

**MAJOR POST-WESTPHALIAN SHIFTS AND SOME
IMPORTANT NEO-WESTPHALIAN HESITATIONS IN THE
STATE PRACTICE ON THE INTERNATIONAL LAW ON
THE USE OF FORCE**

CLAUS KREß

**I. A WESTPHALIAN MODEL OF THE
INTERNATIONAL LAW ON THE USE OF FORCE**

In a seminal article written on the occasion of the tercentenary of the Treaties of Osnabrück and Münster ending the Thirty Years War, Leo Gross opined that the 1648 Peace of Westphalia lent powerful support to the consolidation of a concept of public international law that essentially confines that legal order to the regulation of the relations between sovereign states.¹ To a considerable extent he agreed with the idea that the Peace of Westphalia constituted 'the first of several attempts to establish something resembling world unity on the basis of states exercising untrammelled sovereignty over certain territories and subordinated to no earthly authority.'²

Gross has made a powerful contribution to the widespread use by contemporary international lawyers (and international relations scholars) of the attribute 'Westphalian' to characterise the inter-state nature of an international rule or set of international rules and their emphasis on state sovereignty.³ However, whether the Peace of Westphalia established (or consolidated) a 'Westphalian

* Professor of Public International Law and Criminal Law, Director of the Institute of International Peace and Security Law and Chair for German and International Criminal Law, University of Cologne, Germany.

¹ On the classic normative international legal concept of sovereignty implying the internal supreme authority within a territory and the absolute independence from the will of other states or other external entities, see Samantha Besson, 'Sovereignty' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, vol IX (Oxford University Press, 2012) 366, 374.

² Leo Gross, 'The Peace of Westphalia, 1648–1948' (1948) 42 *American Journal of International Law* 20, 20; see also *ibid.*, 35 *et seq* where Gross explains his view that Vattel was especially instrumental in paving the way to the culmination of a positivist international law which championed unfettered state sovereignty.

³ Rainer Grote, 'Westphalian System' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, vol X (Oxford University Press, 2012) 870, 873; for a recent example, see Daniel Bethlehem, 'The End of Geography: The Changing Nature of the International System and the Challenge to International Law' (2014) 25 *European Journal of International Law* 9, 13.

system' of international law in the above-summarised sense has often been questioned by historians of international relations. In the more recent literature reference is even made to the 'Westphalian Myth'.⁴ It has been disputed whether the two peace treaties of 1648 vested the various principalities within the empire with genuine sovereignty in the modern meaning of that concept. The Peace of Westphalia had rather, so the argument continues, introduced an early example for the protection of religious minorities and had provided for many other grounds upon which external intervention in the (not so) internal affairs of a principality belonging to the empire could be based.⁵ Brendan Simms has recently pushed the point almost to its extreme by calling the Peace of Westphalia a 'charter for intervention'.⁶

It is not the ambition of this article—and it does not fall within the competence of this author—to engage in this fascinating debate among historians. However, the objections to the 'conventional wisdom' are certainly strong enough to place a question mark over the historical accuracy of the idea that the 'Westphalian system' dates back to the Peace of Westphalia. And the same objections may well be taken to support the view that the international legal order as established by the United Nations (UN) Charter more closely reflects a 'Westphalian system' than the Peace of Westphalia did. That being said, there is probably considerable wisdom in Stephen D Krasner's statement that there 'has never been some golden age for sovereignty'.⁷

In light of the foregoing, the expression 'Westphalian system' will not be used in this article to denote the historical configuration of the international legal order as it resulted from the Peace of Westphalia. The concept will rather be referred to as a theoretical model that helps in identifying and clarifying broader trends in the international law on the use of force after 1945. One might, of course, try to come up with another expression than 'Westphalian system' in light of its doubtful historical accuracy. However, the term is so deeply entrenched in the vocabulary of international lawyers that there is no compelling reason to avoid its use if it is made clear that reference is made to it for theoretical rather than for historical purposes.

So what would a purely Westphalian international law on the use of force

⁴ Andreas Osiander, 'Sovereignty, International Relations, and the Westphalian Myth' (2001) 55 *International Organization* 251.

⁵ For a few examples from the literature of the history of international relations, see Stéphane Beaulac, 'The Westphalian Legal Orthodoxy—Myth or Reality?' (2000) 2 *Journal of the History of International Law* 175; Derek Croxton, 'The Peace of Westphalia of 1648 and the Origins of Sovereignty' (1999) 21 *International History Review* 569, 588–89; Osiander (n 4) 261; Gross (n 2) 21–24 had acknowledged the protection of religious minorities.

⁶ Brendan Simms, 'A False Principle in the Law of Nations': Burke, State Sovereignty, (German) Liberty, and Intervention in the Age of Westphalia' in Brendan Simms and DJB Trim (eds), *Humanitarian Intervention. A History* (Cambridge University Press, 2011) 89, 92.

⁷ Stephen D Krasner, 'Rethinking the Sovereign State Model' (2001) 27 *Review of International Studies* 17, 17.

look like? In such a law, a prohibition of the use of force binds states only and is confined to the latter's international relations. A system of collective security deals exclusively with inter-state breaches of the peace. There can be no right of individual self-defence of a civilian population under attack and no corresponding right of collective self-defence of a foreign state to come to the assistance of such a civilian population (usually referred to as a 'right to forcible humanitarian intervention'). Finally, a state right (be it individual or collective) of self-defence is limited to the case of an armed attack by another state.

The following reflections on the development of the international law on the use of force since 1945 will build on this Westphalian model to identify post-Westphalian shifts and neo-Westphalian hesitations.⁸ The two factual scenarios that figure most prominently in the following study of the post-1945 practice of states are those that have most seriously challenged the legitimacy of Westphalian legal answers. In the first case, the government of a state terrorises a civilian population on the territory of that state. In the second case, which is, as it were, the mirror image of the first, a transnational non-state organisation terrorises a state through the large-scale use of force. In both cases the threat cannot be accommodated within a purely Westphalian international law on the use of force. For, in the first case, the legal protection of the civilian population under attack would appear to be precarious, and in the second case, the victim state does not fare any better.

II. POST- AND NEO-WESTPHALIAN RESPONSES TO GOVERNMENTAL TERROR AGAINST A CIVILIAN POPULATION SINCE 1945

i. The Westphalian Starting Point in 1945: The Text of the UN Charter

One of the UN Charter's most important legal novelties was the inclusion of the prohibition of the use of force in Article 2(4), which reads as follows:

All Members shall 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 United Nations.⁹

⁸ To be sure, the development of the international law on the use of force is situated within a broader normative context, including, most importantly, the international law of armed conflicts, international human rights law, and international criminal law. Occasionally, references to corresponding developments in the latter two areas of international law will be made in the footnotes.

⁹ In its judgment in the *Nicaragua* case, the International Court of Justice held that a *customary* international law prohibition of the use of forces exists alongside Art 2(4) of the UN Charter;

The adoption of that provision constituted the eventual culmination of a prior series of more timid efforts to ban the use of force by states.¹⁰ This prohibition is framed in Westphalian terms because it is explicitly confined to the ‘international relations’ of UN Member States.¹¹ The use of force by a state against its own population therefore remained outside the scope of application of the new prohibition.¹² As the UN Charter’s prohibition of the use of force does not apply internally, it does not affect the power by a state to invite, through its government,¹³ other states to use force on the territory of the inviting state.¹⁴ The new system of collective security, as introduced through Chapter VII of the UN Charter, was designed to react to threats to or breaches of international peace. Its Article 39 reads as follows:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore *international* peace and security. (emphasis added)

The meaning originally given by most interpreters to the term ‘international’ was ‘inter-state’,¹⁵ so that no power for the Security Council existed to activate Chapter VII in the case of the terrorisation of a civilian population by its own government.¹⁶

Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Judgment, Merits, ICJ Reports 1986, 14, at 96–97 (para 181).

¹⁰ On the international legal development on the use of force between the end of the First and the end of the Second World War, see Ian Brownlie, *International Law and the Use of Force by States* (Oxford University Press, 1963) 51–111.

¹¹ For a thoughtful recent analysis of the meaning of the words ‘international relations’ within Art 2(4), see Christian Henderson, ‘Contested States and the Rights and Obligations of the *Jus Ad Bellum*’ (2013) 21 *Cardozo Journal of International and Comparative Law* 367, 381–87.

¹² In its Advisory Opinion on Nuclear Weapons, the International Court of Justice was careful to distinguish the use of force by a state ‘within its own boundaries’ from the prohibition of the use of force; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, at 247 (para 50).

¹³ On the traditional concept of ‘government’ under international law, see Louise Doswald-Beck, ‘The Legal Validity of Military Intervention of the Government’ (1985) 56 *British Yearbook of International Law* 189, 190–200.

¹⁴ For this starting point, see Olivier Corten, *The Law Against War. The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing, 2012) 309; Doswald-Beck (n 13) 189, 244; Eliav Lieblich, *International Law and Civil Wars. Intervention and Consent* (Routledge, 2013) 122–24; Ashley S Deeks, ‘Consent to the Use of Force and International Law Supremacy’ (2013) 54 *Harvard International Law Journal* 1, 33.

¹⁵ For a clear statement to this effect, see Hans Kelsen, *The Law of the United Nations. A Critical Analysis of Its Fundamental Problems* (Steven & Sons, 1950) 19: ‘In ordinary use of language, “international peace” is a condition of absence of force in relations among states’; see also Nico Krisch, ‘Article 39’ in Bruno Simma, Daniel Erasmus-Khan, Georg Nolte, and Andreas Paulus (eds), *The Charter of the United Nations: A Commentary*, vol II (Oxford University Press, 3rd edn 2012) 1282–83 (marginal n 19).

¹⁶ For example, in the 1946/47 debate on the question of whether the Spanish government under Franco constituted a threat to international peace and security because it constituted a fascist

Article 51 of the UN Charter recognises an individual and collective right of self-defence.¹⁷ The provision reads as follows:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The right referred to in this Charter provision exclusively covers the case of an armed attack 'against a Member of the United Nations', ie the case of an armed attack against a state.¹⁸ It follows that the text of Article 51 of the UN Charter does not support an argument in favour of a right of a civilian population of self-defence in case of an armed attack against such a population. For the same reason the text of Article 51 of the UN Charter does not offer anything in support of a right of collective self-defence of a foreign state to the benefit of a civilian population under attack by its own government. As the UN Charter, outside the legal framework of the collective security system, does not recognise any exception from the prohibition of the use of force other than Article 51, this Charter, on the whole, does not offer a textual basis for a right of a civilian population under (massive) attack forcibly to resist or for a right of a foreign state forcibly to come to the rescue of such a victimised civilian population.¹⁹

regime, the 'inter-state' perspective of the collective security system prevailed; for a detailed analysis, see Udo Fink, *Kollektive Friedenssicherung*, Band 1 (Peter Lang, 1999) 49 *et seq.*

¹⁷ In its judgment in the *Nicaragua* case, the International Court of Justice held that under customary international law a right of individual and collective self-defence (of not identical, but very similar content) exists alongside Art 51 of the UN Charter; *Nicaragua* case (n 9) 94 (para 176).

¹⁸ While the point is not often made explicit, it would seem generally agreed that despite its formulation to the contrary, the right of self-defence, as recognised by the UN Charter, also applies in the case of an armed attack against a state that is not a member of the UN and the same (obviously) holds true for its customary corollary. Rather exceptionally, the issue was relevant to the US military intervention in Vietnam and the official US legal position addresses the issue (see the latter state's legal memorandum 'The Legality of United States Participation in the Defense of Vietnam', as repr in Richard Falk (ed), *The Vietnam War and International Law*, vol I (Princeton University Press, 1968) 583 *et seq.*). For an early and illuminating legal analysis of this point, see Hans Kelsen, *Recent Trends in the Law of the United Nations* (Stevens & Sons, 1951) 916-17.

¹⁹ Correspondingly, in 1945 and immediately thereafter an international human rights law in the strict meaning of the term did not exist and also no law of non-international armed conflict existed in 1945 (for the various techniques of 'ad hoc regulation' of civil wars including the concept of 'recognition of belligerency', see Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press, 2012) 9-29). While Common Art 3 of the 1949 Four Geneva Conventions relating to the Protection of Victims of Armed Conflict (75 UNTS 31, 85, 135, 287) at least marked the coming into existence of such a law. Yet, that law remained in an embryonic state and its applicability required the existence of a non-state party to the conflict

ii. Early Post-Westphalian Signals during the Cold War (1948–89)

On exceptional occasions, the Security Council has displayed an inclination to activate the system of collective security outside the realm of threats to inter-state peace. The determination in resolution 217 (1965), that the ‘situation resulting from the proclamation of independence by the illegal authorities in Southern Rhodesia is extremely grave ... and that its continuance in time constitutes a threat to international peace and security’,²⁰ has been widely understood to be one early example of such a move by the Council.²¹ Similarly, resolution 418 (1977), strongly condemning South Africa’s system of apartheid,²² is of some interest in that context. Yet, even here it is difficult to speak of clear-cut post-Westphalian precedents, as Westphalian considerations significantly tempered the Council’s course of action in both situations.²³

(a) *Forcible Secession*

The emergence of the right of peoples to self-determination²⁴ exerted post-Westphalian pressure on the international regulation of the use of force outside the collective security system. A lively legal debate developed about a right to forcible national liberation in cases of ‘salt-water’ colonialism. While such a right was forcefully asserted by a significant part of the international community of states, the claim was not universally accepted. It has therefore ultimately

thereby requiring a terrorised civilian population to organise itself in some quasi-military fashion in order to activate the minimal protection under the new international humanitarian law. While the judgment of 30 September and 1 October 1946 rendered by the International Military Tribunal at Nuremberg (*The Trial of German Major War Criminals* (30 September and 1 October 1946), International Military Tribunal, vol I (Nuremberg, 1947) 171) may be seen as an early post-Westphalian moment, it is also true that the first generation of international criminal law reflected the essentially Westphalian configuration of the international legal system through its ‘war nexus’ with respect to crimes against humanity (Art 6(c) of the Charter of the International Military Tribunal, as annexed to the ‘London Agreement’ (entered into force 8 August 1945), 82 UNTS 280; on the sequence of several generations of international criminal law, see Claus Krefß, ‘The International Criminal Court as a Turning Point in the History of International Criminal Justice’ in Antonio Cassese (ed), *The Oxford Companion of International Criminal Justice* (Oxford University Press, 2009) 143, 147).

²⁰ UN Doc S/RES/217 (20 November 1965) op para 1.

²¹ Myres S McDougal and Michael Reisman, ‘Rhodesia and the United Nations: The Lawfulness of International Concern’ (1968) 62 *American Journal of International Law*, 1, 10–11; see also Krisch (n 15) 1285–86 (marginal n 25); for a more nuanced assessment, see Fink (n 16) 309, 354–55.

²² UN Doc S/RES/418 (4 November 1977) preambular para 6.

²³ For a meticulous analysis of the Security Council practice in both cases resulting in a very nuanced conclusion, see Fink (n 16) 309, 354–55 (Rhodesia); 389, 444 (South Africa).

