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Concerning Violence: A Post-Colonial Reading of the Debate on the Use of Force

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Abstract
This article examines the debate on the use of force 'from the periphery', both in the geographical sense and outside the mainstream discourse. It offers an alternative reading of the evolution of the law on the use of force, starting not with the end of the Cold War, but with the process of decolonization. My argument is that this reading is missing from the debate framed as an opposition between a restrictivist and an expansionist camp. Yet it is crucial if one wants to understand the normative pull that is left of legal concepts such as non-intervention, aggression, and self-determination.

Key words
use of force; scholarship; TWAIL; critique; history

> National liberation, national renaissance, the restoration of nationhood to the people, commonwealth: whatever may be the headings used or the new formulas introduced, decolonization is always a violent phenomenon.[1]

1. Introduction

When Jörg Kammerhofer invited me to examine the debate on the use of force 'from the periphery', both in the geographical sense and outside the mainstream discourse, my initial reaction was, past the ego boost, that of ambivalence. On the one hand, I was happy that the *Leiden Journal of International Law* would provide space and visibility to explore the debate from alternative (i.e., non-mainstream, non-Western, non-male) sources. On the other hand, I felt uneasy with the idea that I could look at the issue from a well-defined – and thus circumscribable – critical angle. The problems that this presumption raises have already been explained,[2] and I do not wish to repeat them. Let me simply state that I have mixed feelings about participating in the debate as a peripheral voice (and not just as a plain international lawyer), not least because I cannot and do not want to speak in the name of the Third

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1 Extract from F. Fanon, *The Wretched of the Earth* (1963), 35.

2 M. Koskenniemi, 'Letter to the Editor of the Symposium', (1999) 93 AJIL 351. H. Charlesworth, 'Feminist Methods in International Law', (1999) 93 AJIL 379.

World.[3] Yet I feel sympathetic to many of the concerns and aspirations associated with people living in the margins. At the end of the day, I accepted Jörg's invitation, hoping to make use of this opportunity and to ensure that issues relevant to the 'global South' will not be overlooked.

In order to do so, I first need to dispel the impression that peripheral legal voices have been silent on matters related to the use of force. The situation is, in fact, quite the opposite: an abundant critical and Third World literature has emerged over the last 20 years, and this at an increased pace after the military interventions in Kosovo, Afghanistan, and Iraq.[4] This literature, while united by common themes, is rich in its complexity and diversity. What is striking therefore is not the silence of peripheral voices but the fact that their contributions do not stand in the foreground. This, in turn, raises questions of institutional resources and highlights the politics of knowledge production and dissemination: who publishes what? How do we identify what counts as acceptable scholarship in the field of international law?[5]

In this article, I will attempt both to extract and to extrapolate on some of the fundamental insights provided by critical and Third World scholars on the use of force. My main objective will be to show that their views are not well captured by the mainstream debate. Critical and Third World scholars share a much more ambivalent position vis-à-vis the possibilities to use force than what is allowed by the debate. While being keenly aware that military force has been used over and over again to the detriment of Third World peoples, they keep in mind that emancipatory struggles may well require forcible action. This became an established principle in international law in the 1960s, mainly through the work of newly independent states at the UN General Assembly. Since the 1980s, however, the pendulum has swung: institutional power has moved to the UN Security Council; a so-called 'war on terror' is being lodged against non-state actors; expansive forms of international rule (or Western rule) are now being subsumed under the concept of 'responsibility to protect'.

My argument is that this shift – together with the changing political stakes – is central to a post-colonial reading of the law on the use of force. Yet it is uneasily articulable in a debate framed as an opposition between a restrictivist and an expansionist camp. To explain this, I will proceed in three steps. First, I will make some remarks on the structure and vocabulary adopted in the Symposium. I want to make explicit that which is implied by the restrictivist–expansionist terminology. Second, I will explain why critical and TWAIL scholars, while being sympathetic to the restrictivist camp, cannot stay permanently within it. Their position can best be described as that of an insider-outsider. Third, I will offer an alternative reading

3 For the suggestion that we should unmoor the notion of the Third World from pre-determined geographical categories, see, B. Rajagopal, 'Locating the Third World in Cultural Geography', (1999) 15 *Third World Legal Studies* 1.

4 Among the abundant literature, see, V. Nesiah, 'From Berlin to Bonn to Baghdad: A Space for Infinite Justice', (2004) 17 *Harv. Hum. Rts J.* 75. For a recent bibliographic essay outlining TWAIL's sources, see, J. Gathii, 'TWAIL: A Brief History of its Origins, its Decentralizing Network, and a Tentative Bibliography', (2011) 3 Trade L. & Rev. 26.

5 This question is raised by A. Anghie and B.S. Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts', (2003) 2 *Chinese J.I.L.* 77, at 86.

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of the evolution of the law on the use of force. The focus will be set on another debate, which can be traced back to the 1960s–1980s, which took place largely within the UN, and which had a very different, Third World dynamics, not caught by the mainstream debate. Through this displacement, I hope to unsettle the distinction between 'mainstream' and 'periphery', and to show that the mainstream debate is actually peripheral to the question of violence.

2. The politics of naming

Participants to the Symposium were invited to study the fluctuations of the scholarship on the use of force, which has been divided between two opposite camps. One camp reunites the *restrictivists*, who defend a narrow view of the exceptions to the prohibition on the use of force. The other camp houses the *expansionists*, who put forth extensive interpretations of the possibilities to use force. I find it striking that the other contributors took those categories for granted, and applied them as if they genuinely represented the state of the discipline on the use of force. I find it striking because we all know that categories are not neutral analytical tools, insofar as they come from somewhere and serve a specific function. The restrictive/expansive categories can be traced back to the work of Jörg Kammerhofer and Olivier Corten – two international lawyers who, while analysing the shifts and flux in contemporary scholarship, have defended a restrictive view of the exceptions to use force.[6]

I am not suggesting that we should disregard the restrictive/expansive categories on the ground that they are part of a larger endeavour. My point is rather that we should be aware of the larger framework and understand what is implied by the vocabulary. As soon as we use the terms 'restrictivists' and 'expansionists', the debate on the law on the use of force is set in a certain way, with its own protagonists. The vocabulary tells a story in itself: the story is about the restrictivists, acting in self-restraint and doing their best to 'hold on' to the law against the growing ranks of the expansionists, the latter being 'eager' to broaden the definition of self-defence and to reject the centralisation of the use of force within the UN.

Historians have long made the point that 'we need to treat our normative concepts less as statements about the world than as tools and weapons of ideological debate'.[7] In our case, the restrictive/expansive vocabulary competes with other vocabularies or categorisations, such as the division between 'bright-liners' and 'balancers' coined by Matthew Waxman in a recent edition of the *European Journal*.[8] The restrictive/expansive vocabulary is presented as a more nuanced, less ideological – and thus as a more scientific – description of the legal scholarship on the use of force.[9] Which categorisation will take precedence is still a matter of struggle. Hence

6 O. Corten, *Le droit contre la guerre : l'interdiction du recours à la force en droit international contemporain* (2014); J. Kammerhofer, 'The *Armed Activities* Case and Non-State Actors in Self-Defence Law', (2007) 20 LJIL 89.

