

# Reappraising the Approach of International Law to Civil Wars: Aid to Legitimate Governments or Insurgents and Conflict Minimization

## Repenser l'approche du droit international aux guerres civiles: aide aux gouvernements ou aux insurgés et minimisation des conflits

ANTONIO BULTRINI

### *Abstract*

Since the Second World War, there has been a constant decrease of inter-state conflicts. In sharp contrast, the level of intra-state violence has not declined and has even reached unprecedented peaks. This points to a striking discrepancy between the rejection of violence at the inter-state level and the wide leeway that is still afforded to the use of violence at the intra-state level and to external interferences fueling it. This article takes stock of the main features (and serious flaws) of the existing legal framework on aid to governments or insurgents in internal conflict situations. On the basis of a combined legal and conflict-management analysis, the author proposes a radically different approach and formulates a number of legal and policy recommendations on how to tackle the complex phenomenon of foreign intervention in civil wars, where enormous human, economic, and social implications are at stake.

### *Résumé*

Après la seconde guerre mondiale, les conflits interétatiques n'ont cessé de diminuer. Bien au contraire, le niveau de violence intra-étatique n'a pas baissé et a même atteint des pics sans précédents. Cela indique une discordance criante entre le rejet de la violence au niveau interétatique et la marge ample qui est toujours accordée au recours à la force au niveau intra-étatique ainsi qu'aux ingérences externes à son appui. Cet article dresse un bilan des traits — et défauts — principaux du cadre juridique traditionnel en matière d'aide aux gouvernements ou aux insurgés en cas de conflits internes. Sur la base d'une analyse combinée juridique et de gestion des conflits, l'auteur propose ensuite une approche radicalement différente et formule une série de recommandations de nature juridique et politique sur la manière d'affronter le phénomène complexe des interventions externes dans les guerres civiles, phénomène assorti d'énormes enjeux humains, économiques et sociaux.

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*Mots-clés:* Aide aux gouvernements; aide aux insurgés; conflits armés non-internationaux; Conseil de Sécurité de l'ONU; gestion des conflits non-internationaux; guerres civiles; intervention humanitaire; intervention sur demande; minimisation des conflits; reconnaissance de gouvernements.

## INTRODUCTION

Civil war invariably devastates and shatters the very foundations of the social fabric, the economy, and the institutional–legal settings of the state affected. Yet, until not very long ago, international law basically viewed civil wars as domestic affairs. It essentially addressed the aspect of third state involvement, but only insofar as it affected international relations, and, moreover, tended to safeguard the interests of the legitimate government (aside from rare instances of belligerency). However, since the Second World War, we have seen “internal” aspects of civil wars gradually being drawn into the orbit of international law in three areas: the legal status of agreements concluded between insurgents and the government,<sup>1</sup> conflicts qualifying as self-determination wars, and, last but not least, the ever-increasing extension of the norms of international humanitarian law (IHL) to non-international armed conflicts.

Nonetheless, these developments have had very little impact on another important area — namely, aid/support for the warring parties in “ordinary” civil wars (hereinafter simply referred to as “civil wars”), which are those internal conflicts not qualifying as wars with the aim of asserting the right to external self-determination.<sup>2</sup> With respect to aid to the warring parties in civil wars, international law has remained basically unchanged over time, to the extent that a number of scholars still refer to a “traditional”

<sup>1</sup> On which, see, in particular, Luisa Vierucci, *Gli accordi fra governo e gruppi armati di opposizione nel diritto internazionale* (Napoli: Editoriale Scientifica, 2013).

<sup>2</sup> The latter will not be our focus for two reasons: they are regulated in a different way, which has already been the subject of many studies (Antonio Cassese, *Self-Determination of Peoples* (Cambridge: Cambridge University Press, 1995), is still a leading study in this area; see also Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford: Oxford University Press, 2012) at 212–35; Valentina Grado, *Guerre civili e Stati terzi* (Padova: Cedam, 1998) at 107–45, 350–53); and they now represent an exceptional case. As is widely known, there are currently only two clear-cut external self-determination situations, which unfortunately still present a concrete risk of again leading to armed conflict — that is, Western Sahara and Palestine. Cf also Gerhard Hafner, “Report on Military Assistance on Request” (2011) 74 YB Inst Intl L 245.

approach on the part of international law in this respect.<sup>3</sup> In extremely simplified terms, third states may support the legitimate government, whereas any support for the insurgents is prohibited as amounting to illicit interference in the internal affairs of the affected state or even, depending on the form it takes, to illegal use of armed force against the latter.

Of course, in practice, even the “traditional” legal regime is much more complicated than that, as we shall see, and still raises several questions. In any event, two — partly intertwined — new factors call for a re-assessment of this traditional approach: (1) a greater understanding of the dynamics and realities of civil wars, thanks to a number of studies (which will be referred to in due course) from the angles of economics, conflict resolution, and history and (2) the recent practice of states, international organizations, and non-governmental organizations (NGOs) in the context of, and with regard to, recent and current civil wars occurring in Syria, Libya, Iraq, Yemen, Ukraine, and South Sudan, which we have selected as being emblematic in the context of the present study.

The situation in Syria, which will be our main case study, has become incredibly entangled. The fight against the Syrian government and its various consequences, including the evacuation — in some cases, tending towards ethnic cleansing — of the civilian population from a number of rebel-held areas,<sup>4</sup> are now only one aspect of the war in Syria, and a number of other situations have arisen over time, including the rise of the Islamic State of Iraq and Syria (ISIS) / Daesh and the resulting anti-ISIS military campaign by the international coalition, both in Iraq and Syria; the Turkish military incursions in these two countries, aimed at preventing the Kurds from creating an independent Kurdish entity (including the deployment of Turkish troops across northern Iraq<sup>5</sup>); the decision of the US administration to arm Kurdish elements of the Syrian democratic forces (an alliance of Kurdish and Arab fighters) and to back them with air support against ISIS/Daesh;<sup>6</sup> and the direct deployment, *inter alia*, of US

<sup>3</sup> E.g. Malcolm N Shaw, *International Law*, 8th ed (Cambridge, UK: Cambridge University Press, 2017) at 877; Natalino Ronzitti, *E' lecito armare i ribelli libici?* (Rome: Istituto Affari Internazionali, 2011), online: <<http://www.affarinternazionali.it/2011/04/lecito-armare-i-ribelli-libici/>>; Natalino Ronzitti, “NATO’s Intervention in Libya: A Genuine Action to Protect a Civilian Population in Mortal Danger or an Intervention Aimed at Regime Change?” (2011) 21 *Italian YB Intl L* 9 [Ronzitti, “NATO’s Intervention”]; Grado, *supra* note 2 at 347–50.

<sup>4</sup> As in the city of Daraya, see, among others, Christian Caryl, “Mourning the Syria That Might Have Been,” *Foreign Policy* (16 September 2016); see also, *inter alia*, “Rebels Begin Evacuation of Syria’s Last Besieged Enclave,” *Reuters* (7 May 2018).

<sup>5</sup> “Iraq Calls for U.N. Emergency Meeting on Turkey’s Military Deployment,” *Reuters* (6 October 2016).

<sup>6</sup> “IS Conflict: US Arming Syrian Kurds Unacceptable — Turkey,” *BBC News* (10 May 2017).

and French special forces in northern Syria to assist Kurdish-led militias.<sup>7</sup> These are only some of the major collateral crises that have resulted from the Syrian civil war. All of these developments pose complex legal issues, and international legal scholarship is already looking into them.

Why then, among all of these critical situations, do we consider foreign interventions in the Syrian conflict as a paradigmatic case? It is because the above-mentioned developments, including the emergence of ISIS/Daesh,<sup>8</sup> are major byproducts of the escalation of the turmoil in Syria into an all-out civil war and because foreign interventions have played a major role in contributing to this escalation. In other words, it is important to focus on the initial phase of the Syrian crisis, which generated all of the rest of the events: an uprising against an authoritarian government, followed by brutal repression by the latter and rapidly contaminated by multiple foreign interventions on both sides, which played a crucial role in opening the way for the civil conflict that later degenerated into total mayhem. The purpose of this article, therefore, is to assess the legality and the implications of a crucial factor: foreign intervention in civil wars, generally “defined as the transfer of resources from an external state to a contesting party in a civil war,” of which aid to the government and aid to insurgents, respectively, represent the two main facets.<sup>9</sup> Our goal is threefold: taking stock of the basic features of the existing legal framework with regard to aid to governments or insurgents; identifying its serious defects; and proposing radical changes to the main normative features of the (not coincidentally) highly problematic existing framework.

<sup>7</sup> See, respectively, Thomas Gibbons-Neff, “How a 4-Hour Battle between Russian Mercenaries and U.S. Commandos Unfolded in Syria,” *New York Times* (24 May 2018); Jamie Dettmer, “France Deploys Special Forces in Syria as IS Loses Ground,” *Voice of America* (9 June 2016).

<sup>8</sup> As far as the Islamic State of Iraq and Syria (ISIS)/Daesh is concerned, “the Syrian civil war was the crucible in which ISIS was hardened and forged.” Hal Brands & Peter Feaver, “Was the Rise of ISIS Inevitable?,” *Survival: Global Politics and Strategy* (June–July 2017) at 31; they also refer to Fawaz Gerges, *ISIS: A History* (Princeton, NJ: Princeton University Press, 2016), especially ch 6. In this sense, see also Salman Shaikh & Amanda Roberts, “Syria” in Sebastian von Einsiedel, David M Malone & Bruno Stagno Ugarte, eds, *The UN Security Council in the 21st Century* (Boulder, CO: Lynne Rienner Publishers, 2016) 718.

<sup>9</sup> “Resources are broadly defined as any funds, weapons, equipment, materiel or personnel that have immediate or potential coercive value.” Adam Lockyer, “Foreign Intervention and Warfare in Civil Wars” (2011) 37:5 *Rev Intl Studies* 2337 at 2339. Charity Butcher adopts a broader definition, also including cutoff of aid already in place. See Charity Butcher, “Terrorism and External Audiences: Influencing Foreign Intervention into Civil Wars” (2016) 28 *Terrorism and Political Violence* 774 at 781, also referring to Patrick Regan’s works (see note 187 below).

Although there are several possible ways of classifying internal conflict,<sup>10</sup> two situations are particularly significant in the context of the present research: (1) non-international armed conflict as defined, in particular, by the International Criminal Tribunal for the former Yugoslavia,<sup>11</sup> that is, internal conflict exceeding the threshold of mere “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature,”<sup>12</sup> irrespective of whether it is still possible to identify a legitimate government or not (the non-international conflict being actually characterized by the presence of competing governmental authorities),<sup>13</sup> and (2) any situation constituting a clear and serious risk of escalating into a civil war (and, therefore, possibly including situations still at the stage of internal disturbances and tensions), meaning a situation at risk of civil war that would (or should) be identified as such by the competent bodies of relevant international organizations, such as the United Nations Security Council (UNSC), including via a Presidential Statement, the United Nations Secretary-General, pursuant, in particular, to Article 99 of the *UN Charter*<sup>14</sup> and UN General Assembly (UNGA) Resolution 43/51 of 5 December 1988,<sup>15</sup> the African Union Peace and Security Council,

<sup>10</sup> Various methods to define the threshold that materially qualifies a conflict as “civil war” are reported by Charity Butcher, *supra* note 9 at 775. Cf also Louise Arimatsu & Mohbuba Choudhury, “The Legal Classification of the Armed Conflicts in Syria, Yemen and Libya,” International Law PP 2014/01 (Chatham House, March 2014). Cf also Brad R Roth, *Governmental Illegitimacy in International Law* (Oxford: Oxford University Press, 1999) at 172–73 [Roth, *Governmental Illegitimacy*], focusing, in particular, on the international status of insurgent forces.

<sup>11</sup> According to the well-known *Tadić* case, “[a]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.” ITCY, *Prosecutor v Tadić*, Case no IT-94-1-AR72, Jurisdiction Decision (2 October 1995) at para 70 [*Tadić*]; in this regard, see, in particular, Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge: Cambridge University Press, 2010) at 117ff. Cf also International Committee of the Red Cross (ICRC), “2016 Commentary on the First Geneva Convention 1949” (22 March 2016) at para 422, online: <<https://ihl-databases.icrc.org/applic/ihl/dih.nsf/vwTreaties1949.xsp>>.

<sup>12</sup> *Additional Protocol II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978), art 1(2) [*Additional Protocol II*].

<sup>13</sup> The latter distinction echoes the one made by the Institut de droit international in its resolution “Le principe de non-intervention dans les guerres civiles”, adopted on 14 August 1975 at the Wiesbaden session, art 1(1), online: <[http://www.idi-ii.org/app/uploads/2017/06/1975\\_wies\\_03\\_fr.pdf](http://www.idi-ii.org/app/uploads/2017/06/1975_wies_03_fr.pdf)> [Institut de droit international Resolution].

<sup>14</sup> *Charter of the United Nations*, 26 June 1945, 1 UNTS 15 (entered into force 24 October 1945).

<sup>15</sup> United Nations General Assembly (UNGA) Res 51 and annex, UNGAOR, 43rd Sess, Supp No 49, UN Doc A/43/49, vol 1 (1989) 276.

the Permanent Council of the Organization of American States, or the like. Even though the definition of a non-international armed conflict is notoriously difficult to apply in practice, operational/institutional tools to implement both of the foregoing concepts do exist, and practice does show that they are workable. For example, in July 2012, the International Committee of the Red Cross considered that the Syrian conflict had by then reached the threshold of a non-international armed conflict<sup>16</sup> and so did the Independent International Commission of Inquiry on the Syrian Arab Republic, established by the United Nations (UN) Human Rights Council on 22 August 2011.<sup>17</sup> Furthermore, the indication that the Syrian crisis was at risk of escalating into a civil war could have been derived at the latest from UNSC Resolution 2042 (2012), which was adopted on 14 April 2012.

We shall begin by considering the notion of legitimate/constituted government, which plays a considerable role in the present field of research. We shall then outline the main features of the legal framework concerning aid to governments, and particularly intervention upon request, before identifying the complexities and problematic aspects that lie behind an apparently non controversial legal setting authorizing intervention on behalf of legitimate governments. A similar analysis will be carried out with regard to the other side of the coin — that is, aid to insurgents. At that point, we shall question the coherency and adequacy of the current legal framework, taking into account the realities and implications of civil wars and, thus, integrating into the legal analysis the results of conflict studies on civil wars. This will lead to the concept of “conflict minimization.” We shall finally propose to radically reconsider the international legal and policy approach to foreign interventions in civil war, including the very delicate question of how the proposed framework relates to brutal repression by governmental authorities as a contributing factor to the outbreak of civil wars.

#### THE (CRITICAL) NOTION OF “LEGITIMATE/CONSTITUTED GOVERNMENT”

The definition of what is a legitimate (that is, lawful) government under international law is so critical in this area that it needs to be reviewed at the outset. International law grants the “highest authorities” of a legitimate government such important rights — in particular, the right to request foreign assistance (including so-called “intervention upon request”) — that

<sup>16</sup> ICRC, “Syria: ICRC and Syrian Arab Red Crescent Maintain Aid Effort amid Increased Fighting” (17 July 2012), online: <<https://www.icrc.org/eng/resources/documents/update/2012/syria-update-2012-07-17.htm>>.

<sup>17</sup> Still operating at the time of writing: Independent International Commission of Inquiry on the Syrian Arab Republic, “Third Report of the Commission of Inquiry on the Syrian Arab Republic,” UN Doc A/HRC/21/50 (15 August 2012) at 6, para 12, online: <<https://www.ohchr.org/EN/HRBodies/HRC/IIICISyria/Pages/IndependentInternationalCommission.aspx>>.

extensive legal analysis has been devoted to defining this fairly fundamental concept.<sup>18</sup> The reason why we are using the dichotomy “legitimate/constituted” (or established) government is that the legitimate government still appears to be essentially the constituted/established government — that is, the government that effectively controls a significant portion of the state and that represents at the same time a significant portion of the population. In other words, a sufficiently effective and representative government qualifies as the constituted/established government, and this makes it the legitimate government from the point of view of international law, irrespective of foreign recognition. Thus, from the territorial angle, it has been argued that control of the capital of the state has a special practical relevance<sup>19</sup> and that certain geographical features might also come into play.<sup>20</sup> With respect to representation, this should be understood as “consent of the governed,” which is expressed in one form or another (not necessarily a democratic one) and possibly even as an implicit form of consent — for example, by way of obedience.<sup>21</sup> Yet the application of these two basic requirements (sufficient effective control and a sufficient degree of representation) may be difficult to verify in practice, and inevitably leads to case-by-case assessment, given that borderline situations, where there appears to be a serious default on one or even both of the two requirements, are far from rare.<sup>22</sup>

Although there tends to be a presumption in favour of the established government, there may be situations where strict application of these criteria would actually lead to the conclusion that there is no constituted government.<sup>23</sup> In such critical situations, two exceptional factors may play a major role in artificially keeping alive a “legitimate” government, in spite of the fact that the objective realities would militate against its being considered as the constituted authority. The first situation is where the UNSC so decides pursuant to its powers under the collective security system.

<sup>18</sup> This aspect is underlined by Benjamin Nußberger, “Military Strikes in Yemen in 2015: Intervention by Invitation and Self-Defence in the Course of Yemen’s ‘Model Transitional Process’” (2017) 4 J Use Force & Intl L 110 at 129 (concerning the form of the “invitation” to intervene (at 126–28)); Christian Henderson, *The Use of Force and International Law* (Cambridge, UK: Cambridge University Press, 2018) at 352, 370–73 [Henderson, *Use of Force*].

<sup>19</sup> See Roth, *Governmental Illegitimacy*, *supra* note 10 at 183ff.

<sup>20</sup> On the combined relevance, in the case of Mali, of the control of the capital and the desert nature of much of the area controlled by the insurgents, see Laura Magi, “Sulla liceità dell’intervento francese in Mali” (2013) 96 Rivista di diritto internazionale 551 at 560.

<sup>21</sup> See Roth, *Governmental Illegitimacy*, *supra* note 10 at 138–43 (including an extensive discussion of Hersch Lauterpacht’s views), 164, 414ff.

<sup>22</sup> On recognition in internal armed conflicts, see also Katariina Simonen, “Premature Recognition and Intervention in Libyan Internal Affairs: Who Had the Right to Decide That Gaddafi Must Go?” (2012) 53 Indian J Intl L 421 at 427–30.

<sup>23</sup> Roth, *Governmental Illegitimacy*, *supra* note 10 at 151.

The second situation is where international recognition makes the difference by recognizing (or not recognizing) a given (defective) authority as the legitimate government. Practice offers several examples of both. In Mali, the allegation that consent to French intervention came from a legitimate government, in spite of the fragile situation of Mali's transitional government at the time, was confirmed by the backing of a large share of the international community, including states that had voiced criticism of the intervention, as well as such important organizations as the Economic Community of West African States (ECOWAS) and the European Union (EU).<sup>24</sup> In Libya, the government of National Accord of Libyan Prime Minister Fayeze al-Sarraj was endorsed in 2015 by the UNSC "as the sole legitimate Government of Libya."<sup>25</sup> In Yemen, the Hadi government, in favour of which the Saudi Arabia-led coalition intervened in 2015 after Abd-Rabbu Mansour Hadi had fled into exile as the Houthi Shiite rebels threatened to overrun his last stronghold, was recognized by the UNSC as the legitimate government in spite of the fact that it had lost control of the capital Sanaa in September 2014.<sup>26</sup> However, even in these exceptional (but, by no means, infrequent) cases, legal fiction cannot completely conceal the reality in the field; third states or international organizations may thus take account of it and consent to officially dealing with entities that dispute the legitimacy of the internationally recognized government.<sup>27</sup>

<sup>24</sup> See Magi, *supra* note 20 at 561. Cf also the discussion of the Ivorian case in Simonen, *supra* note 22 at 436.

<sup>25</sup> United Nations Security Council (UNSC) Resolution 2259 (2015) at para 3.

<sup>26</sup> UNSC Resolution 2216 (2015), adopted under Chapter VII on 14 April 2015, refers to it as the "legitimate Government of Yemen" and "demands that the Houthis immediately and unconditionally ... withdraw their forces from all areas they have seized, including the capital Sana'a" (point 1; emphasis in original). "There was a fundamental agreement that we as an international community should continue to support the legitimate government." Gerald Feierstein, former ambassador to Yemen and top State Department official under the Obama administration, quoted by Dan De Luce, Paul McLeary & Colum Lynch, "From the War on al Qaeda to a Humanitarian Catastrophe: How the US Got Dragged into Yemen," *Foreign Policy* (11 September 2017) at 3. In this regard, see also Nußberger, *supra* note 18 at 124, 140ff.

<sup>27</sup> The French government invited both the Libyan Prime Minister Fayeze al-Sarraj and General Khalifa Belqasim Haftar, head of the rival governmental entity ("the Libyan House of Representatives") located in Tobruk and controlling part of eastern Libya, to the meeting that took place in Paris in July 2017 (they were again invited to a broader conference on Libya in Paris on 29 May 2018; see R Aliboni, "Libia: una strategia dall'alto vuota e inefficace" (2018), online: <<http://www.affarinternazionali.it/2018/05/libia-strategia-vuota-inefficace/>>). Furthermore, the Italian defence minister also officially met General Haftar in Rome on 26 September 2017. Lorenzo Cremonesi, "Pinotti incontra Haftar," *Corriere della Sera* (27 September 2017). It is worth noting that paragraph 5 of the above-mentioned UNSC Resolution 2259 (2015) called upon member states "to cease support to and official contact with parallel institutions that claim to be the legitimate authority but are outside of the Agreement as specified by it."



An additional and highly controversial issue in this area is whether the democratic character of a government, as well as its human rights record, should also be considered as relevant requirements. Indeed, as we shall see later, in some of the most dramatic crises of the last few years, a number of states, particularly from the West, have openly challenged the legitimacy of some of the governments at issue, such as the Syrian and the Libyan governments, owing to gross human rights violations and, later, to the international crimes allegedly committed by the authorities under those governments' responsibility.<sup>28</sup> This approach also has led to a doctrinal debate, especially in the context of the development of the "responsibility to protect" principle — a significant matter of controversy — where political and ethical considerations also come into play.<sup>29</sup> However, whatever view we may take from a political and ethical standpoint, resorting to these additional criteria, in strict international legal terms, is problematic for two different reasons. In the first place, the said practice is limited to some, especially Western, states, and states that do not accept these criteria are at least as numerous. In the second place, the practice is highly inconsistent; the benchmarks of democracy and, above all, a state's human rights record, as distinct and additional criteria by which to assess a government's legitimacy, are used in some cases but not used at all in analogous cases, especially those concerning allied governments.<sup>30</sup> We could thus conclude that these criteria are still too controversial to be considered legally founded additional requirements for a government's legitimacy.<sup>31</sup> The logical consequence of

<sup>28</sup> The equation democratic character = legitimacy has also been evident throughout the European Union's (EU) response to the Syrian crisis. See e.g. "Elements for an EU Strategy for Syria," Joint Communication to the European Parliament and the Council by the High Representative of the Union for Foreign Affairs and Security Policy, Doc JOIN(2017) 11 final (14 March 2017) at 7.

<sup>29</sup> See e.g. Anne Orford, "Moral Internationalism and the Responsibility to Protect" (2013) *Eur J Intl L* 83 at 101, on the possible corollary to the said principle: "Indeed, a government that cannot protect its citizens may no longer even be recognizable as the lawful authority in a territory." On the "responsibility to protect" principle, see discussion later in this article.

<sup>30</sup> Thus, the United States (together with other states) questioned the legitimacy of the Libyan and Syrian governments on these grounds, while, at the same time, supporting Saudi Arabia, an absolute monarchy with a very poor human rights record and under serious accusations of committing international crimes in the context of its intervention in the Yemenite civil war.

<sup>31</sup> Jean-Yves De Cara observes (in the context of a discussion on intervention by invitation) that "a democratic requirement is not within the field of positive international law, it could lead to abuse and interference in domestic affairs." Jean-Yves De Cara, "The Arab Uprisings in the Light of Intervention" (2012) 55 *German YB Intl L* 11 at 21; see also Stefan Talmon, "The Difference between Rhetoric and Reality: Why an Illegitimate Regime May Still be a Government in the Eyes of International Law," *EJIL Talk!* (3 March 2011), online: <<https://www.ejiltalk.org/the-difference-between-rhetoric-and-reality-why-an-illegitimate-regime-may-still-be-a-government-in-the-eyes-of-international-law/>>.

this would be that openly questioning a government's legitimacy on such grounds would amount to illicit interference in that state's internal affairs. However, the fact is that the practical use of these criteria for judging a government's legitimacy has much wider implications, specifically in the area of intervention in civil wars. We shall consider them at a later stage. Let us now turn to the main features (as well as the problems and complexities) of the existing legal framework on aid to governments or insurgents.

## AID TO LEGITIMATE GOVERNMENTS

### BASIC ELEMENTS

What we see in practice is that states often provide external military assistance to legitimate foreign governments. In countless cases, this is carried out in a legally formalized manner, through bilateral military cooperation treaties or with the regular sale of weapons by one state to another. Thus, generally speaking, there seems to be little doubt that states can legally provide other states with military assistance.<sup>32</sup> This is no surprise; most states have a clear interest in preserving a legal option to support a foreign government whenever the common interests at stake warrant it.<sup>33</sup> This widespread interest among states echoes one of the ways in which the Congress system was conceived in Vienna in 1814–15, according to which “[e]ach monarch would be guaranteed his throne and territory by the other members of the alliance.”<sup>34</sup>

The issue arises when the military assistance is provided to governments involved in civil wars or facing unrest. Actually, many states do often continue to provide military aid to allies when serious unrest or even an internal armed conflict has started (and, conversely, some governments seek such external support).<sup>35</sup> In several important cases, assistance to a foreign government involved in a civil war has taken the form of direct military intervention in the field. When this occurs with the territorial government's consent, it is qualified as “intervention by invitation.” The relevant case law of the International Court of Justice (ICJ) — in particular, the well-known judgments in *Military and Paramilitary Activities in and against Nicaragua* and in *Armed Activities on the*

<sup>32</sup> See, among others, Roth, *Governmental Illegitimacy*, *supra* note 10 at 179, 187.

<sup>33</sup> “Washington's assistance to Persian Gulf countries waging war against Houthi rebels in Yemen was envisioned as an inexpensive way to show support for an ally.” De Luce, McLeary & Lynch, *supra* note 26 at 3.

<sup>34</sup> Mark Jarrett, *The Congress of Vienna and Its Legacy* (London: IB Tauris, 2013) at 354. This was especially part of Tsar Alexander's complex conception.

<sup>35</sup> Russia constantly claimed its right to continue to provide military assistance to the Syrian government until an arms embargo was brought in. See Tom Ruys, “Of Arms, Funding and ‘Non-lethal Assistance’” (2014) 13:1 *Chinese J Intl L* 13 at 16 [Ruys, “Of Arms”].

*Territory of the Congo* — implies that intervention by consent is lawful.<sup>36</sup> Practice and *opinio juris* in some of the key crises of recent times (such as Syria, Yemen, and Mali) appear at first sight to bear this out.<sup>37</sup> Of course, the issue as to whether the government inviting intervention is the legitimate one will be preliminary to assessing the legality of the invitation.<sup>38</sup>

An additional (and rather powerful) legal argument that has been invoked, often in combination with the legitimate government's invitation, is counter-intervention — that is, the right for a third state to provide foreign military assistance in the field (and, correspondingly, the right of the territorial state to request it) where it is clear that insurgents opposing that government are being supported from outside.<sup>39</sup> This argument, for

<sup>36</sup> “(I)t is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition.” *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, [1986] ICJ Rep 70 at 14, para 246 [*Military Activities against Nicaragua*; emphasis added]; cf *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, [2005] ICJ Rep 116 at 168, paras 42ff [*Armed Activities in the Congo*].

<sup>37</sup> Invitation by the legitimate government has been the main argument invoked by Saudi Arabia and the other members of the coalition to justify their intervention in Yemen. See the Letters to the Secretary-General and the President of the Security Council by Bahrain, Qatar, Saudi Arabia, the United Arab Emirates and Kuwait, UN Doc S/2015/217 (26 March 2015); see also Antonello Tancredi, “Sulla liceità dell’intervento su richiesta alla luce del conflitto in Mali” (2013) 96 *Rivista di diritto internazionale* 946 [Tancredi, “Sulla liceità”]. The Iranian minister for foreign affairs qualified Iran’s direct involvement in the Syrian conflict as an intervention upon invitation of the Syrian government to fight ISIS/Daesh: “Il ministro iraniano Zarif. ‘Sul rispetto dei diritti chiediamo reciprocità,’” *Corriere della Sera* (17 April 2016).

