Leiden Journal of International Law (2016), 29, pp. 13–18
 doi:10.1017/S092215651500062X

INTERNATIONAL LEGAL THEORY

Introduction: The Future of Restrictivist Scholarship on the Use of Force

JÖRG KAMMERHOFER*

> What would you have, you curs,
> That like nor peace nor war? The one affrights you,
> The other makes you proud. He that trusts to you,
> Where he should find you lions, finds you hares;
> Where foxes, geese: you are no surer, no,
> Than is the coal of fire upon the ice,
> Or hailstone in the sun.[1]

No international lawyer bats more than the proverbial eyelid nowadays at states intervening militarily in states which host non-state armed groups. Neither drone strikes nor what used to be called 'invasion'[2] quicken the pulse of the *jus ad bellum* lawyer; this is now a matter for humanitarians; the 'how' matters much more than the 'whether'. We have become inured to relatively small-scale military interventions. Those who remember that 20 years ago international lawyers were more likely to find such actions illegal than justified should (but do not) collectively raise an eyebrow at this rapid change.

Your surprise is entirely unwarranted, responds the majority, the orthodoxy, the voice of reason and *Staatsraison*: there has been change, things are different now. Practice, law and/or its interpretation were radically transformed by '9/11' and its aftermath. There is no reason to cling to formalist notions of the law and be nostalgic[3] for a bygone age of the post-war understanding on the use of force. The law (or at least its interpretation) simply responds to changes in real life.

Such is the setting for the present symposium: life changes, and so do opinions, even those of scholars. In our case, it seems that the ranks of what we have called 'restrictivists' have diminished since 2001. The narrative of this subfield is clear: those holding the view that (i) the prohibition of the use of force in international law encompasses even minor acts of force; (ii) the number of legal justifications for

* Senior Research Fellow, Hans Kelsen Research Group, University of Freiburg, Germany [joerg.kammerhofer@jura.uni-freiburg.de].

1 W. Shakespeare, *Coriolanus*, Act 1, Scene 1.

2 Definition of Aggression, G.A. 3314 (XXIX), UN Doc. A/RES/3314 (14 December 1974), Art. 3(a).

3 M. Garcia-Salmones, 'Faith, Ritual and Rebellion in 21st Century (Positivist) International Law', (2015) 26 EJIL 537, at 548.

the use of force is strictly limited; and (iii) the ambit or scope of these exceptions to the prohibition (particularly the right of self-defence) are narrow, used to constitute the global majority amongst scholars of international law – the '*Nicaragua* consensus'.[4] Now, they have become a minority – at least that is the story we are told.

Matters are never as simple as the stories we tell, however: A survey of the state of the writings on non-state entities in self-defence law after 11 September 2001[5] reveals that narrow readings of the law have diminished outside US scholarship, but cannot find significant change within US academia. Wide readings of the law (expansionists) have become nearly unquestioned, but surely, restrictivists have not suddenly all disappeared? Thus the question, thus the present symposium: What positions do restrictivists hold? How have they responded to the new orthodoxy? What form does the struggle between restrictivists and expansionists take, now that their roles are reversed?

This, then, is an exercise in second-order analysis. The four contributions assembled here do not discuss the 'right' way to read Article 51 of the UN Charter. Rather, the authors write about the structure of arguments employed and their change over time, the responses and counters: argumentative strategies of international lawyers at a critical juncture of this sub-field. The symposium is a sort of meta-analysis of the state of restrictivist thinking and its relationship to the expansionist mainstream, and aims to open a dialogue amongst restrictivists and between restrictivists and expansionists.

Our symposium opens with an article by André de Hoogh, who traces the development of arguments in recent restrictivist scholarship on the personal sphere of self-defence, looking at the use of method by scholars. It becomes clear that the debate on the *ratione personae* dimension has focused most intensely on the rules of attribution of conduct. De Hoogh sees a change amongst the restrictivist community primarily in the details of this standard, including whether state responsibility attribution is apposite for self-defence law. Restrictivists, even if they try to be accommodating towards expansionist arguments, would probably still require *some* sort of link between non-state armed groups and (host) states. The shift is then, for example, between classifying this link as 'Article 8 attribution' and 'substantial involvement' outside the law of state responsibility. This is the shift that restrictivists can make, because it seems so small.

However, the real shift, as it emerges from de Hoogh's analysis, seems to be away from what the present author earlier described as a crucial assumption of the structure of self-defence: 'the identity of the attacker: … the entity that attacks is the *only* valid target for the attacker'.[6] In other words, the law requires that acts of self-defence do not affect any entity but the attacker. Several of the neo-restrictivist designs discussed by de Hoogh could not possibly claim that the host state committed

4 J. Kammerhofer, 'The Resilience of the Restrictive Rules of Self-Defence' in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (2015), 627, at 629.