²⁴ Art 1 of the International Covenant on Civil and Political Rights (adopted 19 December 1966 and entered into force 23 March 1976; 999 UNTS 171); on customary international law, see Antonio Cassese, *Self-Determination of Peoples. A Legal Reappraisal* (Cambridge University Press, 1995) 101 *et seq.*

remained an open question as to whether and to what extent the right to (external) self-determination of colonial peoples brought about a change to the existing regulation of the unilateral use of force.²⁵ In its *Nicaragua* judgment, the International Court of Justice (ICJ) alluded to the debate about a possible right of a foreign state to use force in support of an anti-colonial liberation movement, but it refrained from expressing a view on the matter.²⁶ Importantly, the ICJ limited its dictum to the 'process of decolonization' and did not allude to the possibility that the right of peoples to self-determination could give rise to a right to use force to achieve secession other than in colonial contexts. This was entirely in line with state practice in concrete incidents of secession conflicts which indicated that states were extremely reluctant to activate the UN General Assembly (GA)'s 1970 Friendly Relations Declaration's potential for a right of non-colonialised peoples to 'remedial secession'.²⁷

(b) Intervention upon Invitation

Furthermore, the emergence of the right of peoples to self-determination gave rise to the question as to whether the prohibition to intervene in the internal affairs of another state should be reconceived in a case of non-international armed conflict. In her important 1985 article 'The Legal Validity of Military Intervention by Invitation of the Government', Louise Doswald-Beck put for-

²⁵ For a careful and balanced analysis and references to the pertinent GA resolutions, see Heather A Wilson, *International Law and the Use of Force by National Liberation Movements* (Oxford University Press, 1988) 91-136; a post-Westphalian legal change definitively occurred in the international law of armed conflicts through the adoption of Arts 1(4) and 96 of the 8 June 1977 First Additional Protocol to the Geneva Conventions of 12 August 1949 (1125 UNTS 3), according to which 'armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes' qualify as international armed conflicts if the procedural condition set out in Art 96 is satisfied.

²⁶ *Nicaragua* case (n 9) 108 (para 206); the judgment's inconclusive allusion to the debate sufficed to spark a critical comment by Judge Schwebel in his Dissenting Opinion; *Nicaragua* case (n 9) 259, at 351 (paras 179-81).

²⁷ For a useful analysis of that state practice, see Tom J Farer, 'The Regulation of Foreign Intervention in Civil Armed Conflict' (1974-II) 142 *Recueil des Cours de l'Académie de Droit International* 297, 344-49 (East Pakistan), and at 349-52 (African practice). The Friendly Relations Declaration potential for an argument in support of a right to 'remedial secession' results, above all, from the formulation of the last part of the so-called safeguard clause: 'Nothing in the foregoing paragraphs 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'; UN Doc A/RES/25/2625 (24 October 1970), Annex: Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, Fifth Principle (The Principle of Equal Rights and Self-determination of Peoples), para 8; for a brief commentary, see Helen Keller, 'Friendly Relations Declaration (1970)' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, vol IV (Oxford University Press, 2012), 250, 255.

ward the view that the traditional law, according to which a state was entitled to invite, through its government, another state to help the inviting state, by way of force, to suppress an insurrection, had undergone a revolutionary change.²⁸ Doswald-Beck maintained that state practice since the 1950s had limited the legal power to express such an invitation to the case of a counter-intervention.²⁹ She nuanced her view in two interesting ways. First, she confined the assertion of legal change to the case of a direct use of force and held that there did not appear to be a 'prohibition against States providing governments with weapons and other military supplies during a civil war'.³⁰ Second, Doswald-Beck located the alleged legal change outside the prohibition of the use of force and limited it to the prohibition of intervention.³¹ Doswald-Beck's proclamation of legal change was in line the 1975 resolution by the Institut de Droit International (IDI) on the subject.³² Yet, the controversy within the Institut surrounding the adoption of this resolution indicated that doubts persisted as to whether state practice indeed supported the legal change in question.³³ In 1986, the ICJ did nothing to dispel such doubts because the Court, in its 1986 *Nicaragua* judgment, did not indicate any inclination to lend its voice to the post-Westphalian reinterpretation of the prohibition of (forcible) intervention (by invitation).³⁴

In 1982, the UN GA '(c)all[ed] upon [g]overnments to refrain from supplying arms and other military assistance as long as serious human rights violations in Guatemala continue to be reported'.³⁵ This may be taken as an early sign that the new international human rights law³⁶ had the potential to limit the power of a state to invite, through its government, foreign states to militarily intervene. But it is difficult to say that the practice of states during the Cold War had already reached the degree of consistency necessary to formulate a corresponding rule of customary international law.

²⁸ Doswald-Beck (n 13) 189, 242–52.

²⁹ The case of counter-intervention is that where the intervention constitutes the response to the support of the rebels from the outside.

³⁰ Doswald-Beck (n 13) 189, 251.

³¹ *Ibid*, 244.

³² Institut de Droit International, *The Principle of Non-Intervention in Civil Wars* (14 August 1975).

³³ The 1975 resolution was adopted by 16 votes to 6, with 16 abstentions, as recalled by Tom Ruys, 'Of Arms, Funding and "Non-lethal Assistance"—Issues Surrounding Third-State Intervention in the Syrian Civil War' (2014) 13 *Chinese Journal of International Law* 13, 41.

³⁴ *Nicaragua* case (n 9) 126 (para 246).

³⁵ UN Doc A/RES/37/184 (17 December 1982).

³⁶ In 1966, the adoption of the two international covenants on human rights marked the breakthrough towards a conventional international human rights law. It is widely held that, in the wake of this turning point, a customary international law body of human rights has also come into existence: see Thomas Buergenthal, 'Human Rights' in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, vol IV (Oxford University Press, 2012) 1021, 1023–24.

(c) *Humanitarian Intervention*

In the 1970s, India (in the case of East Pakistan/Bangladesh),³⁷ Tanzania (in the case of Idi Amin's Uganda),³⁸ and Vietnam (in the case of Pol Pot's Cambodia)³⁹ used force, without the authorisation of the Security Council, on the territory of another state in situations where that other state had resorted to a massive use of force against its own civilian population. These armed interventions foreshadowed the post-Cold War debate about humanitarian intervention. They did not, however, set powerful precedents for such a right, for the following two reasons. First, each of the intervening states attempted to justify its use of force on grounds other than humanitarian intervention. Secondly, the international reaction was not such that it could have been interpreted as at least implicitly embracing the idea of a new unwritten exception to the prohibition of the use of force when force is used to avert an impending humanitarian catastrophe. This statement holds true although it should not be overlooked that the international community's reaction in the case of Tanzania's intervention, which was not perceived by the superpowers to touch upon their vital interests, came close to tacit condonement of the use of force.⁴⁰

In light of this at best embryonic state practice in support of right for states to use force abroad to end massive violations of human rights, it is understandable that the ICJ did not indicate any inclination to accept that international law could be moving in that direction when it dealt with the matter in passing in its *Nicaragua* judgment:

In any event, while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect. With regard to the steps actually taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming and equipping of the *contras*. The Court concludes that the argument derived from the preservation of human rights cannot afford a legal justification for the conduct of the United States, and cannot in any event be reconciled with the legal strategy of the respondent State, which is based on the right of collective self-defence.⁴¹

³⁷ Thomas M Franck and Nigel S Rodley, 'After Bangladesh: The Law of Humanitarian Intervention by Military Force' (1973) 67 *American Journal of International Law* 275.

³⁸ Farook Hassan, 'Realpolitik in International Law: After Tanzanian-Ugandan Conflict "Humanitarian Intervention" Reexamined' (1981) 17 *Willamette Law Review* 859.

³⁹ Michael J Bazyley, 'Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia' (1987) 23 *Stanford Journal of International Law* 547, 550–53.

⁴⁰ For a well-balanced recent analysis of all three Cold War cases with detailed references, see Nicholas J Wheeler, *Saving Strangers. Humanitarian Intervention in International Society* (Oxford University Press, 2010) 55–136.

⁴¹ *Nicaragua* case (n 9) 134–35 (para 268).

As we have seen, the 1945 Westphalian starting point with respect to the internal use of force by states was exposed to a number of post-Westphalian challenges of lesser or greater significance during the Cold War. On the whole, however, none of these caused the Westphalian configuration of the law on the use of force to undergo a decisive change. In essence, the Westphalian rationale prevailed and one had to await the end of the Cold War for more decisive post-Westphalian developments in the law governing the use of force.

iii. The Broad Post-Westphalian Trend Immediately after the End of the Cold War (1990–99)

In the 1990s, the internal use of force by the Russian government in Chechnya, the internal use of force by the Turkish government against members of the Kurdish PKK and also the internal use of force by the government of the Federal Republic of Yugoslavia (Serbia and Montenegro) in Kosovo were criticised by other states for having been excessive.⁴² This state practice gave rise to the question of whether a new customary prohibition for states excessively to use force internally might be emerging. Jochen Abraham Frowein put it in the following terms:

It is no longer inconceivable that a rule of international law will come into existence which prohibits the internal use of the State military with its modern weaponry under certain conditions. ... As soon as an internal conflict reaches beyond police action, this would then be of concern to international law not only as a matter of the law of non-international armed conflict, but also with respect to the use of force as such.⁴³

The above-mentioned legal developments towards restraining the internal use of force went hand in hand with the impression that there was a growing hesitation by states to use force upon the invitation of a state responsible for widespread or systematic violations of human rights. However, it remained difficult to assess the state practice in point with precision. In his meticulous 1999 work on the subject, Georg Nolte summarised the state practice as follows:

It would not seem the case that States have made the claim that a government was precluded from inviting foreign troops because of that government's policy of sys-

⁴² On Chechnya, see eg the statement made on 27 February 1995 by the Chairman of the UN Commission on Human Rights (UN Doc E/1995/23, E/CN.4/1995/176, para 594) expressing 'deep concern over the disproportionate use of force by the Russian armed forces' in Chechnya; on the use of force by the Turkish government against Kurdish opponents, see eg the similarly worded critique voiced by the Foreign Ministers of Germany and of the United Kingdom on 31 March 1995 (as referred to in *Frankfurter Allgemeine Zeitung*, 1 April 1995, 2); on the Kosovo conflict, see UN Doc S/RES/1160 (1998), 31 March 1998, preambular para 3: 'Condemning the use of *excessive* force by Serbian police forces against civilians and peaceful demonstrators in Kosovo' (emphasis added).

⁴³ Jochen Abraham Frowein, 'Globale und regionale Friedenssicherung nach 50 Jahren Vereinte Nationen' (1995) 114 *Zeitschrift für Schweizerisches Recht* 269 (the English translation is mine).

tematic human rights violations. Yet, third States avoid interventions based on the invitation of governments, which have acted in gross defiance of human rights in the recent past or at least they avoid placing reliance on the invitation of such a government. ... It must also be noted that the human rights record has played a role with respect to the legality of intervention by invitation only in cases of abuse nearing the genocidal level.⁴⁴

From the perspective of international law, George Bush Sr missed the point when he declared in 1991 that in the case of the liberation of Kuwait from Iraq's aggression a 'new world order'⁴⁵ was at stake. Instead the authorisation of the allied military operation 'Desert Storm' by the Security Council was in complete harmony with the original Westphalian spirit underlying the collective security system as devised in 1945: Iraq had breached the inter-state peace through its act of aggression against Kuwait and this conduct was met with a collective military response under Chapter VII of the UN Charter to have this same inter-state peace restored.⁴⁶

The situation was entirely different when the Security Council activated Chapter VII in view of the internal use of force by Saddam Hussein against the Kurds in the north and against the Shiites in the south of Iraq. Unsurprisingly, therefore, the ground-breaking Security Resolution 688, which condemned 'the repression of the Iraqi civilian population in many parts of Iraq',⁴⁷ met with the Westphalian hesitation of five Member States.⁴⁸ Yet, the Security Council followed its new post-Westphalian course on subsequent occasions. Faced with humanitarian catastrophes in Somalia and Rwanda, the Council not only activated Chapter VII of the UN Charter, but also authorised the use of force.⁴⁹ In 1995, the International Criminal Tribunal for the former Yugoslavia (ICTY)

⁴⁴ Georg Nolte, *Eingreifen auf Einladung* (Springer, 1999), 578–79 (the English translation is mine); with respect to the question whether the emergence of the right to self-determination had limited the power of a state to invite, through its *de iure* government, a foreign state to help the inviting state to fight rebels in a non-international armed conflict (*supra* Section II.ii), Nolte couched his analysis of state practice in more nuanced terms than Doswald-Beck (text preceding n 29) and concluded that the presumption in favour of the *de iure* government could be rebutted only in case of a veritable uprising of the population of a state against its government (*ibid* 574–78).

⁴⁵ State of the Union Speech (29 January 1991).

⁴⁶ Christopher Greenwood, 'New World Order or Old? The Invasion of Kuwait and the Rule of Law' (1992) 55 *Modern Law Review* 153.

⁴⁷ UN Doc S/RES/688 (5 April 1991), op para 1.

⁴⁸ Cuba, Yemen and Zimbabwe voted no and China and India abstained; for a detailed analysis, see Wheeler (n 40) 141–46.

⁴⁹ For Somalia, see UN Doc S/RES/794 (3 December 1992), preambular para 3 in conjunction with op para 10; for Rwanda, see UN Doc 929 (22 June 1994), preambular para 10 in conjunction with op para 3; on this practice, see eg Inger Österdahl, *Threat to Peace* (Iustus Förlag, 1998) 52 *et seq*, 59 *et seq*. In the case of Haiti (1993/94), the Security Council came close to accepting that a coup d'état ousting a democratically elected government could constitute a threat to international peace and security (S/RES/841 (16 June 1993) preambular para 13). The occurrence of an anti-democratic coup d'état also figured prominently in the practice of the Security Council in the case of Sierra Leone (1997/98) S/RES/1332 (8 October 1997) op para 1.

interpreted this rapidly consolidating Security Council practice in the following terms:

It can thus be said that there is a common understanding, manifested by the 'subsequent practice' of the membership of the United Nations at large, that the 'threat to peace' of Article 39 may include, as one of its species, internal armed conflicts.⁵⁰

The first precedent following the end of the Cold War for the lawfulness of forcible humanitarian intervention in case of an impending humanitarian catastrophe following the end of the Cold War was not set by 'Western' states, but by those in Africa. In the summer 1990, the Economic Community of West African States (ECOWAS), without having been so authorised by the UN Security Council, used force in Liberia to end massive atrocities occurring in the civil war there.⁵¹ Whether the Liberian government, which had lost control over most of the state's territory, had actually expressed its consent⁵² has remained doubtful.⁵³ At least in September 1990, when the Liberian President was killed and the Liberian Vice-President opposed the course taken by ECOWAS, it became clearly impossible to explain the military intervention by ECOWAS on the basis of an invitation by Liberia's government.⁵⁴ What is of even greater importance is the fact that ECOWAS itself never explained its intervention primarily on the basis of such an invitation.⁵⁵ In their declaration of 9 August

⁵⁰ *The Prosecutor v Dusko Tadic*, IT-94-1-AR72, 2 October 1995, para 30. In the same seminal decision, the ICTY established itself as the key institution to 'progressively determine' the existence of customary international law of non-international armed conflict. The Tribunal articulated the post-Westphalian spirit, which it saw at work, in the following almost paradigmatic terms: 'This dichotomy (of a sophisticated law of international armed conflict and a rudimentary law of non-international armed conflict) was clearly sovereignty-oriented and reflected the traditional configuration of the international community, based on the coexistence of sovereign States more inclined to look after their own interests than community concerns or humanitarian demands. ... A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. ... If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy shall gradually lose its weight' (*ibid*, paras 96–97). In the same spirit the Tribunal declared the emergence of a second and markedly post-Westphalian generation of international criminal law characterised by the crystallisation under customary international law of war crimes committed in non-international armed conflict and by the emancipation of crimes against humanity from its Nuremberg connection with a war of aggression or war crimes in international armed conflict (Kreß (n 19) 146–48).

⁵¹ Anthony Chukwuka Ofofiele, 'The Legality of ECOWAS Intervention in Liberia' (1994) 32 *Columbia Journal of Transnational Law* 381 *et seq*.

⁵² In that sense, see Georg Nolte, 'Restoring Peace by Regional Action: International Legal Aspects of the Liberian Conflict' (1993) 53 *Zeitschrift für ausländisches und öffentliches Recht* 603, 621; in his article, Nolte explicitly criticises Doswald-Beck's restrictive view on 'intervention by invitation' (text preceding n 29) for precluding a regional organisation from preventing massive violations of human rights based on the consent of the *de iure* government (*ibid*, 624).

