Diverging Interpretations of Individual State Practice on Self-Defence Against Non-State Actors – Considerations for a Methodological Approach

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I. The Significance to Interpret Individual State Practice

Whilst the scholarly community agrees that much disagreement exists about the general methodology for concluding a change in the law on self-defence through either customary or a re-interpretation of United Nations (UN) Charter law, it is regularly overlooked that the controversy extends to even more fundamental stages in the legal process: The identification of individual instances of state practice and, more importantly, the interpretation with regard to the *opinio iuris* expressed in those individual instances.

The more diverse opinions on the meaning of general state practice are, the more important it is to offer an in-depth analysis of practice – starting at the individual level. In the face of more available practice and greater variation of views expressed, the response by scholars cannot be continued simplification of the analytical process. "Expansionists" and "Restrictivists" can be found equally guilty of bending the meaning of individual instances in their favour: The former prematurely categorise practice when it was in fact characterised by a great deal of ambivalence; the latter tend to over-interpret practice when it actually abstained from taking a distinctive view.

As an example, portrayals of German state practice relating to the "unable/unwilling" doctrine in the self-defence measures against the so-called Islamic State (IS; also known as *Da'esh*) show how individual state practice is interpreted differently (II.). This calls for a discussion of general principles for the interpretation of individual practice and the sources from which a framework for such principles might arise (III.).

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II. An Example: German State Practice on *unwilling/unable*

Drawing on one or more of the available sources, scholarly comments have interpreted the German practice on self-defence against IS as endorsing, implicitly supporting or as offering a more differentiated view. *Corten*, only pointing to a passage from the German letter to the UN[1] and offering no further interpretative comment, concludes that "Germany invoked it [the 'unable and unwilling' test] implicitly".[2] *Ruys/Ferro*, referring to both the parliament mandate for the deployment of German forces to Syria[3] and the German UN letter, state that the German position "can be read as endorsing the 'unable and unwilling' test".[4] *Starski* offers the most comprehensive investigation of the material available.[5] She is thereby able to extract a much more differentiated picture, concluding that at different times different views have been presented that therefore do not allow for a clear-cut interpretation of the *opinio iuris* presented by Germany on the matter of "unwilling/unable".[6]

For the purposes of this short contribution it is not relevant to initiate a broader discourse about the "right" interpretation of German practice but to notice that diverging interpretations exist on a matter as seemingly simple as an individual instance of practice by one state. This provokes questions about what can be done on a methodological level to contribute to consistency and sustainability in the interpretation of individual practice.

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1 UN Doc. S/2015/946, 10.12.2015.

2 *O. Corten*, The "Unwilling or Unable" Test: Has It Been, and Could It Be, Accepted?, LJIL 29 (2016), 777 (780); with a similar conclusion of German practice (however before the release of the German UN letter): *A. Peters*, EJIL Talk, 8.12.2015, <http://ejiltalk.org>.

3 BT-Drs. 18/6866, 1.12.2015; also see its renewal BT-Drs. 17/9960, 13.10.2016.

4 *T. Ruys/L. Ferro*, Divergent Views on the Content and Relevance of the Jus ad Bellum in Europe and the United States? The Case of the U.S.-Led Military Coalition Against "Islamic State", available at <https://papers.ssrn.com>, 14 et seq.

5 Drawing on the German UN letter, the parliament mandate, an opinion drafted by the Scientific service of the German parliament and a speech by the German foreign minister *Steinmeier* in the German parliament.

6 *P. Starski*, Silence within the Process of Normative Change and Evolution of the Prohibition on the Use of Force – Normative Volatility and Legislative Responsibility, MPIL Research Paper Series 2016-20, 38.

III. Starting Points for a Methodology

First and foremost, any assessment of individual state practice should be based on a comprehensive compilation of that individual state's practice.[7] Scholarship often evidences not only a selectivity in picking just some instances to assess the general practice of all states, but also when presenting practice by an individual state, only some of those state's materials are unearthed.

Secondly, with all available materials gathered, it will likely more often than not appear that the practice even of one single state shows considerable variation. According to the International Law Commission (ILC), the analysis of state practice consists of a significant step on the level of individual state practice: "Where the practice of a particular State varies, the weight to be given to that practice may be reduced."[8]

That thirdly leaves open questions of how to actually assess and weigh the practice of a particular state. Any assessment leads at its core to the determination of the *opinio iuris* held by a state. Even at the individual level, that involves a fair amount of interpretation because states, or at least their (political) representatives, are essentially "laymen" and what they "do and say, to become explicable, must always, therefore, be subjected to a certain amount of professional interpretation".[9] It is here simply pointed to two possible starting points for a methodological framework guiding such endeavours of interpretation, which merit further consideration: While acts of state practice do not create a legally binding force by itself such as unilateral acts, state practice is in many ways of a similar nature to unilateral acts.[10] Another set of interpretative rules could be gained from applying rules for the interpretation of either customary[11] or treaty law.

However, would such arduous work not unnecessarily complicate the ultimate international lawyer's task of combining and abstracting from all instances of state practice to identify the law itself? Can such efforts avoid (or would they even fuel) that eventually only (again) very few practices are being referred to? It is in the own interest of international legal scholarship

[7] ILC, Identification of customary international law, Text of the draft conclusions provisionally adopted by the Drafting Committee, Draft conclusion 7[8], para. 1.

[8] ILC, Identification of customary international law (note 7), Draft conclusion 7[8], para. 2.

[9] *C. Parry*, The Sources and Evidences of International Law, 1965, 67.

[10] See *V. Rodríguez Cedeño*, Fourth Report on Unilateral Acts of States, 2001, para. 77.

[11] See *A. Orakhelashvili*, The Interpretation of Acts and Rules in Public International Law, 2008, 496 et seq.

to show greater academic rigour or at least candour about the methods applied in the analysis of state practice – a task of essentially hermeneutical nature. This should start at the individual level, because even here room for substantially diverging interpretations exists. It is all the more significant in such cases where the law is in flux and scholarly contributions from all camps invoke individual instances in their favour – such as is the case in the law on self-defence.