INTERNATIONAL DECISIONS

EDITED BY HARLAN GRANT COHEN

Fight against ISIS/Daesh—self-defense against nonstate actors—German constitutional law—deployment of troops—parliamentary control—collective security

DIE LINKE V. FEDERAL GOVERNMENT AND FEDERAL PARLIAMENT (*COUNTER DAESH*), Order of the Second Senate. *At* https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2019/09/es20190917_2bve000216en.html.
Federal Constitutional Court, September 17, 2019.

By a September 17, 2019 Order (Order), the German Federal Constitutional Court (FCC or Court) rejected challenges to Germany's military involvement in anti-Islamic State of Iraq and Syria (ISIS) operations in Syria.[1] This outcome was expected and was as such insignificant. What is significant is the FCC's reasoning. The Court used the Order to clarify the constitutional roles of parliament and the executive in German foreign affairs. And it included an intriguing pronouncement on the scope of Article 51 of the UN Charter, which adds a fresh perspective to the polarized debates about self-defense against nonstate actors.

The case concerned the participation of German troops in anti-ISIS operations following the terrorist attacks in Paris on November 13, 2015. Those attacks prompted France to invoke the mutual defense clause of Article 42(7) of the Treaty on European Union (TEU), pursuant to which all other EU members are to render states suffering armed attacks "aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter."[2] On November 20, the UN Security Council, in Resolution 2249 (SC Res. 2249),

> call[ed] upon . . . all [UN] member States that have the capacity to do so to take all necessary measures, in compliance with international law, in particular with the United Nations Charter, as well as international human rights, refugee and humanitarian law, on the territory under the control of ISIL also known as Da'esh.[3]

On December 1, 2015, the German government authorized the deployment of 1,200 soldiers (*Operation Counter Daesh*), citing as legal bases Article 51 of the UN Charter, Article 42(7)

[1] The Order—including an official translation into English—is available on the FCC's website: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2019/09/es20190917_2bve000216.html. References in the following are to the FCC's translation. English-language versions of the relevant German legislation are at https://www.gesetze-im-internet.de/Teilliste_translations.html.

[2] Treaty on European Union, Feb. 7, 1992.

[3] SC Res. 2249 (2015).

https://doi.org/10.1017/ajil.2020.35 Published online by Cambridge University Press

TEU, and SC Res. 2249. Under German constitutional law, this authorization required legislative approval, which the federal parliament (*Bundestag*) gave on December 4, 2015. On December 10, 2015, Germany notified the UN Security Council that its actions were directed against Daesh, not Syria, and invoked Article 51 of the UN Charter.[4]

In early 2016, the parliamentary bloc of the left-wing party *Die Linke* challenged the deployment decision before the FCC. *Die Linke* sought a declaration that, by approving the deployment, the government and parliament had violated participatory rights of the parliament. The claim may appear peculiar: a parliamentary bloc brings proceedings to defend rights of the *Bundestag*, even though the same *Bundestag* itself had approved the deployment. However, such claims are standard practice in German constitutional law. The German Constitution—the "Basic Law" of 23 May 1949—expressly envisages FCC decisions in such disputes between the federal constitutional organs (*Organstreit* proceedings) about the scope of their rights.[5] Importantly, in such proceedings, parliamentary groups have vicarious standing to defend rights of the *Bundestag* (paras. 25–26).

The peculiar procedural setting narrowed the scope of the FCC's inquiry. The FCC did not assess the legality of the deployment decision as such, but only scrutinized whether participatory rights of the *Bundestag* had been violated. As a result, this case primarily concerned the interplay of legislative and executive powers in Germany's foreign (military) affairs.