⁵³ Christopher Greenwood, 'Humanitarian Intervention: The Case of Kosovo' (1999) 10 *Finnish Yearbook of International Law* 141, 165.

⁵⁴ *Ibid*, 165.

⁵⁵ *Ibid*, 164–66; this is conceded by Nolte (n 52) 620–21. The situation was different when Nigeria and ECOWAS used force in Sierra Leone in 1997/98 after the democratically elected President

1990, the ECOWAS Heads of State had instead emphasised that they were 'going to Liberia first and foremost to stop the senseless killing of innocent civilian nationals and foreigners, and to help the Liberian people to restore their democratic institutions.'⁵⁶ Importantly, the military intervention by ECOWAS was not internationally condemned as a violation of the prohibition of the use of force. Instead, the President of the Security Council issued two statements to the effect that members of the Council 'commend[ed] the efforts made by the ECOWAS Heads of State and Government to promote peace and normalcy in Liberia'⁵⁷ and 'to bring the Liberian conflict to a speedy conclusion'.⁵⁸

The second precedent concerned the massive human rights violations in Iraq that occurred after the liberation of Kuwait and were condemned by Security Council resolution 688.⁵⁹ This resolution, however, had not authorised the use of force to avert the humanitarian catastrophe unfolding in Iraq.⁶⁰ Nevertheless, the United Kingdom, the United States, France, Italy and the Netherlands deployed air and ground forces to northern Iraq to provide safe havens for the Kurdish civilian population under attack.⁶¹ The no-fly zone established in the north was later extended to the south in order to protect the Shiites. The power of this precedent is weakened by the fact that the United States, in particular, made an attempt to justify 'Operation Provide Comfort' by reference to Security Council resolution 688.⁶² However, the United Kingdom, which was the driving force behind the intervention, recognised that this argument was ultimately unconvincing. Therefore the UK Foreign Secretary went public with a claim to unilateral humanitarian intervention in case of extreme humanitarian need:

But we operate under international law. Not every action that a British Government or an American Government or a French Government takes has to be underwritten

Kabbah had been ousted by a coup d'état. The Security Council had deplored the coup d'état and had expressed concern about the deteriorating humanitarian situation in Sierra Leone, but it had not authorised Nigeria's and ECOWAS's use of force in UN Doc S/RES/1332 (8 October 1997). The Council, however, accepted the use of force in Sierra Leone ex post facto in UN Doc S/PRST/1998/5 (26 February 1998). The Council's position is probably best explained by the fact that Kabbah had requested the external use of force and that the international community treated Kabbah as the President of Sierra Leone in exile because it condemned the coup d'état as anti-democratic. Therefore the case of Sierra Leone cannot be counted among the precedents for the legality of unilateral humanitarian intervention. Rather, the 1997/98 external use of force in Sierra Leone constitutes a case of intervention by invitation (as expressed under exceptional circumstances). For a comprehensive and useful analysis of the case, see Karsten Nowrot and Emily W Schabacker, 'The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone' (1998) 14 *American University International Law Review* 321 *et seq.*

⁵⁶ UN Doc S/21485 (10 August 1990) 3.

⁵⁷ UN Doc S/22133 (22 January 1991).

⁵⁸ UN Doc S/23886 (7 May 1992).

⁵⁹ UN Doc S/RES/688 (5 April 1991).

⁶⁰ Greenwood (n 53) 167; Wheeler (n 40) 154.

⁶¹ Wheeler (n 40) 147–52.

⁶² *Ibid.*, 166.

by a specific provision in a UN resolution provided we comply with international law. International law recognizes extreme humanitarian need. ... We are on strong legal as well as humanitarian ground in setting up this 'no fly' zone.⁶³

As in the case of Liberia, the legal claim to unilateral humanitarian intervention in a case of dire need had therefore been articulated with sufficient clarity and in this case again the international community at least implicitly condoned the military action.⁶⁴

Then came Kosovo. On 23 March 1999, the decision was made by NATO Member States to use force on the territory of the Federal Republic of Yugoslavia to avert an 'impending humanitarian catastrophe', about which the UN Security Council had expressed its alarm and which it saw as the consequence mainly of the 'excessive and indiscriminate use of force by Serbian security forces and the Yugoslav Army'.⁶⁵ Yet, the Security Council had not authorised the use of force by NATO states⁶⁶ and for a third time in the 1990s the lawfulness of humanitarian intervention *in extremis* was squarely on the international agenda. While certain participating states, such as Germany, tried hard (and barely convincingly) to avoid relying explicitly on a limited right to unilateral humanitarian intervention,⁶⁷ the United Kingdom once again⁶⁸ was forthright and in the Security Council it justified its use of force in Kosovo as follows:

The action being taken is legal. It is justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe. ... Every means short of force has been tried to avert this situation. In these circumstances, and as an exceptional measure on grounds of overwhelming humanitarian necessity, military intervention is legally justifiable. The force now proposed is directed exclusively to averting a humanitarian catastrophe, and is the minimum judged necessary for that purpose.⁶⁹

The attempt by the Russian Federation to condemn the military intervention by NATO states in Kosovo as a violation of the UN Charter's prohibition of the use of force failed rather clearly by 12 to 3 votes. Yet, these latter votes testified to the fact that the developing state practice in support of a right to unilateral humanitarian intervention *in extremis* met with opposition. Soon after, the neo-Westphalian critics would be able to mobilise more support for their position.

⁶³ The statement is reprinted in (1992) 63 *British Yearbook of International Law* 824.

⁶⁴ Wheeler (n 40) 169.

⁶⁵ UN Doc S/RES/1199 (23 September 1998), preambular paras 6 and 10.

⁶⁶ Greenwood (n 53) 154–57.

⁶⁷ Wheeler (n 40) 261–62, 277–78.

⁶⁸ For a precise account of the UK's consistent practice on humanitarian intervention, see Michael Wood, 'International Law and the Use of Force: What Happens in Practice?' (2013) 53 *Indian Yearbook of International Law* (in print); Michael Wood, 'The Law on the Use of Force: Current Challenges' (2007) 11 *Singapore Year Book of International Law* 1, 9–12.

⁶⁹ UN Doc S/PV 3988 (24 March 1999) 12.

iv. The Persisting Tension between Post-Westphalianism and Neo-Westphalianism (1999–2014)

Before we return to the question of unilateral forcible humanitarian intervention, we shall again look at the broader picture of state practice on the use of force and ask whether the more general post-Westphalian trend of the 1990s has been consolidated, or whether the pendulum has rather swung back in a neo-Westphalian direction.

(a) *Excessive Internal Use of Force*

The reaction by the international community to the massive violence inflicted by some governments in the Arab world upon (initially) peaceful political protesters offers an opportunity to revisit the question of whether state practice is moving towards the recognition of a customary prohibition on states using excessive force against parts of their own populations.⁷⁰ Upon closer inspection, however, doubts persist. While the massive use of force by the governments of Libya (2011) and Syria (as from 2012) against parts of their own populations have provoked much international criticism, the latter has not been worded in a manner that would suggest with sufficient clarity that (an overwhelming majority of) states recognise a new customary international rule on the internal use of force by states. Rather, decisive emphasis was placed on the 'gross and systematic violation of human rights' nearing or passing the threshold of crimes against humanity⁷¹ and the 'violations of international humanitarian law' amounting to war crimes committed in non-international armed conflict.⁷² Therefore, instead of moving towards the recognition of a new customary rule on the internal use of force by states, international practice indicates a preference to rely on international human rights law, the law of non-international armed conflict, and (the second generation of) international criminal law in order to limit the scope and the modalities of an internal use of force by a state.

(b) *Intervention by Invitation*

In more recent times, the 'strict-abstentionist' view on forcible intervention in a situation of non-international armed conflict,⁷³ as set forth in the 1975 IDI

⁷⁰ Cf text *supra* Section II.iii accompanying (n 43).

⁷¹ See, on Libya, UN Doc S/RES/1970 (26 February 2011), preambular paras 2, 6; UN Doc S/RES/1973 (17 March 2011) preambular para 5; on Syria, see eg UN Doc S/RES/2042 (14 April 2012) preambular para 4 ('widespread violations of human rights by Syrian authorities'; no reference to crimes against humanity, though); UN Doc S/RES/2043 (21 April 2012) preambular para 4 (language as in resolution 2042); UN Doc A/67/L63 (8 May 2013) preambular para 5 ('widespread and systematic gross violations and abuses of human rights').

⁷² See, on Libya, UN Doc S/RES/1973 (17 March 2011) preambular para 10; on Syria, see eg UN Doc A/67/L63 (8 May 2013) preambular para 5.

⁷³ The term is borrowed from Eliav Lieblich, *International Law and Civil Wars. Intervention and Consent* (Routledge, 2013) 130.

resolution⁷⁴ and in the 1985 study by Doswald-Beck,⁷⁵ has garnered a measure of scholarly support.⁷⁶ It remains doubtful, however, whether this view can be fully reconciled with state practice.⁷⁷ This may be exemplified by the recent conflict in Mali. In January 2013, France forcibly intervened in Mali by invitation of the latter's government to halt the advance of non-state forces to the country's capital, Bamako. While also claiming to act in accordance with Security Council resolution 2085 (2012), France had to and did rely on Mali's request as a matter of strict law as the Council's authorisation to use force was addressed to an 'African led International Support Mission'.⁷⁸ France's use of force was accepted as legal by the international community and the reference to the consent expressed by the *de iure* government of Mali was widespread.⁷⁹ This is an illuminating instance of state practice in light of the fact that, undisputably, a non-international armed conflict had erupted in Mali when France intervened.

This is not to suggest, however, that the power of a state through its government to express an internationally valid consent to an external use of force is necessarily unlimited. On the contrary, the most recent state practice pertaining to developments in the Arab world sheds new light on a possible international legal limitation on forcible intervention by (governmental) invitation in a situation of massive human rights violations by the requesting state.⁸⁰

In that context, it is worth emphasising that the readiness of numerous states to recognise a rebel opposition group fighting against an abusive regime as 'the [sole] legitimate representative of the *people*' must not be confused with the recognition of such non-state parties as the new government of the respective state.⁸¹ Therefore, this practice has not put into question the fact that the criterion of 'effective control over the state's territory' essentially determines

⁷⁴ IDI (n 32).

⁷⁵ Doswald-Beck (n 13).

⁷⁶ Corten (n 14) 288–310; Ruys (n 33) 42.

⁷⁷ For a more decisively critical view, see Lieblich (n 73) 140: 'While the strict-abstentionist approach has been widely featured in the literature, it is strikingly sparse in the *opinio juris* of states.'

⁷⁸ For France's justification of its use of force, see press conference given by Laurent Fabius, Minister of Foreign Affairs (14 January 2013); www.diplomatie.gouv.fr/en/country-files/mali-224/events-2627/article/mali-press-conference-given-by (accessed 18 June 2014); for the Security Council's authorisation of the use of force, see S/RES/2085 (20 December 2012) op para 9, emphasis added. The 2011 Kenyan use of force in Somalia is probably also best explained as a forcible intervention by invitation, although Kenya also framed its course of action as a measure of self-defence against the violent non-state organisation Al-Shabaab; Daley J Birkett, 'The Legality of the 2011 Kenyan Invasion of Somalia and Its Implications for the Jus Ad Bellum' (2013) 12 *Journal of Conflict and Security Law* 427, 449.

⁷⁹ See the statements made in the Security Council by the Secretary-General, Mali, Ivory Coast, Senegal, Tschad, Burkina Faso, Niger, Benin; UN Doc S/PV6905 (22 January 2013) 2, 6, 9, 11, 12, 13, 14, 15.

⁸⁰ For the emergence of this debate, see *supra* Section II.ii and iii.

⁸¹ For a meticulous and persuasive analysis of the most recent state practice, see Stefan Talmon, 'Recognition of Opposition Groups as the Legitimate Representative of a People' (2013) 12 *Chinese Journal of International Law* 219, emphasis added.

the international legal concept of 'government of a state'.⁸² In case of a non-international armed conflict, this criterion, together with a presumption for continuity, works to the benefit of the incumbent government until the latter has lost almost all control over the state's territory. The most recent state practice on Libya and Syria does not suggest a move towards a change of the law in case of a government which massively violates international human rights law or international humanitarian law.

The question, therefore, is whether the more recent practice indicates the growing conviction among states that an abusive government forfeits the power to invite foreign military intervention in its support. A first case of some interest is that of Bahrain (2011).⁸³ Faced with increasing political opposition, the government of this state reacted not only through harsh repression, including the use of its armed forces, but also invited troops from Saudi Arabia to help it suppress the protest movement. While the governmental use of force was criticised by the United States,⁸⁴ the EU,⁸⁵ the UN Secretary-General⁸⁶ and by the UN High Commissioner for Human Rights,⁸⁷ it is not apparent that third states questioned the power of Bahrain's government as such to invite foreign military support. This may be taken to confirm the view⁸⁸ that human rights violations by a state do not necessarily affect its power to express an internationally valid consent to a foreign use of force on its territory.⁸⁹

Whether the position taken by states was different with respect to Syria, the government of which has been held responsible for widespread violations of fundamental human rights, is not easy to answer. While it would seem that no foreign state claimed to be entitled directly to use force in Syria upon the invitation of the Assad government, at least Russia and Iran have been providing that government with weapons. As the ICJ has determined in the *Nicaragua* judgment, the supply of arms to rebels amounts to a use of force within the meaning

⁸² For the traditional law, see the reference in n 13; for the possibility that the more recent practice places decisive emphasis on legitimacy in the special case of a coup d'état against a democratically elected government, see the observation on the 1997 Sierra Leone case in (n 55).

⁸³ See Lieblich (n 73) 158–59.

⁸⁴ For the readout of President Obama's call with the King of Bahrain about the condemnation of violence (18 February 2011), see www.whitehouse.gov/the-press-office/2011/02/18/readout-president-obamas-call-king-bahrein (accessed 18 June 2014).

⁸⁵ Conclusion of the Council of the European Union on Bahrain (21 March 2011), www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/120084.pdf 10 (accessed 18 June 2014).

⁸⁶ Statement of UN Secretary-General Ban Ki-moon (18 March 2011), www.un.org/apps/news/story.asp?NewsID=37817&Cr=bahrain&Cr1=#.UzKPmFxFRyp (accessed 18 June 2014).

⁸⁷ Statement by the High Commissioner for Human Rights Navi Pillay (17 March 2011), www.ohchr.org/RU/NewsEvents/Pages/DisplayNews.aspx?NewsID=13687&LangID=E (accessed 18 June 2014).

⁸⁸ See the citation *supra* Section II.iii accompanying (n 44).

⁸⁹ Of course the intervening state remains bound by international human rights law and, to the extent applicable, by the law of *non*-international armed conflict regarding the modalities of the use of force; Lieblich (n 73), 158–59.

of Article 2(4) of the UN Charter.⁹⁰ The same should hold true in the case of a supply of weapons requested by a government that is no longer in a position validly to consent to a foreign use of force on its soil. Therefore, indirectly, as it were, the Russian and Iranian supply of weapons to the Syrian government placed the legal issue of intervention by invitation through an abusive government on the international legal agenda. The question has not, however, received a full debate through the exchange of clearly articulated legal positions. Russia appears to have taken a carefully circumscribed approach by highlighting the defensive nature of the weapons supplied to the Assad regime. In an interview, the Russian Minister of Foreign Affairs made the following statements which include interesting *caveats*:

Question: But you have supplied them [the Assad regime] with weapons?

Answer S Lavrov: We supply weapons to all those who contracted legally. And this is the universal rule.

Question: Even if those weapons may be used to perpetrate war crimes?

Answer S Lavrov: I don't think you can perpetrate war crimes with *defensive* weapons ...

