

Intertemporality and Self-Defence Against Non-State Actors

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At the first Max Planck Trialogue, participants were shuttled back and forth between 1945 and the present day in a virtual TARDIS. Those arguing that international law prohibits States from using force in self-defence against non-State actors on the territory of another State pointed to the drafting history of Art. 51 of the Charter of the United Nations (Charter), the historic backdrop against which the Charter's drafters worked, and intellectual traditions that by 1945 had rejected the just war doctrine. Those taking a permissive view drew our attention to the subsequent interpretive practice of States and United Nations organs, considered new realities – of terrorism involving weapons of mass destruction, failed States and a collective security system that has not responded effectively to certain threats to peace – and emphasised legal concepts such as attribution, necessity and proportionality, which have gained traction in recent years. Despite so many arguments hinging on particular timeframes, a discussion of the concept of intertemporality was conspicuously absent. No one mentioned the TARDIS.

When interpreting Art. 51 of the Charter, Art. 31(3)(c) of the Vienna Convention on the Law of Treaties (Vienna Convention) provides that any relevant and applicable rules of international law must be taken into account. To determine applicability, Arts. 31-33 of the Vienna Convention must be applied to answer the following intertemporal question: Did the Charter's drafters intend Art. 51 to be interpreted in light of relevant international law in 1945¹ or at the time an alleged act of self-defence against a non-State actor occurs?² Of course, along with all other interpretive aids, subsequent practice may be used to determine this presumed intent.³

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¹ Intertemporality allows for a third temporal reference point, namely, the date of State accession to a treaty: *Aerial Incident Case (Israel v. Bulgaria)* [1959] ICJ Rep. 127, 142 et seq.

² For the ILC's latest commentary on the concept of intertemporality, see Report on the Work of the Sixty-Eighth Session (2016), UN Doc. A/71/10, at 180 and the subsequent commentary (ILC Commentary).

³ ILC Commentary (note 2). See also 180 et seq. for the concept of presumed intent.

If Art. 51 is to be interpreted against the backdrop of static or contemporaneous international law, meaning as it existed in 1945,⁴ this would preclude reliance on any relevant custom, treaties or general principles that developed at a later date (e.g. laws on aggression and State responsibility). If the applicable timeframe is when an alleged act of self-defence occurs, relevant international law up to the date of the incident must be taken into account in the evolutive interpretive process under Art. 31(3)(c).

For the many who rely on subsequent practice that does not evidence custom as an aid to interpreting Art. 51 of the Charter, what does the principle of intertemporality have to say about this? If subsequent practice in applying the Charter establishes States Parties' agreement on how to interpret Art. 51, this practice must be taken into account under Art. 31(3)(b) of the Vienna Convention as an authentic interpretive aid evidencing the objective intentions of States Parties.⁵ But what happens, as is possibly the case with self-defence against non-State actors, if the practice of States Parties falls short of establishing this agreement? Then Art. 31(3)(b) is not in play and subsequent practice falls to be considered under Art. 32 of the Vienna Convention as supplementary means of interpretation that may be taken into account. Art. 32 is invoked to confirm an interpretation resulting from an Art. 31 analysis or else, following this analysis, to resolve any lingering ambiguity, manifest absurdity or manifest unreasonableness.

In a recent report, the International Law Commission (ILC) stated that there are at least four factors to consider when weighing subsequent practice in the interpretive process – its clarity and specificity as well as whether and how it is repeated – but expressly refrained from commenting on “when and under which circumstances such practice can be considered” under Art. 32.⁶ Assuming subsequent practice may be considered under Art. 32 when interpreting Art. 51 of the Charter, what is the appropriate weight to give it and this provision's drafting history should the two supplementary aids conflict? It is here that the intertemporal analysis again seems relevant. If it supports a static interpretation of Art. 51, relying heavily on subsequent practice while ignoring contemporaneous supplementary aids such drafting history seems disingenuous. It seems equally inapposite to give little or no weight to subsequent practice if an evolutive interpretation of Art. 51 is the presumed intent of the Charter's drafters.

⁴ I am unable to take a position on this here.

⁵ ILC Commentary (note 2), at 132 and the subsequent commentary. The same is true of subsequent agreements under Art. 31(3)(a) Vienna Convention.

⁶ ILC Commentary (note 2), at 188 and 192.

Finally, it is important to recall what an intertemporal analysis cannot support in light of the many *jus cogens* assertions that were made at the Trialogue. If the *jus cogens* status of some part of the collective security system established by the Charter is proven,⁷ that which is *jus cogens* is a “norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”.⁸ Thus, intertemporal analysis favouring an evolutive interpretation cannot support *jus dispositivum* under Art. 31(3)(c) or subsequent practice under Art. 32 of the Vienna Convention being invoked to derogate from or modify a *jus cogens* norm in the Charter.

While the Trialogue attendees are unlikely to agree on the applicable international legal timeframe for interpreting Art. 51,⁹ we can hopefully agree that it is important to expressly carry out an intertemporal analysis and accept the principled consequences that may follow.

⁷ I am unable to comment here on *jus cogens* claims regarding Arts. 2(4) and 51 of the Charter and their relationship to one another.

⁸ Art. 53 Vienna Convention.

⁹ For the view that the Charter is generally subject to an “evolutionary dynamic interpretation”, see for example S. Kadelbach, Interpretation of the Charter, in: B. Simma/D.-E. Khan/G. Nolte/A. Paulus (eds.), *The Charter of the United Nations: A Commentary*, Vol. I, 2 Vols., 3rd ed. 2012, 71 et seq., at 79. For support of the contemporaneous view, see I. Brownlie, *International Law and the Use of Force by States*, 1963, at 274: “It is possible that the terms in which the right of self-defence is defined in Article 51 are much closer to the customary law as it existed in 1945 than is commonly admitted” (original emphasis).