Framed this way, the case turned on the Basic Law's restrictive regime governing troop deployments abroad. Unlike other constitutions, the Basic Law—as a "peace constitution"[6]—permits such deployments only for defensive purposes (Article 87a(2) of the Basic Law) and, under Article 24(2), "within the framework and in accordance with the rules of a system of mutual collective security" (para. 37).[7] As the first ground was not invoked[8] (perhaps owing to uncertainties about what qualifies as a defensive measure), the key question was whether *Operation Counter Daesh* came within the scope of Article 24(2)'s collective security clause. The government pointed to two collective security systems—that of the UN Charter and that of the European Union. Both the UN Charter and the TEU had been approved by parliamentary "consent statutes" prior to Germany's ratification, as required by Article 59(2) of the Basic Law. According to the government, the *Bundestag* therefore already had its say—which in its view was sufficient to meet the participatory rights of parliament.[9]

The parliamentary bloc of *Die Linke* challenged this approach on two grounds. First, it claimed that *Operation Counter Daesh*, as a unilateral measure, could not be justified under the collective security clause of Article 24(2) of the Basic Law and had no basis in any prior

[4] Letter Dated 10 December 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Germany to the United Nations Addressed to the President of the Security Council, UN Doc. S/2015/946 (Dec. 10, 2015).

[5] Pursuant to Article 93(1) of the Basic Law, "[t]he Federal Constitutional Court shall rule . . . on the interpretation of this Basic Law in the event of disputes concerning the extent of the rights and duties of a supreme federal body." *See* DONALD P. KOMMERS & RUSSELL A. MILLER, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 14–15 (3rd ed. 2012).

[6] Russell A. Miller, *Germany's Basic Law and the Use of Force*, 17 IND. J. GLOB. LEG. STUD. 197, 197 (2010).

[7] Article 24(2) provides: "With a view to maintaining peace, the Federation may enter into a system of mutual collective security."

[8] *See* note 17 *infra*.

[9] According to Article 59(2) of the Basic Law, "[t]reaties that regulate the political relations of the Federation . . . shall require the consent . . ., in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law." Kommers and Miller, note 5 *supra*, speak of a parliamentary "consent act" (310); in the following, "consent statute" is used—to clarify that Article 59(2) requires a proper parliamentary statute.

https://doi.org/10.1017/ajil.2020.35 Published online by Cambridge University Press

parliamentary consent statute. A new statute, not a simple decision, was thus required to ensure troops could be deployed at all (para. 41). Second, in the alternative, the applicant argued that the deployment had overstretched the limits of existing collective security systems, notably by "fundamentally . . . chang[ing] the framework of rights and obligations under the United Nations Charter." It was therefore not covered by the *Bundestag*'s prior consent statute, but *ultra vires* (paras. 45–46).

The FCC gave short shrift to the first argument. It noted that under Article 59(2) of the Basic Law, a parliamentary consent statute was required to ratify a new treaty. A new consent statute was also required if the framework of an existing treaty was "fundamentally . . . changed" (as per the applicants' second argument). However, Article 59(2) did not operate in the absence of a treaty. In the peculiar setting of an *Organstreit*, parliament's participatory rights under Article 59(2) were simply not implicated (paras. 42–43).

The second argument required a fuller analysis. The FCC had to determine under which circumstances deployment decisions were *ultra vires.* This question had arisen before,[10] but the FCC used the Order to clarify the respective roles of parliament and government in foreign affairs. It began by noting the importance of legislative consent, without which Germany simply could not join systems of collective security; this, it noted, "safeguards the specific function of the legislative bodies in the context of foreign affairs" (para. 32). However, the remainder of the reasoning gave effect to the executive's otherwise "wide latitude" in foreign affairs (para. 37). While parliamentary approval was not a one-off decision, the implementation and further development of the treaty was in principle in the hands of the executive. This was also true where a collective security system underwent significant changes in the course of its lifetime. In the normal run of events, parliament did not have to renew its consent. In fact, only in two settings would implementation decisions be *ultra vires* (and thus require a new consent statute): if they contravened basic features of the treaty and thus broke with its original "political agenda"; or if they undermined the collective security system's commitment to maintaining peace (paras. 36–38).

These were high hurdles, and they became higher still because the FCC recognized limits to its own judicial scrutiny. The Court considered it sufficient for the executive to make a "tenable case" that a certain deployment decision came within the scope of a collective security system: "not every breach of individual treaty provisions necessarily means that the Federal Government has acted outside the scope of authorisation conferred by the act of approval to the treaty . . . . [T]he constitutional review is in principle limited to determining whether [the executive's] understanding exceeds tenable limits" (paras. 37, 46).

