



Intervention by invitation and collective self-defence: two sides of the same coin?

Laura Visser

To cite this article: Laura Visser (2020) Intervention by invitation and collective self-defence: two sides of the same coin?, *Journal on the Use of Force and International Law*, 7:2, 292-316, DOI: [10.1080/20531702.2020.1834767](https://doi.org/10.1080/20531702.2020.1834767)

To link to this article: <https://doi.org/10.1080/20531702.2020.1834767>



© 2020 The Author(s). Published by Informa UK Limited, trading as Taylor & Francis Group



Published online: 26 Oct 2020.



Submit your article to this journal [↗](#)



Article views: 1330



View related articles [↗](#)



View Crossmark data [↗](#)

Intervention by invitation and collective self-defence: two sides of the same coin?

Laura Visser *

Faculty of Law, Maastricht University, Maastricht, The Netherlands


ABSTRACT

Intervention by invitation and collective self-defence are often dealt with as two distinct justifications to the prohibition of the use of force, thus two separate reasons for states to use force lawfully. Upon closer scrutiny, however, the two concepts appear to be quite similar as both deal with a situation where a state invites/requests the military assistance of another state. This article analyses both concepts and their criteria. It subsequently determines whether they are substantially different or in fact two sides of the same coin.

KEYWORDS Intervention by invitation; collective self-defence; use of force against non-state actors; state sovereignty

1. Introduction

Imagine the following scenario: a state finds itself under attack but cannot or does not want to cope with the attack by itself, and so invites another state for assistance. Would these be considered to be situations of collective self-defence or intervention by invitation? As these two notions of public international law seem quite alike, it can be a difficult question to answer. Yet, despite this seemingly considerable overlap, the two concepts of intervention by invitation and collective self-defence are usually dealt with separately.¹ This article, however, analyses both and subsequently compares and

CONTACT Laura Visser  laura.visser@maastrichtuniversity.nl

*All websites accessed 31 July 2020.

¹See for a separate discussion on intervention by invitation and collective self-defence, Christine Gray, *International Law and the Use of Force* (Oxford University Press, 4th edn 2018) Chapter 3 and Chapter 4, respectively; Christian Henderson, *The Use of Force and International Law* (Cambridge University Press, 2018) Chapter 9 and Chapter 6, section 5, respectively. See for a simultaneous discussion on both concepts, Claus Kreß, 'The Fine Line Between Collective Self-Defence and Intervention by Invitation: Reflections on the Use of Force against "IS" in Syria', *Just Security* (17 February 2015) www.justsecurity.org/2015/02/17/clauss-krebs-force-isil-syria/; Masoud Zamani and Majid Nikouei, 'Intervention by Invitation, Collective Self-Defence and the Enigma of Effective Control' (2017) 16 *Chinese Journal of International Law* 663; Irène Couzigou, 'Respect for State Sovereignty: Primacy of Intervention by Invitation over the Right to Self-Defence' (2019) 79 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 695.

differentiates the two. Differences could potentially lie in the nature of the attacking party (another state or a non-state actor) or the requirement of an armed attack. Most interestingly, the territory in which the defensive action takes place could differ too as the force is used in the territory of either the attacking state or the attacked state.² This article therefore determines whether substantial differences exist between intervention by invitation and collective self-defence or whether they are actually two sides of the same coin, i.e. two things that seem different but are in fact very closely related.³ The implications of the result of this comparison are also analysed.

The comparison between the two concepts is rather essential. In some conflicts, both intervention by invitation and collective self-defence are invoked by the intervening states.⁴ Yet, it remains unclear whether that is even a possibility under public international law, and which concept would be legally correct to invoke. By thoroughly examining and comparing the two concepts, this article makes clear when each concept is applicable and thus which would be the correct notion for states to invoke in a particular situation. This article also demonstrates that the traditional definition of intervention by invitation is too narrow and it should allow for more situations to be caught by it. Moreover, while most scholars presumably have an opinion on this topic, it is not often written down in academic scholarship. It is therefore a topic worth further investigation.

As this comparison is hardly ever explicitly made, it necessitates starting with each concept's foundation. Despite the fact that certain elements may be uncontroversial, to make an all-encompassing comparison, these are still necessary to discuss. Section 2 clarifies the concept of intervention by invitation. It examines its meaning by comparing different authoritative definitions and distils its criteria. Section 3 does the same for collective self-defence. It starts by explaining the main criterion for self-defence, i.e. armed attack. It continues by illustrating the additional requirements of collective self-defence and subsequently the location where self-defence can be invoked. Section 4 subsequently compares the two concepts. Several similarities are revealed and three key differences are identified. It additionally analyses the implications of the result of this comparison. Section 5 concludes.

2. Intervention by invitation

Even though intervention by invitation is not mentioned in the UN Charter, it is considered a recognised form of using force in international

²See Kreß (n 1); Couzigou (n 1) 695.

³Cambridge Dictionary Online, <https://dictionary.cambridge.org/dictionary/english/be-two-sides-of-the-same-coin>.

⁴See, e.g. the Saudi-led intervention in Yemen, Tom Ruys and Luca Ferro, 'Weathering the Storm: Legality and Legal Implications of the Saudi-led Military Intervention in Yemen' (2016) 65 *International and Comparative Law Quarterly* 61.

relations⁵ and many scholars treat it as such.⁶ Disagreements, however, exist as to the exact definition,⁷ scope and criteria of the concept.⁸

The conclusion that an intervention by invitation is legal is derived from the fact that the state in the territory of which the intervention takes place has consented to it. This requesting state has itself invited the intervening state to assist it, which falls within the scope of its sovereignty.⁹ The International Court of Justice (hereinafter: the Court) has accepted this conclusion in the *Nicaragua* case, as it stated:

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.¹⁰

Even though the Court invokes the principle of non-intervention here, the parallel with the prohibition of the use of force is evident as every use of force is also deemed to constitute an intervention.¹¹ The Court thus clearly accepted the possibility of a government requesting military

⁵UN General Assembly Resolution 3314 (XXIX), *Definition of Aggression*, UN Doc A/Res/29/3314 (14 December 1974), Article 3(e), from which it appears that a use of force that stays within the limits of the provided consent is legal (Article 8 *bis* (2)(e) of the Rome Statute of the International Criminal Court, which defines the crime of aggression, also contains this definition); UNSC Res 387, UN Doc S/RES/387 (31 March 1976) preamble, where reference is made to 'the inherent and lawful right of every State, in the exercise of its sovereignty to request assistance from any other State'; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (merits) [1986] ICJ Rep 14, 126, para 246, where the Court determined an intervention based on the request of the government allowable; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (judgment) [2005] ICJ Rep 168, 196–9, paras 42–54, where the Court focussed on when the DRC had withdrawn its consent rather than on whether consent for such a use of force can be provided in the first place.

⁶Louise Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government' (1986) 56 *British Yearbook of International Law* 189, 191; Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing, 2010) 253–4; Karine Bannelier and Theodore Christakis, 'Under the UN Security Council's Watchful Eyes: Military Intervention by Invitation in the Malian Conflict' (2013) 26 *Leiden Journal of International Law* 855, 860; Gregory H Fox, 'Intervention by Invitation' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015) 816, 816; Tom Ruys and Ferro (n 4) 79–80; Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, 6th edn 2017) 126; International Law Association, Sydney Conference, *Final Report on Aggression and the Use of Force* (2018) 18; Henderson (n 1) 349.

⁷Lieblich has called this a 'significant challenge', see Eliav Lieblich, *International Law and Civil Wars: Intervention and Consent* (Routledge, 2013) 10.

⁸For example, concerning the question of who can provide valid consent within a state and whether such an intervention is possible during a civil war. For these issues, see generally Fox (n 6) 816ff; Erika de Wet, 'The Modern Practice of Intervention by Invitation in Africa and its Implications for the Prohibition of the Use of Force' (2015) 26 *European Journal of International Law* 979; Ruys and Ferro (n 4) 81ff; Henderson (n 1) 349ff.

⁹See UN Doc S/RES/387 (n 5) preamble.

¹⁰See *Nicaragua* (n 5) 126, para 246.