<sup>38</sup> Georg Nolte observes that a government “must display a minimum of effectiveness to have international legal authority to invite foreign troops. This minimum is normally present in cases of internal conflict as long as a government that is challenged by rebellion has not lost control of a sufficiently representative part of the State territory.” Georg Nolte, “Intervention by Invitation,” *Max Planck Encyclopedia of Public International Law* (2010) at para 18, online: <<http://opil.ouplaw.com/view/10.1093/law/epil/9780199231690/law-9780199231690-e1702?prd=EPIL>>. Some of the controversial aspects of the notion of governmental (il)legitimacy emerge in this area too; thus, the same author argues that even though “non-democratic” governments may also invite foreign troops if they fulfil the effectiveness criterion, a democratically elected government may invite even after losing “almost all effective control” (at paras 17–18). Similarly, a legitimate government overthrown by a coup d’état would also enjoy a right to invite, at least until the new government acquired effective control (at para 20).

<sup>39</sup> Interestingly, counter-intervention was mentioned in Article 5 of the Institut de droit international Resolution, *supra* note 13, in spite of the non-intervention approach that inspires the rest of the text and its ambiguous terms with regard to the possibility of counter-intervening if an intervention has taken place in violation of the non-intervention clauses: “[Q]u’en se conformant à la Charte et à toute autre règle pertinente du droit international.” On counter-intervention, cf Elian Lieblich, *International Law and Civil Wars: Intervention and Consent* (London: Routledge, 2014) at 169–72; De Cara, *supra* note 31 at 25; Henderson, *Use of Force*, *supra* note 18 at 367–70.

example, emerged as a supporting element even at the beginning of the armed intervention in Yemen<sup>40</sup> and was then invoked by Saudi Arabia to justify its naval blockade of Yemen's rebel-held port of Hodeidah as a necessary measure to prevent Iran from sending weapons to the insurgents.<sup>41</sup> As we shall see, this recurrent justification nevertheless raises serious problems.

#### AID TO GOVERNMENTS AND IHL

Generally speaking, many interventions on behalf of legitimate governments have been criticized on political and strategic grounds, but they have not been legally challenged as such.<sup>42</sup> Many of the same interventions, however, have been questioned insofar as they have entailed serious violations of IHL. Such has been the case, for example, with regard to the Russian military intervention in the field on the side of the Syrian government as

<sup>40</sup> "Iran has been arming and training the Houthi militia, which is responsible for the killing of innocent citizens. No one can deny that Iran created, supported and armed the Houthi militia. The coalition's military aim [is] to stop Iran's military support for the militias. Iran's political initiatives, however, will be addressed by politicians." "Saudi Ministry of Defense Daily Briefing: Operation Decisive Storm" (15 April 2015), online: *Saudi Embassy* <<https://www.saudiembassy.net/press-release/saudi-ministry-defense-daily-briefing-operation-decisive-storm-4>>.

<sup>41</sup> See e.g. "Yemen Conflict: UN Official Warns of World's Biggest Famine," *BBC News* (9 November 2017); cf Nußberger, *supra* note 18 at 138. Iran has denied it, but the Letter from the Panel of Experts on Yemen Established pursuant to Security Council Resolution 2140 (2014), addressed to the President of the Security Council, UN Doc S/2018/192 (22 January 2016) at 24, para 82 [Doc S/2018/192], does contain evidence of Iranian-made weapons being used by Houthi fighters. However, in its subsequent report of 27 January 2017, pursuant to Resolution 2266 (2016), the Panel of Experts ruled out direct large-scale supply of arms from Iran and detected mainly small-scale trafficking. Letter from the Panel of Experts on Yemen addressed to the President of the Security Council, UN Doc S/2018/193 (27 January 2017) at 25, para 62 [Doc S/2018/193]. The latest such report nevertheless found that Iran failed "to take the necessary measures to prevent the direct or indirect supply, sale or transfer of military equipment related to extended-range short-range ballistic missiles to the Houthi-Saleh forces." Letter from the Panel of Experts on Yemen mandated by Security Council Resolution 2342 (2017) addressed to the President of the Security Council, UN Doc S/2018/68 (26 January 2018) at 32, para 96.

<sup>42</sup> The US Obama administration qualified Russia's provision of military assistance to the Syrian government (just before Russia's direct military intervention) as a "mistake," not as a violation of international law. "Obama Warns Russia against Helping Arm Syrian Government," *Associated Press* (11 September 2015) ["Obama Warns Russia"]. At the beginning of the crisis, the United States called on supplier countries to "voluntarily halt arms transfers to the regime." UNSC Meeting, UN Doc S/PV.6706 (24 January 2012) at 12 [emphasis added]. In the same vein, see also the US Secretary of State's comments on the military assistance to the Syrian Government by Russia. "Russia Warned Not to Deliver Missiles to Syria," *CBC News* (31 May 2013).

of September 2015 as well as in respect of the military intervention in the field in favour of the Hadi government in Yemen. Russian support for the Syrian government was openly questioned insofar as it involved particular war crimes.<sup>43</sup> Several states — in particular, the United Kingdom, France, and the United States — have taken a very strong stand when stigmatizing the war crimes committed during the Syrian government's offensive, backed by its allies, to retake Aleppo in the autumn of 2016 and Russia's alleged complicity in committing those crimes.<sup>44</sup>

With respect to Yemen, Saudi Arabia and a coalition of Arab states launched a military intervention in the form of a massive air campaign on 26 March 2015 (and a *de facto* naval blockade on the two main Yemeni ports), aimed at reinstalling the government of President Hadi, who had asked the Gulf states and the League of Arab States to use force against the Houthi rebels. Saudi and other Arab air forces taking part in the campaign (the coalition included aircraft from Egypt, Morocco until February 2019, Jordan, Kuwait, the United Arab Emirates, Qatar, and Bahrain, and also involved the use of ground troops from some of these states<sup>45</sup>) have been supported, in particular, by the United States, the United Kingdom, and France, specifically by the delivery of precision-guided munitions and intelligence and logistical aid, including the air refuelling of Saudi planes.<sup>46</sup> The intervention by the Saudi-led coalition in favour of the Yemeni government, which was initially, by and large, considered to be in

<sup>43</sup> "German Chancellor Angela Merkel urged Russia on Friday to use its influence with the Syrian government to end the devastating bombardment of Aleppo, as her government opened the door to possible sanctions against Russia for its role in the conflict. In some of her harshest comments to date, Merkel said there was no basis in international law for bombing hospitals and Moscow should use its influence with Syrian President Bashar al-Assad to end the bombing of civilians." "Germany Steps Up Pressure on Russia over Syria, Opens Door to Sanctions," *Reuters* (7 October 2016).

<sup>44</sup> "Russia Accused of War Crimes in Syria at UN Security Council Session," *The Guardian* (26 September 2016). At the UNSC meeting of 5 December 2016 (on the occasion of which draft Resolution S/2016/1026, aiming, *inter alia*, at stopping all attacks in the city of Aleppo, was vetoed by China and Russia and opposed also by Venezuela), the UK representative warned that "[t]he world and the Syrian people will not forget Russia's role in carrying out, and supporting the regime in carrying out, such heinous crimes in Syria." UNSCOR, 71st Sess, 7825th Mtg, UN Doc S/PV.7825 (2016) at 7.

<sup>45</sup> See, *inter alia*, "UAE Pounds Yemen Rebels after Coalition's Deadliest Day," *Voice of America* (5 September 2015); "Qatar Sends 1000 Ground Troops to Yemen Conflict: Al Jazeera," *Reuters* (7 September 2015).

<sup>46</sup> See, *inter alia*, "U.S. to Expedite Munition Deliveries for Yemen Fight: Support Includes Deliveries of Precision-Guided Munitions, Intelligence and Logistical Aid," *Wall Street Journal* (7 April 2015); "U.S. Military Planes Cleared to Refuel Saudi Jets Bombing Yemeni Targets," *Wall Street Journal* (2 April 2015).

accordance with international law,<sup>47</sup> was subsequently challenged openly insofar as it allegedly involved serious IHL breaches, most recently by experts mandated by the Human Rights Council.<sup>48</sup> In 2016, the US administration

<sup>47</sup> For the factual background and the initial international reaction to the intervention, see Nußberger, *supra* note 18 at 112–23. Karine Bannelier-Christakis reports the view according to which the intervention in question was approved or at least acquiesced in by a considerable number of states, with few critical voices. Karine Bannelier-Christakis, “Military Interventions against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent” (2016) 29 *Leiden J Intl L* 743 at 749.

<sup>48</sup> Office of the High Commissioner for Human Rights, “Yemen: United Nations Experts Point to Possible War Crimes by Parties to the Conflict” (28 August 2018), online: <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23479&LangID=E>>. Among many other sources, see also, in particular, the Letter from the Panel of Experts on Yemen, which is a very impressive document, Doc S/2018/192, *supra* note 41. The subsequent report adopted on 27 January 2017 documented 10 strikes by the coalition resulting in “292 civilian fatalities, including at least 100 women and children.” Doc S/2018/193, *supra* note 41 at 45, para 120; a detailed assessment of compliance with international humanitarian law (IHL) is contained in Appendices A–D and Annex 49. On the specific subject of air strikes on hospitals, see “Yemen Conflict: MSF to Withdraw Staff from Northern Hospitals,” *BBC News* (18 August 2016). On 27 August 2018, the UN Committee on the Rights of the Child denounced the worst attacks on children in Yemen since 2015. UN Committee on the Rights of the Child, “UN Child Rights Committee Presses Saudi Arabia to Protect Children in Armed Conflict” (27 August 2018), online: <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23478&LangID=E>>; see also Micah Zenko, “America Is Committing War Crimes and Doesn’t Even Know Why,” *Foreign Policy* (15 August 2018); Colum Lynch & John Hudson, “U.N. Chief to U.S.-Backed Saudi Air Coalition: You May Be Committing War Crimes in Yemen,” *Foreign Policy* (8 January 2016); Colum Lynch, “U.S. Support for Saudi Strikes in Yemen Raises War Crime Concerns,” *Foreign Policy* (15 October 2015) at 2 [Lynch, “U.S. Support”] (quoting Senator Patrick Leahy as saying that airstrikes might have violated US legislation barring security assistance to countries responsible for gross human rights abuses); Amnesty International, “Bombs Fall from the Sky Day and Night: Civilians under Fire in Northern Yemen” (October 2015), online: *Amnesty International* <<https://www.amnesty.org/en/documents/mde31/2548/2015/en/>>. According to an independent data collection source, more than one-third of all Saudi-led air raids hit civilian targets such as schools, hospitals, and mosques. *Yemen Data Project*, online: <<http://www.yemendataproject.org/>>. The airstrike that hit a funeral hall in Sanaa, the capital of Yemen, and killed over 800 people in October 2016, a ‘double-tap’ bombing (“Thousands March in Yemen after Over 140 Killed in Airstrike,” *Associated Press* (9 October 2016)), was specifically documented by the panel of experts in the above-cited January 2017 report (Doc S/2018/193, *supra* note 41 at 46–49 and Appendix D, Annex 49). It was only following airstrikes labelled as “war crimes” that calls were made for the United States to withdraw its support to the Saudi-led coalition. See “Lawmakers Demand U.S. Do More Than Just Criticize Saudi Bombing Campaign,” *Foreign Policy* (10 October 2016). On the extent of arms sales and military assistance to Saudi Arabia, in the context of the conflict in Yemen, with US statutory obligations, see also the expert opinion by Michael Newton provided by the Center for Human Rights of the American Bar Association upon request of the US Congress. *American Bar Association* (19 May 2017), online: <[https://www.americanbar.org/content/dam/aba/administrative/human\\_rights/ABACHRAssessmentofArmsSalestoSaudiArabia.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/human_rights/ABACHRAssessmentofArmsSalestoSaudiArabia.authcheckdam.pdf)>.

under President Barack Obama suspended the shipment of precision-guided munitions and cluster bombs to Saudi Arabia and pulled back some intelligence support, “over concerns about botched targeting in Saudi air strikes,” even though the US military continued to refuel coalition aircraft and to share selected intelligence.<sup>49</sup> Several unlawful attacks against civilians by the coalition, involving twenty-three US-made weapons, were also recorded.<sup>50</sup> More radically, in January 2018, the Norwegian government suspended exports of weapons and ammunition to the United Arab Emirates, a participant in the Saudi-led coalition. Although there was no evidence that Norwegian-made ammunition had been used in Yemen, the Norwegian government adopted a precautionary approach following allegations, by a number of NGOs as well as some Norwegian members of parliament, concerning serious IHL violations in the context of the air bombardments carried out by coalition planes.<sup>51</sup>

It must be noted, however, that in this area double-talk is frequent; the United Kingdom, for example, refused to back the Netherlands’s proposal, formally submitted by Slovakia on behalf of the EU, that the UN Human Rights Council set up an inquiry to examine civilian deaths in Yemen.<sup>52</sup>

<sup>49</sup> Helene Cooper, “U.S. Blocks Arms Sale to Saudi Arabia Amid Concerns Over Yemen War,” *New York Times* (13 December 2016); see also Donatella Rovera, “The Human Carnage of Saudi Arabia’s War in Yemen,” *Foreign Policy* (26 August 2015) at 3. These conditions, which were only partly fulfilled by the Saudi-led coalition, were then dropped under the new US Trump administration. Dan De Luce & McLeary Paul, “Saudi Arms Sale Hits Possible Senate Roadblock,” *Foreign Policy* (7 June 2017).

<sup>50</sup> Human Rights Watch, “Yemen: US-Made Bombs Used in Unlawful Airstrikes” (8 December 2016), online: *Human Rights Watch* <<https://www.hrw.org/news/2016/12/08/yemen-us-made-bombs-used-unlawful-airstrikes>>.

<sup>51</sup> Existing export permits were temporarily revoked and no new licenses would be issued under the current circumstances. The sale of arms or ammunition by Norway to Saudi Arabia was already prohibited. See “Norway Suspends Arms Sales to UAE over Yemen War,” *Reuters* (3 January 2018).

<sup>52</sup> “UK Accused of Blocking UN Inquiry into Claim of War Crimes in Yemen,” *The Guardian* (25 September 2016). The United Kingdom had actually previously admitted “that the coalition had dropped ‘a limited number’ of UK-supplied cluster munitions in Yemen.” The Saudi government then stated that it had decided to stop the use of UK-made BL-755 cluster munitions and had informed the UK government, noting, however, that unlike the United Kingdom, Saudi Arabia had not ratified the 2008 *Convention on Cluster Munitions*. “Yemen: Arab Coalition to Stop Using UK Cluster Bombs,” *Aljazeera* (20 December 2016). In March 2017, the Netherlands eventually became the first EU country to stop arms exports to Saudi Arabia. See “Revealed: The £1bn of Weapons Flowing from Europe to Middle East,” *The Guardian* (27 July 2016) [“Revealed: The £1bn of Weapons”]. The British High Court first ruled that UK government arms sales to Saudi Arabia were lawful. “UK Arms Sales to Saudi Arabia Ruled Lawful,” *BBC News* (10 July 2017). However, the House of Lords International Relations Committee subsequently stated that UK arms sales to Saudi Arabia violated international law, since British weapons were “highly likely to be the cause of significant civilian casualties” in Yemen.

On the other hand, the two situations differ in that Russia has allegedly been either directly committing war crimes through its air forces or in a situation of “complicity,” whereas the United Kingdom (and others) have possibly been in a situation of failing to “ensure respect” of IHL by providing weapons to Saudi Arabia in the knowledge that they were being used to commit war crimes.<sup>53</sup> However, although the former case is graver than the latter, both amount to violations of IHL. A similar assessment would also apply to other forms of anti-insurgent intervention that have entailed IHL violations. Saudi Arabia’s blockade of Yemen’s rebel-held port of Hodeidah seems to provide a case in point.<sup>54</sup>

#### FURTHER CRITICAL ELEMENTS

At this stage, one might be tempted to peremptorily conclude that, in principle, the supply of military aid to a legitimate government involved in a civil war, or even direct foreign military intervention in the field (upon request and possibly pursuant to counter-intervention), would as such be

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“UK Arms Sales to Saudi Arabia Break International Law, Say Lords,” *Financial Times* (16 February 2019). The Court of Appeal in London then ruled British arms sales to Saudi Arabia to be in breach of IHL on grounds that the risk to civilians in Yemen had not been properly addressed. *The Queen (on the Application of Campaign against Arms Trade) v Secretary of State for International Trade*, Case No T3/2017/2079 (20 June 2019), online: <[www.judiciary.uk/judgments/the-queen-on-the-application-of-campaign-against-arms-trade-v-secretary-of-state-for-international-trade-and-others/](http://www.judiciary.uk/judgments/the-queen-on-the-application-of-campaign-against-arms-trade-v-secretary-of-state-for-international-trade-and-others/)>.

<sup>53</sup> In this respect, see especially Marco Sassòli, “State Responsibility for Violations of International Humanitarian Law” (2002) 84 *Intl Rev Red Cross* 401 at 401ff, 413; see also Luigi Condorelli & Laurence Boisson De Chazournes, “Quelques remarques à propos de l’obligation des États de ‘respecter et faire respecter’ le droit international humanitaire ‘en toutes circonstances’” in Christophe Swinarski, ed, *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (Geneva: Springer, 1984) 17; Ruys, “Of Arms,” *supra* note 35 at 20–31.

<sup>54</sup> Further to the specific provisions on humanitarian assistance contained in UNSC Resolution 2216 (2015) at paras 9 and 19, the issue was also officially raised as to whether US assistance to foreign countries blocking or hindering the flow of humanitarian aid, such as Saudi Arabia in the Yemeni crisis, would violate the 1961 *US Foreign Assistance Act*, s 620I.a, “Legislation on Foreign Relations through 2002,” US House of Representatives and US Senate, vol I-A (2003) at 320, online: <<https://www.usaid.gov/sites/default/files/documents/1868/faa.pdf>> as well as IHL, even though (under subsection b. of the same provision) the US president could still make an exception and keep providing assistance if he determined that to do so would be in the national security interest of the United States. See Dan De Luce, “Trump Nominee Concedes Saudi Siege of Yemen Could Be Violating U.S. Law,” *Foreign Policy* (19 December 2017); see also Human Rights Watch, “Yemen: Coalition Blockade Imperils Civilians” (7 December 2017), online: *Human Rights Watch* <<https://www.hrw.org/news/2017/12/07/yemen-coalition-blockade-imperils-civilians>>. Colum Lynch underlines that for a country that imports more than 90 percent of its food and fuel, the blockade has been devastating. Lynch, “U.S. Support,” *supra* note 48 at 5.



legal.<sup>55</sup> However, on closer inspection, the actual picture, in terms of practice and *opinio juris*, seems to be more complex and, above all, possibly in flux. To begin with, the legal or principled impact of IHL should not be underestimated. It is evident, from the examples cited above, that its application would considerably limit the options for intervening foreign states.<sup>56</sup> Furthermore, it is unclear whether an intervention upon request tainted by serious IHL violations would become altogether unlawful. In this context, reference must also be made to the *Arms Trade Treaty (ATT)*, whose Article 6, paragraph 3, stipulates:

A State Party shall not authorize any transfer of conventional arms covered under art 2 (1) or of items covered under Article 3 or Article 4, if it has knowledge at the time of authorization that the arms or items 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 as such, or other war crimes as defined by international agreements to which it is a Party.<sup>57</sup>

Under Article 7 of the *ATT*, each state party, in any event, prior to the authorization of the export of the conventional arms and other items falling within the scope of the *ATT*, must assess, in particular, the potential that the conventional arms or items might not only be used to commit or facilitate a serious violation of international humanitarian or human rights law but also “contribute to or undermine peace and security,” which could well be interpreted to mean that arms exports to any of the warring parties in a case of civil strife, including the government, would fuel the internal conflict, thus undermining peace and security.<sup>58</sup>

It is worth noting that these provisions are reflected in a number of national laws and also specific EU acts. For example, Italian Law 185/1990 prohibits arms exports to, among others, states whose governments are responsible for serious violations of international human rights conventions, as established by the competent bodies of the UN, the EU, or the

<sup>55</sup> See e.g. Lieblich, *supra* note 39 at 68; L Visser, “Russia’s intervention in Syria,” *EJIL Talk!* (25 November 2015), online: <<https://www.ejiltalk.org/russias-intervention-in-syria/#more-13869>>; cf also Grado, *supra* note 2 at 67–69.

<sup>56</sup> It was thus noted that in the early stage of the Syrian crisis the US administration “refrained from publicly pressing Russia to stop supporting” Assad’s attacks on civilians. See Kenneth Roth, “Barack Obama’s Shaky Legacy on Human Rights,” *Foreign Policy* (4 January 2017) at 6; but cf also Aaron David Miller, “It’s Not Obama’s Fault,” *Foreign Policy* (11 September 2015).

<sup>57</sup> *Arms Trade Treaty*, 2 April 2013, 52 ILM 988 (2013) (entered into force 24 December 2014 and ratified by 100 states at the time of writing; Canada is not among the states parties or the signatories).

<sup>58</sup> See, in this regard, the analysis of costs and causes of civil wars later in this article.

Council of Europe.<sup>59</sup> Furthermore, the EU Council's Common Position 2008/944/CFSP, defining the rules governing the control of exports of military technology and equipment, provides, *inter alia*, that "Member States shall deny an export licence for military technology or equipment which would provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination."<sup>60</sup> The European Parliament thus deems the continued authorization of transfers of weapons and related items to Saudi Arabia by some EU member states to be in violation of this common position.<sup>61</sup> Interestingly, the UNSC-mandated panel of experts in Yemen recognized the fact that, although not tasked with the monitoring of the coalition's transfer of weapons to resistance fighters on the side of the legitimate government, the supply of weapons to resistance forces by the coalition without due measures being taken to ensure accountability was also contributing to a destabilizing accumulation of arms in Yemen.<sup>62</sup>

It is then argued that the principle of non-intervention in a state's internal affairs also prohibits any disproportionate interference on the government's side; by altering the balance in the latter's favour, external intervention would inevitably lead to interference in the internal dynamics of any internal strife, and it is hard to see why, from this perspective, a government (possibly an authoritarian one) should be given an advantage. So it is obvious that the 2016 military successes of the Syrian government owe a great deal to Russia's (and Iran's, plus the Lebanese Hezbollah militias') forceful intervention on the Syrian government's behalf.<sup>63</sup>

<sup>59</sup> Italian Law 185/1990, art 1, para 6.d.

<sup>60</sup> Council Common Position 2008/944/CFSP (8 December 2008), art 2, criterion 3: "Internal situation in the country of final destination, as a function of the existence of tensions or armed conflicts." Both the said Italian law and the EU common position have founded an unprecedented (and still pending at the time of writing) complaint before the Italian courts, lodged against Italian officials and the local subsidiary German conglomerate Rheinmetall (RWM Italia), over their alleged involvement in the aerial bombardment of Yemen by the Saudi-led coalition. See Ewen MacAskill, "Italian Officials and German Firm Face Legal Action over Saudi Arms Sale," *The Guardian* (18 April 2018). Cf also Patrick Wintour, "MPs Call for Immediate Halt of UK Arms Sales to Saudi Arabia," *The Guardian* (3 February 2016).

<sup>61</sup> Resolution on the Humanitarian Situation in Yemen, Doc 2016/2515 (RSP) (25 February 2016) at para N.

<sup>62</sup> See Doc S/2018/192, *supra* note 41 at 3, 25, para 85.

<sup>63</sup> Brad Roth observes that "where a contending faction — even one that obtains some level of illicit aid from abroad — manages to sustain a serious challenge notwithstanding substantial foreign assistance to the established government, or is kept at bay or crushed only with a massively disproportionate deployment of foreign supplies or logistical support, the legitimacy of that government can scarcely be regarded as unproblematic." Roth, *Governmental Illegitimacy*, *supra* note 10 at 197.

The legality of intervention by invitation in the midst of a non-international armed conflict, further to the issue of the legitimacy of the requesting government, is actually a controversial question. If some authors support the view that intervention by invitation would be licit even in the context of an internal conflict that had reached a high-intensity threshold,<sup>64</sup> other authoritative sources tend to restrict interventions by invitation. Thus, in the case of a classical and full-scale civil war, intervention by invitation would only “be permissible as long as the extent of the foreign military support does not exceed the dimension of an auxiliary enterprise” and does not remove the political control of the inviting government, except where foreign troops were invited “to fight secessionist groups or to reverse a military coup against a democratically elected government”; however, any government which is confronted “with a manifest and comprehensive popular uprising” would be prevented by the principle of (internal) self-determination from inviting foreign troops.<sup>65</sup>

Some elements even point to the possibility of denying a government that has committed gross human rights violations the right to receive foreign assistance when it is confronted with non-armed unrest. Article 16 of the *Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)* considers equally responsible a state that aids or assists another state in the commission of an internationally wrongful act, on condition, *inter alia*, as the accompanying commentary specifies, that the assisting state be aware of the wrongfulness of the conduct of the assisted state. The said commentary includes the case of a state providing material aid to a state that uses the aid to commit serious human rights violations.<sup>66</sup> Some practice seems to corroborate this provision. Thus, at the fourth ministerial meeting of the Group of Friends of the Syrian People, held in Marrakech on 12 December 2012 and bringing together more than 100 states, the chairman’s conclusions called upon the international community, and, particularly, the members of the UNSC, “to increase pressure on the Syrian regime by adopting and implementing measures to prevent the Syrian regime from receiving external support

<sup>64</sup> See e.g. Lieblich, *supra* note 39 at 156–65.

<sup>65</sup> See Nolte, *supra* note 38 paras 20, 22. In this respect, see also art 3(1) of the Institut de droit international’s resolution on “Assistance militaire sollicitée” (8 September 2011), online: <[http://www.idi-iil.org/app/uploads/2017/06/2011\\_rhodes\\_10\\_C\\_fr.pdf](http://www.idi-iil.org/app/uploads/2017/06/2011_rhodes_10_C_fr.pdf)>. In the same sense, see Henderson, *Use of Force*, *supra* note 18 at 375. Cf also the various views reported by Ruys, “Of Arms,” *supra* note 35 at 40–45; Hafner, *supra* note 2 at 242–44.

<sup>66</sup> International Law Commission, *Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries*, UN Doc A/56/83 (10 August 2001) at para 9 [ARSIWA]; see also Hafner, *supra* note 2 at 248.

and resources allowing it to commit violence against its own citizens.”<sup>67</sup> EU Council Decision 2013/255/CFSP of 31 May 2013 on restrictive measures against Syria prohibited, *inter alia*, the provision of equipment that might be used for internal repression as well as the importation from Syria of crude oil and petroleum products (Articles 1 and 5).

In any event, the principle of non-intervention could certainly be read in the sense that aid to the government should stop short of massive direct intervention in the field with the intervening state’s own armed forces. It is also worth noting that states intervening in a civil war on the side of what they consider to be the legitimate government do not always rely only on a supposed right to intervene in a civil war in favour of the legitimate government following an invitation by the latter.<sup>68</sup> Thus, in addition to the invitation and the counter-intervention arguments, Saudi Arabia and the other members of the coalition have argued that they had to intervene in the civil war in Yemen in collective self-defence against an alleged aggression by non-state actors against both the Yemeni state and Saudi Arabia itself.<sup>69</sup> Furthermore, in the debates in the UNSC on the most serious current civil war situations, several states expressed the view that third states ought not to intervene on either side, even indirectly by providing military aid. Consistently with the approach highlighted above, some states, in the context of the Syrian crisis, attached special importance to the allegations of the

<sup>67</sup> See the chairman’s conclusions, based on the participants’ contributions. “Chairman’s Conclusions” (12 December 2012), point 26, online: *Group of Friends of the Syrian People* <[http://www.mofa.go.jp/mofaj/area/syria/friends\\_kaigo/2012\\_12/pdfs/2012\\_12\\_01.pdf](http://www.mofa.go.jp/mofaj/area/syria/friends_kaigo/2012_12/pdfs/2012_12_01.pdf)>. The question of sales of military equipment to Venezuela while violent clashes continued was raised in the United Kingdom at the highest political level. See Rowena Mason, “UK Criticised over Sales of Military Equipment to Venezuela,” *The Guardian* (11 August 2017). Although only binding upon EU member states, it is nevertheless worth noting that EU Council Common Position 2008/944/CFSP, *supra* note 60, requires member states to assess export license applications for military technologies and equipment against respect for human rights in the country of final destination (art 2, criterion 2). Furthermore, as of 13 November 2017, the EU Council’s restrictive measures in respect of Venezuela have included an embargo on arms and on related material that might be used for internal repression.