7 Q. Skinner, *Visions of Politics. Volume I: Regarding Method* (2002) 177.

8 M. Waxman, 'Regulating Resort to Force: Form and Substance of the UN Charter Regime', (2013) 24 EJIL 151.

9 O. Corten, 'Regulating Resort to Force: A Response to Matthew Waxman from a "Bright-Liner"', (2013) 24 EJIL 191. The exchange between Corten and Waxman leaves the impression that they speak totally different languages. However, I agree with Arnulf Becker Lorca that both reflect the standpoint of lawyers situated at

the publication by the *Leiden Journal of International Law* of a Symposium that uses the restrictive/expansive vocabulary is not an innocent proposition but a move in an argument. This is surely one matter that would be flagged by critical and Third World scholars.

3. The view of an insider-outsider

It has become clear, I hope, that my contribution does not pretend to stand outside the debate on the use of force. What unites critical, feminists, and TWAIL scholars is the attempt to engage with the arguments put forth by both sides, while maintaining a critical distance vis-à-vis them. This is close to what Makau Mutua calls the 'view of an insider-outsider'.[10]

On the one hand, the restrictivists have reasons to be concerned about the expansive interpretations of the exceptions to the prohibition to use force. The advent of the 'war on terror' has triggered a shift from debating anticipatory to pre-emptive self-defence.[11] What was previously contentious has become increasingly accepted, mostly (but not exclusively) by American scholars, as falling within the scope of Article 51 or as part of customary law. In addition, one often hears that the respect of state sovereignty and the centralization of the use of force in the hands of the UN Security Council should give way in situations where those principles hamper the defence of human rights or democratic governance.[12]

Against such arguments, critical and TWAIL scholars have unequivocally denounced the US's imperial ambitions and its disengagement with international law.[13] Many have pleaded for the preservation of the UN system and for a strict interpretation of the right to self-defence enshrined in Article 51. 'A UN that is transformed to accommodate pre-emption doctrine will simply become a vehicle for [US] imperialism, and Third World countries have not been slow to recognize this reality', wrote Antony Anghie.[14] Likewise, James Thuo Gathii has expressed a renewed confidence in the UN against unilateral intervention: 'institutions like the UN have come to represent the aspirations of the most vulnerable populations around the world'.[15]

On the other hand, it is hard to remain permanently within the restrictivist camp on matters related to the use of force. There are at least three reasons for that: one

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the world's centers of power. See A. Becker Lorca, 'Rules for the "Global War on Terror": Implying Consent and Presuming Conditions for Interventions', (2012) 45(1) *NYU J. Int'l L. & Pol.* 1.

10 M. Mutua, 'Critical Race Theory and International Law: The View of an Insider-Outsider', (2000) 45 *Vill. L. Rev.* 841.

11 'Anticipatory' attack is usually used to describe military action against an imminent threat, while 'preemptive' attack is employed to describe the response to a threat that is more remote in time. For a plea in favor of the former, see for instance L. Van de Hole, 'Anticipatory Self-Defence under International Law', (2003), 19(1) *Am. Uni. Int'l L. Rev.* 69. For an examination of anticipatory self-defence, see van Steenberghe, at 8.

12 A. Orford, 'Moral Internationalism and the Responsibility to Protect', (2013) 24 EJIL 83.

13 A group of critical legal scholars published a letter in the Guardian on 7 March 2003 qualifying the war against Iraq as illegal. See M. Craven, et al., 'We Are Teachers of International Law', (2004) 17 LJIL 363. See also M. Koskenniemi, 'Global Governance and Public International Law', (2004) 37 *Kritische Justiz* 241.

14 A. Anghie, 'The War on Terror and Iraq in Historical Perspective', (2005) 43 *Osgoode Hall L. J.* 64.

15 J. Gathii, 'Failing Failed States: A Response to John Yoo', (2011) 2 *Calif. L. Rev.* 47.

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is structural; another is institutional, and the last is historical. The first points to the fundamental indeterminacy of the legal debate on the use of force; the second underscores the dark sides of institutional multilateralism and in particular of the UN; the third juxtaposes both (restrictivist and expansionist) lines of argumentation with colonial practices. I will elaborate on each of them. My point is that taken together, these three elements offer an explanation as to why the concerns of the peripheries do not fit well within the mainstream debate.

3.1 The debate's structural indeterminacy

It is difficult to take a final stand in the restrictivist/expansionist debate given the indeterminacy of the debate itself.[16] Both sides use 'descending' and 'ascending'[17] patterns of justification in a way that renders them (structurally) indistinguishable from one another, and that induces them to adopt (unsatisfying) middle-ground positions. Let me take as an example the case of pre-emptive self-defence against terrorist threats by non-state actors.

Restrictivists take as a 'point of reference'[18] the relevant treaty texts, and more specifically Article 2(4) and Article 51 of the UN Charter. They construct a narrow understanding of the exceptions to use force, notably with the help of ICJ decisions that have upheld a 'textually-oriented'[19] interpretation of the relevant provisions.[20] This descending argument is visible in the World Summit Outcome 2005, which recommended a strict adherence to Charter terms.[21] The problem with this position is that it is vulnerable to the critique of utopia, as it can hardly be justified by reference to what actually exists in the world. Taking the US-led invasion of Iraq as a dramatic illustration, Thomas Franck has argued that the widespread resort to the use of force is strong evidence about the inefficacy of the prohibition of the use of force.[22] How do restrictivists answer that critique? They accept that rules may evolve

16 M. Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (2005).

17 Martti Koskenniemi uses the terms 'ascending' and 'descending' to describe the two ways of justifying international obligations. Descending arguments trace down the sources of obligation from something superior to states, such as justice and concept of common interests; ascending arguments attempt to construct the normative order on the basis of states' behavior, will and interests. The former stresses normativity over concreteness, while the latter concreteness over normativity. For the one making the descending argument, the opposite ascending argument is an 'apology' for states. For the one making the ascending argument, the opposite descending argument is 'utopian' and detached from reality. See also De Hoogh, at 6.

18 O. Corten, 'The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate', (2005) 16 EJIL 803, at 812.

19 This conception confines self-defence to a riposte to an *effective* armed attack by a state or by a private group whose acts can be attributed to the state. M. Byers, 'The Shifting Foundations of International Law: A Decade of Forceful Measures against Iraq', (2002) 13 EJIL 21, at 25. See also M. Bothe, 'Terrorism and the Legality of Pre-emptive Force', (2003) 14 EJIL 227, at 299.

20 Taken to its extreme, the descending argument presents the prohibition to use force as the archetype of a peremptory norm of international law. J. Charney, 'Anticipatory Humanitarian Intervention in Kosovo', (1999) 32 *Vand. J. Transnat'l L.* 1231, at 1240. F. Dubuisson, 'La problématique de la légalité de l'opération "Force alliée" contre la Yougoslavie : enjeux et questionnements', in O. Corten and B. Delcourt (eds.), *Droit, légitimation et politique extérieure : l'Europe et la guerre du Kosovo* (2001), 149 at 176. M. Kohen, 'The Use of Force by the United States after the End of the Cold War, and its Impact on International Law', in M. Byers (ed.), *United States Hegemony and the Foundations of International Law* (2003), 197 at 228. C. Tams, 'The Use of Force against Terrorists', (2009) 20 EJIL 359, at 359.

21 2005 World Summit Outcome, UN Doc. A/Res/60/1, (2005), paras. 77–80. The document adds no additional support for a right to attack in self-defence in situations other than an armed attack.

