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USE OF FORCE AND SELF-DETERMINATION: PARSING INDETERMINACY

Abstract: The legal standards on the use of force applicable in a self-determination context remain controversial. Still, a close parsing of state practice in several different scenarios suggests some answers. 1. A colonial or occupying state may not use force to suppress self-determination in a colony or territory subject to alien subjugation. 2. A third state may not use force to support a colonizing or occupying state in scenario one. 3. A state may not use force to recover contiguous territory administered by a colonizing state. 4. The *jus ad bellum* generally does not apply to force used by a government or non-state actor in an internal conflict outside of a colonial or alien subjugation context. 5. An intervening state supporting the government of a state in scenario four may use force with that government's consent. 6. An intervening state may not use force to support the non-state actor against a government in scenario four. 7. International law does not create a "right to armed struggle" for a national liberation movement in a territory subject to colonial or alien subjugation. Nor does it make that movement an aggressor for using force. 8. An intervening state may not use force to support a national liberation movement in scenario seven.

Keywords: Self-determination, use of force, national liberation movements, internal conflicts, external intervention.

1. Introduction

Hersch Lauterpacht observed in 1952 that 'if international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law'.[1] More than 70 years later, Lauterpatch's observation overstates the indefiniteness of modern international humanitarian law – that is, the *jus in bello* or law of armed

1 Lauterpacht, "The Problem of the Revision of the Law of War", 360 at 382.

conflict governing the means and methods of armed conflict. However, it remains a fair critique of the *jus ad bellum* – the law that addresses the 'rightness' of a recourse to force. Even more pointed would be a codicil, addressing the relationship between this *jus ad bellum* and the right of self-determination: The vanishing point at the vanishing point of international law is the relationship between the regulation of force and the right to self-determination. At this convergence point, two challenging questions of high politics intertwine to compound the indeterminacy of the law. The result is an area fertilized with opinions but containing uncertainty. This fact is not accidental. States have little incentive to create a roadmap for their lawful forcible dismemberment. Still, it may be possible to tease from the accrual of state practice answers to some questions in this area, if factual scenarios are carefully parsed.

This article attempts this parsing by focusing primarily on state practice. This is, in other words, not a theoretical or normative inquiry. I do not attempt to resolve indeterminacy or propose a theoretical path from the impasse. Rather, my objective is to propose 'best answers' applicable to the current state of play. To this end, Part I briefly describes the rules of the modern *jus ad bellum* and of self-determination. Part II I juxtaposes these two areas of law in eight different scenarios. The result suggests that some questions about the use of force and self-determination are reasonably settled. Others are not. The latter tend, not surprisingly, to be points of heated contention in international relations.

2. Basic Doctrine

2.1. Jus ad Bellum

The modern law on the use of force in international relations is a creature of the post-Second World War period and the *Charter of the UN*. Article 2 of the UN Charter sets out the principles of the UN. Two of these of these principles address force in international relations. First, Article 2(3) specifies that states are to settle their international disputes in such a manner that international peace and security and justice are not endangered. Second, Article 2(4) obliges states to 'refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the UN'. Article 2(4)'s prohibition on the use of force in international relations is foundational to the Charter's system and is also

part of modern customary international law, binding even on states that are not members of the UN.[2]

The Article 2(4) prohibition on the use of force is subject to two recognized exceptions. These are: UN Security Council (UNSC) authorization under Chapter VII of the UN Charter and state self-defence against 'armed attacks'. Article 2(4) is also typically inapplicable where the territorial state consents to the use of force on its territory.

The scope, especially, of the right of self-defence has been a source of contention. These disputes have been acute during the post 9/11 era. During this century, some states have used forcible defensive measures in response to 'armed attacks' by non-state actors operating from the territory of states not themselves internationally responsible for these armed attacks. Despite considerable state practice, commentators have doubted that a right of self-defence exists against a non-state actor and, even if it does, that it enables recourse to force on a state territory where that state is not itself responsible for the armed attack.[3]

2.2. Right to Self-Determination

For its part, the norm of self-determination likely has two origins. First, 'self-determination' is a conceptual product of the late 18th century and the self-government impulses of the American Revolution. Second, it is a product of 19th century nationalism, resulting in the consolidation of ethnic nations into states (such as Germany and Italy). These principles of self-government and ethnic nationalism were bundled in the 'self-determination' advanced by US President Woodrow Wilson as part of the post-First World War peace settlement.[4] The net result was 'three of the central interlocking elements of the post-war settlement: (1) a scheme whereby identifiable peoples were to be accorded Statehood; (2) the fate of disputed border areas was to be decided by plebiscite; and (3) those ethnic groups too small or too dispersed to be eligible for either course of action were to benefit from the protection of special minorities regimes, supervised by the Council of the new League

2 *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, I.C.J. Reports 1986, p. 14 at para 188 *et seq*.

3 See discussion on these issues in Moore, *The Virginia-Georgetown Manual Concerning the Use of Force Under International Law: Rules and Commentaries on Jus ad Bellum*.

4 Thürer, Burri, "Self-Determination".

of Nations'.[5] The practical result was the fissioning of the multinational Austro-Hungarian and Ottoman empires into often fragile states at the end of the First World War.

Self-determination remained a political rather than a legal concept until after the Second World War. As the ICJ observed in its advisory opinion on *Unilateral Declaration of Independence in Respect of Kosovo*, '[d]uring the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation'.[6]

Most notably in this post-War legal evolution, self-determination was invoked, although not defined, in Articles 1(2) and 55 of the UN Charter. Article 1 pledges the UN to the purpose of developing friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. Article 55 anticipates economic and social cooperation based on respect of these same two principles. The right to (although again, not the content of) self-determination was codified in treaty by the 1966 *International Covenant on Civil and Political Rights* (ICCPR)[7] and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).[8]

The definitional weakness of self-determination results in an indeterminacy that is only partially bridged by state practice, a point made in the scholarship on the concept.[9] This incertitude reflects the threat self-determination poses to stability in the state system. In the result, the bearer of the 'right' of self-determination is often uncertain, as shall be discussed in describing the concept of 'peoples'. Further, there is considerable resistance to the idea that the right of self-determination extends beyond decolonizations of empires, to reach secessionist movements in a geographically contiguous state (with exceptions sometimes made for the post-Cold War collapse of the ethnically heterogeneous USSR and Yugoslavia).

5 Whelan, "Wilsonian Self-Determination and the Versailles Settlement", 100-101.

6 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010, p. 403 at para 79.

7 United Nations, *Treaty Series*, vol. 999, p. 171.

8 United Nations, *Treaty Series*, vol. 993, p. 3.

9 See, e.g., Fisch, *The Right of Self-Determination of Peoples: The Domestication of an Illusion*; Summers, *Peoples and International Law*.

During the post-War period, the notion of self-determination became closely associated with Afro-Asian decolonization. That process prompted a host of UN General Assembly (UNGA) resolutions on self-determination and decolonization.[10] Some of these resolutions have proven especially influential in shaping views on the legal content of self-determination. They are, moreover, often ambiguous. This indefiniteness is consistent with Summer's observations about the politics of self-determination in the post-War period: 'there was broad support for those rights in general, and this was certainly important for establishing their legal status. ... However, this coalition shattered when the right was looked at in terms of specific legal obligations'.[11]

This pattern is illustrated in the way UNGA resolutions have been endorsed (or not) as constitutive of international law. Speaking generally, the ICJ has recognized that UNGA resolutions may have varying significance in shaping law. In its *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion, the ICJ observed:

> General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradua1 evolution of the *opinio juris* required for the establishment of a new rule.[12]

In that matter, the Court observed that resolutions adopted with 'substantial numbers of negative votes and abstentions' may reflect 'a clear sign of deep concern' but 'they still fall short of establishing the existence of an *opinio juris*'.[13]

10 See, e.g., A/RES/742 (VIII) (1953); A/RES/1514 (XV) (1960); A/RES/1541 (XV) (1960); A/RES/2625 (XXV) (1970).

11 Summers, ibidem, 398.

12 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1.C.J. Reports 1996, p. 226 at para 70.

