

Doctrinal Alternatives to Self-Defence Against Non-State Actors

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Since the obligation not to knowingly allow its territory to be used for acts contrary to the rights of other States is a “best efforts” obligation,¹ what if the host State, despite all its efforts, proves to be simply unable to stop terrorist activities on its territory resulting in military attacks against other States?

A preliminary problem is that it is not always easy to draw a clear dividing line between lack of effort and inability. However, recent practice (concerning, for example, Lebanon in 2006, Somalia in 2008, and Mali in 2013) still shows that also a State that acknowledges its inability to guarantee internal and international security can, as a last resort, fulfil its *alienum non laedas* obligation by opening up to international cooperation. If, conversely, the host State refrains from any form of international cooperation, it may be questionable whether its authorities have made their “best efforts” to behave in accordance with the diligence which is due under general international law. On the other hand, their consent should always be sought, precisely in order to stimulate this cooperation.

Having said that, what if the host State makes every effort without result? In this case, some authors² have referred to a classic institute of Roman law, the *negotiorum gestio*, describing it as a general principle of law recognized by civilized nations. One possibility, then, could be to present *gestio* as a sort of fall-back argument to cover, at least, the constellation of cases of inability. The concept of *negotiorum gestio*, inspired by principles of solidarity and cooperation, must obviously be adapted to international law. Today, given the ongoing structural evolution of the international legal order from a prevalently individualistic configuration towards models of public management of its functions and interests, the rationale of the *negotiorum gestio* – which since the time of Justinian is to be found in reasons of “general convenience” and social protection – lends itself more easily to be trans-

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¹ ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Reports 2007, 221 and 225.

² See A. F. Panzera, *Attività terroristiche e diritto internazionale*, 1978, 107 et seq.

posed from domestic law into the international legal realm. Ideas of *gestio*, more specifically, can be useful to conceptualize a possible form of unauthorized intervention in the sovereign sphere of a State that is unable to discharge its responsibilities under international law. This constellation of cases, in fact – such as when the intervenor discharges a duty of the principal whose performance is in the public interest – is contemplated by both civil and common law legal orders, albeit under different names and legal categories.³

Indeed, being unable to discharge its duties under international law, the “principal” State fulfils the criterion of “*absentia domini*”, which must be interpreted not only as a physical lack, but more generally as the impossibility to fulfil the principal’s obligations. The test of spontaneity would also be met, since in our hypothesis the host State’s government has not invited foreign intervention. Relatively less problematic is also the fulfilment of the “*utiliter coeptum*” criterion, provided that this element of the initial usefulness of the unsolicited intervention is interpreted objectively, that is, in accordance with the “interests of society”⁴ rather than with the principal’s subjective interests or aspirations.

Having said that, we arrive at the main obstacle to configuring a *negotiorum gestio* in the cases at hand, that is, the altruistic nature of this institution. *Gestio*, at least in its pure form, implies that action must be taken “for” another, whereas in the cases under consideration the intervening State acts primarily to protect itself. Nonetheless, the obstacle might prove not to be insurmountable. Where *gestio* doctrines are applied to cases in which the obligation discharged by the *gestor* in substitution of the *dominus* is one in whose performance there is a public interest, the latter becomes predominant and overrides the principal’s preferences. This happens in different ways. Firstly, unlike other cases of *gestio*, several national legislations deem the possible prohibition to intervene established by a *dominus* irrelevant. Secondly, there is no discussion of the principal’s *own* interest, since it *must* be in its interest that its duties be discharged by an unauthorized intervenor. Thirdly, what really matters is the fulfilment of the collective interest that law be respected.

When it comes to transposing the elements described above into the international legal order, two solutions are possible. Either to identify the *dominus* with the unable host State replaced in the discharge of its sovereign

³ With reference to Anglo-American law, see *J. P. Dawson, Negotiorum Gestio: The Altruistic Intermeddler*, Harv. L. Rev. 74 (1961), 817, 1073; *P. B. H. Birks, Negotiorum Gestio and the Common Law*, Current Legal Probs. 24 (1971), 110.

⁴ *Rogers v. Price* (1829), The English Reports 148, 1080 et seq.

functions by the unauthorized intervenor, in which case it could be argued that the *gestor* acts simultaneously in its interest (as an “injured” State) but also, and perhaps most importantly, *uti universi*, on behalf of the whole international community, in order to protect shared interests such as peace, security, and fundamental human rights from the threat posed by terrorism. On the other hand, it is also possible to prospect an even more unorthodox solution, namely to consider that the real *dominus* at stake here is not the host State, but the whole international community (primarily the United Nations [UN]), of which the host State is a member, when and if unable to intervene promptly to stop a terrorist aggression.