¹¹See *Nicaragua* (n 5) 107–8, para 205; Maziar Jamnejad and Michael Wood, 'The Principle of Non-Intervention' (2009) 22 *Leiden Journal of International Law* 345, 348–9, 359; Marcelo Kohen, 'The Principle of Non-Intervention 25 Years after the *Nicaragua* Judgment' (2012) 25 *Leiden Journal of International Law* 157, 161; Lieblich (n 7) 55–6.

assistance. That is to say, an intervention by invitation is legal as long as the invitation comes from the government and not from the opposition.¹²

To carry out a detailed analysis in this article, the concept of intervention by invitation must be explained by having its definition and criteria determined. These will be analysed in turn. While these elements may be reasonably uncontroversial, the criteria are used to make the comparison and should therefore be properly examined. Furthermore, the comparison shows that the definition of intervention by invitation should be modified and have a broader scope than traditionally assumed.

2.1. Defining intervention by invitation

To clarify intervention by invitation, this article relies on two definitions from authoritative sources.¹³ The first is the definition provided by Georg Nolte in the *Max Planck Encyclopedia of Public International Law*.¹⁴ The second definition comes from a Resolution of the *Institut de Droit International* (hereinafter: IDI).¹⁵

Nolte defines intervention by invitation as follows: ‘military intervention by foreign troops in an internal armed conflict at the invitation of the government of the State concerned’.¹⁶ The IDI defines it in its 2011 Resolution as ‘direct military assistance by the sending of armed forces by one State to another State upon the latter’s request’.¹⁷ It continues by stating that ‘[t]he objective of military assistance is to assist the requesting State in its struggle against non-State actors or individual persons within its territory’.¹⁸

Based on these two definitions, common denominators can be identified to clarify intervention by invitation. Evidently, one state through its government requests another state to assist it. The reason for the invitation is that the requesting state is confronted with a non-state actor, perhaps in the form of an internal armed conflict. The intervention is in fact a military one, as foreign troops are deployed into the requesting state’s territory and military assistance is provided. The intervention is thus actually forcible in nature and can therefore be classified as a use of force. The next section examines whether these common denominators actually form the criteria for intervention by invitation.

¹²This is not to ignore the academic debate on interventions in civil war, which is discussed further in subsection 2.2.

¹³Max Planck Encyclopedia of Public International Law, about, [https://opil.ouplaw.com/page/About%20\(EPII\)/about](https://opil.ouplaw.com/page/About%20(EPII)/about); *Institut de Droit International* (IDI), About the Institute, www.idi-iil.org/en/a-propos.

¹⁴Georg Nolte, ‘Intervention by Invitation’, *Max Planck Encyclopedia for Public International Law* (2011) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1702?rkey=JZexuR&result=1&prd=MPL>.

¹⁵*Institut de Droit International* (IDI) Resolution Session of Rhodes 2011, Tenth Commission, ‘Present Problems of the Use of Force in International Law – Sub-Group C – Military Assistance on Request’.

¹⁶See Nolte (n 14) para 1.

¹⁷See IDI Resolution 2011 (n 15) Article 1(a). This definition is also used by De Wet (n 8) 980.

¹⁸See IDI Resolution 2011 (n 15) Article 2(2).

2.2. The criteria for intervention by invitation

Although there is no clear consensus on the criteria for an intervention by invitation, some potential requirements can be distilled from the provided definitions. More specifically, the factors to be considered are the internal situation in the requesting state (an internal armed conflict or civil war), the attacking party (a non-state actor), and the question of who can provide consent and under what circumstances (the government and the validity of the consent). Moreover, the IDI Resolution makes explicit reference to the requesting state's territory as the place where the assistance is provided.

Concerning the first potential criterion of the internal situation in the requesting state, Nolte mentions an internal armed conflict. It is unclear whether or not this is actually a requirement or only the typical situation in which an intervention by invitation occurs. The IDI's definition merely mentions a struggle taking place between the state and a non-state actor within the requesting state's territory. This resembles Nolte's reference to an internal armed conflict, which by its definition is an armed conflict between a state and non-state actor.¹⁹ Therefore, it is reasonable to make the assumption that an intervention by invitation typically takes place during an internal armed conflict, or even perhaps may only take place during such a conflict (at least for the intervention to be defined as an intervention by invitation). This is not meant to ignore the important scholarly debate on whether an intervention by invitation is allowed to occur during a civil war,²⁰ nor to exclude other possible situations in which an intervention by invitation could occur, but merely to signal that this is the typical situation for an intervention by invitation. In other words, for an intervention by invitation to be named and classified as such, it would typically occur during an internal armed conflict. This is also supported by state practice as

¹⁹It is held to be synonymous with the term non-international armed conflict, which is defined as a conflict between a state and a non-state actor in Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), 8 June 1977, Article 1(1).

²⁰See Corten (n 6) 290, 301; Bannelier and Christakis (n 6) 860–4; Raphaël Van Steenberghe, 'The Alleged Prohibition on Intervening in Civil Wars Is Still Alive after the Airstrikes against Islamic State in Iraq: A Response to Dapo Akande and Zachery Vermeer', *EJIL:Talk!* (12 February 2015) www.ejiltalk.org/the-alleged-prohibition-on-intervening-in-civil-wars-is-still-alive-after-the-airstrikes-against-islamic-state-in-iraq-a-response-to-dapo-akande-and-zachary-vermeer; Karine Bannelier-Christakis, 'Military Interventions against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent' (2016) 29 *Leiden Journal of International Law* 743; Antonello Tancredi, 'A "Principle-Based" Approach to Intervention by Invitation in Civil Wars' (2019) 79 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 659. See generally Fox (n 6) 816–40; Ruys and Ferro (n 4) 86–9; Gray (n 1) 75–119; Henderson (n 1) 361–71; Veronika Bilkova, 'Reflections on the Purpose-Based Approach' (2019) 79 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 681. See also *Institut de Droit International (IDI) Resolution Session of Wiesbaden 1975*, Eighth Commission, 'The Principle of Non-Intervention in Civil Wars', Articles 1 and 2(1); Georg Hafner (Rapporteur), *Present Problems of the Use of Force in International Law – Sub-group : Intervention by Invitation*, IDI 10th Commission, Naples Session (2009) www.idi-ii.org/app/uploads/2017/06/Hafner.pdf, 365.

many, if not all, recent interventions by invitation have taken place during a civil war. Examples include the French intervention in Mali,²¹ the Russian intervention in Syria,²² the Saudi-led intervention in Yemen,²³ and the US-led intervention in Iraq.²⁴ It is therefore concluded for now that an intervention by invitation is lawful, even in a situation of civil war, as long as the invitation comes from the government.²⁵ The existence of a civil war in a state which invites outside assistance is thus neither a requirement nor an inhibition for the intervention by invitation, but it does seem to be the typical situation in which such an intervention occurs.

Regarding the second criterion, the attacking party must be a non-state actor. The 2011 IDI Resolution makes that explicitly clear,²⁶ while Nolte's definition implies this requirement by using the term 'internal armed conflict', which by definition takes place between a state and a non-state actor.²⁷ This criterion can also be derived from state practice. In Mali, the intervention took place against the Toareg/MLNA;²⁸ in Syria, against ISIS and other factions opposing the government;²⁹ and in Iraq, against ISIS.³⁰ This criterion seems quite typical for an intervention by invitation: the state is struggling with a non-state actor on its territory and invites another state to assist it in this struggle. The non-actor typically challenges the state; often it tries to overthrow the government. The term 'intervention by invitation' has – to the knowledge of this author – never been used to define a situation where one state is directly attacked in its own territory by another state and subsequently invites a third state to assist it. The comparison made in section 4 proves that this situation should in fact also be included in the definition.

As for the third criterion regarding consent, following the *Nicaragua* case it has already become apparent that the invitation must come from the

²¹See Bannelier and Christakis (n 6).

²²Laura Visser, 'Russia's Intervention in Syria', *EJIL:Talk!* (25 November 2015) www.ejiltalk.org/russias-intervention-in-syria.

²³See Ruys and Ferro (n 4).

²⁴See Bannelier-Christakis (n 20).

²⁵Antonio Tanca, *Foreign Armed Intervention in Internal Conflict* (Martinus Nijhoff Publishers, 1993) 26; David Wippman, 'Military Intervention, Regional Organizations, and Host-State Consent' (1996) 7 *Duke Journal of Comparative and International Law* 209, 209; Christopher J Le Mon, 'Unilateral Intervention by Invitation in Civil Wars: The Effective Control Test Tested' (2003) 35 *New York University Journal of International Law and Politics* 741, 742, 791; Dapo Akande and Zachery Vermeer, 'The Airstrikes against Islamic State in Iraq and the Alleged Prohibition on Military Assistance to Governments in Civil Wars', *EJIL:Talk!* (2 February 2015) www.ejiltalk.org/the-airstrikes-against-islamic-state-in-iraq-and-the-alleged-prohibition-on-military-assistance-to-governments-in-civil-wars; De Wet (n 8) 998; Erika de Wet, 'Reinterpreting Exceptions to the Use of Force in the Interests of Security: Forcible Intervention by Invitation and the Demise of the Negative Equality Principle' (2017) 111 *American Journal of International Law Unbound* 307, 311; Dinstein (n 6) 125–7.

