

A Call for a Turn to the *Meta-Level* of International Law: Silence, the “Interregnum”, and the Conundrum of *Ius Cogens*

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The debates during the first “Dialogues Workshop” on “Self-Defence Against Non-state Actors” have evidenced both the multidimensionality of the problem in question as well as the multiplicity of perspectives from which it can be viewed. “Expansionists” collided with “restrictionists”, “formalists” with “pragmatists” and “crits”, “realist” views were confronted with “idealist” or even “utopian” conceptions of international law. Most scholars assumed that we are presently witnessing a process of normative dynamics concerning the use of force regime and its corollary, the right to self-defence, whilst others stressed that a truly established reading of Art. 51 of the Charter of the United Nations (UN Charter) has never existed (and possibly never will). Diametrically opposed views surfaced particularly with regard to a relaxation of standards concerning the nexus between armed attacks of non-state actors and the states hosting them necessary for an invocation of Art. 51 UN Charter. It became apparent that all *prima facie* incompatible positions as to the normative substance of Art. 51 UN Charter *de lege lata* – the “micro-level of law” – find their roots (also) in considerable uncertainties and/or discord with respect to *meta*-questions of international law. The self-evidence of this assertion does by no means diminish its truth. Many aspects of the theory of sources, especially the secondary rules on law formation and mechanisms of normative change have remained undertheorised in international legal doctrine.¹ At this neuralgic point of a possible reconfiguration of one of the most fundamental norms of the international legal order – the prohibition on the use of force – a turn to these *meta*-questions is urgently needed. Obviously, some *caveats* are indicated here: It would be illusionary, if not naïve, to assume that ultimate answers to such “grand” questions could ever be given. Many conceptual issues will

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¹ See J. Kammerhofer, Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems, EJIL 15 (2004), 523 et seq.

remain “essentially contested.”² Furthermore, a turn to the *meta*-level will not free legal discourse from “ideological” clashes. Its result might be a “doctrinalism” that distracts from finding pragmatic solutions to “real world problems”. Nevertheless, focusing on the theoretical underpinnings of the rules governing processes of law creation, evolution and change will be beneficial in three respects: Firstly, the efficiency of the discourse on micro-questions of law will be enhanced by tackling the nucleus of the problems at hand thereby preventing a mere talk at cross purposes. Secondly, a turn to the *meta*-level will potentially enhance the transparency of the academic debate. Scholars will be forced to disclose their presuppositions regarding the genesis of norms. Thirdly, such a turn might potentially facilitate a more “responsible” academic discourse. Whilst scholarship will always remain essentially normative to a certain extent, it is exactly the purpose of the theory of sources to discipline this normativity by separating valid from invalid arguments concerning the state of the law on the micro-level thereby reducing the risk of both delayed and premature proclamations of an altered normative content of Art. 51 UN Charter.³

In light of these findings: What are some of the “right” *meta*-questions to be asked?

Firstly, “silence” should rank prominently on the research agenda: Most “expansionist” lines of argument assuming changed legality standards for self-defence actions arrive at their conclusion by referring to the (contested) practice and explicit contentions of a limited number of states, the verbal support of these actions and claims by few others, and the fact that they are not opposed by the remaining majority of states. The crucial question is whether and, if so, under which conditions mere passivity of states in view of state actions that challenge the established reading of Art. 2 (4), 51 UN Charter might induce and consolidate a process of normative change.⁴ Taking a closer look at the doctrine of acquiescence will be only of limited avail since it has traditionally rather focused on bilateral relationships (e.g. in the context of “acquisitive prescription”) and not the setting of normative dynamics. In my view silence can only issue law-generative effects if a “legitimate” expectation exists that a state speaks up which depends on numerous

² See *W. B. Gallie*, Essentially Contested Concepts, *Proceedings of the Aristotelian Society* 56 (1956), 167 et seq.

³ Obviously, it is more than legitimate for scholars to argue how the law should be as long as they denote their assertions clearly as *de lege ferenda* statements.

⁴ See *P. Starski*, Silence Within the Process of Normative Change and Evolution of the Prohibition on the Use of Force – Normative Volatility and Legislative Responsibility, *Journal on the Use of Force and International Law* 4/1 (2017), 1 et seq. (online version).

factors. These might include the frequency and consistency of the contentious state practice itself, the determinacy of the claims made by the acting states, the “silent” states’ capacity to react, the circumstances in which the relevant claims were made, the reactions of non-involved actors to the state practice in question, the impact of the contentious practice on rights and interests of “passive” states but also on the rights and interests of the acting states, considerations of time and – possibly – the nature of the affected rules in question.

Secondly, the problem of – as *Tams*, inspired by *Gramsci*, called it – the “interregnum”, the phase in which “the old is dying and the new cannot be born”⁵ deserves a deeper analysis: Does the old rule apply in this phase of normative change by default or has the binary code of legal/illegal become dysfunctional? Since the essential purpose of norms is to constrain state behaviour and it lies in their very nature to stabilise counterfactual expectations even if they are disappointed⁶ the latter reading appears dangerous. Obviously, processes of normative evolution advance gradually. But until the new state practice has condensed into a norm – when this threshold is overstepped is undoubtedly one of the most controversial *meta*-questions – I submit that the normative command of the “old” remains the yardstick for determining the legality of the conduct in question. Undeniably this assertion appears problematic in light of one fundamental conundrum of international law: While norms are not invalidated by violations, each violation potentially carries the seed for the emergence of new law.⁷ States violating the “old rule” might hence be seen as “norm entrepreneurs” possibly not “truly” acting illegally. Nevertheless, it appears to me that this aspect should rather be taken into consideration on the secondary level of state responsibility *de lege ferenda* than on the primary normative level.

Thirdly, the question whether the *ius cogens* nature – a conceptual Pandora’s box in itself – of the prohibition on the use of force (or at least its substantial core)⁸ and possibly – due to their interrelatedness – also the right to self-defence influences processes of normative dynamics is in need of further reflection. Amendments to *ius cogens* require the emergence of contradictory norms of the same nature (Art. 53 Vienna Convention on the Law of Treaties [VCLT]). But what are the consequences of a norm’s *ius cogens*

⁵ A. *Gramsci*, Selections from the Prison Notebooks, 1971, 275.

⁶ N. *Luhmann*, Ausdifferenzierung des Rechts, 1999, 17.

⁷ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports 1986, 14, para. 98.

⁸ *Nicaragua v. United States of America* (note 7), para. 100 et seq.

quality for its mere reinterpretation in light of subsequent state practice evidencing an “interpretative agreement” of the parties (Art. 31 (3) (b) VCLT)? Since the evolutionary potential of interpretation is far-reaching and distinguishing interpretation from amendment practically difficult and frequently arbitrary in the realm of international law I am inclined to argue that the *ius cogens* character of potentially affected norms is to be taken into account within both processes – albeit on a different doctrinal level and possibly to a different extent. The decisive point appears to be that *ius cogens* norms – even in their treaty emanation – are founded on the belief of the “international community as a whole” in their binding nature.⁹ Their “contractual embedding” within a treaty must not obscure the fact that it is eventually the “international community as a whole” that is the reference point for a possible “interpretative agreement” deviating from the established reading of the norms in question. This diminishes the significance of individual “re-interpretative” state practice.

⁹ A. Orakhelashvili, *Peremptory Norms in International Law*, 2006, 403.