22 T. Franck, 'What Happens Now? The United Nations After Iraq', (2003) 97 AJIL 607, at 616.

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to match social changes, but they insist that such normative evolution be based upon extensive – and not selective – practice involving the most varied groups of states. Any alteration to the rules on the use of force 'require[s] the support of most, if not all, states, as expressed through their active or passive support'.[23] This allows them to say that there is no uniform state practice and *opinio juris* showing that we would have moved away from a restrictive analysis of Article 51 to a broader interpretation that would accommodate anti-terrorist force. From the expansionist perspective, however, this ascending argument is unsatisfactory. For it is inconceivable to draw no difference among states: surely what matters is the practice of those states with the effective capacities to ensure world peace.[24]

Expansionists start by emphasizing the need to adapt the law to the necessities of social life. The 9/11 terrorist attacks on the US have inaugurated a 'different era of political violence'[25] in such a way as to justify the retrenchment of international legal rules.[26] Because of the new threats, a proper understanding of the right of self-defence should now extend to authorizing pre-emptive attacks against potential aggressors, cutting them off before they are able to launch their strikes.[27] From the restrictivist perspective, the problem is that this position deprives international law of its distinctive character, which is normative. While rules can indeed be affected by social necessities, this fact alone does not entail an abolition of the distinction between normative aspiration and actual behaviour. 'Otherwise, international law would be all "apology" – its rules would merely mirror state action and lose all critical distance'.[28] The expansionists typically respond to this critique by insisting on the (legal) processes through which the desired results can be reached. For them, the process by which the right of self-defence is interpreted is more important than the substance of the rule itself.[29] It follows that the 2003 war against Iraq would have been legal so long as the US would have persuaded other countries of the necessity of its actions.[30] From the restrictivist perspective, however, this line of argumentation is unconvincing. For the military action against Iraq was precisely the object of

23 M. Byers and S. Chesterman, 'Changing the Rule about Rules? Unilateral Intervention and the Future of International Law', in J. Holzgrefe and R. Keohane (eds.), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (2003), 177 at 180.

24 For an early statement, see T. Ehrlich and M. O'Connell (eds.), *International Law and the Use of Force* (1993), 216–39. W. Taft and T. Buchwald, 'Preemption, Iraq, and International Law', (2005) 97 EJIL 557. For a presentation of the different liberal trends in international law, see G. Simpson, 'Two Liberalisms', (2001) 12 EJIL 537.

25 J. Weiler and G. Blum, 'Preface', (2013) 24 EJIL 13, at 13.

26 For the view that 9/11 was a 'transformative event' in global history, see R. Falk, *The Great Terror War* (2003). See also Banks and Criddle, at 21.

27 After all, so goes the argument, this is in line with the purpose Art. 51 is intended to serve. 'To deprive the international community of a reasoned basis for using force threatens Charter interests and values, rather than supporting and advancing them'. A. Sofaer, 'On the Necessity of Pre-emption', (2003) 14 EJIL 209, at 225.

28 N. Krisch, '*Legitimacy and Legality in International Law: An Interactional Account*. By Jutta Brunnée and Stephen J. Toope. Cambridge, New York: CUP, 2010', (2012) 106 AJIL 203.

29 The legality of a military action taken in self-defence should be evaluated 'not simply in terms of certain rules, … but in terms of the acceptability of those responses in different contexts, to the contemporary international decision process'. M. Reisman, 'International Legal Responses to Terrorism', (1999) *22 Houston J. Int'l L* 3, at 5.

30 T. Franck, 'Iraq and the Bush Doctrine of Pre-emptive Self-Defence', (20 August 2002), Crimes of War Project, Expert Analysis.

disagreement within the authoritative international decision-making process (i.e., the UN Security Council).[31]

To summarize, restrictivists highlight the enduring normative character of the prohibition on the use of force (descending argument) before assessing the limitations to that prohibition (ascending argument). Expansionists stress the necessity of pre-emptive military action in today's world (ascending argument) before looking at the conditions for its deployment (descending argument). The structure of the debate is such that both positions can be criticized; in the end, both sides recognize the existence of 'grey zones'[32] in the field and contrive to examine, on a case-by-case basis, whether the use of force can be justified under the principles of necessity and proportionality.[33] This is the pragmatic ground on which both sides seem to defer: the law on the use of force boils down to an *ad hoc* analysis of the opportunity to deploy force.[34] But this does not end the debate, as it begs two questions: how should we assess the necessity and proportionality of a forcible action, and who is competent to make such assessment? A division between restrictivists and expansionists re-emerges:[35] whereas restrictivists search for a 'universal inter-subjective'[36] interpretation of the law on the use of force through hermeneutics, expansionists tend to explore the pros and cons of military interventions through economically-inspired doctrines – the most extreme one being rational choice theory.[37]

3.2 The dark sides of UN multilateralism

Leaving structural indeterminacy aside, there is another reason why it is difficult to agree altogether with the restrictivists. Their positions often imply that international legal institutions – and especially the UN – are good, and that what they lack are the effective capacities of enforcement to circumvent the political machinations of powerful states. In this sense, the debate rests on an implicit dichotomy between international law and institutions (which would be anti-imperial by nature), and the (imperialist) 'Bush doctrine'.[38] Needless to say, this dichotomy is over-simplistic.[39]

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31 M. Bothe, 'Terrorism and the Legality of Pre-emptive Force', (2003), 14 EJIL 227, at 239–40.

32 See Corten, *supra* note 9, at 191.

33 Hence the observation according to which today's debate 'has shifted towards issues of necessity and proportionality (i.e., the scope of self-defence measures)'. C. Tams, 'The Use of Force against Terrorists', (2009), 20 EJIL 359, at 381. See also Banks and Criddle, at 13.

34 How could it be otherwise? A state will always be 'expansive' in respect of one's own right to use force and 'restrictive' in respect of others' use of it. It would be irresponsible for a diplomat or a drafter to be 'absolutist' in either direction -because such absolutism might come back later to haunt oneself and one's state.

35 For a powerful critique of both formalism and pragmatism, see D. Kennedy, 'The International Human Rights Regime: Still Part of the Problem' in R. Dickinson et al. (eds.), *Examining Critical Perspectives on Human Rights* (2012).

36 See Corten, *supra* note 9, at 192.

37 See for instance S. Murphy, 'The Doctrine of Preemptive Self-Defense', (2005), 50 *Vill. L. Rev.* 699.

38 U. Natarajan, 'A Third World Approach to Debating the Legality of the Iraq War', (2007) 9 *Int'l Comm. L. Rev.* 405.

39 The dichotomy is typical of the '*self-aggrandizing narrative of mainstream liberal international legal theory*', which suggests that international law is a bulwark against power and represents the best aspirations of a global community. O. Taylor, 'Reclaiming Revolution', (2011), 22 FYBIL 259, at 277.