13 Ibidem, para 72. For a summary of scholarly theories on GA resolutions and customary international law, see Lepard, *Customary International Law: A new theory with practical applications*, 208 *et seq*.

The ICJ has elsewhere endorsed the significance of several UNGA Resolutions addressing self-determination. The ICJ has concluded that these have had a strong formative influence upon customary international law.[14] Especially notable are: Resolution 1514 (1960), *Declaration on the granting of independence to colonial countries and peoples* (adopted 89 votes to 0 with 8 abstentions); Resolution 2625 (1970), *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States* (Friendly Relations Declaration) (adopted by consensus without vote).[15] The Court has also treated the latter resolution's language on use of force as reflecting customary international law.[16]

In discussing self-determination, the Friendly Relations declaration specifies: '...all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development'. There is, however, a caveat:

> Nothing in the declaration shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

14 See, e.g., *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971 at para 53 (pointing to, among other things, Resolution 1514 in discussing changes to customary international law); *Western Sahara*, Advisory Opinion, I.C.J. Reports 1975, p. 12. at paras 56 *et seq* (discussing Resolutions 1514 and 1541 in the context of international law and self-determination); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136 at para 88 (discussing Resolution 2625); *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, I.C.J. Reports, 2024 19 July, General List No. 186 at para 231 (discussing the self-determination in the context of Resolutions 1514 and 2625).

15 A/RES/1514 (XV) (1960); A/RES/2625 (XXV) (1970).

16 *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, I.C.J. Reports 1986, p. 14 at para 188 *et seq* (treating the Declaration's statements on use of force are reflecting customary international law); *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168 at para 162 (same). Keller, "Friendly Relations Declaration (1970)", para 40 ('That the Declaration reflects customary international law has gained general acceptance in international law scholarship and practice').

Collectively, these passages suggest two key prerequisites to the right of self-determination. First, as the Declaration provides, the human community claiming it must be a 'people'. Second, the people must be non-self-governing, typically because they are subjected to colonial control. In this manner, they are not 'possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour', in the language of the declaration. Both tests are, however, poorly developed in international law.

First, there is no formal definition of a 'people'. A special report by a UN special rapporteur urged in 1981 that a people denoted a social entity possessing a clear identity and its own characteristics.[17] This notion suggests that a 'people' may share a common ethnicity, language, religion, cultural heritage or history of persecution. However, self-determination does not depend on this homogeneity. Not many of the world's decolonized states are ethnically homogenous. The most, therefore, that can plausibly be said is that a people is a human community that self-identifies as having a shared identity. At the same time, a 'people' is different from an ethnic, religious, cultural, or linguistic minority in a state.[18] Minorities have certain rights in international human rights law. Under the ICCPR, for instance, minority rights in the state are guaranteed.[19] This minority right is supplemental to the guarantee against discrimination found in many human rights treaties. Thus, in the ICCPR, state parties owe the rights found in it without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. None of these rights are, however, the right to self-determination.

To exist, that self-determination right requires that the 'people' have a relationship with a territory, 'even if the people in question has been wrongfully expelled from it and artificially replaced with another population'.[20] That is, the self-identifying group must have a connection to a territory, a space of land that is defined and delineated and comprises a geographically

17 Aureliu Cristescu, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The right to self-determination: historical and current development on the basis of UN instruments: study*. UN Doc E/CN.4/Sub.2/404/Rev.1 (1981) at para 279.

18 Ibidem.

19 See ICCPR, above note 7, Art 27.

20 Cristescu, ibidem, para 279.

separate unit. Or put another way, the people perceives itself as possessed of a homeland.

Second, the people must be non-self-governing, creating a distinction between so-called internal and external self-determination. Where a people is possessed of a government representing the whole people belonging to the territory, then the people has satisfied an internal self-determination. It has, in the words of the Supreme Court of Canada in its 1998 Québec Secession Reference case, pursued 'its political, economic, social and cultural development within the framework of an existing state'.[21] The people cannot assert a right of external self-determination that might dismember or impair the territorial integrity or political unity of sovereign and independent States. Thus, the Supreme Court of Canada concluded that Québec does not enjoy a right of self-determination enabling it to secede from Canada because the Québec people are in full participation within the Canadian Confederation.

Where internal self-determination of a people within a state is denied, then in extreme cases, there is a right of external self-determination. The classic and undisputed extreme example of a people denied self-determination is a colony of an overseas colonial empire. An overseas power governs a people inhabiting a colony – the 'people' enjoy nothing resembling internal self-determination. Indeed, to use the words of the Friendly Relations Declaration, it is instead subject 'to alien subjugation, domination and exploitation'. These colonies are presumptively distinct from the colonizing power, and their identity as an autonomous human community is compromised by their status as a colony. Decolonization is the restoration of that autonomy.

It may also be the case that external self-determination exists faced with 'alien subjugation, domination and exploitation' outside of a formal colonial structure. For instance, a state does not avoid questions of self-determination by purporting to annex to its own state a territory populated by a people.[22]

More recently, some commentators have urged that external self-determination may exist as a form of remedy outside of these contexts where there is a denial of internal self-determination within a state. Exactly in what circumstances this remedy exists in international law is debated – usually,

21 *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 126.

22 See, e.g., *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, I.C.J. Reports 2024 19 July, General List No. 186 at para 233.

remedial secession is discussed in the context of extreme repression and systematic human rights abuses.[23] There is, however, nothing close to consensus (or general state practice) suggesting that international law allows secession as a 'remedy' in such cases.[24] As the ICJ observed in its Kosovo advisory opinion:

> Whether, outside the context of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation, the international law of self-determination confers upon part of the population of an existing State a right to separate from that State is, however, a subject on which radically different views were expressed by those taking part in the proceedings and expressing a position on the question. Similar differences existed regarding whether international law provides for a right of 'remedial secession' and, if so, in what circumstances.[25]

Where a right to external self-determination does exist, there are three possible outcomes. The Friendly Relations Declaration anticipates

> [t]he establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

Resolution 1541 outlines the process that should be followed for either of the latter outcomes, both of which hinge on fair democratic processes. It is for these reasons that self-determination processes have come to be associated with referenda.

3. Use of Force and Self-determination

Still, despite the focus on plebiscites, the process of self-determination has often been violent. Colonial states have not always peaceably decolonized. Peoples exercising a right of self-determination have not always accepted

23 Thürer, Burri, ibidem.

24 Lieblich, *International Law and Civil Wars,* 226 ('the doctrine of remedial secession has received much support in legal literature, but scant support, if at all, in state practice').

25 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010, p. 403 at para 82.

a colonial state's failure to decolonize. Questions of violence, and thus of use of force, have recurred regularly.

How the prohibition on the use of force aligns with the right to self-determination has, however, never been clear, and positions have often followed geopolitical divides. Resolutions of both the UNGA and the UNSC have used often ambiguous language that leaves much latitude for interpretation. Likewise, state practice in various conflicts has often been equivocal. The ICJ has addressed the issue on the margins, and its opinions on use of force are often divided. Scholarly opinion is also divided, and in any event of marginal utility in ascertaining the content of the law where the sources of international law themselves offer oblique responses.

It is, however, possible to identify from the factual record different scenarios involving the interplay between self-determination and the use of force. Summers, in his scholarship, proposes four possible obligations.[26] In this article, I suggest eight. It cannot be assumed that the law is equally ambiguous is each case. In the balance of this article, therefore, I discuss these eight scenarios, ranked roughly in terms of the seeming certainty of the legal rules applicable to them.

3.1. Force Used by a Colonial or Occupying State to Suppress Self-determination in a Colony or Territory Subject to Alien Subjugation

There appears to be a considerable consensus that forcible suppression of the right of self-determination is unlawful. The UNGA resolutions issued during the period of decolonization and dealing with self-determination often inveigh against force used to repress the right to self-determination. Thus, UNGA Resolution 1514 (1960) condemned the forcible repression of self-determination

> All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.