²⁶See IDI Resolution (n 16) Article 2(2).

²⁷See Additional Protocol II (n 19) Article 1(1); Nolte (n 14) para 1.

²⁸See Bannelier and Christakis (n 6) 856.

²⁹See Bannelier-Christakis (n 20) 765–6.

³⁰See *ibid*, 750.

government.³¹ States are not allowed to act based on an invitation from the opposition.³² Whenever states supported an opposition group, they did so covertly, seemingly fully aware of its illegality.³³ Nolte calls for ‘demonstrable consent by the highest available governmental authority’,³⁴ and the IDI Resolution for ‘a request reflecting the free expression of will of the requesting State’.³⁵ This is in line with the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA)³⁶ where Article 20 requires valid consent by a state. The Commentary to Article 20 ARSIWA clarifies that the consent ‘must be freely given and clearly established’³⁷ and it could be ‘vitiating by error, fraud, corruption or coercion’.³⁸ Furthermore, the consent must be provided by someone authorised by the state.³⁹

Lastly, and compelling for the current analysis,⁴⁰ the 2011 IDI Resolution makes explicit reference to the location where the intervention takes place, namely within the territory of the requesting state.⁴¹ This is relatively easy to comprehend, as a state can consent to foreign troops being present on its own territory.⁴²

To conclude, intervention by invitation is not clearly defined and its criteria are not always clearly portrayed. Yet, it would appear that it concerns a situation where one state invites another state to use force in its territory where the requesting state is struggling against a non-state actor. The invitation needs to come from the government and it needs to constitute valid consent. The internal situation in the requesting state does not need to be regarded as an internal armed conflict or civil war nor is an intervention by invitation prohibited in such a situation.

³¹See *Nicaragua* (n 5) 126, para 246.

³²See Hafner (n 20) 371; Corten (n 6) 260–1; Max Byrne, ‘Consent and the Use of Force: An Examination of “Intervention by Invitation” as a Basis for US Drone Strikes in Pakistan, Somalia and Yemen’ (2016) 3 *Journal on the Use of Force and International Law* 97, 99–102; Malcolm N Shaw, *International Law* (Cambridge University Press, 8th edn 2017) 878–80; Dinstein (n 6) 126; Gray (n 1) 108.

³³See Gray (n 1) 77–9, 108–13.

³⁴See Nolte (n 14) para 12, see also para 23.

³⁵See IDI resolution 2011 (n 15) Article 1(b).

³⁶Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), UNGA Res A/RES/56/83 (12 December 2001).

³⁷International Law Commission, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries’ (2001) Vol II (Part Two) *Yearbook of the International Law Commission* 31, 73, para 6.

³⁸*Ibid.*

³⁹*Ibid.*, 73, para 4. For a discussion on notions such as consent and effective control, see Doswald-Beck (n 6); Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (Cambridge University Press, 2000); Le Mon (n 25); Brad R. Roth, ‘Secessions, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine’ (2010) 11 *Melbourne Journal of International Law* 393; Stefan Talmon, ‘Recognition of Opposition Groups as the Legitimate Representative of a People’ (2013) 12 *Chinese Journal of International Law* 219; Several authors, ‘Symposium: Recognition of Governments and Customary International Law’ (2014) 108 *American Journal of International Law Unbound* 199; Letizia Lo Giacco, ‘“Intervention by Invitation” and the Construction of the Authority of the Effective Control Test in Legal Argumentation’ (2019) 79 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 663.

⁴⁰To be discussed further in section 4.

⁴¹See IDI Resolution 2011 (n 15) Article 2(2).

⁴²See ARSIWA Commentary (n 37) 85, para 6.

3. Collective self-defence

To carry out a detailed analysis in this article, it is also necessary to explore the concept of collective self-defence. The main criterion of self-defence, i.e. armed attack, is explored first. As this article does not focus on the individual right of self-defence nor on self-defence in general; not all criteria are explained in detail.⁴³ Rather, the focus lies on the requirement of armed attack. The reason becomes clear in section 4 when the comparison is made between the two concepts discussed in this article. Next, the additional requirements of collective self-defence are investigated. The section ends with the territory in which defensive action is taken.

3.1. Main criterion for self-defence: armed attack

Article 51 UN Charter contains a ‘threshold requirement’⁴⁴ as a use of force under the right of self – defence is only allowed if an armed attack occurs. Anything failing to meet that threshold cannot lead to lawful defensive actions involving the use of force.⁴⁵ These two seemingly simple words have caused significant debate among international legal scholars.⁴⁶ Rather than going into this entire debate, the focal point in this article is the author of the armed attack and the contemporary question of whether a non-state actor is able to conduct an armed attack, thereby triggering the right of self-defence.

According to the traditional interpretation of self-defence and Article 51, only a state is able to conduct an armed attack in order to trigger the right of self-defence.⁴⁷ This position is maintained by the Court in, for example, the *Wall* advisory opinion.⁴⁸ As an armed attack requires an external/cross-border element,⁴⁹ it is either conducted by another state or it is conducted

⁴³See for the criteria Article 51 UN Charter: *Nicaragua* (n 5) 94, para 176; *Legality of the Threat or Use of Nuclear Weapons* (advisory opinion) [1996] ICJ Rep, 226, 245, para 41; *Oil Platforms (Islamic Republic of Iran v United States of America)* (judgment) [2003] ICJ Rep 161, 183, para 43, 186–7, para 51, 196–7, paras 73–4; *DRC v Uganda* (n 5) 223, para 147. In the *Oil Platforms* case, 198, para 76, the Court even stated that ‘[t]he conditions for the exercise of the right of self-defence are well settled’, thereby referring to proportionality and necessity.

⁴⁴See Dinstein (n 6) 205.

⁴⁵See *Nicaragua* (n 5) 110–1, para 211; *DRC v Uganda* (n 5) 223–4, para 148; Eritrea Ethiopia Claims Commission, Partial Award, *Jus ad Bellum*, 4, para 11; Dinstein (n 6) 205; Henderson (n 1) 208.

⁴⁶Tom Ruys, ‘Armed Attack’ and Article 51 of the UN Charter (Cambridge University Press, 2010); T D Gill, ‘When Does Self-Defence End?’ in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015) 737; Kimberly N Trapp, ‘Can Non-State Actors Mount an Armed Attack?’ in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015) 679; Dinstein (n 6) 197–327; Gray (n 1) 134; Henderson (n 1) 207–26.

⁴⁷See Trapp (n 46) 679; Henderson (n 1) 208.

⁴⁸*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (advisory opinion) [2004] ICJ Rep, 136, 194, para 139. The Court refused to rule on this matter further in *DRC v Uganda*, as it was not considered relevant for the case, see *DRC v Uganda* (n 5) 223, para 147. See also Shaw (n 32) 864.

⁴⁹See Ruys and Ferro (n 4) 72.

by a non-state actor but can be attributed to another state (through effective control or substantial involvement).⁵⁰

Notwithstanding the traditional analysis, the alternative interpretation is gaining ground among legal scholars and could reasonably be seen as the current majority opinion.⁵¹ It holds that since Article 51 does not refer to the author of the armed attack, it could very well be conducted by a non-state actor.⁵² Furthermore, the words 'an attack by any state' were dropped from draft versions of the article⁵³ and after the 9/11 attacks the right of self-defence for the US against a non-state actor was widely accepted and reaffirmed in Security Council resolutions.⁵⁴

Nevertheless, accepting that a non-state actor can conduct an armed attack to trigger the right of self-defence for the attacked state is one thing;⁵⁵ accepting that this justifies attacking the state territory where the non-state actor is located is quite another. This predicament is caused by the need for an external component of the armed attack. This presupposes that the non-state actor is operating outside the attacked state's territory and thus from a third state's territory.⁵⁶ In order to attack the non-state actor, the attacked state needs to use force in and invade another sovereign state. This appears contrary to international law, as that other state's sovereignty, right to non-intervention, and right to non-use of force would be violated.⁵⁷ Christian Henderson has termed this the 'state sovereignty barrier' or simply 'sovereignty barrier'.⁵⁸

⁵⁰See Shaw (32) 862; Dinstein (n 6) 242; Henderson (n 1) 209.

