resolutions adopted in the aftermath (UN Security Council Res 1368 and UN Security Council Res 1973, both of 2001).

21 For a full response to these arguments, see Tladi (n *) 281–316.

22 Ian Brownlie, *Principles of Public International Law* (6th edn, Oxford University Press 2003) 701.

23 See, eg ICJ *Military and Paramilitary Activities case* (n 17) para 195; ICJ, *Case Concerning Oil Platforms (Iran v United States)* (Judgment, ICJ Reports 2003) 161 para 51; See ICJ *Case Concerning the Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (ICJ Reports 2005) 168 para 146–147 and ICJ *Legal Consequences of the Construction of the Wall in Occupied Palestinian Territory* (Advisory Opinion, ICJ Reports 2004) 136 para 139.

true that it does not exclude the possibility that it applies only to attacks from a state.[24] To put it differently, the words in Article 51 simply do not address the matter. Moreover, a proper interpretation cannot rely just on the ordinary meaning, but also on context and object and purpose, as required by Article 31(1) of the Vienna Convention.[25]

The most promising argument in favour of an expansive interpretation is the subsequent practice-based argument. Yet even this argument must fall flat on its face. First, all the relevant examples of practice that are often put forward as the basis for subsequent practice, have been subject to criticism, such that they cannot constitute subsequent practice as agreed. While the US attacks in Afghanistan did not receive much criticism, it also appears that, at least for the US, the attacks were not solely against Al Qaida (a non-state actor), but also against the Taliban—then the government of the territorial state, Afghanistan.

The brief discussion above illustrates that the expansive approach to the right to self-defence against non-state actors is flawed and without merit. This is even without accounting for the fact that the rule implicated, the prohibition on the use of force, is *jus cogens* and any modification thereto is subject to a high threshold. On this basis, the Hague Academy Course concluded, consistent with a restrictive approach, that as a general rule, that a State cannot use force against non-state actors in the territory of third states without attribution.

Intervention by Invitation

While a narrow, restrictive, approach to the right to use force was adopted in relation to self-defence, the lecture adopted a broader more permissive approach in respect of extraterritorial use of force by invitation.[26] In respect of intervention by invitation, the course adopted the approach that, in general, the use of force is generally permitted and only in exceptional circumstances is it not permitted.

Intervention by invitation refers to situations where one State intervenes in the territory of a third a State on the strength of an invitation by the territorial state. The Institut de Droit International defines intervention by invitation as 'direct military assistance by

24 See André de Hoogh, 'Restrictivist Reasoning on the *Ratione Personae* Dimension of Armed Attacks in the Post 9/11 World' (2016) 29 Leiden Journal of International Law 19, 24: 'The particular assertions regarding the silence of Article 51 as to the origin of an armed attack appear at times to function as a knock down argument, making redundant any subsequent inquiry as to the proper construction of Article 51. Certainly, its silence makes a determination of the ordinary meaning of its terms impossible, but this does not prejudge the use of other elements of interpretation.'

25 Vienna Convention on the Law of Treaties Art 31(1), provides as follows: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

26 See for discussion, the Tladi (n *) Ch V.

the sending of armed forces by one state to another state upon the latter's request.'[27] While non-military intervention could also be covered by intervention by invitation, such non-military intervention falls outside the scope of this article. Importantly, intervention by invitation applies to 'situations of internal disturbances and tensions … the threshold of non-international armed conflict.'[28] The reference to 'situations of internal disturbances and tensions …' in the scope provision signifies that, by definition, intervention by invitation applies to intervention directed at non-state actors.[29] Indeed the Institut's resolution makes it explicit that intervention by invitation applies only to intervention directed at non-state actors.[30]

While for most scholars, intervention by invitation is an exception to the rule prohibiting the use of force,[31] the view advanced in the Hague Lectures is that intervention by invitation does not implicate the prohibition on the use of force at all. Because the use of force by invitation is based on the consent of the territorial state, it cannot be said to be 'against the territorial integrity or political independence' of a state.[32] The consent given by the territorial state (and the consequent intervention by the requested state) are in fact an exercise in respect for the sovereignty and political independence of the territorial State.[33] Thus, as a point of departure the intervention by invitation is lawful and does not violate any rule of international law. Such an intervention can be shown to

27 Institut de Droit International Law Resolution on Military Assistance on Request Art 1 (Tenth Commission, Sub-Group C, adopted 8 September 2011).