Be that as it may, i.e., whatever use of *gestio* ideas can be admitted under international law, they seem to rest on a rationale which is not too dissimilar from justifications based on necessity (in fact, in US and English law, the same effects of *gestio* are sometimes reached by invoking the institute of the *agency of necessity* or the law of maritime salvage in order to preserve human life or health). *Gestio* and necessity have in common, for instance, the absence of any unlawful conduct attributable to the State undergoing the unauthorized intervention; the presence of a grave and imminent danger for the protection of interests deemed worthy of legal protection; a certain measure of urgency which makes immediate action imperative.

It is also rather evident that the remedy presented here responds to a “substitutive” logic, which is the same advocated by other authors⁵ as informing a kind of “self-help” rather than “self-defence”, that can be invoked in a varied constellation of cases, namely when a State *is* responsible for violating the *alienum non laedas* obligation.⁶ In this second situation,

⁵ A. Verdross, *Völkerrecht*, 5th ed. 1964, 429 et seq.; G. Morelli, *Nozioni di diritto internazionale*, 7th ed. 1967, 352.

⁶ Substitutive self-help is most certainly not codified in the UN Charter. On the other hand, however, it might be argued that nor is it entirely excluded (at least when the threshold of gravity of an armed attack has been met). In fact Art. 51, which is the relevant *lex specialis* in this field (that is, the place to look for a *clear* intention to dispense with the pre-existing principles of customary international law to which the same provision refers), does not specify who the perpetrator of an armed attack must be. If this lacuna is not sufficient to prove the invocability of Art. 51 as a conventional norm against non-State actors (because the reference to inter-State relations must be deemed implicit in the whole system of the UN Charter), neither does it show a clear willingness to contract out from a previously existing – or, at least, so the argument runs – form of self-help regulated by general international law. One could simply think that, for obvious historical reasons, the problem of non-State actors was not of paramount importance in 1945. If this is true, then the only theoretical possibility available to support the continuing legality of substitutive intervention rests upon general international law, and, more precisely, on the possibility of tying together episodes from pre-1945 practice with (some) post 9/11 extra-territorial interventions against non-State actors. And also in this case – at least this is the present author’s opinion – we could at best speak of a trend that

the general idea is that a State cannot claim full respect for its sovereignty as a right if it does not fulfil the functions that come with that same sovereignty as a duty.⁷ If these functions of protection of other States' rights are not fulfilled, then, the international community, or, if this is not possible, the victim State directly, could take over from the negligent local authorities in performing their *law enforcement* functions. Certainly, in the case of *negotiorum gestio*, protection of the special interests of the host State should play a more prominent role. It can be imagined that this could have an impact on the need to seek its consent and cooperation more actively and at all times, or to apply the criteria of necessity and proportionality more strictly. Whether this makes a huge difference remains to be seen. A possible advantage of this "substitutive" logic, however, is that the triangular relationship existing between a territorial State, an irregular group operating from this State, and a victim State targeted by this group, rather than being forced into a legal category, such as "self-defence" under Art. 51 of the Charter of the United Nations (UN Charter), which is based on a binary logic, focused on attacker/target identity, and seemingly codified so as to apply to interstate relationships, would (also) become a more traditional bilateral relationship between the host and the targeted States, based on the concept of the substitution of functions. Within this legal context, the private actors' conduct would mostly be configurable as a fact.

Seen from the vantage point of State sovereignty, the adoption of a substitutive approach risks blurring any distinction between the consequences of both lawful and unlawful behaviour. Seen from a more communitarian perspective, however, the view may change. Effectiveness of power is a responsibility towards the entire international community, not only a fact or an exclusive right. A temporary inability to function as a sovereign, or a lasting absence of control over what used to be sovereign spaces are situations which can endanger legally protected interests, and, consequently, nurture a demand for appropriate remedies. Whether these remedies are provided for, as is desirable, through the functioning of the UN collective security system, or only through consenting intervention, or rather by way of unilateral intervention is often a matter of politics, urgency, and contingency. From a realist perspective, one cannot entirely exclude the existence of a twilight zone between legality and illegality. Radical as it may sound,

awaits further confirmation and generalization in practice. In this regard, however, one thing of importance from a methodological standpoint – but all too often overlooked – is that in para. 176 of the *Nicaragua* judgment, the ICJ seemed to admit the theoretical possibility of the existence of norms regulating intervention and use of force *outside* the UN Charter.

⁷ *Island of Palmas Case (Netherlands v. USA)*, RIAA 2 (1928), 839, and *Affaire des biens britanniques au Maroc espagnol (Espagne c. Royaume-Uni)*, RIAA 2 (1925), 641 et seq.

illegality itself can turn out to be a residual mechanism which enables the very legal order to perform its functions and to protect the collective interests of the community regulated by it. This can happen more easily if some fundamental limits (such as necessity, proportionality, human rights, *ius in bello*) are respected in such a way as to minimize the consequences of a doubtful legality/illegality and thus more easily induce tolerance, acquiescence, or even (more or less tacitly) cooperation on the part of the injured State.

ZaöRV 77 (2017)