⁵¹See Ruys (n 46) 485–93; Dinstein (n 6) 241; Gray (n 1) 206–7; Henderson (n 1) 210. See in support of this alternative interpretation Elisabeth Wilmshurst, 'The Chatham House Principles of International Law on the Use of Force in Self-Defence' (2006) 55 *International and Comparative Law Quarterly* 963; Lindsay Moir, 'Action Against Host States of Terrorists Groups' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015) 720; Raphaël van Steenberghe, 'The Law of Self-Defence and the New Argumentative Landscape on the Expansionists' Side' (2016) 29 *Leiden Journal of International Law* 43.

⁵²*Wall* (n 48) separate opinion of Judge Higgins 215, para 33; *ibid*, separate opinion of Judge Kooijmans 230, para 35; *ibid*, separate opinion of Judge Buergenthal 242, para 6; Dinstein (n 6) 241, 248; Henderson (n 1) 208–9. One can wonder whether this argument is really convincing. If the prohibition of the use of force as contained in Article 2(4) only applies between states, then logically its exceptions also only apply between states. Nevertheless, using force against a non-state actor would then fall outside the scope of Article 2(4) so neither the prohibition nor the exception of self-defence apply as such. Thus, the conclusion would be the same: the non-state actor can be attacked. This leaves out the question of whether the territory of the state on which the non-state actor finds itself can be attacked. See also Corten (n 6) 126ff; André De Hoogh, 'Restrictivist Reasoning on the *Ratione Personae* Dimension of Armed Attacks in the Post 9/11 World' (2016) 29 *Leiden Journal of International Law* 19, 22–3.

⁵³See Trapp (n 46) 684–5, analysing the *travaux préparatoires* of the UN Charter.

⁵⁴UN Security Council Resolution 1368 (2001), preamble; UN Security Council Resolution 1373 (2001), preamble. See also *DRC v Uganda* (n 5) separate opinion of Judge Simma 337, para 11; Dinstein (n 6) 245–7.

⁵⁵It is at times questioned whether attacks by non-state actors, with the obvious exception of the 9/11 attacks, are actually grave enough to meet the threshold of an armed attack, see Shaw (n 32) 865; Henderson (n 1) 310.

⁵⁶See Dinstein (n 6) 244–5; Henderson (n 1) 211.

⁵⁷See Gray (n 1) 210, 226.

⁵⁸See Henderson (n 1) 309. He tries to remove this barrier in Chapter 8, 308–46. Henderson first coined this term in Christian Henderson, 'Non-State Actors and the Use of Force' in Math Noortmann, August Reinisch and Cedric Ryngaert (eds), *Non-State Actors in International Law* (Hart, 2015) 77.

Christine Gray concluded that state practice after 9/11 of invoking self-defence against non-state actors has been ‘limited and unclear’⁵⁹ due to this barrier. Kimberly Trapp affirmed that an armed attack by a non-state actor that cannot be attributed to a state is ‘at the fault line’⁶⁰ of the prohibition of the use of force and the right of self-defence.

Certainly, the sovereignty barrier is removed when the territorial state where the non – state actor is located can be held responsible for the actions of the non-state actor or for the continued presence of the non-state in its territory in such a way that would justify using force. This scenario rarely transpires, however. Another method employed to overcome the sovereignty barrier is by invoking the elusive doctrine of unwilling or unable.⁶¹ This is founded on the principle of international law that it is ‘every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States’.⁶² Some states have invoked this doctrine in their letters to justify their interventions in Syria,⁶³ but it does not seem to be accepted by many states or by academic literature just yet.⁶⁴ The issue of the sovereignty barrier thus remains unsettled.⁶⁵ As a thorough examination of the topic is necessary to resolve it, this article does not attempt to resolve it, merely to raise it in the current analysis.

3.2. Additional criteria for collective self-defence

All requirements for individual self-defence are also applicable to collective self-defence.⁶⁶ This includes the need for an armed attack, as the Court made

⁵⁹See Gray (n 1) 226.

⁶⁰See Trapp (n 46) 696.

⁶¹Ashley Deeks, ‘“Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self-Defense’ (2012) 52 *Virginia Journal of International Law* 483; Olivier Corten, ‘The “Unable and Unwilling Test”: Has it Been, and Could it be, Accepted?’ (2016) 29 *Leiden Journal of International Law* 777.

⁶²*Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania)* (merits) [1949] ICJ Rep 4, 22.

⁶³Letter dated 9 September 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council, UN Doc S/2015/693 (9 September 2015), Letter dated 31 March 2015 from the Chargé d’affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council, UN Doc S/2015/221 (31 March 2015); Letter dated 24 July 2015 from the Chargé d’affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council, UN Doc S/2015/563 (24 July 2015); Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, UN Doc S/2014/695 (23 September 2014).

⁶⁴See Corten, ‘Unable and Unwilling’ (n 61) 785–91, 798–9; Gray (n 1) 243–8.

⁶⁵Nicholas Tsagourias, ‘Self-Defence against Non-State Actors: The Interaction between Self-Defence as a Primary Rule and Self-Defence as a Secondary Rule’ (2016) 29 *Leiden Journal of International Law* 801; Erika de Wet, ‘The Invocation of the Right to Self-Defence in Response to Armed Attacks Conducted by Armed Groups: Implications for Attribution’ (2019) 32 *Leiden Journal of International Law* 91.

⁶⁶See for a discussion on collective self-defence, Josef L. Kunz, ‘Individual and Collective Self-Defence in Article 51 of the Charter of the United Nations’ (1947) 41 *American Journal of International Law* 872; D.W. Bowett, *Self-Defence in International Law* (Praeger, 1958) 200–48; Ian Brownlie, *International Law and the Use of Force by States* (Oxford University Press, 1963) 328–31; *Nicaragua* (n 5) 94, para

explicitly clear.⁶⁷ Additionally, collective self-defence has two further criteria: the attacked state must declare itself the victim of an armed attack ('the declaration') and it must request the assistance of the intervening state ('the request').⁶⁸

These two additional requirements have been criticised by scholars⁶⁹ and judges,⁷⁰ as the Court did not provide any evidence to support its reasoning and calling for two separate requirements seems unnecessarily complicated.⁷¹ Yet, the need for a request seems firmly settled in state practice: as Gray proclaims that 'in every case where a third state has invoked collective self-defence it has based its claim on the request of the victim state'.⁷² However, even though the Court asserted that the two requirements are additional to and separate from each other,⁷³ it seems that state practice does not support the need for the second requirement, namely the declaration.⁷⁴ When confronted with the issue of collective self-defence again in later case law, the Court surprisingly only referred to the need for a request and was silent on the need for a declaration.⁷⁵ An IDI resolution

176, 102–6, paras 193–201, 110–1, paras 210–1; *ibid*, dissenting opinion of Judge Oda 253–8, paras 90–7; *ibid*, dissenting opinion of Judge Jennings 544–6; Christopher Greenwood, 'Self-Defence', *Max Planck Encyclopedia for Public International Law* (2011) <https://opil.ouplaw.com/view/10.1093/law/epil/9780199231690/law-9780199231690-e401?rskey=UksSIY&result=1&pr=MPIL>, paras 35–40; Albrecht Randelzhofer and Georg Nolte, 'Article 51' in Bruno Simma *et al* (eds), *The Charter of the United Nations, A Commentary, Vol II* (Oxford University Press, 2012) 1420–1, paras 47–8; James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 8th edn 2012) 749–50; Shaw (n 32) 872–4; Dinstein (n 6) 301–27; Gray (n 1) 176–99; Henderson (n 1) 256–62. For the history of collective self-defence and its precursors, see Tadashi Mori, *Origins of the Right of Self-Defence in International Law* (Brill Nijhoff, 2018) 124–36.

⁶⁷See *Nicaragua* (n 5) 103–4, para 195, 122–3, para 237.

⁶⁸*Ibid*, 103–4, para 195, 105, para 199; Shaw (n 32) 873; Gray (n 1) 181; Henderson (n 1) 259. Kritsiotis went so far as to state that the Court 'articulated a separate and additional schemata' for collective self-defence, Dino Kritsiotis, 'A Study of the Scope and Operation of the Rights of Individual and Collective Self-Defence under International Law' in Nigel White and Christian Henderson, *Research Handbook on International Conflict and Security Law* (Edward Elgar, 2013) 170, 181. See also *Oil Platforms* (n 43) 186–7, para 51; *DRC v Uganda* (n 5) 218, para 128, for the need for a request.

