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Discourses on Methods in International Law: An Anthology

Methodological Choices and Debates Concerning the Non-Use of Force

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Abstract: This *Chapter* provides an overview of the debates in relation to the non-use of force. Its objective is to understand that, beyond debate on the substance of the matter, there are invariably divergences as to the approach taken, which relate to international custom and to the principles of interpretation of international law. The divide between the extensive and restrictive approaches to *jus contra bellum* has not disappeared and is not about to disappear either.

Keywords: non-use of force – UN Charter – methodology – theory of international law – customary law – interpretation.

I. Introduction

Season 2 of the French TV series *Baron noir* broadcast in 2018 features a particularly interesting discussion between the President of the Republic, Amélie Dorendeu, and her special advisor. The two are looking for a way to neutralize a terrorist threat facing France and specifically by contemplating the military option in Syria.
President: "Option C. I need you to tell me more about it".
Advisor: "Technically, the position is unchanged. The operation is still feasible".
President: "Legally, what authorizes us to execute a Daesh soldier in Syria?".

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Advisor: "In Syria, it's a little complicated. Because we rely on an extensive approach to international law and the United Nations Charter. Unlike Russia, which is acting on an appeal for help from Assad, France is compelled to claim it is acting in either collective or individual self-defence. In the case in point, Iraq has asked for help from France. We consider that to be a mandate to act against Islamic State in Syria".
President: "Our operations in Syria are a direct extension of our operations in Iraq".
Advisor: "Exactly. The point has never been challenged at the UN".
President: "And the second possibility?".
Advisor: "Individual self-defence. Being attacked in France by Islamic State fighters gives us the right to kill Islamic State fighters in Syria. But, be careful. Each operation must be thoroughly documented so we can prove the action out there is directly linked to an imminent threat back here".
President: "I'm afraid Jacques. I'm afraid of not having done everything I could. I'm afraid it will start over. Slaughter. Children. It gets harder every time. The country breaks further apart each time".[1]

What is depicted is what is referred to explicitly as an "extensive approach" to the prohibition of the use of force.[2] "Unlike Russia, which is acting on an appeal for help from Assad", France "is compelled to", as the advisor puts it, use an extensive interpretation of self-defence. More specifically, the terrorist threat supposedly justifies strikes on Syrian territory – with all the material and human loss which that implies – without having to prove that that state was responsible. This view of things, which the advisor concedes is "a little complicated" can supposedly be justified only by reference, not to legal texts or case law, but to a sort of military necessity combined with humanitarian considerations: the purpose is to protect France and more specifically its citizens. What the President has to say is significant. Under certain circumstances, legal form must give way to the requirements of action: "I'm afraid of not having done everything I could".

Such a contrast between an extensive approach and another more restrictive one is to be found, too, this time in the very real statements of several heads of state. Statements by the last three presidents of the United States to hold office are significant:

1) "[T]hose who plan, authorize, commit or aid terrorist attacks against the United States and its interests – including those who harbor terrorists – threaten the national security of the United States. It is, therefore, necessary and appropriate that the United States exercise its right to defend itself and protect United States citizens both at home and abroad".[3]

[1] E. Benzekri, J.-B. Delafon, *Baron Noir*, Canal +, Season 2, Episode 4, 2018 (our translation).

[2] See in general O. Corten, *The UN Charter in Action Movies*, in O. Corten, F. Dubuisson (eds.), *Melland Schill Guidebooks on International Law: Cinematic Perspectives on International Law*, Manchester: Manchester University Press, forthcoming.

[3] G.W. Bush, *President Signs Authorization for Use of Military Force Bill*, The White House, Washington, 18 September 2001, georgewbush-whitehouse.archives.gov.

2) "I have made it clear that we will hunt down terrorists who threaten our country, wherever they are [...]. This is a core principle of my presidency: If you threaten America, you will find no safe haven".[4]

3) "I will quickly and decisively bomb the hell out of ISIS, will rebuild our military and make it so strong no one – and I mean, no one – will mess with us".[5]

The legitimacy of the use of force is asserted manifestly in an extensive manner, with barely any reference to the formal legal constraints deduced from the UN Charter or from other sources of public international law. The contrast with this declaration by 120 UN Member States in April 2018 is striking: "The Movement stressed that the UN Charter contains sufficient provisions regarding the use of force to maintain and preserve international peace and security [...]. In addition, and consistent with the practice of the UN and international law, as pronounced by the ICJ, Article 51 of the UN Charter is restrictive and should not be re-written or re-interpreted".[6]

All of these states insist on strict observance of the Charter terms and consideration of the precedents of the International Court of Justice (ICJ). However, no mention is made of criteria such as the necessity to defend oneself or the "reasonableness" of any military intervention.[7]

The same contrast can be found in scholarship on the subjects, as the two excerpts below show:

1) "A state (the 'victim state') suffers an armed attack from a nonstate group operating outside its territory and concludes that it is necessary to use force in self-defense to respond to the continuing threat that the group poses [...]. If the territorial state is unwilling or unable to take those steps, however, it is lawful for the victim state to use that level of force that is necessary (and proportional) to suppress the threat that the nonstate group poses".[8]

2) "Concentrating on the notion of 'attribution' of non-state actor conduct to states this article evidences that all approaches put forward in favor of grounding attribution on 'unwillingness' or 'inability' of states to suppress terrorist activities have not reached the level of *lex lata*. The systematics of the Charter allocate the responsibility to deal

[4] B. Obama, *Statement by the President on ISIL*, The White House, Washington, 10 September 2014, obamawhitehouse.archives.gov.

[5] D. Trump, (quoted in J. Johnson), *Donald Trump promises to 'bomb the hell out of ISIS' in new radio ad* , in*The Washington Post*, 18 November 2015, www.washingtonpost.com.

[6] Non-Aligned Movement, 18th Mid-Term Ministerial Meeting of the Non-Aligned Movement, Baku, 3-6 April 2018, para. 27.2. See also, among other similar statements, 17th Summit of Heads of State and Government of the Non-Aligned Movement, Venezuela, 16-18 September 2016, para. 25.2, www.dirco.gov.za.

[7] See O. Corten, *Necessity as a Justification for the Use of Force?*, in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law*, Oxford: Oxford University Press, 2014, p. 861 *et seq*.

[8] A. Deeks, *'Unwilling or Unable': Toward a Normative Framework for Extraterritorial Self-Defense*, in *Virginia Journal of International Law,* 2012, p. 487 *et seq*.

with 'unwilling or unable' states to the Security Council. Even if the Security Council is paralyzed and fails to act, 'armed enforcement actions' by states against non-state actors are as of current law not legal".[9]

The first author reiterates fairly flexible criteria such as necessity or proportionality, which alone should guide interpretations as to the lawfulness of the use of force. The second prescribes a more stringent method; in order to act in self-defence within the territory of a state harbouring a non-state actor, it should first be ascertained that the latter's acts can indeed be attributed to that state. The mere fact that the state concerned is "unwilling or unable" to take action is not sufficient to make any action in self-defence against it legitimate. In such an instance, the matter should be taken to the Security Council, pursuant to the UN Charter.

In short, in all discussions about the use of force we have a clash that can be considered on several levels.

1) Substantively, between a position underscoring the stringency of the prohibition and another position based on a more flexible and more extensive approach, tending to justify military action.[10]

2) More theoretically or even philosophically, between a peace-making ideal of international law, that is sometimes characterized as utopian, and realism referring to the necessity to take account of states' vital interests at the risk of incidentally vindicating them.[11]

3) Methodologically, between the references to classical sources of positive international law, such as the UN Charter, and the call for value-laden concepts such as "necessity" or "reasonableness".

As shall be explained below, positions need not necessarily match on all three levels. Although it is not frequent in practice, it is theoretically possible to defend an extensive position substantively and to use a rather restrictive method,[12] and vice-versa.[13] In the remainder of this exposition, the focus shall fall on the methodological aspects of

[9] P. Starski, *Right to self-defense, attribution and the non-State Actor – Birth of the "unable or unwilling" standard?*, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2015, p. 455 *et seq*.

[10] See the topical examples of C. Gray, *International Law and the Use of Force*, Oxford: Oxford University Press, 2018, and Y. Dinstein, *War, Aggression and Self-Defence*, Cambridge: Cambridge University Press, 2012.

[11] O. Corten, F. Dubuisson, V. Koutroulis, A. Lagerwall, *A Critical Introduction to International Law*, Bruxelles: Les éditions de l'Université de Bruxelles, 2019, p. 401 *et seq*.

[12] An illustration of the first possibility can be found in R. Van Steenberghe, *La légitime défense en droit international*, in *Annuaire Français de Droit International*, 2012.

[13] Some studies by M.E. O'Connell can, to some extent, be considered as an illustration of this second possibility, see e.g. M.E. O'Connell, *Self-Defense against non-State Actors*, Cambridge: Cambridge University Press, 2019.

the contrast between restrictive and extensive approaches to the non-use of force, although full account will be taken of the connections with substantive positions.[14]

It is from this perspective that I reasoned in a paper published in 2005[15] and then more fully some years later in chapter 1 of *Le droit contre la guerre*.[16] Since then other publications have addressed this methodological two-way split, even if other terms are employed: Matthew Waxman draws a distinction between "balancers" and "bright-liners",[17] Tom Farer opposes "purists" and "eclectics",[18] and others speak of "expansionists" and "restrictivists".[19] On reading these contributions, two caveats should be given from the outset.

First it would be pointless to establish any scientific rank order between these two approaches.[20] The choice between them is primarily a philosophical, even a political one, and it may also be explained by cultural factors (the extensive approach in particular seems to reflect more a US culture whereas the restrictive approach is traditionally associated more closely with European legal culture).[21] It cannot be claimed, for instance, that the restrictive approach is superior because it is more characteristic than the extensive approach of the case law of the ICJ,[22] since that would imply that this case law is scientifically superior, which is just one of many choices.[23] As shall be seen, one might conversely, from an extensive viewpoint, give precedence to state practice over more classical sources of positive law, which again is a matter of choice that cannot be

[14] See G. KAJTAR, *Self-Defence Against Non-State Actors – Methodological Challenges*, in *Annales Universitatis Scientiarum Budapestinensis de Rolando Eotvos Nominatae: Sectio Iuridica*, 2013, p. 309.