28 ibid Art 2(2).

29 See also Georg Nolte, 'Intervention by Invitation' in *Max Planck Encyclopedia of Public International Law* (online edition last updated 2010), where intervention by invitation is defined in intervention in an 'internal armed conflict'. This definition might, however, be misleading since it suggested that intervention by invitation applies to non-international armed conflict as understood in the Geneva Conventions Common Art 3 1949.

30 Institut de Droit Resolution on Military Assistance Art 2(2). ('The objective of military assistance is to assist the requesting State in its struggle against non-State actors or individual persons within its territory.')

31 See Erika de Wet, 'The Modern Practice of Intervention by Invitation in Africa and its Implications for the Prohibition of the Use of Force' (2016) 26 European Journal of International Law 979 at 980: 'According to another (in this contribution, preferred) line of argument, the reference to force "against territorial integrity or political independence" also covers military intervention on request, unless it is certain that the request does not undermine the territorial integrity or political independence of the requesting State.' See also Christopher J Le Mon, 'Unilateral Intervention by Invitation in Civil Wars: The Effective Control Test Tested' (2003) 35 New York University Journal of International Law and Policy 741 at 742: 'Invited military intervention focuses on the consent of the inviting State to justify action that would absent such a consent, *constitute an illegal use of force by one State within the territory of another*.' [emphasis added].

32 UN Charter Art 2(4).

33 Max Byrne, 'Consent and the Use of Force: An Examination of "Intervention by Invitation" as a Basis for US Drone Strikes in Pakistan, Somalia and Yemen' (2020) 7 Journal on the Use of Force and International Law 97, 99 ('Consent is a manifestation of the 'sovereign equality' of States…').

be in breach of the prohibition on the use of force if certain conditions are met. The general framework on intervention can be described as follows:

- A state, acting through its recognised government and in the exercise of sovereignty, may invite another state to conduct military operations on its territory against non-state actors;

- an intervention following such an invitation will not offend against the prohibition on the use of force; and

- only the recognised government of a state may consent to the use of force on its territory.

Yet, while as a general rule, international law permits the use of force pursuant to an invitation by the territorial state, not all interventions following an invitation will be lawful. First, intervention by invitation will not be permitted under international law if the consent of the territorial state is tainted.[34] For example, consent would be tainted if given by an unauthorised person, it was obtained through force, coercion, fraud or any other ground capable of vitiating consent. Second, to remain within the permissible limits of international law, the intervention in question must not exceed the limits of consent.[35] Thirdly, the intervention will no longer be covered by the rule that permits intervention by invitation if consent is withdrawn.[36] These requirements, which may be termed 'formal requirement of consent', are also reflected in the Institut de Droit International's resolution on military assistance.[37]

There is, in addition to the formal requirements of consent, a more substantive element. Where the consent undermines the independence of the State and the principle of self-

34 Tom Ruys, 'Of Arms, Funding and "Non-Lethal Assistance" – Issues Surrounding Third-State Intervention in the Syrian Civil War' (2014) 13 Chinese Journal of International Law 13, 40.

35 *Armed Activities in the Territory of the Congo* (n 23) para 52 ('More pertinently, the Court draws attention to the fact that the consent that had been given to Uganda to place its forces in the DRC, and to engage in military operations, was not an open-ended consent … Even had consent to the Ugandan military presence extended much beyond the end of July 1998, the parameters of that consent, in terms of geographic location and objectives, would have remained thus restricted').

36 ibid para 51 ('The Court notes, first, that for reasons given above, no particular formalities would have been required for the DRC to withdraw its consent to the presence of Ugandan troops on its soi', and especially para 53: 'Thus, it appears evident to the Court that, whatever interpretation may be given to President Kabila's statement of 28 July 1998, any earlier consent by the DRC to the presence of Ugandan troops on its territory had at the latest been withdrawn by 8 August 1998, i.e. the closing date of the Victoria Falls Summit').