26 Summers, ibidem, 374.

Likewise, Resolution 2131 (1965) observed that 'The use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention'.[27]

The usual caution should be exercised in concluding that every passage in UNGA resolutions reflects customary international law. As noted, however, the ICJ (and scholars) have to concluded that the Friendly Relations Declaration does.[28] The Declaration asserts that '[e]very State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence'.[29] It also provides: 'Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence'.[30] This passage was cited with approval by the ICJ in its discussion of Palestinian self-determination in the *Construction of a Wall*[31] and *Israeli Practices*[32] Advisory Opinions.

The precise source of this prohibition against forcible suppression of self-determination is uncertain. There are, however, plausible candidates. It may be situated inherently in the customary law of self-determination. For parties to the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), this suppression would seem inconsistent with treaty obligations in Article 1(3)

> The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

27 A/RES/2131 (XX) (1965). See also A/RES/2160 (XXI) (1966).

28 See discussion in note 16.

29 A/RES/2625 (XXV) (1970).

30 Ibidem.

31 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136 at para 88.

32 *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, I.C.J. Reports 2024 19 July, General List No. 186 at para 255.

Finally, it may be forcible suppression of self-determination would violate Article 2(4) of the UN Charter. While that Article is primarily concerned with force against an existing state's 'territorial integrity or political independence', it also bars a state's use of force 'in any other manner inconsistent with the Purposes of the UN'. It should be recalled that the purposes of the UN in Article 1 include: 'To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples'.

3.2. Force Used by a Third State to Support a Colonizing or Occupying State in Scenario 1

If scenario 1 is unlawful, an obvious corollary is that force used by a third state to support a colonizing state to suppress self-determination is also unlawful. UNGA resolutions have counselled against this form of intervention. For example, in Resolution 2107 (1965) dealing with Portuguese African colonies, the UNGA requested 'all States, and in particular the military allies of Portugal ... [t]o refrain forthwith from giving the Portuguese Government any assistance which would enable it to continue its repression of the African people in the Territories under its administration...'[33]

The legal obligation to refrain from the assisting state may stem from several possible sources. A state assisting another state in committing an internationally wrongful act is internationally responsible if the act would be wrongful if committed by that assisting state.[34] It seems likely that suppressing self-determination would be a wrong if committed by the assisting state. The ICJ has concluded four times that the right of self-determination is an *erga omnes* obligation, whose observance is an obligation for all states.[35] A third state's collaboration with a colonial state to repress self-determination would be inconsistent with this *erga omnes* obligation, as well as independently a violation of treaty obligations under Article 1 of the ICCPR and ICESCR. Depending on the nature of the assistance, it would

33 A/RES/2107 (XX) (1965).

34 ILC, Responsibility of States for Internationally Wrongful Acts, Art 16.

35 *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 102, para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136 at para 155; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, I.C.J. Reports 2019 (I), p. 139, para. 180 *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, I.C.J. Reports 2024 19 July, General List No. 186 at para 232.

also independently be a violation of Article 2(4)'s strictures on use of force contrary to the purposes of the UN.

3.3. Force Used by a State to Recover Contiguous Territory Administered by a Colonizing State

More complicated are scenarios in which an existing state uses force to acquire contiguous territory administered by a colonizing state as a colony. The most notable example of this scenario arose in 1961, after India occupied Goa and two other districts on the west coast of the Indian sub-continent.[36] These areas were, at the time, under Portuguese administration and had been for centuries. The Indian invasion became the subject of two intensive UN SC sessions. Implicit in the debate at the Council were two legal issues. As described by Ruys, these were:

> First, it could be claimed that the recovery of territory under colonial domination was not caught by Article 2(4) of the UN Charter, since it did not *contravene* 'the purposes of the United Nations', but rather sought to *achieve* these purposes (which include, under Article 1(2) [of the] UN Charter, the principle of self-determination). Alternatively, one could theoretically claim the emergence of a new exception to the prohibition on the use of force under customary international law, permitting the forcible recovery of (contiguous?) territory under colonial domination.[37]

Neither of these positions has attracted clear status as international law. In the Goa controversy, Portugal condemned the invasion of districts it regarded as integral parts of Portugal. This status, Portugal claimed, negated the application of UNGA Resolution 1514, calling for decolonization. It urged that India's forcible occupation of the districts was contrary to Articles 2(3) and (4) of the UN Charter.[38] In its justification, India asserted that Goa was part of India and was not a region over which Portugal could assert sovereignty. Supporting the Indian position, the United Arab Emirates noted 'that the distance between Portugal and these territories is enormous and that their inhabitants are very different in every way'.[39]

36 For an overview of this dispute, see Ruys, "The Indian Intervention in Goa – 1961", 85.
37 Ibidem, 93.
38 UN Doc S/PV.987 (18 December 1961) at para 75.
39 Ibidem, para 125.

Faced with a territory it regarded as integrally part of India, India obliquely invoked a form of self-defence 'for the protection of the people of a country – and the people of Goa are as much Indians as the people of any other part of India'.[40] The Indian position was supported by the Soviet Union, which urged that the matter of Goa's status was not properly before the UNSC since it concerned only Indian sovereign territory.[41] Implicitly, the Soviet Union disputed that Article 2(4) had any bearing on force used against a colonial territory that was plausibly part of the territory of a (now) sovereign state.

The United States, while asserting that Goa was a colony within the meaning of UNGA Resolution 1514, disputed the application of self-defence and urged that 'India cannot lawfully use force against Goa, especially when the peaceful methods in the Charter have not been exhausted.' It urged that:

> Resolution 1514 (XV) does not and cannot overrule the Charter injunctions against the use of armed force. It would not have been adopted if it had attempted to do so. It gives no licence to violate the Charter's fundamental principles: that all Members shall settle their international disputes by peaceful means, that all Members shall refrain from the threat or use of force against any other State.[42]

This position appeared to capture the majority sentiment on the Council. A draft resolution friendly to the Indian position and calling on Portugal to co-operate with India was defeated by 7 votes to 4. A second draft resolution calling upon India to withdraw its forces from Goa was supported by 7 votes to 4, but the opposing Soviet vote vetoed the measure.[43]

In sum, it seems likely a use of force by a state to recover colonized territory is unlawful, as self-determination contains no bespoke exception to Article 2(4) in this scenario.

40 UN Doc S/PV.988 (18 December 1961) at para 77.
41 UN Doc S/PV.987 (18 December 1961) at paras 2-3.
42 UN Doc S/PV.988 (18 December 1961) at para 93.
43 Ibidem, para 128 *et seq*.

3.4. Force Used by a Government or Non-state Actor in an Internal Conflict Outside of a Colonial or Alien Subjugation Context

This scenario is the first to address what international law says about the force used by both a state and a non-state actor. I begin with the more straightforward scenario of an internal armed conflict between a government and a non-state actor in a non-colonial context. To use language from the law of armed conflict (*jus in bello*), this is an armed conflict between an organized armed group (or dissident armed force) and a government. This armed conflict may stem from several causes, including an internal struggle over governance or a secessionist movement within a state.

The dispute may be clothed in the language of 'self-determination'. The non-state actor may purport to represent a 'people'. For instance, examples exist of a secessionist conflict in a newly decolonized state, such as the Katanga conflict in newly decolonized Congo, or the Biafra conflict in newly decolonized Nigeria. These secessionist movements contested the status of a territory within a new state with the government of the new state. These are not instances of decolonization. It cannot be presumed, therefore, that the standard concept of self-determination even applies. As noted, the right of self-determination will not exist if the additional pre-requisite of non-self-governing status is inapplicable. As discussed above, the absence of colonization or alien subjugation generally precludes the existence of a right to self-determination, as do the cautionary caveats about dismemberment of states.