<sup>68</sup> See Bannelier-Christakis, *supra* note 47 at 749.

<sup>69</sup> See the Letters to the Secretary-General and the President of the Security Council dated 26 March 2015 by Bahrain, Qatar, Saudi Arabia, the United Arab Emirates and Kuwait, UN Doc S/2015/217 (27 March 2015). In the same way, an official from the US government stated that “the United States is committed to backing the coalition war effort, which is ‘supporting the legitimate Yemeni government and defending itself from Houthi incursion into Saudi territory and missile attacks.’” De Luce, McLeary & Lynch, *supra* note 26 at 7. Benjamin Nußberger, however, is of the view that the self-defence argument was used “more as a political tool than a primary legal basis.” Nußberger, *supra* note 18 at 112.

crimes committed by the Syrian government<sup>70</sup> or by both warring parties.<sup>71</sup> Not least, however, several other key states called in general (and sometimes even in rather radical terms) for a halt to the provision of weapons to any of the “warring parties,” irrespective of the commission of international crimes.<sup>72</sup>

Certain practical elements with regard to the conflict between the Ukrainian government and pro-Russia insurgents in the East are also worth mentioning. Thus, under the former Obama administration, the United States decided not to send lethal weapons to the Ukrainian government and opted instead to provide a limited quantity of non-lethal aid.<sup>73</sup> Furthermore, European states are considered to be opposed to the provision

<sup>70</sup> The first hints at crimes against humanity date as early as 25 August 2011. Briefing to the Security Council by Mr. Lynn Pascoe, Under-Secretary-General for Political Affairs (UNSCOR, 66th Sess, 6602nd Mtg, UN Doc S/PV.6602 (2011) at 5), referring to the United Nations High Commissioner for Human Rights covering events from 15 March to 15 July 2011, UN Doc A/HRC/18/53 (15 September 2011).

<sup>71</sup> When the first important UNSC resolution on humanitarian assistance in Syria was adopted (see notes 129 and 193 below), the representative of Nigeria expressed “regret that there was no consensus on the inclusion of a paragraph in the final text calling upon all States to refrain from transferring arms *to the parties* in the Syrian conflict, given that such arms could be used to commit or to facilitate Syria’s violations or abuses of international human rights or humanitarian law.” UNSCOR, 69th Sess, 7116th Mtg, UN Doc S/PV.7116 (2014) at 11 [emphasis added]; see also the statements of the representative of Rwanda on the same occasion (at 12ff).

<sup>72</sup> Among other countries, Argentina (UNSC meeting of 23 July 2013; “we insist that supplying weapons to the parties must stop. There is no doubt that weapons in Syria are being used to commit human rights violations and violations of international humanitarian law” (UNSCOR, 68th Sess, 7007th Mtg, UN Doc S/PV.7007 (2013) at 15) and UNSC meeting of 20 January 2014 (UNSCOR, 69th Sess, 7096th Mtg, UN Doc S/PV.7096 (2014) at 20); Pakistan (again at the UNSC meeting of 23 July 2013; “The Council and the international community should take steps to stop arms supplies *to all sides* and bring the Syrian Government and opposition representatives to Geneva for talks that will lead to a political solution and national reconciliation. ... each side wants to demonstrate military superiority before moving to the negotiating table. More arms will lead only to more bloodshed, not to peace” [*ibid* at 20; emphasis added]); Brazil (“Brazil reiterates its repudiation of actions that further militarize the conflict in Syria. We call on all members of the international community, *including members of the Security Council*, to ... cease arms transfers to all actors involved in the conflict. The argument that providing weapons to the parties will help reach a military balance and somehow contribute to the success of the planned Geneva conference is seriously flawed. It will only promote an arms race, which in turn will further reduce the chances of a political understanding. ... Furthermore, it is clear that more weapons can sadly lead to more human rights violations. In the light of the conclusions of the Commission of Inquiry that all parties have gravely violated human rights, the protection of civilians requires fewer, not more, arms in the hands of the parties” [*ibid* at 33; emphasis added]).

<sup>73</sup> Such as radios, night vision goggles, first aid kits, and military ambulances. See Emily Tamkin, Dan De Luce & Robbie Gramer, “Ukraine Expects Trump to Approve Arms Deliveries,” *Foreign Affairs* (26 October 2017); see also “Contemporary Practice of the United States” (2015) 109:1 *Am J Intl L* 174 at 179. The US policy changed under the Trump administration, when anti-tank weapons were provided to the Ukrainian

of lethal aid to the Ukrainian government.<sup>74</sup> In both cases, however, the policy of refraining from providing lethal aid appears to be motivated, above all, by the concern to avoid military escalation.

A specific feature, in any case, is that the above-mentioned views have often been accompanied by a clear call not just for a political solution but also for active involvement by the international community (in particular, through international organizations such as the UN or the League of Arab States, in the form of mediation or good offices). In one of the many meetings on Syria that took place at the UNSC, Valerie Amos, UN under-secretary general for humanitarian affairs and emergency relief coordinator, stated that “only a genuine political process can prevent Syria from sliding into deeper fragmentation and chaos. *We are looking to the Council to exercise its leadership role in that regard.*”<sup>75</sup> In paragraph 13 of Resolution 2216 (2015) on Yemen, the UNSC requested the “Secretary-General to intensify his good offices role in order to enable a resumption of a peaceful, inclusive, orderly and Yemeni-led political transition process.”

Account should also be taken of the UNSC decisions imposing an arms embargo with regard to specific civil war situations that extended to the supply of military equipment to the government side, like Resolution 1970 (2011), imposing a comprehensive arms embargo on Libya (although followed by a number of exemptions<sup>76</sup>) or the general arms embargo imposed by Resolution 733 (1992) with regard to Somalia. Of course, such decisions are made by the UNSC on the basis of case-by-case assessment and cannot therefore be seen as reflecting a general practice. Nonetheless, specific UNSC resolutions may restrict the possibility of providing weapons or direct support in the field in support of a government engaged in civil strife. Paragraph 5 of UNSC Resolution 1747 (2007) provides, *inter alia*, that:

Iran shall not supply, sell or transfer directly or indirectly from its territory or by its nationals or using its flag vessels or aircraft any arms or related materiel, and ... all States shall prohibit the procurement of such items from Iran by their nationals, or using their flag vessels or aircraft, and whether or not originating in the territory of Iran.

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government. See, *inter alia*, Olearchyk Roman, “Ukraine to Deploy US Anti-Tank Missiles in Defiance of Russia,” *Financial Times* (1 May 2018).

<sup>74</sup> In this sense, see Erik Brattberg of the Carnegie Endowment for International Peace, quoted in Tamkin, De Luce & Gramer, *supra* note 73.

<sup>75</sup> UNSCOR, 68th Sess, 7000th Mtg, UN Doc S/PV.7000 (2013) at 4 [emphasis added]; see also the Statement by the President of the Security Council, Doc S/PRST/2012/6 (21 March 2012), point 2.

<sup>76</sup> “Peace and Security,” online: *United Nations Security Council* <[https://www.un.org/sc/suborg/en/sanctions/1970/exemptions\\_measures/arms-embargo](https://www.un.org/sc/suborg/en/sanctions/1970/exemptions_measures/arms-embargo)>.

Even though this resolution went (almost) unnoticed,<sup>77</sup> Iran clearly violated it (and the previous Resolution 1737 (2006)) by providing weapons and engaging its troops in Syria on the side of the Damascus government.<sup>78</sup> In the context of the conflict in the Darfur region, the UNSC demanded that the government of Sudan “immediately cease conducting offensive military flights in and over the Darfur region”<sup>79</sup> and, subsequently, expressed its concern that “the direct or indirect supply, sale or transfer to Sudan of technical assistance and support, including training, financial or other assistance and the provision of spare parts, weapons systems and related materiel, could be used by the Government of Sudan to support military aircraft being used” in violation of previous UNSC resolutions.<sup>80</sup>

However, there is one well-established situation that departs from the latter elements that we have been considering in favour of a working hypothesis pointing to a prohibition on intervention in civil wars on the side of the legitimate government by providing weapons, not to speak of directly intervening in the field (unless the UNSC decides to authorize intervention in favour of one of two competing government authorities). We are referring to a legitimate government confronted with terrorist acts; practice and *opinio juris* point overwhelmingly to a clear right for legitimate governments to receive foreign help, including direct intervention upon consent, in their fight against terrorist movements.<sup>81</sup> With regard to the fight against ISIS/Daesh, this position is further reinforced by the various

<sup>77</sup> France, however, did denounce “known violations of the arms embargo imposed on Iran, with arms flowing to Syria.” UNSCOR, 67th Sess, 6706th Mtg, UN Doc S/PV.6706 (2012) at 26. A possible violation of this resolution was also advanced by Jeffrey Feltman, UN Under-Secretary-General for Political Affairs, at the UNSC meeting on 22 August 2012. UNSCOR, 67th Sess, 6824th Mtg, UN Doc S/PV.6824 (2012) at 5. Raghida Dergham observes that the UNSC too “turned a blind eye to Iran’s military role in Syria despite the fact that Syria is in violation of Resolution 1737.” Raghida Dergham, “Commentary: The Council’s Failure on Syria” in von Einsiedel, Malone & Stagno Ugarte, *supra* note 8, 743.

<sup>78</sup> On the deployment of a whole Iranian brigade in Syria, which was openly admitted by Iranian officials, see e.g. “Four Iran Army Special Forces Troops Killed in Syria: Agency,” *Reuters* (11 April 2016). On Iranian involvement, see also the sources quoted by Ruys, “Of Arms,” *supra* note 35 at 15.

<sup>79</sup> Resolution 1591 (2005) at para 6; see also UNSC Resolution 1556 (2005).

<sup>80</sup> Resolution 2138 (2014) at para 5.

<sup>81</sup> In this respect, see Theodore Christakis & Karine Bannelier, “French Military Intervention in Mali: It’s Legal but ... Why? Part II: Consent and UNSC Authorisation,” *EJIL: Talk!* (25 January 2013), online: <<https://www.ejiltalk.org/author/christakisbannelier/>>. This was indeed one of the main arguments used by France to justify its intervention upon request in Mali (though in combination with other arguments, such as the preservation of Mali’s territorial integrity). See also Tancredi, “Sulla liceità,” *supra* note 37, especially at 953–55; cf also Hafner, *supra* note 2 at 24off.

UNSC resolutions explicitly upholding states' conduct to this effect.<sup>82</sup> This seems to be indirectly confirmed by the fact that governments confronted with internal unrest or civil war tend, in fact, to label demonstrators or insurgents as "terrorists" even when this is actually not the case.<sup>83</sup> Although this is far from being the only reason, governments may tend to arbitrarily attach the label of "terrorists" to their opponents with an aim to being able to rely on a stronger legal basis for requesting outside help. In response to the above-mentioned criticism by the United States, Russia denied it was trying to bolster Syrian President Bashar al-Assad and, instead, stated that its increased military activity was part of the international effort to defeat the Islamic state and that the notion of a moderate opposition in Syria was a "fiction of the West, broadly characterizing all opponents of Syrian President Bashar al-Assad's government as terrorists."<sup>84</sup>

In summary, apart from a general right for states to purchase arms (provided that any relevant legal provisions on arms trade are complied with), a state confronted with a situation of internal unrest is entitled, in principle, to seek and obtain foreign assistance (including through the provision of arms). It is likewise clearly entitled to foreign assistance (including by means of direct military intervention in the field on the side of the legitimate government) when confronted with a clear-cut terrorist threat or attack. Furthermore, aid to the legitimate government may also be authorized on an ad hoc basis by the UNSC. What is unclear is what legal regime applies to the critical situations we have identified above — namely, the provision of military aid to a legitimate government that is committing human rights violations (or international crimes) in dealing with a

<sup>82</sup> See especially Resolution 2249 (2015) at para 5.

<sup>83</sup> This has been the constant narrative of the Syrian authorities: "Prime Minister Wael al-Halaki said Saudi Arabia, Qatar, Turkey, Britain and France did not want a political solution to the conflict. 'These regimes are working to escalate terrorist actions, support terrorists and destroy the cessation of hostilities agreement agreed by Russia and the United States,' state news agency SANA quoted him as saying." "Syrian Ministers Say Europe and Regional Powers Support Terrorists: SANA," *Reuters* (21 April 2016) ["Syrian Ministers Say"].

<sup>84</sup> "Vladimir Putin Says Bashar al-Assad Backs Russian Support to Rebels Fighting Islamic State," *Wall Street Journal* (22 October 2015); "Putin Defends Russia's Military Assistance to Syrian Regime," *Associated Press* (9 September 2015), online: <<http://www.ynetnews.com>>. The Russian foreign minister called on world powers to join Russia in that pursuit, arguing that Syria's army was the most efficient force to fight the extremist network: "I can only say once again that our servicemen and military experts are there to service Russian military hardware, to assist the Syrian army in using this hardware, ... [a]nd we will continue to supply it to the Syrian government in order to ensure its proper combat readiness in its fight against terrorism." Russian Foreign Ministry spokeswoman Maria Zakharova added that Russia was not trying to conceal the presence of its servicemen, who were involved in "military-technical cooperation with a legitimate government." See "Obama Warns Russia," *supra* note 42.



situation of unrest; direct military intervention in the field for the benefit of a government engaged in a large-scale internal armed conflict, even where IHL is generally complied with (which is definitely not the usual pattern); and the conditions to which counter-intervention would be subject, such as the level that the prior intervention would need to attain to justify counter-intervention or whether there would also be a proportionality requirement.<sup>85</sup>

#### AID TO INSURGENTS

Aid to insurgents may, and, of course, does, take many different forms. One rather crucial distinction, however, must be made between aid to insurgents that are not under another state's control and those situations where insurgents actually operate under another state's control, which would turn insurgents into *de facto* organs of that other state (within the meaning of Article 8 of *ARSIWA*). Consequently, the controlling state would take direct responsibility for the deeds of the controlled armed groups (possibly even an armed attack), in addition to any acts that might be imputed directly to that state on the basis of any other relevant grounds. Of course, such situations lead to the important and much analyzed issue regarding the conditions under which an armed group qualifies as a *de facto* organ of a third state, with all of the related implications in terms of international responsibility. Although some of the situations we are focusing on could raise this issue (as in the case of the pro-Russian rebels in Eastern Ukraine<sup>86</sup>), we will focus primarily on the various forms of external support to insurgents that retain their operational autonomy and are not under the control of another state.<sup>87</sup> That said, bearing in mind that aid to insurgents, under certain conditions, may also take the form of actually

<sup>85</sup> See Henderson, *Use of Force*, *supra* note 18 at 369.

<sup>86</sup> See, among other texts, Sergey Sayapin & Evhen Tsybulenko, eds, *The Use of Force against Ukraine and International Law* (The Hague: Asser Press-Springer, 2018); Thomas D Grant, *Aggression against Ukraine: Territory, Responsibility and International Law* (New York: Springer, 2015).

<sup>87</sup> Whether according to the strict "effective control" criterion developed by the International Court of Justice (ICJ) in its leading judgments on the matter (*Military Activities against Nicaragua and Armed Activities in the Congo*, *supra* note 36) plus the later *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, [2007] ICJ Rep 43 at para 393, or following the less stringent "overall control" criterion elaborated by the European Court of Human Rights (see, *inter alia*, *Ilaşcu and Others v Moldova and Russia*, 48787/99, [2004] VII ECHR 318, 40 EHRR 1030 at paras 310–21) and by the International Criminal Tribunal for former Yugoslavia (see, *inter alia*, *Tadić*, *supra* note 11, Appeals Chamber, Judgment, 15 July 1999, at para 116 and especially para 122). On these issues, see, among many other texts, Shaw, *supra* note 3 at 598ff; Giovanni Distefano & Aymeric Héche, "L'organe de facto dans la responsabilité internationale: curia, quo vadis?" (2015) 61

controlling the insurgents, some of the considerations on foreign intervention in civil wars that we shall develop later are also relevant to the case of insurgents operating under another state's control.<sup>88</sup>

Generally speaking, the legal regime applying to the provision of aid to insurgents (again, with the exception of insurgents qualifying as “national liberation movements”<sup>89</sup>) appears to be less problematic than the issue of aid to governments, in that a general prohibition seems to apply. In its leading and well-known judgment on this issue, the ICJ articulated this principle in precise terms as being a key corollary to the fundamental international law triad: states' equality and independence and duty of non-intervention in other states' domestic affairs. According to the ICJ,

[a] prohibited intervention must ... be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. *The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State.*<sup>90</sup>

The ICJ relied extensively on the UNGA *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*,<sup>91</sup> which was considered to reflect customary law in this area. Thus, “organizing or encouraging the organization of irregular forces or armed bands ... for incursion into the territory of another State” and “participating in acts of civil strife” in another state would breach the principle of the prohibition of the use of force when the acts of civil strife referred to “involve a threat or use of force.” The mere provision of funds, while undoubtedly an act of intervention in internal affairs, would not in itself amount to a use of force. In any case, in international law, if one state, with a view to the coercion of another state,

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AFDI 3; James Crawford, *State Responsibility: The General Part* (Cambridge, UK: Cambridge University Press, 2013) at 124–26, 141–61; Marina Spinedi, Alessandra Gianelli & Maria Luisa Alaimo, eds, *La codificazione della responsabilità internazionale degli Stati alla prova dei fatti* (Milan: Giuffrè, 2006), especially at 3–103.

<sup>88</sup> See discussion later in this article.

<sup>89</sup> Cf Ruys, “Of Arms,” *supra* note 35 at 34–36.

<sup>90</sup> *Military Activities against Nicaragua*, *supra* note 36 at para 205 [emphasis added].

<sup>91</sup> United Nations General Assembly (UNGA) Res 2625, UNGAOR, 25th Sess, Supp No 28, UN Doc A/8018 (1970) 121.

supports and assists armed bands in that state whose purpose is to overthrow the government of that state, this action amounts to an intervention by the one state in the internal affairs of the other, whether or not the political objective of the state giving such support and assistance is equally far reaching.<sup>92</sup>

Thus, the prohibition on providing military aid of any kind or financial support to insurgents is part of the fundamental sovereignty/non-interference paradigm.<sup>93</sup> That said, the principle of non-intervention is one of the most elusive concepts of international law,<sup>94</sup> and, indeed, the concrete articulation of the prohibition in question is less straightforward than it might appear since it also depends on the form that this aid to insurgents concretely takes. The principal forms are (1) military aid; (2) humanitarian and organizational assistance; and (3) political support.

#### MILITARY AID

The ban on military aid, including logistical and intelligence aid, is a very strong component of the principle, also because, as illustrated above, it was grafted onto a principle of international law as fundamental as the prohibition of the use of force in international relations.<sup>95</sup> The *opinio juris* and, to some extent, the practice of states have been consistent with the prohibition on providing military aid to insurgents. Of course, this does not mean that states have refrained from aiding insurgents. They have not and still do not, but one distinctive practical feature has been secrecy; aid to insurgents has usually been provided in the context of secret operations, which can be seen as reflecting states' perception of its illegality.<sup>96</sup> Conversely, in a great many situations, some states have qualified aid to insurgents as an illegal course of action under international law. Among many other examples, the alleged Iranian military aid to rebels in Yemen, and, in particular, the possible shipment of missiles or missile parts that were

<sup>92</sup> *Military Activities against Nicaragua*, *supra* note 36, especially at paras 228, 241; see also *Armed Activities in the Congo*, *supra* note 36 at paras 162ff.

<sup>93</sup> Or "a corollary of the principle of the sovereign equality of States." *Military Activities against Nicaragua*, *supra* note 36 at para 202. Cf Roth, *Governmental Illegitimacy*, *supra* note 10 at 162: "The same anti-interventionist language is reaffirmed time and again in international treaties, declarations, and resolutions"; Ruys, "Of Arms," *supra* note 35 at 32.

<sup>94</sup> See Christine Nowak, "The Changing Law of Non-Intervention in Civil Wars: Assessing the Production of Legality in State Practice after 2011" (2018) 5:1 J Use Force & Intl L 40 (and the relevant literature therein).

<sup>95</sup> *Military Activities against Nicaragua*, *supra* note 36 at para 242.

<sup>96</sup> However, even though the US intervention in Nicaragua was initially undisclosed, it "subsequently became the subject of specific legislative provisions and ultimately the stake in a conflict between the legislative and executive organs of the United States." *Ibid* at para 95.

launched on targets in Saudi Arabia, was stigmatized by the United States as a violation of international law.<sup>97</sup> Russia has consistently condemned any help to rebels in Syria.<sup>98</sup> The German Chancellor Angela Merkel described Russia's actions in Ukraine as a violation of the fundamental principles of international law;<sup>99</sup> the support for separatists in eastern Ukraine, in particular, being overtly questioned by the Council of Europe's Parliamentary Assembly.<sup>100</sup>

In addition to this basic principle, specific prohibitions may also apply in this regard, particularly by means of embargos decided upon by the UNSC, as previously mentioned with regard to military aid to governments. However, UNSC resolutions represent practical responses to particular cases, and there is again no single pattern. Thus, with regard to Yemen, at a time when the internal conflict had already started, UNSC Resolution 2216 (2015) imposed an arms embargo only on the insurgents' side — that is, the Houthi leaders and their key supporters.<sup>101</sup> On the other hand, UNSC Resolution 1970 (2011) on Libya did impose a comprehensive arms embargo applying to all sides but, nevertheless, allowed for the possibility of supplying not only non-lethal military equipment but also arms, subject to approval by the Sanctions Committee established by the same resolution, which authorized limited supplies to the insurgents'/transitional authorities' side.<sup>102</sup>

<sup>97</sup> "Yemen Rebels Say They Fired Missile at Saudi Military Camp," *New York Times* (5 January 2018).

<sup>98</sup> See e.g. the statements by Kremlin spokesman Dmitry Peskov, quoted in "Pentagon Ramps Up Airstrikes in Syria to Help U.S.-Backed Rebels," *Los Angeles Times* (3 August 2015) ["Pentagon Ramps Up Airstrikes"]. Not surprisingly, so have the Syrian authorities. See e.g. "Syrian Ministers Say," *supra* note 83; Statements of Syria at the UNSC meeting on 23 April 2012, UNSCOR, 67th Sess, 6757th Mtg, UN Doc S/PV.6757 (2012) at 27; see also Ruys, "Of Arms," *supra* note 35 at 16.

<sup>99</sup> See, *inter alia*, the policy statements on the situation in Ukraine of 13 March 2014 and the speech on 18 February 2017 at the fifty-third Munich Security Conference, online: <<http://www.bundesregierung.de>>.

<sup>100</sup> "The Assembly urges the Russian authorities to: ...10.1. cease all financial and military support to the illegal armed groups in the Donetsk and Luhansk regions." Resolution 2198 (2018).

<sup>101</sup> UNSC Resolution 2216 (2015) at paras 14ff. Interestingly, Russia was actually in favour of imposing an embargo on all parties to the conflict, including therefore Hadi's government, not just the Houthis and their supporters. See "UN to Vote on Arms Embargo against Yemen Rebel Leaders," *New York Times* (13 April 2015).

<sup>102</sup> UNSC Resolution 1970 (2011) at para 9. On the question as to whether UNSC Resolution 1970 (2011) could be interpreted as authorizing states to provide not only humanitarian aid but also military assistance to the insurgents in order to defeat the governmental forces and thus achieve the objective of protecting the civilian population, given the authorization to take all necessary measures for that purpose "notwithstanding paragraph 9" of the resolution — imposing the arms embargo (para 4 of the Resolution), see Henderson, *Use of Force*, *supra* note 18 at 139ff; Ronzitti, "NATO's Intervention," *supra*

UNSC Resolution 1556 (2004) imposed an arms embargo on Sudan in relation to the conflict in the Darfur region that was limited to non-governmental entities and individuals operating in the states of North Darfur, South Darfur, and West Darfur.<sup>103</sup>

That said, serious cracks have appeared in some of the most recent crises, which raise the issue as to whether important changes in the practice of states do or do not indicate a process of modification of the customary norm. In particular, one of the distinctive features of the Syrian crisis has been the fact that, although secrecy has continued to characterize some of the operations for supply to rebel groups,<sup>104</sup> aid was provided in a more overt manner in some other cases. Thus, at the June 2013 meeting in Doha, Qatar, eleven states (including the United States) openly discussed how to organize the delivery of military and other kinds of aid for Syrian rebels.<sup>105</sup> Just a few days earlier, the United States had officially announced its decision to provide more support (including military support) to the military wing of the (then) main Syrian opposition,<sup>106</sup> and, in September 2013, the United States began a Central Intelligence Agency-led program of support for vetted Syrian insurgents.<sup>107</sup> No clear legal justification was put forward, although, apparently, these decisions were linked to the alleged use of chemical weapons by the Syrian government. In any case, the US program was never denied by the US authorities, and support for Syria's moderate rebels was occasionally endorsed officially; in May 2014, US President Obama not only ruled out deploying US troops in Syria but also stated that "that doesn't mean we shouldn't help the Syrian people stand

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note 3 at 10. Canada proposed an arms embargo with regard to Syria but specifically in order to "increase pressure on the Al-Assad regime to end the violence and recognize the legitimate democratic rights of the Syrian people." UNSCOR, 67th Sess, 6847th Mtg, UN Doc S/PV.6847 (2012) at 37 (Resumption 1).

<sup>103</sup> UNSC Resolution 1556 (2004) at paras 7–9.

<sup>104</sup> Initially, Turkey did not openly admit sending arms to Syrian rebels, to the extent that the Turkish President Erdogan filed a personal criminal complaint against the editor in chief of the newspaper *Cumhuriyet* for releasing "state secrets," following a newspaper report about weapons shipments by Turkey's espionage agency to rebels opposed to the Syrian government. A year later, on 6 May 2016, the editor in chief and another journalist were condemned to a prison sentence.

<sup>105</sup> "Friends of Syria' Debate Arming Rebels," *Al Jazeera* (22 June 2013).

<sup>106</sup> "US Offers 'Military Support' to Syrian Rebels," *Al Jazeera* (14 June 2013).

<sup>107</sup> See "CIA Starts Arming Syrian Rebels Overtly," *RT* (13 September 2013) online: <<https://www.rt.com/usa/us-weapons-syrian-rebels-745/>>; Mark Hosenball, "Congress Secretly Approves U.S. Weapons Flow to 'Moderate' Syrian Rebels," *Reuters* (27 January 2014). On the evolution of the US approach, see also "United States Recognizes Syrian Opposition as 'Legitimate Representative of the Syrian People', Will Provide Small Arms and Ammunition to Opposition Forces" (2013) 107:3 *Am J Intl L* 650 at 654.

up against a dictator who bombs and starves his own people.”<sup>108</sup> France openly admitted to delivering non-lethal military equipment to Syrian rebels (such as bullet-proof jackets or night-vision goggles) and later also conceded that, in the second half of 2012, lethal weapons were also delivered.<sup>109</sup> In 2013, the United Kingdom openly started to provide non-lethal military equipment, including armoured vehicles.<sup>110</sup> Indeed, the EU embargo was eased in February 2013 precisely with a view to enabling non-lethal military assistance to rebels in Syria and again in May 2013 with a view to theoretically opening the door for arms exports to insurgents in Syria, although subject to an assessment of compliance with the above-mentioned EU Council Common Position 2008/944/CFSP (the two, however, being hardly compatible in principle and hard to reconcile in practice).<sup>111</sup>

<sup>108</sup> Formal approval by the US Congress was thus being envisaged by the US administration. “U.S. Pledge of Support for Syria’s Moderate Rebels in Early Stages — Official,” *Reuters* (28 May 2014). This position was officially reiterated by US President Obama in his statement of 18 September 2014 on congressional authorization to train the Syrian opposition: “These Syrian opposition forces are fighting both the brutality of ISIL terrorists and the tyranny of the Assad regime. We had already ramped up our assistance, including military assistance, to the Syrian opposition.” “Statement by the President on Congressional Authorization to Train Syrian Opposition” (2014), online: <<https://obamawhitehouse.archives.gov/the-press-office/2014/09/18/statement-president-congressional-authorization-train-syrian-opposition>>; see also Nathalie Weizmann, “What Happens If American-Trained Rebels Commit War Crimes?” (2015), online: *Just Security* <<https://www.justsecurity.org/25469/responsible-american-trained-rebels-commit-war-crimes/>>.