5 Kammerhofer, *supra* note 4, at 632.

6 J. Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (2010), 41 (emphasis removed and added).

https://doi.org/10.1017/S092215651500062X Published online by Cambridge University Press

an armed attack by itself, but would make a (host) state liable to defensive measures because it has committed some other breach of law.

De Hoogh also discusses an important methodological point with regard to the relevance of practice or customary law to changes in the law or its interpretation. Method is undoubtedly a weak point of the scholarship on the use of force; the lack of analysis of the exact legal import of later practice or custom on the rules on force is one of its most glaring omissions.[7] He is rightly critical of that feature when he writes, 'at times no clear indication is given as to the source investigated or the purpose of discussion of practice and responses'.[8] De Hoogh paints a picture of a restrictivism that has simply rolled over and died in the face of relentless onslaught. The few hold-outs, like himself, Corten, or Kammerhofer are increasingly isolated – irrespective of the force of their legal arguments.

Raphaël van Steenberghe's article is the companion piece to de Hoogh's for expansionist scholarship, describing and analysing how the arguments used by expansionists have changed. The key move in the method employed by expansionists in response to the changing scholarly landscape, he argues, has come from a shift from the 'whether' to the 'how' as well as towards 'policy and pragmatic considerations'.[9] This is a point relevant for US scholarship as well. Therefore, one could be forgiven for arguing that expansionist literature in Europe has become more American in style. It is not entirely clear, however, whether this trend is as strong as van Steenberghe imagines, as many of the references he gives on this point are, still, US publications and authors. He also varies sharply in his assessment of the validity of policy and legal realist arguments versus arguments from state practice, stating that the former is invalid, whilst the latter is valid.[10] One wonders whether this is simply another generational shift? Just like the restrictivists' shift to accepting a wider right of self-defence was driven largely by those who were in their formative years as scholars after 2001 and were relying on new state practice as argument, the next generation of scholars uses that *acquis* and adds policy arguments. That again may evidence the trend towards adopting US scholarship as a model, but van Steenberghe disputes this. He argues that the Europeans accord the Security Council's response to the attacks of 11 September 2001 a linchpin function for the development of the law, whereas the Americans tend not to.

William Banks and Evan Criddle do not focus on the shift between restrictivists and expansionists. Theirs is a far more settled world – the world of US academic writing on the law on the use of force. They look at scholarly perception of the right to self-defence as well, but show that the legal culture in the US is radically different from the European-led debate. The two cultures use different legal arguments; there never was a restrictivist position in European terms. Restrictivist readings in

7 Raphaël van Steenberghe's writings are a welcome exception.
8 A. de Hoogh, 'Restrictivist Reasoning on the *Ratione Personae* Dimension of Armed Attacks in the Post 9/11 World', (2016) 29 LJIL 19, at 39.
9 R. van Steenberghe, 'The Law of Self-Defence and the New Argumentative Landscape on the Expansionists' Side', (2016) 29 LJIL 43, at 44.
10 He is careful to point out that state practice should be seen in a wide sense – evidencing both behaviour and *opinio juris* – and that we are thus actually talking about customary international law.

https://doi.org/10.1017/S092215651500062X Published online by Cambridge University Press

US academia have taken a different form. Instead of a discussion on the 'correct' interpretation of the terms of Article 51 of the UN Charter, which they claim is the focus of the (civil law) restrictivists, they identify a genuinely US restrictive position, which they call 'customary restrictivism'.[11]

It is doubtful whether the core difference between the US and the 'civilian' debate is really about treaty interpretation versus an appreciation of customary law. The authors acknowledge this and identify a wide variety of 'sources' of use of force law, like proportionality and necessity, which are used by US scholars, but stress that these are concerned exclusively with the modalities of force (the 'how' principles). While modal restrictions also appear in debates outside the US, they do not supplant restrictions on the exercise of the right of self-defence, and appear as second-tier arguments: 'whether' followed by 'how'; not 'how' without 'whether'.

The decisive difference between non-US and US legal scholarship on this point is that considerations of utility, instrument and purposiveness are seen as legal arguments, whereas the continental European debate is framed in more formalist terms. According to Banks and Criddle, the question of whether we should judge a state's action against non-state actors on the basis of the rules in the UN Charter can largely be answered by asking whether it serves the goal of 'defending their people from dangerous non-state actors',[12] as 'American legal scholars … view[] international law in instrumentalist terms'.[13] They argue that continental restrictive readings of the law are 'politically unsustainable'[14] – but is that not the exact difference between the two mind-sets? Continental lawyers would say that it matters whether the readings accord with the law (according to its formal sources), not whether it is good politics. In this respect, this article is itself an example of what it claims: it contains a cost-benefit analysis of switching to a different method of legal analysis.