Of course, the armed conflict would be governed by the *jus in bello* in terms of its conduct. However, the *jus ad bellum* would generally not apply to an internal conflict without a transboundary aspect – that is, one involving the use of force on the territory of another state.[44] Thus, Article 2(4) would not regulate either the state's or the non-state actor's conduct on the state's territory. Nor would the right to self-determination generally apply to bar the government's suppression of the non-state actor. Nevertheless, as the next two scenarios suggest, commentators have sometimes invoked self-determination in a manner that purports to constrain state action.

44 See, e.g., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136 at para 139 (conduct by a non-state actor purely within the territory occupied by the state does not give rise to a right to self-defence under Article 51 of the UN Charter).

3.5. Force Used by an Intervening State in Support of the Government of a State in Scenario 4

This fifth scenario addresses circumstances in which a third state forcibly intervenes in an internal conflict (outside of an anti-colonial or anti-alien subjugation situation) to support a government with its consent. As observed in scenario 2 above, force used by a third state in support of a colonial state suppressing self-determination is almost uncertainly unlawful. It is much less clear that the same standard applies outside of a colonial (or alien subjugation) context.

There appear to be two views on this point. The first view simply accepts the capacity of a government to consent to the use of force on its territory. In its Articles on State Responsibility, the International Law Commission (ILC) observed that '[v]alid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent'.[45] In its practice, the UNSC, has acknowledged the 'inherent and lawful right of every State, in the exercise of its sovereignty, to request assistance from any other State or group of States'.[46] Likewise, in its *Nicaragua* judgment, the ICJ concluded that 'intervention is allowable at the request of the government'.[47]

To be clear, this consent standard does not leave the intervening state unfettered. As suggested by the ILC, any use of force must remain within the scope of the consent.[48] Further, the state using force must observe other international obligations. Consent could not, for instance, vitiate the application of the *jus in bello* in the armed conflict. However, generally, a consensual use of force on the territory of the consent state would not violate the *jus ad bellum*.

A second view, however, demurs on this point, based on a broad concept of self-determination. Under this approach, self-determination extends beyond situations of colonialization and alien subjugation, reaching,

45 ILC, Responsibility of States for Internationally Wrongful Acts, Article 20.

46 S/RES/376 (1976) (condemning South African aggression in Angola).

47 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment. I.C.J. Reports 1986, p. 14 at para 246.

48 See also the "Definition of Aggression" Resolution adopted, by consensus, by the UN GA in 1974, aggression includes: 'The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement'. A/RES/3314 (1974), Article 3(e).

in addition, 'the right of a people that has already formed a state to maintain its political independence with regard to third states and to choose its own government with no outside interference or intervention'.[49] Proponents of this position point to the Friendly Relations Declaration's assertion that 'all peoples have the right freely to determine, without external interference, their political status ... and every State has the duty to respect this right'. Further, Article 1 of the ICCPR and ICESCR specify that all peoples have a right to 'freely determine their political status.' External intervention in (at least) a full-fledged civil war inhibits this right.[50] In the result, third states must be neutral in a civil war, assuming that it remains a civil war and is not internationalized by the intervention of another state. As summarized by the 2009 EU Independent International Factfinding Mission on the Conflict in Georgia:

> it is argued that the principle of non-intervention and respect of theinternational right to self-determination renders inadmissible any type of foreign intervention, be it upon invitation of the previous 'old' government or of the rebels taking of sides and intervention in civil war is in that perspective forbidden. This reasoning leads to the conclusion that a military intervention by a third state in a state torn by civil war will always remain an illegal use of force, which cannot be justified by an invitation (doctrine of negative equality).[51]

It is not clear, however, that this position is justified. The view has a scholarly constituency, motivated by a desire to limit the international use of force.[52] The record of state conduct does little, however, to affirm

49 Bannelier, Christakis, "The Intervention of France and Others in Mali", 820.

50 See summary in Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law*, 275 *et seq*.

51 EU Independent International Factfinding Mission on the Conflict in Georgia, (2009) Volume II at 277-278. See also Institute of International Law, *The Principle of Non-Intervention in Civil Wars* (1975) at Art. 2 ('Third States shall refrain from giving assistance to parties to a civil war which is being fought in the territory of another State'); Canada, *Operational Law Manual*, B-CH-005-104/FP-024 at 12-4 ('Consensual intervention in full-fledged civil wars has less clear support at international law, as these situations may raise concerns relating to whether the correct lawful authority has given its consent and whether an intervention would conflict with the right of self-determination.')

52 See discussion in Lieblich, *International Law and Civil Wars*, 124.

the scholarly position.[53] There is some hint of this view in the response of states to the 1956 Soviet invasion of Hungary, but in a context where the existence of valid governmental consent was doubted.[54] A view reportedly advanced by the United Kingdom during the late Cold War precluded intervention when a conflict reached the level of a 'civil war' in which organized armed groups controlled territory.[55] However, exactly where such a distinction comes from in international law is unclear. Control of territory is a threshold consideration in the *jus in bello* for a non-international armed conflict governed by Additional Protocol II to the Geneva Conventions.[56] Still, it is doubtful that this 'control of territory' threshold matters much in practice, even for the *jus in bello*. It is not a threshold for the existence of a non-international armed conflict governed by Common Article 3 of the Geneva Conventions[57] or customary international law.[58]

At any rate, even if this criterion made a difference in the *jus in bello*, there is no authority that this 'control of territory' threshold has any significance in the different legal area of *jus ad bellum*. There is no evidence that a 'doctrine of negative equality' dependent on the intensity of an internal conflict commands regular support among states. On the contrary, state practice is replete with examples of states intervening in internal conflicts of varying intensity at the request of governments.[59] In recent decades, this

53 Ibidem, 140 ('While the strict- abstentionist approach has been widely featured in the literature, it is strikingly scarce in the opinio juris of states').

54 See UN SC. *Report of the Security Council to the General Assembly, Covering the period from 16 July 1956 to 15 July 1957*, Supplement No. 2 (A/3648), French statement at para 339 ('the United Nations must act without delay to fulfil the hopes of a people struggling for its independence. It was obvious that foreign intervention in Hungary had taken place and was continuing against the express will of the great majority of the Hungarian people and of the Hungarian Government'), Belgian statement at para 331 ("A foreign State could not be allowed, by force of arms and profuse bloodshed, to deprive a people of the right to govern itself freely in accordance with its own wishes.') See also discussion in Lieblich, "The Soviet Intervention in Hungary – 1956," 58.

55 Gray, *International Law and the Use of Force*, 85.

56 *Protocol (II) additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts*, 1125 UNTS 609.

57 See, e.g., *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of August 12, 1949*, 75 UNTS 287.

58 The threshold for a non-international conflict depends on a series of intensity factors, none of which make control of territory a prerequisite. See discussion in, e.g., Denmark, *Military Manual on International Law Relevant to the Danish Armed Forces in International Operations* (2020) at 49.

59 See Gray, *International Law and the Use of Force*, 90 *et seq*.

intervention is sometimes undertaken in the name of 'anti-terrorism'.[60] Some scholars place these activities on a different legal footing than interventions because the purpose of the involvement does not violate a right to self-determination.[61] It is hard, however, to situate a purpose-based distinction in any source of international law. Nor can it be argued that labelling an intervention 'anti-terrorism' has legal significance. Terrorism is a description of conduct that can as easily arise in situations of 'civil war' and in situations short of it. There does not appear to be state practice suggesting that once an armed conflict reaches some unknown threshold of 'civil war', counter-terror interventions have a different legal quality.