...

Answer S Lavrov: ... As I said, the international law does not prohibit legal supplies, *legitimate* supply of arms to any sovereign state *without violating any international norms*.⁹¹

While the United States has certainly criticised the supply of weapons by Russia, it is difficult to pinpoint a clearly formulated legal argument underlying this critique. At one point in time, the United States (reportedly) commented as follows on the Russian supply of arms to the Syrian government:

It is not technically, obviously, a violation of international law since there's not an arms embargo, but it's reprehensible that arms would continue to flow to a regime that is using such horrific and disproportionate force against its own people.⁹²

All that can be said about state practice in the Syrian conflict on the point in

⁹⁰ *Nicaragua* case (n 9) 118–19 (para 228); in reaching its conclusion, the Court drew heavily on the eighth and ninth paragraph of the explanation of the principle of the non-use of force by states in their international relations set out in the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, A/RES/2625 (24 October 1970).

⁹¹ Interview of the Minister of Foreign Affairs of Russia Sergey Lavrov for the CBS, Moscow (7 June 2013), www.mid.ru/bdcomp/brp_4.nsf/e78a48070f128a7b43256999005bcb3/ee591092e586c2144257b8700252ffa!OpenDocument (accessed 18 June 2014), emphasis added.

⁹² Statement made by the Permanent Representative of the United States at the UN, Susan E Rice quoted in the *New York Times* (31 May 2012), www.nytimes.com/2012/06/01/world/middleeast/frustrated-clinton-says-russian-inaction-may-lead-to-syrian-civil-war.html?_r=0 (accessed 18 June 2014).

question is therefore that states seem to be reluctant to explicitly assert a fully fledged right to intervene militarily at the request of a regime held responsible for widespread violations of fundamental human rights, but are equally hesitant to maintain that such a regime has forfeited its power to express a valid consent to a use of force by a foreign state. This picture is not markedly different from the one emerging in the 1990s.⁹³

There are two further developments, however, which additionally weaken the legal position of a state using force abroad at the request of a government that is responsible for massive violations of human rights. The first is the recognition, in the 2005 World Summit Outcome Document, of the idea of the (primary) responsibility of the territorial state to protect its population from crimes under international law, including crimes against humanity and war crimes committed in non-international armed conflict:

Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it.⁹⁴

The conceptualisation of state sovereignty in light of the protection principle provides a new space to argue that a state leadership which, instead of protecting its civilian population from crimes under international law, is inflicting such crimes upon this very population loses its power to invite foreign states to use force.⁹⁵ The second legal development is the consolidation of a rule under customary international law which prohibits the rendering by a state of aid or assistance in the commission of an internationally wrongful act by another state. The International Law Commission (ILC) has stated this rule in Article 16 of its Articles on State Responsibility⁹⁶ and—in its commentary—the Commission, *inter alia*, refers to state practice on the supply of arms.⁹⁷ In the context of these two legal developments, it is interesting to note that Article 6 of the recently adopted Arms Trade Treaty prohibits the transfer of conventional arms (as defined in the treaty) if the state concerned

has knowledge at the time of authorization that the arms...would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected

⁹³ *Supra* Section II.iii.

⁹⁴ A/RES/60/1 (24 October 2005) para 138.

⁹⁵ This argument is usefully developed in Lieblich (n 73), 179–88.

⁹⁶ The International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, A/RES/56/83 (12 December 2001); reprinted in James Crawford, *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries* (Cambridge University Press, 2002) 64.

⁹⁷ Crawford, *ibid* 150–51 (para 9); for a detailed analysis of these and other instances of state practice, see Helmut Philipp Aust, *Complicity and the Law of State Responsibility* (Cambridge University Press, 2011) 108–45.

as such, or other war crimes as defined by international agreements to which it is a party.⁹⁸

Interestingly, Article 6 of the Arms Trade Treaty requires no more than the transferring state's 'knowledge' or 'foresight' of the commission of crimes under international law, while the commentary to Article 16 of the ILC Articles on State Responsibility can be read as to suggest that a state must act with the purpose to contribute to the commission of an internationally wrongful act in order to be held responsible for aiding or assisting.⁹⁹ This may be taken as evidence for the *opinio iuris* of states that knowledge or foresight of the aiding or assisting state suffices to render it internationally responsible where the principal internationally wrongful act goes hand in hand with the commission of crimes under international law.

The overall picture that results from all of this would seem to be as follows. There are two legal avenues¹⁰⁰ to limit the right of states to use force abroad at the request of a state which, through its government, attacks (part of) its own civilian population so intensively that the threshold of crimes against humanity is reached. The more far-reaching legal proposition would be that the state concerned forfeits the power to consent through its government to the use of force by another state on the former's territory and in support of the government of the former. The more moderate position would be that any form of military support by one state to another state, which commits widespread violations of fundamental human rights, triggers the international responsibility of the supporting state for aiding or assisting in the commission of these human rights violations. In light of their conduct and statements regarding concrete incidents, it is difficult to say that states have been consistently going down the path of (at least one of) these two legal avenues and it is equally difficult to say that they have drawn a fine analytical line between the two distinct legal arguments. However, it is clear that the development has reached a stage where it has become very difficult for a state to explain the legality of a use of force at the request of a foreign government which is responsible for systematically violating fundamental human rights.

⁹⁸ A/CONF.217/2013/2 (annex) (adopted on 2 April 2013). For the connection of this provision with the debate on the 'complicity rule' within the international law on state responsibility, see Aust (n 97) 137–38; similarly, the IDI has recently declared illegal any military assistance 'when it is exercised in violation of generally accepted standards of human rights'; Art 3(1) of the IDI resolution on 'Military Assistance on Request' adopted at the 2011 session; 10th Commission—Sub-group C, Plénière (8 September 2011); the overall meaning of this resolution and its relationship with the 1975 IDI resolution (n 40) is not free from doubt. For a careful analysis, see Georg Nolte, 'The Resolution of the Institut de Droit International on Military Assistance on Request' [2012] *Révue belge de droit international* 233.

⁹⁹ For a meticulous analysis of this point, see Ruys (n 33) 23–25.

¹⁰⁰ Ruys (n 33) 25–31 demonstrates that the duty of states to ensure respect for the law of armed conflicts by other states might offer a third avenue where the state inviting, through its *de iure* government, the external use of force systematically commits war crimes.

(c) (Direct and Indirect) Humanitarian Intervention

Paragraph 139 of the World Summit Outcome Document reads as follows:

[W]e are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.¹⁰¹

Through this formulation, states have almost ceremonially accepted the idea of a subsidiary international responsibility to protect populations from crimes under international law, and by referring to Security Council action under Chapter VII they have implicitly lent their stamp of definitive approval to the Security Council's practice since 1990 of including the commission of those crimes under international law, which form the second generation of international criminal law¹⁰², into the concept of 'threat to international peace and security' within the meaning of Article 39 of the UN Charter.¹⁰³

In March 2011, the Security Council stated that the 'widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity' and determined 'that the situation in the Libyan Arab Jamahiriya continues to constitute a threat to international peace and security'.¹⁰⁴ The Council then authorised

Member States that have notified the Secretary-General ... to take all necessary measures ... to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form and any part of Libyan territory.¹⁰⁵

While the Security Council highlighted the 'responsibility of the Libyan authorities to protect the Libyan population',¹⁰⁶ it did not explicitly base its authorisation of the use of force on the subsidiary international responsibility to protect as formulated in the World Summit Outcome Document. Instead, the Council

¹⁰¹ UN Doc A/RES/60/1 (24 October 2005) para 139.

¹⁰² Cf text in (n 50).

¹⁰³ For the same view Wood (n 68) (*Indian Yearbook of International Law*) who also correctly points out that para 139 the 2005 World Summit Outcome Document cannot be read as having somehow imposed or assumed an *obligation* on states or on the UN to use force in the exercise of the subsidiary international responsibility to protect.

¹⁰⁴ UN Doc S/RES/1973 (2011) preambular paras 7, 21; for scholarly commentaries, see Constantine Antonopoulos, "'The Legitimacy to Legitimise": The Security Council Action in Libya under Resolution 1973 (2011)' (2012) 14 *International Community Law Review* 359; Marie-José Domestici-Met, 'Protecting in Libya on Behalf of the International Community' (2011) 3 *Goettingen Journal of International Law* 861; Jennifer Welsh, 'Civilian Protection in Libya: Putting Coercion and Controversy Back into RtoP' (2011) 25(3) *Ethics and International Affairs* 255.

¹⁰⁵ UN Doc S/RES/1973 (2011) op para 4.

¹⁰⁶ UN Doc S/RES/1973 (2011) preambular para 4.

simply followed the practice it had begun in the 1990s and thereby made it clear by implication that paragraph 139 of the World Summit Outcome Document had essentially confirmed that practice.

The allied use of force in Libya proceeded in two phases.¹⁰⁷ The intervening states quickly established a no-fly zone and equally quickly brought the advance by the Gadhafi troops to Benghazi to a halt. Thereafter, the NATO states increasingly appeared to act as the rebels' air force. With that support, the rebels eventually succeeded in ending Gadhafi's reign over Libya. The forcible action taken by the intervening states in this second phase was met with criticism from part of the UN membership. In particular, Brazil, the Russian Federation,¹⁰⁸ India,¹⁰⁹ China¹¹⁰ and South Africa¹¹¹ (the so-called 'BRICS states') took the view that the NATO states had overstepped their Security Council mandate and that they had abused that mandate to bring about an inadmissible regime change. Brazil subsequently submitted a paper setting out a 'responsibility *while protecting*' concept.¹¹² This paper refers to a 'growing perception that the concept of international responsibility to protect could be abused for purposes other than protecting civilians, such as regime change' and suggests limiting any authorisation of the use of force 'in its legal, operational and temporal elements' and developing 'enhanced Security Council procedures ... to monitor and assess the manner in which resolutions are interpreted and implemented'.¹¹³ At the same time, the paper acknowledges 'that there may be situations where the international community might contemplate military action to prevent humanitarian catastrophes'.¹¹⁴

The most recent Security Council practice therefore results in a nuanced picture. On the one hand, the post-Westphalian turn since the 1990s towards activation of the UN Charter's collective security system in cases of widespread or systematic attack by a state against its own civilian population has reached a stage of consolidation. On the other hand, the case of Libya has also given rise to a controversy about the proper scope of Security Council-based military intervention to protect a civilian population. In particular, a significant part of the international community has voiced a strong neo-Westphalian hesitation to accept that such a use of force could result in regime change.¹¹⁵ Whether and to

¹⁰⁷ For a more detailed account, see Julian M Lehmann, 'All Necessary Means to Protect Civilians: What the Intervention in Libya Says about the Relationship between the *Jus in Bello* and *Jus ad Bellum*' (2012) 17 *Journal of Conflict and Security Law* 117.

¹⁰⁸ UN Doc S/PV.6620 (16 September 2011) 3.

¹⁰⁹ UN Doc S/PV.6531 (10 May 2011) 11.

¹¹⁰ *Ibid.*, 21.

¹¹¹ UN Doc S/PV.6566 (27 June 2011) 3 *et seq.*; S/PV.6595 (28 July 2011) 4–5.

¹¹² UN Doc A/66/551-S/2011/701 (11 November 2011) (annex), emphasis added.

¹¹³ *Ibid.*, title and paras 10, 11 (d), (h).

¹¹⁴ *Ibid.*, para 8.

¹¹⁵ It may be worth noting in passing that the practice of Security Council-based 'judicial intervention' which, if effective, would result in a regime change is by now fairly consolidated; the most

what extent the future Security Council practice will accommodate these concerns remains to be seen. At the time of writing, no protective use of force has been authorised by the Security Council in Syria.

The neo-Westphalian concern with respect to humanitarian interventions based on a Security Council mandate, as enunciated most clearly in Brazil's paper on 'responsibility while protecting', is essentially directed towards the scope and the modalities of forcible action in cases of dire humanitarian need. The neo-Westphalian criticism of humanitarian intervention without a Security Council mandate, however, concerns the use of force as such. What was foreshadowed by the three votes in support of the Russian draft Security Council resolution on NATO's use of force in Kosovo, soon after took the form of an outright rejection by the 'Group of 77' of the idea that unilateral humanitarian intervention could be legal in the case of an impending humanitarian catastrophe. In September 1999, the G77 'rejected the so-called right of humanitarian intervention, which had no basis in the UN Charter or in international law',¹¹⁶

In light of this unambiguous neo-Westphalian message, an effort was made to abandon the term 'humanitarian intervention'¹¹⁷ while ensuring that the underlying idea survived. In 2001, the International Commission on Intervention and State Sovereignty suggested that the idea could be maintained by rethinking the international legal concept of state sovereignty. The Westphalian emphasis on the supreme state authority within a territory was nuanced by highlighting the state's responsibility vis-à-vis its population.¹¹⁸ The idea underlying the alleged

recent example is the Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, as rendered by ICC Pre-Trial Chamber II, ICC-02/05-01/09 (9 April 2014), paras 29–33, regarding the international criminal proceedings against the incumbent president of Sudan, Omar Al Bashir; see also the observations *infra* in (n 140).

¹¹⁶ Ministerial Declaration of the Twenty-Third Annual Meeting of Ministers of Foreign Affairs of the Group of 77 (24 September 1999) para 69, www.g77.org/doc/Decl1999.html (accessed 18 June 2014).

¹¹⁷ While the use of term 'humanitarian intervention' is widespread in recent international legal scholarship, states have been reluctant to refer explicitly to this term. This is true even for the United Kingdom which, in the 1990s, preferred the formulation 'exceptional measure to prevent an overwhelming humanitarian catastrophe' (see the text *supra* Section II.iii accompanying n 69). While the latter words more precisely denote the subject-matter of the debate, the text uses the traditional term 'humanitarian intervention'. After all, it is substance and not terminology that matters.

¹¹⁸ The International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (International Development Research Centre, 2001) 12 (para 2.7) explicitly speaks of sovereignty 'in the Westphalian concept'. This concept of 'sovereignty as control' is then contrasted with 'sovereignty as responsibility' (*ibid*, 13, para 2.14) and, unsurprisingly, this post-Westphalian turn is then connected with the 'ever-increasing impact of international human rights norms, and the increasing impact in international discourse of the concept of human security' (*ibid*, 13, para. 2.15). It may be noted in passing that the idea of 'sovereignty as responsibility' is not incompatible with Jean Bodin's and Thomas Hobbes's vision of sovereignty as for both political thinkers the main function of the concept was to protect the civilian population against existential threats (at the time emanating from religious struggles). The key difference between

right to humanitarian intervention *in extremis* could therefore reappear as a legal consequence of a fundamental neglect of the responsibility embedded in state sovereignty. If seen in that light, the external use of force by a state to protect a civilian population under lethal attack by its own government could turn out to be compatible with the concept of state sovereignty.¹¹⁹

As may be expected, however, disguising the 'post-Westphalian' idea of unilateral humanitarian intervention in seemingly Westphalian terminology did not make this idea more palatable to its neo-Westphalian critics.¹²⁰ Accordingly, the above-cited paragraph 139 of the World Summit Outcome Document, while not rejecting the idea of unilateral humanitarian intervention, endorses forcible intervention to protect a civilian population under attack by its own government only in the case of a Security Council authorisation to that effect. There is thus clearly no prospect in the immediate future of the inclusion of a right of unilateral humanitarian intervention *in extremis* in an international document adopted by state consensus.¹²¹

It would, however, be hasty to conclude from all this that the idea of such a customary right has been buried.¹²² In August 2013, and in light of the alleged use of chemical weapons by the Syrian government, the United Kingdom confirmed its legal claim in the following terms:

If action in the Security Council is blocked, the UK would still be permitted under international law to take exceptional measures in order to alleviate the scale of the overwhelming humanitarian catastrophe in Syria by deterring and disrupting the further use of chemical weapons by the Syrian regime. Such a legal basis is available, under the doctrine of humanitarian intervention, provided three conditions are met:

- (i) there is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief;
- (ii) it must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved; and
- (iii) the proposed use of force must be necessary and proportionate to the aim of relief of humanitarian need and must be strictly limited in time and scope

this original idea and the modern conceptual turn, as suggested by the International Commission, is to sanction the fundamental neglect of the sovereign's responsibility to protect under positive law instead of relegating the matter to the extra-legal realm; on Bodin and Hobbes on sovereignty, see Dieter Grimm, *Souveränität. Herkunft und Zukunft eines Schlüsselbegriffs* (Berlin University Press, 2009) 20–26, 31–32.