[15] O. CORTEN, *The Controversies over the Customary Prohibition on the Use of Force: A Methodological Debate*, in *European Journal of International Law*, p. 803 *et seq*.

[16] English version in O. CORTEN*, The Law Against War,* Oxford: Hart Pub., 2010, p. 4 *et seq*.

[17] M.C. WAXMAN*, Regulating resort to force: Form and substance of the UN Charter regime*, in *European Journal of International Law*, 2013, p. 151 *et seq.*

[18] T. FARER, *Can the United States Violently Punish the Assad Regime? Competing Visions (including that of Anthony d'Amato) of the Applicable International Law*, in *American Journal of International Law*, 2014, pp. 702-704.

[19] J. KAMMERHOFER, *Introduction: The Future of Restrictivist Scholarship on the Use of Force*, in *Leiden Journal of International Law*, 2016, p. 13.

[20] D. KLEIMANN, *Positivism, the New Haven School and the Use of Force in International Law*, in *BSIS Journal of International Studies*, p. 27 *et seq.;* see generally about the impossibility of 'proving' the superiority of one method or approach of international law O. CORTEN, *Méthodologie du droit international public*, Bruxelles: Editions de l'Université de Bruxelles, 2017, p. 41.

[21] W.C. BANKS, E.J. CRIDDLE, *Customary Constraints on the Use of Force: Article 51 with an American Accent*, in *Leiden Journal of International Law*, 2016, p. 67 *et seq.*; J. KAMMERHOFER, *Introduction*, cit., pp. 15-16; see also, focusing on the policy-makers, I.H. DAALDER, *The Use of Force in a Changing World–US and European Perspectives*, in *Leiden Journal of International Law*, 2003, p. 171 *et seq*.

[22] G. PALMISANO, *Determining the Law on the Use of Force: The ICJ and Customary Rules on the Use of Force*, in E. CANNIZZARO, P. PALCHETTI (eds), *Customary International Law on the Use of Force: a Methodological Approach*, Leiden: Brill, 2005, p. 197 *et seq.*

[23] O. CORTEN, *Le positivisme juridique aujourd'hui: science ou science fiction?*, in *Revue québécoise de droit international*, 2016, pp. 39-40. See R. VAN STEENBERGHE, *The Law of Self-Defence and the New Argumentative Landscape on the Expansionists' Side*, in *Leiden Journal of International Law*, 2016, p. 48.

readily made objective. Besides, it would be sticking one's neck out to claim that either approach prevails because it is supposedly best able to ensure peace and security, which are the essential purposes of the UN Charter. The restrictive approach is often legitimized in this way, by underscoring the bellicose tendencies that seem to go along with overly flexible interpretations. By contrast, the extensive approach sets itself up as being the more able to effectively counter the risks of destabilization of international relations generated by certain states or groups that directly or indirectly challenge international security. Only a broader conception of self-defence is purportedly suitable for achieving the peace-making objectives of international law.[24] Here again, one may be more or less convinced by one or other of these approaches but, scientifically, it would be an intricate matter, not to say an impossible task to prove the validity of the arguments made by either side. It remains for commentators to specify the approach that is given precedence, so as to relativize their arguments. For my own part, and as I have explained elsewhere,[25] the reading of my works leaves no doubt about my categorization; one author has even labelled me as a "restrictivist *pur sang*".[26]

Next, it is generally accepted that the point in studying this divide is primarily to ensure a better understanding of the debates about the non-use of force.[27] One cannot fully understand – and therefore respond to – a study of *jus contra bellum* without taking into account the specific features of the legal and methodological approach it reveals. Reference to the wording of Art. 51 of the Charter or to ICJ case law will not have the same scope when addressing a "restrictivist", who will probably respond by interpreting those sources in turn, or an "extensionist", who will tend more to set them aside and prefer instead considerations relating to the spirit of the law or more openly politi-

[24] Thus, according to J.N. Moore, "Of particular importance, for *jus ad bellum* as a normative principle to inhibit aggression, as is the very purpose of the norm, it must differentially impose costs on the aggression it seeks to deter. If, to the contrary, it treats aggression and defense equally, by failing to effectively differentiate between them, or even worse, it effectively favors aggression by ignoring an aggressive attack while condemning a defensive response, then it will have turned this central normative principle into a cipher. Like an autoimmune disease, it will have turned the international order's own immune system against itself, thus encouraging aggression. Moreover, international institutions effectively ignoring aggression while condemning defense – thus supporting an inverse of the critically important principle banning use of force as a modality of change – will themselves inevitably be harmed as they, in turn, undermine the rule of law"; J.N. Moore, *Jus ad Bellum before the International Court of Justice*, in *Virginia Journal of International Law*, 2011, pp. 904-905.

[25] O. Corten, *The Law Against War*, cit., pp. 1-2; O. Corten, *Regulating Resort to Force. A Reply to Matthew C. Waxman from a 'Bright-Liner'*, in *European Journal of International Law*, 2013, p. 191 *et seq*.

[26] A. De Hoogh, *Restrictivist reasoning on the ratione personae dimension of armed attacks in the post 9/11 world*, in *Leiden Journal of International Law*, 2016, p. 41.

[27] Thus, as enunciated by A. Bianchi, "the current difficulties in determining the exact contours of the international legal regulation of the use of force would greatly benefit from a reflexive consideration, by all relevant actors, of some methodological aspects underlying the legal discourse on the use of force"; A. Bianchi, *The international regulation of the use of force: The politics of interpretative method*, in *Leiden Journal of International Law*, 2009, p. 284.

cal arguments or moral values.[28] It should be noted incidentally that it would be pointless to claim to escape from any considerations of this sort in the name of a form of pragmatism that is refractory to any theoretical thinking: "Practitioners, even when not conscious of it, always presuppose 'a theory' or 'a method'. It is against the backdrop of theory and method, whatever they may be, that they provide their choices with the necessary level of credibility and persuasiveness required by the players of the game".[29]

In other words, it is certainly not by denying it that we shall be able to settle the problem. In this sense, the objective of this contribution is to understand that, beyond debate on the substance of the matter, there are invariably divergences as to the approach taken, which relate to international custom and to the principles of interpretation of international law (section II). After evoking both these facets of the methodological debate, we shall briefly illustrate the latter by taking up the two particularly controversial substantive issues of self-defence and of the right of humanitarian intervention (section III). We shall continue by reading and interpreting a few excerpts from scholarship that show it is sometimes difficult to categorize an author or even a single study within one or other of the approaches in question (section IV). Lastly, we shall question, from a dynamic and prospective perspective, whether these recent years have seen significant or even radical change in the extensive approach (section V).

As stated, I have already dealt with this issue in earlier writings, which were based mostly on material covering the scholarship of the first half of the 2000s. At that time, which was marked by 9/11 and the beginnings of the "War on Terror" in Afghanistan and then by the war conducted in Iraq without specific authorization from the Security Council, particularly sharp controversy developed about the meaning or even the continued existence of the rules prohibiting the use of force.[30] The remainder of this contribution shall draw on publications from the 2010s, in the context of conflicts like those in Iraq, Syria, or Ukraine. Again, the stringency of the rules prohibiting the use of force has been called into question in the name of considerations relating both to security and to observance of human rights and humanitarian law. As shall be seen, the divide between the extensive and restrictive approaches to *jus contra bellum* has again been apparent, whether with respect to considerations of customary law or the question of the interpretation of treaties.

[28] Compare P. STARSKI, *Right to self-defense*, cit., and A. DEEKS, *'Unwilling or Unable'*, cit.

[29] A. BIANCHI, *The international regulation of the use of force*, cit., p. 285.

[30] See M.J. GLENNON, *The Fog of Law: Pragmatism, Security, and International Law*, Palo Alto: Stanford University Press, 2010.

II. The extensive v. restrictive approach: customary law and the interpretation of treaties

The *jus contra bellum* is a regime that ultimately relies on just a few treaty-based rules in the Charter: Art. 2, para. 4, lays down a general principle of prohibition while Art. 51 and Chapter VII provide for "exceptions" (a term that shall be given precedence from a restrictive perspective) or certain rights to use force (to use a more extensive terminology, aimed at presenting self-defence as a sovereign right rather than an exceptional situation). It is therefore a matter of a body of rules that is little developed in treaties and that can only be supplemented by limited case law.[31] These particularities set it apart from other areas of international law in which there are a great many instruments and precedents, such as WTO law or human rights. In this context, most of the methodological reflections relating to the non-use of force bear traditionally on the scope of precedent,[32] whether with respect to custom, which has a central position, or to the interpretation of treaties, which also includes essential consideration of practice.

Before developing the analysis, we must first emphasize a fundamental distinction between the two approaches.

1) From an extensive perspective, there will be a tendency to associate legitimacy and legality and to move away from a positivist or formalistic perspective. So there is nothing to exclude referring to "natural law",[33] that should be associated with the central criterion of necessity: "Necessity as a general proposition in *jus ad bellum* is best understood as a prohibition against use of force except in protection of major values".[34] Finally, it is all about applying "most comprehensive and fundamental test of all law, reasonableness in a particular context".[35]

2) A restrictive perspective relies by contrast on a positivist underpinning.[36] In this sense, "the methodological option underlain by this approach is to consider that legality

[31] International Court of Justice: *Military and paramilitary activities in and against Nicaragua* (Nicaragua v. United States of America), judgment of 27 June 1986; *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), judgment of 19 December 2005; and to a lesser extent *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996; *Oil Platforms* (Islamic Republic of Iran v. United States of America), judgment of 6 November 2003; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004; *Accordance with International Law of the unilateral declaration of independence in respect of Kosovo*, Advisory Opinion of 22 July 2010.

[32] T. Ruys, O. Corten, A. Hofer, *Introduction: The Jus Contra bellum and the Power of Precedent*, in T. Ruys, O. Corten, A. Hofer (eds), *The use of force in international law: a case-based approach*, Oxford: Oxford University Press, 2018, p. 1 *et seq.*; R. Van Steenberghe, *The Law of Self-Defence*, cit., p. 58.

[33] J.D. Ohlin, *The Doctrine of Legitimate Defense*, in *International Law Studies*, 2015, p. 120.

