Assessing Practice on the Use of Force

*Michael Wood**

Scholarship on intervention by invitation raises important methodological questions. The papers presented at the Trialogue workshop rightly emphasise practice, chiefly the practice of States, including within the organs of international organisations, such as the Security Council. This is important both for treaty interpretation[1] and as an element, together with acceptance as law (*opinio juris*), in the formation and identification of rules of customary international law.[2] The thoroughness with which the Trialogue authors have set about taking account of and assessing practice is admirable.

Sometimes, however, one gets the impression that, in seeking to support a particular thesis, the authors read too much into the materials. This is not new in the field of the law on the use of force. *Tom Franck's* "Hersch Lauterpacht Memorial Lectures" on recourse to force, for example, reached some quite surprising conclusions on the international law on the use of force based on a questionable reading of practice.[3] Particularly surprising, in my view, is the weight *Franck* gives to non-condemnation by the Security Council.

The assessment of State practice and of evidence of acceptance as law (*opinio juris*) is not always an easy task (and determining whether such an assessment has been properly done can itself be quite subjective). There is a particular need for caution when seeking to attribute acceptance as law (*opinio juris*) to States. When States act, and perhaps especially when they act within a political organ such as the Security Council, or when there is inaction, this is often not out of a sense of legal right or obligation on the part of the State concerned: other motives, such as political expediency, comity or convenience, may well be at play. On the other hand, States cannot simply hide behind motives of political expediency, comity or conven-

* Barrister, Twenty Essex Chambers, London; Member, UN International Law Commission; Senior Fellow, Lauterpacht Centre for International Law.

1 International Law Commission, 2018 conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, Chapter IV of the ILC Report for 2018. The General Assembly took note of the conclusions and annexed them to GA Res. 73/202 of 20.12.2018.

2 International Law Commission, 2018 conclusions on Identification of Customary International Law, Chapter V of the ILC Report for 2018. The General Assembly took note of the conclusions and annexed them to GA Res. 73/203 of 20.12.2018.

3 *T. Franck*, Recourse to Force. State Action Against Threats and Armed Attacks, 2002.

ience; certain statements or letters by States to the Security Council (for example, on self-defence or on intervention by invitation), as well as reactions by other States in that setting, can amount to evidence of *opinio juris* (and also shed light on their practice). At the very least, one has to approach such assessments with caution and rigour.

Some practice concerning the use of force may raise particular challenges. This is the case, for example, with military operations on foreign soil for which no State has taken responsibility; or with acts that are not necessarily accepted as a use of force, such as certain cyber operations. Accessing and assessing practice may also prove difficult where proof of the facts would require the disclosure of classified material, intelligence or sources.[4] There may also be difficulties with knowing exactly what happened on the battlefield. On the other hand, military manuals may be a rich source of practice and evidence of *opinio juris*, as is the International Committee of the Red Cross' study on customary international humanitarian law. The extent to which the practice of international organisations themselves can assist in identifying rules of customary international law remains somewhat controversial,[5] but this question may in some cases prove to be a rather academic one. To take, as an example, resolutions of the Security Council: they may be regarded as the practice of an organ of the United Nations, or they may be viewed as the practice of member States; either way they can be significant.

The International Law Commission's conclusions on *Identification of customary international law*, with their commentaries, offer some pointers which may be helpful. These include the following (in each case the conclusion should be read with the commentary):

- "[…], regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found." (conclusion 3(1)).
- "In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law." (conclusion 4(2).
- "Practice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction." (conclusion 6(1)).

[4] See also *M. Wood*, International Law and the Use of Force: What Happens in Practice, Indian Journal of International Law 53 (2013) 345, 350.

[5] See conclusion 4(2) of the conclusions on Identification of Customary International Law (note 2), and paragraphs (4)-(7) of the commentaries thereto.

- "The relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent. Provided that the practice is general, no particular duration is required." (conclusion 8).
- "[…], the practice in question must be undertaken with a sense of legal right or obligation." (conclusion 9(1)).
- "Failure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction." (conclusion 10(3)).

There are many impressive examples of the treatment of practice among recent writings on the international law on the use of force, most of which have extensive treatment of intervention by invitation. In addition to *Olivier Corten*,[6] I would point to the latest edition of *Christine Gray's* book on the use of force,[7] and to the monograph by *Christian Henderson*,[8] both published in 2018. The "Case-based Approach" volume is a rich source of materials[9] including chapters directly related to intervention by invitation.

As *Michael Byers* wrote in his review of *Franck's* book: "[i]n an area of international law as disputed and politicised as the rules on the use of force, the line between analysis and advocacy is necessarily fine".[10] *Byers* concluded that "the kinds of behaviour that one considers legally relevant […] are largely determinative of one's substantive conclusions."[11] If this is so (and I believe it is), a *methodologically sound assessment* of practice, and of evidence of *opinio juris*, is essential in relation to intervention by invitation, as in relation to all aspects of customary international law. A methodologically sound approach to the identification of rules of customary international law is what the International Law Commission has sought to describe in its 16 conclusions, with commentaries, adopted in August 2018[12] and endorsed by the United Nations General Assembly in December 2018.[13] Different methodologies, while no doubt of interest, are not equally sound. One cannot reach different "correct" positions on the law by adopting different

6 *O. Corten*, Le droit contre la guerre, 2nd ed. 2014.
7 *C. Gray*, International Law and the Use of Force, 4th ed. 2018.
8 *C. Henderson*, The Use of Force and International Law, 2018.
9 *T. Ruys/O. Corten/A. Hofer* (eds.), The Use of Force in International Law: A Case-based Approach, 2018.
10 *M. Byers*, Book Review, AJIL 97 (2003), 721, 724.
11 *M. Byers* (note 10).
12 See note 2 above. The commentaries (which were deliberately kept short (and I hope are user-friendly) are here: <http://legal.un.org>.
13 The UN General Assembly adopted Res. 203/73 on 20.12.2018, annexing the conclusions.

"methodologies"; to admit such a possibility is to put in doubt the nature of international law as law.