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The relationship between international law and imperialism is much more intricate and pervasive than what the dichotomy suggests.[40]

In an article published in this Journal in 2003, Susan Marks suggested that there are at least three ways to envisage the relationship between 'empire' on the one hand and international law and institutions on the other.[41] The most common way is to equate 'empire' with the nineteenth century system of European colonialism, and international law with the theory of self-determination. Even though the legitimation of colonial conquest was a defining project of international law, so are we told, at least since the 1960s international law has set its face against colonialism; in particular, international institutions such as the UN have adopted resolutions and created committees to achieve decolonisation. Under this narrative, international law and institutions are set against the empire. The second way to understand 'empire' is in terms of the current geopolitical status occupied by the United States as the world's hegemon.[42] Here, international law and institutions are the empire's opponent as well as the object that the empire has trampled. The third sense of the term 'empire' – the one that Marks prefers – is less idiomatic among international lawyers. It can be found in critical sociological work that draws inspiration from the Marxist concept of imperialism. In Michael Hardt's and Antonio Negri's eponymous book, for instance, 'empire' refers to the political order that is emerging in connection with the processes of economic globalization.[43] What matters for my purposes is that, as Marks puts it,

> as soon as 'empire' is used to refer to the political order associated with contemporary globalization, it becomes clear that, far from international law and institutions being against empire, or empire being against them, *empire and international law and institutions are for one another*.[44]

By contrast to the other two, the third narrative stresses that international law and institutions are implicated in the constitution and reproduction of 'empire' understood as the new world order. In the debate on the use of force, the third narrative is relevant in at least two ways.

First, it reminds us that the choice is not simply between healthy multilateralism (UN) and fearful unilateralism (US). 'Contemporary international legal regimes are not principally about choosing between acting as lawless empire or pre-committing oneself to multilateral co-operation'.[45] For TWAIL scholars, the point is that multilateralism can be just as brutal and imperialist as unilateralism. This has been

40 The pervasiveness of 'imperialism' is visible in the way TWAILers reorient the focus of the debate on the use of force to broader, underlying legal issues. In the case of the 2003 Iraq war, for instance, Usha Natarajan has argued that we should assess the legality to use force not only in terms of the actual intervention but also in terms of the aftermath occupation. Natarajan, *supra* note 38. See also, more generally, B.S. Chimni, 'International Institutions Today: An Imperial Global State in the Making', (2004), 15 EJIL 1.

41 S. Marks, 'Theme III: Global Governance: Institutions. Three Concepts of Empire', (2003) 16 LJIL 901.

42 See for example P. Sands, *Lawless World: American and the Making and Breaking of Global Rules* (2006). P.-M. Dupuy, 'The Place and Role of Unilateralism in Contemporary International Law', (2000), 11 EJIL 19. C. Gray, 'From Unity to Polarization: International Law and the Use of Force against Iraq', (2002) 13 EJIL 1.

43 M. Hardt and A. Negri, *Empire* (2000).

44 See Marks, *supra* note 41, at 903. Emphasis is in the original text.

45 J. Alvarez, 'Contemporary International Law: An "Empire of Law" or the "Law of Empire"?', (2009) 24(5) *Am. Uni. Int'l L. Rev.* 811, at 815.

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shown by China Miéville through his detailed analysis of the UN intervention in Haiti, where the 2004 coup and occupation have served to maximize profit of major players.[46] For Miéville, part of the problem is that the multilateral UN-backed nature of the intervention made it legally uncontroversial, to the point of near-invisibility, in mainstream scholarship.[47] In a similar vein, David Kennedy has argued that the way the discussion on the opportunity to intervene in Iraq in 2003 was limited to obtaining a UN Security Council authorisation made it more difficult to address the motives for a war and to devise alternatives.[48] Instead of asking ourselves whether a Security Council authorisation was secured, we should have assessed the reasons for intervening militarily.

The second insight offered by the third narrative is that one cannot simply counterpoise American imperialism with European universalism. It has been tempting to compare the 2003 Iraq war with the 1999 NATO air strikes in Kosovo, and to suggest that the Kosovo campaign was somehow fundamentally distinct from the Iraq invasion in terms of its international legitimacy.[49] Yet this comparison is problematic, as it vehicles the image of 'old Europe' as a post-historical entity sitting above interstate struggles, promoting human rights and the rule of law, and devoid of imperial ambitions.[50] In other words, we cannot hope to circumvent the expansive reading of the exceptions to use force by suggesting that Europe (as the 'law's helper'[51]) only reluctantly carries on forcible action whereas the US unashamedly does so.

3.3 The 'war on terror' as a repetition of the colonial experience

Criticising UN multilateralism does not mean rallying with the expansionists. There are also important difficulties with their lines of argumentation. James Thuo Gathii has vigorously criticized John Yoo's plea in favour of unilateral interventions in failed States, by pointing to the hubris of knowledge (and, therewith, implicit moralism) found in Yoo's cost-benefit analysis.[52] These difficulties become even clearer when we look at the expansive readings of the exceptions to use force in a historical perspective, in light of the colonial experience.

The expansionist position on pre-emptive self-defence is premised on the idea that the novel threat of global terror calls for radical changes to international law. In other words, the argument that pre-emption is necessary or legal is based on the idea

46 C. Miéville, 'Multilateralism as Terror', (2008) 19 FYBIL 63.

47 In a similar vein, Nathaniel Berman has argued that the discussion over the imperial character of an intervention cannot be limited to the securing of a Security Council resolution. N. Berman, 'Discussion' in E. Jouannet and H. Ruiz Fabri (eds.), *Impérialisme et droit international en Europe et aux Etats-Unis* (2007), 125.

48 D. Kennedy, 'Reassessing International Humanitarianism: The Dark Sides', in A. Orford (ed.), *International Law and its Others* (2008) at 147–8.

49 Following Jürgen Habermas's late writings, many have portrayed Europe as the driving force of global constitutionalism. See for instance O. de Frouville, 'Une conception démocratique du droit international', (2001), 120 RESS 101.

50 Alejandro Lorite Escorihuela has made the point that there may be differences in styles and in techniques between American imperialism (hard, aggressive) and European imperialism (soft, discrete). But there is one constant – imperialism. A. Lorite Escorihuela, 'Discussion', in Jouannet and Ruiz Fabri (eds.), *supra* note 47, at 314–15. For an illuminating depiction of European integration in imperialist terms, see I. Porras, 'Les ambivalences impériales – discussion' ibid., at 218.

51 A. Rasulov, 'Writing about Empire: Remarks on the Logic of a Discourse', (2010) 23 LJIL 449, at 466.

52 Gathii, *supra* note 15. He criticizes J. Yoo, 'Fixing Failed States', (2011) 99 *Cal. L. Rev.* 95.

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that the challenges confronting states are unprecedented, and require a profound revision of international law. As several TWAIL scholars have noted, this claim to 'newness'[53] relies on a highly selective and Eurocentric historical reading of 'global terror'. This is achieved through a definition of terrorism that excludes 'the histories of the colonial wars of terror',[54] that is to say, the historical violence that was inflicted upon the non-European world in the colonial period.[55]

Antony Anghie has also argued that the legal structure of the 'war on terror' can be traced back to the early colonial idea of the 'civilizing mission'.[56] This structural similarity is due to the fact that the doctrine of pre-emptive self-defence comes with the notion of 'rogue states'. It is argued that the threat generating the need for pre-emption is not caused by all states. Rather it is caused by a small number of irresponsible, terrorist-supporting states that either threaten the world by their existence or that are incapable of properly controlling their populations that dwell within them.[57] For hard-core expansionists, rogue states are not only dispossessed of the right to intervene pre-emptively, but they are also the target for such interventions, given their role in promoting terrorism. For Anghie, this doctrine is an almost direct reproduction of the colonial international law of the nineteenth century. Back then, civilized states were full members of the 'Family of Nations' and thus possessed the right to wage war, whereas uncivilized states existed only as objects to be acted upon.[58]

The analogy between nineteenth century colonial international law and the Bush doctrine goes further. Since rogue states are the source of instability within the international order, a mere intervention with military force will prove insufficient. What is needed is to transform rogue states into liberal, democratic and stable states. 'It is for this reason that the rhetoric of the war on terror has always been accompanied by arguments for regime change and the promotion of democracy and human rights'.[59] Here is where the continuity with the colonial experience is obvious. It is not simply that violence can be used against rogue and failed ('uncivilized') states, but also that this violence should be used in order to transform them into modern

53 O. Okafor, 'Newness, Imperialism, and International Legal Reform in Our Time: a Twail Perspective', (2005), 43 *Osgoode Hall J.L.* 171. See also J. Gathii, 'Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy', (2000), 98 *Mich. L. Rev.* 1996.