3.6. Force Used by an Intervening State in Support of the Non-state Actor in Scenario 4

At first blush, the response to this scenario should also be straightforward: a state forcibly intervening in support of the non-state actor against a state government in an internal conflict violates Article 2(4). After all, Article 2(4) bars a use of force contrary to the territorial integrity or political independence of a territorial state. Putative 'consent' by a non-state actor to a use of force by an intervening state does not relax the prohibition on the use of force.[62] Certainly, instances may arise in which there are factual disputes as to whether a non-state actor is a government competent to consent.[63]

60 See discussion in *ibid* at 86 *et seq* (pointing to interventions in Afghanistan after 2014; Mali after 2013; Iraq after 2014; Libya after 2015).

61 See, e.g., Bannelier, Christakis, ibidem, 820.

62 As the ILC notes in the Articles on State Responsibility, '[i]n order to preclude wrongfulness, consent dispensing with the performance of an obligation in a particular case must be 'valid'.' Validity hinges on, among other things, 'whether the agent or person who gave the consent was authorized to do so on behalf of the State'. ILC, Responsibility of States for Internationally Wrongful Acts, Article 20 (Commentary).

63 S/PV.2932 (1990) at 11 (Iraq asserting that its 1990 invasion of Kuwait was invited by the 'Free Provisional Government of Kuwait'). The UNSC rejected this view, as implied by its resolutions on Iraq's invasion of Kuwait. See, e.g., S/RES/661 (1990). See also, e.g., UN Doc S/PV.746 (1956) (USSR asserting that the Hungarian government invited its invasion of Hungary); UN Doc S/PV.1441 (1968) (USSR asserting that the Czechoslovakian government invited its invasion). See also Fox, "The Vietnamese Intervention in Cambodia – 1978', 251-252 (The 1978 Vietnamese intervention in Cambodia defended by Vietnam as based on consent by a legitimate government regarded as a non-state actor by other states); Nolte, Barkholt, "The Sovet Intervention in Afghanistan – 1979-80", 300 *et seq* (The Soviet invasion of Afghanistan in 1979 defended by the USSR as based on consent, a position rejected by other states).

The legal principle is, however, straightforward: only governments may consent to a forcible intervention.

As with scenario 5, however, there is a school of scholarship suggesting that in a 'civil war', 'no international legal prohibition of intervention has crystallised, so that intervention on either side of a civil war (or war of secession) is allowed (doctrine of positive equality).'[64] This position is doubtful. As the ICJ observed in its *Nicaragua* judgment,

> no such general right of intervention, in support of an opposition within another State, exists in contemporary international law. ... Indeed, it is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition. This would permit any State to intervene at any moment in the internal affairs of another State, whether at the request of the government or at the request of its opposition. Such a situation does not in the Court's view correspond to the present state of international law.[65]

In that judgment, the ICJ concluded that US aid to the organized armed group in question (the *contras*) was a use of force, to the degree that it involved 'organizing or encouraging the organization of irregular forces or armed bands ... for incursion into the territory of another State' and 'participating in acts of civil strife ... in another State'. The use of force threshold was also met by the US 'arming and training of the *contras*' (although not by their financing).[66]

It follows that a forcible intervention by a third state in *support* of the non-state actor described in scenario 4 would be unlawful, unless authorized by the UNSC or a lawful exercise of self-defence. As a corollary, the ICJ has suggested that a state must not tolerate the presence of organized armed groups operating against another state from its territory. It has referred to the obligation to respond to this presence as a 'duty of vigilance'.[67]

64 EU *Independent International Factfinding Mission on the Conflict in Georgia*, (2009) Volume II at 278.

65 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment. I.C.J. Reports 1986, p. 14 at paras 209 and 246.

66 Ibidem, para 228.

67 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168 at para 300.

The right of self-determination does not change this analysis to the extent it purportedly applies to an internal conflict outside of colonization or alien subjugation. In its practice, Russia has sought to limit the principle of non-intervention and to justify use of force in its near-abroad based on a tacit right of remedial secession by a non-state actor, which then permits Russia's own intervention in the conflict.[68] This position is just one of several that Russia has invoked to justify its conduct.[69] In the context of Ukraine, it has sought to bolster its self-determination arguments by engineering implausible referenda in areas occupied by it. However, the Russian position has not been accepted by, e.g., the EU Independent International Fact-Finding Mission on the Conflict in Georgia.[70] Indeed, in the context of Ukraine, its conduct has been repeatedly condemned as unlawful by a majority of the state members of the UN.[71]

This condemnation is supported by the UNGA's Friendly Relations Declaration. Recall that the Declaration asserts that

> [i]n their actions against, and resistance to, such forcible action [suppressing self-determination] in pursuit of the exercise of their right to self-determination, [dependent] peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.[72]

The meaning of support' is unclear and, as discussed below, cannot be assumed to reach a use of force.[73] In any event, the reach of the Declaration's 'support' standard is qualified by its own text. The Declaration observes that colonies retain a 'status separate and distinct from the territory of the State

68 See, e.g., Russian positions on Abkhazia and South Ossetia as independent of Georgia by reason of self-determination. EU *Independent International Factfinding Mission on the Conflict in Georgia*, (2009) Volume II at 189-190. Russia asserted similar positions in relation to its interventions in Ukraine, beginning in 2014. See O'Connell, "The Crisis in Ukraine – 2014,' 857.

69 It has also regularly urged a broad concept of self-defence of nationals. See, e.g., discussion in Gray, "The Conflict in Georgia – 2008", 718.

70 EU *Independent International Factfinding Mission on the Conflict in Georgia*, (2009) Volume II at 279 *et seq*.

71 See UNGA, Aggression against Ukraine, A/RES/ES-11/1 (2022); UNGA, Territorial integrity of Ukraine: defending the principles of the Charter of the United Nations, A/RES/ED-11/4 (2022); UNGA, Furtherance of remedy and reparation for aggression against Ukraine, A/RES/ES-11/5 (2022); UNGA, Principles of the Charter of the United Nations underlying a comprehensive, just and lasting peace in Ukraine, A/RES/ES-11/6 (2023).

72 A/RES/2625 (XXV) (1970).

73 See discussion in Lieblich, *International Law and Civil Wars*, 124 at 240.

administering' them and enjoy a right to self-determination. On the other hand, the Declaration also specifies that nothing in in it authorizes and encourages 'any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples'. It notes that '[e]very State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.' Further, [e]very State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands including mercenaries, for incursion into the territory of another State.'

As a result, the Declaration impliedly puts colonies and non-colonies on a different footing in terms of the relationship between force, territorial integrity and self-determination. A colony (or other non-self-governing territory) is not an integral part of the territory of the colonial state. The colonial state cannot assert a right of territorial integrity faced with self-determination. However, a non-colonial state conducting itself 'in compliance with the principle of equal rights and self-determination of peoples' has a different status. It enjoys this integrity, and efforts by third states to dismember that integrity, including by using force (directly or through proxies), is unlawful.

The Declaration is far from a fully coherent document – it leaves unaddressed, for instance, the implications of not complying 'with the principle of equal rights and self-determination of peoples'. However, the ultimate position of the 2009 EU Independent International Factfinding Mission on the Conflict in Georgia probably best encapsulates the state of the law:

> [m]ilitary force is never admissible as a means to carry out a claim to self-determination, including internal self-determination. There is no support in state practice for the right to use force to attain self-determination outside the context of decolonization or illegal occupation. Still less is there support by states for the right of ethnic groups to use force to secede from existing states. This means that the use of force by secessionist groups is in any case illegal under international law, even assuming that a right to secede exists.[74]

74 EU *Independent International Factfinding Mission on the Conflict in Georgia*, (2009) Volume II at 278.

Examples certainly exist of states intervening in support of a non-state actor. However, there appear to be few (if any instances) in which that conduct was defended as a legal entitlement to do so unless tied to an alternative legal theory permitting intervention (such as a theory of self-defence, however unpersuasive).[75] On the other hand, condemnations of forcible interventions in support of non-state actors have been recurring.[76]

3.7. Force Used by a National Liberation Movement in a Territory Subject to Colonial or Alien Subjugation

More fraught is the question raised by this seventh scenario: does a national liberation movement in a territory subject to colonial or alien subjugation have a right to use force in support of self-determination? Here, a careful distinction must be made between the *jus ad bellum* and the *jus in bello*. That is because some sort of *jus in bello* would always apply to an armed conflict between a state and an organized armed group. The real question is whether the rules are those for 'non-international' or 'international' armed conflicts. Generally, an armed conflict between a state and a non-state actor is a 'non-international armed conflict'. However, Additional Protocol I to the Geneva Conventions purports to 'internationalize' the *jus in bello* applicable during armed conflicts arising in the context of self-determination. By Article 1(4), an 'international' armed conflict reaches

> armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.[77]

75 See discussion in Gray, *International Law and the Use of Force*, 108 *et seq*. On this point, see also the summary positions taken by India in relation to its 1971 intervention in East Pakistan (now Bangladesh). Kritsiotis, "The Indian Intervention into (East) Pakistan", 181 *et seq*. See also Lieblich, *International Law and Civil Wars*, 124 at 129 (describing how the United States position in the late Cold War under the 'Reagan Doctrine' of intervention was less sweeping in its legal than rhetorical justifications).