⁶⁹For an overview of these criticisms, see Ruys (n 46) 83–91.

⁷⁰Two dissenting opinions criticised the Court's approach on this issue, see *Nicaragua* (n 5) dissenting opinion Judge Jennings, 544–6; *ibid*, dissenting opinion of Judge Schwebel 356, para 191, 373–4, paras 221–4.

⁷¹See *Nicaragua* (n 5) 104–5, para 197; D W Greig, 'Self-Defence and the Security Council: What Does Article 51 Require?' (1991) 40 *International and Comparative Law Quarterly* 366, 375–6; Ruys (n 46) 84; James A Green, 'The "Additional" Criteria for Collective Self-Defence: Request but Not Declaration' (2017) 4 *Journal on the Use of Force and International Law* 4, 5; Gray (n 1) 185; Henderson (n 1) 260. Nevertheless, despite this lack of evidence, many scholars continue to list these requirements when reviewing collective self-defence, see Greenwood (n 66) paras 37–8; Kritsiotis (n 68) 185–7; Michael Wood, 'Self-Defence and Collective Security: Key Distinctions' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015) 649, 654; Green (n 71) 5; Dinstein (n 6) 317–21; Shaw (n 32) 873; Gray (n 1) 181; Henderson (n 1) 260.

⁷²See Gray (n 1) 187. This is confirmed by Ruys (n 46) 89; Green (n 71) 6, 11.

⁷³See *Nicaragua* (n 5) 105, para 199.

⁷⁴See Ruys (n 46) 91; Green (n 71) 6–11; Henderson (n 1) 261–2.

⁷⁵See *Oil Platforms* (n 43) 186–7, para 51; *DRC v Uganda* (n 5) 218, para 128.

from 2007 also only refers to the need for a request.⁷⁶ Additionally, James Green outlines several situations, both during and after the Cold War, where a request for assistance was standard practice yet a declaration was not.⁷⁷ A recent example of state practice also supports this finding, namely the use of force in Syria. Iraq requested assistance in its letter to the UN,⁷⁸ but it never declared itself a victim of an armed attack.⁷⁹ When states subsequently invoked collective self-defence to attack ISIS in Syria, they used the request for assistance issued by Iraq, but were not troubled by the lack of a declaration.⁸⁰ What is more, in their condemnation of the actions of the intervening states, both Syria and Russia did not refer to the lack of a declaration.⁸¹ They instead focused on the extent to which the request issued by Iraq could justify the use of force in Syria, when that latter state had not provided any consent itself.⁸²

Accordingly, for the current analysis the relevant criteria for collective self-defence are an armed attack by a state and potentially a non-state actor, and a request for assistance by the attacked state. The next section examines where the force used in (collective) self-defence takes place.

3.3. Location of (collective) self-defence

When contemplating non-state actors in the debate noted in subsection 3.2 concerning the identity of the attacker against whom self-defence could be invoked – a state or also a non-state actor – the discussion quickly turned to the sovereignty barrier. Evidently, the main issue with the possibility of a non-state actor conducting an armed attack is not whether they are capable of doing so, perhaps not even whether the attacked state can invoke self-defence in response, but that attacking the non-state actor in the host state means violating that state's sovereignty.⁸³

The analysis thus quickly centres on the sovereignty barrier, as it needs to be overcome in order to act in self-defence against a non-state actor located

⁷⁶See *Institut de Droit International* (IDI) Resolution Session of Santiago 2007, Tenth Commission: Present Problems of the Use of Armed Force in International Law, A. Self-defence, para 8.

⁷⁷See Green (n 71) 6–11.

⁷⁸Letter dated 25 June 2014 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General, UN Doc S/2014/440 (25 June 2014); Letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the Security Council, UN Doc S/2014/691 (20 September 2014).

⁷⁹See Green (n 71) 9; Henderson (n 1) 261.

⁸⁰*Ibid.*

⁸¹See Green (n 71) 10.

⁸²*Ibid.*; Identical letters dated 17 September 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2015/719 (17 September 2015).

⁸³This is not to say that the host state is voluntarily placing its territory at the disposal of the non-state actor, nor to ignore the responsibilities of the host state that arguably come with state sovereignty. It is merely meant to signal that the actions of the non-state actor cannot be attributed to the host state.

in a third state's territory. This implies that there is no need to invoke the right of self-defence, even if the attack was initiated by a non-state actor, if that actor or at least the specific perpetrators are still located in the attacked state's territory. Ergo, self-defence is necessary in order to justify a use of force in another state's territory. That is precisely why the issue of lawful self-defensive action against a non-state actor in another state's territory is so difficult to resolve and why the sovereignty barrier is an issue under international law.⁸⁴

Support for the fact that the right of self-defence justifies a use of force outside of the attacked state's own territory can be found in a Commentary to the UN Charter:

any State which is affected by another State's unlawful use of force that does not reach the threshold of an 'armed attack', is bound, if not exactly to endure the violation, at least to respond only by means falling short of the use of *cross-border force*. One possible means of defence is, of course, the use of force by a State on its own territory.⁸⁵

In the *Nicaragua* case the Court had arrived at the same conclusion. For countermeasures involving the use of force, a preceding armed attack is required. No right exists to take collective armed and cross-border actions against an act that falls short of an armed attack.⁸⁶ This consequence represents the mirror-image of the need for a cross-border element for the armed attack. The armed attack must have an external component and must thus initiate from outside the attacked state's territory.⁸⁷ This provides the attacked state with the right to defend itself by counterattacking the attacking state in the latter's territory. Without the armed attack, the attacked state cannot take any countermeasures involving the use of cross-border force.

It is difficult to distil examples of state practice where states acted under the notion of collective self-defence, as 'different commentators produce different lists'.⁸⁸ Nonetheless, one example of state practice clearly supports the conclusion that self – defence justifies cross-border force. When states were attacked by ISIS, e.g. the Brussels and Paris attacks,⁸⁹ they saw no

⁸⁴See Kreß (n 1).

⁸⁵See Randelzhofer and Nolte (n 66) 1401, para 6 (see also para 8) (emphasis added). See also Jure Vidmar, 'The Use of Force as a Plea of Necessity' (2017) 111 *American Journal of International Law Unbound* 302, 303–4; Dinstein (n 6) 241–2; Henderson (n 1) 309.

⁸⁶See *Nicaragua* (n 5) 110, paras 210–1, 127, para 249; Corten, *The Law Against War* (n 6) 405.

⁸⁷See Ruys and Ferro (n 4) 72.

⁸⁸See Gray (n 1) 176. Gray's list includes situations in which no force was actually used or no force was used outside the borders of the requesting state, see Gray (n 1) 176–7. See also the list of Henderson (n 1) 256. See additionally the disagreements regarding Kuwait, Dinstein (n 6) 323–7; Wood (n 71); Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing, 2004) 280–90; Crawford (n 66) 766; Shaw (n 32) 873; Gray (n 1) 341–3, 361–4; Henderson (n 1) 106.

⁸⁹The question whether the intensity was sufficient to pass the threshold of it being an armed attack is left aside for now.

need to invoke the right of self-defence to act against the perpetrators in their own territories. However, when they subsequently wanted to attack ISIS in Iraq and Syria, some states justified their actions on the basis of self-defence, signalling the need for a justification to use force outside the state's own territory. Moreover, when using force in Syria, most states based their conduct on the request issued by Iraq,⁹⁰ often specifically invoking the right of collective self – defence.⁹¹ The state under attack (Iraq) thus requested military assistance to be provided in the state from where the attack originated (Syria) and thus outside its own territory.

Some intervening states also referenced Security Council Resolution 2249.⁹² However, they started and ended their letters by stating that their actions taken are justified under the notion of self-defence following Article 51 UN Charter. Furthermore, they only referenced the resolution to reiterate that ISIS constitutes a threat to international peace and security. They did not claim the resolution authorised any intervention. Moreover, while the resolution did call for all necessary measures to be taken, it was not adopted under Chapter VII and there was no other indication it was binding.⁹³ This resolution cannot therefore be said to authorise the subsequent airstrikes and interventions. Thus, states relied on collective self-defence with the request from Iraq to justify their interventions in Syria,

⁹⁰See UN Doc S/2014/440 (n 96) and UN Doc S/2014/691 (n 96).