These general findings set the tone for the FCC's assessment of *Operation Counter Daesh*, which, predictably, could "tenably" be tied back to two systems of collective security. One was the system of mutual defense of the European Union, as envisaged in Article 42(7). The FCC thought at least a tenable case could be made that the EU qualifies as a system of collective security, and nothing more was required. If so, the TEU's mutual defense clause,

[10] See notably the *New Strategic Concept* judgment (2001) (English translation at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2001/11/es20011122_2bve000699en.html); and the *Tornados* judgment (2007) (English translation at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2007/07/es20070703_2bve000207en.html).

https://doi.org/10.1017/ajil.2020.35 Published online by Cambridge University Press

agreed in 2007, could be read to permit self-defense against armed attacks by terrorists (paras. 52–53).

Did *Operation Counter Daesh* also come "within the framework" of the UN's collective security system, and was it "in accordance with [its] rules" (*cf.* para. 32)? This question prompted the FCC to offer a surprisingly detailed assessment of the Charter regime governing recourse to force. The Order briefly mentioned SC Res. 2249, which might "provid[e] a sufficient basis" for the deployment of troops. However, the FCC's real concern was with the scope of self-defense under the Charter. In fact, the Court went out of its way to hold that Article 51 could "tenably" be read to permit measures of self-defense against armed attacks by nonstate actors.

Its pronouncement can be summarized in three steps, which deserve to be quoted extensively: First, according to the FCC, "there has never been complete consensus regarding the normative contents of Art. 51 of the UN Charter nor regarding a possible corresponding norm of customary international law" (para. 49). "To the contrary," the FCC explained, "since its adoption, this provision has been the subject of various disputes as to its correct interpretation, including whether it can be invoked against attacks by non-state actors" (*id.*). Second, textual and purposive arguments suggest Article 51 permits self-defense against attacks by nonstate actors:

> [T]he wording of Art. 51 of the UN Charter does not preclude an interpretation that recognises non-state actors as possible aggressors for the purposes of this provision. Nor does its wording give rise to an absolute prohibition on self-defence measures adversely affecting third parties, for instance states from whose territory non-state actors operate. This broad interpretation of Art. 51 of the UN Charter . . . does . . . not contravene the object and purpose of the provision [which] [u]ltimately aims to ensure that UN Member States . . . remain capable of defending themselves against attacks, regardless of the aggressor. (Para. 50)

And *third,* the existing International Court of Justice (ICJ) jurisprudence does not preclude such a reading:

> It is true that the ICJ generally tends to interpret Art. 51 of the UN Charter restrictively in its decisions, finding self-defence measures against a state in response to acts of aggression by non-state actors to be permissible only if these acts are attributable to the affected state. . . .[11] However, in more recent decisions the ICJ has avoided any clear determination on this issue. . . .[12] Moreover, the ICJ has yet to decide whether the restrictive interpretation of Art. 51 of the UN Charter also applies in the event that the right of self-defence is not directly invoked against the affected state, but against non-state actors operating from that state's territory.[13] (Para. 51)

[11] *Citing* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 ICJ Rep. 14, paras. 115, 195 (June 27); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Opinion, 2004 ICJ Rep. 136, para. 139 (July 9).

[12] *Citing* Armed Activities on the Territory of Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 ICJ Rep. 168, para. 147 (Dec. 19).

[13] *Citing Armed Activities*, Separate Opinions of Judges Kooijmans and Simma, *supra* note 12; *Wall*, Declaration of Judge Buergenthal, *supra* note 11.

https://doi.org/10.1017/ajil.2020.35 Published online by Cambridge University Press

It is worth reiterating that the FCC did not have to assess whether *Operation Counter Daesh* was lawful. Given its "wide latitude" in foreign affairs matters, the government merely had to make out a "tenable" case. This test had been met; and since the applicant's claim therefore stood no chance of success, its challenge against *Operation Counter Daesh* could be dismissed in the form of an Order, without an oral hearing.