¹¹⁹ To be accurate, the Commission stopped immediately short of the recognition of a fully fledged right to unilateral humanitarian intervention *in extremis* (n 118) 32–35, 53–55.

¹²⁰ Peter Hilpold, 'Intervening in the Name of Humanity: R2P and the Power of Ideas' (2012) 17 *Journal of Conflict and Security Law* 49, 66–69.

¹²¹ For the same view, see The International Commission on Intervention and State Sovereignty (n 118) 54 (para 6.37).

¹²² For the contrary view, see Hilpold (n 120) 64: 'If the Kosovo case constituted the culmination of the post-1945 attempts to revive the humanitarian institute it marked at the same time its final demise.'

to this aim (ie the minimum necessary to achieve that end and for no other purpose).¹²³

While the United States has not come up with an official statement taking a similarly articulate view in support of a right to humanitarian intervention *in extremis* after the use of chemical weapons in Syria,¹²⁴ and while this state has also not done so at any previous point in time, including the Kosovo conflict,¹²⁵ US President Barack Obama chose no less ceremonial an occasion than his 2009 Nobel Lecture to make a declaration which is hard to read as anything other than the endorsement of the UK legal position. Obama said the following:

More and more, we all confront difficult questions about how to prevent the slaughter of civilians by their own government. ... I believe that *force can be justified on humanitarian grounds, as it was in the Balkans*, or in other places that have been scarred by war. Inaction tears at our conscience and can lead to more costly intervention later. That's why all responsible nations must embrace the role that militaries with a clear mandate can play to keep the peace.¹²⁶

It is perhaps even more fruitful to look at the international debate regarding the possible supply of arms to the 'Free Syrian Army'.¹²⁷ After some pressure from France and the United Kingdom to that effect, the EU Foreign Ministers

¹²³ Chemical Weapon Use by Syrian Regime—UK Government Legal Position (29 August 2013), www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version (accessed 18 June 2014). Interestingly, the United Kingdom, in that statement, no longer avoids explicitly referring to the 'doctrine of humanitarian intervention'. The formulation of the first of the three conditions makes it clear that this use of the term 'humanitarian intervention' does not entail any change of position on substance (on terminology and substance, see the observation in (n 117)).

¹²⁴ The US President did not explicitly rely on a right to humanitarian intervention, but laid emphasis on the need to prevent the international legal rule against the use of chemical weapons from eroding; see 'Contemporary Practice of the United States. General International and US Foreign Relations Law. United States Threatens Military Strikes Against Syria, then Joins in Diplomatic Efforts to Control Syrian Chemical Weapons' (2013) 107 *American Journal of International Law* 900; in its Joint Resolution to authorize the limited and specified use of the United Armed Forces against Syria the US Senate does also not refer to a right to humanitarian intervention, but on the need to deter Syria's use of weapons of mass destruction in the future in order to protect *the United States and its allies* and to prevent the transfer to terrorist groups of any weapons of mass destructions (S J RES 21, 113th Congress, 6 September 2013; www.foreign.senate.gov/imo/media/doc/S.%20J.%20Res.%202013.pdf (accessed 18 June 2014)); for a useful criticism of the lack of clarity in the US legal position on the threat to use (direct) force in Syria, see Michael Schmitt, 'The Syrian Intervention: Assessing the Possible International Law Justifications' (2013) 89 *International Law Studies* 744.

¹²⁵ Michael Matheson, *Council Unbound: The Growth of UN Decision Making on Conflict and Post-conflict Issues after the Cold War* (United States Institute of Peace Press, 2006) 139; Wood (n 68) (*Singapore Year Book of International Law*) 11.

¹²⁶ 'A Just and Lasting Peace', Nobel Lecture by Barack H Obama (10 December 2009), http://nobelprize.org/nobel_prizes/peace/laureates/2009/obama-lecture_en.html?print=1 (accessed 18 June 2014), emphasis added.

¹²⁷ For an excellent documentation of this debate, see Ruys (n 33); see also Michael N Schmitt, 'Legitimacy versus Legality Redux: Arming the Syrian Rebels' (2014) 7 *Journal of National Security Law and Policy* 139.

decided on May 2013 not to renew the EU arms embargo on the supply of arms to Syrian opposition forces.¹²⁸ While there was an informal agreement at this time not to proceed with the delivery of arms, the decision cleared the way to provide rebels in Syria with arms ‘for the protection of civilians’¹²⁹ without thereby violating EU law. More importantly, the decision must have been based on the implicit assumption that such a supply of arms would also not be in breach of international law.¹³⁰ In light of the fact that the ICJ considers the delivery of weapons to rebels in a non-international armed conflict as a(n indirect) use of force,¹³¹ the assumption of the legality of a supply of arms must in turn have been based on the idea that in the case of Syria an exception from the prohibition of the use of force did in fact apply. As there was no other exception than humanitarian intervention even distantly in sight,¹³² it follows that, from the perspective of international law, the debate about the supply of arms to Syrian opposition forces is best seen as an ‘indirect conversation about indirect unilateral humanitarian intervention.’¹³³

While the EU practice only implicitly touches on the international legality of the supply of arms to Syrian rebels,¹³⁴ the matter was squarely addressed in the Doha Declaration issued by the Arab League Summit in May 2013. The pertinent passage reads as follows:

It emphasized the importance of efforts being taken in order to reach a political solution as a priority for the Syrian crisis, while stressing on the right of each member state, in accordance with its wish, to provide *all* means of *self-defense*, including *military* support to back the steadfastness of the Syrian people and the free army.¹³⁵

¹²⁸ Council Declaration on Syria, 3241st Foreign Affairs Council Meeting (27 May 2013).

¹²⁹ *Ibid*, sub 2, first indent.

¹³⁰ Before the adoption of the Council Declaration on Syria of 27 May 2013, Austria had (reportedly) raised the concern that the supply of arms to the Syrian opposition would ‘amount to a breach of the principle of non-use of force under Article 2(4) UN Charter’; Ruys (n 33) 17.

¹³¹ *Nicaragua* case (n 9) 118–19 (para 228) and text *supra* in n 90.

¹³² All other arguments are usefully discussed and discarded as ‘far-fetched’ (at best) by Christian Henderson, ‘The Provision of Arms and “Non-Lethal” Assistance to Governmental and Opposition Forces’ (2013) 36 *University of New South Wales Law Journal* 642, 665–72; for a similar view, see Ruys (n 33) 32; Schmitt (n 124) 147–49.

¹³³ The term ‘indirect humanitarian intervention’ is borrowed from Henderson (n 132) 672, who devotes an illuminating analysis to the debate.

¹³⁴ As Clapham correctly observes, ‘[f]ew governments want to discuss in legal terms’. See Andrew Clapham, ‘Weapons and Armed Non-State Actors’ in Stuart Casey Maslen (ed), *Weapons under International Human Rights Law* (Cambridge University Press, 2014) 195; for an exception, see the letter by the Dutch government to its parliament of 4 June 2013 in which it is stated ‘that the lack of legitimacy of the Assad regime and the broad recognition of the Syrian Opposition Council as the legitimate representative of the Syrian people has led the Government to conclude that the supply of military equipment to the Syrian Opposition Council, under exceptional circumstances and under specific conditions, need not be contrary to international law’, www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2013/06/04/kamerbrief-over-de-volk-enrechtelijke-aspecten-van-het-sanctieregime-tegen-syrie.html (accessed 18 June 2014).

¹³⁵ 24th Arab Summit Issues Doha Declaration (21–27 March 2013), <http://arableaguesummit2013.qatarconferences.org/news/news-details-17.html> (accessed 18 June 2014), emphasis added.

This remarkable statement furnishes another illustration why caution is due in order to avoid drawing too hasty conclusions on the subject of a right to unilateral humanitarian intervention *in extremis* from the impossibility to reach a consensus *in abstracto*. As in the case of the ECOWAS states, which set an important, though largely overlooked precedent on unilateral humanitarian intervention in 1990,¹³⁶ most members of the Arab League belong to the G77. While this group of states rejected the existence of a ‘right to humanitarian intervention’ *in abstracto*,¹³⁷ a quite significant number of states belonging to that same group maintained the legality of the use force in two concrete incidents (on one occasion in a direct, on another in an indirect manner) to end an alleged humanitarian catastrophe.

It would be short sighted to discard the Doha Declaration as irrelevant to the debate about humanitarian intervention because it did not use that term and instead relied on the ‘right of self-defence of the Syrian people’. This reference to the right of self-defence reveals a strikingly neo-Westphalian approach to the question because it conceptualises the right of a foreign state to use force to protect a civilian population *in extremis* as a power derived from the original right of the civilian population under attack. While it is unpersuasive to argue that such a neo-Westphalian extension of the concept of individual and collective self-defence can be brought in line with the text of Article 51 of the UN Charter,¹³⁸ it is in fact the most consistent and therefore the most persuasive way to explain the rationale which lies at the heart of the neo-Westphalian tendency in question. This debate would best be reframed as being about a strictly limited *ius ad bellum internum* by a civilian population under lethal attack.¹³⁹ Despite the ‘neo-Westphalian hesitation’ against the ‘so-called right of humanitarian intervention’, as voiced clearly and loudly by the G-77 *in abstracto*,¹⁴⁰ the odds on the outcome of such a debate are still uncertain.

¹³⁶ *Supra* Section II.iii.

¹³⁷ It would be too simple to say that the subsequent rejection of a right to forcible humanitarian intervention in the abstract by the G-77 undid that precedent. On the contrary, even on the level of abstract statements, Art 4(h) of the African Union (AU)’s constitutive document suggests that the AU Member States do not categorically exclude a customary exception from the prohibition of the use of force in case of overwhelming humanitarian need—if the use of force is based on regional authorisation; Ben Kioko, ‘The Right of Intervention under the African Union’s Constitutive Act: From Non-Interference to Non-Intervention’ (2003) 85 *International Review of the Red Cross* 807, 812–15, makes it clear that the drafters of Art 4(h) had the use of force by states to avert a humanitarian catastrophe, such as in the case of Rwanda in 1994, in mind.

¹³⁸ Such an attempt has recently been made by George P Fletcher and Jens David Ohlin, *Defending Humanity: When Force Is Justified and Why* (Oxford University Press, 2008) 145–47; for a compelling rebuttal, see Henderson (n 132) 677.

¹³⁹ For a proposal pointing in this direction, see Frédéric Mégret, ‘“Civil Disobedience” and International Law: Sketch for a Theoretical Argument’ (2010) 46 *Canadian Yearbook of International Law* 143; see also Claus Krefß, ‘Review of Books’ (2012) 83 *British Yearbook of International Law* 145, 159.

¹⁴⁰ See text accompanying (n 115). Broadly at the same time, there have been similar expressions of neo-Westphalian hesitation regarding ‘judicial intervention’ in cases of crimes under

(d) Forcible Secession

The same is true for the (analytically distinct, but substantively closely connected) contemporary debate regarding a possible right of a non-colonialised people to 'remedial secession'. We had left the debate with a clearly Westphalian understanding of the 1970 Friendly Relations Declaration's safeguard clause, as practised by states in concrete secession conflicts.¹⁴¹ In 1998, the Supreme Court of Canada revisited the legal issue at stake in 'Reference Re Secession of Quebec' and alluded to the possibility that international law could have developed to a point where the right of a people to secede from its parent state exists where its 'ability to exercise its right to self-determination internally is somehow being totally frustrated'.¹⁴² The debate about a possible right to remedial secession gained further momentum as a result of the 2008 declaration of independence of Kosovo and due to the controversy surrounding the legal status of South Ossetia and Abkhazia after the August 2007 international armed conflict between Georgia and the Russian Federation. But a significant degree of scepticism prevailed. The Independent International Fact-Finding Mission on the Conflict in Georgia summarised the state of the debate as follows:

[O]utside the colonial context, self-determination is basically limited to internal self-determination. A right to external self-determination in [the] form of a secession is not accepted in state practice. A limited, conditional extraordinary allowance to secede as a last resort in extreme cases is debated in international legal scholarship.

international law. As far as possible international law exceptions from international immunity rights of states are concerned, the ICJ, in 2002, denied that there was an exception to immunity *ratione personae* before a foreign criminal court for crimes under international law (*Arrest Warrant of 11 April 2000* (2002) ICJ Reports 3, para 58). The Court hereby ruled out the legality under international law of a 'unilateral judicial intervention' which, if effective, would be tantamount to a regime change. Conversely, the decision of 12 December 2011 by the ICC's Pre-Trial Chamber I (*The Prosecutor v Omar Hassan Ahmad Al Bashir*, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir (12 December 2011), ICC-02/05-01/09-139, paras 18, 43 *et seq*) deserves to be highlighted for having fully realised the international customary law's post-Westphalian potential with respect to the 'collective judicial intervention' by the ICC. Based on the underlying idea that the ICC has been entrusted with the enforcement of the '*jus puniendi* of the international community', the Chamber held that there exists, for the purpose of genuine international criminal proceedings, a customary law exception from the immunity right *ratione personae*. It being an exception under general international law, it was also held to apply to states not party to the ICC Statute and irrespective of an involvement of the Security Council. While this remarkable judicial pronouncement recognises the lawfulness under international law of a 'judicial intervention', through a genuinely international criminal jurisdiction which, if effective, would be tantamount of a regime change, the ICC's Pre-Trial Chamber II, in its subsequent decision of 9 April 2014, has chosen the more cautious approach to recognise the lawfulness of such an ambitious form of 'judicial intervention' only in case of a Security Council authorisation to that effect (see *supra* n 115).

¹⁴¹ *Supra* Section II.ii, text preceding note 27.

¹⁴² Supreme Court of Canada, *Reference Re Secession of Quebec* (1998) 2 RCS 217, 286.

However, most authors opine that such a remedial 'right' or allowance does not form part of international law as it stands. The case of Kosovo has not changed the rules.¹⁴³

The Advisory Proceedings before the ICJ in *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* have not shed much new light on the matter. In its Advisory Opinion of 22 July 2010, the ICJ, without stating its own view on the possibility of a right to 'remedial' secession, noted that 'radically different views' had been expressed on that question.¹⁴⁴ Interestingly, however, the Russian Federation had maintained in the course of the written proceedings that a right of a people to 'remedial secession' did exist under 'truly extreme circumstances, such as an outright armed attack by the parent state, threatening the very existence of the people in question'.¹⁴⁵

Whether or not the threshold, as proposed by the Russian Federation before the ICJ,¹⁴⁶ accurately reflects the existing international legal standard on a possible right of non-colonialised peoples to 'remedial secession', is not a matter to be fully explored in this article. But it is worth noting that the factual scenario described in the above-cited Russian statement closely mirrors that of an '[impending] humanitarian catastrophe', which is, at present, the only conceivable threshold for a possible *ius ad bellum internum* of a civilian population and a possible right of foreign states to forcible humanitarian intervention in defence of such a population. The more recent state practice on secession conflicts therefore suggests one modest conclusion: whatever contemporary international law has to say on remedial secession outside the colonial context, and whether or not a right to remedial secession may ever be enforced through the use of force, the factual threshold for such a right to forcible remedial secession would be at

¹⁴³ *Independent International Fact-Finding Mission on the Conflict in Georgia, Report*, vol II (September 2009) 141.