<sup>109</sup> “France Armed Syria in 2012: Hollande,” *Daily Star Lebanon* (8 May 2015). At that time, France had actually stated that the question of arms supplies to the insurgents in Syria would be looked into as soon as the Syrian Opposition Council became the legitimate government of Syria. “Syria: France Backs Anti-Assad Coalition,” *BBC News* (13 November 2012); see also the Dutch government’s position at the time, cited by Ruys, “Of Arms,” *supra* note 35 at 36. On the provision of non-lethal aid to Syrian insurgents, cf Nowak, *supra* note 94 at 72–75, where she notes, *inter alia*, that Russia objected also to the provision of non-lethal equipment, whereas Iran and Syria condemned it in vague terms.

<sup>110</sup> “UK to Send Armoured Vehicles to Syrian Opposition,” *BBC News* (6 March 2013).

<sup>111</sup> Council Common Position 2008/944/CFSP, *supra* note 60. On 27–28 May 2013, the EU Council (Foreign Affairs) took note of the commitment by member states to assess the export license applications on a case-by-case basis, taking full account of the criteria set out in Council Common Position 2008/944/CFSP with regard to the sale, supply, transfer, or export of military equipment for the Syrian National Coalition for Opposition and Revolutionary Forces and intended for the protection of civilians. EU Council (Foreign Affairs), Press Release, 3241st Council Meeting, Doc 9977/13 (2013) at 11–12. This was repeated in the preamble to the above-mentioned EU Council Decision 2013/255/CFSP of 31 May 2013 concerning restrictive measures against Syria, especially in the light of the very important third criterion laid down in art 2. In its Joint Communication of 24 June 2013 to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, the high representative of the European Union for foreign affairs and security policy clarified that, as of 1 June 2013, “the possible delivery of arms to Syria (would) be subject to national policies under strict conditions as defined in the Council Declaration adopted on 27 May.” Doc JOIN(2013) 22 final (2013) at 6; cf Ruys, “Of Arms,” *supra* note 35 at 18–19.

Although, subsequent to the emergence of ISIS/Daesh, some of the states supporting the rebels in Syria shifted their focus towards countering the new threat, thus beginning to adumbrate an argument based on self-defence to justify a policy of openly supporting rebel groups in Syria,<sup>112</sup> the support for Syrian rebels nevertheless continued irrespective of the new threat<sup>113</sup> and was also advocated in terms of policy.<sup>114</sup> Against this somewhat confused

<sup>112</sup> The US Senate approved the training and arming of Syrian rebels in the fight against ISIS/Daesh in September 2014. See Jonathan Weisman & Jeremy W Peters, “Congress Gives Final Approval to Aid Rebels in Fight with ISIS,” *New York Times* (18 September 2014). In 2015, an ambitious US and Turkish plan to train and arm a Syrian opposition force was unveiled. “Turkey, U.S. to Start Train-and-Equip Plan for Syria Rebels May 9 – Turkey,” *Reuters* (2 May 2015). On the US side, however, the plan to train Syrian rebels was eventually abandoned later that same year. See Michael D Shear, Helene Cooper & Eric Schmitt, “Obama Administration Ends Effort to Train Syrians to Combat ISIS,” *New York Times* (9 October 2015). At this point, the United States was targeting the Islamic state and openly admitted providing weapons and equipment to Kurdish YPG militias in Syria in their fight against the former. Pursuant to the same anti-ISIS strategy, in July 2015 (two months before the Russian direct intervention in the conflict), the United States had also decided to extend air strikes against ISIS in an area about forty miles deep into Syria along a sixty-eight-mile stretch of border with Turkey, though without officially declaring the area a protected zone, a safe area or a no-fly zone. See “U.S.-Turkey Deal Aims to Create De Facto ‘Safe Zone’ in Northwest Syria,” *Washington Post* (26 July 2015); see also “Exclusive: U.S. Supplies Syrian Fighters Ahead of Push for Islamic State Town,” *Reuters* (16 December 2015); “Obama Outlines Plans to Expand U.S. Special Operations Forces in Syria,” *Washington Post* (25 April 2016); as well as the public statements by the US defence secretary, quoted in “U.S. Eyes Arms for YPG Fighters in Syria Even after Raqqa’s Fall,” *Reuters* (27 June 2017).

<sup>113</sup> The four countries where the military training was to take place — Turkey, Jordan, Saudi Arabia and Qatar — were still focusing on ousting Syrian President Bashar al-Assad. “\$500-Million Program to Train Anti-Islamic State Fighters Appears Stalled,” *Los Angeles Times* (4 May 2015); see also “Pentagon Ramps Up Airstrikes,” *supra* note 98. At the end of its term, the Obama administration was still openly considering boosting its military support in favour of moderate rebels. “Exclusive: Obama, Aides Expected to Weigh Syria Military Options on Friday,” *Reuters* (14 October 2016) [“Exclusive: Obama, Aides Expected”]. However, US President Trump eventually decided to end the Central Intelligence Agency’s (CIA) covert program to arm and train moderate Syrian rebels fighting the government of Bashar al-Assad. The US nevertheless continued “a Pentagon-run train-and-equip program in support of the largely Kurdish rebel force that is advancing on Islamic State strongholds.” Greg Jaffe & Entous Adam, “Trump Ends Covert CIA Program to Arm Anti-Assad Rebels in Syria, a Move Sought by Moscow,” *Washington Post* (19 July 2017). Indirect US support for rebels fighting mainly against Syrian government forces nonetheless seemed to continue — for example, through “new supplies of U.S.-made anti-tank missiles from states opposed to President Bashar al-Assad,” such as Saudi Arabia, Turkey, and Qatar. “Syrian Rebels Say They Receive More Weapons for Aleppo Battle,” *Reuters* (19 October 2015).

<sup>114</sup> “There is no guarantee of success, yet enabling the moderates to fight Assad is the best way to ensure that there is never any need for the large-scale deployment of American forces as there was in Iraq.” Evan McMullin, “How to Turn Things Around in Syria,” *Foreign Policy* (31 October 2016) at 6.

background,<sup>115</sup> it must be observed that the same limitations resulting from the IHL-related obligations referred to above with regard to aid to governments would also apply, of course, to aid to insurgents in the presence of evidence, or even a clearly ascertained risk, of weapons being used by insurgents to commit IHL violations.<sup>116</sup> Furthermore, the various legal instruments in the arms trade area referred to above with regard to aid to governments cover aid to insurgents as well. Additionally, a specific risk that emerges in this area is of diversion of regular arms supplies to conflict zones and non-state actors — a risk that calls for specific assessment.<sup>117</sup>

Furthermore, unlike the direct military intervention in Crimea and the provision of ostensibly humanitarian aid to the pro-Russian separatist regions in Eastern Ukraine, which were both openly admitted and for which justifications were provided (see the following subsection), the Russian many-sided military support for the pro-Russian insurgents in the Donbass region (military aid, possibly direct control of certain insurgent units, plus the sending of Russian soldiers) appears to have only partially been admitted (limited to the presence of Russian “volunteers” and then “military specialists” in the East of Ukraine).<sup>118</sup> The alleged direct control of certain insurgent units and the sending of Russian soldiers pertain to the area of aggression/armed attack and are therefore beyond the scope of the

<sup>115</sup> At the UNSC meeting of 30 August 2012, South Africa considered it appropriate, “given the allegations being made, that some are arming the opposition, to ask whether arming the opposition in Syria is not indirect military intervention.” UNSCOR, 67th Sess, 6826th Mtg, UN Doc S/PV.6826 (2012) at 26.

<sup>116</sup> Ruys, “Of Arms,” *supra* note 35 at 31, concludes that “on the basis of the information publicly available, there are credible reasons to believe that various States have breached the obligation to ensure respect for (IHL) ... by transferring arms to the Assad regime or to anti-government forces.”

<sup>117</sup> Both the above-mentioned *Arms Trade Treaty* and EU law require adoption of safeguards against misuse of authorizations as well as verification of end-users and final destination of delivery. See, respectively, *Arms Trade Treaty*, *supra* note 57, art 11, “Diversion”; EU Common Position 2008/944/CFSP, *supra* note 60 at 5; see also the Final Declaration of the EU Council’s Meeting, reprinted in *Foreign Affairs* (27–28 May 2013), point 2. Thus, a team of independent investigators (from the Balkan Investigative Reporting Network and the Organised Crime and Corruption Reporting Project) pointed to arms exports from a number of Central European and Balkan countries to several Middle Eastern states being diverted to Syrian rebels failing adequate risk assessment. See “Revealed: The £1bn of Weapons,” *supra* note 52. The United States was accused of undermining the object and purpose of the *Arms Trade Treaty*, of which it is a signatory, by willingly side-stepping rigorous controls and facilitating the delivery of Eastern Europe-made weapons to Syrian rebels. See Rhys Dubin, “The Pentagon Is Spending \$2 Billion Running Soviet-Era Guns to Syrian Rebels,” *Foreign Policy* (12 September 2017). In this regard, cf also Lieblich, *supra* note 39 at 67–70.

<sup>118</sup> “Vladimir Putin Admits: Russian Troops ‘Were in Ukraine,’” *The Telegraph* (17 December 2015).



present article. As to the provision of military aid to insurgents possibly not under Russian control, the Russian authorities' statements on the situation in the East of Ukraine systematically referred to the dire humanitarian situation in the separatist regions and alleged violations of IHL by the Ukrainian military<sup>119</sup> and even labelled the insurgents as "self-defence formations."<sup>120</sup> Thus, at least theoretically, the humanitarian intervention doctrine, which the Russian government invoked to justify its intervention in Crimea (in terms of a "humanitarian mission"),<sup>121</sup> could have been used to justify military aid to insurgents opposing governmental forces using force against the civilian population in breach of IHL and human rights norms, bearing in mind that one of the three conditions for resorting to this (highly controversial) doctrine 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"<sup>122</sup> (which, in the case of Ukraine, is in fact widely refuted both in the legal literature and in the positions taken by international organizations).<sup>123</sup> One might therefore have expected this doctrine to be invoked also with regard to the provision of military aid to insurgents in Syria.<sup>124</sup> In the latter case, the said doctrine was indeed resorted to, but only in respect of the

<sup>119</sup> See, *inter alia*, the statements by the Russian representative at the UNSC meeting on 21 January 2015. UNSCOR, 70th Sess, 7365th Mtg, UN Doc S/PV.7365 (2015) at 7–10.

<sup>120</sup> UNSCOR, 70th Sess, 7368th Mtg, UN Doc S/PV.7368 (2015) at 5.

<sup>121</sup> President of Russia Press Release, "Vladimir Putin Answered Journalists' Questions on the Situation in Ukraine" (4 March 2014), online: *Kremlin* <<http://en.kremlin.ru/events/president/news/20366>>.

<sup>122</sup> According to the definition provided by the "Syria Action: UK Government Legal Position" (14 April 2018), online: *UK Government* <<https://www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position>>, the United Kingdom being one of the key states supporting the doctrine (reference to it had already been made on 29 August 2013 following the first large-scale chemical attack in Syria). See Henderson, *Use of Force*, *supra* note 18 at 403, n 154. Cf Shaw, *supra* note 3 at 880–82.

<sup>123</sup> See, among others, Elena Sciso, "La crisi ucraina e l'intervento russo: profili di diritto internazionale" (2014) *Rivista di diritto internazionale* 992, especially at 1022; Antonello Tancredi, "Crisi in Crimea, referendum ed autodeterminazione dei popoli" (2014) 8 *Diritti umani e diritto internazionale* 480 at 481ff; of the numerous international institutional reports and statements on the absence of any serious form of oppression against the Russian-speaking population, see e.g. Parliamentary Assembly of the Council of Europe Resolution 2198 (2018), "Statement by the OSCE High Commissioner on National Minorities" (6 March 2014), online: *Organization for Security and Cooperation in Europe* <[www.osce.org/hcnm/116180](http://www.osce.org/hcnm/116180)>; and the reports on the human rights situation in Ukraine by the Office of the United Nations High Commissioner for Human Rights, online: <<http://www.ohchr.org/EN/Countries/ENACARRegion/Pages/UARports.aspx>>.

<sup>124</sup> On this point, cf Ruys, "Of Arms," *supra* note 35 at 33ff.

armed action undertaken by the United States, the United Kingdom, and France in April 2018 following the umpteenth time chemical weapons were alleged to have been used by the Syrian government.<sup>125</sup> However, in spite of the ambiguity noted above, which pervades the official positions of intervening governments on the side of insurgents in both contexts, the legal justification for the provision of military aid to insurgents does not appear to have gone thus far in any of them.

#### HUMANITARIAN AND ORGANIZATIONAL ASSISTANCE

At the above-mentioned Marrakech meeting of the Group of Friends of the Syrian People, more than 100 states openly affirmed their support for the opposition in Syria, particularly in the form of humanitarian and organizational/capacity-building assistance.<sup>126</sup> Some states went on to specify publicly the amount of humanitarian assistance (in addition to “non-lethal” support) being provided to the Syrian opposition.<sup>127</sup> This was in sharp contrast with the more limited number of states that considered arming Syrian rebels at the above-mentioned Doha meeting. This issue is likewise complex as it encompasses humanitarian assistance channelled to insurgent movements or to the civilian population as such, unilaterally or via the UN or UN agencies, other international organizations, the EU,<sup>128</sup> and NGOs operating in an international framework.<sup>129</sup>

<sup>125</sup> And, indeed, this is what the above-mentioned legal position of the UK government (as well as the previous one) refers to. In this regard, cf, among others, Natalino Ronzitti, “Impiego di armi chimiche in Siria, intervento d’umanità e responsabilità di proteggere” (2018) 101 *Rivista di diritto internazionale* 851.

<sup>126</sup> See “Chairman’s Conclusions,” *supra* note 67, point 15. The meeting brought together, among various other figures, the representatives of 130 states, including sixty ministers, and of several international and regional organizations. France subsequently stated its intention to “work in coordination with the Syrian National Coalition and its assistance coordination unit to bring aid to vulnerable populations that do not have access to traditional assistance channels.” UNSCOR, 68th Sess, 6906th Mtg, UN Doc S/PV.6906 (2013) at 16.

<sup>127</sup> See the statements made by the United States at the UNSC meeting of 15 October 2012 (UNSCOR, 67th Sess, 6847th Mtg, UN Doc S/PV.6847 (2012) at 13; UNSCOR, 68th Sess, 6950th Mtg, UN Doc S/PV.6950 (2013) at 12) as well as the observations made by the representatives of France (at 14) and the UK (at 17ff). On the stabilization effects of humanitarian assistance, cf Shadi Martini & Nicholas A Heras, “The One Place in Syria That Works,” *Foreign Policy* (23 May 2018).

<sup>128</sup> According to the EU itself, “the biggest funder of humanitarian efforts inside Syria.” “EU Council Conclusions on an EU Strategy for Syria,” Doc 7652/17 (3 April 2017) at 5 [“EU Council Conclusions”].

<sup>129</sup> See, among other documents, UNSC Resolution 2139 (2014) (the first comprehensive UNSC resolution on the humanitarian situation in Syria); and the co-chairs’ declaration following the Brussels II Conference on Supporting the Future of Syria and the Region, 24–25 April 2018, hosted by the EU and co-chaired by the UN. “EU Leaders to Discuss Nominations and a New Strategic Agenda” (20–21 June 2019), press section, online: <<http://www.consilium.europa.eu/en/>>.

In the *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, the ICJ dealt with the issue and made a very important distinction:

There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law. The characteristics of such aid were indicated in the first and second of the fundamental principles declared by the Twentieth International Conference of the Red Cross. ... In the view of the Court, if the provision of “humanitarian assistance” is to escape condemnation as an intervention in the internal affairs of Nicaragua, not only must it be limited to the purposes allowed in the practice of the Red Cross, namely “to prevent and alleviate human suffering” and “to protect life and health and to ensure respect for the human being”; it must also, and above all be given *without discrimination to all in need* in Nicaragua, not merely to the *contras* and their dependents.<sup>130</sup>

Article 18, paragraph 2, of *Additional Protocol II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict* specifically provides that,

[i]f the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken *subject to the consent of the High Contracting Party concerned*.<sup>131</sup>

Ambiguous practice on the part of states and the absence of clear legal justifications create uncertainty in this respect too. In the case of Ukraine, in which Russia justified the humanitarian assistance to the separatist regions in the east in the light of the alleged indiscriminate attacks by the Ukrainian military,<sup>132</sup> such aid was however questioned insofar as it was provided without the express consent of the Ukrainian authorities and, moreover, without any coordination with the appropriate agencies.<sup>133</sup> Furthermore, the so-called *Minsk II Agreement* on Ukraine provided for

<sup>130</sup> *Military Activities against Nicaragua*, *supra* note 36 at paras 242–43 [emphasis added].

<sup>131</sup> *Additional Protocol II*, *supra* note 12 [emphasis added].

<sup>132</sup> See, *inter alia*, the statements by the representative of Russia at the UNSC meeting on 28 August 2014. UNSCOR, 69th Sess, 7253rd Mtg, UN Doc S/PV.7253 (2014) at 12ff.

<sup>133</sup> See the positions of the United States, Lithuania, and the United Kingdom on Russian “humanitarian” convoys entering Ukraine, reported in (2015) 109:1 Am J Intl L 174 at 175–85. The Ukrainian authorities insisted particularly on the said convoys actually covering the delivery of supplies, troops, mercenaries, and weapons to Eastern Ukraine (at 184).

“safe access, delivery, storage, and distribution of humanitarian assistance to those in need, on the basis of an international mechanism.”<sup>134</sup> In other instances, humanitarian aid was also openly channelled directly to insurgent movements (in a way that was comparable with the legal treatment of national liberation movements). Thus, in Syria, the direct provision of humanitarian aid and even of non-lethal military aid to some of the insurgent factions went apparently unchallenged.<sup>135</sup> Furthermore, there seems to be a trend towards an exception (to the principle requiring the territorial state’s consent) whenever the latter is being withheld for arbitrary reasons.<sup>136</sup>

On the other hand, the requirement of impartiality/neutrality has been holding; while the Group of Friends of the Syrian People, at the above-mentioned Marrakech meeting, agreed to coordinate and work with the Assistance Coordination Unit (ACU) of the National Coalition of Syrian Revolution and Opposition Forces, they nevertheless “noted the commitment by the ACU to honour the fundamental principles of providing humanitarian assistance, *particularly without discrimination*.”<sup>137</sup> As to organizational assistance, such as capacity-building, a non-forcible measure of this type may amount to unlawful intervention (for example,

<sup>134</sup> “Package of Measures for the Implementation of the Minsk Agreements” (11 February 2015) at para 7, online: <<https://www.ft.com/content/21b8f98e-b2a5-11e4-b234-00144feab7de>>.

<sup>135</sup> Ruys, “Of Arms,” *supra* note 35 at 52. Specifically with regard to Syria, Christine Nowak is of the view that the “occasional provision of humanitarian assistance cannot be regarded as being indicative of a changing rule of international law, but instead was a breach of the norm carried out in an act of despair. As a result, this practice strengthened the rule rather than weakening it.” Nowak, *supra* note 94 at 62, 65 (for the relevant literature).

<sup>136</sup> As noted by Nowak, *supra* note 94 at 63. This exception was also implied in the “Statement of the President of the UNSC,” UN Doc S/PRST/2013/15 (2 October 2013). Besides, in 2014, the UNSC eventually authorized cross-border access for aid operations by the UN humanitarian agencies and their implementing partners, irrespective of the state’s express consent and only subject to notification to the Syrian authorities. Resolution 2165 (2014), point 2. Christine Nowak underlines that “with good reason, states consider the Security Council to be the accountable forum to manage humanitarian assistance if consent is being withheld.” Nowak, *supra* note 94 at 65ff. In Syria, the ICRC has constantly sought the agreement of all concerned, including the government (see e.g. “Interview with Peter Mauer President of the ICRC” (2017) 99 *Intl Rev Red Cross* 875 at 879, online: <<https://www.icrc.org/en/international-review/article/interview-peter-mauer>>), whereas certain non-governmental organizations, notably Médecins Sans Frontières, have operated even without the government’s permission. See Rony Brauman, “Médecins Sans Frontières and the ICRC: Matters of Principle” (2012) 94 *Intl Rev Red Cross* 1523 at 1530, online: <<https://www.icrc.org/en/international-review/article/medecins-sans-frontieres-and-icrc-matters-principle>>.

<sup>137</sup> “Chairman’s Conclusions,” *supra* note 67, point 33 [emphasis added]. At the UNSC meeting of 30 August 2012, Russia stated that it could not accept “the efforts of individual States to use pseudo-humanitarian arguments to justify their financial, material, technical or logistical support to illegal armed groups. When implementing humanitarian activities, it is critical to continue to fully comply with the principles of neutrality and impartiality.” UNSCOR, 67th Sess, 6826th Mtg, UN Doc S/PV.6826 (2012) at 25.

when violating the target state's law), even though there is no clear consensus in this area either.<sup>138</sup>

#### POLITICAL SUPPORT/RECOGNITION

An additional issue in this context concerns public and official statements calling for regime change, which could possibly accompany other forms of support to insurgents. The Syrian crisis is also highly emblematic in this regard. Since its initial phase, public positions were taken in favour of the departure of Syrian President Bashar Al-Assad. The US Obama administration overtly adopted this position as early as August 2011,<sup>139</sup> and, at the beginning of 2012, it recognized the Syrian National Council as a "legitimate entity."<sup>140</sup> France likewise affirmed the Syrian leaders' loss of legitimacy<sup>141</sup> and, in November 2012, announced its recognition of the Syrian National Coalition "as the sole legitimate representative of the Syrian people and as the future government of a democratic Syria, allowing it to bring an end to Bashar al-Assad's regime."<sup>142</sup> On 12 December 2012,

<sup>138</sup> See Roth, *Governmental Illegitimacy*, *supra* note 10 168–70.

<sup>139</sup> See, *inter alia*, Shaikh & Roberts, *supra* note 8 at 733. The call was then repeatedly reiterated, for example, by the US representative at the UNSC meeting of 23 January 2013. UNSCOR, 68th Sess, 6906th Mtg, UN Doc S/PV.6906 (2013) at 13. A similar position was echoed by the United Kingdom (at 19), which in October 2013 was affirming that "Al-Assad and his close associates with blood on their hands will have no future role to play in Syria." UNSCOR, 68th Sess, 7047th Mtg, UN Doc S/PV.7047 (2013) at 22.

<sup>140</sup> UNSCOR, 67th Sess, 6710th Mtg, UN Doc S/PV.6710 (2012) at 15.

<sup>141</sup> UNSCOR, 66th Sess, 6636th Mtg, UN Doc S/PV.6636 (2011) at 20. Norway referred to the "discredited Syrian authorities" at the UNSC meeting on 23 April 2012. UNSCOR, 67th Sess, 6757th Mtg, UN Doc S/PV.6757 (2012) at 15. Canada expressed the view that President Al-Assad had to "relinquish power." UNSCOR, 67th Sess, 6757th Mtg, UN Doc S/PV.6757 (2012) at 23. It also stated that his government had "lost legitimacy by waging a campaign of terror on the Syrian people." UNSCOR, 67th Sess, 6816th Mtg, UN Doc S/PV.6816 (2012) at 35. See also Australia's statements at the same meeting (at 4). At the UNSC meeting of 30 August 2012, Germany stated the following: "Our position is clear: there can be no future for President Al-Assad in a new Syria. We call on him to step aside to avoid further bloodshed." UNSCOR, 67th Sess, 6826th Mtg, UN Doc S/PV.6826 (2012) at 28.

<sup>142</sup> "Syria: France Backs Anti-Assad Coalition," *BBC News* (13 November 2012). See also the very clear statements that the representative of France had already made at the UNSC meeting of 19 July 2012: "We will continue to support the Syrian opposition on its road to a democratic transition in Syria. In every forum, France is resolved to work unceasingly with those who share its values ... so that the violence perpetrated on the Syrian people can be ended, their legitimate aspirations are realised fairly and swiftly, and the perpetrators of crimes and their accomplices are brought to justice." UNSCOR, 67th Sess, 6810th Mtg, UN Doc S/PV.6810 (2012) at 4. At the UNSC meeting of 30 August 2012, France went as far as to state its readiness to recognize a transitional government "once it is formed" and that "Mr. Assad will fall." UNSCOR, 67th Sess, 6826th Mtg, UN Doc S/PV.6826 (2012) at 15. Canada expressed its intention to engage with the Syrian opposition but stopped short of recognition. "Canada Does Not Recognize Syrian Opposition: Baird," *CTV News* (16 December 2012).

at the above-mentioned fourth ministerial meeting held in Marrakech, more than 100 states reiterated that Bashar Al-Assad had lost legitimacy to govern Syria and “acknowledged” the National Coalition for Syrian Revolutionary and Opposition Forces as the “legitimate representative of the Syrian people,”<sup>143</sup> although some states used different nuances.<sup>144</sup> The conclusions of the Marrakech summit were also welcomed by the EU:

The European Council tasks the Foreign Affairs Council to work on all options to support and help the opposition and to enable greater support for the protection of civilians. The European Council repeats its view that political transition is necessary in Syria towards a future *without President Assad and his illegitimate regime*. We support a future that is democratic and inclusive with full support for Human Rights and the rights of minorities.<sup>145</sup>

<sup>143</sup> “Chairman’s Conclusions,” *supra* note 67, points 2 and 13.

<sup>144</sup> Thus France, at the UNSC meeting on 23 January 2013, again openly stated that it was helping the opposition to develop a structure and actively prepare for transition (and later reiterated that it would “continue to work on structuring the opposition,” UNSCOR, 68th Sess, 7007th Mtg, UN Doc S/PV.7007 (2013) at 26, as did the United Kingdom at the same meeting, *ibid* at 27), but referred to the Syrian National Coalition as a project representing “the aspirations of the Syrian people,” rather than the Syrian people as such. UNSCOR, 68th Sess, 6906th Mtg, UN Doc S/PV.6906 (2013) at 16. At the UNSC meeting of 24 April 2013, France viewed the Syrian National Council as being engaged in establishing a government that sought to unite the various components of Syrian society. UNSCOR, 68th Sess, 6950th Mtg, UN Doc S/PV.6950 (2013) at 14. The Syrian state as such had been previously suspended from the Arab League (see, *inter alia*, the report in UNSCOR, 66th Sess, 6662nd Mtg, UN Doc S/PV.6662 (2011) at 4), an “unprecedented move,” due to Syria’s alleged failure to implement the Arab peace plan. Dergham, *supra* note 77 at 742.

<sup>145</sup> “Conclusions of the European Council” (13–14 December 2012), point 28 [emphasis added]. In its above-cited Joint Communication, Doc JOIN(2013)22 final (24 June 2013) at 4, the high representative of the European Union for foreign affairs and security policy stated that the EU should continue its engagement with the National Coalition for Syrian Revolutionary and Opposition Forces. However, the same document stigmatized the failure of Lebanon to enforce its official policy of dissociation, given the increased involvement of Hezbollah in Syria and the flow of weapons, supplies, and fighters from Lebanon in support of the Syrian opposition (at 5). Political support was nevertheless also subsequently pursued. The EU Council (Foreign Affairs), *supra* note 111 at 9, stated that the EU accepted the National Coalition for Syrian Revolutionary and Opposition Forces as the “legitimate representatives of the Syrian People,” and the EU Council conclusions on an EU strategy for Syria of April 2017 stated, *inter alia*, that the EU would continue to support the Syrian opposition. “EU Council Conclusions,” *supra* note 128 at 4. Furthermore, in the Joint Communication, the EU high representative for foreign affairs and security policy stated that the EU would continue to coordinate closely with the Syrian interim government, created by the Syrian National Coalition in 2013. “Elements for an EU Strategy for Syria,” *supra* note 28 at 13–14.