76 Gray, *International Law and the Use of Force*, 110 *et seq* (pointing to UNSC condemnations in relation to Angola, Liberia, Eritrea.

77 *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 1125 UNTS 3, Article 1.

Like the Geneva Conventions, Article 4 of Protocol I provides that its application 'shall not affect the legal status of the Parties to the conflict'. Nevertheless, it does have that effect: if the conflict is one for self-determination and within the terms of Article 1(4), the members of the national liberation movement concerned acquire the status of privileged combatants, enjoying prisoner of war status if captured. This status means that they cannot be penalized for their participation in the armed conflict, although they enjoy no immunity for conduct that amounts to war crimes. Moreover, Additional Protocol I eases certain rules of distinction, with the result that combatants may be permitted in some circumstances to not wear a uniform, not carry their arms openly, or not wear marks of identification visible at a distance.

However, Additional Protocol I is not determinative of all legal questions arising when a national liberation movement uses force. First, Article 1(4) is not a convincing candidate for customary international law. It applies only where Additional Protocol I is in force. This ties its formal application to armed conflicts between a 'people' and a state party to Additional Protocol I. For their part, those state parties may be reluctant to declare that the conditions specified in Article 1(4) of the Protocol have been met.

National liberation movements may force that issue. By Article 96, an 'authority representing a people *engaged against a High Contracting Party* in an armed conflict' is entitled to make a unilateral declaration to the depository of Protocol I; in practice, the Swiss government.[78] In this declaration, the authority undertakes to apply the Protocol and the Conventions in any conflict in which it may be engaged. When the Swiss government receives such a declaration, the effect is to impose on the movement all the rights and liabilities of a High Contracting Party.

Still, while several non-state actors purporting to be an authority representing a people have filed declarations, only one has had the legal effect of internationalizing an armed conflict: in 2015, following the declaration issued by the Polisario Front in relation to the armed conflict between it and Morocco concerning the fate of Western Sahara.[79] In other cases, the Swiss government rejected the unilateral declaration because the armed conflict

78 Emphasis added.

79 Switzerland, Notification to the Governments of the States Parties to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, 242.512.0 – GEN 4/15 (26 June 2015). Morrocco condemned this notification. Switzerland, Notification to the Governments of the States Parties to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, 242.512-0 – GEN 5/15 (9 July 2015).

in pursuit of self-determination was not with a state party to Additional Protocol I.[80]

Second, even where an armed conflict is internationalized through the proper operation of Additional Protocol I, it cannot be assumed that the use of violence by the national liberation movement is thereby also legalized under the separate area of *jus ad bellum*. As noted, fighters for a national liberation movement become privileged belligerents. However, from this, it cannot be concluded that Additional Protocol I creates a 'right to armed struggle'. As with all *jus in bello*, it is agnostic on the 'rightness' of the armed conflict. Instead, it concerns itself with the rules that apply when an armed conflict arises, regardless of its cause.

To the extent it is regulated in international law, the 'rightness' of the initiation of an armed conflict is addressed by the *jus ad bellum* rules situated in the UN Charter and customary international law. Part of the problem is that these *jus ad bellum* standards govern *state* use of force. Article 2(4) of the UN Charter restricts a state's use of force against another state's territorial integrity or political independence. Article 51, governing self-defence, refers to a *state*'s right of self-defence when an armed attack occurs (mounted by a protagonist unidentified in the text of Article 51). Subject to the further restriction in Article 2(4), discussed in scenario 1, about *state* use of force contrary to the purposes of the UN, the *jus ad bellum* has nothing to say about intra-state conflicts with no transboundary features. As the ICJ observed in its Kosovo advisory opinion, discussing Article 2(4), 'the scope of the principle of territorial integrity is confined to the sphere of relations between States'.[81]

Still, there is a school of scholarly thought that regards a forcible suppression of the right of self-determination as giving the 'people' seeking self-determination a right of self-defence.[82] That is, they enjoy a right to use violence in the *jus ad bellum* by analogy to the 'armed attack' condemned by

80 Mačák, *Internationalized Armed Conflicts in International Law*, 65, 70.

81 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010, p. 403 at para 80.

82 See, e.g., *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), Judge Ammoun, Separate Opinion, I.C.J. Reports 1971 at p. 70. For a summary of these positions, see Corten, ibidem146. For a contemporary position urging that such a right of self-defence exists in the Palestinian context, see Wilde, "Israel's War in Gaza is not a valid act of self-defence in international law", ('Israel's failure to end the occupation gives rise to a right to resist in international law on the part of the Palestinian people'). For a critique of this view, see Milanovic, "Does Israel have a right to defend itself?"

Article 51. This position might be considered a corollary of the prohibition, discussed above in scenarios 1 and 2, of force used by a colonial or occupying state (or a third state) to suppress a right to self-determination. If the forcible suppression is wrongful, then (the argument might be) there is a 'right' to resist. It follows that the repressing state could not itself claim a right to self-defence against this forcible riposte. Under the logic of the *jus ad bellum*, there can be no right to self-defence against the lawful exercise of self-defence.

However, the legal basis for a right to forcible resistance is deeply contested. In fact, Gray concludes that '[s]ince the end of the decolonization process, [the] claim of a right to use force to further self-determination is no longer put forward by states or writers outside the Middle East'.[83] There certainly is state practice supporting the legitimacy of a 'struggle' in favour of self-determination in a colonial context. Thus, UNGA Resolutions in the 1960s invoke the 'legitimacy' of the 'struggle of peoples under colonial rule to exercise their right to self-determination'.[84] The Friendly Relations Declaration also uses 'struggle' language, omitting further detail to enable consensus among negotiating states.[85] For their part, UNSC resolutions also invoke the legitimacy of 'struggle' for the 'full exercise of the right to self-determination' in resolutions on Portuguese-occupied territories,[86] then-Rhodesia,[87] apartheid South Africa,[88] and South Africa's invasions of Angola.[89]

The word 'struggle' creates an obvious indeterminacy, neither endorsing nor condemning force supporting self-determination.[90] Summers makes this same point, noting that neither the Friendly Relations Declaration nor the UNGA's 1974 definition of aggression

> endorsed an inherent right of peoples to use forcible action in self-determination, referring only to peoples who had been forcibly deprived and action against that forcible deprivation. The nature of the 'resistance' and 'struggle' of those peoples was never specified, although by implication it

83 Gray, "The Conflict in Georgia – 2008", 727.
84 A/RES/2105 (XX) (1965). See also A/RES/2189(XXI), A/RES/2107 (XX) (1965), A/RES/2022 (XX) (1965), A/RES/2184 (XXI) (1966), A/RES/2189 (XXI)
85 Gray, *International Law and the Use of Force*, 71.
86 S/RES/312(1972); S/RES/322(1972).
87 S/RES/326 (1973); S/RES/424 (1978).
88 S/RES/556 (1984); S/RES/557 (1984).
89 S/RES/447(1979).
90 See discussion in Gray, *International Law and the Use of Force*, 69.