54 U. Baxi, 'The "War on Terror" and the "War of Terror": Nomadic Multitudes, Aggressive Incumbents, and the "New" International Law: Prefatory Remarks on Two Wars', (2005), 43(1) *Osgoode Hall L.J.* 7, at 24.

55 The claim of newness also occludes the fact that the non-European world was subject to paramilitary violence throughout the Cold War, often under the lead of the US and its allies. Okafor, *supra* note 53, at 186.

56 A. Anghie, 'The War on Terror and Iraq in Historical Perspective', (2005), 43(1) *Osgoode Hall L.J.* 45.

57 For the argument that foreign intervention is acceptable in the state that is either unwilling or unable to prevent terrorist threats, see Sofaer, *supra* note 27.

58 Colonial international law relied on a distinction between civilized and uncivilized states. Even though the particular basis of civilisation varied at different historical periods (religion, culture, political or economic organisation), what remained constant was the fact that it largely excluded the non-European world. A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2004), 327. See also A. Anghie, 'On Critique and the Other', in A. Orford (*ed.*), *International Law and its Others* (2008), 389.

59 R. Knox, 'Civilizing Interventions? Race, War and International Law', (2913), 26(1) *Cambridge Rev. Int'l Aff.* 111, at 115.

and democratic ('civilized') states. As such, the war on terror 'represents a set of principles and policies that reproduces the structure of the civilizing mission'.[60]

4. The impulse to historicize

As the last section suggested, one of the most important contributions of critical and TWAIL scholars to the debate on the use of force is the impulse to historicize. This goes beyond the demonstration of the debate's structural indeterminacy. A post-colonial analysis may also differ from the demonstration of the colonial origins of the rules on the use of force. What I suggest to do is to narrate the evolution of the international legal regime regulating the use of force since the time of decolonisation.[61] This contrasts with the mainstream tendency to take 1989 as the 'starting point'[62] to explain the latest controversies in *jus ad bellum*.

This brings me to the quote with which I started this article, which is an extract from Franz Fanon's *Wretched of the Earth*. Fanon wrote this book during the Algerian war (in which he was actively involved), a few months before his death. In writing it, Fanon was concerned with two questions: what are the necessary conditions for the success of decolonization? And when can we tell that the situation is ripe for the movement of national liberation?[63] The assertiveness of his claim – decolonization is always a violent phenomenon – was intended to elicit the urgency and implication of decolonization, which could not be a peaceful process. For Fanon, a peaceful decolonisation would simply mean the transposition of the norms of colonialism; it would mean the return of the same under a different form.[64]

That violence is necessary to achieve decolonization is, in international law, a claim that came to the foreground during the 'Bandung era'.[65] In 1964, the Asian-African Legal Consultative Committee (as it was then called[66]) met in Cairo and declared that 'the process of liberation is irresistible and irreversible. Colonized peoples may legitimately resort to arms to secure the full exercise of their right to self-determination and independence if Colonial Powers persist in opposing their natural aspirations'.[67] The Non-Aligned Movement made sure that the UN General Assembly

60 Anghie, *Imperialism, Sovereignty and the Making of International Law, supra* note 58, at 309. Makau Mutua makes a similar argument with regard to the spread of human rights and more particularly humanitarian intervention: it 'fits a historical pattern in which all high morality comes from the West as a civilizing agent against lower forms of civilization'. M. Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights', (2001), 42 *Harv. Int'l L. J.* 201, at 210.

61 One can obviously go further back in time. For a study of self-determination prior to decolonisation, see A. Becker Lorca, 'Petitioning the International: A "Pre-history" of Self-determination', (2014), 25(2) EJIL 497.

62 C. Tams, 'The Use of Force against Terrorists', (2009), 20 EJIL 359, at 362. According to the author, 1989 was the 'heyday' of the restrictivist camp.

63 A. Cherki, *Franz Fanon: Portrait* (2000), 246–7.

64 J.-M. Vivaldi, *Fanon: Collective Ethics and Humanism* (2007), 17.

65 M. Berger (ed.), *After the Third World?* (2009), 2.

66 The Asian Legal Consultative Committee (which later became the Asian-African Legal Consultative Committee, then Organization) was constituted in the aftermath of the 1955 Bandung Conference.

67 The Cairo Conference, which was attended by 47 heads of state or government of nonaligned countries, adopted a Programme for Peace and International Co-operation. The text can be found in E. Osmanczky (ed.), *Encyclopedia of the United Nations and International Agreements* (2002), 1578.

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was equally vocal in affirming the legitimacy of wars of national liberation.[68] The General Assembly's landmark statement on this matter is the Friendly Relations Declaration, which was adopted by consensus on 24 October 1970 through resolution 2625 (XXV).[69] The Declaration enshrined the 'principle of equal rights and self-determination of peoples' as one of the ten principles of international law regulating the friendly relations and co-operation among states. It conferred the right to self-determination, freedom and independence to all peoples; it also condemned any forcible action depriving the beneficiaries of their right to self-determination, and envisaged a 'right of resistance'.[70]

In 1972, Gaetano Arangio-Ruiz devoted an entire course at The Hague Academy to analysing the normative role of the UN General Assembly, using Resolution 2625 (XXV) as a case-study. His 312-page course is a carefully worded celebration of the Friendly Relations Declaration and, above all, of the embodiment of a principle on self-determination, 'the most valuable piece'[71] of the declaration. Arangio-Ruiz was pleased that the right to self-determination was meant to address colonial situations but that it was not limited to them. Because it applies to all peoples suffering under despotic regimes, 'self-determination is there to stay'.[72] Equally important in Arangio-Ruiz's eyes was the rather unusual procedure through which the declaration was drafted.[73] The General Assembly had decided in 1963 to set up a Special Committee, thereby 'set[ting] aside, for the purpose of the Friendly Relations operation, the International Law Commission channel'.[74] The declaration was thus elaborated without any input from those in charge of the development and codification of international law; instead, it was drafted by a body composed of government officials – many of whom were representatives of newly independent states. This is what made it possible to insert the principle on self-determination in the declaration, thereby fulfilling 'the high hopes of small and newly emergent

68 See the Declaration on the Granting of Independence to Colonial Countries and Peoples, contained in UN General Assembly Resolution 1514 (XI) of 14 December 1960, Resolution 1654 (XVI) of 27 November 1961, Resolution 1810 (XVII) of 17 December 1962 and Resolution 1956 (XVIII) of 11 December 1963. For the appraisal of the General Assembly as the best forum to ensure the 'democratisation of international relations', see M. Bedjaoui, 'Non-alignement et droit international', (1976-III) 151 RCADI 349, at 408–14.

69 The Resolution was adopted only after numerous stumbling stones. Resolution 2625 (XXV), 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations', UN Doc. A/RES/25/2625, (1970).