* * * *

The FCC's September 17, 2019 Order highlights the interplay between domestic and international law arguments in foreign (military) affairs. It also illustrates the significance of domestic courts as agents of international legal development. Viewed as a foreign relations law decision, the Order finetunes the German Basic Law's regime governing troop deployments. It is unsurprising that such finetuning should remain important. The regime is still relatively young; only in the early 1990s did (the by then unified) Germany begin to participate in forcible enforcement missions abroad; and only in 1994 did the FCC, in its landmark judgment in the *AWACS I* case, decide that this nascent practice was compatible with the Basic Law.[14] Over the course of the past quarter-century, the regime has been shaped through a series of FCC decisions, which have defined key parameters, among them: the need for parliament to approve deployments; the proper understanding of the term "deployment" in borderline cases; the focus on collective security systems within which Germany has typically deployed troops; and the reach of parliamentary control where collective security systems change over time.[15]

The September 17, 2019 Order is inscribed in this quarter-century of constitutional jurisprudence and accentuates it in two respects. First, affirming earlier decisions, the Order clarifies how parliament can become involved in decisions to deploy German troops. The FCC's emphasis was on executive discretion, which limits the right of the *Bundestag* (or one of its parliamentary blocs) to exercise continued control over Germany's involvement in collective security systems. However, that limitation leaves intact parliamentary control over each particular troop deployment. The German government possesses no executive "war powers" or other military prerogative; every deployment must pass the *Bundestag*. By emphasizing the importance of this parliamentary approval, but also the executive's "wide latitude" (para. 37) in shaping foreign treaty relations, the Order reflects a curious feature of the German regime. In the words of Anne Peters: "Normally the legislature sets the general rules and the executive implements them [in concrete cases]. With regard to foreign military engagement, Parliament has been kept . . . from setting the [general] rules in the form of developing [collective security systems], and instead now decides on concrete cases of deployment."[16]

Second, the Order construes the Basic Law's collective security clause very broadly, which may, in turn, open up the constitutional regime governing troop deployments. To reiterate: under the Basic Law's framework, German troops can only be deployed abroad for defensive purposes, or "within the framework and in accordance with the rules of a system of mutual

[14] AWACS I, Judgment of the Second Senate of 07 May 2008, 2 BvE1/03 (BverfG 1994) (Ger.) (English translation in 106 *International Law Reports* 319 (1997).

[15] For a detailed analysis of the FCC's relevant jurisprudence, see, e.g., Anne Peters, *Between Military Deployment and Democracy: Use of Force Under the German Constitution*, 5 J. USE FORCE & INT'L L. 246, 249–61 (2018).

[16] *Id.* at 282.

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collective security" (para. 37). In German constitutional discourse since 1994, decisions on troop deployment have turned on the proper reading of the collective security clause. The September 17, 2019 Order is no exception, even though the link between *Operation Counter Daesh* and collective security systems seemed rather remote: in its letter to the Security Council, Germany itself had invoked self-defense.[17] The mutual defense clause of Article 42(7) was part of a multilateral treaty, but the EU never took a formal (collective security) decision to activate the mutual defense mechanism. Finally, SC Res. 2249 did call upon states to take measures against Daesh, but it was not adopted under Chapter VII, and therefore could not justify forcible measures as a matter of international law.[18]

The FCC was unperturbed and, notwithstanding the remoteness of the links, viewed *Operation Counter Daesh* through the prism of Article 24(2) of the Basic Law.[19] Its willingness to grant wide latitude to the executive helped in this respect. However, the Order may also reflect a highly pragmatic interpretation of the collective security clause. Perhaps the FCC considered it sufficient that Germany acted with *some* measure of UN support—even where the particular measures adopted by the UN, in and of themselves, did not authorize recourse to force. Perhaps the Court considered *Operation Counter Daesh* to be a form of "legitimized self-defense," [20] somewhere between collective security and coordinated private conduct. What seems clear, however, is that following the FCC's September 17, 2019 Order, the collective security clause of Article 24(2)—as the main gateway toward troop deployments under German constitutional law—appears to be very broad.