37 Institut de Droit Resolution on Military Assistance (n 27), which states that the 'requesting State is free to terminate its request or to withdraw its consent … irrespective of the expression of consent through a treaty', that any intervention is to be 'carried out in conformity with terms and modalities of the request' and that the intervention may not be carried out 'beyond the time agreed'.

determination, the consent would be invalid. If the consent is invalid, then the intervention pursuant to it would fall foul of the prohibition on the use of force in international law. As explained at the beginning of the section, intervention by invitation is accepted in international law *because* it is an exercise in sovereignty, independence and the right to self-determination. It is for this reason that, where the intervention undermines these principles, it will not be covered by the general rule permitting intervention.[38] The consequence of this position is that during a civil war intervention by invitation is not permitted. The reason for this is that, during a

> [c]ivil war … where the government has lost control of some of its territory, supporting one side in the conflict negatively affects the rights of the State (or the people of the State) to 'choose its political, economic, social and cultural system' – or to put it another way, to determine its future.[39]

According to Fox, the principle which prevents a government from inviting assistance in the midst of a civil war is based on the recognition that, in such situations, 'political consensus [may have] dissolved' and that it may be impossible to identify 'a single 'legitimate leadership'.[40] This position is generally recognised in scholarly writings, with the main point of contention being the extent of control that a government must maintain to retain the right to request assistance.[41] Yet this position, which is generally correct, fails to explain instances where states have intervened, on the basis of an invitation, in the midst of a raging civil war. The United States' intervention against ISIS in Iraq, at the invitation of the government of Iraq, and the intervention of Russia against ISIS in Syria, at the invitation of the Syrian government, are examples of interventions in the midst of on-going internal conflict that have generally been accepted as lawful under international law.[42] Similarly, the intervention by France and some

38 Institut de Droit (n 27): 'Military Assistance is prohibited when it is exercised in violation of the Charter of the United Nations, of the principles of non-intervention, of equal rights and self-determination of peoples.'

39 See Dire Tladi, 'The Duty not Intervene in Matters within Domestic Jurisdiction' in Jorde E Viñuales (ed), *The UN Friendly Relations Declaration at 50: An Assessment of the Fundamental Principles of International Law* (Cambridge 2020) 97–98.

40 See Gregory H Fox, 'Intervention by Invitation' in Marc Weller (ed) *Oxford Handbook of the Use of Force in International Law* (OUP 2015) 828.

41 See, eg Ruys (n 34); De Wet (n 31); Le Mon (n 31); and Byrne (n 33). For a different view, which accepts that the government of a state embroiled in civil war remains entitled to request assistance, see Kasaija Phillip Apuuli, 'Explaining the (Il)legality of Uganda's Intervention in the Current South Sudan Conflict' (2014) 23 African Security Review 352.

42 See Olivier Corten, 'The Military Operations against the "Islamic State" (ISIL or Da'esh) – 2014' in Tom Ruys and Olivier Corten (eds), *The Use of Force in International Law: A Case-Based Approach* (Oxford 2018).

African states in the midst of an ongoing civil war in Mali was generally accepted as lawful.[43]

Thus, while the general position endorsed by the majority of scholars is that an intervention by invitation is not permissible in cases of internal armed conflict, this position does not account for the practice in which states have intervened during ongoing internal armed conflicts. The reason that some cases of internal armed conflict permit intervention by invitation is that the determining factor for the lawfulness of intervention is not whether there is an armed conflict, but rather whether the intervention would undermine the right of the peoples to self-determination. The existence of an armed conflict is likely to mean that intervention would prevent the people of a State in which 'political consensus has dissolved' from exercising their right to self-determination. A typical example of such a scenario is the case of the Saudi-led intervention in Yemen's civil war.[44]

Synopsis

Comparison

In the preceding sections of the article, I sought to describe the law on the extraterritorial use of force against non-state actors. The lectures focused on two particular areas that have attracted the most attention in recent years. First, whether a State can use force in self-defence against non-state actors on the territory of third states without that state's consent. The second concerned the right of a State to use force extraterritorially against non-state actors at the invitation of the territorial state. By analysing these two situations, the peculiarities concerning the extraterritorial use of force against non-state actors emerge and reveal that, while a restrictive approach to the use of force is warranted in respect of self-defence, a more permissive approach is warranted in relation the use of force by invitation of the territorial state. Key to the assessment was the point of departure: As a general rule, international law does not permit the unilateral extraterritorial use of force against non-state actors without the consent of the territorial state. Unilateral force, in these circumstances is a violation of the law of the Charter on the use of force which constitutes a peremptory norm of general international law.