70 The convolute paragraph enabled ex-colonial states of Asia and Africa to assert that there were occasions warranting external participation in support of liberation movements. The legitimation of foreign military assistance was framed within 'anti-colonialist' struggles. See G. Abi-Saab, 'Wars of National Liberation in the Geneva Conventions and Protocols', (1979-IV), 165 RCADI 353, at 371. G. Tunkin, *Theory of International Law* (1974), 55.

71 G. Arangio-Ruiz, 'The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations', (1972-III) 137 RCADI 419, at 603.

72 Ibid., at 566.

73 Interestingly, Arangio-Ruiz contrasts it with the conception that Dag Hammarskjöld developed of the UN, according to which the UN is 'primarily as dynamic instrument of government through [member states] seek to develop forms of executive action to resolve and forestall conflicts'. Ibid., at 618. For a critical analysis of the managerial role of the UN in the decolonized world, see A. Orford, *International Authority and the Responsibility to Protect* (2011).

74 Ibid., at 521. The UN Special Committee on Friendly Relations was established pursuant to General Assembly Resolution 1966 (XVIII) of 16 December 1963. See E. McWhinney, 'The "New" Countries and the "New" International Law: The United Nations' Special Conference on Friendly Relations and Co-operation among States', (1966) 60 AJIL 1.

nations, who sought peace and security through translating the ideals of the United Nations Charter into a practical code of conduct'.[75]

Third World states achieved another victory in the struggle against imperialist domination during the diplomatic conference for the reaffirmation and development of international humanitarian law applicable in armed conflicts (1974–1977). Remarkably, issues related to wars of national liberation, even though they were practically absent from the draft protocols submitted by the ICRC and the Swiss government, soon came to dominate the conference. The 'hijacking'[76] of the agenda by Third World states is powerfully narrated by Georges Abi-Saab, who was then part of the Egyptian delegation and one of the strongest advocates of the internationalisation of wars of national liberation. He explains how representatives of Arab, African, Asian and socialist (and to a lesser degree Latin American) states formed a coalition and succeeded in having wars of national liberation recognized as international armed conflicts under Article 1 of the First Additional Protocol to the 1949 Geneva Conventions.[77] This strengthened (even if *a posteriori*) the legitimacy of Third World struggles against colonial powers and alien occupation. Wars of national liberation were no longer within the domestic jurisdiction of states; they fell under international humanitarian law. Accordingly, liberation movements – including guerrilla fighters – were no longer 'rebels' but 'legitimate belligerents' who, if captured, should be treated as prisoners of war.[78]

Notwithstanding that victory, newly independent states were confronted with important challenges. It was becoming clear that the older pattern of intervention in the internal affairs of states was beginning to repeat itself, with the superpowers' creation of spheres of influence in Eastern Europe, Asia, Africa, the Middle East, and Latin America. The Soviet invasion of Hungary, the US invasion of the Dominican Republic and Cuba, and the Indian invasion of East Pakistan were all defined as exercises of collective self-defence or interventions at the invitation of governments that had requested military assistance.[79] The key difference between this period and that of colonisation was that representatives of newly independent states were now formal players in public debates about interventions. The composition of the ICJ – a topic much commented on – meant that jurists from states outside Western Europe and North America were involved in shaping the 'new international law'.[80] The ICJ (the Court) decisions in the *Nicaragua* case in 1984 (admissibility) and in 1986

75 L. Lee, 'The Mexico City Conference of the United Nations Special Committee on the Principles of International Law Concerning Friendly Relations and Co-operation Among States', (1965) 14(4) *Int'l & Comp. L. Quarterly* 1296, at 1297. For the 'new' countries and the Soviet bloc, the ILC appeared to be preoccupied 'with the petit point needlework of international law rather than to be concerned with the imaginative reshaping and rewriting of international law to meet new conditions in international society'. See McWhinney, *supra* note 74, at 3.

76 C. Greenwood, 'A Critique of the Additional Protocols to the Geneva Convention of 1949', in H. Durham and D. McCormack (eds), *The Changing Face of Conflict and the Efficacy of International Humanitarian Law* (1999) at 7.

77 Abi-Saab, *supra* note 70.

78 Arts. 43 and 44 of the First Additional Protocol.

79 The UN General Assembly had tried to give legal substance to the notions of aggression and self-defence. One famous formulation is Resolution 3314 (XXIX), U.N. Doc. A/RES/3314 (14 December 1974).

80 *International Status of South-West Africa*, Advisory Opinion, 11 July 1950, [1950] ICJ Rep. 128, at 174 (Judge Alvarez).

(merits) were perhaps the Court's most valiant effort towards strengthening the political independence of developing states.[81] The Court reaffirmed the principle of non-intervention and the sovereign integrity of a Third World state that was being threatened by a superpower.[82] 'This was indeed a bold decision', wrote R.P. Anand, looking back at those years.[83]

Such boldness was discontinuous, however, and the UN proved to be remarkably silent on the Vietnam War. This was at odds with the inclination of international lawyers to debate the legality of US intervention at length: American scholars were sharply divided on the matter.[84] Richard Falk was adamant on limiting the possibilities for a foreign military intervention in what he considered to be an 'internal struggle for control of a national society'.[85] Those who justified US interventionism criticized Falk's 'juridical'[86] analysis and hoped to confront 'legal theory with the political motivations behind the actions of nation states' – these motivations being 'the meaningful transmission of human values'.[87] Likewise, official explanations of US involvement in Vietnam were often described in moralistic and altruistic terms.[88]

> Those who support[ed] the role of the United States in the Vietnam War often emphasize[d] the absence of any selfish American interests in Vietnam. We want no territory or foreign bases, and we have no economic holdings or ambitions.[89]

What I want to convey through this (very brief) historical account is the sense that, during the 1960s-1980s, one could speak about non-intervention and legitimate forms of non-state violence in a way that is no longer acceptable – or even thinkable. Because of the threat of nuclear annihilation, international lawyers were keen to think about preventing resort to war instead of trying to limit war once it begun.[90] In addition, pro-humanitarian intervention arguments were treated with suspicion by someone like Charles Chaumont: any claim to know what is good for other

81 On the previous mistrust manifested by newly independent states towards the Court, see R.P. Anand, 'Attitude of the "New" Asian-African Countries towards the International Court of Justice', (1962) 4 *Int'l Studies* 119. G. Abi-Saab, 'The International Court of Justice as a World Court', in V. Lowe and M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (1996).

82 *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States*), Merits, Judgment of 27 June 1986, [1986] ICJ Rep. 1986, at 14.

83 R.P. Anand, 'Enhancing the Acceptability of Compulsory Procedures', (2001) 5 *Max Planck UN YB* 1, at 11. At the time, however, it was also feared that the Court had decided the *Nicaragua* case at a very high cost. See R.P. Anand, 'The World Court on Trial', in R.S. Pathak and R.P. Dhokalia (eds.), *International Law in Transition: Essays in Memory of Judge Nagendra Singh* (1996), at 253.

84 Richard Falk edited four books on the question, which were sponsored by the American Society of International Law. See R. Falk (ed.), *The Vietnam War and International Law*, vol. 1 (1968), vol. 2 (1969), vol. 3 (1972) and vol. 4 (1976).