This leaves the Court's pronouncement on self-defense. In the framework of an Order focused on foreign relations law, it appeared almost as a long afterthought—and one that merely tested whether the government had made out a "tenable case." But notwithstanding these caveats, it is likely to be of the greatest interest to international lawyers. It deserves such interest, for three reasons: (1) because of the significance of the debate on self-defense; (2) because the FCC's pronouncement lends judicial support to some of the prominent normative claims in that debate; and (3) because it broadens the argumentative spectrum in at least one significant respect.

The first reason is straightforward. Over the course of the last few decades, self-defense against nonstate actors has become a major issue for international lawyers.[21] Dozens of states have relied on self-defense to justify forcible military measures against nonstate groups based in a foreign country. Significant groups of states, while willing to tolerate individual uses of force, have sought to prevent normative drift and emphasized the limits of self-defense. The

[17] Given the prominence of self-defense arguments, there would have certainly been room to present *Operation Counter Daesh* as a "defensive measure" in the sense of Article 87a(2) of the Basic Law. However, both applicant and respondents argued on the basis of Article 24(2)'s collective security clause.

[18] *See, e.g.*, Olivier Corten, *The Military Operations Against the "Islamic State" (ISIL or Da'esh) - 2014*, *in* THE USE OF FORCE IN INTERNATIONAL LAW: A CASE-BASED APPROACH 888–90 (Tom Ruys, Olivier Corten & Alexandra Hofer eds., 2018).

[19] For an alternative perspective, see, e.g., Mehrdad Payandeh & Heiko Sauer, *Die Beteiligung der Bundeswehr am Antiterroreinsatz in Syrien*, 49 ZEITSCHRIFT FÜR RECHTSPOLITIK 34 (2016).

[20] *See* Paulina Starski, *Legitimized Self-Defense* – Quo Vadis *Security Council?*, EJIL: *TALK!* (Dec. 10, 2015), *at* https://www.ejiltalk.org/legitimized-self-defense-quo-vadis-security-council.

[21] The following draws on Christian J. Tams, *Self-Defence Against Non-state Actors: Making Sense of the "Armed Attack" Requirement*, *in* MARY ELLEN O'CONNELL, CHRISTIAN J. TAMS & DIRE TLADI, SELF-DEFENCE AGAINST NON-STATE ACTORS (2019).

https://doi.org/10.1017/ajil.2020.35 Published online by Cambridge University Press

scholarly debate has "taken off"; and subissues that might be considered niche (e.g., on the relevance of the "unable and unwilling test") exercise the literature. The ICJ and individual judges, too, have addressed the scope of self-defense, if at times ambiguously. Against the background of such a high-profile, highly polarized, and often confused debate, the views expressed by the highest court of a relevant UN member state merit attention.

The FCC did not, however, comprehensively engage with the debate on self-defense. In its selective engagement, three aspects seem significant. First, textual arguments mattered to the FCC: Article 51 recognizes the right of UN members to respond against "armed attacks," without stating that such attacks had to emanate from (or be attributed to) another state. This has long been the starting point for those willing to accept that self-defense can be used against nonstate attacks, and the FCC seemed to endorse this approach.[22] Second, contextual readings, perhaps curiously, did not seem to matter: the FCC did not mention the link between Article 2(4) and exceptions to the use of force (such as self-defense). It therefore did not engage with what is perhaps the most prominent argument for an "interstate reading" of self-defense—that since Article 2(4) follows an interstate logic, so should its main exception.[23] Third, in trying to make sense of the ICJ's Delphic pronouncements, the FCC joined observers who "sense" a new openness in the Court's approach. Hence the *Nicaragua* and *Wall* statements are noted, but "set off" against more recent statements in the opinions of Judges Kooijmans, Simma, and Buergenthal. None of this, to be sure, precludes further engagement on these issues: the different understandings of self-defense have but "varying degrees of legal merit."[24] However, in the argumentative quest for the slightly more meritorious understanding, the FCC's preference for certain mainstream arguments over others is noteworthy.