[34] J.N. Moore, *Jus ad Bellum before the International Court of Justice*, cit., p. 915.

[35] *Ibid.*, p. 916.

[36] A. Orakhelashvili, *Changing jus cogens through State practice? The case of the prohibition of the use of force and its exceptions*, in M. Weller (ed.), *The Oxford Handbook on the Use of Force*, Oxford: Oxford University Press, 2012, pp. 174-175.

and legitimacy pertain to two analytical registers which, although not formally watertight, remain irreducibly separate by nature".[37] The conclusions of this type of study claim therefore to be valid only if "one keeps to positive law, as expressed through that "mouthpiece" of international law, the International Court of Justice".[38]

This divergence of views must be clearly understood in order to address the question of custom as well as the question of interpretation.

II.1. Non-use of force and customary law: which method?

The distinction between the two main ways of dealing with custom when contemplating a question of the use of force may be illustrated by the table below.[39] It is designed to set out the differences between approaches and it goes without saying that most of positions actually taken fall between the two and cannot necessarily be immediately and categorically classified.[40] Even so, as I see it, such a schema can provide a better understanding of the debates about the customary regime of the prohibition of the use of force.

	Extensive approach	**Restrictive approach**
Legal status of custom	Main Source	Treaty Law & Customary Law on the same level
	Policy-oriented perspective	Formalist perspective
Constitutive elements	Practice (main element)	*Opinio Juris* (main element)
	Rapid evolution	Progressive evolution
	Role of "custom pioneers" (like USA or other Western States)	Equality Between States

Table 1.

The distinction between the two approaches is marked therefore both with respect to the status of custom and to the way its constitutive elements are viewed.

First, with respect to the *status of custom*, the differences in approach are radical.

An extensive approach will tend to see custom as the main source of law against which the lawfulness of any use of force should be gauged. The wording of the Charter should therefore take a back seat behind the way it has been implemented in actual

[37] N. Hajjami, *De la légalité de l'engagement militaire de la France en Syrie*, in *Revue du Droit Public*, 2017, p. 152 (our translation).

[38] F. Latty, *Le brouillage des repères du jus contra bellum. A propos de l'usage de la force par la France contre Daech*, in *Revue générale de droit international public*, 2016, p. 21 (our translation).

[39] See also O. Corten, *The Law Against War*, cit., p. 6.

[40] See *infra*, section IV.

practice.[41] Custom would make it possible to adapt the rules on the use of force, initially designed in 1945, to the new necessities arising from the continuing development of international relations: "the credibility of the law depends ultimately upon its ability to address effectively the realities of contemporary threats".[42] Allowance should therefore be made for political or even ethical requirements rather than hanging on regardless to overly formal reasoning that is detached from reality.[43]

A restrictive approach views custom as one source among others but a source that can certainly not be thought of as superior to treaty law. When it comes to the use of force, allowance for the wording of the Charter must be made to fit with customary practices that have developed since the Charter came into force. The required standard is purportedly very high insofar as prohibition of the use of force is a matter of mandatory law.[44] Any change to the rule would not be excluded, provided it could be grounded on varied and repeated precedents as well as sound legal sources and not just on political or moral considerations.[45] This sets aside "the 'what is reasonable' school, or the 'something-must-be-done' school".[46]

By the same logic, the two approaches ought therefore to be carefully told apart with respect to the *constitutive elements of custom*.

The extensive approach will emphasize practices and the real situation on the ground: "Particularly in this area of law, it is important that principle should be sensitive to the practical realities of the circumstances that it addresses".[47] Obviously this does not mean that the justificatory discourse of states (especially intervening states) is ignored but that it will always come in support of practice (or even as a constituent component of it).[48] The point that military interventions have actually and regularly occurred would in any event be the sign of a softening of the prohibition of the use of force, which might come about quite quickly: "Usually, customary international law changes slowly over many decades. But sometimes, world events are such that customary international law develops quite rapidly".[49] This swift change might be achieved via the Security Council which, without authorizing military interventions, can legitimize

[41] M.P. SCHARF, *How the war against ISIS changed international law*, in *Case Western Reserve Journal of International Law*, 2016, p. 36 *et seq.*

[42] D. BETHLEHEM, *Principles relevant to the scope of a State's right to self-defense against an imminent or actual armed attack by nonstate actors*, in *American Journal of International Law*, 2012, p. 4.

[43] See R. VAN STEENBERGHE, *The Law of Self-Defence*, cit., pp. 54-55.

[44] A. ORAKHELASHVILI, *Changing jus cogens through State practice?*, cit., pp.157-175.

[45] *Ibid.,* p. 174; N. HAJJAMI, *De la légalité de l'engagement militaire de la France en Syrie*, cit., p. 152.

[46] C. GRAY, *The Limits of Force*, in *Collected Courses of the Hague Academy of International Law*, Leiden: Brill, 2016, p. 109.

[47] D. BETHLEHEM, *Principles relevant to the scope of a State's right to self-defense,* cit., p. 4.

[48] See R. VAN STEENBERGHE, *The Law of Self-Defence,* cit., pp. 56-57.

[49] M.P. SCHARF, *How the war against ISIS changed international law*, cit., pp. 4 and 11.

them.[50] In this context, the preponderant status of some states, referred to as "custom pioneers",[51] that is, primarily the United States and its allies, should be accepted and acknowledged. Those states play a leading part in the formation of custom since they are the states best placed to ensure actual compliance with international law (their power being an asset and not a failing) and to embody a degree of democratic legitimacy. By comparison, states like Russia, China, or most Third World states, are supposedly too weak or have too little legitimacy to deserve being granted equivalent standing.

A restrictive approach will tend instead to give precedence to legal discourse over facts and to see this as the only way to maintain the integrity of international law. In this way, when a state resorts to the use of force contrary to the Charter but invokes an exception contained in the Charter, this strengthens rather than weakens the legal regime of the Charter.[52] Practice would be meaningless unless associated with the expression of a new *opinio juris*: "'state practice' is not self-fulfilling or self-explanatory", "*opinio juris* is crucial".[53] As the ICJ stated, for the rule to change, the intervening powers would have to rely on some new justification that was originally excluded by the Charter and this new justification be accepted by all the other UN member states.[54] On the side of the intervening states, the claim should be expressed in clear legal terms: "[t]he changing allusion to multiple justification casts doubt on the validity of all related claims".[55] As for third states, it is not enough to point to their remaining silent and inferring general acceptance from that: "toleration of practice is not the same as acceptance of its legality".[56] The principle of equal sovereignty would rule out favouring one or other category of state and thereby consecrating the primacy of power over law.[57] Law could therefore only evolve gradually and by means of "unambiguous and widespread acceptance and recognition".[58] In view of the mandatory status of *jus contra bellum*, an agreement of the "international community of states as a whole" would indeed have to be secured.[59] From this perspective, although Security Council resolutions may obviously have legal effects in a specific instance, they could not as such suffice to conclude that custom had evolved.

[50] G. H. Fox, *Invitations to intervene after the Cold War: Toward a new collective model*, in A. Peters, C. Marxsen (eds.), *Intervention by Invitation*, Cambridge: Cambridge University Press, forthcoming.

[51] M.P. Scharf, *How the war against ISIS changed international law*, cit., p. 11.

[52] O. Corten, *The Russian Intervention in the Ukrainian Crisis: was jus contra bellum 'confirmed rather than weakened'?*, in *Journal on the Use of Force and International Law*, 2015, p. 17 *et seq.*

[53] A. Orakhelashvili, *Changing jus cogens through State practice?*, cit., pp. 159 and 158.

[54] O. Corten, *Breach and evolution of the international customary law on the use of force*, in E. Cannizzaro, P. Palchetti (eds), *Customary International Law on the Use of Force*, cit., p. 119 *et seq*.

[55] A. Orakhelashvili, *Changing jus cogens through State practice?*, cit., pp.169.

[56] *Ibid.*, p. 171.

[57] C. Gray, *The Limits of Force*, cit., p. 103.

[58] C. Henderson, *The Use of Force and International Law*, Cambridge: Cambridge University Press, 2018, p. 26.

[59] *Ibid.*, p. 25; A. Orakhelashvili, *Changing jus cogens through State practice?*, cit., p. 158.

As can be seen, there are many differences reflecting radically different legal – and beyond that theoretical and philosophical – approaches. In this way, beyond the substantive positions that are defended, the methodology used to establish a customary rule seems to open the way to various possibilities, some of them extensive and others more restrictive. The International Law Commission's development of principles for the establishment of customary law is not of a nature to limit those possibilities inasmuch as the principles themselves are broad enough to leave considerable leeway for whoever interprets them.[60] And in this respect, broader reference may be made to the principles of treaty interpretation which also open up the path to different and potentially opposing approaches.

II.2. Non-use of force and treaty interpretation: which method?

In addition to its Art. 32 on supplementary means of interpretation such as preparatory work, and Art. 33, which refers to issues of translation assuming several official languages are used, Art. 31 of the 1969 Vienna Convention on the Law of Treaties (VCLT) sets out various means that must be fitted together to reflect a "general rule of interpretation":

> "1. 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 [...].
> 3. There shall be taken into account, together with the context:
> (*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (*c*) any relevant rules of international law applicable in the relations between the parties.
> 4. A special meaning shall be given to a term if it is established that the parties so intended".

Other than the specificities of these various means, in essence, three approaches to interpretation are be found.[61] The first is literal; it involves beginning with the "ordinary meaning" or "special meaning" of the relevant articles based on the text and therefore on the vocabulary used as well as the usual rules of grammar. The second is teleological; consideration of the "object and purpose" of the rule being interpreted must enable the rule to be adapted to the changes in the political context and the changing spirit of international law. The third is pragmatic: it is centred on the way in which the rule has actually been interpreted by the various states parties to the treaty so as to come to an

[60] International Law Commission, Identification of Customary International Law. Draft Conclusions annexed to General Assembly Resolution 73/203, 20 December 2018, UN Doc. A/RES/73/203.

[61] O. Corten, F. Dubuisson, V. Koutroulis, A. Lagerwall, *A Critical Introduction to International Law*, cit., pp. 49-50.