⁹¹See the letters from Australia (UN Doc S/2015/693 (n 63)), Belgium (Letter dated 7 June 2016 from the Permanent Representative of Belgium to the United Nations addressed to the President of the Security Council, UN Doc S/2016/523 (9 June 2016)), Canada (UN Doc S/2015/221 (n 63)), Denmark (Letter dated 11 January 2016 from the Permanent Representative of Denmark to the United Nations addressed to the President of the Security Council, UN Doc S/2016/34 (13 January 2016)), Germany (Letter dated 10 December 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council, UN Doc S/2015/946 (10 December 2015)), the Netherlands (Letter dated 10 February 2016 from the Chargé d'affaires a.i. of the Permanent Mission of the Netherlands to the United Nations addressed to the President of the Security Council, UN Doc S/2016/132 (10 February 2016)), Norway (Letter dated 3 June 2016 from the Permanent Representative of Norway to the United Nations addressed to the President of the Security Council, UN Doc S/2016/513 (dated 3 June 2016)) and the UK (Identical letters dated 25 November 2014 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2014/851 (26 November 2014)) for the interventions in Syria. Interestingly, France in its letter (Identical letters dated 8 September 2015 from the Permanent Representative of France to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2015/745 (9 September 2015)) does refer to Article 51 and the request made by Iraq, but does not mention collective self-defence explicitly. See also Green (n 71) 9–10; Shaw (n 32) 873; Gray (n 1) 190–3, 238–40; Henderson (n 1) 261.

Turkey (UN Doc S/2015/563 (n 63)) also invoked collective self-defence, but its intervention is rather complicated, see Gray (n 1) 194–6.

⁹²See the letters from Belgium (UN Doc S/2016/523 (n 91)), Germany (UN Doc S/2015/946 (n 91)), the Netherlands (UN Doc S/2016/132 (n 91)), and Norway (UN Doc S/2016/513 (n 91)).

Scholars have described this Resolution as ambiguous at best, see Gray (n 1) 243; Dapo Akande and Marko Milanovic, 'The Constructive Ambiguity of Security Council's ISIS Resolution', *EJIL:Talk!* (21 November 2015) www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/.

⁹³See Dinstein (n 6) 322.

thereby proving that self-defence is invoked as a justification for force used outside the state's own territory. These interventions have however been controversial due to the sovereignty barrier.⁹⁴

In light of the foregoing, the main criterion for (collective) self-defence is an armed attack by a state and potentially a non-state actor. Additionally, collective self-defence requires a request and a declaration by the attacked state, although the latter appears to exist only in theory and not in practice. Furthermore, actions taken under the umbrella of self-defence take place outside the territory of the state that found itself under attack and subsequently issued the request. In fact, the self-defensive actions take place in the attacking state's territory or the territory of the state where the non-state actor is located.

4. Two sides of the same coin?

To make the comparison between the two concepts, it is useful to repeat their definitions and criteria briefly. Their similarities are subsequently identified, followed by their differences. The implications of the comparison are also analysed.

4.1. *The two concepts and their similarities*

As demonstrated in section 2, intervention by invitation refers to a situation where a state finds itself under attack.⁹⁵ This attack is normally conducted by a non-state actor that operates from the same state territory, or rather, this is the situation where an intervention by invitation is usually requested and invoked. This non-state actor often tries to overthrow the government of the state. In this scenario, the state under attack can invite another state to assist it in its struggle against the non-state actor. The intervening state deploys its armed forces into the territory of the requesting state, and therefore uses force.⁹⁶ There is considerable discussion among international legal scholars whether such an intervention by invitation is allowed if a civil war is raging in the requesting state.⁹⁷ The view held in this article is that such a situation does not prevent inviting outside assistance. Another significant discussion centres on the question of who constitutes the government of a state in times of internal turmoil.⁹⁸ While it is still to be settled whether and to what extent notions such as effective control and democratic legitimacy play a role

⁹⁴See Gray (n 1) 192, 241.

⁹⁵See definitions provided by Nolte (n 14) para 1; IDI Resolution 2011 (n 15) Article 1(a), Article 2(2).

⁹⁶*Ibid.*

⁹⁷See n 20.

⁹⁸See n 39.

therein, what is clear is that the invitation must come from the government and it must constitute valid consent.⁹⁹

As demonstrated in section 3, with collective self-defence, the state also finds itself under attack. The attack must have reached the threshold of an armed attack to trigger the right of self-defence.¹⁰⁰ Furthermore, the armed attack must have a cross-border element.¹⁰¹ It must either be conducted by another state, be attributed to another state or be conducted by a non-state actor which operates from another state's territory.¹⁰² The right of self-defence therefore serves as a justification for using force outside a state's own territory (thus in another state's territory) to stop the attack that initiated there. The armed attack can thus be conducted by a state or a non-state actor. For the latter option, while this now appears to be accepted in academic literature, the main difficulty revolves around the sovereignty barrier.¹⁰³ That is, even if one were to accept that a non-state actor can conduct an armed attack that triggers the right of self-defence, this non-state actor is located in another state's territory. Attacking the non-state actor there violates that other state's territorial sovereignty. Collective self-defence additionally calls for a request and a declaration by the attacked state,¹⁰⁴ although the need for a declaration is not supported by state practice.¹⁰⁵ As only states have the right of self-defence, it must be the state in the form of its government to request the military assistance.

The two concepts therefore carry many similarities. In fact, the IIFMCG Report stated that 'collective self-defence overlaps with military intervention by invitation'.¹⁰⁶ Both constitute lawful instances of states using force. Both account for the situation where a state finds itself under attack and requests another state's assistance. This requires a valid request/consent from the government, whichever party can be identified as such. This requirement is made explicit in the provided definitions of intervention by invitation which refer to 'the invitation of the government of the State concerned'¹⁰⁷ and 'upon the [inviting state's] request'.¹⁰⁸ It can be implied for collective self-defence, as it is only states who have the right to self-defence.¹⁰⁹ For both it must therefore be the government who requests the assistance. Consent seems to follow stricter rules than the request for self-defence,

⁹⁹See *Nicaragua* (n 5) 126, para 246; ARSIWA (n 36) Article 20.

¹⁰⁰See Article 51 UN Charter.

¹⁰¹See Ruys and Ferro (n 4) 72.

¹⁰²*Ibid.*

¹⁰³As coined by Henderson (n 1) 309.

¹⁰⁴See *Nicaragua* (n 5) 105, para 199.

¹⁰⁵See Green (n 71) 6–11.

¹⁰⁶*Independent International Fact-Finding Mission on the Conflict of Georgia* (IIFMCG) Report (Vol II, September 2009) 282.

¹⁰⁷See Nolte (n 14) para 1.

¹⁰⁸See IDI Resolution 2011 (n 15) Article 1(a).

¹⁰⁹See Article 51 UN Charter.

but the two are largely similar and serve the same purpose. The assistance takes the form of using force, i.e. intervening with military means. Again, this is made explicit for intervention by invitation as the two definitions refer to ‘military intervention by foreign troops’¹¹⁰ and ‘direct military assistance by the sending of armed forces by one State’.¹¹¹ For collective self-defence, it is implied by the structure of the UN Charter wherein Article 51 forms a recognised exception to the prohibition of the use of force contained in Article 2(4). The self-defensive actions therefore constitute a use of force themselves as they involve an intervention by military means.

4.2. The differences between intervention by invitation and collective self-defence

The two concepts share many similarities. However, three important differences can be identified. Firstly, collective self-defence requires an armed attack to take place,¹¹² while no such threshold requirement is present for an intervention by invitation. For the latter, the state will find itself in troubling circumstances, but whether those present themselves in the form of riots, a fully-fledged civil war,¹¹³ or an armed attack is irrelevant. Thus, no threshold requirement exists in general for an intervention by invitation, let alone the requirement of an armed attack. This is the logical consequence of the third difference, as will be explained subsequently.

Secondly, according to the provided definitions of intervention by invitation, the state would be attacked by a non-state actor.¹¹⁴ For the right of collective self-defence, the perpetrator or author of the armed attack must be another state according to its traditional interpretation.¹¹⁵ Yet, the current debate now appears to endorse the possibility of non-state actors being able to conduct an armed attack.¹¹⁶ That, however, leads to the additional predicament of the sovereignty barrier.¹¹⁷ Thus, with collective self-defence the attacking party is a state and arguably a non-state actor, while with an intervention by invitation it is a non-state actor. Despite this contrast, the third difference will illustrate that the attacking party for both notions could be either a state or a non-state actor.

Thirdly, and the main point raised in this article, the force used as part of an intervention by invitation is used *within* the requesting state’s territory.¹¹⁸

¹¹⁰See Nolte (n 14) para 1.

¹¹¹See IDI Resolution 2011 (n 15) Article 1(a).

¹¹²See Article 51 UN Charter.