85 R. Falk, 'International Law and the United States Role in the Viet Nam War', (1966) 75 *Yale L.J.* 1122, at 1127.

86 C. Murphy, 'Vietnam: A Study of Law and Politics', (1968) 36(3) *Fordham L. Rev.* 453, at 453.

87 Ibid., at 457 and 460.

88 Moralism was supposed to oppose legalism. An influential dismissal of legal formalism is found in H. Kissinger, 'The Viet Nam Negotiations', (1969) 47 *Foreign Aff.* 211.

89 R. Falk, 'Law, Lawyers, and the Conduct of American Foreign Relations', (1969) 78 *Yale L.J.* 919, at 926. As we know, the Vietnam War came to a humiliating end for the US – a humiliation it would not allow itself to experience again. In 2007, seeking marshal support for his war policy, George Bush defended his military commitment in Iraq by linking the conflict there to the Vietnam War, arguing that the withdrawal of U.S. troops would lead to widespread death and suffering as it did in Southeast Asia three decades ago. M. Fletcher, 'Bush Compares Iraq to Vietnam', *Washington Post*, 23 August 2007.

90 Ibid., at 927–98.

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peoples without being open to alternative views was untenable in a post-colonial and Cold War environment.[91] In other words, the notion that a powerful state or a coalition of allies might intervene to rescue or protect the people of another state could not easily be represented as an apolitical action. Humanitarian intervention thus played a limited role, both in official justifications for the use of force and in scholarly commentary.[92] Equally important was the fact that the recourse to violence by non-state actors in revolutionary situations was something feasible, something international lawyers could support. Both Richard Falk and Charles Chaumont were openly sympathetic to 'Uncle Ho' and the 'indomitable energy'[93] of the Vietnamese peoples. Others applauded the fact that 'the indigenous peoples in Chiapas rose in arms as a symbolic cry'.[94] In France's leading international law journal, Jean Salmon pleaded for the 'immediate'creation of the Palestinian state, not only because the conditions for statehood were met, but also as an 'act of solidarity towards Palestinian peoples'.[95] It seems to me that today very few international lawyers would want their names to be associated that publicly with freedom fighters – the term seems anachronistic – and violent forms of emancipatory struggles.[96]

Why? What happened? There is a sense that things are much more complicated today than they were in the past, that 'war and peace are far more continuous with one another than our rhetorical habits of distinction',[97] that revolutionary movements are harder to defend now that we have witnessed 'the collapse of the social and political hopes that went into the anti-colonial imaginings and postcolonial making of national sovereignties'.[98] The next TWAIL generation criticized its predecessors for their 'immense faith [placed] in the UN'[99] as well as in the 'political independence'[100] of Third World states and in the 'crafting [of] genuinely universal norms'.[101] The next generation saw that the project defended by many international lawyers in the 1960–1980s to strengthen the political (and economic[102]) independence of Third World states did not prevent the increasing political, economic, and military disparities around the globe.

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91 C. Chaumont, 'Analyse critique de l'intervention américaine au Vietnam', (1968) 1 RBDI 61, at 84.

92 'Humanitarian intervention was still at that time very much perceived as an anachronistic doctrine that was closely tied to imperialism'. See Orford, *supra* note 12, at 93–4. This included both the Brezhnev doctrine and the Reagan doctrine.

93 Chaumont, *supra* note 91, at 93.

94 J. Vargas, 'NAFTA, the Chiapas Rebellion, and the Emergence of Mexican Ethnic Law', (1994), 25(1) *Cal. West. Int'l L.* 1, at 13.

95 J. Salmon, 'La proclamation de l'Etat palestinien', (1988) 34 AFDI 37.

96 There are, of course, notable exceptions. See I. Scobbie, 'Unchart(er)ed Waters?: Consequences of the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* for the Responsibility of the UN for Palestine', (2006) 16(5) EJIL 941. Z. Miller, 'Perils of Parity: Palestine's Permanent Transition', (2014) 47 *Cornell Int'l L. J.* 331 (2014).

97 D. Kennedy, *Of War and Law* (2006), 3.

98 D. Scott, *Conscripts of Modernity: The Tragedy of Colonial Enlightenment* (2004), 1. See also V. Nesiah, L. Eslava, and M. Fakhri (eds.), *Bandung, Global History and International Law: Critical Pasts and Pending Futures* (2015).

99 Anghie and Chimni, *supra* note 5, at 81.

100 Ibid., at 82.

101 Gathii, *supra* note 4, at 39.

102 To be exhaustive, any post-colonial story would need to include the attempts that Third World lawyers together with leftist international lawyers (such as René-Jean Dupuy) made in the 1960–1980s to complete the political dimension of the self-determination of Third World states with the conquest over their national resources. See for instance M. Virally, 'Vers un droit international du développement', (1965) AFDI 3.

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What is particularly striking is the fact that violent actions are undertaken on a daily basis in the 'global South' under two legal justifications: either to protect civilians or to defeat non-state terrorist groups. This suggests that whether, and under what conditions, external actors can intervene in wars continues to be a pressing question. Yet, any attempt to respond to it is caught between an idealist (human rights, humanitarian, etc.) and a realist (security, survival, etc.) vocabulary.[103] Both have shaped the political imagination grounding our concepts of non-intervention and resistance. Let me explain this.

Today is a moment after 1989, when a triumphant liberalism rose out of the collapse of the USSR.[104] From a Third World perspective, the end of the Cold War led to an important change in the UN: institutional power moved from the General Assembly to the Security Council.[105] The latter proved willing to interpret its jurisdiction widely and to authorize force in order to address situations of civil war or humanitarian crisis. It is almost strange to recall how intensely the first resolutions based on a broad understanding of 'threats to the peace' were debated.[106] Equally strong were the critiques lodged against the Security Council's lack of representativeness in terms of composition and transparency in terms of decision-making. Negotiations for a comprehensive reform of the Security Council did take place, but by 2002, 'the pressure for such a reform [gave] way to a certain ennui or resignation'.[107] With its composition and decision-making process intact, the Security Council allowed for ever more expansive forms of intervention in response to crises in Third World countries, whether through military action or through a wide range of humanitarian assistance.

Anne Orford has shown how the institutional and ideological conditions of the post-Cold War period led to the 'slow growth of support amongst scholars and activists for the idea that force could legitimately be used as a response to situations of massive human rights violations within a state'.[108] Her analysis helps us to see how the appeal to the moral authority of human rights to justify the exercise of power by international actors challenges the traditional meaning and scope of non-intervention. Take the cases of Libya and Côte d'Ivoire, which became the settings for the first application of the concept of 'responsibility to protect' by the Security Council in 2011.[109] Both military campaigns were heavily criticized;

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103 The two vocabularies may well work together. As one of my reviewers pointed out, 'humanitarian intervention' appears in some cases to have been undertaken to transform 'rogue' states into 'democratic' (i.e., civilized) states that would pose no threat and provide no support for terrorists.

104 For an examination of the ways in which the end of the Cold War and the collapse of Socialism contributed to greater differentiation among Third World states and greater prospects for Third World instability, see M. Berger, 'The End of the "Third World"?', (1994) 15(2) *Third World Quarterly* 257.

105 This had already started in the 1980s as a strategy of the concerted West to undermine the power of the General Assembly by qualifying its resolutions as 'soft law' and taking away the General Assembly's mandate over economic affairs through the increasing power of the Bretton Woods organisations.

106 T. Franck, 'The "Power of Appreciation": Who is the Ultimate Guardian of UN Legality?' (1992) 86 AJIL 519. M. Bedjaoui, *The New World Order and the Security Council. Testing the Legality of its Acts* (1994).