In the case of self-defence, this general rule is implicated. The State using force, purportedly in self-defence, in the territory of a third State violates this basic principle unless it can be shown that the conduct falls within the scope of self-defence. While some of the scholarly writing in support of the proposition for an expansive approach suggests that international law has always permitted the use of force against non-state

43 Karine Bannelier and Theodore Chsristakis, 'The Intervention of France and African Countries in Mali – 2013' in Ruys and Corten (n 42).

44 Luca Ferro and Tom Ruys, 'The Saudi-led Intervention in Yemen's Civil War – 2015' in Ruys and Corten (n 42).

actors, this is not the dominant view, and is, in any event, unsustainable as a matter of law. Similarly, subsequent practice does not support the view that there has been an evolution of the rules relating to the use of force against non-state actors. Indeed, in the light of the peremptory character of the prohibition on the use of force, any shift in this basic rule would have to be shown to be (a general norm) accepted and recognised by the international community of states as a whole as one from which no derogation is permitted. It is for these reasons that a restrictive approach to the rules on self-defence against non-state actors continues to apply, ie a State may not use force extraterritorially against non-state actors in the territory of third states in self-defence, without the consent of the territorial State. While there may well be questions about the appropriate standard of attribution, the basic principle that either consent or attribution is required, remains unaffected in practice.

Different considerations apply to the rules relating to intervention by invitation and how those rules apply to the use of force against non-state actors. The point of departure in respect of intervention by invitation is different from that of self-defence. Sovereignty and sovereign equality of States mean that the territorial State is entitled to invite another State to intervene militarily in its territory. Any intervention by invitation is therefore, as a point of departure, lawful and does not implicate the law of the Charter on the use of force. The right to invite intervention is an exercise of sovereignty and is therefore only available to the government, and not to non-state actors. It is only in very narrow circumstances where the consent of the territorial State is somehow defective or where the intervention (even if accompanied by consent) would undermine the right of the people to determine their own political destiny, including through violent means, that international law prohibits the use of force. Thus, in relation to the intervention by invitation against non-state actors, a more permissive approach applies. The use of force against non-state actors, where there has been an invitation by the territorial State, is generally permitted. Only in limited instances where such extraterritorial use of force undermines the principles of self-determination, would it be prohibited and thus fall foul of the prohibition on the use of force.

Why the Discrepancy?

Why the discrepancy? Why is a restrictive approach applicable in relation to the use of force in self-defence, and an expansive approach applicable in relation to the use of force pursuant to invitation? The answer lies in the principles of sovereignty and independence. In relation to the former, the use of force is, as a point of departure, a violation of territorial integrity, sovereignty and independence of the territorial State. In the case of the latter, the use of force is an exercise in sovereignty and independence, and not inconsistent with territorial integrity.

It should be recalled that while the prohibition on the use of force outlaws forcible measures which are violent acts, it is not the violence that is at the heart of the

prohibition. The values protected by the prohibition are the sovereignty, self-determination and territorial integrity.[45] In this sense, the use of force, without the consent of the territorial State, not only violates the *jus cogens* prohibition codified in Article 2(4) of the Charter and the bedrock principles of international law concerning territorial integrity and sovereignty, it also undermines another *jus cogens* principle, namely the principle of self-determination. Intervention, including the use of force at its core, is intended to influence the State in which the intervention is taking place to follow a path preferred by the intervening State, thus depriving the peoples of the territorial State their right to self-determination.[46] Thus, any forcible intervention without the consent of the territorial State has to be interpreted restrictively since it impacts on two peremptory norms of general international law. This rule of restrictive interpretation follows from the principle of systemic integration which, when applied to peremptory norms requires that other norms be interpreted, to the extent possible, in order to be consistent with *jus cogens* norms.[47]

For the law on self-defence, in particular against non-state actors, the above has a number of implications. First, as a point of departure, any extraterritorial use of force without consent, is strictly prohibited. The use of force in self-defence, which continues to undermine the territorial integrity of the territorial State, is permitted precisely because *that* State itself bears responsibility for the breach of the impacted fundamental principles of international law, ie prohibition in Article 2(4) of the Charter, territorial integrity, sovereignty and self-determination.[48] In this sense self-defence is itself intended to protect the sovereignty of the State exercising the right from incursion by other States. Permitting States to use extraterritorial force in self-defence against non-states would encourage the violation of the fundamental principles (prohibition on the