> would appear to involve forcible action. A right to resist in those circumstances, though, would appear to be no more than an exercise of the right to self-determination. This, in itself, does not impose any new obligations on states, which already have a duty to refrain from forcible action that deprives peoples of self-determination.[91]

The most likely candidates for customary international law status are, therefore, silent on the legality in the *jus ad bellum* of an armed struggle by national liberation groups. Some UNGA resolutions do go further and qualify the reference to 'struggle' with 'armed'. Thus, various UNGA resolutions in the 1970s and 1980s '[r]eaffirm the legitimacy of the struggle of peoples for their independence, territorial integrity, national unity and liberation from colonial domination, apartheid and foreign occupation by all available means, including armed struggle'.[92] This language is found from 1973 to 1990 in the UNGA's recurring resolution on the 'Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights'.[93] Similar language is found in the 1981 'Declaration on the Inadmissibility of Intervention'.[94]

However, it is doubtful that these references settle the question of the legality of use of force by a national liberation group in self-determination. Certainly, the *jus ad bellum* would be engaged where a state used a pretextual invocation of self-determination to justify a conquest. Otherwise, it generally 'seems to be deliberately neutral on the legality of such use of force' in the context of self-determination.[95] First, the UNGA

91 Summers, ibidem, 376. See also Cassese, *Self-Determination of Peoples: A Legal Reappraisal*, 197.

92 A/RES/36/9 (1981) (Affirmative/Negative/Abstentions: 120/17/9). See also A/RES/34/92G (1979) (125/0/17); A/RES/35/33 (1980) (120/18/4); A/RES/38/36 (1983) (117/0/20).

93 A/RES/3070 (XXVIII) (1973) (Affirmative/Negative/Abstentions: 97/5/28); A/RES/3246 (XXIX) (1974) (107/1/20); A/RES/3382 (XXX) (1975) (99/1/18); A/RES/31/34 (1976) (109/4/24); A/RES/32/14 (1977) (113/3/18); A/RES/33/24 (1978) (92/19/20); A/RES/33/44 (1979) (105/20/16); A/RES/35/35A (1980) (119/18/7); A/RES/36/9 (1981) (120/17/9); A/RES/37/43 (1982) (120/17/6); A/RES/38/17 (1983) (104/16/6); A/RES/39/17 (1984) (121/17/7); A/RES/40/25 (1985) (118/17/9); A/RES/41/101 (1986) (126/18/12); A/RES/42/95 (1987) (126/17/10); A/RES/43/106 (1988) (124/15/15); A/RES/44/79 (1989) (123/15/16); A/RES/45/130 (1990) (113/15/23). See discussion in Higgins, *Regulating the use of force in wars of national liberation: the need for a new regime: a study of the South Moluccas and Aceh*, 70.

94 A/RES/36/103 (1981) (Affirmative/Negative/Abstentions: 120/22/6).

95 Higgins, ibidem, 71.

resolutions invoking armed struggle point to 'legitimacy', an expression that should not automatically be conflated with 'legality'. Second, these resolutions were opposed by a regular minority voting block of Western countries. As observed above, the ICJ has counselled that UNGA resolutions adopted with 'substantial numbers of negative votes and abstentions' may reflect 'a clear sign of deep concern' but 'they still fall short of establishing the existence of an *opinio juris*'.[96] These 'armed struggle' resolutions are not, in other words, analogous to resolutions reached by the consensus such as the Friendly Relations Declaration.[97]

Other analyses confirm this view. Some state statements supported armed struggle in self-defence to colonialism in the *travaux preparatoires* culminating in the Friendly Relations Declaration.[98] However, reviewing the *travaux préparatoires* of UNGA resolutions and state practice generally, Corten finds

> no agreement has ever been reached to transpose the *jus contra bellum* to situations of self-determination. Practice seems to show rather that, even for States that have supported national liberation movements, it has not officially been claimed that the regime set up by UN Charter articles 2(4) and 51 could apply as it stands to situations of self-determination.[99]

Thus,

> the right of peoples to self-determination cannot be construed in a way that detracts from the principle of the non-use of force. A State that violates the right of a people to self-determination is not, for that alone, an aggressor State against which a riposte, including a collective riposte, in self-defence could be made.[100]

From this, Corten concludes 'we remain bound by the rules such as set out in the UN Charter and the major resolutions adopted for interpreting their most relevant provisions', with a *jus cogens* prohibition on use of force

96 Ibidem, 72.
97 See discussion in Higgins, ibidem, 70-71, 77-78. See also Wilson, *International Law and the Use of Force by National Liberation Movements,* 103.
98 Yau, "The Legality of the Use of Force for Self-Determination", 32 at 64.
99 Cortin, above note 82 at 155.
100 Ibidem.

and a *jus cogens* principle of self-determination incapable of derogating one from the other.[101]

Three implications flow from these conclusions. First, they suggest international law contains no 'right to armed struggle', and that it is essentially silent on this issue. Second, these conclusions have a bearing on the question raised next in scenario 8: force used by a state in support of a national liberation movement. Third, they also affect how one evaluates the lawfulness of a *state*'s forcible resistance to the *people*'s forcible resistance to the *state*'s suppression of self-determination. A people denied self-determination cannot claim self-defence. But likewise, as Corten observes, 'one cannot characterise a people as an aggressor [against a state] because it challenges the territorial integrity of a State, or more generally deny it a right to insurrection by invoking Charter article 2(4)'.[102] If so, it follows that a state faced with a forcible reaction to its suppression of the right of self-determination cannot invoke 'self-defence' to justify its further forcible reaction to the people's forcible reaction. In consequence, the abstinence of international law on the 'right to armed struggle' question may have little legal significance. Even in the absence of this right, a state still cannot forcibly repress self-determination.

This position has obvious implications for the Israeli-Palestinian conflict. Hamas's attack on Israel on 7 October 2023 drew new attention to this issue, especially whether the Israeli response could be grounded in self-defence. As has been true repeatedly when states respond with force against non-state actors, some debate has hinged on whether self-defence exists where the attacker is a non-state actor. Even if one accepts that it does (as much post-9/11 state practice now reinforces), the question of self-determination complicates the question in the Palestinian context. Indeed, it produces a 'down the rabbit hole' quality, given the *sui generis* qualities of the Israeli-Palestinian conflict.[103] For instance: In the absence of a transboundary aspect implicating more than one state, does Article 2(4) of the UN Charter apply and must Israel's forcible reaction have any *jus ad*

101 Ibidem.

102 Ibidem.

103 For examples of the debate on the 'self-defence' question, see Milanovic, ibidem; Shany, Cohen, "International Law 'Made in Israel' v. International Law 'Made for Israel'"; Tsagourias, "Israel's Right to Self-Defence Against Hamas"; Miliani, "How does the (il)legality of the Israeli occupation inform and is informed by the doctrine of self-defence?"; Ulfstein, "Does Israel have the right to self-defence – and what are the restrictions?"; Heinze, „International Law, Self-Defense, and the Israel-Hamas Conflict".

bellum justification? Or does Israel's use of force require this justification because of the *de facto* transboundary element stemming from Palestine's status as a state under the declaratory theory of statehood? Also, if Israel has a right to self-defence, is the lawful scope of that self-defence right then narrowed because of what the ICJ has characterized[104] as its wrongful suppression of self-determination? Indeed, as Corten's conclusion implies, does Israel have no right to use force in response to resistance to its suppression of Palestinian self-determination? But would its response to Hamas's armed attack be exempted from this question on the existence or scope of self-defence if Hamas is not reasonably the entity representing the people exercising the right to self-determination? Even if Hamas did have this status, would Israel be entitled to respond forcibly because Hamas's force was directed beyond the Israeli state (responsible in international law for observing self-determination) and reached civilians?