In another respect, the FCC's pronouncement goes beyond the mainstream. It does so by asserting, without much supporting evidence, that the correct understanding of Article 51 has "since its adoption" been disputed, "including whether [self-defense] can be invoked against attacks by non-state actors" (para. 49). This view runs counter to the dominant understanding, according to which self-defense traditionally was restricted to the interstate context. Judge Kooijmans' separate opinion in the *Wall* case encapsulates this dominant view: "it has been the generally accepted interpretation for more than 50 years" that an "armed attack must come from another State." [25] The dominant understanding relies on a charmingly simple reading in which the "certainty of old" is contrasted with the messy realities of our days. And it suggests that those relying on self-defense against nonstate actors have to demonstrate that the law has changed.[26] The FCC's challenge to this dominant understanding, it is

[22] *See, e.g.*, Thomas M. Franck, *Terrorism and the Right of Self-Defense*, 95 AJIL 839, 840 (2001); Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the UN Charter*, 43 HARV. INT'L L.J. 41, 50, 113–14 (2002).

[23] See the references in Tams, *supra* note 21, at 115–17.

[24] *Cf.* HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 398 (1958).

[25] *See Wall*, Separate Opinion of Judge Kooijmans, *supra* note 11, para. 35.

[26] For prominent accounts, see, e.g., Olivier Corten, *Has Practice Led to an "Agreement Between the Parties" Regarding the Interpretation of Article 51 of the UN Charter?*, 77 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 15 (2017); Antonio Cassese, *Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L L. 993 (2001); Michael P. Scharf, *How The War Against ISIS Changed International Law,* 48 CASE WESTERN RES. J. INT'L L. 16 (2016).

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submitted, is convincing: the "certainty of old" is a surprisingly popular myth that deserves to be challenged.

A case note is not the place fully to engage in the debate;[27] however, three examples illustrate the plausibility of the FCC's reading. French raids into Tunisia during the Algerian war of independence are the first case in point. France described them as a "legitimate defence" of its own troops against raids by the Algerian National Liberation Front, in which Tunisia, providing a safe haven, had been complicit.[28] In the late 1970s, Morocco advanced a very similar argument: it asserted a right to pursue insurgents belonging to the Polisario Front within and outside its own territory. In this second example, "outside" meant "in Algeria," which Morocco accused of having armed, trained, financed, and sheltered Polisario fighters and thereby violating the prohibition against armed force.[29] Finally, there is Greece. In one of the earliest UN debates on self-defense, barely a year after Article 51 had been adopted, Greece accused Yugoslavia and Albania of supporting Greek insurgents, which amounted to "aggression" and to a "breach of the peace." Greece also noted that this breach would be "renewed" and "aggravated," "even if these countries . . . merely allowed the retreating bands to cross their frontiers and slink back into Greek territory."[30]

These select examples suggest that debates about self-defense against nonstate attacks have indeed been with us "since [the] adoption" of Article 51 (*id.*). This is not to say that broad readings were common, or widely accepted at the time: they were occasionally accepted, but often rejected. However, there was, before the September 11, 2001 terrorist attacks, much more room for nuance than the dominant understanding admits. To have recognized as much is the most significant aspect of the FCC's pronouncement.

Given the polarized nature of discussions about self-defense, the FCC's reading of self-defense is unlikely to meet with general approval. In addition, as a pronouncement by a domestic court on a question of international law, it does not have any formal authority as a source of international law. But perhaps it can prompt some rethinking about the alleged "certainty of old" and gently tip the scales in an often protracted debate. It certainly illustrates how domestic courts enrich the discourse on core questions of international law.

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doi:10.1017/ajil.2020.35

[27] For a comprehensive analysis of early practice, see Claus Kreß, *Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen bei staatlicher Verwicklung in Gewaltakte Privater* (Berlin 1995). A succinct plea for nuance can be found in Christian J. Tams, *Embracing the Uncertainty of Old: Armed Attacks by Non-state Actors Prior to 9/11*, 77 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 61 (2017).

[28] See references in Tams, *supra* note 21, at 137.

[29] See references in *id.* at 138.

[30] See references in *id.* at 130; and further the statement by the Greek representative in UN Doc. S/PV.147, at 1129.