

A Note on Indeterminacy of the Law on Self-Defence Against Non-State Actors

*Christian Marxsen**

The international law on self-defence suffers from a high degree of indeterminacy. We face a “hard case” in which the secondary rules (in a Hartian sense) of international law – the doctrines on the sources of international law – do not provide an answer about whether self-defence actions taken against a non-state actor on the territory of another state are in accordance with international law or not, and – if in principle so – under which circumstances.¹ An indicator in that regard is not in the least the fact that the participants of the Trialogue workshop – many of them being among the leading experts on the *jus contra bellum* – drew opposing conclusions regarding the state of the law, often as the result of the review of the very same instances of state practice. This is not surprising, since the practice of states and international organs virtually is intended to be ambiguous, not ruling out one or the other interpretation of the rule on self-defence. The Security Council employs a clear strategy of ambiguity. In its post 9/11 resolutions² and later in its resolution on Syria,³ the Security Council acted in a way that gives ammunition to those supporting an extended right to self-defence, and those rejecting it. In resolution 2249, for example, the Council called on states to act against the Islamic State of Iraq and Syria (ISIS), but only within the constraints of international law – herewith leaving it open whether international law allowed states to take action in self-defence, but somehow implying that taking measures was justified under international law. The majority of states is silent about self-defence measures taken against non-state actors and make it a matter of appreciation on how to interpret their inaction. The International Court of Justice (ICJ) case law also receives contradictory interpretations.

How did this indeterminacy of the law reflect in the Max Planck Trialogue workshop? Interestingly we observed that a binary logic that aims

* Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Dr. iur., LL.M. (NYU).

¹ See generally the short essay by *M. Milanovic*, Self-Defense and Non-State Actors: Indeterminacy and the Jus ad Bellum, EJIL Talk!, 21.2.2010, <www.ejiltalk.org>.

² Security Council, S/RES/1368 (2001) of 12.9.2001, S/RES/1373 (2001) of 28.9.2001.

³ Security Council, S/RES/2249 (2015) of 20.11.2015.

to solve the problem with legal-doctrinal arguments prevailed. While the indeterminacy of the law was somehow largely conceded, the debate mostly focused on producing doctrinal arguments about why the wider or the narrower reading of self-defence was in fact correct. The problem with such arguments is that under conditions of indeterminacy of the law, doctrinal arguments are not able to solve the problem, as the indeterminacy is the result of the law itself, not of an insufficient analysis. The practice of states is a core element of the customary rule of self-defence and it is likewise decisive for the concrete shape and substance of the rule on self-defence under the Charter of the United Nations (UN Charter), because subsequent practice is an important element in interpreting the law. As long as the practice remains as unsettled and controversial as the one in regard to self-defence against non-state actors, doctrine will allow conclusions in either direction.

This does not of course devalue the role of doctrinal debates. Doctrinal analysis remains important in the attempt to structure the legal debate and to assess new developments, such as the recent events in Syria. At some point, practice and legal opinions of states might eventually lead to a clear change of the law and doctrinal analysis will help discover when this is the case. However, the issue will ultimately not be decided by academia, but by those engaged in state practice.

The consequence of such indeterminacy is that the scholarly positions taken are in fact motivated by political choices. Clearly, our background and our general convictions always inform the legal views we take, but in hard cases of indeterminacy the weight of doctrinal arguments for deciding a legal question in one or the other direction vanishes almost completely and extra-legal (in the sense of not-doctrine based) background assumptions determine our decisions. In regard to self-defence against non-state actors, those taking restrictive positions fear the abuse of an extended notion of self-defence by powerful states – this was evident in *Dire Tladi's* contribution to the Trialogue workshop who warned of an emerging unilateralism, replacing the cooperative structure of the UN Charter. The counter position, on the other hand, is often driven by the belief that states under threat of terrorism must have some effective tool to defend themselves. These assessments, of course with many nuances, are then cast as doctrinal arguments about whether there is, for example, a sufficiently dense subsequent practice or whether the positions articulated by states are in fact not clear enough to assume a change in the law.

In my opinion, participants in academic legal debates should be less hesitant to bring the political background assumptions into the open. Academics rarely admit that this background is decisive and make it an explicit sub-

ject of discussion. While this is obviously not possible for government lawyers representing specific interests, academics are free to do so. I believe that it would benefit the legal debate to openly admit the limits of the legal profession to provide an answer to the issue of legality of self-defence against non-state actors and to mark where the realm of policy choices begins. Something could be gained by exploring these background assumptions and making them an explicit subject of analysis, herewith allowing for a better understanding of the perspectives and concerns that are at issue and for which legal solutions are ultimately needed. By bringing the background to the forefront we would at least – in addition to the important doctrinal aspects – also discuss the true motivations for taking specific positions and not only indirectly tackle them, mediated through doctrinal arguments.

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