¹⁴⁴ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (22 July 2010) (2010) ICJ Reports 403, 438 (para 82).

¹⁴⁵ Written Statement of 16 April 2009, 32/3 (para 88), www.icj-cij.org/docket/files/141/15628.pdf (accessed 18 June 2014).

¹⁴⁶ It is difficult to determine with precision whether the Russian Federation adopted a more permissive view with respect to the right of peoples to secession in the recent conflict about the Crimea. (In his address before State Duma deputies, Vladimir Putin, among other considerations, relied on the fact that the Supreme Council of Crimea referred to the United Nations Charter, which speaks of the 'right of nations to self-determination' and that 'the Crimean authorities referred to the well-known Kosovo precedent—a precedent our western colleagues created with their own hands in a very similar situation', www.mid.ru/bdomp/brp_4.nsf/e78a48070f128a7b43256999005bcb3/2a848aedcfc7109644257ca0002a1ca6!OpenDocument (accessed 18 June 2014).) In any event, the claim to secession, as put forward by the self-proclaimed authorities in Crimea and by Russia as from February 2014, has not met with the approval by the international community of states (UN Doc A/68/L39 (20 March 2014), in particular preambular para 7 and op para 5). The rejection of the claim to secession appears to have been based primarily on the factual consideration that the Russian-speaking community on the Crimea was not prevented from exercising its right to self-determination within the Ukraine (see eg UN Doc S/PV7124 (3 March 2014) 4 (USA), 6 (France), 7 (United Kingdom)). The 2014 incident of the Crimea is therefore not particularly instructive as to the precise content of the existing international legal standard on a possible right of peoples to remedial secession.

least as stringent as that for a possible right of a civilian population *ad bellum internum* and for the corresponding right of a foreign state to forcible humanitarian intervention.

III. POST- AND NEO-WESTPHALIAN RESPONSES TO TRANSNATIONAL NON-STATE TERROR AGAINST STATES SINCE 1945

Let us now change the perspective and look at the evolution since 1945 of the international legal response to threats posed to states by massively violent transnational non-state actors. Following a brief clarification of the legal starting point in 1945, the study of the practice of states subsequent to the UN Charter's entry into force will be divided into the period in time before and after 11 September 2001.

i. A Westphalian Pillar of the Legal Edifice Complemented by Wide Spaces for Legal Evolution

The prohibition of the use of force constitutes the Westphalian pillar of the international legal edifice established in 1945, also with a view to transnational non-state threats. At the same time, the formulations both of the UN Charter's collective security system and of the right of self-defence leave considerable room for post-Westphalian legal responses.

Article 2(4) of the UN Charter does not leave room for post-Westphalian doubt: the prohibition of the use of force binds states only. As a treaty rule, the latter provision applies to UN Member States,¹⁴⁷ but Article 2(4) is complemented by a customary international prohibition of the use of force binding upon all states.¹⁴⁸ The state-centricity of the prohibition of force in Article 2(4) of the UN Charter may be taken to suggest a corresponding state-centric interpretation of Article 39 of the UN Charter.¹⁴⁹ It should be noted, though, that

¹⁴⁷ It is not necessary for present purposes to enter into the debate about the legal conundrum enshrined in Art 2(6) of the UN Charter; for an early legal analysis, see Kelsen (n 15) 106.

¹⁴⁸ *Nicaragua* case (n 9); on the specific question as to how the international law on the use of force should deal with 'contested states', see Henderson (n 11) 368–407.

¹⁴⁹ As Kelsen (n 15) pointed out in his early study of the UN Charter, it would also be consonant with the 'ordinary use of language' to interpret the term 'international peace' to constitute a 'condition of absence of force *in the relations among States*' (emphasis added); see also Michael Wood, 'The Role of the UN Security Council in Relation to the Use of Force against Terrorists' in Larissa van den Herik and Nico Schrijver (eds), *Counter-Terrorism Strategies in a Fragmented International Legal Order. Meeting the Challenges* (Cambridge University Press, 2013) 317, 320: 'When the Security Council first met, in London on 17 January 1946, no one could have anticipated that the Council would come to play a role in the field of counter-terrorism. It was set up to keep the peace between peace, and that is mostly what it tried to do in the early years, though with difficulty given the Cold War.'

the wording of Article 39 of the UN Charter is much less clear than that of Article 2(4) of the Charter and does not categorically rule out the possibility to include non-state threats, all the more should they be transnational in nature. Thus, the text of Article 39 of the UN Charter, while certainly amenable to a strictly Westphalian construction, also leaves room for a more extensive post-Westphalian vision. The wording of Article 51 of the UN Charter is even more open in both directions as it does not explicitly require an armed attack by a state. Again it is possible to construe the latter legal concept in consonance with the legal term 'use of force' in Article 2(4) of the UN Charter and thus in a state-centric manner. But no such necessity exists. To the contrary, the text of Article 51 of the UN Charter leaves room for the post-Westphalian inclusion of transnational non-state violence.¹⁵⁰

ii. No Decisive Activation of the Law's Post-Westphalian Potential before 11 September 2001

Transnational non-state violence is not only a phenomenon of the third millennium. It had been a recurring theme in nineteenth-century state practice and between 1945 and 2001 a number of states responded by the use of armed force to transnational non-state violence.¹⁵¹ Yet, the practice of states before 2001 did not fully activate the law's neo-Westphalian potential in that respect.

The state-centric character of the prohibition of the use of force remained essentially unchallenged.¹⁵² The Security Council also did not develop a clear and consistent practice to the effect that certain forms of transnational non-state violence in itself amounted to a threat or breach of international peace and security which could justify the adoption of non-military sanctions, let alone the use of force under the collective security system.¹⁵³

¹⁵⁰ For a detailed argument to that effect, see Claus Kieß, *Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen bei staatlicher Verwicklung in Gewaltakte Privater* (Duncker & Humblot, 1995) 206–35. The relationship between the new law of non-international armed conflict (see the observations *supra* n 19) and transnational conflicts between states and non-state organisations was also an open question. Common Art 3 of the GCs introduced the legal concept of non-international armed conflict. It is possible to give a restrictive meaning to the latter and to confine it to intensive violence between a state and a non-state organisation (or between at least two non-state organisations) within the territory of one state. Yet, the words 'occurring in the territory of one of the High Contracting Parties' in Common Art 3 of the GCs do not require the narrow geographical construction as they can also be taken only to exclude armed conflicts taking place on the territory of a state not party to the GCs from the provision's scope of application. It should take a long while, however, until this potential for a broader post-Westphalian construction of the concept of non-international armed conflict would occupy a central place in the international legal debate.

¹⁵¹ For a perusal of the relevant state practice, see Kieß (n 150) 218–31 (19th century and 20th century until 1945); 42–142 (1945–94).

¹⁵² For a summary of the state practice in point, see Kieß (n 150) 133.

¹⁵³ In preambular para 7 of S/RES/748 (31 March 1992), the Security Council determined that Libya's refusal to extradite the suspects of the Lockerbie bombings constituted a threat to international peace and security. While this undoubtedly marked an important precedent for the

To the extent that it occurred, the legal debate centred around the right of self-defence by states. Not infrequently, states have asserted a right of individual¹⁵⁴ self-defence to respond to transnational non-state violence.¹⁵⁵ In most of these cases, the state's use of force was met with widespread international criticism.¹⁵⁶ This reaction explains the widespread belief in international legal scholarship that state practice before 11 September 2001 does not support the existence of a right of self-defence against a non-state armed attack¹⁵⁷ and it also constitutes the background against which the ICJ opined in its *Nicaragua* judgment that the right of self-defence, as recognised in Article 51 of the UN Charter, requires an armed attack by another state.¹⁵⁸

The widespread international criticism of the use of force by states in the cases under consideration was, however, only rarely based on the rejection of the idea that non-state actors were capable of launching an armed attack within the meaning of Article 51 of the UN Charter.¹⁵⁹ On many occasions, the use of force was rejected because it was believed that it was indiscriminate and/or would cause excessive civilian casualties.¹⁶⁰ Not infrequently, the use of force was also condemned as a 'reprisal'.¹⁶¹ Probably most importantly, the negative international stance very often chiefly resulted from the fact that the states

Security Council practice regarding international terrorism, it cannot be overlooked that the assumption here was the direct involvement of a state in the terrorist attacks; Erika de Wet, *The Chapter VII Powers of the United Security Council* (Hart Publishing, 2004) 167–68; for some further examples of precursors of the subsequent practice, see Wood (n 149) 323–24.

¹⁵⁴ It is worth noting that there is no clear precedent before 11 September 2001 for the invocation of a right of collective self-defence against transnational non-state violence.

¹⁵⁵ That is violence which, in the view of the states asserting a right of self-defence, could not be attributed under customary international law, to another state; for a summary of the pertinent state practice, see Kreß (n 150) 134–35.

¹⁵⁶ For a summary of the international response, see Kreß (n 150) 130.

¹⁵⁷ For a representative assessment to that effect, see Tom Ruys, *Armed Attack and Article 51 of the UN Charter. Evolutions in Customary Law and Practice* (Cambridge University Press, 2010) 368–419.

¹⁵⁸ *Nicaragua* case (n 9) 103 (para 195).

¹⁵⁹ For a detailed analysis, see Kreß (n 150) 130.

¹⁶⁰ For one example, see the widespread criticism in respect of Israel's use of force in Lebanon in July 1981, see UN Doc SCOR, 36th year, 2292nd meeting, 7 (Jordan), 9 (Soviet Union); 2293rd meeting 4 (Tunisia), 5 (United Kingdom), 6–8 (Egypt), 15 (Syria), 17 (China), 19 (Yemen).

¹⁶¹ For one early example, see Algeria's protest against a French use of force in Tunisia, as repr in UN Doc GAOR, 12th session, 1st committee, 914th meeting, 260; for some later examples, see the widespread criticism in respect of Israel's use of force in Jordan in November 1966, as repr in UN Doc SCOR, 21st year, 1320th meeting 23 (United States), 1321st meeting 1 (France), 1322nd meeting 2 (Argentina), 3 (Japan), 5 (New Zealand), 1324th meeting 18–19 (Uruguay), 1325th meeting 2 (Bulgaria); the criticism of the United Arab Republic in respect of a Portuguese use of force in Senegal in 1969, as repr in UN Doc SCOR, 24th year, 1518th meeting, 6; and the widespread criticism in respect of Israel's use of force in Lebanon in May 1970, as repr in UN Doc SCOR, 25th year, 1539th meeting 7–8 (Finland), 1540th meeting 1 (Zambia), 6 (Burundi), 6–7 (Nepal), 1541th meeting 4 (China (Taiwan)), 5 (France), 1542th meeting 8 (United Kingdom).

concerned were criticised for their colonial (Portugal)¹⁶² or racist (South Africa) rule¹⁶³ or for their illegal occupation (Israel).¹⁶⁴ Where a state was not widely accorded a pariah status of that kind, as was the case with respect to Turkey, the international response to the use of force was conspicuously less negative.¹⁶⁵

iii. The Activation of the Law's Post-Westphalian Potential after 11 September 2001

Therefore, on the basis of this closer inspection of state practice since 1945, the international community's response to al-Qaeda's horrific terrorist attack on 11 September 2001 appears more as a powerful crystallising moment than as a dramatic departure from prior state practice.

(a) *The Right of Self-defence*

As early as the 12 September 2001, the Security Council recognised the right of individual and collective self-defence without implying that the 'horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, DC and Pennsylvania' were attributable to Afghanistan.¹⁶⁶ Soon thereafter, the United States as well as NATO and the United Kingdom formulated their legal claim to use force in self-defence, as recognised in Article 51 of the UN Charter, against al-Qaeda and the Taliban, in more specific terms.¹⁶⁷ This legal claim was based on the view that the terrorist attacks of 11 September 2001 constituted an armed attack within the meaning of Article 51 of the UN Charter and was not based on the conviction that this attack was attributable under customary international law to Afghanistan. NATO activated Article 5 of the NATO treaty simply because the 'attack against the United States on 11 September *was directed from abroad*',¹⁶⁸ and—while the United States and the United Kingdom emphasised in their letters to the Security Council¹⁶⁹ that the Taliban had rendered al-Qaeda support—neither of the two states made its legal argument dependent on the attribution of the latter's conduct to the state of Afghanistan (under the *de facto* government of the Taliban). Therefore, the legal claim

¹⁶² For the relevant state practice, see Krefß (n 150) 63–65; see eg the particularly instructive statement made by Algeria, as repr in UN Doc SCOR, 24th year, 1516th meeting, 13.

¹⁶³ For the relevant state practice, *ibid*, 72–73; see eg the particularly instructive statement made by France, as repr in UN Doc S/PV 2686 7.

¹⁶⁴ For the relevant state practice, *ibid*, 82–88.

¹⁶⁵ For the relevant state practice, *ibid*, 89–92; for a similar view on the international reaction to the repeated armed incursions by Turkey since the 1980s into northern Iraq to hit military bases held by the Kurdish PKK, see Ruys (n 157) 429–32.

¹⁶⁶ S/RES1368 (12 September 2001) preambular para 3 in conjunction with op para 1.

¹⁶⁷ For a detailed account, see Ruys (n 157) 433–37.

¹⁶⁸ Statement by NATO Secretary-General Lord Robertson (2 October 2001) (2001) 41 *International Legal Materials* 1267, emphasis added.

¹⁶⁹ UN Doc S/2001/946 (7 October 2001) and UN Doc S/2001/947 (7 October 2001).

underlying the allied Operation Enduring Freedom in Afghanistan,¹⁷⁰ which began on 7 October 2001, was that of a right of individual and collective self-defence against a non-state armed attack emanating from the territory of a state whose government was manifestly unwilling to prevent the attack from occurring. This legal claim was squarely placed before the international community and received almost universal support.¹⁷¹ The initial phase of Enduring Freedom and the international reaction to it therefore lend powerful support to the post-Westphalian extension of the right of self-defence to cases of non-state armed attacks.

The international endorsement of the initial phase of Operation Enduring Freedom has not remained an isolated international incident. In 2006, Israel asserted its right of self-defence to use force in Lebanon against an armed attack carried out by the non-state¹⁷² Hezbollah organisation.¹⁷³ While Israel's forcible action was criticised by some as disproportionate when it began to hit state infrastructure,¹⁷⁴ the alleged right of self-defence against a non-state

¹⁷⁰ For scholarly analyses, see Michael Byers, 'Terrorism, the Use of Force and International Law After 11 September' (2002) 51 *International and Comparative Law Quarterly* 401; Antonio Casese, 'Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law' (2001) 12 *European Journal of International Law* 993; Luigi Condorelli, 'Les Attentats du 11 Septembre et Leurs Suites: où va le Droit International?' (2001) 105 *Révue Générale de Droit International* 829; Jost Delbrück, 'The Fight Against Terrorism: Self-Defense or Collective Security as International Police Action? Some Comments on the International Legal Implications of the "War Against Terrorism"' (2001) 44 *German Yearbook of International Law* 9; Barry A Feinstein, 'Operation Enduring Freedom: Legal Dimensions of an Infinitely Just Operation' (2002) 11 *Journal of Transnational Law and Policy* 201; Christopher Greenwood, 'International Law and the "War" Against Terrorism' (2002) 78 *International Affairs* 301; Thomas M Franck, 'Terrorism and the Right of Self-Defense' (2001) 95 *American Journal of International Law* 839; Jochen Abr Frowein, 'Der Terrorismus als Herausforderung für das Völkerrecht' (2002) 62 *Zeitschrift für ausländisches Recht und Völkerrecht* 879; Markus Krajewski, 'Selbstverteidigung gegen bewaffnete Angriffe nicht-staatlicher Organisationen—Der 11 September 2001 und seine Folgen' (2002) 40 *Archiv des Völkerrechts* 183; Rein Müllerson, 'Jus Ad Bellum: Plus Ca Change (Le Monde) Plus C'est La Même Chose (Le Droit)?' (2002) 7 *Journal of Conflict and Security Law* 149; Sean D Murphy, 'Terrorism and the Concept of "Armed Attack" in Article 51 of the UN Charter' (2002) 43 *Harvard Journal of International Law* 41; Tom Ruys and Sten Verhoeven, 'Attacks by Private Actors and the Right of Self-Defence' (2005) 10 *Journal of Conflict and Security Law* 289; Christian Schaller, 'Operation Enduring Freedom und das Recht auf Selbstverteidigung' (2011) 86 *Die Friedens-Warte* 111; Michael N Schmitt, 'Responding to Transnational Terrorism under the *Jus ad Bellum*: A Normative Framework' in Michael N. Schmitt and Jelena Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines. Essays in Honour of Yoram Dinstein* (Martinus Nijhoff, 2007) 157–95; Carsten Stahn, 'International Law at a Crossroads? The Impact of September 11' (2002) 62 *Zeitschrift für ausländisches Recht und Völkerrecht* 183.