Calls for regime change in Syria were also openly reiterated by several Western states (and Saudi Arabia) at subsequent stages of the Syrian crisis, at least up to early September 2015, just prior to Russia's direct intervention.<sup>146</sup> It was also advocated from the outset of the international intervention in Libya.<sup>147</sup>

With a couple of exceptions, the above-mentioned recognitions stopped short of recognizing the Syrian National Council or Coalition as the legitimate government of Syria.<sup>148</sup> Even though such peculiar forms of recognition of the opposition cannot qualify as this group's recognition as the legitimate government — thus, formally/legally, and not just politically, challenging the legitimacy of the constituted government<sup>149</sup> — calls for regime change such as these, as well as the related political support that the various above-mentioned forms of recognition essentially represent, raise a number of important issues in the context of this study. Of course, regime change may well be the hidden goal behind support for insurgents. Besides, formal recognition being granted to an insurgent entity that does not yet fulfil the requirements of a legitimate government typically qualifies as a premature recognition infringing the principle of non-intervention.<sup>150</sup> But what about external public calls for regime change as such? Do they also amount to illicit interference in another state's domestic affairs? As noted above, according to the ICJ, the element of coercion defines and, indeed,

<sup>146</sup> UNSCOR, 67th Sess, 6847th Mtg, UN Doc S/PV.6847 (2012) at 14, Resumption 1. After Russian deployment of its air force, on 4 September 2015, several leaders began to soften their stance (see the Chart drawn up by the Institute for the Study of War research team (30 September 2015), online: *Understanding War* <<http://www.understandingwar.org/backgrounder/international-community%E2%80%99s-position-syrian-president-bashar-al-assad-september-30-2015>>). The Trump administration subsequently further strengthened the policy shift *vis-à-vis* the Syrian president; in 2017, the US representative to the UN declared that the United States was no longer prioritizing the removal of Syrian President Bashar al-Assad, which was confirmed by the US secretary of state, who stated that Assad's long-term future would be decided by the Syrian people. "Removing Assad No Longer a Priority — US," *BBC News* (30 March 2017).

<sup>147</sup> See, *inter alia*, the statements by the representatives of Germany, the United States, and Lebanon at the UNSC meeting of 4 May 2011. UNSCOR, 66th Sess, 6528th Mtg, UN Doc S/PV.6528 (2011) at 5, 12. For a concise reconstruction of the crisis, see Simonen, *supra* note 22 at 23–25.

<sup>148</sup> In this regard, see also the various sources cited by Ruys, "Of Arms," *supra* note 35 at 37–40, who mentions Qatar and the League of Arab States as the most notable exceptions. Cf also Nowak, *supra* note 94 at 68.

<sup>149</sup> In this sense, see also Henderson, *Use of Force*, *supra* note 18 at 358, who notes that some states, like the United States, made it clear that they were not prepared to recognize the opposition as the legitimate government of Syria, while France's recognition as the future government of Syria was (perhaps) intended to legitimize a self-determination claim.

<sup>150</sup> With regard to the recognition (as the government of Libya) of the Libyan National Transitional Council in 2011, cf Henderson, *Use of Force*, *supra* note 18 at 357.

forms the very essence of prohibited intervention.<sup>151</sup> UNGA Resolution 2625 (1970), quoted above, which the ICJ saw as reflecting customary law, does not explicitly refer to the specific situation of third states publicly calling for regime change. However, it does provide that “[n]o State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State, ... or interfere in civil strife in another State.” Such a general provision may of course be read in the sense that third states should abstain from publicly encouraging regime change in another state, especially in the context of civil strife that would make the regime change violent, all the more where foreign interventions involving the use of force are already underway.

Would the fact that the legitimate government was responsible for large-scale human rights violations and international crimes legitimize external calls for regime change? This was in fact the basis for the repeated calls for regime change in Syria that several Western states expressed, even in debates within the UNSC. However, if humanitarian and organizational assistance provided to Syrian rebels, for example, drew only limited criticism, the idea of pursuing regime change was constantly opposed by a number of key states, as were the forms of limited recognition granted to the insurgents, in line with the traditional reading of the principle of non-intervention in states’ internal affairs in this regard.<sup>152</sup> It is worth noting that this position was taken not only by states with direct interests at stake,<sup>153</sup> or those traditionally inclined to defend the “domestic jurisdiction” of states,<sup>154</sup> but also by other states that argued it on a very different basis.<sup>155</sup>

<sup>151</sup> *Military Activities against Nicaragua*, *supra* note 36 at para 205; cf Roth, *Governmental Illegitimacy*, *supra* note 10 at 166.

<sup>152</sup> See Roth, *Governmental Illegitimacy*, *supra* note 10 at 173ff.

<sup>153</sup> Russia referred to the acknowledgement of the Syrian National Council in terms of a “dubious campaign to legalize structures that seek to replace the legitimate Government of Syria.” UNSCOR, 68th Sess, 6950th Mtg, UN Doc S/PV.6950 (2013) at 19; see also the earlier statements by Russia at the UNSC meeting of 21 January 2012. UNSCOR, 67th Sess, 6710th Mtg, UN Doc S/PV.6710 (2012) at 24. On regime change, see also, *inter alia*, the statements by the representative of Russia at the UNSC meetings on 4 October 2011 and 22 February 2014. UNSCOR, 66th Sess, 6627th Mtg, UN Doc S/PV.6627 (2011) at 5; UNSCOR, 69th Sess, 7116th Mtg, UN Doc S/PV.7116 (2014) at 7.

<sup>154</sup> See the initial statements on Syria by the representative of China on 30 June 2011 (UNSCOR, 66th Sess, 6572nd Mtg, UN Doc S/PV.6572 (2011) at 5) and the later statements against any forcible attempt to push for regime change on 31 January 2012 and 12 March 2012 (UNSCOR, 67th Sess, 6710th Mtg, UN Doc S/PV.6710 (2012) at 25; UNSCOR, 67th Sess, 6734th Mtg, UN Doc S/PV.6734 (2012) at 20, where China stressed that “(n)o Chinese self-interests are involved on the issue of Syria”). UNSCOR, 67th Sess, 6810th Mtg, UN Doc S/PV.6810 (2012) at 13.

<sup>155</sup> See the statements on Syria by the representative of India at the UNSC meeting on 4 October 2011 (UNSCOR, 66th Sess, 6627th Mtg, UN Doc S/PV.6627 (2011) at 6) and by South Africa at the UNSC meeting on 24 January 2012 (UNSCOR, 67th Sess, 6706th



That said, the rejection of the idea of regime change is not as rigid as it might seem; in UNSC Resolution 2042 (2012), which was unanimously adopted, the UNSC called for immediate implementation of the UN special envoy's six-point proposal "aimed at ... facilitating a Syrian-led political transition leading to a democratic, plural political system."<sup>156</sup> The call for a "transitional governing body" and for preparing "free and fair multiparty elections," meeting the legitimate aspirations of the Syrian people and fostered by "joint and sustained pressure on the parties in the Syrian Arab Republic" by Action Group for Syria members,<sup>157</sup> was stated, among other contexts, in the latter's final communiqué of 30 June 2012.<sup>158</sup> The Sochi Final Statement (circulated to the UNSC on 14 February 2018) called for the establishment of a Constitutional Committee for Syria in Geneva, under UN auspices and in accordance with UNSC Resolution 2254 (2015). At the same time, commitment to the sovereignty, independence, unity, and territorial integrity of Syria was repeatedly spelled out.<sup>159</sup> In past cases,

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Mtg, UN Doc S/PV.6706 (2012) at 29); see also UNSCOR, 67th Sess, 6711st Mtg, UN Doc S/PV.6711 (2012) at 11. At the UNSC meeting of 30 August 2012, South Africa subsequently affirmed its hope "that humanitarian and protection of civilians pretexts will not be used to effect regime change in Syria, at least not in the name of the Security Council." UNSCOR, 67th Sess, 6826th Mtg, UN Doc S/PV.6826 (2012) at 26. Officially, Qatar stated that it was not after regime change in Syria (UNSCOR, 67th Sess, 6710th Mtg, UN Doc S/PV.6710 (2012) at 5), although it later became one of the main providers of financial, logistic, and military support to Syrian insurgents. Mark Mazzetti, Christopher John Chivers & Eric Schmitt, "Taking Outsize Role in Syria, Qatar Funnels Arms to Rebels," *New York Times* (29 June 2013). Regime change in Syria was also ruled out by the secretary-general of the League of Arab States at the UNSC meeting of 31 January 2012: "[T]he road map adopted on 22 January can in no way be interpreted as calling on the Syrian President to renounce power." UNSCOR, 67th Sess, 6710th Mtg, UN Doc S/PV.6710 (2012) at 9.

<sup>156</sup> UNSC Resolution 2042 (2012), point 1; see also, in this respect, UNSC Resolution 2118 (2013), point 16; UNSC Resolution 2139 (2014), point 15.

<sup>157</sup> Including such prominent international community representatives as the secretaries-general of the UN and the League of Arab States, the ministers for foreign affairs of China, France, the Russian Federation, the United Kingdom, the United States, Turkey, Iraq (chair of the Summit of the League of Arab States), Kuwait (chair of the Council of Foreign Ministers of the League of Arab States), and Qatar (chair of the Arab Follow-up Committee on Syria of the League of Arab States), and the high representative of the European Union for foreign affairs and security policy.

<sup>158</sup> UN Doc S/RES/2118 (2013), Annex II.

<sup>159</sup> See, among many other observations, the "Statement of the President of the UNSC," *supra* note 136, and the co-chairs' declaration following the Brussels II Conference on Supporting the Future of Syria and the Region, 24–25 April 2018, hosted by the EU and co-chaired by the UN, online: <<http://www.consilium.europa.eu/en/>> (press section at point 7). The UNSC was also actively involved in the transitional process in Yemen before the situation worsened again. See, in particular, UNSC Resolution 2140 (2014), in which the UNSC reaffirmed "the need for the full and timely implementation of the

the international community had in fact taken sides with respect to regime transformation processes (for example, the UN response to the military coup in Haiti in 1991 or the international approval of forcible measures by ECOWAS against the coup in Sierra Leone in 1992,<sup>160</sup> not to mention the African Union's practice of reacting, in particular by adopting sanctions, whenever an unconstitutional change of government takes place in a Member State). Therefore, what appears to be rejected by a significant number of states is any regime change unilaterally imposed or fomented, especially when it involves force or any other form of coercion, outside a collective framework.<sup>161</sup> An additional major issue must be raised in this regard, apart from that of legality: what weight do outside public calls for regime change bear with regard to developments in the field? It has been contended, as we will see later on, that open support for the uprising in Syria might have encouraged the rebels to take up arms.<sup>162</sup>

#### A FLAWED LEGAL FRAMEWORK

Notwithstanding general, non-controversial indications of the — albeit not unlimited — right to aid a legitimate government, on the one hand, and a prohibition on providing military support to insurgent movements, on the other hand, the current legal framework, in addition to the various critical aspects highlighted in the preceding sections, shows two major flaws that are partly intertwined: too many key features remain uncertain and too many of them — partly because of the uncertainty, partly because of their very nature — can easily be manipulated (it is too easy, for example, to

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political transition following the comprehensive National Dialogue Conference" (at para 1), expressed "strong support for completing the next steps of the transition, in line with the Implementation Mechanism, including: (a) drafting a new constitution in Yemen; ... (d) state structure reform to prepare Yemen for the transition from a unitary to a federal state" (at para 2), called upon the Houthi movement, among other things, "to constructively partake and to reject the use of violence to achieve political aims" (at para 3), and decided on targeted sanctions against "individuals or entities designated ... as engaging in or providing support for acts that threaten the peace, security or stability of Yemen" (at para 17).

<sup>160</sup> This and other similar cases are analyzed by Roth, *Governmental Illegitimacy*, *supra* note 10, in particular at 318–22, 416–18.

<sup>161</sup> In this sense, see also Henderson, *Use of Force*, *supra* note 18 at 358ff. Katariina Simonen, however, observes that "a regime change is an extreme measure in international law, and it is extremely doubtful whether the Security Council could even mandate such a measure." Simonen, *supra* note 22 at 435. Ruys, "Of Arms," *supra* note 35 at 50, and Stefan Talmon, "Recognition of Opposition Groups as the Legitimate Representative of a People" (2013) 12:2 *Chinese J Intl L* 219 at 248, are of the view that political/moral support, including forms of recognition not amounting to recognition as the legitimate government and unaccompanied by military or other assistance, would not qualify as a coercive act infringing the non-intervention principle.

<sup>162</sup> See discussion later in this article.

invoke counter-intervention, with insufficient or no supporting evidence, as a justification for intervention in a civil war).<sup>163</sup> As a result, in our view, the traditional normative parameters in this area are not legally viable and are of little use. In other words, the traditional legal approach appears to be critically flawed.

Especially in the context of the Syrian crisis and with regard to military aid provided to various insurgent groups, it is worth noting that states have been reluctant to invoke a legal justification, even when they have openly provided military aid. Such behaviour, of course, is not peculiar to the area of interventions in civil wars, although it is an increasing (and worrying) pattern, particularly in the area of armed conflicts. In any event, states failing to specify the legal grounds for a given course of action run into ambiguity. At least in some cases, they intentionally do so with one end in mind — namely, not to tie their hands with legal considerations and so keep all options open. The result is that in those circumstances it is very difficult to detect *opinio juris*.<sup>164</sup> A customary norm requires both a general practice and *opinio juris*. Where practice departs from the legal principle to a significant extent — that is, when one of the two equally essential elements constituting a customary norm starts receding and, at the same time, *opinio juris* is lacking — this can be symptomatic of two alternative processes: a modification of the norm or its collapse. With specific regard to the Syrian crisis, where such a process has become more evident, the latter scenario appears to be highly plausible: collapse of the norm leads to the absence of any norm and an anarchic situation where, basically, all actors openly pursue their political/strategic goals, bypassing legal considerations, which is precisely what has been happening in Syria.

However, even assuming that the practice — in some cases — of openly aiding insurgents could be interpreted as being indicative of the emergence of a derogation from the norm prohibiting aid to insurgents (which is far from being certain given both the recurrent pattern of the lack of any legal justifications by the states concerned and the clear position of several other states in favour of non-intervention), a legal development of this kind would not necessarily be desirable in the light of the profound implications of civil wars and foreign interventions (as will be discussed in the following sections). In sum, the legal inference resulting from state practice and *opinio juris* in both respects (aid to governments and aid to insurgents)

<sup>163</sup> The most abused exception to the prohibition of intervention, according to Christine Gray, *International Law and the Use of Force*, 3rd ed (Oxford: Oxford University Press, 2008) at 92.

<sup>164</sup> Christine Nowak observes that “it is increasingly difficult to accurately draw the line between an unfriendly but legal interference and an unlawful intervention. States are increasingly creating exceptions. ... Most noticeably, these creative exceptions tailored especially for a specific time and context have fallen into disuse in similar and comparable situations.” Nowak, *supra* note 94 at 75.

is that it is increasingly difficult to identify a coherent legal framework.<sup>165</sup> The current legal situation seems to be tending towards an implosion of the “traditional” principles, with practice and *opinio juris* pointing in different, and very often contradictory, directions. This, in turn, makes it more evident that the traditional approach shows a number of serious faults. In this context, *lex ferenda* aspects (or a progressive development perspective) become of major importance. Therefore, a new approach to the whole matter becomes necessary, and, above all, the focus should be completely different: legal rules must in fact be discussed in their context, which in our case means civil wars.

Where the legal framework shows clear signs of crisis, and events in the field appear to have developed beyond any clear legal guidance in several crucial cases, the question is not only whether the traditional legal framework still holds but also, and more importantly, whether it is in any case suitable to meet the challenges that civil wars pose and even whether it is consistent with other key features of the international legal system. Law must make sense, and international law is no exception. Furthermore, legal rules should work consistently with each other and be compatible with the basic norms enshrining the fundamental values of the legal system as a whole. Of course, in terms of international law, this condition applies to peremptory norms.<sup>166</sup> It is evident that the traditional normative setting (authorizing even lethal aid to legitimate governments while banning lethal and logistical aid to insurgents) responds to the basic interest of states to protect their sovereignty and preserve their territorial integrity. Is it possible to detect, in today’s international community and practice, any other strong, possibly competing interests that might point to, or, at any rate, call for, a different normative setting?

<sup>165</sup> Indeed, three different approaches emerge from the literature: the negative equality principle (prohibition to support any side during a civil war; see also note 229 below), a purpose-based approach (admissibility of an intervention on behalf of the government if the purpose is lawful and it does not violate the principle of self-determination), and counter-intervention, which will be discussed shortly. See Henderson, *Use of Force*, *supra* note 18 at 360–70; cf also Nußberger, *supra* note 18 at 130ff.

<sup>166</sup> Cf, however, Carlo Focarelli: “The temptation either to call for a ‘rationalization’ ... or to conclude that international law is anything but a ‘system’ is strong but has to be resisted. While international law is to some extent a puzzle, it embodies and reflects the international community as it is. Contrary to a widespread idea, law may work even in a fragmented condition, and sometimes it works precisely because of fragmentation (faithfully mirroring the international community and its real conflicting interests and views), the alternative being no rules at all.” Carlo Focarelli, *International Law as Social Construct: The Struggle for Global Justice* (Oxford: Oxford University Press, 2012) at 461. Nonetheless, in the area of civil wars and foreign interventions, fragmentation (in the legal dimension as well as in the field) can hardly represent a satisfactory perspective, given the dramatic consequences it leads to.

First of all, with closer in-depth analysis, as seen above, it is possible to identify limits, including in the provision of aid to governments, that correspond to other important interests (and values) at stake — for example, the prevention of war crimes and crimes against humanity or the right to internal self-determination. In addition, even taking these limits into account, the current approach, which, to a large extent, is still influenced by the traditional doctrine, is highly unsatisfactory from a systemic point of view. First, given the current trend towards aligning both governmental authorities and insurgents with regard to their obligations under IHL,<sup>167</sup> differential treatment with respect to external military aid (to the advantage of the legitimate government) appears inconsistent. Second, it has been demonstrated that external military aid to any of the warring parties fuels internal conflict.<sup>168</sup> It is likewise clear that the intensification of an internal conflict leads to widespread human rights and IHL violations, as acknowledged by the UNSC itself,<sup>169</sup> and that many of those violations correspond to serious breaches of peremptory norms of international law.<sup>170</sup> Consequently, admitting the possibility of providing unilateral military aid to any of the warring parties — in civil wars as well as in conflict-risk situations (as defined above) — is in flagrant contradiction with the objective of preventing the said serious breaches (also inherent in the endeavour of developing an international criminal justice system) and possibly also with that of fostering respect for the “responsibility to protect” principle.<sup>171</sup> On top of that, and from a purpose/rationale point of view, other fundamental questions arise that can have a highly significant

<sup>167</sup> In this respect, see Dieter Fleck, “The Law of Non-International Armed Conflict” in Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 3rd ed (Oxford: Oxford University Press, 2013) 581 at 585ff; Sivakumaran, *supra* note 2 at 242–46. This trend has also emerged in practice. See e.g. “Statement of the President of the UNSC,” *supra* note 136 at 2.

<sup>168</sup> See discussion later in this article.

<sup>169</sup> See, in particular, UNSC Resolution 2139 (2014) on the humanitarian situation in Syria.

<sup>170</sup> In this regard, see Liebllich, *supra* note 39 at 172–79, who observes that “it seems that collective *opinio juris* has elevated ... the principle of protection of civilians to the same plateau as basic principles of international law such as sovereignty, territorial integrity, non-intervention and the prohibition of the use of force, effectively complementing and redefining them” (at 178).

<sup>171</sup> An in-depth study conducted by the ICRC highlights how the widespread availability of weapons, particularly small arms and light weapons, can be a major factor facilitating the proliferation of violations of IHL and aggravating the plight of civilians during and after armed conflict. “Arms Availability and the Situation of Civilians in Armed Conflict” (1999), online: <<https://www.icrc.org/en/doc/resources/documents/publication/po734.htm>>. On the “responsibility to protect” principle, see discussion later in this article.

impact on the legal discussion, particularly *de lege ferenda*. Let us address the first one: are civil wars useful?

#### THE (IMMENSE) COSTS OF CIVIL WARS

Studies on civil wars and particularly on their distinctive feature — widespread violence — point to a fundamental reality, of which the Syrian conflict represents a paradigmatic case: for a number of reasons, civil wars tend to be particularly barbaric and produce a massive amount of violence via brutalization, including, of course, indiscriminate violence: “[A] civil war is likely to open a Pandora’s box of violence.”<sup>172</sup> What is especially important in this latter regard is that the escalation of violence leads to a spiral that “acquires a logic of its own, ... even independent of the war’s initial causes.”<sup>173</sup> What is more, “war is a transformative phenomenon,” “and civil war even more so.”<sup>174</sup> As one author explains, “[b]y their very nature, civil wars have a tendency to foster extremes. The ruthless are rewarded, while the moderates and the evolutionary reformers tend to get culled out.”<sup>175</sup> Furthermore, “[c]ivil wars have a sticky quality: they are notorious for being a past that won’t go away.”<sup>176</sup> In other words, the long-term consequences of the large-scale brutal violence that they produce and the enormous costs that this generates will not only have a huge impact on the success and

<sup>172</sup> Stathis N Kalyvas, *The Logic of Violence in Civil War* (Cambridge, UK: Cambridge University Press, 2006); the author looks into the reasons for such brutalization (at 20 *in fine*, 55ff); indiscriminate violence is also investigated (at 146ff).

<sup>173</sup> *Ibid* at 82.

<sup>174</sup> George Kennan, *American Diplomacy, 1900–1950* (Chicago: University of Chicago Press, 1951), among others, quoted by Kalyvas, *supra* note 172 at 389. In several civil conflicts independent observers found that any right cause or ideal had been overwhelmed by years of brutalizing violence, with most of the civilian population simply seeking survival (at 117). The fragmentation of the conflict in Yemen at the end of 2018 had little to do with the relatively clearer context existing at the time when the Saudi-led coalition began its armed intervention.

<sup>175</sup> Caryl, *supra* note 4 at 1. Cf also Charles Lister: “After six years of conflict, Syria and its people have been completely transformed. ... [I]t is impossible to ignore how the brutal and protracted war has instilled deep divisions in a once-cohesive society. ... [T]he sectarian dynamic that was once supported only by extremist fringes has started to decisively shape the mainstream opposition.” Charles Lister, “Al Qaeda Is Starting to Swallow the Syrian Opposition” *Foreign Policy* (15 March 2017) at 1. It is also worth recalling the case of Salwa Bugaighis, a human rights lawyer from Benghazi and one of the moderate protagonists of the 2011 uprising in Libya, assassinated in 2014. See “Salwa Bugaighis, Libyan Human Rights Activist, Shot Dead in Benghazi,” *The Guardian* (26 June 2014).

<sup>176</sup> Kalyvas, *supra* note 172 at 35.

the costs of post-conflict reconstruction<sup>177</sup> but also create conditions for potential new conflicts.<sup>178</sup>

Data on the more recent civil wars, which have been the major focus of attention in the present article, confirm these findings. Thus, Yemen's civil war has led to a humanitarian catastrophe, with half of Yemen's twenty-eight million people "food insecure" and the country on the brink of famine.<sup>179</sup> The effects of the Syrian conflict are simply appalling, as a vast number of sources indicate.<sup>180</sup> Albeit with human losses and destruction on

<sup>177</sup> On the economic impact of civil wars, see, in particular, the comprehensive study by Stefano Costalli, Luigi Moretti & Costantino Pischedda, "The Economic Costs of Civil Wars: Synthetic Counterfactual Evidence and the Effects of Ethnic Fractionalization" (2017) 54 *Journal of Peace Research* 80. Adam Roberts observes that "postconflict reconstruction of damaged societies is a fearsomely difficult task." Adam Roberts, "The Use of Force: A System of Selective Security" in Einsiedel, Malone & Stagno Ugarte, *supra* note 8, 349 at 353.

<sup>178</sup> "As we have seen elsewhere in the region, once this cycle has begun it is very hard to bring it to an end." Peter Salisbury, "Is Yemen Becoming the Next Syria?" *Foreign Policy* (6 March 2015) at 4. According to a 2016 US State Department report on terrorism, "(b)ecause of the instability and violence in Yemen, the internationally recognized government under Hadi cannot effectively enforce counterterrorism measures. A large security vacuum persists, which gives AQAP (*al-Qa'ida in the Arabian Peninsula*) and ISIS-Y more room in which to operate. ... AQAP has managed to exacerbate the effects of the conflict, fighting against the Houthi-Saleh alliance, while at the same time working to prevent Hadi's government from consolidating control over southern governorates." US State Department, "Country Reports on Terrorism 2016" (July 2017) at 232 online: *US State Department* <<https://www.state.gov/documents/organization/272488.pdf>>.

<sup>179</sup> As stated by Mark Lowcock, UN Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator at the UNSC meeting on 23 October 2018. UNSCOR, 73rd Sess, 8379th Mtg, UN Doc S/PV.8379 (2018) at 2–4. In the Letter dated 22 January 2016 from the Panel of Experts on Yemen established pursuant to Security Council Resolution 2206 (2015) addressed to the President of the Security Council, containing their final report pursuant to the said Resolution, the Experts highlighted the "catastrophic economic situation" resulting from the war. Doc S/2018/192, *supra* note 41. See also, among many other documents, "Yemen Edging Nearer Famine as War, 'Shredded Economy' Take Toll: U.N. Official," *Reuters* (16 December 2016); United Nations Office for the Coordination of Humanitarian Affairs, "Crisis Overview" (2017), online: *UNOCHA* <<http://www.unocha.org/yemen/about-ocha-yemen>>; Alexandre Faite (Head of delegation for the ICRC in Sanaa, Yemen), "The Human Toll of Yemen's Unending War," *Foreign Policy* (20 July 2017), online: <<http://features.foreignpolicy.com/07-20-2017-the-human-toll-of-yemens-unending-war-cholera-icrc/>>. "(T)he armed intervention led by Riyadh has turned into a quagmire and has left thousands of dead and injured civilians in its wake. Interviews with current and former U.S. government officials paint a picture of a counterproductive war effort that threatens to introduce more instability in the Middle East while also aggravating the U.S.-Saudi alliance." De Luce, McLeary & Lynch, *supra* note 26 at 1.

<sup>180</sup> See, *inter alia*, ICRC, "Conflict in Syria" (2017) 90:906 *Intl Rev Red Cross*, online: *ICRC* <<https://www.icrc.org/en/international-review/conflict-syria>>, as well as the assessment provided by the EU high representative for foreign affairs and security policy in "Elements

a relatively smaller scale, such patterns can also be detected in Ukraine,<sup>181</sup> South Sudan,<sup>182</sup> and Libya,<sup>183</sup> to mention but a few examples among the many more that could be cited. Furthermore, it must be stressed that even when the initial cause of the insurgency might appear just, there is clear evidence of widespread human rights violations and even international crimes on the part of all rebel movements.<sup>184</sup> A government, as in the case of Syria, may well bear a prime responsibility for the resort to violence and show a grim record of large-scale human rights abuses and international

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for an EU Strategy for Syria,” *supra* note 28 at 4; the assessments by the World Bank, “The World Bank in Syrian Arab Republic” (2017), online: <<https://www.worldbank.org/en/country/syria/overview>>; the latest report by Human Rights Watch, 2019 Human Rights Watch, “Syria Events of 2018” (2019), online: <<https://www.hrw.org/world-report/2019/country-chapters/syria>>. Cf also Megan Specia, “How Syria’s Death Toll Is Lost in the Fog of War,” *New York Times* (13 April 2018). Based on the estimate by most international experts of over 500,000 deaths, Specia reckons that “around 2.33 percent of Syria’s prewar population of 22 million has been killed.”

<sup>181</sup> See ICRC, “Ukraine Conflict (2014–2018),” online: <<https://www.icrc.org/en/where-we-work/europe-central-asia/ukraine/ukraine-conflict>>, among other sources. Cf also Amy MacKinnon, “Counting the Dead in Europe’s Forgotten War,” *Foreign Policy* (25 October 2018).

<sup>182</sup> Several sources have documented the dire consequences of the war and the terribly high costs for the population and the country (see, *inter alia*, Human Rights Watch, “South Sudan Events of 2018” (2019), online: <<https://www.hrw.org/world-report/2019/country-chapters/south-sudan>>).

<sup>183</sup> At the UNSC meeting of 28 July 2011, the representative of South Africa had (rather prophetically) warned that “action focused on the military solution ... has worked to destabilize the country even further, and therefore the long-term security and stability of Libya remain uncertain as the situation deteriorates, with more loss of civilian lives and massive destruction of infrastructure.” UNSCOR, 66th Sess, 6595th Mtg, UN Doc S/PV.6595 (2011) at 4.