107 B. Fassbender, 'Pressure for Security Council Reform' in D. Malone (ed.), *The UN Security Council: From the Cold War to the 1st Century* (2004), at 341. In a 2002 Report, the UN Secretary-General Kofi Annan spoke of the 'stalled process of Security Council reform'. *Strengthening of the United Nations: An Agenda for Further Change*, UN Doc. A/75/387, (9 September 2002), para. 20.

108 Orford, *supra* note 12, at 98.

109 United Nations Security Council, Resolution 1973 (17 March 2011) and Resolution 1975 (30 March 2011).

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several states – including Brazil, Russia, and China – denounced the fact that the protection of civilians was used as a smokescreen for 'regime change'.[110] This critique is reminiscent of past attacks on imperialist interventionism; yet, its persuasiveness is limited in post-Cold War international law, where intervention is closely linked to the protection of civilians.[111] It poses no real threat to the authority of the executive agents of the 'international community'. For they can always argue that, in some cases, the only way to protect the population is to change the regime. In addition, the critique can be reversed and presented as morally objectionable (as an illustration: 'the perception among the BRICS that the UN and NATO went too far in Cote d'Ivoire and Libya has encouraged them to block a timely, decisive and united response to the killing of civilians by the governments in Syria and Yemen' [Bellamy (2011)].

This critique also says nothing about the on-going involvement of external actors in the militarisation of the region. 'In quite subtle ways', observes Orford, 'the invocation of the responsibility to protect concept appears to have legitimised forms of intervention just short of direct resort to force'.[112]

Today is also a moment after 9/11 and the 'biopoliticisation of security'[113] as a response to global terrorism. In an article published in 1994, Ileana Porras pointed to the complex function that terrorism has come to perform vis-à-vis western democracies,[114] and to international law's intimate connection with the outlaw.[115] One effect of the claim that a group using violence is a terrorist group is that it liberates the state from having to itself abide by the laws of war in its 'war on terror'.[116] This is exemplified by the practice of targeted killings of suspected terrorists, a practice developed by the US and other Western powers in their military campaigns in Afghanistan, Pakistan, Yemen, etc. The legal basis for this – i.e., for the deployment of armed force 'short of war' against non-state actors within the jurisdiction of another state – continues to be debated. One cannot fail to notice how the connection between 'protection' and targeted killings renders, here again, the concept of non-intervention almost unsuitable.[117] The question is not whether we should intervene, the question is now how should we intervene (launch of drone attacks? Deployment of special military forces? Etc.). Put differently, terrorism liberates us

110 See the remarks by representatives of the BRICS group in the Security Council. United Nations Security Council, 6531st Meeting, UN Doc. S/PV.6531 (10 May 2011).

111 A. Bellamy, 'The Responsibility to Protect and the Problem of Regime Change', *E-International Relations*, 27 September 2011, available at: www.e-ir.info/2011/09/27/the-responsibility-to-protect-and-the-problem-of-regime-change/.

112 A. Orford, 'The Politics of Anti-Legalism in the Intervention Debate', *Global Policy Journal*, 30 May 2014, available at www.globalpolicyjournal.com/blog/30/05/2014/politics-anti-legalism-intervention-debate.

113 M. Dillon and L. Lobo-Guerrero, 'Biopolitics of Security in the 21st Century: An Introduction', (2008) 34 *Rev. Int'l Stu.* 265, at 265. Amongst the vast literature on the subject, see E. Dauphinee and C. Masters (eds.), *The Logics of Biopower and the War on Terror. Living, Dying, Surviving* (2007).

114 I. Porras, 'On Terrorism: Reflections on Violence and the Outlaw', (1994), 1 *Uni. Utah College L.* 119, at 120.

115 She explained how 'the rhetorical transformation of terrorists into frightening, alien outlaws leads inexorably towards a justification of repression by the state, and to excuse authoritarian regimes'. Ibid., at 144. See also D. Mieckli, 'The Emergence of Terrorism as a Distinct Category of International Law', (2008) 44 *Texas Int'l L. J.* 157, at 178.

116 Ibid., at 141.

117 Here again, the connection between 'protection' and targeted killings renders the concept of non-intervention almost unsuitable. For the argument that targeted killings emerged as a means for the protection of the political body, see M. Gunneflo, *Targeted Killings. A Legal and Political History* (forthcoming).

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from justifying recourse to violence – what we become concerned about is how to ensure the effectiveness of military action while minimizing its costs.

In addition, it is easy to see how terrorism has come to disqualify non-state actors who resort to violence, regardless of the means or the cause or any contextual element.[118] Terrorism is precisely the kind of non-state violence that cannot, ever, be justified. Vasuki Nesiah made a similar point in relation to the ICJ Advisory Opinion in the *Wall in the Occupied Territories* case. 'Today', she writes,

> the principle strategy for blunting the political challenge against repressive occupation is "scaling-up" the issues at stake into the war against terror. In its written submissions to the ICJ the government of Israel insisted that the wall was the vanguard in the war against terror, the shield providing security for those fighting the good fight. The wall was not about occupation but about self-defence for those confronting terrorism. Not about self-determination but about self-preservation.[119]

Her argument is that the 'war on terror' has diffused the critical charge of national self-determination. But the latter concept has also become dated or somewhat unpractical given the pervasiveness of occupation: 'it can speak of how Palestinian people are hurt by the colonial occupation, but it cannot address how their aspirations are also shaped by that relationship'.[120] More generally, the idea of a legitimate resistance to occupation – not only in Palestine but also, for instance, in Iraq – has become harder to sustain. For Frédéric Mégret, this is due not only to the rise of counter-terrorism but also to the 'transformative' role that occupation has acquired in international law.[121]

To conclude, one cannot study the dynamics in the scholarship on the use of force without looking at the evolution of the law on the use of force. A post-colonial analysis invites us to examine the trajectories of legal concepts such as non-intervention, aggression, and self-determination. What did they mean at the time of decolonization? How much of their critical charge is left, in light of the ever more humanitarian interventions allowed (in the name of 'protection') and the ever less resistance movements tolerated (in the fight against 'terrorism')? It appears that, even though their political effects are not pre-determined, the vocabularies through which international lawyers talk about the use of force today largely work to the detriment of marginalized groups and people from the global South. This is precisely what is occulted by the restrictivist-expansionist framework.[122] Indeed, I have tried to show that the 'history of violence', as it were, appears quite different if viewed from a Third World perspective. Any meaningful contribution to the debate on the use of force should now consider avenues of resistance to legally saturated violence.

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118 J. Klabbers, 'Rebel with a Cause? Terrorists and Humanitarian Law', (2003) 14(2) EJIL 299.

119 V. Nesiah, 'Resistance in the Age of Empire: Occupied Discourse Pending Investigation', (2006) 27(5) *Third World Quarterly* 903, at 917.

120 Ibid., at 916.

121 F. Mégret, 'Grandeur et déclin de l'idée de résistance à l'occupation : Réflexions à propos de la légitimité des "insurgés"', (2008) 41 RBDI 382.

122 Arnulf Becker Lorca has shown that both restrictive and expansive positions are problematic as they both reflect the standpoint of lawyers situated at the world's centers of power. From a Third World perspective, it is important to strengthen the legal position of 'semi-peripheral' states, that is, states that are vulnerable to hostile non-state actor presences in their territories and, therefore, more likely subject to interventions. See Becker Lorca, *supra* note 9.