¹⁷¹ For detailed references, see Ruys (n 157) 436–37 (nn 375–78).

¹⁷² For a scholarly argument to bring Hezbollah within Art 9 of the ILC Articles on State Responsibility, see Tom Ruys, 'Crossing the Thin Blue Line: An Inquiry into Israel's Recourse to Self-Defense against Hezbollah' (2007) 43 *Stanford Journal of International Law* 265, 287–88.

¹⁷³ UN Doc S/2006/515 (12 July 2006); for a useful analysis of the ambiguities in Israel's legal claim, see Ruys (n 157) 450–51; for another scholarly analysis on this incident, see Michael N Schmitt, 'Change Direction' 2006: Israeli Operations in Lebanon and the International Law of Self-Defense' (2007–2008) 27 *Michigan Journal of International Law* 127.

¹⁷⁴ For a critical analysis of this aspect of the operation, see Ruys (n 172) 290–92.

armed attack was as such widely accepted.¹⁷⁵ Since 2004, Turkey was again, and increasingly, facing transnational non-state violence emanating from Kurdish PKK bases in northern Iraq. In 2008, Turkey responded with a major ground offensive directed against these PKK positions. While the picture with respect to this operation is somewhat less clear, which is probably also due to Turkey's failure to articulate clearly its legal case,¹⁷⁶ the conspicuous sparsity of international criticism of Turkey's use of force cannot be ignored.¹⁷⁷ The only more recent international incident possibly pointing in a different direction is Colombia's military incursion into Ecuador in 2008 to target members of the FARC, ie its non-state adversary in the ongoing Colombian non-international armed conflict. The Colombian use of force in Ecuador, which had been justified by that state as a measure of self-defence,¹⁷⁸ was criticised as a violation of international law by all members of the Organisation of American States,¹⁷⁹ except for the United States.¹⁸⁰ This negative position need not, however, be interpreted as the rejection of the possibility of a non-state armed attack within the meaning of Article 51 of the UN Charter. It might simply suggest that the non-state violence against Colombia emanating from Ecuador's territory was not significant enough to pass the threshold of a non-state armed attack triggering the right of self-defence or that Colombia's forcible action as not considered necessary.

On the whole, the practice of states since 11 September 2001 clearly supports the existence of a right of self-defence (both in its individual and collective dimension), as recognised in Article 51 of the UN Charter, against armed attacks by non-state actors. It would be premature to say that state practice has led to a robust international consensus regarding a (carefully delineated) right of individual and collective self-defence 'if a non-state armed attack occurs'.¹⁸¹ Most importantly, the ICJ, as of yet, has not accepted the existence of such right.¹⁸²

¹⁷⁵ For the Security Council debates, see UN Doc S/PV 5489 (14 July 2006); and S/PV 5493 (21 July 2006); for the G8 St Petersburg Summit Declaration, Middle East (16 July 2006), see www.g8.utoronto.ca/summit/2006stpetersburg/mideast.html (accessed 18 June 2014); and for the position of the UN Secretary-General, see UN Doc SG/SM/10570, SC/8781 (20 July 2006).

¹⁷⁶ For the same view, see Ruys (n 157) 458.

¹⁷⁷ For a careful analysis of the international reaction, see Ruys (n 157) 459–62.

¹⁷⁸ Comunicado No 081 del Ministeria de Relaciones Exteriores de Colombia, Bogotá (2 March 2008), <http://web.presidencia.gov.co/comunicados/2008/marzo/archivo.html> (accessed 31 March 2014).

¹⁷⁹ Doc OEA/SerF/II25, RC25/RES1/08 rev 1 (17 March 2008).

¹⁸⁰ US State Department, Daily Press Briefings by T Casey, Deputy Spokesman (3–5 March 2008); <http://2001-2009.state.gov/r/pa/prs/dpb/2008/mar/index.htm> (accessed 18 June 2014).

¹⁸¹ For a contrary scholarly position, see Dire Tladi, 'The Nonconsenting Innocent State: The Problem with Bethlehem's Principle 12' (2013) 107 *American Journal of International Law* 570.

¹⁸² On the narrow starting point of the ICJ's case-law, see (n 158). This was followed by the Court in the *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)*, (2003) ICJ Reports 161, at 186 (para 51); the picture became less clear with *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004) ICJ Reports 136, at 194 (para 139); and in the *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, (2005) ICJ Reports 168, at 223 (para

In international legal scholarship, an attempt has been made to portray the relevant state practice in a 'Westphalian light'. Instead of recognising the possibility of a non-state armed attack within the meaning of Article 51 of the UN Charter, this part of international legal scholarship explains the legality of Operation Enduring Freedom exclusively¹⁸³ by reference to a *lex specialis* on attribution. It is argued that, for the specific purposes of Article 51 of the UN Charter, and in deviation from the general rule on the attribution of the conduct of persons other than *de iure* organs, as set out by the ICJ,¹⁸⁴ the harbouring of a violent non-state organisation is sufficient to attribute the latter's conduct to the harbouring state.¹⁸⁵ Occasionally, the 'Westphalian avenue' to meet the transnational non-state threat has been put to its extreme by applying the alleged *lex specialis* on attribution even in a case where a territorial state is 'manifestly unable to prevent large-scale attacks' by armed groups from emanating from its territory.¹⁸⁶ In the form of this last extension, the Westphalian explanation of the broadening of the right of self-defence becomes indistinguishable, for all practical purposes, from its post-Westphalian competitor.

It is the latter, though, that has increasingly gained ground in international legal scholarship. In 2007, the IDI recognised that Article 51 of the UN Charter is applicable 'en principe' in the case of a non-state armed attack.¹⁸⁷ Furthermore, the 2010 Leiden Policy Recommendations on Counter-Terrorism and International Law state that it 'is now well accepted that attacks by non-state actors, even when not acting on behalf of a state, can trigger a state's right of individual and collective [upon request of the victim state] self-defence'.¹⁸⁸ Most

147), the Court made a statement which might be taken to suggest an inclination to reconsider the matter. For a comprehensive and precise account of the ICJ's case law, see James A Green, *The International Court of Justice and Self-Defence in International Law* (Hart Publishing, 2009) 44–51.

¹⁸³ It is of course also possible to accept a right of self-defence of individual and collective self-defence in case of a non-state armed attack and at the same time to maintain that a *lex specialis* on attribution has come into existence.

¹⁸⁴ *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (2007) ICJ Reports 43, at 202–15 (paras 385–415).

¹⁸⁵ For such a view, see eg Christian J Tams, 'The Use of Force Against Terrorists' (2009) 20 *European Journal of International Law* 359, 383–87. It has often been submitted that since '9/11' the USA have been working towards the recognition of a *lex specialis* on attribution. For an illuminating discussion, see Christian Henderson, *The Persistent Advocate and the Use of Force: The Impact of the United States upon the Jus ad Bellum and the Post-Cold War Era* (Ashgate, 2010) 137–70.

¹⁸⁶ Albrecht Randelzhofer and Georg Nolte, 'Article 51' in Bruno Simma, Daniel Erasmus-Khan, Georg Nolte, and Andreas Paulus (eds), *The Charter of the United Nations: A Commentary*, vol II (Oxford University Press, 3rd edn 2012) 1418–19 (marginal n 41).

¹⁸⁷ *Problèmes actuels du recours à la force en droit international. La Légitime défense*, 10ième Commission sous-groupe A (27 October 2007).

¹⁸⁸ The recommendations, which were formulated by a group of international lawyers, are reprinted in van den Herik and Schrijver (n 149) 716 (para 38). For the same view, see para F of the 'Chatham House Principles of International Law on the Use of Force in Self-Defence', which

recently, the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, has stated that state practice since 11 September 2001 'suggests that international law may now permit' self-defence in response to a non-state armed attack.¹⁸⁹

The IDI was right, however, to point out that this post-Westphalian interpretation of the right of self-defence gives rise to 'problèmes complexes.' The United States' geographical extension of the use of force against al-Qaeda since 2002 has brought these problems to light. In the legal view of the United States, as it was expressed in a series of pronouncements by government officials,¹⁹⁰ culminating in Barack Obama's remarks at the National Defense University on

were prepared by Chatham House based on the responses received by a group of leading British international lawyers and international relations scholars to a questionnaire on questions on the right of self-defence in international law. See E Wilmshurst, 'The Chatham House Principles of International Law on the Use of Force in Self-Defence' (2006) 55 *International and Comparative Law Quarterly* 963, 969.

¹⁸⁹ UN Doc A/68/382 (13 September 2013) para 88. The rapidly growing recognition of a right of self-defence against a non-state armed attack has given rise to the question of which body of law governs the modalities of the use of force when this right is exercised. The Westphalian answer would be that the law of international armed conflict applies between the state acting in self-defence and the host state of the non-state organisation. But such an answer would ignore the fact that the actual fighting is between the state acting in self-defence and the attacking non-state organisation. In the initial period of its use of force against al-Qaeda, the United States therefore made an attempt to support the emergence, under customary international law, of a post-Westphalian version of the concept of international armed conflict (George W Bush, 'Memorandum: Human Treatment of Al Qaeda and Taliban Detainees' (7 February 2002) para 2(c)). But the articulation of the idea that an international armed conflict can take place between a state and a non-state organisation has not secured much traction (for an exception, see Supreme Court of Israel Sitting as the High Court of Justice, *The Public Committee Against Torture in Israel et al v The Government of Israel et al* (11 December 2005) HCJ 769/02 para 18). In that situation the US Supreme Court recognised the transnational potential (see (n 150)) of the concept of non-international armed conflict (*Hamdan v Rumsfeld. Secretary of Defense et al* (2006) 126 S Ct 2746, 2757).

¹⁹⁰ John O Brennan, Speech at the Woodrow Wilson International Center for Scholars: The Ethics and Efficacy of the President's Counterterrorism Strategy (30 April 2012), www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy; Stephen Preston, General Counsel, Central Intelligence Agency, Speech at Harvard Law School: CIA and the Rule of Law (10 April 2012), www.cfr.org/rule-of-law/cia-general-counsel-stephen-prestons-remarks-rule-of-law-april-2012/p27912; Eric Holder, Attorney General, Remarks at Northwestern University Law School (5 March 2012); <http://lawfareblog.com/2012/03/text-of-the-attorney-generals-national-security-speech/#mare-6236>; Jeh Johnson, General Counsel, US Department of Defense, Dean's Lecture at Yale Law School: National Security Law, Lawyers and Lawyering in the Obama Administration (22 February 2012), <http://lawfareblog.com/2012/02/jeh-johnson-speech-at-yale-law-school>; John O Brennan, Assistant to the President for Homeland Security and Counterterrorism, Remarks at the Harvard Law School Program on Law and Security: Strengthening Our Security by Adhering to Our Values and Laws (16 September 2011), www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an; Harold Hongju Koh, Legal Adviser, US Department of State, Remarks at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (25 March 2010), <http://www.state.gov/s/l/releases/remarks/139119.htm> (all accessed 18 June 2014).

23 May 2013,¹⁹¹ this state has continued to be the victim of an armed attack by al-Qaeda even after the destruction of this organisation's strongholds in Afghanistan in 2001 and 2002. Over time, so the argument continues, 'associated forces' have joined al-Qaeda in carrying out this continuing non-state armed attack and this attack has been emanating from the territories of a number of different states that, again in the view of the United States, have proven either unwilling or unable to bring the armed attack to a halt. The United States feels entitled to exercise its right of self-defence on all these territories and has acted accordingly.¹⁹² The two most important background assumptions for this legal position are the denial of a gravity threshold for a non-state armed attack and the possibility to consider the use of force emanating from different terrorist cells spread over several state territories as one armed attack if these cells are somehow—perhaps only by a common ideology—'associated'. This self-defence claim goes beyond what was necessary to justify Operation Enduring Freedom in Afghanistan in 2001–02, or Israel's use of force in Lebanon in 2006, or Turkey's use of force in Iraq in 2008, and it was not met with widespread international acceptance.¹⁹³ Conversely, it is widely believed that a non-state armed attack must pass a significant gravity threshold.¹⁹⁴ And as the Special

¹⁹¹ Remarks by the President at the National Defense University (23 May 2013), www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university (accessed 18 June 2014).

¹⁹² It is of secondary interest for the purposes of this study that the relevant territorial state may occasionally have consented to the use of force against alleged terrorist targets (see Deeks (n 14) 1–60) because the legal claim articulated by the United States unambiguously exceeds this scenario.

¹⁹³ The same is true for the specifics of the 'transnational non-international armed conflict paradigm', as developed in a piecemeal fashion by the US government (for references, see (nn 190–191) for the fight against al-Qaeda. The rejection of any geographical limitation upon the applicability of the non-international armed conflict targeting powers constitutes one important legal assertion which remains hotly debated (for a presentation and discussion of the arguments, see Kreß (n 139) 152–55). And the further legal conviction of the United States that the violence emanating from a transnational network of terrorist cells, which are somehow—but not necessarily through the existence of a central quasi-military command—associated, can be aggregated to determine the existence of one transnational non-international armed conflict, is deeply disturbing. With this legal construction, the applicability of the 'law of non-international armed conflict paradigm' unfolds a significant spill-over to what was hitherto peaceful territory (for a compelling criticism of this part of the US legal position, see UN Special Rapporteur Heyns (n 189) paras 59–63).

¹⁹⁴ The general gravity threshold for the concept of 'armed attack', as developed by the ICJ in the *Nicaragua* case (n 9) 101 (para 191), and as confirmed and refined in the *Oil Platforms* case (n 182) 186–87, 191–92, 195–96 (paras 51, 64, 72) as well as in the *Armed Activities* case (n 182) 222–23 (para 146), remains a matter of considerable controversy (for a detailed discussion, see Green (n 182) 111 *et seq.*). There is, however, a widespread conviction that only violence of a significant intensity amounts to a non-state armed attack; see para 39 of the Leiden Recommendations (n 188) and para F of the Chatham House Principles (n 188). A gravity requirement appears to be absent in the list of criteria set out in Daniel Bethlehem, 'Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors' (2012) 106 *American Journal of International Law* 770, 775–77. For a criticism of this omission, see Elizabeth Wilmschurst and Michael Wood, 'Self-Defense Against Nonstate Actors: Reflections on the "Bethlehem Principles"' (2013)

Rapporteur on extrajudicial, summary or arbitrary executions has succinctly put it, 'this specific intensity requirement for the definition of an armed attack must be met *vis-à-vis* each host state on whose territory action in self-defence is taken'.¹⁹⁵ This latter requirement ensures that the post-Westphalian extension of the right of self-defence in case of a non-state armed attack is duly balanced against the Westphalian consideration that the use of force in self-defence against the non-state attackers will usually take on the territory of another state so that it must be justified also *vis-à-vis* the latter.¹⁹⁶

(b) The Practice of the Security Council

Although there had been precursors in its prior practice,¹⁹⁷ it 'was only from September 2001 that the issue [of terrorism] began to play a major role in the Council's work'¹⁹⁸ and the relevant practice has become so rich and multifaceted that a comprehensive account would by far exceed the subject matter of this article.¹⁹⁹ Crucially for present purposes, on 12 September 2001 the Security Council not only condemned 'in the strongest terms' the armed attack on the United States, but it also determined that this attack, 'like any act of international terrorism', constitutes a threat to international peace and security.²⁰⁰ This qualification soon became a settled Council practice, which was summarised in the 2006 Presidential Statement that 'terrorism constitutes one of the most serious threats to international peace and security'.²⁰¹ This statement ceremonially

107 *American Journal of International Law* 390, 394; for the same view, see Mahmoud Hmoud, 'Are New Principles Really Needed? The Potential of the Established Distinction between Responsibility for Attacks by Nonstate Actors and the Law of Self-Defense' (2013) 107 *American Journal of International Law* 576, 577–78.