<sup>184</sup> As to the conflict in Yemen, see, *inter alia*, Doc S/2018/192, *supra* note 41 at 38, para 133; Amnesty International, “‘Where Is My Father?’: Detention and Disappearance in Houthi-controlled Yemen” (18 May 2016), online: <https://www.amnesty.org/en/documents/mde31/4006/2016/en/>; Human Rights Watch, “Yemen: Houthi Strike on Saudi Airport Likely War Crime” (7 November 2017), online: [Human Rights Watch <https://www.hrw.org/news/2017/11/07/yemen-houthi-strike-saudi-airport-likely-war-crime>](https://www.hrw.org/news/2017/11/07/yemen-houthi-strike-saudi-airport-likely-war-crime). As to Syria, in its report published on 5 February 2013, the independent international commission of inquiry of the Human Rights Council concluded that both government and opposition forces had become increasingly violent and reckless with human life, although it conceded that the scale of the abuses committed by the government side significantly exceeded those of the opposition. “Report of the Independent International Commission of Inquiry on the Syrian Arab Republic”, Doc A/HRC/22/59 (5 February 2013); see also, *inter alia*, the statements by Ivan Šimonović, UN Assistant Secretary-General for Human Rights at the UNSC meeting on 16 July 2013. UNSCOR, 68th Sess, 7000th Mtg, UN Doc S/PV.7000 (2013) at 6. At the UNSC meeting of 23 July 2013, the EU speaker expressed concern “over the involvement of extremist and foreign non-State actors in the fighting in Syria on all warring sides.” UNSCOR, 68th Sess, 7007th Mtg, UN Doc S/PV.7007 (2013) at 36.



crimes. However, reprisals and brutalities, whether on political or inter-ethnic grounds, or, indeed, on both, which sooner or later will most likely be committed also on the rebels' side, inevitably create a vicious spiral devastating the economic and social structure of the country for generations to come.<sup>185</sup> The readiness that many states show for getting involved in proxy wars indicates that the long-lasting destructive consequences of civil conflicts are still underestimated (or irresponsibly ignored).

Where does this take us? Simply put, the logical conclusion is that civil wars must be prevented as far as possible and contained where it is not possible to prevent them in the first place. In other words, we have to start approaching civil wars, including from a legal point of view, according to a logic of conflict minimization. This leads to the next fundamental question: which factors feed civil war and are therefore at odds with such a logic?

#### CAUSES OF CIVIL WARS

Civil wars, of course, are a very complex and diversified matter. However, a jurist's task is not empirically identifying the various patterns and variations that history offers in the tragic field of civil war. Historical and political studies provide the analytical context, whereas the jurist's task is a selective one: the law is not meant to regulate all aspects of reality but, rather, to identify those crucial aspects that need to be regulated. Nevertheless, historical and political studies are, especially for international lawyers, clearly of crucial importance in supporting the jurist's selective approach. Accordingly, it seems possible to identify three key factors, in particular, that alone or in combination play an especially important part in creating the conditions for the outbreak of internal conflict and/or fuelling it:

- brutal repression by state authorities (for example, Syria);
- foreign intervention (for example, Syria, Yemen, Ukraine);
- power struggles or exclusion from power structures along sectarian, ethnic, or political lines (for example, South Sudan, Yemen, Bosnia).<sup>186</sup>

The way in which the legal framework impacts on each of these factors is clearly key in assessing whether it adequately responds to the fundamental

<sup>185</sup> As early as the UNSC meeting of 19 December 2012, Jeffrey Feltman, UN Under-Secretary-General for Political Affairs, had warned that "the military approach pursued by both sides in Syria comes at a devastating cost in terms of human lives and destruction, and it breeds a serious risk of sectarian and communal strife, radicalization and terrorism. If nothing is done to change the current dynamic and to move toward a political solution, the destruction of Syria will be the likely outcome." UNSCOR, 67th Sess, 6894th Mtg, UN Doc S/PV.6894 (2012) at 5.

<sup>186</sup> On Yemen, in particular, see, among other authors, Salisbury, *supra* note 178.

goal of minimizing civil conflicts. We shall deal with the latter two factors before considering the first.

#### PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW ON FOREIGN INTERVENTIONS

Several studies point out that third party interventions in civil wars tend to aggravate conflict, prolonging its duration<sup>187</sup> and even hindering post-war reconstruction.<sup>188</sup> There are even studies that depict foreign interference as contributing to igniting conflict in situations at risk, as defined at the beginning of this article.<sup>189</sup> Yemen is one telling example. After the UNSC had already (long before) clearly identified Yemen as a situation at risk,<sup>190</sup> Saudi Arabia and Iran had “proven eager to arm groups that they believed they could control, despite the legacy this destructive rivalry had already wrought in Syria and Iraq. And, if the story is repeated in Yemen, *what began as a manageable power struggle between rival factions* could descend into a brutal and increasingly sectarian civil war that would tear the country apart; ... foreign funders are inflaming previously unimportant divisions. This would not be the inevitable outcome of long-standing rivalries but, rather, a tragic self-fulfilling prophecy.”<sup>191</sup>

<sup>187</sup> See, *inter alia*, Lise Morié Howard & Alexandra Stark, “Why Civil Wars Are Lasting Longer,” *Foreign Affairs* (27 February 2018), online: <<https://www.foreignaffairs.com/articles/syria/2018-02-27/why-civil-wars-are-lasting-longer>>; Patrick M Regan & Aysegul Aydin, “Diplomacy and Other Forms of Intervention in Civil Wars” (2006) 50 *J Conflict Resolution* 736; Patrick M Regan, “Third-Party Interventions and the Duration of Intrastate Conflicts” (2002) 46:1 *J Conflict Resolution* 55. Although the United Kingdom later sided with the insurgents, at the beginning of the Syrian crisis, the UK representative at the UNSC had actually pointed the finger at the flow of arms pouring into Syria: “[W]e are concerned about the supply of weapons into Syria – whether sales to the Government or illegal smuggling to the regime or the opposition. ... *It is glaringly obvious that transferring weapons into a volatile and violent situation is irresponsible and will only fuel the bloodshed.*” UNSCOR, 67th Sess, 6706th Mtg, UN Doc S/PV.6706 (2012) at 17 [emphasis added]; cf also Ruys, “Of Arms,” *supra* note 35 at 53.

<sup>188</sup> See Sang Ki Kim, “Third-Party Intervention in Civil Wars and the Prospects for Postwar Development” (2015) 61:3 *J Conflict Resolution* 615. This aspect also emerges indirectly from the document on EU–Syria strategy dated 3 April 2017, one feature of the strategy being the EU’s position that “(s)pecial responsibility for the costs of reconstruction should also be taken by those who have fuelled the conflict.” See “Council Adopts EU strategy on Syria,” Council Press Release 180/17 (3 April 2017) at para 4; cf Steven Blockmans, “In Search of a Role to Play: The EU and the War in Syria” (2017) 2:1 *European Papers* 9 at 9.

<sup>189</sup> See discussion earlier in this article.

<sup>190</sup> See, in particular, UNSC Resolution 2051 (2012), *inter alia*, calling upon “all sides in Yemen immediately to reject the use of violence to achieve political goals” (at para 2).

<sup>191</sup> Salisbury, *supra* note 178 at 1ff [emphasis added]. On the impact of Saudi intervention in the Yemeni conflict, cf Arwa Ibrahim, “Analysis: Yemen, a Nation Destroyed by

A comprehensive arms embargo (*vis-à-vis* all parties) should thus have already been decided upon during the transition process, instead of the partial arms embargo (only targeting the Houthi insurgents) imposed by UNSC Resolution 2216 (2015) when civil war had again broken out.<sup>192</sup>

Consequently, the possibility of intervening on either side of the conflict — be it that of the government (even pursuant to counter-intervention) or of the insurgents — will inevitably lead to fuelling the conflict and increasing the spiral of violence, with all of the above-mentioned distortive and dramatic consequences. This idea has also frequently been put forward in international institutional fora.<sup>193</sup> Even the mere prospect of external help — on either side — may encourage the conflicting parties to harden their positions. Thus, a government's expectation of obtaining external help would probably encourage it

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Bin Salman's Aggression," *Middle East Eye* (22 June 2017). In September 2013, Yemen was still defined as "the only peaceful country in negotiated transition among those of the Arab Spring," Jamal Benomar, Special Adviser to the Secretary-General on Yemen, UNSCOR, 68th Sess, 7037th Mtg, UN Doc S/PV.7037 (2013) at 5.

<sup>192</sup> As early as 2012, Jamal Benomar, Special Adviser to the UN Secretary-General for Yemen, had warned that the country remained "awash with arms, with new shipments still reportedly coming in." UNSCOR, 67th Sess, 6878th Mtg, UN Doc S/PV.6878 (2012) at 3. In 2016, the European Parliament called for an initiative to bring in an EU arms embargo against Saudi Arabia. Resolution on the Humanitarian Situation in Yemen, *supra* note 61 at para 7.

<sup>193</sup> At the UNSC meeting of 23 January 2013, Robert Serry, special coordinator of the Middle East Peace Process and Personal Representative of the Secretary-General to the Palestine Liberation Organization and the Palestinian Authority, quoted the Secretary-General and the joint special representative for Syria as expressing their "deep disappointment and anguish at the appalling levels of killing and destruction carried out by both the Government and the opposition, fueled by outside Powers providing weaponry to both sides." UNSCOR, 68th Sess, 6906th Mtg, UN Doc S/PV.6906 (2013) at 5. At the UNSC meeting of 23 July 2013, India stressed that any "further militarization will only exacerbate the conflict and must be avoided by all parties concerned, internal as well as external." UNSCOR, 68th Sess, 7007th Mtg, UN Doc S/PV.7007 (2013) at 57. At the UNSC meeting of 15 October 2012, Brazil stated that "[a]rmed opposition groups, especially those that increasingly rely on foreign military and logistical support, have only added to the scope of the Syrian tragedy." UNSCOR, 67th Sess, 6847th Mtg, UN Doc S/PV.6847 (2012) at 35. At the UNSC meeting of 22 February 2014, concerning the adoption of the first UNSC resolution on humanitarian assistance in Syria (see notes 70 and 128 above), Rwanda expressed its "regret that the important amendments on the responsibility of States that are supplying weapons to the Syrian parties were not included in the final version of the resolution" and underlined the grave concern at the negative impact of the transfer and use of weapons in Syria, in that the increased arms transfers to all parties hurt the prospect of a political settlement to the conflict. UNSCOR, 69th Sess, 7116th Mtg, UN Doc S/PV.7116 (2014) at 12ff. At the UNSC meeting of 30 August 2012, the UN deputy secretary-general stated that "Syrians need fewer weapons, not more. Those who supply the Government or the armed opposition with weapons, equipment or money are creating a vicious circle of violence and are paving the way for more suffering and chaos." UNSCOR, 67th Sess, 6826th Mtg, UN Doc S/PV.6826 (2012) at 3.

to become intransigent on demands for political reforms and stifle any opposition movement, let alone an insurgency. On the other hand, the prospect of being supported from the outside would just as likely encourage opposition elements to resort to arms (even if not openly fomented to do so).<sup>194</sup> This grave allegation was made by authoritative sources with regard to the Syrian crisis; the prospect of foreign intervention may have driven the developing insurgent movement to stiffen its positions *vis-à-vis* the government on the basis of the growing conviction that external help would materialize and enable it to overthrow the government by force.<sup>195</sup> Similar questions could be raised with regard to the Libyan crisis.<sup>196</sup>

<sup>194</sup> “External aid to rebel groups may help states meet their foreign policy objectives, but it fundamentally changes the incentives facing rebel leaders and foot soldiers within a conflict. Flows of foreign resources in Mozambique, Sierra Leone, Liberia, and the Democratic Republic of the Congo enabled the growth of movements with little or no interest in political or economic change. A similar danger presents itself whenever and wherever foreign governments finance rebellion and back that support up with military assistance.” Jeremy M Weinstein, *Inside Rebellion: The Politics of Insurgent Violence* (Cambridge, UK: Cambridge University Press, 2007) at 342ff.

<sup>195</sup> According to a 2016 report by the International Peace Institute, although “[t]he conflict in Syria has proven particularly resistant to mediation,” the last obvious opportunity for mediation, when violence was still somewhat contained, was Kofi Annan’s mediation of 23 February–2 August 2012. However, “[t]he regime, made up of hardened Machiavellians, has been prepared to do whatever necessary to survive, whatever the cost to the country,” “[t]he opposition has contributed to the intractability of the conflict through its maximalist demands for the ‘fall of the regime,’ its ‘rush to confrontation’ when the regime still retained significant support, its unrealistic expectation of a NATO intervention” and the fact that “[b]ehind the opposition’s intransigence was that of the regional powers that gave it the resources and encouragement to continue the fight.” Raymond Hinnebusch et al, “UN Mediation in the Syrian Crisis: From Kofi Annan to Lakhdar Brahimi” (New York: International Peace Institute, March 2016) at 4–5, 11 [“UN Mediation in the Syrian Crisis”]. In this regard, see also Shaikh & Roberts, *supra* note 8 at 720. At the UNSC meeting of 25 March 2013, Robert Serry, special coordinator for the Middle East peace process and personal representative of the Secretary-General, noted the “continuing pursuit of a military victory by both sides, and their reckless disregard for civilian lives” and observed that prospects for a political solution in Syria would remain slim unless the parties abandoned violence and instead committed to a political solution. UNSCOR, 68th Sess, 6940th Mtg, UN Doc S/PV.6940 (2013) at 4. At the UNSC meeting of 19 July 2012, India (as did Colombia) stigmatized the fact that all parties continued to pursue a military approach; South Africa observed that “where the international community, including the Security Council, has preferred one side over the other, such bias has resulted in the polarization of the conflict. This is especially true for such fractious societies as Syria.” UNSCOR, 67th Sess, 6810th Mtg, UN Doc S/PV.6810 (2012) at 7, 12, 14. Mary Ellen O’Connell underlines the contrast with the handling of the crisis in Ukraine, in the context of which France and Germany put a great deal of pressure on Ukraine to make concessions for the sake of peace. Mary Ellen O’Connell, “Europe and Syria: Diplomacy, Law and War” (2017) 2:1 European Papers 15 at 19.

<sup>196</sup> Bearing in mind the turn in favour of the insurgency that international intervention in Libya was taking (cf, *inter alia*, the statements by the UN under-secretary-general for political affairs at the UNSC meeting on 27 June 2011, UNSCOR, 66th Sess, 6566th Mtg,

Account must also be taken of the risk that the prospect of violent overthrow of a government or of a summary elimination of its leaders by the insurgents (as occurred in the case of Muammar Al Gaddafi) could drive the governmental side to step up repression of any opposition drastically, thus further precipitating the escalation of the conflict.<sup>197</sup> Therefore, hasty external calls for regime change, especially if preceded by violent regime changes in similar circumstances, could backfire and drive another government to hold on to power at all costs. On top of that, calling for regime change and indirectly or directly encouraging an insurgent movement to take up arms without consistently following through could be seen as morally or, in any event, politically unacceptable.<sup>198</sup>

Foreign intervention is most likely to aggravate the conflict where the third factor (power struggle) is also at work.

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UN Doc S/PV.6566 (2011) at 2), it is worth noting that the position of the insurgent provisional authority (the Transitional National Council (TNC)) hardened; at the UNSC meeting of 3 May 2011, it was reported that the TNC had declared that a ceasefire would not be sufficient to end the conflict in Libya if it was not directly linked to the departure of Colonel Al-Qadhafi and his family (UNSCOR, 66th Sess, 6527th Mtg, UN Doc S/PV.6527 (2011) at 4); this in spite of the UNSC's calls for a ceasefire (see note 203 below) and the fact, also reported to the UNSC on 9 May 2011, that Valerie Amos, under-secretary-general for humanitarian affairs and emergency relief coordinator, had reached an agreement with the Libyan authorities in Tripoli on the establishment of a UN humanitarian presence in Tripoli (UNSCOR, 66th Sess, 6530th Mtg, UN Doc S/PV.6530 (2011)). Natalino Ronzitti reports that "[t]he South African President, Jacob Zuma, made several attempts to mediate, proposing as a starting point a ceasefire and the opening of humanitarian corridors. His proposals were rejected by rebels, however, while they were in principle favored by Gaddafi." Ronzitti, "NATO's Intervention," *supra* note 3 at 17.

<sup>197</sup> In this respect, see the March 2016 report by Hinnebusch et al, *supra* note 195 at 11.

<sup>198</sup> With regard to the case of Syria, reference has been made to "a sense of betrayal among moderate rebels who feel Obama encouraged their uprising by calling for Assad to go but then abandoned them, failing even to enforce his own 'red line' against Syria's use of chemical weapons." "Exclusive: Obama, Aides Expected," *supra* note 113. Emile Simpson, "Stop the Hand-Wringing about Aleppo," *Foreign Policy* (19 December 2016) at 4: "Although the West is not responsible for the atrocities in Aleppo, we are morally responsible for giving false hope to the rebels since 2011, when we offered them rhetorical and, later, material support but did not have the will to back them with our own troops. Act decisively. Or stay out." According to Nikolaos Van Dam, "[n]or did the West's military support for the Syrian opposition ever match its rhetoric, thus dangerously inflating the opposition's expectations. The opposition was never given sufficient military support to bring the regime to its knees, even when such military pressure would have been necessary to achieve the political solution the West claimed it wanted." Nikolaos Van Dam, "What the West Got Wrong in Syria," *Foreign Policy* (22 August 2017) at 2. Salman Shaikh and Amanda Roberts consider that "[b]y coming out so early in the conflict with a demand for Assad's ouster without any substantial investment in the opposition, the United States arguably contributed greatly to the stalemate." Shaikh & Roberts, *supra* note 8 at 733.

These observations lead to a framework of both policy and legal directions. Indeed, legal norms alone cannot satisfactorily address such complex realities or foster the achievement of the fundamental goal of conflict minimization. A combination of purposeful legal norms and an array of policy options appear to be called for. And, in fact, on closer inspection, practice already offers several pointers in this direction. Legally speaking, the logical inference from the preceding analysis is a general non-intervention principle; in both situations identified above (non-international armed conflicts as well as situations at risk of escalating into civil wars), third states should be under a strict obligation to stop any supply of military aid to the government and to refrain from providing any armed or logistical support to any opposition movement. As was rightly stressed by the Institut de droit international, which in 1975 sketched non-intervention as a general rule (albeit limited to actual internal armed conflicts), any intervention on one side very often leads to intervention on the other side.<sup>199</sup>

The proposed general principle of non-intervention goes beyond the scope of the traditional rules on neutrality, which only apply from the point of recognition of belligerency and are limited to the recognizing states. Furthermore, it is generally acknowledged that the law of neutrality has applied in very few cases, cannot apply to internal conflicts unless there has been recognition of belligerency, and is, in any case, now deemed anachronistic.<sup>200</sup> Given the current state of the law, this position can only be qualified as progressive development.<sup>201</sup> However, practice already offers a number of elements supporting both the idea of conflict minimization and a position in favour of non-intervention as a principle to be followed

<sup>199</sup> “[L]a violation du principe de la non-intervention en faveur d’une partie à la guerre civile mène souvent, en pratique, à l’ingérence en faveur de la partie opposée ... [T]oute guerre civile peut affecter les intérêts d’autres Etats et est donc susceptible de se transformer en conflit international si des obligations très rigoureuses de non-intervention ne sont prévues.” Institut de droit international Resolution, *supra* note 13, preamble.

<sup>200</sup> See Roth, *Governmental Illegitimacy*, *supra* note 10 at 178ff; Cullen, *supra* note 11 at 22ff. On the law of neutrality in general, see Michael Bothe, “The Law of Neutrality” in Fleck, *supra* note 167, 549. The law of neutrality requires the existence of an international armed conflict. There is no neutrality in relation to internal armed conflicts (at 557), except where there is formal recognition of belligerency of the insurgents by third states (*Convention on Duties and Rights of States in the Event of Civil Strife*, 20 February 1928, OAS TS 7 (entered into force 21 May 1929), art 1, para 3). Canada did not participate in any of the Pan American Conferences that adopted this and other pre-Second World War pan-American treaties. *Protocol to the Convention on Duties and Rights of States in the Event of Civil Strife*, 1 May 1957, UNTS 4138 (entered into force 12 September 1957; Canada has neither ratified nor signed), art 2. In this regard, see also Ronzitti, “NATO’s Intervention,” *supra* note 3 at 16.

<sup>201</sup> Jean-Yves De Cara refers to the Institut de droit international Resolution, *supra* note 13, in terms of *de lege ferenda*. See De Cara, *supra* note 31 at 23ff, also on the drafting of this resolution.

in general. In numerous cases, the UNSC and other international bodies have called upon all parties to resolve differences through dialogue and rejected violence as a means to achieve political goals.<sup>202</sup> The policy focus on the need to reduce the level of violence, contain the conflict, and de-escalate likewise loomed large in most of the key cases.<sup>203</sup> Furthermore, the

<sup>202</sup> See e.g. UNSC Resolution 2406 (2018) on South Sudan (at para 1); UNSC Resolution 2216 (2015) on Yemen (at para 6); the African Union on the Libyan crisis (Assembly of the Union, 17th Session 30 June–1 July 2011, Decision on the Report of the Peace and Security Council on Its Activities and the State of Peace and Security in Africa, Assembly/AU/Dec.369 (XVII), at 7, para 27); the Secretary-General of the League of Arab States at the beginning of the Syrian crisis, speaking before the UNSC on 31 January 2012 (UNSCOR, 67th Sess, 6710th Mtg, UN Doc S/PV.6710 (2012) at 6, 8); Guatemala, Portugal, China, Togo, India, and South Africa on Syria at the UNSC meeting of 31 January 2012 (UNSCOR, 67th Sess, 6710th Mtg, UN Doc S/PV.6710 (2012) at 18–19, 25, 27–28, 30). The above-cited EU Council conclusions on an EU strategy for Syria of April 2017 state that “[t]he EU firmly believes that there can be no military solution to the conflict.” “EU Council Conclusions,” *supra* note 128 at 3.

<sup>203</sup> The idea of de-escalation, in the context of the Syrian crisis, goes in the same direction and has actually been frequently present in UNSC practice. It had already been expressed in the first UNSC presidential statement on Syria calling for the end of violence and utmost restraint on all sides. “UNSC Presidential Statement on Syria,” UN Doc S/PRST/2011/16 (2011). It was then explicitly invoked by some of the UNSC members when the first resolution on the Syrian crisis was adopted on 14 April 2012 and was implicitly embodied in the latter resolution: both the resolution itself and the six-point proposal (which the resolution endorsed) of the Joint Special Envoy of the UN and the League of Arab States called upon all parties, including the opposition, to cease all armed violence in all its forms (see also the statements by Morocco at the UNSC meeting of 21 April 2012, calling on all parties to commit to a full cessation of violence (UNSCOR, 67th Sess, 6756th Mtg, UN Doc S/PV.6756 (2012) at 5); by Japan, Brazil, and Canada at the UNSC meeting of 23 April 2012 (UNSCOR, 67th Sess, 6757th Mtg, UN Doc S/PV.6757 (2012) at 4, 6, 22); by the Republic of Korea at the UNSC meeting of 23 July 2013 (UNSCOR, 68th Sess, 7007th Mtg, UN Doc S/PV.7007 (2013) at 19): “The militarization of the conflict in Syria will only accelerate the killings and violence and the emergence of Al-Qaida-linked groups”). Too bad that an actual plan seemingly echoing this idea began to be implemented only in May 2017, outside the framework of the UNSC and involving worrying arrangements providing for the transfer of thousands of refugees into rebel-held areas. “Truce Goes into Effect in Another Syria ‘Safe Zone,’” *Washington Post* (3 August 2017). The difference is that implementation of the idea of de-escalation began only when the war had already wreaked havoc. It is a very different matter to try to freeze, or minimize, the conflict before it escalates and leads to disastrous and most likely irreversible consequences. De-escalation was likewise repeatedly advocated in the case of Ukraine. See e.g. UNSCOR, 69th Sess, 7253rd Mtg, UN Doc S/PV.7253 (2014). De-escalation through a ceasefire was also advocated in the first phase of the international intervention in Libya. See, *inter alia*, the statements by the representative of China at the UNSC meeting of 4 May 2011 (UNSCOR, 66th Sess, 6528th Mtg, UN Doc S/PV.6528 (2011) at 10); the UN special envoy to Libya: “A ceasefire must be declared either formally or, in a first step, as part of an informal understanding between the opposing forces in Libya” (UNSCOR, 66th Sess, 6527th Mtg, UN Doc S/PV.6527 (2011) at 5); the UN Secretary-General (UNSCOR, 66th Sess, 6541<sup>st</sup> Mtg, UN Doc

prioritization of conflict minimization is also implied in the endeavour to develop an international criminal justice system, one of whose aims is to contribute to preventing international crimes, including the typical IHL violations that are committed in the context of civil wars.

It must be added that the idea of actively sponsoring regime change (be it by supporting an insurgent movement or through direct intervention), aside from Chapter VII action by the UNSC, has a very weak basis, both as a matter of principle and in practice. First of all, many states openly oppose it, which in terms of international law should never be underrated.<sup>204</sup> Second, forcing a regime change from outside (even on the basis of a democratization endeavour) is open to abuse and manipulation and appears to be a very bad policy option.<sup>205</sup> In fact, experience (aside possibly from states having a previous democratic history) shows that democratic change and the dawning of a civil society take time. Any attempt to promote such an evolution from outside calls for a very cautious approach, carefully choosing the method according to the

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S/PV.6541 (2011) at 3); the African Union Ad Hoc High-Level Committee on Libya with a view to implementing the African Union road map and ending the crisis in cooperation with both the Libyan authorities and the representatives of the TNC (UNSCOR, 66th Sess, 6555th Mtg, UN Doc S/PV.6555 (2011) at 3–5); South Africa (UNSCOR, 66th Sess, 6566th Mtg, UN Doc S/PV.6566 (2011) at 4).

<sup>204</sup> See Roth, *Governmental Illegitimacy*, *supra* note 10 at 166ff, 411.

<sup>205</sup> A number of scholars have highlighted the harmful consequences of some prominent cases of externally sponsored/fostered regime change. See e.g. Stephen M Walt, “The Art of the Regime Change,” *Foreign Policy* (8 May 2018); cf also W Michael Reisman, “Why Regime Change Is (Almost Always) a Bad Idea” (2004) 98:3 *Am J Intl L* 516, who safeguards the possibility of a strategy of unilateral regime change as an extraordinary remedy when the formal international system cannot operate (at 521), but proposes ten guidelines, the first of which is that “[a]s much international organizational support should be gained as possible” (!) (at 524) and, nevertheless, concludes that, “in each context, let the strongest and best-intentioned government contemplating or being pressed to undertake regime change remember that not everything noble is lawful; not everything noble and lawful is feasible; and not everything noble, lawful, and feasible is wise” (at 525). Roth, *Governmental Illegitimacy*, *supra* note 10 at 163, observes that “history arguably teaches that foreign intervention (whether by armed force or some other form of coercive interference), though often advertised as liberating a subject populace from tyranny, seldom portends genuine liberation; rather, the typical result is some new and worse predation, with even less coincidence of interests between ruler and ruled” (at 420–28); the author, writing just four years before the invasion of Iraq by the United States, the United Kingdom, and Poland, states, *inter alia*, that “the ‘democratic peace’ thesis does not assert that democracies do not commit aggression, but merely that they do not do so against regimes that are (or that their populations perceive to be) also democratic” (at 427); see also Simonen, *supra* note 22 at 432–37. Robert Ford, “the then U.S. ambassador to Syria, had reportedly opposed calling for Assad’s departure, arguing that the United States would not be able to bring it about, but his counsel was overruled.” Van Dam, *supra* note 198 at 4.



circumstances of each case and in conformity with such fundamental principles of international law as independence and non-interference. This, in any event, is best done via collective fora and tools.<sup>206</sup>

Of course, the UNSC could well decide (under Chapter VII) to intervene in a civil war, as in fact occurred in Libya. However, *mutatis mutandis* (a UNSC-mandated intervention could and would obviously derogate from the principle of non-interference), similar considerations would apply in this case too. Apart from the specific mandate laid down in the UNSC decision (such as protection of the civilian population in the case of Libya), the participating states' underlying objective should be at most to favour the dawning of a democratic process by shielding groups encouraging democracy rather than aiming at regime change outright. The case of Libya is indeed a telling one. The use of force was authorized by the UNSC to protect the civilian population, including in Benghazi.<sup>207</sup> The latter was home to the most genuine democratic elements that had started the movement against Gaddafi's rule. Strict compliance with UNSC Resolution 1973 (2011), which was openly advocated by several major states and organizations,<sup>208</sup>

<sup>206</sup> "Until such time as a genuine consensus emerges as to the criteria of governmental legitimacy, the principle of non-intervention will remain an enlightened one. The exception to that principle properly remains limited to those relatively few instances in which judgments from disparate worldviews overlap." Roth, *Governmental Illegitimacy*, *supra* note 10 at 430.