¹¹³See n 20. This term is employed here as it is often used in the context of intervention by invitation.

¹¹⁴See Nolte (n 14) para 1; IDI Resolution 2011 (n 15) Article 2(2).

¹¹⁵See *Wall* (n 48) 194, para 139.

¹¹⁶See n 51.

¹¹⁷See Henderson (n 1) 309.

¹¹⁸See IDI Resolution 2011 (n 15) Article 2(2).

In contrast, the force used as part of (collective) self-defence is used *outside* the attacked state's territory.¹¹⁹ In other words, with intervention by invitation the invited military forces are deployed in the requesting state's territory, while with collective self-defence they are deployed in the attacking state's territory. The first difference of the need for an armed attack is thus the logical consequence of this third difference, as a higher threshold is needed for using force in another state's territory than for using force in a state's own territory.

The second difference concerning the nature of the attacking party consequently becomes irrelevant. When a state is attacked in its own territory, when it wants to strike back in its own territory and when it invites another state to assist it, this is an intervention by invitation, whether the attacking party is a non-state actor or another state. A state does not need to justify a use of force in its own territory. States have an inherent right independent from Article 2(4) UN Charter to protect themselves in their own territory.¹²⁰ This holds true even if the attacking party is another state, as the attacked state is not using force against a state within another state; it is merely using force within its own territory. One could refer to this as an inherent right of every state to use force in its own territory,¹²¹ as a state's prerogative or as part of state sovereignty. Be that as it may, this certainly does not imply that this right is unlimited. The state is still bound by other international legal rules, such as human rights.

Regarding the intervening state, it has the permission of the requesting state to use force in its territory. As a state can consent to foreign troops being present in its own territory,¹²² these actions cannot be seen as a violation of the prohibition of the use of force. No violation occurs *ab initio* when acting upon an intervention by invitation and therefore no justification is required.¹²³ Therefore, as long as a state uses force in its own territory and invites another state for assistance it does not matter whether the attacking party is another state or a non-state actor.

Conversely, a justification is needed when a state uses force outside its own territory and thus in another state's territory, as this initially violates the prohibition of the use of force. States must have good reason to act in another state's territory, especially if this involves the use of force. This is so no matter who initiates the attack, whether that is another state or a non-state actor. This is where the notion of (individual) self-defence comes into play. Collective self-defence becomes relevant if the attacked

¹¹⁹See Randelzhofer and Nolte (n 66) 1401, paras 6, 8; *Nicaragua* (n 5) 110, paras 210–1.

¹²⁰See UN Doc S/RES/387 (n 5) preamble; ILA Sydney (n 6) 18.

¹²¹Although, admittedly, employing the term use of force in this regard is not correct as there is no external element.

¹²²See ARSIWA Commentary (n 37) 85, para 6.

¹²³See ILA Sydney (n 6) 18.

state requests the assistance of another state. If the attacking party is a non-state actor located in another state's territory, that still leaves the issue of the sovereignty barrier.

To summarise, state A is attacked by state B or a non-state actor and the counterattack by state A would be limited to its own territory. If state A would like the military assistance of state C, this is allowed as long as the counterattack remains limited to state A's territory. This is a situation of intervention by invitation. Conversely, if state X is attacked by state Y and the counterattack would extend to state Y's territory, state X needs to be able to invoke the individual right of self-defence. If state X would like the military assistance of state Z, this is a situation of collective self-defence.¹²⁴ If state X is attacked by a non-state actor operating from state Y's territory and it would like to counterattack the non-state actor in state Y's territory, this is also a situation of self-defence (collective, if state X request the military assistance of state Z), yet the sovereignty barrier is still an issue.

This third and main difference between the two concepts also resonates with recent state practice, namely the interventions in Syria. Firstly, as already considered in subsection 3.3, some intervening states relied on the notion of collective self-defence based on the request issued by Iraq to use force in Syria.¹²⁵ Thus, the force was intended to be used outside the attacked/requesting state's territory (Iraq) and in the territory of the host state (Syria). Secondly, Syria and Russia opposed these interventions.¹²⁶ Both states argued that the general actions (or armed attacks if they pass that threshold) undertaken by ISIS cannot be attributed to Syria. Both states invoked a violation of Syria's sovereignty, as the intervening states did not obtain the consent of the Syrian government to use force in Syrian territory. More specifically, the intervening states did not comply with the condition within the consent issued by Syria of coordinated action.¹²⁷ This signifies that Syria and Russia acknowledge the difficulty of the sovereignty barrier and thus argue that an intervention in Syrian territory can only occur with either Security Council authorisation or with the consent of Syria and thus under the scope of intervention by invitation.

The interventions in Syria have been controversial,¹²⁸ while the interventions in Iraq have not. It seems generally accepted that Iraq could consent to

¹²⁴Laura Visser, 'May the Force Be with You: The Legal Classification of Intervention by Invitation' (2019) 66 *Netherlands International Law Review* 21, 28.

¹²⁵See n 91.

¹²⁶Australia (UN Doc S/2015/693 (n 63)), Canada (UN Doc S/2015/221 (n 63)) and the US (UN Doc S/2014/695 (n 63)) invoked the elusive notion of 'unable and unwilling' to overcome this barrier. See also Gray (n 1) 237–8, 243–8.

¹²⁷See UN Doc S/2015/719 (n 100); 'Russia Condemns U.S. Strikes on Islamic State Without Syria's Approval', *The Moscow Times* (25 September 2014) www.themoscowtimes.com/2014/09/25/russia-condemns-us-strikes-on-islamic-state-without-syrias-approval-a39759. See also Kreß (n 1); Green (n 71) 10; Couzigou (n 1) 696.

¹²⁸See Gray (n 1) 192, 241.

the presence of foreign troops in its own territory to fight ISIS. When Iraq's request was used to justify the interventions in Syria, thus acting under collective self-defence, this was not so easily accepted due to the sovereignty barrier. Even though (collective) self-defence would be the correct legal concept to invoke by the intervening states in this situation – as it concerns defensive use of force taken outside the attacked state's territory on the request of that state – it is difficult to rely on this justification here, as the sovereignty barrier remains an issue.

4.3. Implications of the comparison

In light of the foregoing, the main point advocated in this article is that the two concepts apply in different situations, i.e. in different territories. Important implications follow this determination. In particular, one state cannot invoke both collective self-defence and intervention by invitation simultaneously when acting in the same territory and based on the same invitation/request. For example, if Iraq would like assistance with attacking ISIS in its own territory, it should call for an intervention by invitation. If it wants ISIS attacked in Syria, it should invoke collective self-defence – although the issue of the sovereignty barrier remains. If Syria wants ISIS attacked in its own state territory, it should call for an intervention by invitation. If a state is to receive both a request for collective self-defence by Iraq to act in Syria and simultaneously an invitation for an intervention by Syria, it should prioritise the request from Syria itself. One apparent reason for this is that the request by Iraq does not remove the sovereignty barrier. More importantly, if the territorial state itself makes a request for military assistance, this should be prioritised over another sovereign state's wish to use force in the territorial state's territory.

Both Claus Kieß and Irène Couzigou have therefore concluded that the right of collective self-defence against non-state actors is subsidiary to intervention by invitation.¹²⁹ The current author agrees with this analysis. The existence of the sovereignty barrier clearly indicates that much weight is still given to state sovereignty in international law. A state needs a lawful reason, or rather a justification, to take measures in another state's territory, especially if these involve the use of force. By obtaining the invitation of the host state to use force against the non-state actor present there, state sovereignty is respected, while this is less certain for a self-defensive action based on the request of another state. Certainly, there are situations where host states do not provide this consent, resulting in continuing attacks by the non-state actor in other states' territories. It is not the opinion expressed here that nothing should be done about those ensuing attacks. Nevertheless,

¹²⁹See Kieß (n 1); Couzigou (n 1) 698.

given the current state of the international legal rules regarding the use of force, unfortunately little can be legally done. Perhaps the behaviour of the territorial state will be taken into account in the future, something the unwilling or unable doctrine already provides for. However, as pointed out previously, this doctrine is yet to be accepted as law.¹³⁰

There are also clear political implications for making this distinction based on territory between intervention by invitation and collective self-defence. For example, if a state is attacked by a third state or a non-state actor operating from that third state and it invokes self-defence (and invites another state to assist it, which will implicate collective self-defence), the attacked state clearly sends the message it feels justified in using force outside its own territory and thus in the attacking or host state's territory. This could be politically undesirable if the attacked state fears retaliatory actions or does not wish to engage in a conflict with the attacking state or in that state's territory. Taking the Yemeni situation as an example, the correct legal concept for the Saudi-led coalition to invoke is intervention by invitation as the force is used in Yemen's state territory on the government's invitation.¹³¹ If Yemen or the coalition would seek to attack Iran due to its alleged involvement in the conflict, the right of individual or collective self-defence would need to be invoked,¹³² as in that case the force will be used outside the attacked state's territory. States should therefore be careful and invoke the concept that is both legally correct, but also politically sensible.