"agreement of the parties regarding its interpretation". This third element of interpretation seems to relate to the concept of custom because it contains both the factor of practice and the decisive factor of the agreement of the parties.[62]

Let us return now to the opposition between extensive and restrictive approaches to interpretation to relate them with these principles, which are themselves applicable on a customary basis.[63] Logically, the extensive approach will tend to favour the teleological approach over the wording of the text and the mere existence of the practice over the "agreement of the parties" that such practice should reveal. This teleological approach will even be construed very broadly without citing or evoking Art. 31.[64] Conversely, the restrictive approach will give precedence to the literal meaning of the text, at least to establish a presumed meaning, although that meaning might be overturned if it can be shown there is agreement among all the parties to do so. As for the object and purpose of the rule, the argument is used to emphasize its peace-making and stabilizing character.[65] And the authors concerned will tend to refer to principles of interpretation set out in the Vienna Convention, which is a fairly logical approach from a more formalistic or restrictive perspective.

As can be seen, the establishment of a customary rule and the interpretation of a conventional rule are two intellectual operations that largely overlap or even merge. This is especially so when practice is taken into account as an essential means of interpreting a text.

It has, however, been emphasized that a distinction should be made between debates about "modification" and debates about the "interpretation" of treaties.[66] The first instance arguably requires a more stringent standard than the second:

> "As a result, the modification of that law through state practice should imply, first, that the weight of this practice is high in the sense that it must be able to reveal the *opinio juris* of states in the least ambiguous manner; second, that, in case of international reactions to a specific practice, those reactions be as abundant as possible and consist of explicit – rather than only implicit – approbations when assessing the generality of such practice; and, third, that the repetitions of the relevant practice over time be numerous and its uniformity well established".[67]

[62] R. Van Steenberghe, *The Law of Self-Defence*, cit., pp. 60-62.

[63] A. De Hoogh, *Restrictivist reasoning on the ratione personae dimension of armed attacks in the post 9/11 world*, cit., p. 23.

[64] See R. Van Steenberghe, *The Law of Self-Defence*, cit., p. 55.

[65] C. Gray, *The Limits of Force*, cit., pp. 109-110.

[66] R. Van Steenberghe, *State practice and the evolution of the law of self-defence: clarifying the methodological debate*, in *Journal on the Use of Force and International Law*, 2015, p. 92 *et seq*.

[67] *Ibid.*, p. 93.

This argument is made in support of an extensive approach, because it would then suffice to assert that a rule was only being interpreted in order to reduce the degree of methodological stringency required.[68]

Such an argument is confounding, especially if a restrictive outlook is given precedent.

First because it is difficult to understand in concrete terms what is at issue, since Art. 31, para. 3, VCLT expressly requires an "agreement between the parties" to establish a simple interpretation by means of subsequent practice; this seems a particularly difficult target to reach since it concerns "virtually, every state".[69] The afore-cited author adds that, if it is a question of modification, the *opinio juris* will have to be established "in the least ambiguous manner" or that "as abundant as possible" a reaction will have to be established, or again that the precedents referred to in support of it will have to be "numerous" and their uniformity "well established". True enough. But it seems that these criteria are in any event excellent guidelines for analysing practice, whether with regard to customary law or to the interpretation of treaties and whether such interpretation is changing or not. In other words, I fail to see in what way the criteria mentioned should be distinguished from – even less opposed to – the criterion of agreement between the parties within the meaning of Art. 31, para. 3, VCLT. It seems they should be contemplated instead in a supplementary way, as part of a method to be used in an integrated manner.

Next, it is hard to see how it would be possible to make an objective distinction between authentic "interpretation" of the rule and "modification" of the rule, in each particular case. While admitting this difficulty as a point of principle, the afore-cited author argues that it would easily be overcome in the area of the non-use of force, where it would suffice to define the modification as "the situation where the new rule cannot fit in any of the plausible meanings that could be given to the treaty text".[70] Simply reading this criterion gives a glimpse of all the difficulties likely to arise in implementing it. Can an entire theory really be based on so subjective a concept as a "plausible meaning"?

Lastly and more fundamentally, this argument rests on a theory that has largely been called into question, that there could be an interpretation that, if only marginally, would not entail at the very least some adaptation or adjustment – that is, ultimately a modification however minimal – of the rule.[71] In this context, the distinction between interpretation and modification appears to be fictitious. True, it is often asserted formally, as confirmed by the work on interpretative practice especially in the International

[68] *Ibid.*, pp. 93-95

[69] C. HENDERSON, *The Use of Force and International Law*, cit., p. 25; see also A. ORAKHELASHVILI, *Changing jus cogens through State practice?*, cit., pp. 158.

[70] R. VAN STEENBERGHE, *State practice and the evolution of the law of self-defence*, cit., p. 93 (citing T. Ruys).

[71] See e.g. D. ALLAND, *L'interprétation du droit international public*, in *Collected Courses of the Hague Academy of International Law*, Leiden: Brill, 2013, p. 41*et seq.*.

Law Commission.[72] But that is a purely rhetorical argument because in practice and even if it is often used to reduce the scope of the changes in meaning that may effectively be generated informally, the distinction between interpretation, evolution, or modification of the rule is quite simply impossible to show.

What is relevant, however, is to ask what the content of the initial agreement between the parties was. This generally leads an author taking a restrictive approach to begin with the text of the Charter and with the meaning attributed to it when it was first drafted. The stakes are very clear this time: once the initial meaning has been established, any new interpretation, evolution, or modification (no matter what the terms) of that meaning will have to be based on a general agreement among the parties. The task is not impossible, as illustrated by the examples of the abstention of a permanent member state (accepted in practice as being consistent with the letter of Art. 27, para. 3, of the UN Charter although formally contrary to it) or the possibility for the Security Council to authorize states to use force (a move that is envisioned nowhere in the Charter, which provides only for Security Council action with forces placed under UN command).[73] But the task is an intricate one because, in many instances (just think of the two examples that shall be evoked below: self-defence and humanitarian intervention), practice points instead more to *disagreement* among states. Under this last assumption, and regardless of whether a "modification" or an "interpretation" of the rule is invoked, it will have to be concluded that its initial meaning is maintained: "Overall there is a strong presumption against any extension of the right to use force".[74] Obviously enough, whatever anyone's position may be, it will always be in their interests to claim to be merely interpreting a meaning that was globally favourable to them from the outset.

Finally relations between customary law and the law of treaties appear themselves to be an issue in the debate among authors arguing for extensive or restrictive approaches. Whatever the sources mobilized, the jurists' margin of appreciation will enable them to implement radically different approaches to determine the scope of the prohibition of the use of force within the meaning of Art. 2, para. 4, of the UN Charter.[75] A first approach is to extend the possibilities of military intervention by giving precedence to considerations of opportuneness while a second, more restrictive approach aims to defend the stringency of prohibition both in the name of the provisions of the Charter, their peace-making objective, and the refusal of member states to make its

[72] International Law Commission, Fifth report on subsequent agreements and subsequent practice in relation to the interpretation of treaties (Special Rapporteur: G. Nolte), 28 February 2018, UN Doc. A/CN.4/715.

[73] O. Corten, *The Law Against War*, cit., chapter 6, section 1.

[74] C. Gray, *The Limits of Force*, cit., p. 194.

[75] See generally O. Corten, *Les techniques reproduites aux articles 31 à 33 des Conventions de Vienne: approche objectiviste ou approche volontariste de l'interprétation?*, in *Revue generale de droit international public*, 2011, p. 351 *et seq.*

terms more flexible. The observation may be illustrated by a brief glimpse of current debates relative to the content of the rules governing the non-use of force.

III. The extensive v. restrictive approach: self-defence and humanitarian intervention

The events of 11 September 2001 revived both the political and the scholarly debate on self-defence. In parallel and this time further to the War in Kosovo in 1999, more thought has been put into the legitimacy and the legality of humanitarian intervention (often associated with the new expression, "responsibility to protect"). These two substantive questions can be taken up briefly to illustrate the methodological differences characterizing the restrictive and extensive approaches to the non-use of force.

III.1. The extensive v. restrictive approach: self-defence

Current debates over self-defence are many and concern two aspects mostly. The first, concerning timing, relates to the question: can self-defence be validly invoked in the event of a simple threat (or an "imminent" threat) or is it essential to establish that an "armed attack" has already actually begun? The second debate concerns not the timing but the attacker's identity: need it be demonstrated that it is a state, against which a valid riposte may be made, or is it enough to observe that a non-state group has used force in order for it to be targeted and pursued wherever it may be? In practice, in the context of the war against terrorism, these two debates are often connected. They shall therefore be contemplated jointly here by showing how the choice of an extensive or restrictive approach will influence matters.

To understand this debate we must obviously begin with Art. 51 of the UN Charter, whereby: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security".

From an extensive standpoint, it shall be observed that Art. 51 clarifies from the outset that it shall under no circumstances "impair the inherent right of individual or collective self-defence", thereby emphasizing a sovereign right that should be largely construed and that originates in history.[76] Accordingly, "self-defence was a mainstay of discussions about law and peace, in both natural law and *jus gentium* traditions, even before the 'state' had become the normative authority in international affairs".[77] Here

[76] M.C. Alder, *The Inherent Right of Self-Defence in International Law*, New York: Springer, 2013.