<sup>207</sup> Resolution 1973 (2011) at para 4.

<sup>208</sup> Not only by Russia (see, *inter alia*, the statements made at the UNSC meeting of 4 May 2011 — UNSCOR, 66th Sess, 6528th Mtg, UN Doc S/PV.6528 (2011) at 9) but also by the African Union (in very strong terms; see the UNSC meeting of 15 June 2011 — UNSCOR, 66th Sess, 6555th Mtg, UN Doc S/PV.6555 (2011) at 4). See also the statements by South Africa at the UNSC meetings of 27 June 2011 (UNSCOR, 66th Sess, 6566th Mtg, UN Doc S/PV.6566 (2011) at 4); 28 July 2011 ("the intention of resolution 1973 (2011) was to ensure the protection of civilians, and not regime change or the targeting of individuals" — UNSCOR, 66th Sess, 6595th Mtg, UN Doc S/PV.6595 (2011) at 4 and 5); and 4 October 2011 (UNSCOR, 66th Sess, 6627th Mtg, UN Doc S/PV.6627 (2011) at 11), where the representative of South Africa refers to previous resolutions having been "abused"; as well as by several states attending the UNGA's informal thematic debate on "[t]he role of regional and subregional arrangements in implementing the responsibility to protect" that took place on 12 July 2011 (UN Press Release GA/11112 (2011)). Katariina Simonen observes that "the UN and the AU strove for a negotiated solution between the warring parties on an equal footing. Whatever the motives were of some States in claiming the illegitimacy of the Gaddafi administration, such claims can hardly be justified on the basis of the Security Council's civilian protection mandate. ... [P]remature recognition also seriously hampered the UN's and the AU's efforts to find a negotiated solution for ending the crisis." Simonen, *supra* note 22 at 438; see also at 436. It must be noted that a divergence appeared within the Russian leadership at the time (Nowak, *supra* note 94 at 70), then Russian President Dmitry Medvedev claiming that the Libyan government had lost legitimacy, whereas the Russian minister for foreign affairs took a much more cautious approach, conforming to the approach that Russia would later follow with regard to Syria.

would have meant limiting military action to the pursuit of this objective, without directly supporting a broader armed insurgency aimed at overthrowing Gaddafi's regime — in other words, implementing a no-fly zone and stopping any military attempt to crush civilian opposition, particularly in the Benghazi area.<sup>209</sup> A major side effect of this action would have been to protect the embryo of a democratic and civil society that had begun to develop precisely in this latter area.<sup>210</sup> What happened instead is all too well known; in short, the external military intervention rapidly escalated into all-out aerial and covert military and logistical support for the armed insurgency,<sup>211</sup> eventually contributing to the overthrow of the regime and the capture (and summary execution) of Gaddafi. As regularly happens in civil wars, the radical elements of the insurgency took over, the initial moderate and democratic opponents were marginalized (and in some cases killed),<sup>212</sup> and Libya eventually plunged into chaos. Thus, from this point of view, Libya can be seen as a huge missed opportunity and all the more so considering that the military intervention had been authorized exceptionally by the UNSC, even relying on the “responsibility to protect” principle.<sup>213</sup>

<sup>209</sup> On the allegedly limited scope and legality of the US military operations in Libya, with regard to achieving the objectives laid down in UNSC Resolutions 1970 and 1973 (2011), cf “Department of State Legal Adviser Discusses International Law Basis for US Military Operations in Libya” (2011) 105:3 *Am J Intl L* 568 at 605–07.

<sup>210</sup> In Syria (although not concerned by any UNSC decision to intervene), the city of Deraya offered a very interesting experience of that sort (see Caryl, *supra* note 4 at 3–4) and presents a striking similarity with the situation in Benghazi at the beginning of the crisis in Lybia. Cf also Martini & Heras, *supra* note 127.

<sup>211</sup> “Egypt and Qatar were shipping advanced weapons to rebel groups the whole time, ... while Western intelligence and military forces provided battlefield intelligence, logistics, and training support. ... [A] NATO surface vessel stationed in the Mediterranean to enforce an arms embargo did exactly the opposite.” Micah Zenko, “The Big Lie about the Libyan War,” *Foreign Policy* (22 March 2016) at 3ff; the author is of the view that “there almost certainly was a decision by the civilian heads of government of the NATO coalition” to take out Qaddafi “from the very beginning of the intervention.” On the provision of weapons to the insurgency, cf also Christina Larson, “The Gun Smuggler’s Lament,” *Foreign Policy* (September/October 2015) at 79, 81. On regime change in Libya, see also Stephan Hobe, “The Responsibility to Protect and Security Council Action in Libya” (2011) 51 *Indian J Intl L* 502 at 510; Ronzitti, “NATO’s Intervention,” *supra* note 3 at 17, 20.

<sup>212</sup> See note 175 above.

<sup>213</sup> The representative of South Africa, at the UNSC meeting of 28 July 2011, warned that “[t]aking sides in any internal conflict situation in an effort to institute regime change in Libya sets a dangerous precedent that will surely damage the credibility of the Council and its resolutions.” UNSCOR, 66th Sess, 6595th Mtg, UN Doc S/PV.6595 (2011) at 5. Such criticism has persisted over time; in a statement dated 8 September 2014, the Permanent Mission of India to the United Nations declared that “we must be careful

## THE ISSUE OF BRUTAL REPRESSION AS A FACTOR CONTRIBUTING TO THE OUTBREAK OF CIVIL WAR

Last but not least, we still have to deal with another factor contributing to the outbreak or worsening of civil conflict — that is, brutal repression by governmental authorities, especially as a reaction to domestic demands for political transition or democratic change. An arms embargo may succeed in keeping an internal conflict at a low level, but it may fail to prevent brutal violence, particularly on the part of a government that may be determined to repress any form of opposition, even ahead of any possible armed upheaval. Syria is often referred to in this respect; the appallingly brutal reaction by the Syrian authorities to the initial, mostly peaceful demonstrations in the wake of the so-called Arab Spring is considered to have contributed to the country spiralling into an all-out civil war.<sup>214</sup> The idea that brutal repression by state authorities can pave the way to internal conflict is by no means new. The French novelist Stendhal, who had lived through the Napoleonic period, wrote that “a revolution turns bloody *exactly in proportion* to the horror of the abuses that it aims to extirpate.”<sup>215</sup>

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that R2P should not be misused to bring about regime change.” Addressing the UN General Assembly in 2015, an Indian representative also stated that “we must not forget what happened in Libya in 2011 when the Security Council Resolution referred to R2P without taking into account how sudden regime change will impact on the protection of the population.” “Indian Practice Relating to International Law” (2015) 55 *Indian J Intl L* 109 at 144 and 557 at 579. Stephan Hobe considers that “it may well be that the Libyan affair has discredited, rather than strengthened, the responsibility to protect for some time to come. It will take time and effort to overcome the mistrust that was created, and it remains to be seen whether the responsibility to protect can reassert itself in the future.” See Hobe, *supra* note 211 at 511; cf also Giulio Bartolini, “L’operazione Unified Protector e la condotta delle ostilità in Libia” (2012) 95 *Rivista di diritto internazionale* 1012 at 1021.

<sup>214</sup> The brutality of the Syrian government was stigmatized by the UNGA as early as December 2011 (Resolution 66/176 (19 December 2011)) and, indeed, by several UNSC members neither directly nor indirectly involved. See e.g. Brazil (UNSCOR, 66th Sess, 6524th Mtg, UN Doc S/PV.6524 (2011) at 9; UNSCOR, 68th Sess, 7047th Mtg, UN Doc S/PV.7047 (2013) at 35), which, however, also highlighted the armed opposition’s responsibilities, and Guatemala at the UNSC meeting of 31 January 2012. UNSCOR, 67th Sess, 6710th Mtg, UN Doc S/PV.6710 (2012) at 18. The above-mentioned International Peace Institute’s 2016 report contains a comprehensive analysis of what went wrong in the mediation efforts in the Syrian crisis. Hinnebusch et al, *supra* note 195. In any case, that “the security forces had to be restrained from the large-scale killings that had started with their use of heavy weapons in urban areas” was one of the key components of Kofi Annan’s approach to first reducing the violence. “UN Mediation in the Syrian Crisis,” *supra* note 195 at 7. On the brutality of the Syrian authorities’ reaction to the initial peaceful demonstrations, see also Arimatsu & Choudhury, *supra* note 10 at 7.

<sup>215</sup> Translated by the author; the original text in French reads as follows: “[U]ne révolution n’est sanglante qu’en *proportion exacte* de l’atrocité des abus qu’elle est appelée à déraciner.” Stendhal, *Œuvres romanesques complètes* (Paris: Pédone, 2005) at 822, 835 [emphasis in original]: “Projet d’article sur ‘Le rouge et le noir.’”

More recently, the preamble to the *Universal Declaration of Human Rights* states that it is essential that human rights be protected by the rule of law, “if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression.”<sup>216</sup> Irrespective of the issue as to whether international law grants the right to revolt, or the right of victims of human rights abuses to protect themselves,<sup>217</sup> and also apart from individuals’ commitments under IHL and their accountability before the international criminal justice system, the evident risk involved in the use of brutal, disproportionate force by state authorities to quash democratic demands, or even political change of a different kind, is eventual incitement of at least some of the actors on the other side of the barricade to take up arms. Of course, this by no means implies that all those opposing a government that refuses to engage in a transition process or political dialogue with the opposition should be considered potential insurgents. It is indeed striking that many opposition elements in Syria have continued to oppose the Syrian government without resorting to force, in spite of the appalling violence and suffering the Syrian authorities have inflicted on the civilian population.<sup>218</sup> The point is that, in the face of so much brutal force on the part of the authorities, one can hardly expect everyone on the opposing side to endure

<sup>216</sup> *Universal Declaration of Human Rights*, 10 December 1948, UN Doc A/810 at 71 (1948) at 71, preamble.

<sup>217</sup> See Gwilym David Blunt, “Is There a Human Right to Resistance?” (2017) 39 *Hum Rts Q* 860, especially at 870–72; Tom Ginsburg, Daniel Lansberg-Rodriguez & Mila Versteeg, “When to Overthrow Your Government: The Right to Resist in the World’s Constitutions” (2013) 60:5 *UCLA L Rev* 1184, online: <[https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=5102&context=journal\\_articles](https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=5102&context=journal_articles)>; Tony Honoré, “The Right to Rebel” (1988) 8 *Oxford J Leg Stud* 34; cf also Jarrett, *supra* note 34 at 377–79. The chairman’s conclusions at the Marrakech Meeting of the Group of Friends of the Syrian People stated that “[p]articipants recognized the legitimate need for the Syrian people to defend themselves against the violent and brutal campaign of [the] Al Assad regime.” “Chairman’s Conclusions,” *supra* note 67, point 4. This idea was also upheld in the debates in the UNSC. At the UNSC meeting of 24 January 2012, the Arab League’s Secretary General’s report to the League’s Council on 22 January 2012 was quoted: “[T]he opposition had to carry arms in response to the excessive use of force by the Syrian Government to counter protests, the use of repression, detention and torture and violations of human rights by security agencies.” UNSCOR, 67th Sess, 6706th Mtg, UN Doc S/PV.6706 (2012) at 12. In the same sense, see also the statements by the secretary-general of the Arab League himself at the UNSC meeting of 31 January 2012. UNSCOR, 67th Sess, 6710th Mtg, UN Doc S/PV.6710 (2012) at 8. At the UNSC meeting of 23 April 2012, Qatar stated that as a result of the repressive solution the Syrian authorities had opted for, “some in Syria have had to resort to self-defence, which is a legitimate right.” UNSCOR, 67th Sess, 6757th Mtg, UN Doc S/PV.6757 (2012) at 17. The United States also labelled the response by the protestors against the Syrian government as “self-defence.” UNSCOR, 67th Sess, 6751<sup>st</sup> Mtg, UN Doc S/PV.6751 (2012) at 9.

<sup>218</sup> See e.g. Center for Civil Society and Democracy, <<http://www.ccsd.ngo>>; the Syrian Civic Platform, <<http://www.scplatform.net>>; the Aman Network, <<http://www.amansyria.org>>.

such severe punishment indefinitely, passively, and without resorting to the use of force. To put it another way, when the authorities resort to prolonged brutal and disproportionate use of force, there is a very real risk that some individuals on the opponents' side may eventually take up arms.<sup>219</sup>

The use of brutal/disproportionate force by the authorities, therefore, is a factor contributing to the deterioration of unrest into armed confrontation, with the additional risk of foreign intervention combining to create an irresistible drive towards conflict, as was the case in Syria.<sup>220</sup> Consequently, the principle of conflict minimization must also reckon with this factor. This, however, raises a tremendous challenge, for in addition to the general difficulty of enforcing the ban on military aid to any of the parties, imposing self-restraint on a government regarding its own use of force would prove even harder. Logically, the challenge would (at least partly) be met if the UNSC succeeded in approving a course of action under Chapter VII of the *UN Charter*, as occurred with regard to Libya. The problem, on the contrary, dramatically arises in all of the cases, like Syria, where the UNSC has never reached an agreement on measures specifically targeting the government with regard to its brutal/disproportionate use of force against its civilian population.

Of course, the Syrian crisis has subsequently been further complicated by a number of factors that were not present at the outset: the use of chemical weapons, the emergence of ISIS/Daesh, the direct intervention by Russia and Iran, the deployment of US troops in the northeast of Syria, and the deployment of Turkish troops in the northwest of Syria, to mention only the most evident factors. However, the principal question concerning the first phase of the Syrian crisis remains: how to deal with a government that, by resorting to an excessive amount of force, risks plunging the country into all-out civil war, while there is no agreement within the UNSC? The question is all the more important if one considers that none of the above-mentioned complicating factors would have emerged, and the Syrian crisis would not have become so dangerous for the region and even for international peace and security, had the crisis been kept under control by containing the Syrian government while, at the same time, preventing

<sup>219</sup> This idea emerged in essence at the highest institutional level within the UN; at the UNSC meeting of 28 February 2012, Lynn Pascoe, UN under-secretary-general for political affairs, stated that “[t]he disproportionate use of force and military aggression against the civilian population by the authorities has driven the largely peaceful opposition forces to resort to armed resistance although to date the opposition’s firepower appears to be minimal as compared to the heavy weapons being used by the Syrian army.” UNSCOR, 67th Sess, 6725th Mtg, UN Doc S/PV.6725 (2012) at 2.

<sup>220</sup> The EU high representative for foreign affairs and security policy described the deadly mix in these terms: “The military reaction of the Syrian regime to the peaceful political uprising in 2011 led to a protracted civil war supported and exacerbated by a number of external actors.” “Elements for an EU Strategy for Syria,” *supra* note 28 at 3.

the flow of arms and fighters from the outside, both factors being clearly intertwined in this case. The answer to such a difficult and critical issue is complex, multi-level, and multifaceted.

It is not our intention to depreciate the current efforts to strengthen the UNSC's capability to take early action with a view to preventing genocide, crimes against humanity, or war crimes — namely, the code of conduct regarding the UNSC's action in these cases, which was addressed to the UN secretary-general on 14 December 2015 and is supported, at the time of writing, by over 110 UN member states (but signed by only two of the five UNSC permanent members).<sup>221</sup> Nonetheless, however critical and dramatic it may be (as in the case of Syria), the question of how to oppose a brutal government should the UNSC be unable to take action (due to the opposition of one or more of its permanent members or possibly because of a lack of political will to do so) should not override a series of other, fundamental questions: was there a serious attempt to contain the conflict in the first place, in the sense discussed above, without hasty calls for regime change; had any permanent members' actions in previous, similar cases been conducted in strict compliance with international law, rather than pursuant to a *de facto* regime change agenda, so as not to provide others with excuses to then refuse cooperation in the UNSC?<sup>222</sup> This does

<sup>221</sup> See “Global Centre for the Responsibility to Protect,” online: <[http://www.globalr2p.org/our\\_work/un\\_security\\_council\\_code\\_of\\_conduct](http://www.globalr2p.org/our_work/un_security_council_code_of_conduct)>. In the case of Syria, several calls on the UNSC to assume its responsibilities and take action have been made by international institutions and fora. See, among other examples, UNGA Resolution 66/53 (unprecedented), UN Doc A/RES/66/253 B (3 August 2012), preamble; the speech by the UN High Commissioner Zeid Ra'ad Al Hussein in his final address to the Human Rights Council (“For the love of mercy, end the pernicious use of the veto”, 26 February 2018, online: <<http://www.coalitionfortheicc.org/news/20180226/un-security-council-love-mercy-end-pernicious-use-veto>>); chairman's conclusions at the Marrakech Meeting of the Group of Friends of the Syrian People. “Chairman's Conclusions,” *supra* note 67, point 7. At the UNSC meeting of 26 September 2012, South Africa stressed that “the inability of the Council to deal with the situations in Palestine and Syria underscores the need for Council reform. The absence of reform renders cooperation with regional organizations vitally important as the unreformed Council attempts to grapple with contemporary threats to international peace and security.” UNSCOR, 67th Sess, 6841st Mtg, UN Doc S/PV.6841 (2012) at 13.

<sup>222</sup> The issue arises as to how NATO's stretched action in Libya, in the context of the *Unified Protector* operation that continued the international intervention in Libya, might have played a part in facilitating the hardening of the positions of certain key states on the handling of the Syrian crisis, then still in its initial phases, the two having developed at the same time. Russia, for example, explicitly linked the two and voiced its concern over a possible application of the Libyan model to Syria. See the Russian statements at the UNSC meeting of 4 October 2011. UNSCOR, 66th Sess, 6627th Mtg, UN Doc S/PV.6627 (2011) at 4. Cf also the retort by the US representative (at 8). The United States qualified this as a “pretext,” denying any plan to set up a military operation in Syria. UNSCOR, 67th Sess, 6710th Mtg, UN Doc S/PV.6710 (2012) at 16; cf also UNSC meeting of 4 February 2012, UNSCOR, 67th Sess, 6711st Mtg, UN Doc S/PV.6711 (2012) at 7. However, the link was also made by the representative of South Africa: “We have

not imply, nevertheless, that egregious human rights violations, especially by a government, should be ignored. In a sense, unilaterally pushing for regime change or advocating no collective interference at all are both equally wrong.<sup>223</sup> What we are suggesting is to adopt a cautious and holistic approach to internal conflicts (including the issue of foreign intervention) in the broader context of the collective security system. This leads us to our final remarks and proposals.

#### THE WAY AHEAD (BEYOND PAST AND CURRENT TRAGIC FAILURES)

Interestingly, the general prohibition of the use or threat of force in international relations (Article 2, paragraph 4, of the *UN Charter*) is now

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seen recently that Security Council resolutions have been abused, and that their implementation has gone far beyond the mandate of what was intended. ... With regard to the draft resolution ... before us, ... [w]e are concerned that this ... not be part of a hidden agenda aimed at *once again* instituting regime change, *which has been an objective clearly stated by some*" (at 11; emphasis added). According to Salman Shaikh and Amanda Roberts, "[i]t would be fair to argue that Brazil, India and South Africa's abstentions on the Syria vote in October 2011 were significantly influenced by the perception that the NATO-led intervention in Libya had gone beyond its protection mandate, instead directly aiding the opposition and enabling the overthrow of Muammar Qaddafi. The ensuing controversy over postconflict Libya was therefore a convenient and compelling public argument for Russia to use, but by no means was it the sole or even dominant factor in Russia's ongoing defense of the Assad regime in the Security Council, nor in China's consistent backing of the Russian veto. Still, the Libyan case has continued to impact Syria-related discussions within the Council over the implementation and enforcement of various agreements. Nowhere was this more damaging than when the Council failed to agree on a Chapter VII resolution in support of the June 2012 Geneva communiqué." Shaikh & Roberts, *supra* note 8 at 719ff; cf also 722. In this respect, see also Hobe, *supra* note 211 at 510ff; Derek Averre & Lance Davies, "Russia, Humanitarian Intervention and the Responsibility to Protect: The Case of Syria" (2015) 91:4 *International Affairs* 813; Dergham, *supra* note 8 at 741. On the other hand, the question arose as to whether the authorization to take "all necessary measures" to protect the civilian population in Libya, contained in Resolution 1973 (2011), included assistance to opposition forces and whether regime change was actually the only method for achieving that, on the basis of the allegation that it would have been difficult to protect civilians in Libya as long as Gaddafi remained in power. See Henderson, *Use of Force*, *supra* note 18 at 136–42, where the author nevertheless concludes that such broad interpretations of the authorization were a concern for many members of the UNSC. Furthermore, the point has been made that the Russian and Chinese representatives on the UNSC should probably have known that the military action in Libya would involve taking sides in the ongoing civil war as well as attacking regime installations as the only practical ways to protect the civilian population. Roberts, *supra* note 8 at 361.

<sup>223</sup> Interestingly, at the UNSC meeting of 23 July 2013, Iceland observed that "[t]he parties have demonstrated that they are not going to lay down arms without external interference, and the Council has yet to demonstrate that it is doing all in its power to prevent further human tragedy. Before the conflict escalates further, with even more serious consequences for regional peace and security, we ask that the Council please take action." UNSCOR, 68th Sess, 7007th Mtg, UN Doc S/PV.7007 (2013) at 54.

reflected, to some extent, in a constant decrease of inter-state conflicts. Of course, several factors may account for this, but it can reasonably be argued that the above legal prohibition has at least partially contributed to this trend by progressively making the resort to force in international relations less acceptable in the realm of international politics. In sharp contrast, the level of intra-state violence has not decreased and has even reached unprecedented peaks, as in the case of Syria.<sup>224</sup> This conclusion amounts to clear evidence of a serious shortcoming in the legal framework concerning the use of force within states and, in particular, the issue of foreign interaction with internal armed conflicts. What emerges is a striking discrepancy between the rejection of violence at the inter-state level and the wide leeway that is still afforded to the use of violence at the intra-state level and even to external contribution to the use of force at the domestic level (read “foreign intervention”), particularly on the government side. The “massive failure” of the international community in Syria, to quote the terms of former UN High Commissioner for Human Rights Zeid Ra’ad Al Hussein,<sup>225</sup> seems also to derive from this shortcoming in the legal framework.

It is a fact that state and international practice and *opinio juris* strongly back the right of a government to seek support from other states in fighting terrorism. This may even stretch as far as granting states the possibility of extending anti-terrorist operations beyond their territory into a third state, should the latter be unwilling or unable to prevent terrorist attacks from within its territory. The fight against ISIS/Daesh seems to be a case in point. As already noted above, there is a tendency for governments to label any insurgent movement as terrorism, with a view to discrediting it politically.<sup>226</sup> The problem of states manipulating legal categories in order to justify their conduct is (unfortunately) recurrent in the field of international law and, for that matter, is also affecting such well-established legal concepts as self-defence. It is invariably up to the international community, particularly in the context of international organizations, to challenge any such cases of state manipulation of international law. Justifications based on the need to counter terrorist threats call for particular caution, taking account of the absence of a definition of terrorism under international law. In the face of grave terrorist threats, the UNSC could thus grant an

<sup>224</sup> See, *inter alia*, Geneva Academy of International Humanitarian Law and Human Rights, “The War Report: Armed Conflicts in 2018,” edited by Annyssa Bellal (2019), online: *Geneva Academy* <<https://www.geneva-academy.ch/news/detail/226-the-war-report-armed-conflicts-in-2018>>; cf also Roberts, *supra* note 8 at 351.

<sup>225</sup> “The United Nations at 70” (2015) 20:6 *Eur HRL Rev* 555 at 556.

<sup>226</sup> The ‘popular’ argument of counterterrorism was thus also invoked — in vague terms — by the Saudi-led coalition intervening in Yemen, in addition to the other arguments, although the UNSC never classified the Houthis as “terrorists.” See Nußberger, *supra* note 18 at 136ff.



authoritative imprimatur to states' anti-terrorist actions, as in the case of Resolution 2249 (2015) concerning the fight against ISIS/Daesh.<sup>227</sup> This should apply especially to foreign direct intervention (upon request) aimed at assisting a state in fighting a terrorist threat.

Aside from clearly established and predominantly terrorist threats/campaigns, any other situation (including insurgencies interspersed with sporadic/non-systematic terrorist acts) should be dealt with under the three guiding principles set out below, stemming from the key principle of conflict minimization and the important practical elements and trends (especially within international organizations) illustrated above. Taking account of the progressive development approach that we have favoured, the core elements of the following principles could be promoted by means of a resolution of the UNGA, which could lay the basis not only for the development of customary standards but also for the possible adoption of a code of conduct regarding the UNSC's approach to the situations at issue:

<sup>227</sup> In this sense, see also Nußberger, *supra* note 18 at 137. The same approach is relevant also with regard to legitimizing armed action in third states unwilling or unable to combat non-state actors operating from within their territory (as in the case of the armed operations carried out by the international coalition against ISIS/Daesh targets in Syria), in which case the international/collective backing or endorsement would incidentally allow the ascertainment of a clear inability of the third state in question to prevent/counter the terrorist threats. See Daniel Bethlehem, "Self-Defense against an Imminent or Actual Armed Attack by Nonstate Actors" (2012) 106:4 Am J Intl L 769; Elizabeth Wilmschurst & Michael Wood, "Self-Defense against Nonstate Actors: Reflections on the 'Bethlehem Principles'" (2013) 107:2 Am J Intl L 390; Dapo Akande & Thomas Liefländer, "Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defense" (2013) 107:3 Am J Intl L 563; Dire Tladi, "The Nonconsenting Innocent State: The Problem with Bethlehem's Principle 12" (2013) 107:3 Am J Intl L 570; 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) 107:3 Am J Intl L 576; Daniel Bethlehem, "Principles of Self-Defense: A Brief Response" (2013) 107:3 Am J Intl L 579; IM Lobo de Souza, "Revisiting the Right of Self-Defence against Non-State Armed Entities" (2015) 53 Can YB Intl L 202; Franck Latty, "Le brouillage des repères du jus contra bellum: A propos de l'usage de la force par la France contre Daech" (2016) 120 RGDIP 11; François Alabrune, "Fondements juridiques de l'intervention militaire française contre Daech en Irak et en Syrie" (2016) 120 RGDIP 41; Tom Ruys, "Divergent Views on the Charter Norms on the Use of Force: A Transatlantic Divide?" (2015) 109 American Society Intl L Proceedings 67; Raphaël Van Steenberghe, "Les interventions militaires étrangères récentes contre le terrorisme international: Première partie: fondements juridiques (jus ad bellum)" (2015) 118 AFDI 145; Corten Olivier & Agatha Verdebout, "Les interventions militaires récentes en territoire étranger: vers une remise en cause du jus contra bellum?" (2014) 60 AFDI 135; Raffaella Nigro, "La risoluzione del Consiglio di sicurezza delle Nazioni Unite n. 2249 (2015) e la legittimità dell'uso della forza contro l'ISIS in base al diritto internazionale" (2016) 10 Diritti umani e diritto internazionale 137. For a critical analysis of states' practice and of their related statements, cf also Nowak, *supra* note 94 at 55 ff.

- *Principle 1*: a formal prohibition of intervention on either side once the threshold of low level unrest has been passed, which means that the prohibition of intervention, also in favour of the legitimate government, would apply not only to any situation qualifying as a civil war, whatever the level of intensity,<sup>228</sup> but also to those situations showing a clear and serious risk of escalating into civil war;<sup>229</sup> the prohibition would only exclude strictly speaking humanitarian assistance on the basis of the criteria that have been discussed earlier;<sup>230</sup>
- *Principle 2*: a formal obligation of the international community to cooperate with a view to containing and de-escalating the conflict and building up mediation efforts aimed at fostering political dialogue between the conflicting parties;<sup>231</sup>
- *Principle 3*: international/collective intervention options (as a last resort).