There may be definitive claims by states, scholars and commentators purporting to answer these questions.[105] More often, there may be tacit assumptions underlying different opinions on the 'rightness' of force in the Israeli-Hamas conflict. Opinion is clearly partitioned between those who believe a 'right of armed struggle' exists and those who do not. There is a similar divide between those who conclude that Israel has a right to self-defence and those who do not. However, the indeterminate state of the *jus ad bellum* in the context of self-determination makes any certain conclusion on any of these questions an expression of preferences. It is not surprising, therefore, that much of the post-7 October legal discussion has now focused instead on *jus in bello* – a body of rules indisputably applicable to the armed conflict. The precise content of those rules and their application to contested facts generates their own legal debates. Still, it is unambiguously the case that, regardless of the answers to any of the *jus ad bellum* questions, the *jus in bello* would apply to both state and non-state parties to the conflict. Thus, whatever the 'rightness' of any use of force, conduct in an armed conflict must still comply with international humanitarian law, including

104 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136; *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, I.C.J. Reports 2024 19 July, General List No. 186.

105 For a critique of this tendency, see Milanovic, ibidem.

its rules outlawing the directing of attacks at civilians or civilian objects, disproportionate attacks, hostages and human shields.[106]

3.8. Force Used by an Intervening State in Support of a National Liberation Movement in Scenario 7

If scenario 7 represents the peak of indeterminacy, scenario 8 exists in a quieter zone of uncertainty. Addressing this scenario, Corten observes that a people have a 'right to ask for and receive support from third States 'in accordance with the principles of the Charter ...'[107] At the same time, '[n]o exception to or derogation from the principle prohibiting giving military aid to armed bands has, however, been admitted either in the texts, or in practice, or in case law'.[108] Put another way, this scenario cannot be distinguished from scenario 6 above, in which a state intervenes forcibly to support a non-state actor against a government.

Still, it is possible to find states asserting a right to intervene in support of a national liberation movement. It is also possible to find other states disputing this intervention – and indeed, claiming a right to self-defence against an intervening state.[109] State practice reflected in UNGA resolutions is also ambiguous. UNGA Resolution 3314 (1974), adopted by consensus and defining 'aggression', is sometimes used as a starting point in scoping wrongful uses of force (amounting to an armed attack) in the *jus ad bellum*. Article 3 includes as 'aggression': '[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein'. The list to which this provision refers identifies various uses of force, including '[t]he invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack'.[110]

106 See, e.g., International Committee of the Red Cross (ICRC), Rules of Customary International Humanitarian Law (2005).

107 Cortin, above note 82 at 155.

108 Ibidem. See also O'Connell, ibidem, 870 (considering the same question and concluding '[r]eceiving support is more appropriately considered diplomatic or economic measures, rather than military support.')

109 See examples in Higgins, ibidem, 84-85.

110 A/RES/3314 (XXIX) (1974).

The Resolution contains, however, a caveat:

> Nothing in this Definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination: nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.[111]

This passage might suggest that there is something special about state intervention in support of a 'people'. Indeed, in *Nicaragua*, the ICJ seemed to distinguish (obliquely) its conclusions condemning forcible intervention in support of a non-state actor to circumstances outside the 'process of decolonization'.[112]

Still, it does not follow that 'support' in this context may involve use of force. Notably, various UNGA resolutions in the 1960s invited 'all States to provide material and moral assistance to the national liberation movements in colonial Territories'.[113] Such appeals to third states to provide moral and 'material' support recur regularly.[114] For their part, UNSC resolutions concerning, e.g., apartheid-era South Africa urge third states 'to assist the oppressed people of South Africa in their legitimate struggle for the full exercise of the right to self-determination'.[115]

This position is repeated in more universal terms in the UNGA's Friendly Relations Declaration. It asserts that

> [i]n their actions against, and resistance to, such forcible action [suppressing self-determination] in pursuit of the exercise of their right to self-determination,

111 Ibidem, Article 7.

112 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment. I.C.J. Reports 1986, p. 14 at para 206. This position was rejected in the dissenting opinion of Justice Schwebel, at para 179 et seq.

113 A/RES/2105 (XX) (1965). See also A/RES/2189(XXI), A/RES/2107 (XX) (1965), A/RES/2022 (XX) (1965), A/RES/2184 (XXI) (1966), A/RES/2189 (XXI).

114 See, e.g., A/RES/2074 (XX) (1965), A/RES/2022 (XX) (1965), A/RES/2189 (XXI).

115 S/RES/556 (1984).

> [dependent] peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.[116]

Exactly which way these purposes and principles of the Charter cut, and whether support can include force, is left unstated. 'Support' cannot be assumed, therefore, to amount to military intervention or other forms of assistance constituting a use of force. This is, in fact, the position taken by Justice Schwebel in dissenting in *Nicaragua* to the Court's oblique distinction noted above:

> In contemporary international law, the right of self-determination, freedom and independence of peoples is universally recognized; the right of peoples to struggle to achieve these ends is universally accepted; but what is not universally recognized and what is not universally accepted is any right of such peoples to foreign assistance or support which constitutes intervention. That is to say, it is lawful for a foreign State or movement to give to a people struggling for self-determination moral, political and humanitarian assistance; but it is not lawful for a foreign State or movement to intervene in that struggle with force or to provide arms, supplies and other logistical support in the prosecution of armed rebellion. This is true whether the struggle is or is proclaimed to be in pursuance of the process of decolonization or against colonial domination.[117]

This discussion supports Corten's observations, cited in scenario 7 above, that the general rules on *jus ad bellum* remain intact.[118] If so, then a state may not intervene forcibly in support of a national liberation movement without engaging the Article 2(4) prohibition. Further, as discussed in scenario 7, a theory of collective self-defence built on the notion that a colonial or subjugated people enjoy a right to self-defence would overstate the law.

116 A/RES/2625 (XXV) (1970).

117 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment. I.C.J. Reports 1986, p. 14, Dissenting Opinion of Justice Schwebel at para 180.

118 See also Summers, ibidem, 378 (noting efforts by states supporting force in assistance of self-determination to create ambiguity on this issue in the Friendly Relations Declaration and the 1974 definition of aggression, but conclude that it is 'certainly questionable whether the Declaration or the Definition provide any coherent *opinio juris* on this matter, much less sufficient intent to effectively amend article 2(4).'

4. Conclusion

In sum, the legal standards on the use of force applicable in a self-determination context remain a source of contention. This is not surprising since the individual content of both areas of the law remains contentious. A close parsing of state practice in several different scenarios triangulates some answers. As the article suggests, there are different scholarly views on many issues in several of these scenarios. This is especially true in relation to scenario 7, where international law's indeterminacy permits a sort of Rorschach test for political opinion. The parsing conducted in this article does suggest 'best answers'. I summarize these 'best answers' as follows:

A colonial or occupying state may not use force to suppress self-determination in a colony or territory subject to alien subjugation.

A third state may not use force to support a colonizing or occupying state in scenario 1.

A state may not use force to recover contiguous territory administered by a colonizing state.

The *jus ad bellum* generally does not apply to force used by a government or non-state actor in an internal conflict outside of a colonial or alien subjugation context

An intervening state supporting the government of a state in scenario 4 may use force with that government's consent.

An intervening state may not use force to support the non-state actor against a government in scenario 4.

International law does not create a 'right to armed struggle' for a national liberation movement in a territory subject to colonial or alien subjugation. Nor does it make that movement an aggressor for using force. In other words, international law does not resolve questions of the 'rightness' of recourse to force in this scenario. The means and methods of armed conflict are, however, regulated by the *jus in bello*. While a national liberation movement may benefit from privileged belligerent (and, therefore, prisoner of war) status under Additional Protocol I to the Geneva Conventions if it applies, all combatants are bound by rules of international humanitarian law governing such things as directing attacks at civilians or civilian objects, disproportionate attacks, hostages and human shields.

An intervening state may not use force to support a national liberation movement in scenario 7.

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