A further implication covers the scope of intervention by invitation. Arguing that the term intervention by invitation covers actions taken against both a non-state actor and another state contradicts the earlier provided definitions in section 2. These definitions only mention actions against non-state actors and it seems generally accepted that those are the instances where intervention by invitation should be invoked. Having stated before that these definitions are authoritative, it perhaps seems odd to contradict them now. However, while authoritative, they are neither definitive nor uncontroversial. It has also already been pointed out that these definitions seem to portray the typical situations in which interventions by invitation take place, but perhaps do not cover all situations. Furthermore, having proven the difference in territorial location between the two concepts, the logical consequence is broadening the definition of intervention by invitation. Simply put, if a state is attacked by another state and the counterattack is limited to the attacked state's own territory, it cannot be maintained that the state can invoke self-defence in this situation. This is the incorrect notion

¹³⁰See n 64.

¹³¹The question of whether this constituted valid consent is left aside for now, but see Ruys and Ferro (n 4) 79–96.

¹³²The question of whether this is a possibility is left aside for now, but see Ruys and Ferro (n 4) 70–9.

to invoke, as self-defence is used for cross-border actions, which do not occur in this situation. An additional point raised in this article is therefore that the concept of intervention by invitation is wider than commonly believed and thus includes actions against an attacking state.

An additional thought worth touching upon is what happens when a state is invited to intervene in another state, but the requesting state at a certain point in time revokes the invitation. Yet, the armed forces of the intervening state remain stationed in the requesting state's territory and refuse to leave. If the requesting state would like to take forcible measures against the foreign troops of the previously invited state and it is merely concerned with expelling the foreign troops from its own territory, it can take these measures under the notion of state sovereignty. If it would therein prefer the military assistance of another state, this would fall under the notion of intervention by invitation.

What is more, this situation could be classified as an armed attack conducted by the previously invited state, as that state has lost the lawful reason for the presence of its troops in another state's territory. This line of reasoning follows Article 3(e) of the *Definition of Aggression*,¹³³ where an example of an act of aggression (which for all intents and purposes here is viewed to be synonymous to armed attack) is the extension of the presence of foreign troops beyond the termination of the agreement or invitation. If the requesting state indeed views the presence of the foreign troops as an armed attack and it would like to counterattack in the (previously invited) attacking state's territory, it can invoke individual self-defence. If the state would like the military assistance of another state in doing so, this would fall under the notion of collective self-defence, as force will be used outside the attacked state's own territory.

As a final point, if one agrees to the possibility of invoking self-defence against a non-state actor (disregarding issues such as the sovereignty barrier for now), but disagrees to invoking intervention by invitation against a state, this results in strange scenarios. In this interpretation, if a state is attacked by another state and independent of where it wants to counterattack the attacking state (in its own territory or in the attacking state's territory), it should invoke self-defence. However, if a state is attacked by a non-state actor, it should invoke intervention by invitation if the counterattack is limited to its own territory, but should invoke self-defence if the counterattack takes place in the host state's territory. If these scenarios are true, why can the state not just invoke self-defence against a non-state actor operating from within its own territory? Why does a different concept (i.e. intervention by invitation) exist to cover just this one particular situation? Certainly, given the history and development of public international law,

¹³³See *Definition of Aggression* (n 5) Article 3(e).

this is understandable. Non-state actors originally did not operate across borders, at least not to the extent they do nowadays, thus no need arose to invoke self-defence against them, i.e. to justify the use of cross-border force. Nevertheless, with the current developments of the law by which self-defence could potentially also be invoked against non-state actors operating from another state's territory, this traditional position is no longer acceptable.

Two solutions can be proposed: either self-defence is limited to actions against other states and it is not possible to invoke it against non-state actors situated in another state's territory (perhaps because the sovereignty barrier cannot be overcome) and one of the only possibilities to act against them is an invitation from the host state. Alternatively, the scope of intervention by invitation is broadened to include actions taken against an attacking state when the use of force is limited to the requesting state's territory. This article has opted for the latter solution.

5. Conclusion

By first analysing in detail both the concepts of intervention by invitation and collective self-defence and their criteria, and by subsequently comparing them, this article has established whether they are inherently different or in fact two sides of the same coin. This is an important issue to address as this comparison is hardly ever explicitly made in academic scholarship.¹³⁴ Furthermore, different criteria apply to the two concepts and they are applicable in different situations. States and scholars alike must thus take care to invoke the correct legal concept with its accompanying criteria in the correct situation.

Intervention by invitation is commonly used as a term for a state inviting another state to assist it in its territory with its struggle against a non-state actor. Collective self-defence is generally applied to a state requesting military assistance from another state when it has been subjected to an armed attack by another state or potentially a non-state actor. The two concepts therefore carry many similarities or 'overlap'¹³⁵ as the IFFMCG Report has phrased it. Both cover situations where a state finds itself under attack. The state through its legitimate government subsequently requests assistance from another state. This assistance takes the form of military assistance and thus covers using force. Both also constitute lawful exercises of using force.

Despite these clear parallels, three important differences between the two notions have been identified. Firstly, collective self-defence requires an armed attack to have been conducted, while no such threshold requirement

¹³⁴See n 1.

¹³⁵See IFFMCG Report (n 106) 282.

exists for intervention by invitation. Secondly, with collective self-defence, the attacking party is a state and arguably also a non-state actor (although this raises the issue of the sovereignty barrier), while with intervention by invitation this is a non-state actor. Thirdly, and most strikingly, this article has put forward that the key difference between the two concepts is the territorial location of the force used. With intervention by invitation, the force is used in the requesting state's own territory. As a state can take measures (although not unlimited) within its own territory, it therefore does not matter whether it is attacked by another state or by a non-state actor, making the second difference redundant. With collective self-defence the force is used outside the attacked state's territory and in the territory of the attacking state or the state where the non-state actor is located. The first difference, i.e. the need for a high threshold in the form of an armed attack to trigger this right, therefore becomes apparent, as force is used in another state's territory.

Indeed, collective self-defence against a non-state actor is subsidiary to intervention by invitation.¹³⁶ Having obtained the consent of the territorial state and thus acting under a notion of intervention by invitation, respects state sovereignty and does not raise the sovereignty barrier, which is the difficulty with using collective self-defence against non-state actors present in another state's territory. Furthermore, by invoking (collective) self-defence, states indicate that they consider themselves justified to strike the attacking state's territory or the territory where the non-state actor is located. This could have grave political consequences. Moreover, by concluding that an intervention by invitation also covers domestic forcible actions against another state, the definition of this concept is considerably wider than currently understood. This is, however, a clear and logical consequence of the different territories in which the two concepts apply.

Given the considerable overlap between the two concepts, it would be interesting for future research to examine whether more parallels could exist or should be created. For example, should an intervention by invitation – or rather the intervening state – also fulfil the customary international law requirements of proportionality and necessity which exist for collective self-defence? Should it also follow the UN treaty obligation of reporting to the Security Council¹³⁷ and terminate when the Security Council has acted? *Vice versa* for collective self-defence, should there be a discussion about the authority of the requesting government and the validity of the provided consent? Should it be allowed during a civil war? In fact, it would be desirable to create even more overlap between the two concepts. By doing so, the

¹³⁶See Kreß (n 1); Couzigou (n 1).

¹³⁷Larissa van den Herik, 'A Reporting Requirement for Consent-Based Use of Force?' (2019) 79 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 707.

safeguards that are built into each concept can be used within the other as well, thereby strengthening the prohibition of the use of force.

Hence, even though important differences exist between the notions of intervention by invitation and collective self-defence, the conclusion of this article is that they are in fact two sides of the same coin, i.e. two things that seem different but are in fact very closely related. The key distinction that sets these two concepts apart, as already famously proclaimed by property experts, is location, location, location.

Acknowledgements

The author would like to thank the reviewers and editor Tom Ruys for their insightful and constructive comments.

Disclosure statement

No potential conflict of interest was reported by the author(s).

ORCID

Laura Visser  <http://orcid.org/0000-0003-4399-4634>