[77] C. Espaliú Berdud, *The EU Response to the Paris Terrorist Attacks and the Reshaping of the Right of Self-Defence in International Law*, in *Spanish Yearbook of International Law*, 2017, p. 185.

we find again a certain fuzziness between considerations of positive law and of "droit naturel", to use the French translation for "inherent right" in the English version:

> "The effect of this incorporation was to preserve and protect, as a carve-out from the prohibition against force codified in Article 2 of the Charter, the rights of defensive force that applied in natural law (and so continue to be protected by Article 51). This is the doctrine of legitimate defense [...]. Both "inherent right" and "*droit naturel*" suggest an explicit reference to natural law as defining the proper scope of self-defense".[78]

This right has therefore always been around which is why the Charter did not purport to challenge it: "customary international law, in which resides the inherent right of self-defense, including anticipatory self-defense, usually traced back to the Webster-Ashburton correspondence of 1842 concerning the *Caroline* incident".[79] To define the outline of this right, we should therefore go back to the "Webster formula" made by the U.S. Secretary of State in 1841 in the case of the *Caroline*: "the *necessity of that self-defense is instant, overwhelming and leaving no choice of means, and no moment for deliberation*. [T]he act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it".[80] From this perspective, if circumstances so warrant, there is nothing to prohibit a state from acting even before a threat, especially if imminent, is materialized. Likewise, this riposte may be aimed at acts of a state but also of a non-state group. Again Art. 51 is drafted in terms broad enough to cover both assumptions.[81] To contemplate the lawfulness of the riposte, appeal is made not so much to formal criteria as to "reasonable" judgment, that must act as a guide, with the essential thing being to establish "a necessity to act in self-defense with no other reasonably available effective means to address an imminent or actual armed attack".[82] In any case, all the criteria that can be established theoretically "are without prejudice to the application of any circumstance precluding wrongfulness or any principle of mitigation that may be relevant".[83] This tendency to recognize an extended right of self-defence was supposedly enshrined in resolution 1368, adopted by the Security Council on 12 September 2001, and which acknowledges in its preamble a right of self-defence.[84] And that right must logically be able to cover certain preventive actions, always by application of an "inherent right" to self-preservation. It might even be asserted that: "Under natural law, self-defense was conceptualized in terms of self-preservation, not only as a right but also as a duty. [...] Self-preservation in its

[78] J.D. OHLIN, *The Doctrine of Legitimate Defense*, cit., pp. 120 and 125.

[79] D. BETHLEHEM, *Principles relevant to the scope of a State's right to self-defense*, cit., p. 4.

[80] Italics added; Letter from Daniel Webster, US Secretary of State, to Mr. Fox, 24 April 1841; see M.P. SCHARF, *How the war against ISIS changed international law*, cit., p. 11.

[81] C. ESPALIÚ BERDUD, *The EU Response to the Paris Terrorist Attacks and the Reshaping of the Right of Self-Defence in International Law*, cit., p. 190.

[82] D. BETHLEHEM, *Principles relevant to the scope of a State's right to self-defense*, cit., p. 7.

[83] *Ibid.*, p. 8.

[84] *Ibid*., 5; M.P. SCHARF, *How the war against ISIS changed international law,* cit., p. 31.

broadest sense included not just repelling an outside attack, but also pro-actively intervening externally in foreign States whose behavior was inconsistent with basic principles of natural law. [...] This provided for the right of intervention against States acting contrary to international legal norms".[85]

Preventing a state from taking appropriate and necessary measures to defend itself on the pretext that the attack has not yet begun or that the attack could not be attributed to a state would be meaningless. In short, "self-defense is not a static concept but rather one that must be reasonable and appropriate to the threats and circumstances of the day".[86] Abundant practice could be cited along these lines for that matter. To take just one example, a good number of states have recently intervened to put an end to the threat from the so-called Islamic State of Iraq and the Levant (ISIL) in Syria by invoking the right of self-defence.[87] This right was supposedly enshrined implicitly by the Security Council when, in its resolution 2249 (2015), it "*Calls upon* Member States that have the capacity to do so to take all necessary measures, [...] to eradicate the safe haven they have established over significant parts of Iraq and Syria". [88] Accordingly, the rules on the non-use of force are "capable of developing incrementally to meet modern threats".[89]

A restrictive reading of Art. 51 will view the question quite differently.[90] It will be noticed that the text of this provision makes self-defence explicitly conditional on the prior existence of an armed attack ("if an armed attack occurs"). Significantly, no "threat", whether imminent or not, is mentioned, whereas it features prominently in other provisions: Art. 2(4) prohibits the "threat" of the use of force and Art. 39 empowers the Security Council to take coercive measures in the event of any "threat to the peace".[91] The text of the Charter makes a clear distinction between the triggering of an "armed attack", which entitles a state to riposte without waiting for the Security Council to make a statement, and the existence of a mere "threat", which must lead the Security Council to take the necessary measures, including military measures. These features are again confirmed by the texts subsequently adopted by the states parties to the Charter, like

[85] J.D. OHLIN, *The Doctrine of Legitimate Defense*, cit., pp. 130 and 133.

[86] D. BETHLEHEM, *Principles relevant to the scope of a State's right to self-defense*, cit., p. 3

[87] C. ESPALIÚ BERDUD, *The EU Response to the Paris Terrorist Attacks and the Reshaping of the Right of Self-Defence in International Law*, cit., pp.199-200.

[88] Security Council, Resolution 2249 of 20 November 2015, UN Doc., S/RES/2249 (2015), para. 5; see P. HILPOLD, *The evolving right of counter-terrorism: An Analysis of SC Resolution 2249 (2015) in view of some basic contributions in International Law literature*, in *Questions of International Law*, 2016, pp. 15-34; M.P. SCHARF, *How the war against ISIS changed international law*, cit., pp. 51-53 and M. WOOD, *The Use of force in 2015 with Particular Reference to Syria*, in *Hebrew University of Jerusalem Legal Research Paper*, no.16-05, 2016, p. 5 *et seq.*

[89] M. WOOD, *The Use of force in 2015*, cit., p. 3.

[90] See A. DE HOOGH, *Restrictivist reasoning on the ratione personae dimension of armed attacks in the post 9/11 world*, cit., 19-42.

[91] N. HAJJAMI, *De la légalité de l'engagement militaire de la France en Syrie*, cit., p. 159.

the definition of aggression appended to resolution 3314 (XIX) adopted by the General Assembly in 1974. This resolution limits aggression, and so armed attack within the meaning of Art. 51, to the "use" of force (threat not being mentioned), and also specifies that such use means use by one state against another.[92] Accordingly, the fact that Art. 51 does not specify that the perpetrator of the attack must be a state should not be of any consequence: it is clear that the whole of the regime of the prohibition of the use of force (*jus contra bellum*) is conceived of from an interstate perspective.[93] This does not mean that terrorist groups cannot be targeted, but within a cooperative framework, not by multiplying armed actions in the territory of third states without their consent, and always assuming Security Council authorization has not been obtained. Whether in its resolution 1368 (2001) referred to above or in others, the Security Council has never recognized an extended right of self-defence.[94] To accept that such a practice becomes law would besides undermine the very foundations of the peace-making objectives that underpin the drafting of the UN Charter.[95] This explains why the precedents in which self-defence has been extensively invoked have never given rise to a new *opinio juris* shared by the international community of states as a whole.[96] On the contrary, many states have constantly made manifest their reluctance or even their opposition.[97] Characteristic of this is the declaration referred to in the introduction made public by the Non-Aligned Movement that "Article 51 of the UN Charter is restrictive and should not be re-written or re-interpreted".[98] Such particularly vigorous language echoes many other declarations.[99] Thus, in view of the restrictive positions that are regularly repeated by the Non-Aligned Movement, it is clear that the Syrian precedent is not sufficient to conclude there has been any change to international law. Against this conclusion it is possible to hold up the wording of resolution 2249 (2015), which does not mention self-defence but on the contrary reiterates that any action taken should be "in compliance with international law, in particular with the United Nations Charter".[100] Conversely, the

[92] *Ibid*., p. 161.

[93] F. LATTY, *Le brouillage des repères du jus contra bellum*, cit., pp. 21-22.

[94] A. ORAKHELASHVILI, *Changing jus cogens through State practice?*, cit., pp. 172-173; G. KAJTAR, *Self-Defence Against Non-State Actors*, cit., pp. 318-324.

[95] F. LATTY, *Le brouillage des repères du jus contra bellum*, cit., pp. 30-38.

[96] *Ibid.*, pp. 27-28; G. KAJTAR, *Self-Defence Against Non-State Actors*, cit.; C. HENDERSON, *The Use of Force and International Law*, cit., pp. 332-333.

[97] C. GRAY, *The Limits of Force*, cit., p. 139.

[98] 17th Summit of Heads of State and Government of the Non-Aligned Movement, Venezuela, 16-18 September 2016, para. 25.2; see *supra*, footnote 6.

[99] See e.g. Comments of the Non-Aligned Movement on the Observations and Recommandations contained in the Report of the High-Level Panel on Threats, Challenges and Change (A/59/565 and A/59/565CORR.1), New York, 28 February 2005, www.un.int, par. 23-24.

[100] N. HAJJAMI, *De la légalité de l'engagement militaire de la France en Syrie*, cit., pp. 171-174; P. HILPOLD, cit., p. 18; J.-C. MARTIN, *Les frappes de la France contre l'EIIL en Syrie, à la lumière de la résolution 2249 du Conseil de sécurité*, in *Questions of International Law*, 2016, pp. 11-14.

case law of the ICJ, in the cases concerning the *Wall* or *Armed activities on the territory of the Congo*, seemingly confirm this restrictive reading.[101] And it would be pointless trying to neutralize or underestimate the scope of statements by the Court because it "was straightforwardly and consistently clear on the principles it upheld, and there is no international authority postulating the law of self-defence in a different manner".[102]

Finally, it can be understood that one and the same provision may open the way to very different approaches on which the textual, teleological, and pragmatic dimensions of the interpretation all hinge. Beyond these two substantive positions, there are two opposing approaches, one tending to refer to flexible criteria, the other preferring a perspective centred more on positive law. Such a distinction is also to be found in parallel, as shall now be seen, in the debates on the question of the law of humanitarian intervention.

III.2. The extensive v. restrictive approach: humanitarian intervention and responsibility to protect

The bone of contention refers first to a question of interpretation not this time of Art. 51 but of Art. 2, para. 4, of the Charter, which provides: "All Members shall refrain in their international relations from the threat or use of force *against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations*".[103]

This provision has been construed in two radically different ways.

From an extensive perspective, it has been claimed that the object of the provision was to prohibit uses of force contrary to the purposes of the United Nations, which was not the case of a humanitarian intervention.[104] An intervention of this type is supposedly not designed to call into question a state's territorial integrity or even necessarily to overthrow its government and so impede its political independence. In support of this teleological interpretation, mention has been made of the practice that allegedly enshrines the possibility, under exceptional circumstances, of conducting military actions designed to protect human rights. From this perspective, allowance for moral considerations is said to become decisive: "natural law protects nations and peoples in addition to formal states";[105] and the right of humanitarian intervention might even be related to a form of self-defence: "[T]he doctrine of legitimate defense provides a foundation for humanitarian intervention because it carves out from the Article 2 prohibition on the

[101] N. Hajjami, *De la légalité de l'engagement militaire de la France en Syrie*, cit., p. 164; F. Latty, *Le brouillage des repères du jus contra bellum*, cit., pp. 51-52.