<sup>228</sup> Many Western authors have already supported the view that once actual civil war has started, foreign intervention is impermissible on either side (Roth, *Governmental Illegitimacy*, *supra* note 10 at 181), as did the Institut de droit international Resolution, *supra* note 13. A general non-intervention rule is also referred to as the “Negative Equality Principle,” that some sources consider as the most recent trend in scholarship. See namely “Report of the Independent International Fact-Finding Mission on the Conflict in Georgia Set up by the EU in 2008,” vol 2 (2009) at 277, online: <[http://www.mpil.de/files/pdf4/IIFFMCG\\_Volume\\_II1.pdf](http://www.mpil.de/files/pdf4/IIFFMCG_Volume_II1.pdf)>; cf Henderson, *Use of Force*, *supra* note 18 at 361, 367. Furthermore, according to Roth, “[a] government that is kept in power by foreign assistance ... is a problem even where foreign security assistance enables a government to prevent rebellion, snuff it out in its incipient stages, or keep it from rising to the level of insurgency.” Roth, *Governmental Illegitimacy*, *supra* note 10 at 197.

<sup>229</sup> According to the definition set out at the beginning of this article. The proposed non-intervention principle would thus have a broader scope than the worthy attempt made by the Institut de droit international Resolution, *supra* note 13, which did not refer to situations at risk of escalating into civil war.

<sup>230</sup> According to the Institut de droit international Resolution, *supra* note 13, financial or economic assistance should be prohibited insofar as it would be likely to influence the outcome of the conflict (art 2(2)(d)) — a criterion, however, that would be extremely difficult to apply in practice.

<sup>231</sup> Interestingly, the five principles for settling the Syrian crisis that were agreed upon between Russia and the League of Arab States on 10 March 2012 comprised “first, the end of violence on the part of all sides; secondly, an impartial monitoring mechanism; thirdly, no outside interference; fourthly, unimpeded access for humanitarian assistance to all Syrians; and, fifthly, strong support for Kofi Annan’s mission aimed at launching political dialogue between the Government and all opposition groups.” UNSCOR, 67th Sess, 6734th Mtg, UN Doc S/PV.6734 (2012) at 10. At the UNSC meeting of 21 April 2012, the representative of South Africa stressed that the deployment of the advance team of the observer mission in Syria (UNSMIS), set up by UNSC Resolution 2042 (2012), had already proved to be a calming influence, as violence had decreased in its presence. UNSCOR, 67th Sess, 6756th Mtg, UN Doc S/PV.6756 (2012) at 7. In the same sense, see also the statements by the representative of India at the same UNSC meeting (at 9). UNSMIS’s activities were nevertheless suspended in June 2012 owing to security concerns.

It must be stressed that these three guiding principles should work in combination. In particular, the first legal principle is the cornerstone of the entire construct: if the first principle were not strictly complied with, the second and third principles might well be unworkable (as the case of Syria tragically shows).<sup>232</sup> Of course, the principle might well be implemented legally through an arms and military equipment embargo imposed by the UNSC under Chapter VII of the *UN Charter*, as has already occurred in a number of cases (for example, with regard to Libya). However, this should not detract from the importance of affirming a general obligation not to intervene in the conflict in the situations referred to above, ahead of any possible decision by the UNSC, not least because a UNSC-imposed arms embargo may be late in obtaining the necessary political backing (as in the case of South Sudan, in spite of the officially stated need for an arms embargo)<sup>233</sup> or may be partial

<sup>232</sup> The UN-appointed mediator for Syria in the first half of 2012 (and former secretary-general of the UN), Kofi Annan, observed that “there was a contradiction between the Western powers’ support for his mediation and their simultaneous backing of one side in the conflict. He believed that momentum toward a political settlement had to build before the conditions would be right for Assad’s departure.” Quoted in “UN Mediation in the Syrian Crisis,” *supra* note 195 at 6.

<sup>233</sup> An arms embargo on South Sudan was only imposed on 13 July 2018 (UNSC Resolution 2428 (2018)), after nearly five years of fighting and mass atrocities. UNSC Resolution 2400 (2018), adopted on 8 February 2018, had reiterated the targeted sanctions already in place but had not gone as far as to impose a comprehensive arms embargo. In the Letter dated 12 April 2018 from the Panel of Experts on South Sudan addressed to the President of the Security Council, containing their final report on South Sudan, the Experts had clearly stated that in the absence of a UNSC-imposed arms embargo, member states were not prohibited from selling weapons to South Sudan, in spite of the fact that an arms embargo, which they recommended, would be “technically feasible and would have a positive impact on the political and security environment.” UN Doc S/2018/292 (12 April 2018) at 24–25, 31. Russia, backed by Angola within the UNSC, was reluctant to support an arms embargo on grounds that it “would be one-sided because it would be easier to enforce on the government.” Russia’s UN ambassador, quoted in “South Sudan Needs Arms Embargo; Leaders Killing Civilians – UN Panel,” *Reuters* (28 January 2016). This in spite of the fact that government security forces were held responsible for the vast majority of the violations of international humanitarian and human rights law (see UN Doc S/2018/292, *ibid* at 12). Furthermore, the Russian position in this case was in clear contradiction with the position Russia took in the case of Yemen, where it was in favour of imposing an embargo on all opposing parties and not just on the insurgents (see note 101 above). The United States and the EU had consequently adopted a unilateral arms embargo, and some other states had adopted self-imposed restrictions on arms sales to South Sudan (see UN Doc S/2018/292, *ibid* at 25, n 115, 7–8; cf also “Exclusive: U.S. to Impose Arms Embargo on South Sudan to End Conflict — Sources,” *Reuters* (2 February 2018); Colum Lynch, “U.S. Push to Halt Genocide in South Sudan Unravels at United Nations,” *Foreign Policy* (30 November 2016). On the problem of arms being diverted/re-transferred into South Sudan and the flow of arms fueling

and belated (as in the case of Yemen).<sup>234</sup> By analogy, the right to collective self-defence (Article 51 of the *UN Charter*) also exists irrespective of the possibility that the UNSC might decide to take action or back collective defensive action within the ambit of its mandate and powers under Chapter VII of the *UN Charter* (as happened, for example, following the Iraqi invasion of Kuwait in 1990).<sup>235</sup>

Any aid to one of two or more would-be or competing governmental authorities, based, for example, on counter-intervention, should consequently have explicit and unequivocal institutional/collective backing. It is worth stressing that an important corollary would be the prohibition also of counter-intervention, unless the latter responded to a qualitatively different threat to the legitimate government — that is, externally controlled or dispatched armed groups performing military actions amounting to armed attack on behalf of another state, in which case counter-intervention itself (again, if there is still a legitimate government) would take a different name — that is, collective self-defence.<sup>236</sup> This would require a demonstration, in particular, that the armed groups in question were “acting on the instructions of, or under the direction or control of” that other state.<sup>237</sup> In addition to the rationale of conflict minimization (bearing in mind the vicious circle counter-intervention usually generates),<sup>238</sup> not to speak of the difficult legal problems that counter-intervention raises anyway,<sup>239</sup> a further reason to exclude counter-intervention would be that allowing for such an additional exception, in an area of international law where manipulation by states is frequent and ensuring compliance with the rules proves particularly difficult, would offer states a relatively easy way to justify any intervention.<sup>240</sup>

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the conflict, see Robbie Gramer, “How European and Chinese Arms Diverted to South Sudan Fueled Its Civil War,” *Foreign Policy* (29 November 2018). At the beginning of the Syrian crisis, an arms embargo was advocated by Germany. UNSCOR, 67th Sess, 6711st Mtg, UN Doc S/PV.6711 (2012) at 5.

<sup>234</sup> See discussion earlier in this article.

<sup>235</sup> See, in particular, UNSC Resolutions 660 (1990) and 678 (1990).

<sup>236</sup> In this respect, see Roth, *Governmental Illegitimacy*, *supra* note 10 at 187. Only in these terms would we deem acceptable the counter-intervention exception provided for by Article 5 of the Institut de droit international Resolution, *supra* notes 13 and 39.

<sup>237</sup> Pursuant to *ARSIWA*, *supra* note 66, art 8.

<sup>238</sup> With regard to the new internal conflict then looming in Yemen, Peter Salisbury underlined that “if war does break out, their only hope of defeating a Saudi-backed coalition will be to lean even more heavily on Iranian support.” Salisbury, *supra* note 178 at 2.

<sup>239</sup> See discussion earlier in this article.

<sup>240</sup> In this respect, see also Ruys, “Of Arms,” *supra* note 35 at 46, 52.

As observed above, the exception (with regard to aid to the government) based on the need to fight terrorism is already prone to the risk of manipulation, so it is very important to keep this exception to the minimum, reflecting its very clear support in state practice and *opinio juris*, though with the safeguards that were mentioned earlier, without recognizing other controversial and manipulable exceptions that would inevitably jeopardize the basic non-intervention principle. And if there was a serious allegation of an externally supported insurgency against a given government or the need to support a democratically elected government, the response should again be at an international/collective level, pursuant to the second and third principles above. In other words, it should be left to the UN or regional security systems, such as the African Union, to decide to counter-intervene on behalf of a legitimate government, if and when necessary to safeguard international or regional peace and security. Otherwise, the basic prohibition of any unilateral counter-intervention (that is, not explicitly authorized at the collective level) should invariably apply. Yemen offers an instructive example since, before unilateral intervention on behalf of the ousted government of President Hadi, the UNSC had urged “the Yemeni Government to pass legislation on transitional justice to support reconciliation without further delay” and had actually envisaged collective action (under Article 41 of the *UN Charter*) had actions aimed at undermining the government of National Unity and the political transition continued.<sup>241</sup>

Consequently, aid to the government (whether in reaction to an illegal intervention not amounting to an armed attack or, for example, to counter violent secessionist attempts that would be deemed unacceptable by the international community) would become permissible only with some sort of international institutional backing (and, presumably, upon invitation by the legitimate government), be it the UNSC or a regional security organization.<sup>242</sup> It must be stressed, in this regard, that the most recent practice does indeed show that in several cases states intervening on behalf of a legitimate government (especially where the

<sup>241</sup> “Statement of the President of the UNSC,” UN Doc S/PRST/2013/3 (15 February 2013).

<sup>242</sup> These two exceptions (clearly established terrorist threats and/or forcible interventions on behalf of the legitimate government authorized by the UNSC or a regional security organization) would in our view override the criticism of what has been labelled a “strict-abstentionist” approach, for example, by Lieblich, *supra* note 39 at 130–40. It is also worth stressing that, after all, “forcible or armed activities undertaken by an inter-governmental organization following an invitation by a legitimate government ... are the most wide-spread example of such interventions in the contemporary world.” Hafner, *supra* note 2 at 256 (comments by Abdulqawi Ahmed Yusuf); in this latter regard, cf also Lieblich, *supra* note 39 at 30–37.

latter is in a precarious situation) have sought the support of international security organizations, beginning with the UNSC.<sup>243</sup>

With respect to the second principle, a purpose-oriented obligation to cooperate (short of including an obligation to achieve a result, which would obviously be impossible in this case) is definitely conceivable under international law. For example, Article 41, paragraph 1, of *ARSIWA* provides that “[s]tates shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40” (that is, a serious breach of obligations under peremptory norms of general international law, as defined by paragraph 2 of the latter provision). In other words, the purpose of the proposed obligation would be to trigger early and coordinated international pressure in favour of political dialogue, building up mediation efforts and pursuing a political solution to the conflict, particularly through international organizations.<sup>244</sup> Once again, the principle of non-intervention in favour of any of the parties would be conducive to facilitating implementation of this principle. When he left his post as joint special envoy for Syria, Kofi Annan said that “(o)nly a united

<sup>243</sup> See Henderson, *Use of Force*, *supra* note 18 at 356; Magi, *supra* note 20 at 561. Mamady Traore and Louis Balmond consider that the 2013 French intervention in Mali fulfilled, in particular, the objectives laid down in previous UNSC resolutions concerning the fight against terrorism and merely anticipated, in an emergency situation, collective action. See Mamady Traore & Louis Balmond, “A propos des fondements juridiques de l’opération ‘Serval’” (2013) 117 *RGDIP* 150. UNSC Resolution 2100 (2013) subsequently authorized French troops “to intervene in support of elements of MINUSMA when under imminent and serious threat upon request of the Secretary-General” (at para 18). Furthermore, even if he concludes that the legal basis for the French intervention was the invitation of the Malian transitional government, Massimo Starita stresses the legal relevance of the UNSC resolutions in the context of which the intervention took place. Massimo Starita, “L’intervento francese in Mali si basa su un’autorizzazione del Consiglio di Sicurezza?” (2013) 96 *Rivista di diritto internazionale* 561.

<sup>244</sup> Interestingly, at the UNSC meeting of 30 August 2012 on Syria, the UN deputy secretary-general stated that “Member States with influence on the Syrian Government or the opposition forces have an *obligation* to end the killing and promote a peaceful resolution of the conflict.” UNSCOR, 67th Sess, 6826th Mtg, UN Doc S/PV.6826 (2012) at 3 [emphasis added]. At the UNSC meeting of 23 April 2012, Lynn Pascoe, UN under-secretary-general for political affairs, stressed that the objective was “clearly not to freeze the situation but to create the conditions for a serious and credible political process.” UNSCOR, 67th Sess, 6757th Mtg, UN Doc S/PV.6757 (2012) at 2. It has been observed that multilateral (especially UN) rather than unilateral intervention is also better suited to lead to positive results in terms of postwar development. Ki Kim, *supra* note 188 at 636. Roth notes that “[t]he end of the Cold War, in addition to eliminating the most prominent source of ideological polarization in the international community, occasioned a role for international organizations in the resolution of civil conflicts previously fueled by superpower competition”; he also underlines the fact that negotiated solutions often included electoral frameworks and provisions for international organizations to serve as guarantors of electoral fairness. See Roth, *Governmental Illegitimacy*, *supra* note 10 at 322.

international community can compel both sides to engage in a peaceful political transition. But a political process is difficult, if not impossible, while all sides — within and without Syria — see opportunity to advance their narrow agendas by military means.”<sup>245</sup>

The third principle refers to the issue of possible international/collective intervention options.<sup>246</sup> Whether an intervention would be required, what sort of intervention (international observers, use of force to protect the civilian population, classical/robust/aggressive peacekeeping, peace enforcement, and so on), with what aims, and under what conditions would of course depend on careful assessment of the circumstances of each particular case and the political context, particularly within the UNSC. However, in policy terms, any international intervention option should be tested against two crucial priorities: first, the protection of the civilian population (which was in fact the explicit core objective of the military intervention in Libya) and, second, a well-founded expectation that the planned intervention would prevent further deterioration of the situation, which also implies that it should occur as early as apparently necessary to avoid an escalation of the conflict and the likely ensuing massive suffering for the civilian population. Furthermore, any planned intervention should also aim at contributing to conditions that would boost agreement on transition, reform, better power sharing, or whatever would be needed in the specific circumstances of each case, and, in particular, any decision to resort to armed force should be based on strong and particularly well-founded considerations that failing to take armed action would most likely result in the conflict spreading/worsening and/or in a significant increase in suffering for the civilian population.<sup>247</sup>

<sup>245</sup> Quoted at the UNSC meeting of 22 October 2013. UNSCOR, 68th Sess, 7047th Mtg, UN Doc S/PV.7047 (2013) at 26.

<sup>246</sup> Always bearing in mind, as observed by Michael Wood, that “experience suggests that collective decisions (whether for action or inaction) are almost invariably better than unilateral ones.” Michael Wood, “International Law and the Use of Force: What Happens in Practice?” (2013) 53 *Indian J Intl L* 345 at 366.

<sup>247</sup> Which corresponds to one of the key elements of the 2001 report drafted by the Canadian International Commission on Intervention and State Sovereignty (ICISS), which laid down the basis for the responsibility to protect principle. ICISS, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Center, 2001), online: <<http://responsibilitytoprotect.org/ICISS%20Report.pdf>>. The latter principle, adopted in 2005 in the World Summit Outcome, did not, however, include this element with regard to resorting to collective action, through the UNSC, “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.” 2005 *World Summit Outcome*, UNGA Resolution 60/1, UN Doc A/60/49 (2005), vol 1, para 139. On the thorny issue as to whether or not military intervention in Syria would have been a useful option, cf, for example, Niamh O’Sullivan, “The Moral Enigma of an Intervention in Syria: A Just War Analysis,”

In other words, the underlying logic of this last principle is, in short, to freeze the conflict, deter the parties from resorting to violence and favour a negotiated transition process (which, incidentally, is best suited to producing lasting results in terms of developing a democratic and human rights-based state framework),<sup>248</sup> while, at the same time, taking the necessary measures to deter/counter a disproportionate use of force against the civilian population — in particular, the commission of large-scale international crimes or gross human rights violations. The importance of this point is also linked, as previously observed, to the fact that the use of such an amount of force against the civilian population is one of the key factors contributing to the escalation of an internal conflict.<sup>249</sup>

Since prevention, deterrence, or early reaction to large-scale international crimes or massive human rights violations is one important component of the principle of conflict minimization, we are apparently left with the highly critical and much debated issue of what to do should the UNSC be unable or unwilling to take action.<sup>250</sup> Even though we cannot cover the issue in depth here, some key remarks are nevertheless necessary.

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IAI Working Papers 1222 (2012); Micah Zenko, “A No-Fly Zone Doesn’t Mean a No-War Zone,” *Foreign Policy* (6 September 2016). In 2016, fifty-one US State Department officials signed a document dissenting from Obama’s Syria policy; in this regard, see, *inter alia*, Frederic C Hof, “A Humanitarian Intervention in the West Wing,” *Foreign Policy* (20 June 2016); David E Sanger, “Kerry Meets with State Dept. Dissenters Urging Action on Syria,” *New York Times* (21 June 2016).

<sup>248</sup> The words of the minister for foreign affairs and cooperation of Mauritania at the UNSC meeting of 15 June 2011, on behalf of the visiting ministerial delegation of the African Union Ad Hoc High-Level Committee on Libya, appear particularly far-sighted: “We are here today to reassure the Council of our commitment to an inclusive political solution that will enable Libyans to agree on an approach that is as consensual as possible to meet their aspirations for democracy, the rule of law and respect for human rights. ... We are here to say to the Council how important it is that such a process be conducted and owned by all Libyans and that it include mutual concessions as part of a dialogue without predetermined conditions. Its outcome should be that the democratization of their country is the result of their own efforts and the consensus they arrive at. Experience has shown us time and time again that this is a precondition for lasting democratic change, as well as to ensuring that there is no reason for the fratricidal upheaval that is tearing Libya apart to continue.” UNSCOR, 66th Sess, 6555th Mtg, UN Doc S/PV.6555 (2011) at 4–5. Interestingly, Patrick M Regan and Aysegul Aydin observe that “interventions that have an explicit focus on conflict management are more likely to be effective at stopping the violence than those that focus on manipulating the structural conditions, such as relative capabilities.” Regan & Aydin, *supra* note 187 at 754.

<sup>249</sup> See discussion earlier in this article.

<sup>250</sup> See, *inter alia*, Elena Sciso, “I crimini in Siria, la Responsibility to Protect e l’esercizio del veto nel Consiglio di Sicurezza” in Natalino Ronzitti & Elena Sciso, eds, *I conflitti in Siria e Libia. Possibili equilibri e le sfide al diritto internazionale* (Torino: G Giappichelli, 2018) 21; Christian Henderson, “The Centrality of the United Nations Security Council in the Legal Regime Governing the Use of Force” in Nigel D White & Christian Henderson,



The issue concerns primarily the (last) resort to forcible measures, given that the adoption of restrictive measures of another kind by organizations other than the UN does not raise major issues (the EU, for example, has adopted non-controversial restrictive measures targeting the Syrian governmental military structure as well as that of Myanmar and Venezuela), although the combined political and economic pressure of which the UNSC is capable has no equal in terms of authority, legitimacy, and efficacy.

In regard to the use of force in those instances where the UNSC is unwilling or unable to decide, possibly because of one or more vetoes, we do not argue in favour of an unconditional legal right of humanitarian intervention for individual states or “coalitions of the willing,” which is too controversial and, as such, unsupported by the necessary critical mass of practice and *opinio juris*. Nor do we intend to become entangled in the “illegal but necessary/legitimate” argument; any unilateral course of action carries with it an inevitable potential for incoherency and double standards, let alone the risk of encouraging unilateral actions by others elsewhere. Unilateral forcible action for humanitarian purposes does not comply with the widely recognized legal framework based on the UN collective security system, it is very hard to justify (indeed, states have often refrained from providing any legal justification in such cases)<sup>251</sup> and, therefore, pertains to the realm of power politics.<sup>252</sup>

From a legal perspective, two main orientations emerge from the current debate: first, the possibility for the UNGA, taking into account its larger representativeness, to step in and to recommend to member states the adoption of forcible measures, based on the well-known precedent of the “uniting for peace” resolution and/or, second, the possibility for action to be taken by a regional organization that is competent to act in the relevant region.<sup>253</sup> With respect to the first option, even though the UNGA openly voiced its criticism *vis-à-vis* the UNSC for its inaction with regard

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eds, *Research Handbook on International Conflict and Security Law: Jus ad Bellum, Jus in Bello and Jus post Bellum* (Cheltenham, UK: Edward Elgar, 2013) 148; cf also Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge, UK: Cambridge University Press, 2011); Jeff L Holzgrefe & Robert O Keohane, eds, *Humanitarian Intervention. Ethical, Legal and Political Dilemmas* (Cambridge, UK: Cambridge University Press, 2003).

<sup>251</sup> In the context of the 1999 intervention in Kosovo and elsewhere, see Henderson, *Use of Force*, *supra* note 18 at 393ff, 401ff, and the literature therein.

<sup>252</sup> The ICJ's words in the *Corfu Channel* judgment are still illuminating in this regard. *Corfu Channel (United Kingdom v Albania)*, [1949] ICJ Rep 4 at 35.

<sup>253</sup> Both options had already been put forward by the Canadian ICISS, although the ensuing developments (the 2004 report of the High-Level Panel on Threats, Challenges and Change, the response of the UN secretary-general, and the position taken by states through the 2005 World Summit Outcome Document) upheld the existing collective security system based on the UNSC's central role. See Thomas G Weiss, “Humanitarian Action and Intervention,” in Einsiedel, Malone & Stagno Ugarte, *supra* note 8, 217 at 224ff.

to the Syrian crisis,<sup>254</sup> going as far as to recommend military action would have been a wholly different story. This is because it would have most likely reproduced — and probably magnified and aggravated — the rifts that blocked the UNSC from acting in the first place.<sup>255</sup> As one scholar put it, such a course of action might have triggered a constitutional crisis within the UN.<sup>256</sup> Furthermore, there would also have been a competence issue.<sup>257</sup>

The second option appears to be a more feasible one, given some interesting precedents, especially in Africa, where the UNSC subsequently endorsed the regional organization's action aimed at stopping mass atrocities.<sup>258</sup> Problems, however, arise in this area as well. In the first place, Article 53 of the *UN Charter* provides that “no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council,” so the UNSC should approve, at least at some later stage, the initiative taken by a regional organization on condition that the latter produces positive results from a humanitarian perspective (which implies the need that this doctrine be further and properly framed). Besides, a regional organization with enforcement tools might not exist for the relevant region (there is no comparison, for example, between the collective security architecture in Africa and the lack of anything of the sort in the Middle East) or it might likewise be unable or unwilling to act.

Consequently, however appealing these options might be, the fact is that the first one does not provide a reliable and safe alternative and the second one does not in any case replace the mechanism centred upon the UNSC. Therefore, they should not divert our attention from the fundamental question, which should rather be how to foster conditions enhancing the UNSC's capability to effectively react to a brutal government that risks plunging its country into civil war with dire humanitarian consequences

<sup>254</sup> See note 221 above.

<sup>255</sup> Salman Shaikh and Amanda Roberts note that “[a]n effort by Arab states to have the General Assembly invoke the ‘Uniting for Peace’ formula — whereby the General Assembly should take action when the P5 are deadlocked — was successfully discouraged by the P3” — that is, the United States, the United Kingdom, and France. Shaikh & Roberts, *supra* note 8 at 723.

<sup>256</sup> Nigel D White, *Advanced Introduction to International Conflict and Security Law* (Cheltenham, UK: Edward Elgar, 2014) at 75–77; it is very doubtful whether such a constitutional crisis would be beneficial to the UN or would instead have dangerous and unpredictable disruptive effects.

<sup>257</sup> The UNGA could only recommend forcible measures with regard to breaches of the peace or acts of aggression. See Henderson, *Use of Force*, *supra* note 18 at 400.

<sup>258</sup> In particular, the Economic Community of West African States's interventions in Liberia and Sierra Leone. See Shaw, *supra* note 3 at 977–79; Henderson, *Use of Force*, *supra* note 18 at 391–93.

and possibly a spillover effect threatening regional peace and security, which completely falls under the UNSC's mandate in light of its post-Cold War practice. A brutal reaction by a government confronted with a popular uprising must thus be deterred or countered in a timely manner, and the UNSC is the key competent body in this regard. This could be done either by taking direct action (the use of force being, once again, only a measure of last resort depending on the circumstances) or possibly by approving *ex post* any urgent forcible humanitarian measure that might have been taken by the relevant regional security organization. We concede that a certain degree of selectivity, with regard to both if and how to take action, is inherent in the UNSC's decision-making.<sup>259</sup> Furthermore, as we have already mentioned above, there is undeniably a whole range of difficult choices to make when tackling civil wars or internal conflict-risk situations. It nevertheless appears that when it comes specifically to mass atrocities and possibly gross human rights violations committed, *inter alia*, by a brutal regime, selectivity is no longer an acceptable option (as the wide support for the code of conduct regarding the UNSC's action against genocide, crimes against humanity, and war crimes seems to suggest).<sup>260</sup>

Fostering the conditions enabling the UNSC to take action (whatever that means in the concrete circumstances of each case) calls for a strong commitment in four areas. First, there must be cooperation and mutual trust among the UNSC's permanent members. The UNSC is made up of political actors, so these two ingredients are critical for its effectiveness, and with a view to confining the exercise of the veto power to exceptional cases. Those two ingredients are in turn highly dependent on the permanent members showing self-restraint and taking international law very seriously; Iraq in 2003, Libya in 2011, Eastern Ukraine as of 2014, Syria, and the South China Sea dispute in the last decade are all major instances in which the five permanent members did not live up — to put it mildly — to the highest responsibilities and powers that were entrusted to them by the drafters of the *UN Charter*.<sup>261</sup> Unilateral, highly controversial (or plainly illegal) action by a permanent member produces shocks that sooner or later will — no doubt — have grave repercussions elsewhere:

<sup>259</sup> See Roberts, *supra* note 8 at 349ff, especially 365–69.

<sup>260</sup> See discussion earlier in this article and note 221 above.

<sup>261</sup> Although, in a more specific context, it is nevertheless interesting to note that in their joint political statement on the suspension of the veto in case of mass atrocities, presented on the occasion of the seventieth session of the UNGA, the governments of France and Mexico evoked a similar concept of “responsibility” within the UNSC and underscored that the so-called “veto power” “is not a privilege but an international responsibility.” “Political Statement on the Suspension of the Veto in Case of Mass Atrocities” (1 October 2015), online: <<http://responsibilitytoprotect.org/ACT%20English.pdf>>.

“[T]out se tient” (“all is connected”).<sup>262</sup> Second, codes of conduct must be adopted. The above-mentioned code of conduct regarding the UNSC’s action against genocide, crimes against humanity, and war crimes is a starting point, but one could well imagine a code of conduct also on handling civil wars and internal conflict-risk situations, stemming from the resolution of the UNGA proposed above. Third, the UNSC’s working methods must continue to be improved, in particular, by broadening the UNSC’s consultative processes and enhancing its cooperation with regional organizations,<sup>263</sup> ahead of any possible reform of the UNSC’s composition.<sup>264</sup> Fourth, there must be clear and consistent support, along these lines, from international civil society (including scholars).

In conclusion, there is a pressing need for a legal and policy approach to civil wars and conflict-risk situations that follows a broad conflict-prevention/minimization approach and that goes well beyond the “traditional,” but, in reality, obsolete and inadequate, pattern of unilateral aid to governments or insurgents.

<sup>262</sup> Antoine Meillet, *Introduction à l'étude comparative des langues indo-européennes* (Paris: Librairie Hachette, 1903) at x [translation by the author].

<sup>263</sup> See Roberts, *supra* note 8 at 369.

<sup>264</sup> See Christian Wenaweser, “Working Methods: The Ugly Duckling of Security Council Reform” in Einsiedel, Malone & Stagno Ugarte, *supra* note 8, 175 at 189.