The first three articles may seem to suggest that there are two worlds in writings on the law on use of force: US realism and instrumentalism on the one hand, and the Rest of the World on the other, with restrictivism turning into expansionism. Anne-Charlotte Martineau reminds us that there are still other voices, the periphery in more than one sense. She draws our attention to the framing of the debate by the present guest editor – the restrictivist–expansionist dichotomy is an argumentative move, not a neutral category. Drawing particularly on critical and Third World voices, she shows how these cannot easily be categorized as restrictivist or expansionist, and how their interests are cross-cutting. She also claims that all use the same logic in their arguments: 'in the end, both sides recognize the existence of "grey zones" and … examine, on a case-by-case basis, whether the use of force can be justified under the principles of necessity and proportionality'.[15] This goes to show that

11 W. Banks and E. Criddle, 'Customary Constraints on the Use of Force: Article 51 with an American Accent', (2016) 29 LJIL 67, at 68.
12 Ibid., at 87.
13 Ibid., at 73.
14 Ibid., at 93.
15 A.-C. Martineau, 'Concerning Violence. A Post-Colonial Reading of the Debate on the Use of Force', (2016) 29 LJIL 95, at 101.

https://doi.org/10.1017/S092215651500062X Published online by Cambridge University Press

even when they seem different they are, in the end, the same. The third section of Martineau's article raises the greatest deconstructive potential; it is a political reading of developments in the law on the use of force from a different perspective – that of Third World countries' quest for recognition for wars of national liberation, and the politicisation of First World use of force. Taking humanitarian intervention as an example, she writes: 'the notion that a powerful state or a coalition of allies might intervene to rescue or protect the people of another state could not easily be represented as an apolitical action'.[16]

However, Martineau indirectly also proves that scholarly argument on both sides has succumbed to the temptations to supplant political for legal argument, as a stricter formalist legal method would define it. Martineau's rendering of the scholarly argument for violence in national liberation movements in the fight against oppression finds a parallel in Banks and Criddle's account of instrumentalist scholars seeing a legal text that does not adequately protect the security of one's population as unreal and non-law. The two scholarly traditions may be diametrically opposed *substantially*, but they are the same formally or methodologically speaking. Political goals are integrated into legal argument, either because it is impossible to separate them or because they are one and the same: law is politics.

We learn from this symposium that the restrictivism–expansionism dichotomy is not exhaustive of disagreements on the content of the law on force. It is also not entirely surprising to learn that the ostensible disagreement on the substantive law is not the most potent issue here. In the end, the different views of the law are merely expressions of deeper disagreements. First, the politics of force seems to determine more than what states, IOs, NGOs or civil society say and do – even scholars seem mesmerized by the freedom to debate 'the real' issues of life and death, rather than arcane legal texts. 'The UN Charter is not a suicide pact'[17] seems to be a much stronger and more relevant argument than debating the meaning-content of 'armed attack'. Second, this doctrinal debate depends utterly on which sources of law (or legal arguments) are considered to be legitimate or properly legal. The sources of a reading of the law to some mean the political goals that they claim are to be achieved with the law. If the law on the use of force must fail if it does not ensure the protection of one's own people, then a legal text that seems to fail us cannot stand either. Even in a narrower, more orthodox and continental formal-legal sense the debate is about what the sources of the law on the use of force are, and what majority interpretations of that law do to the law itself. Even de Hoogh and van Steenberghe – hailing from the same legal tradition – differ when it comes to the effect and nature of 'subsequent practice', when it comes to assessing the legal effect of the reference in Article 51 pointing to an 'inherent right'. These are questions about the sources of international law, how they relate to each other and what *legal* effect we can give to (majority) interpretations of the

16 Ibid., at 109.
17 G. Shultz, 'Low-Intensity Warfare: The Challenge of Ambiguity', 1986 (March) 86 *Department of State Bulletin* 15, at 17.

https://doi.org/10.1017/S092215651500062X Published online by Cambridge University Press

law. Perhaps then, this is one area of the law where our capacity as scholars to keep a 'clinical distance' is most tested and where emotions, moral or political ideas and jingoist instincts surface most easily. As most of those conversant with the literature in this field will confirm, this is not a state conducive to avoiding muddled thinking.

https://doi.org/10.1017/S092215651500062X Published online by Cambridge University Press