[102] A. Orakhelashvili, *Changing jus cogens through State practice?*, cit., p. 172.

[103] Italics added.

[104] J.N. Moore, *Jus ad Bellum before the International Court of Justice*, cit., p. 914.

[105] J.D. Ohlin, *The Doctrine of Legitimate Defense*, cit., pp. 120-121.

use of force not only self-defense, but also defense of others, which also falls under the rubric of legitimate defense".[106]

From a restrictive perspective, emphasis has been placed on the contrary on the stringency of the text, which prohibits any use of force by a state against the political independence of another, which excludes the exercise of extraterritorial executive competencies without the consent of the state concerned.[107] The reference of the necessity to observe the other purposes of the United Nations seems to be, as is confirmed by the consideration of preparatory work, of a nature to reinforce and not chip away at prohibition.[108] The agreements entered into subsequently by the parties on the subject of interpretation of this text confirm as much, in particular Resolution 60/1 adopted by the General Assembly in 2005.[109] This Resolution opens up the path to intervention only under the Security Council's authority, which merely codifies customary law:

> "*The international community, through the United Nations, also has the responsibility* to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, *we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate,* should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity."[110]

Lastly and as to recent practice, the vindicatory discourse of states has been classical indeed: in most precedents, the intervening states have relied on Security Council resolutions.[111] The only exception is the War in Kosovo in which a few rare states (especially the United Kingdom) did indeed take on a broader right of humanitarian intervention. But such reference has either been presented as a *sui generis* case and unable to create a precedent or strongly condemned as incompatible with existing international law.[112] It is for that reason that, when the new concept of responsibility to protect was evoked, the

[106] *Ibid.*, p. 140; see also J.N. MOORE, *Jus ad Bellum before the International Court of Justice*, cit., p. 914, fn. 33.

[107] International Law Association, *Final report on Aggression and the Use of Force*, 2018, www.ila-hq.org, pp. 4-5.

[108] C. HENDERSON, *The Use of Force and International Law*, cit., pp. 21-22.

[109] C. GRAY, *The Limits of Force*, cit., p. 153.

[110] Italics added; UN General Assembly Resolution 60/1 of 24 October 2005, UN Doc. A/RES/60/1, paras 138-139. See C. GRAY, *The Limits of Force*, cit., p. 183; N. HAJJAMI, *De la légalité de l'engagement militaire de la France en Syrie*, cit., p. 155.

[111] Independent International Fact-Finding Mission on the Conflict in Georgia, *Report*, Vol. II, September 2009, www.mpil.de, p. 284.

[112] A. ORAKHELASHVILI, *Changing jus cogens through State practice?*, cit., p. 174.

very great majority of states insisted that no unilateral actions should be accepted, and that such responsibility should only be exercised by the UN Security Council.[113]

At this stage, we have tried to clearly distinguish the features of the two approaches characterizing scholarship on the use of force. From this perspective we have deliberately emphasized the differences and contrasts, minimizing the nuances and ambiguities that may sometimes characterize particular writings. In what follows, we shall look at a few examples of such ambiguities in order to add nuance to the contrasts highlighted so far.

IV. The extensive v. restrictive interpretation: Some persistent ambiguities

Although many studies can be easily attributed to an extensive or a restrictive approach, some lend themselves less readily to categorization. The two excerpts below on humanitarian intervention in the War in Syria can be compared to this end.

> "There are at least two distinct though intersecting strands of legal argument that could support a sustainable conclusion that the use of force in circumstances of dire humanitarian need would be lawful under international law notwithstanding the absence of an authorising Chapter VII resolution of the UN Security Council or other Charter-based justification (such as collective self-defence). *The first strand is purpose-driven, focused on the insufficiency of a narrow, traditionalist view of the law on such matters and the consequential imperative to translate from the existing law to address circumstances of dire humanitarian need.* This approach contends for the rapid crystallisation of a norm of customary international law in favour of a principle of humanitarian intervention [...]. The second strand is *more rooted in the detail of the law, pulling together threads of practice that in isolation may appear fragile and unreliable but which, when knitted together, are more robust and compelling*".[114]
>
> "The inability of the international community to effectively respond to the Syria crisis through the humanitarian intervention responsibility to protect doctrine (RtoP) and the geopolitics between the United States (US), Russia and China mean that a dangerous stalemate remains in the Syria crisis*. This study argues that for the RtoP to silence its critics, world leaders need to agree on a common ground for the protection of civilians through a strict monitoring and evaluation of the intervention process and the actors involved, enforcing an arms embargo, and committing to support local cease fires*".[115]

[113] V. Lowe, A. Tzanakopoulos, *Humanitarian Intervention*, in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford: Oxford University Press, 2012, p. 55; C. Gray, *The Limits of Force*, cit., pp. 191-192.

[114] Italics added; D. Bethlehem, *Stepping Back a Moment – The Legal Basis in Favour of a Principle of Humanitarian Intervention*, in *EJIL: Talk!*, 12 September 2013, www.ejiltalk.org.

[115] Italics added; N.I. Erameh, *Humanitarian intervention, Syria and the politics of human rights protection*, in *The International Journal of Human Rights*, 2017, p. 517.

The first of these two excerpts is by Daniel Bethlehem and clearly aims to mark off a distance with a restrictive conception that is characterized as a "narrow traditionalist view". However, contrary to what can be found in some studies with extensive overtones, it is not a question of setting aside the classical legal methods of establishing custom; it is a question rather of interpreting them more flexibly. The determining factor in this is supposedly the objective of the Charter, which is meant also and perhaps primarily to protect human rights. In this context, it might more rapidly be concluded there is a customary practice of intervention that should be contemplated overall as a general and progressive trend. How, now, should the excerpt from Nicholas Idris Erameh be taken? One the one hand, the terminology is characteristic of an extensive approach: the "international community" is denounced for being passive and the need to ensure effective compliance with international humanitarian law is reasserted. On the other hand, the author does not seem for all that to assert there is any right for states to conduct military action without Security Council authorization. Perhaps he is calling for a change to existing law, but that implies that however unsatisfactory it may be it does not yet recognize any right of humanitarian intervention. In this sense, and even if the excerpt contains no development implementing the criteria for establishing custom or interpreting the Charter, it has overtones at this point of a rather restrictive approach. In both cases, though, it is understood that there is no straight or orthodox version of one or other approach.

These two examples therefore show the difficulty sometimes found in classifying writings in terms of the criteria set out above. This is particularly so when articulating considerations concerning existing law and others on the developments to be made to that law. But we also sometimes find philosophical reflections surrounding the rules on the non-use of force, which may further reinforce the difficulty. These two short but dense excerpts are evidence of this.

"Kelsen's insistence on the strict autonomy of the law [...] constitute[s] an attempt to save the law from destruction through its instrumentalization for political purposes".[116]

"[T]here [is] no international law governing use of force, and in the absence of governing law, it [is] impossible to act unlawfully".[117]

Vera Gowland-Debbas does not set about analysing positive law here by implementing the constituent components of custom or the principles of interpretation enshrined in the 1969 Vienna Convention on the Law of Treaties. At the same time, she openly makes a profession of positivist and formalist faith, going so far as to cite the classical reference in this field embodied by Hans Kelsen. She claims that making the

[116] V. Gowlland-Debbas, *The Limits of Unilateral Enforcement of Community Objectives in the Framework of United Nations Peace Maintenance*, in *European Journal of International Law*, 2000, p. 381.

[117] M.J. Glennon, *The UN Security Council in a Unipolar World*, in *Virginia Journal of International Law*, 2003, p. 100.

distinction between what is legal and what is moral is the only way to save law from power relations. Because, if we let each state rely on its own conceptions of justice to justify the triggering of military action, it is all of international law that is under threat. Here we find a few traces, in scholarship, of the fears manifested by the states of the Non-Aligned Movement that acceptance of new doctrines tending to make the prohibition of the use of force more flexible – and specifically to circumvent the central position of the Security Council – would not be a step forward but a step backward for international law. International law would be dragged back to what were thought to be bygone times, such as the time when the conception of "just war" prevailed and crusades and imperial actions followed on one from the other. In this sense, Vera Gowland-Debbas lays bare the normative and philosophical underpinnings of the restrictive approach. She reminds us that this approach cannot be reduced to a defence of law for law's sake but embodies a political project in which observance of forms and procedures is the only guarantee for maintaining the peace and besides for maintaining a degree of pluralism in conceptions of what is fair and just.

Michael Glennon's formulation is also particularly arresting. His position is clearly opposed to that of Vera Gowlland-Debbas. First because the idea is not to promote or for that matter to criticize legal formalism. The statement is more of an observation of fact. Like it or not, then, there are no longer (the paper was published in the aftermath of the War against Iraq, which revealed deep disagreements among states) or never have been (because it may even be considered that the repeated military interventions since the Charter was adopted have shown it has no normative power) any rules effectively prohibiting the use of force.[118] Next, and in substance, Michael Glennon does seem to legitimise military interventions. Because, if there is no prohibition, those rules cannot by definition be used to challenge the lawfulness of the interventions in question. At this point, we have the impression of standing clearly apart from a restrictive approach, which would consist in stating a view on the scope of the rule with respect to the texts, practice, and *opinio juris*. On the other hand, the argument about the absence of any rule prohibiting the use of force seems to be based on an examination of practice: practice would seem to point to the *absence* of any customary rule, because states' behaviour seemingly attests rather to their belief they are free to act sovereignly to uphold what they consider to be their rights. But, even if the conclusion may appear astonishing or even provocative, things remain within the domain of the establishment of custom which, strictly, it would simply have been impossible to demonstrate. So there is no ruling out interpreting Michael Glennon's assertion as being linked to a restrictive approach for the simple reason that, fundamentally, it enshrines the sovereign right of states to use force.

[118] T.M. Franck, *Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States*, in *American Journal of International Law*, 1970 p. 809 *et seq*.