45 See, for the relationship between these various principles, generally, *Military and Paramilitary Activities case* (n 17), including para 205 and 206 and especially para 212 where the court states that 'the principle of respect for State sovereignty … is of course closely linked with the principles of the prohibition of the use of force and of non-intervention.' See also Mazier Jamnejad and Michael Wood, 'The Principle of Non-Intervention' (2009) 22 Leiden Journal of International Law 345, at 348, noting that the prohibition on the use of force is 'a specific application of the principle of non-intervention, indeed the most important application of the principle.' See also Percy H Winfield, 'The History of Intervention in International Law' (1922–1923) 3 British Yearbook of International Law 130, 131 and 136. This relationship is also described in some detail in Hannah Woolaver, 'Sovereign Equality as a Peremptory Norm of General International Law' in Tladi (n 12), especially, at 721–722 ('The State's exclusive international legal authority over its territory bars nonconsensual incursions by other States …. The right to territorial integrity is buttressed by other rules of international law, primarily the "fundamental" prohibition of the use of force in Art 2(4) and 51 of the UN Charter respectively.')

46 It is thus no surprise that the first iteration of a (quasi) universal prohibition on the use of force, namely the 1928 Kellogg-Briand Pact Art I, provided for the renunciation of war 'as an instrument of national policy in … relations' between the states parties.

47 See Draft Conclusion 20 of the Draft Conclusions on Peremptory Norms (n 11). See also Sâ Benjamin Traoré, 'Peremptory Norms and Interpretation in International Law' in Tladi (n 12).

48 See also Woolaver (n 45) 722.

use of force, sovereignty, territorial integrity), without the requisite protection of sovereignty and territorial integrity as a justification (it being understood that these latter principles, by definition, operate in the inter-state context).

In contrast, intervention by invitation does not violate the principles of sovereignty, territorial integrity and independence. It is, in fact, a reflection and application of those principles. Importantly, intervention by invitation is also an exercise, through duly recognised representatives, of peoples' right to self-determination. It is for this reason that, as a general rule, intervention by invitation does not implicate the prohibition on the use of force where the consent is untainted. Thus, as a point of departure international law permits the use of force against non-state actors on invitation.

The exception to the general rule permitting the intervention by invitation is a narrow one: it is only where the intervention by invitation undermines the right of peoples to self-determination that the prohibition on the use of force becomes implicated. This is because in such cases, where the political consensus in a State has been lost, and the right to self-determination must be exercised directly by the people themselves, the government no longer retains the right to invite external intervention. In such cases, the right that a State has under international law to invite external intervention becomes inconsistent with a peremptory norm, the right to self-determination. Consistent with the principle of systemic integration described above, the right of a State to invite external intervention has to interpreted in such a way that it is not inconsistent with a norm of *jus cogens*, in this case the principle of self-determination. The outcome of this process is that the right to invite ceases to apply when the political consensus has been lost. Without the right to invite intervention, the forcible intervention falls within the scope of the prohibition in Article 2(4) and is thus not permitted in international law. What separates the two scenarios of the extraterritorial use of force, self-defence and intervention by invitation, are the fundamental principles of international law. The use of force in self-defence against non-state actors harms these principles, and must accordingly be prohibited—a restrictive approach to the use of force. The use of force by invitation, on the other, serves, as a point of departure, to promote these principles. A more permissive approach is thus applicable.

Concluding Remarks

At first glance, the conclusion that a restrictive approach to the extraterritorial use of force in self-defence is warranted, seems at odds with the view that a more permissive approach is warranted in relation to extraterritorial use force by invitation. These two conclusions might seem to pull in different directions, creating tension and incoherence in the line of argument. Yet, that would only be the case if the focus is placed on the prohibition of violence inherent in the prohibition of force. If, in contrast, the emphasis is placed on the underlying values, namely the principles of territorial integrity, sovereignty and self-determination, then it becomes clear that not only is there

consistency between the two apparently conflicting ideas, but there is also a great deal of coherence. Both conclusions—restrictive approach to the extraterritorial use of force on self-defence and a permissive approach to intervention by invitation—are aimed at protecting sovereignty and the right to self-determination.

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