¹⁹⁵ UN Special Rapporteur Heyns (n 189), para 89. For what appears to be a more permissive view, see Bethlehem (n 194).

¹⁹⁶ The point is set out in greater detail in Claus Kieß, 'Some Reflections on the International Legal Framework Governing Transnational Armed Conflict' (2010) 15 *Journal of Conflict and Security Law* 245, 250–52; for a similar view, see Kimberley N Trapp, 'Back to Basics: Necessity, Proportionality, and the Right to Self-Defence against Non-State Terrorist Actors' (2007) 56 *International and Comparative Law Quarterly* 141, 143–55. In that context, it is important to recognise the basic truth, that the concept of state sovereignty here again implies a 'duty to protect' as a corollary to the 'right to be protected' against forcible intervention from abroad (for the same view, see Hmoud (n 194) 577–78). This time it is the Westphalian duty to protect foreign states against non-state armed attacks emanating from the territory over which territorial sovereignty is claimed. Compare this duty with the post-Westphalian responsibility to protect one's own civilian population, as discussed *supra* Section II.iv.

¹⁹⁷ See text *supra* Section III.ii accompanying n 153 and references therein.

¹⁹⁸ Wood (n 149) 321.

¹⁹⁹ In particular, the remarkable quasi-legislative Security Council action in the form of UN Doc S/RES/1373 (28 September 2001) will not be dealt with here; see instead Wood (n 149) 325.

²⁰⁰ UN Doc S/RES 1368 (12 September 2001) op para 1.

²⁰¹ UN Doc S/PRST/2006/56 (20 December 2006) para 1.

confirms the Council's activation of the post-Westphalian potential of the UN Charter's collective security system vis-à-vis transnational non-state violence.²⁰²

As of yet, however, the Security Council has not authorised the use of force by states with the principal objective of halting an act of international terrorism.²⁰³ This is true, in particular, for al-Qaeda's armed attack of 11 September 2001, because the United States (perhaps deplorably²⁰⁴) preferred to situate its military response outside the framework of collective security. This provokes the following comparison between the two areas of post-Westphalian developments under consideration. While all relevant international actors are united in their preference to seek a Security Council authorisation if the use of force to protect a civilian population under lethal attack is considered necessary, states faced with a non-state armed attack have generally preferred unilateral action in self-defence.

Below the level of the authorisation of military action, the Security Council, beginning shortly before 11 September 2001, has developed a robust post-Westphalian practice of non-military measures against transnationally violent non-state actors. On 19 December 2000, the Security Council decided to entrust a Committee consisting of all the members of the Council to designate 'individuals and entities associated' with Osama bin Laden and to place them on a list. States were then required to 'freeze without delay funds and other financial assets' of these listed individuals and entities.²⁰⁵ A delisting required a decision to that effect to be made by the 'Sanctions Committee' by unanimity of its members. In view of the extremely weak procedural position of the listed persons and entities, these targeted sanctions were barely reconcilable with the international human right to judicial review and were rather reminiscent of measures of 'economic warfare' taken against 'enemy aliens' in former times.²⁰⁶

The Security Council sanction regime therefore provoked serious criticism from many quarters and led to two important judgments by the Court of Justice

²⁰² On this potential see *supra* Section III.i; remarkably, the Security Council has recently also determined that 'transnational organized crime' may threaten international peace and security; the Council did so in the context of its action against piracy and armed robbery at sea which are both specific species of this phenomenon; UN Doc S/RES/2039 (29 February 2012) preambular para 18.

²⁰³ Wood (n 149) 330. The Council has, however, recently authorised forcible action against piracy and armed robbery at sea. The triggering resolution on this point is UN Doc S/RES/1816 (2 June 2008) op para 7(b)—the case of piracy is *sui generis*: on the one hand it is a form of (often organised) ordinary criminality (such as armed robbery); on the other hand it has got a long tradition of 'internationalisation' due to the *locus delicti* on the high seas.

²⁰⁴ For the policy advantages of pursuing the Security Council avenue, see Wood (n 149) 332–33; see also Wood (n 68) (*Indian Yearbook of International Law*).

²⁰⁵ UN Doc S/RES/1333 (19 December 2000) op para 8 (c) to be read in conjunction with UN Doc S/RES/1267 (15 October 1999) op paras 4 (b) and 6.

²⁰⁶ The person or entity concerned had no standing before the Security Council to put forward a defence and a delisting decision required the unanimity of the members of the Sanctions Committee.

of the European Union²⁰⁷ and one of the European Court of Human Rights²⁰⁸ implicitly questioning whether the Security Council had found the right balance between the goal to avert the post-Westphalian international peace and security threat posed by international terrorism and the equally post-Westphalian concern not to downgrade unduly the protection of internationally recognised human rights.²⁰⁹ The Security Council has responded to these criticisms through the establishment of the Office of the Ombudsperson²¹⁰ and a significant change in the delisting procedure.²¹¹ The balance to be struck by the Security Council between the two post-Westphalian concerns remains, though, a delicate one.

(c) *The Prohibition of the Use of Force*

The post-Westphalian developments summarised above must culminate in the question of whether the 'principle of the non-use of force'²¹² in international law now extends to non-state actors. As early as in 2002, Anne-Marie Slaughter and William Burke-White took up this question in their essay 'An International Constitutional Moment'. They suggested that Article 2(4)(a) should read: 'All states and individuals shall refrain from the deliberate targeting or killing civilians in armed conflict of any kind, for any purpose.'²¹³ As of yet, the practice of states does not support the suggestion that such an evolution of the prohibition of the use of force has occurred through the customary process. In 2010, the ICJ therefore correctly held that under existing international law 'the prohibition of the use of force as a particular aspect of the obligation to respect the territorial integrity of states is confined to the sphere of relations between states.'²¹⁴

²⁰⁷ Grand Chamber, Joined Cases C-584/10P, C-593/10P and C-595/10P ('Kadi II') (18 July 2013); Joined Cases C-402 and 415/05P ('Kadi I') (2008) ECR I-6351.

²⁰⁸ Grand Chamber, *Case of Nada v Switzerland* (Application No 10593/08) (12 September 2012).

²⁰⁹ For a thoughtful analysis of the broader context of the controversy, see Gráinne de Búrca, 'The European Court of Justice and the International Legal Order after *Kadi*' (2010) 51 *Harvard International Law Journal* 1.

²¹⁰ UN Doc S/RES/1904 (17 December 2009) paras 20 *et seq.*

²¹¹ UN Doc S/RES/1989 (17 June 2011) op para 23. For the resolution governing the work of the Ombudsperson and the delisting procedure at the time of writing, see UN Doc S/RES/2083 (17 December 2012) op para 21.

²¹² To use what is the terminology preferred by the ICJ since the *Nicaragua* case (n 9) 118 (para 227).

²¹³ Anne-Marie Slaughter and William Burke-White, 'An International Constitutional Moment' (2002) 43 *Harvard International Law Journal* 1, 2.

²¹⁴ ICJ (n 144) 437 (para 80). The 2009 Report of the Independent Fact-Finding Mission on the Conflict in Georgia does not contradict this finding of the Court. The Mission applied Art 2(4) of the UN Charter to the non-state entity South Ossetia, but it did so on the basis of the belief that South Ossetia and Georgia had specifically stipulated the applicability of this provision to their bilateral relationship (n 143, 239). For a far-reaching (but unsupported) scholarly view that the customary prohibition of the use of force binds non-state actors, see Nicholas Tsagourias, 'Non-State Actors in International Peace and Security. Non-State Actors and the Use of Force' in Jean d'Aspremont (ed), *Participants in the International Legal System: Multiple Perspectives on*

Of course this need not be the end of the matter *de lege ferenda*. Thought may indeed be given to the question whether the time is ripe for international law to make the post-Westphalian move towards a new *ius contra bellum* binding upon the leadership of a non-state organisation. Contrary to Slaughter and Burke-White's proposal, such a new prohibition should not, however, be confined to the use of force by such an organisation against civilians, but should also cover massive violence against state soldiers or state infrastructure. Furthermore, any debate about such a new prohibition of the use of force by non-state actors would have to include the question of an exceptional *ius ad bellum* for a civilian population under lethal attack by the government of a state.²¹⁵

IV. CONTEMPORARY INTERNATIONAL LAW ON THE USE OF FORCE: A WESTPHALIAN NOYAU DUR AND A NUMBER OF POST-WESTPHALIAN DIMENSIONS OF PARTIALLY UNCERTAIN REACH

To conclude, current international law on the use of force, while retaining its Westphalian *noyau dur*, has undergone a number of post-Westphalian developments of as yet partially uncertain reach. As regards the protection of a civilian population under illegal attack by its government, what seemed to be an almost irresistible and comprehensive post-Westphalian trend in the 1990s, has since 1999 met with neo-Westphalian resistance on several fronts. In comparison, the second post-Westphalian development, which was triggered by al-Qaeda's armed attack on the United States on 11 September 2001, while not having reached the stage of full consolidation, appears to be more robust.

This difference is clearly discernible with respect to the use of force outside the collective security system. In view of the development of state practice since 11 September 2001 it is hard to deny, persisting controversies notwithstanding,

Non-State Actors in International Law (Routledge, 2011) 326, 327. The non-applicability of the prohibition of the use of force to non-state conduct is mirrored in current international criminal law. Despite the increasing recognition of the possibility of a non-state armed attack within the meaning of Art 51 of the UN Charter, states decided not to extend the definition of the crime of aggression to aggressive non-state action (Claus Krefß and Leonie von Holtzendorff, 'The Kampala Compromise on the Crime of Aggression' (2010) 8 *Journal of International Criminal Justice* 1179, 1190).

²¹⁵ This question was raised *supra* Section II.iv in the context of an internal non-state use of force. However, a civilian population under attack by its government might also exercise its use of force transnationally, ie from the territory of another state. The non-state armed attack would then be lawful so that the terror government could not rely on the right of self-defence of the state it continues to represent *de iure* to fight the victimised civilian population transnationally. This hypothetical scenario suggests the need to discuss the proposal for a *ius contra bellum* directed to non-state actors with a view both to internal and transnational non-state violence. For a more detailed argument in support of having such a debate, see Claus Krefß, 'Civil Wars and International Law: Two Lines of Legal Development and One Question for the Future' (2014) 95 *International Review of the Red Cross* (forthcoming).

that the alleged right of self-defence in case of a non-state armed attack now occupies a place within the 'light grey' area of the international law on the use of force. With respect to the alleged right to humanitarian intervention in case of an impending humanitarian catastrophe, however, the pendulum has swung back in the years following 1999 so that the area for this legal claim can at present only be painted in a 'dark grey' colour.²¹⁶

These different shades of grey are best explained by the fact that the international law on the use of force continues to be decisively shaped by the practice of states.²¹⁷ And it needs no explanation that states display more sensitivity vis-à-vis attacks directed against them than vis-à-vis attacks by themselves against non-state actors. This will hold true as long as a significant number of states are not internally governed by the rule of law.

One wonders whether the existing international law on the use of force suffers from an important inconsistency because of these different shades of grey. This question is inevitable if one assumes that a state-driven international law on the use of force must also ultimately serve the protection of civilian populations.²¹⁸ However, a different legal treatment, under this body of law, of a civilian population's terrorisation by its government on the one hand, and of a state's terrorisation by a transnational non-state organisation on the other hand, could be explained as follows. Arguably, while self-defence under present international law is a right of states as a technical legal matter, its substantive purpose is to protect the civilian population within the attacked state. If seen in that light, not only a forcible humanitarian intervention to avert an impending humanitarian catastrophe, but also any use of force in self-defence (ultimately) aims at the protection of a civilian population. In addition, though, the exercise of the right of self-defence serves to uphold the (more or less) effective internal legal order of the state under attack and this legal order, if not perverted as an instrument of terror, ensures that within its realm of protection, the individual rights to life and personal liberty are not just abstract ideals, but can be

²¹⁶ The idea to paint in light or dark grey is borrowed from Christian J Tams, 'Prospects for Humanitarian Uses of Force' in Antonio Cassese (ed), *Realizing Utopia* (Oxford University Press, 2012) 359, 367.

²¹⁷ This conclusion is in line with the more general statement by Jean d'Aspremont, 'Conclusion. Inclusive Law-making and Law-enforcement Processes for an Exclusive International Legal System' in d'Aspremont (n 214) 425, 431, that '[h]owever one construes the consequences of the significant role played by non-state actors for the international legal system as a whole, it cannot be denied ... that states remain the ultimate lawmakers'; for a recent, more general, criticism of such an essentially Westphalian international law-making process, see Bethlehem (n 3) 22–23.

²¹⁸ For the central role of the individual in international law from the perspective of a 'constitutionalised' international law, see Anne Peters, 'Membership in the Global Constitutional Community' in Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (Oxford University Press, 2009) 153, 157–79.

enjoyed in reality.²¹⁹ This additional collective good may justify the fact that the international law on the use of force provides civilian populations with a more robust protection if the armed attack comes from abroad than in case of an armed attack by the population's own government.

Despite this possible justification of a different legal response to our two main post-Westphalian challenges, the debate about a right to unilateral humanitarian intervention to avert an impending humanitarian catastrophe is unlikely to disappear from the international legal agenda. The International Commission on Intervention and State Sovereignty formulated the key question as follows:

[The current legal position] may still leave circumstances when the Security Council fails to discharge what this Commission would regard as its responsibility to protect, in a conscience-shocking situation crying out for action. It is a real question in these circumstances where lies the most harm: in the damage to international order if the Security Council is bypassed or in the damage to that order if human beings are slaughtered while the Security Council stands by.²²⁰

As we have seen, there is currently no prospect that states may wish to answer this question *in abstracto*. But our study of concrete incidents since 1990 suggests that states may *in concreto*, and be it only implicitly, react more favorably to a genuine humanitarian intervention than when they are asked to state the law *in abstracto* and, ultimately, such a practice *in concreto* should prevail.

Regarding the violent non-state threat to states, the more recent US policy of targeted killings of members of al-Qaeda and its associated forces has, in too many places in the world, brought to light a 'post-Westphalian excess'. In view of both the sovereignty rights of other states and the international human right to life of the targeted human beings, an overwhelming majority of states do not accept the United States' legal claim as the authoritative interpretation of the existing international peace and security law. On 23 May 2013, President Barack Obama indicated that the 'war' with al-Qaeda might end in the not too distant future. But as long as the excessive United States' legal claim remains in place, it will be important not to pass over it in diplomatic silence.

²¹⁹ For a recent discussion of the 'common good' behind the 'right of national defence' from a non-legal perspective, see Nigel Biggar, *In Defence of War* (Oxford University Press, 2013) 202–06.

²²⁰ International Commission on Intervention and State Sovereignty (n 118) 55 (para 6.37).