When one comes to think about it, claiming that interventionist practice has resulted in the disappearance (or even the non-emergence) of a legal rule prohibiting war does not seem to arise from either a restrictive or an extensive approach in the sense in which we have described them above. Michael Glennon illustrates rather a strictly realistic approach to international relations whereby law is quite simply powerless to regulate power-based phenomena. Therefore it is not a matter of interpreting law restrictively, since there is no such law. But for the same reason, we are no longer dealing with an extensive interpretation of a rule, that rule being purely and simply absent. The value of this realist stance is to show us that, beyond their divergences, the restrictive and extensive approaches share a common frame of reference. To claim that Art. 2, para. 4, or Art. 51 of the UN Charter prohibits, or does not prohibit, military action presupposes that the two provisions exist and have binding legal effects on states. As will also have been observed, a consensus also seems to emerge over certain criteria that should be used to establish a customary rule or interpret a treaty. Those criteria have been set out by the ICJ, by the International Law Commission, or by states themselves in instruments like the VCLT. They are all sources that make up a common legal landscape in which interpreters are at loggerheads, some preferring a restrictive, others an extensive reading. Accordingly, debates about the non-use of force may reveal both divergences and common ground, which should be taken into account when undertaking an examination of the subject.

V. Towards the success of the extensive approach?

That being specified, might it not be considered that the restrictive approach is tending to weaken within scholarship to the point of being threatened with extinction? Several authors seem to have answered in the affirmative. Pointing out what they considered to be a spectacular advance by the extensive approach, they consider, somewhat bombastically, that "restrictivism [...] has simply rolled over and died in the face of relentless onslaught. The few hold-outs [...] are increasingly isolated – irrespective of the force of their legal arguments ",[119] or that "the orthodoxy on the law on the use of force has dramatically switched from a restrictivist to an expansionist perspective [...]. The legal scholarship on the use of force has clearly moved towards a broader conception of the law of self-defence [...]. Expansionists have recently succeeded in imposing their views upon the restrictivist camp with respect to important issues of this law".[120]

The tipping point is supposedly the events of 11 September 2001 and the resulting shift to the age of the "War on Terror".

[119] J. Kammerhofer, *Introduction*, cit., p. 15.

[120] R. Van Steenberghe, *The Law of Self-Defence*, cit., pp. 43 and 44. And further on: "Legal scholarship on the use of force has undeniably moved towards a broader interpretation of the law of self-defence" (*ibid.*, p. 64).

But can it really be shown that such a change occurred? It has been claimed on the basis of individual writings on the use of force, and we shall begin by looking at the arguments made in this respect. Then we shall step back to evoke the collective standpoints involving a large number of international law scholars to ask whether it can really be deduced there has been a radical shift towards an extensive approach.

V.1. *Jus contra bellum* individual studies: is the restrictive approach really "increasingly isolated"?

It is hard to deny that numerous papers and books have been published recently to defend an extensive approach, as attested especially by the work of Michael Wood,[121] Christian Tams,[122] or Daniel Bethlehem.[123] But how far does this trend extend? This is the question Jörg Kammerhofer asks, presenting himself as a supporter of a restrictive approach. While conceding that it is particularly difficult to measure, he bases his impression on an analysis of a "random sample"[124] of 61 articles. These are in English or German and published between 2001 and 2012 and include 38 US authors. In looking more specifically at the question of the "possibility, degree and shape of a "delinkage" of armed attacks from the "host state", Jörg Kammerhofer concludes that "39 authors in the sample support a wide reading, 13 do not and one is too close to call".[125] He goes on, "(particularly continental European) non-US writings have changed to a significant degree because of the impact of the events on and following 11 September 2001 on society, including scholars. Even writers in countries where restrictive readings used to be prevalent, for example Germany, have now moved to an expansionist position".[126]

This analysis enables him to conclude that "the orthodoxy, seems to have shifted markedly in favour of a wider reading of the right in the last 13 years".[127]

The paper does not list the 61 articles examined, but one thing is sure: since 2001 in particular, countless studies have discussed self-defence in the event of a terrorist attack and they have often tended to support a broad interpretation of the Charter.[128] It

[121] See, for example, M. Wood, *Terrorism and the International Law on the Use of Force*, in *Indian Journal of International Law*, 2013, p. 195 *et seq*.

[122] C.J. Tams, *The Use of Force against Terrorists*, in *European Journal of International Law*, 2009, p. 359 *et seq*.

[123] D. Bethlehem, *Principles relevant to the scope of a State's right to self-defense*, cit., pp. 1-8.

[124] J. Kammerhofer, *The Resilience of the Restrictive Rules on Self-Defence*, in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law*, Oxford: Oxford University Press, 2015, p. 633.

[125] *Ibid*.

[126] *Ibid.*, p. 634.

[127] *Ibid.*, p. 635.

[128] See, for example, N. Ronzitti, *The Expanding Law of Self-Defence*, in *Journal of Conflict and Security Law*, 2006, pp. 344 and 348; K.N. Trapp, *Back to Basics: Necessity, Proportionality, and the Right of Self-Defence Against Non-State Terrorist Actors*, in *International & Comparative Law Quarterly*, 2007, p. 156; R. Van Steenberghe, *Self-Defence in Response to Attacks by Non-state Actors in the Light of Recent State Practice: A*

is true that the simple choice of selecting, analysing, and commenting on recent practice in this domain probably prompts the authors concerned to identify innovative or even revolutionary features rather than conclude unexcitingly that positive law has gone unchanged. Moreover, can we see in this teeming literature on the extensive trend a snowball effect, as these studies tend to some degree to cite each other to strengthen their position, which, by dent of repetition, tends to pass for the norm. Can we, for all that, draw such sharp conclusions like the one Jörg Kammerhofer puts forward? The straightforward exposition of his method shows its limitations, which he readily admits.[129] The following four points can be emphasized in particular.

First, the number of studies analysed is quantitatively small compared with the volume of output in the discipline. Even if we confine ourselves to books and journals in English, we very quickly get beyond the five or six studies per year that is the average for the selected sample. It will be recalled in this respect that there are at least two specialized journals in this area: the *Journal of Conflict & Security Law*, founded in 1996, and the *Journal on the Use of Force in International Law*, the first issue of which dates from 2014. Even if we confine ourselves to these two publications, we will already have a score of studies per year on the non-use of force. Although it is difficult to identify them all, it seems obvious that recent years have seen a spate of multi-authored books including the *Oxford Handbook of the Use of Force in International Law* (57 chapters)[130] published in 2015 and *The Use of Force in International Law. A Case-based Approach* (66 chapters) published in 2018.[131] To gain some idea of the approximate number of relevant studies, a search was conducted on the *Heinonline* database, with the keywords "self-defence/terrorism/international law", with the year 2000 as the start date: 4930 studies were listed. Even if some of them did not refer directly to the subject of interpretation of Art. 51 of the Charter, the number does in any event far exceed 61, particularly as the search engine can select only articles in English, which leads us to a further remark.

This purely quantitative aspect apart, we can obviously question the limitations with the lack of diversity of the studies selected. They are exclusively papers in English or German, which omits a substantial number of publications, whether in languages traditionally used by international law scholars such as French, Spanish or Italian, or other languages such as Arabic or Russian to take just two examples. Yet, as Jörg Kammerfofer himself remarks, "the debates in international legal scholarship are to a surprising-

Step Forward?, in *Leiden Journal of International Law*, p. 183 *et seq.*; N. Tsagourias, *Non-state actors in international peace and security, Non-state actors and the use of force*, in J. D'Aspremont (ed.), *Participants in the International Legal System Multiple Perspectives on Non-State Actors in International Law*, London: Routledge, 2011, p. 326 *et seq*.

[129] In his own words, "in contrast to jurisprudence, scholarly literature in international is far more difficult to survey"; J. Kammerhofer, *The Resilience of the Restrictive Rules on Self-Defence*, cit., p. 632.

[130] M. Weller (ed.), *The Oxford Handbook on the Use of Force*, cit.

[131] T. Ruys, O. Corten, A. Hofer (eds), *The use of force in international law: a case-based approach*, cit.

ly large extent still confined within national or linguistic boundaries".[132] It can therefore be seriously doubted whether the sample of 61 studies from a random sample (which, remember, includes some 60 per cent of US authors) is representative. And it can also be doubted whether this reductionism is without any effect on the results insofar as it is known that US authors are generally purveyors of more extensive conceptions.[133] In any event, the choice to use just English (and German) as the relevant language excludes studies in other languages by renowned authors from various nationalities who, for their part, have supported more restrictive conceptions such as Maurice Kamto,[134] Slim Laghmani,[135] Théodore Christakis,[136] or Pierre Klein, who gave a course at The Hague Academy on the subject.[137]

A third bias with the method used in the paper under discussion is that it is limited to a particular theme (the "possibility, degree and shape of a "delinkage" of armed attacks from the "host state"), which besides is not very clearly defined. Why not, for example, have looked at the right of humanitarian intervention, which also gives rise to a traditional opposition between extensive and restrictive approaches? It is not sure, in that case, that the author would have reached the same conclusion. The conclusion therefore seems to hold for a highly specific question and it would be difficult to infer from it a weakening, let alone the gradual disappearance, of the restrictive approach generally in the domain of *jus contra bellum*. To really make a ruling on the matter, we would have to broaden the perspective not just to all studies of the topic but to others such as international law textbooks or the general courses of The Hague Academy of International Law, with the test of the victory of a new conception relating to its inclusion in these books designed to teach international law. At the very least we could look at textbooks on the non-use of force and there again it is far from obvious that we should obtain similar figures to those reached on the basis of the 61 articles selected by Jörg Kammerhofer. To take just publications after 2001, it could be hypothesized that a certain balance would arise with Thomas Franck,[138] Yoram Dinstein,[139] and Tarcisio

[132] J. KAMMERHOFER, *The Resilience of the Restrictive Rules on Self-Defence*, cit., p. 632.

[133] See V. CHAPAUX*, Pour une relativisation de la rupture entre approches étasuniennes et françaises du droit international*, in R. BACHAND (ed.), *Théories critiques et droit international*, Bruxelles: Larcier, 2013, p. 93 *et seq*.

[134] M. KAMTO, *L'agression en droit international*, Paris: Pedone, 2010.

[135] S. LAGHMANI, *La doctrine américaine de la "preemptive self-defense"*, in R.B. ACHOUR, S. LAGHMANI (eds), *Le droit international à la croisée des chemins*, Paris: Pedone, 2004, p. 137 *et seq.*

[136] T. CHRISTAKIS, *Existe-t-il un droit de légitime défense en cas de simple "menace"? Une réponse au "groupe de personnalités de haut niveau" de l'ONU*, in Société française pour le droit international (ed.), *Les métamorphoses de la sécurité collective - Droit, pratique et enjeux stratégiques*, Paris: Pedone, 2005, p. 197 *et seq*.

[137] P. KLEIN, *Le droit international à l'épreuve du terrorisme*, Leiden: Brill, 2008, p. 368 *et seq.*

[138] T.M. FRANCK, *Recourse to Force. State Action against Threats and Armed Attacks*, Cambridge: Cambridge University Press, 2009.

[139] Y. DINSTEIN, *War, Aggression and Self-Defence*, cit.

Gazzini[140] representing an extensive approach and Christine Gray,[141] Robert Kolb,[142] and Christian Henderson[143] or myself[144] embodying a more restrictive position.

Some points of the classification just made might be challenged. Yoram Dinstein and Thomas Franck, for example, have been characterized as Bright-Liners,[145] which plainly corresponds to what has been referred to as a restrictive approach. Conversely, Robert Kolb, given his emancipation from the letter of the UN Charter and his approach that takes its liberties more generally with legal positivism,[146] might in some respects reflect a method with extensive tendencies. In this we touch upon the last but not the least of limitations in any attempt for any tendency to claim victory over another: that of the difficulty, in many instances, of associating a study with one and only one such tendency. In the article referred to, Jörg Kammerhofer fails to say how he set about his categorization,[147] and so we have no way of validating his procedure.

In the light of all these factors, it seems difficult to say the least to claim that the extensive approach has developed in such a spectacular way as to now threaten the survival of a more restrictive position. Patently in view of the various individual writings just mentioned, the restrictive approach has not disappeared. To consolidate this impression, we can evoke certain collective rather than individual stances, as shall be seen in what follows.

V.2. *Jus contra bellum* collective positions: is the restrictive approach really "increasingly isolated"?

Several stances reflecting an extensive approach were made public in the period following 11 September 2001. In this respect we might cite the *Principles of International Law on the Use of Force by States in Self-Defence* established by Chatham House of the Royal Institute of International Affairs in London, in 2005,[148] the *Leiden Policy Recommenda-*

[140] T. Gazzini, *The Changing Rules on the Use of Force in International Law*, Manchester: Manchester University Press, 2006.

[141] C. Gray, *International Law and the Use of Force*, cit.

[142] R. Kolb, *International Law on the Maintenance of Peace: Jus Contra Bellum*, Cheltenham: Edward Elgar, 2018.

[143] C. Henderson, *The Use of Force and International Law*, cit., p. 58.

[144] O. Corten, *The Law Against War*, cit.

[145] M.C. Waxman, *Regulating resort to force*, in *European Journal of International Law*, 2013, p. 151 *et seq.*

[146] R. Kolb, *International Law on the Maintenance of Peace: Jus Contra Bellum*, cit., pp. xi-xii.

[147] In his study he comes up with the figure of 39 authors (out of 61) having defended and extensive view of self-defence but fails to explain how he reached this figure (with the exception of Albrecht Randelzhofer); J. Kammerhofer, *The Resilience of the Restrictive Rules on Self-Defence*, cit., pp. 634-635.

[148] See E. Wilmshurst, *Principles of International Law on the Use of Force by States In Self-Defence*, Chatam House, 1 October 2005, www.chathamhouse.org.

tions on Counter-Terrorism and International Law, made public in 2010,[149] or the *Tallinn Manual* (2013), and *Tallinn Manual 2.0* (2017), on "International Law applicable to Cyber Operations".[150]

But, apart from having been drafted at the instigation of or with support from states (the United Kingdom in the first case, the Netherlands in the second) or international organizations (NATO in the third) that are developing an interventionist practice more in line with an extensive conception, these texts are the output of a comparatively limited number of specialists, and mostly from Western countries.

If we broaden the outlook, it can rapidly be seen that many other texts, signed by numerous international law scholars outside of any state initiative, may be evoked. These texts were first drawn up in the context of the 2003 War on Iraq,[151] but more recent ones can be identified. Particularly emblematic in this regard is the "Plea against the Abusive Invocation of Self-Defence as a Response to Terrorism".[152] This text was initiated in May 2016 by the *Centre de droit international* at the *Université libre de Bruxelles* (ULB) and in conjunction with several colleagues.[153] It was published in French, English, Dutch, Spanish, Portuguese, Italian, and Arabic and quickly met with remarkable success: 306 signatures (205 men and 101 women), including 243 full or associate professors (and even an international judge) as well as 63 teaching assistants, researchers, and PhD students. The nationalities represented were very varied and included the following countries: Argentina, Australia, Austria, Bahrain, Belgium, Brazil, Burundi, Cameroon, Canada, Chile, China, Columbia, Costa Rica, Cyprus, the Democratic Republic of Congo, Finland, France, Germany, Greece, Iran, Israel, Italy, Japan, Kazakhstan, Kuwait, Luxembourg, Mauritania, Netherlands, Portugal, Romania, South Africa, Spain, Switzerland, the UK, Uruguay, and the US. The highly sensitive context was the aftermath of the Paris attacks of 13 November 2015 and the commitment of several European states in the war against ISIL in Syria. It was at this time too that the extensive conceptions of self-defence were developing based on the "unwilling or unable" standard already referred to. The Plea Against the Abusive Conception of Self-Defence was therefore from the outset a reaction against an extensive approach to the use of force:

[149] See the document explaining and exposing the Recommendations: N. SCHRIJVER, L. VAN DEN HERIK, *Leiden Policy Recommendations on Counter-terrorism and International Law*, 1 April 2010, www.openaccess.leidenuniv.nl.

[150] M. SCHMITT, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, Cambridge: Cambridge University Press, 2017.

[151] See *Appel de juristes de droit international concernant le recours à la force contre l'Irak*, in *Revue belge de droit international*, 2003, p. 266 *et seq.*

[152] *Plea against the Abusive Invocation of Self-Defence as a Response to Terrorism*; Text and list of signatories in *Revue belge de droit international*, 2016, p. 7 *et seq*.

[153] O. CORTEN, *A Plea Against an Abusive conception of Self-Defense as a Response to Terrorism,* in *EJIL:Talk!,* 14 July 2016, www.ejiltalk.org.

> "[N]umerous military interventions have been conducted in the name of self-defence, including against Al Qaeda, ISIS or affiliated groups. While some have downplayed these precedents on account of their exceptional nature, there is a serious risk of self-defence becoming an alibi, used systematically to justify the unilateral launching of military operations around the world. Without opposing the use of force against terrorist groups as a matter of principle – particularly in the current context of the fight against ISIS – we, international law professors and scholars, consider this invocation of self-defence to be problematic".[154]

The text then covers more strictly legal considerations including the following:

> "[I]t is only if – and as long as – the Security Council has not adopted the measures necessary for maintaining international peace and security that self-defence may be invoked to justify a military intervention against a terrorist group. *In accordance with article 51 of the Charter, the use of force in self-defence on the territory of another State is only lawful if that State bears responsibility for a violation of international law tantamount to an "armed attack". This may occur either where acts of war perpetrated by a terrorist group can be attributed to the State, or by virtue of a substantial involvement of that State in the actions of such groups*. In certain circumstances, such involvement may result from the existence of a direct link between the relevant State and the group. *However, the mere fact that, despite its efforts, a State is unable to put an end to terrorist activities on its territory is insufficient to justify bombing that State's territory without its consent. Such an argument finds no support either in existing legal instruments or in the case law of the International Court of Justice*. Accepting this argument entails a risk of grave abuse in that military action may henceforth be conducted against the will of a great number of States under the sole pretext that, in the intervening State's view, they were not sufficiently effective in fighting terrorism".[155]

The plea therefore manifestly enshrines a restrictive conception both in terms of substance and in a more narrowly methodological way, with a reference to the UN Charter, to "legal instruments" which, given the language used, contains the definition of aggression annexed to Resolution 3314 (XXIX) of the General Assembly and the case law of the ICJ.

In light of this evidence, it seems to be overstating matters to claim that the restrictive conception is "increasingly isolated". The signatories of the last text include specialists who have written studies in the area of *jus contra bellum*.[156] One could obviously

[154] *Plea against the Abusive Invocation of Self-Defence as a Response to Terrorism*, cit., p. 11.

[155] *Ibid.* (italics added).

[156] Karine Bannelier, Michael Bothe, Michael Byers, Enzo Cannizzaro, Théodore Christakis, Luigi Congorelli, Christine Gray, James Green, Christian Henderson, Mary Ellen O'Connell, Jörg Kammerhofer, Maurice Kamto, Robert Kolb, Anne Orford, Tom Ruys, Christian Walter, Myra Williamson, and others. See also other major figures of international legal scholarship like Georges Abi-Saab, Denis Alland, Philip Alston, Tony Anghie, Jean d'Aspremont, Hilary Charlesworth, Monique Chemillier-Gendreau, Olivier de Schutter, Yann Kerbrat, Martti Koskenniemi, Nico Krisch, Frédéric Mégret, Dhamchid Momtaz, Marco Sassoli, Emmanuelle Tourme-Jouannet, and others.

debate the interpretation of the different texts mentioned, and again the reasons why they were sometimes signed. The essential point, though, is to demonstrate that it is difficult if not impossible to measure the scope and respective shifts in the extensive and restrictive approaches within scholarship. What is for sure, though, is that the restrictive approach is still very much present, not just among many figures from many different countries, but also in the Institute of International Law, which adopted several resolutions in 2007 and 2011 which are far from enshrining an extensive approach to the use of force, and the International Law Association, which published a report leading to the same conclusions in 2018. Lastly, it is difficult not to remind readers that the ICJ for its part has held to a particularly narrow and restrictive line. Finally, the only conclusion to be drawn is that the debate has not disappeared and even that, more than likely than not, it is not about to disappear either.