04

Armed Intervention and Consent

Dino Kritsiotis, Olivier Corten and Gregory H. Fox

Max Planck Trialogues on the Law of Peace and War

Edited by Anne Peters and Christian Marxsen

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ARMED INTERVENTION AND CONSENT

In the past decade, outside states have relied on the real or alleged 'invitation' of one of the parties to launch numerous military operations. In this book, three experts examine the relevant legal issues, ranging from sovereignty, and the scope and relevance of consent, to the use of force and the role of the UN Security Council. Using critical historical analysis, qualitative case studies, and large-N empirics, the authors debate their topics within a unique trialogue format. Accommodating pluralism, the format highlights divergence between and common ground across each of the three approaches. Benefiting from the authors' in-depth analysis of recent cases of armed intervention and diverse perspectives, this collection aims to develop and deepen our understanding of the law of military intervention. This title is also available as Open Access on Cambridge Core.

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A list of books in the series can be found at the end of this volume.

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Armed Intervention and Consent

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Preface

At the time of writing of this preface, the war launched by Russia against Ukraine has been raging for almost one year, causing unspeakable suffering. In its letter to the UN Security Council, dated 24 February 2022, Russia pointed, among other things, to an appeal made by the so-called People's Republics of Donbass to Russia for help.[1] However, the primary explanation and 'justification' of the invasion has been self-defence, not the supposed invitation. This is visible in both the form (an Article 51 letter) and the substance of the document submitted to the Council. None of the reasons given in that letter is a valid legal justification for this invasion, which remains a blatant violation of the prohibition of the use of force, in its aggravated form: aggression.

The ongoing war in Ukraine will likely change the legal framework within which the use of force is broadly conceived – notably, in relation to the role of the Security Council and the aggressors' criminal responsibility. But despite the alleged invitation by 'Republics' that the overwhelming majority of states do not recognise, this horrible war changes none of the findings presented in the ensuing chapters. All materials gathered here remain current as of 31 January 2022.

This book is the fourth *Max Planck Trialogue on the Law of Peace and War.* The three preceding volumes of the series deal with self-defence against non-state actors,[2] the law applicable to armed conflict,[3] and reparation for victims of

[1] Letter dated 24 February 2022 from the Permanent Representative of the Russian Federation to the United Nations, addressed to the Secretary-General, containing, as an annex, the text of the address of the President of the Russian Federation, Vladimir Putin, to the citizens of Russia, informing them of the measures taken in accordance with Article 51 of the Charter of the United Nations in exercise of the right of self-defence (UN Doc. S/2022/154).

[2] Mary-Ellen O'Connell, Christian Tams and Dire Tladi, *Self-Defence against Non-State Actors*, Max Planck Trialogues on the Law of Peace and War (Anne Peters and Christian Marxsen, series eds), vol. 1 (Cambridge: CUP 2019).

[3] Ziv Bohrer, Janina Dill and Helen Duffy, *Law Applicable to Armed Conflict*, Max Planck Trialogues on the Law of Peace and War (Anne Peters and Christian Marxsen, series eds), vol. 2 (Cambridge: CUP 2020).

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armed conflict.[4] The trialogue format responds to the current volatile state of the international legal order. A shift of economic and political power, a changed intellectual climate, and new ideas are challenging the economic, political, military, and ideational dominance of the West. The international legal order is characterised by a 'securitisation' and by renewed competition among the great powers.

All this has an impact on the international law governing the use of force and surrounding armed conflict. In that field of the law, deep-seated differences arise in the legal assessment of problems – such as interventions with consent of the territorial state. This is understandable because states must take existential decisions and the issues are highly value-loaded. This means that sourcing 'correct' solutions through purely doctrinal scholarship is not easy and may even be impossible. Such a state of affairs warrants more reflection on our scholarly premises and methods – and that is exactly the aim of the *Max Planck Trialogues*. The trialogue format accommodates the pluralism and changing values of the current era – of a shifting world order, and a rise of nationalism and populism. It brings to light the cultural, professional, and political pluralism that characterises international legal scholarship, and it exploits this pluralism as a heuristic device. We have called this approach 'multiperspectivism'.[5]

The multiperspectivism of this volume does not flow from geographical or gender diversity: all authors are 'Western'-educated men. Rather, the authors employ distinct and diverse scholarly methods: a deep historical and conceptual analysis in Chapter 1 (Dino Kritsiotis); a rich description, coupled with critical positivism, in Chapter 2 (Olivier Corten); and a large-N study, with quantitative methods, in Chapter 3 (Gregory H. Fox).

As with the preceding volumes, this work was kicked off – in 2018 – with an expert workshop, at which Veronika Bílková, Theodore Christakis, Larissa van den Herik, Eliav Lieblich, Achilles Skordas, Antonello Tancredi, and Erika de Wet delivered valuable input. The workshop also generated 'Impulses': short essays by the participants, published as 'Intervention by Invitation: Impulses from the Max Planck Trialogues on the Law of Peace and War', in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht/Heidelberg Journal of International Law* 79 (2019), 633–711.

[4] Cristián Correa, Shuichi Furuya and Clara Sandoval, *Reparation for Victims of Armed Conflicts*, Max Planck Trialogues on the Law of Peace and War (Anne Peters and Christian Marxsen, series eds), vol. 3 (Cambridge: CUP 2020).

[5] Anne Peters, 'Introduction to the Series: Trialogical International Law', in O'Connell et al., *Self-Defence against Non-State Actors* (n. 2), XI–XXV.

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We are thankful to all those who contributed to the workshop and for all support in the later phases. A team of student assistants searched documents, retrieved books, and helped to style footnotes. We are indebted to Ms Verena Schaller-Soltau for editorial support and to Vanessa Plaister for superb copy-editing. Last, but not least, we thank Anette Kreutzfeld, whose oversight and engagement, always with diligence, circumspection, and equanimity, has supported this project in countless ways.

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Introduction

Principle and Practice of Armed Intervention and Consent

Anne Peters

I. RECENT EVENTS AND POSSIBLE SHIFTS OF THE LAW

In the past decade, numerous outside states, coalitions, or regional organisations have launched military operations in reliance on the (real or alleged) request, or 'invitation', of one of the parties embroiled in military strife. The most prominent among these are as follows. The French operation 'Serval' in Mali of 2013 was a response to a 'request for assistance from the Interim President of the Republic of Mali'.[1] In 2014, Russia intervened in Crimea (Ukraine) at the request of a pro-Russian Ukrainian president, which resulted in the annexation of the peninsula.[2] Eight years later, an appeal for help by the secessionist regions in eastern Ukraine was a (minor) topos in the Russian narrative that seeks to justify its fully fledged invasion of the country.[3] A US-led coalition launched 'Operation Inherent Resolve' against so-called Islamic State in Iraq and Syria in 2014 at the express request of Iraq.[4] Meanwhile, the Russian interveners in Syria were explicitly pointing to the Syrian government's request for military assistance in combating

[1] Identical letters of 11 January 2013 from the Permanent Representative of France to the United Nations, addressed to the Secretary-General and the President of the Security Council (UN Doc. S/2013/17).

[2] Ukrainian President Viktor Yanukovych later confirmed he had asked Russia for support on 1 March 2014: Caro Kriel and Vladimir Isachenkov, 'Associated Press Interview: Yanukovych Admits Mistakes on Crimea', 2 April 2014, available at www.apnews.com, quoted in Christian Marxsen, 'The Crimea Crisis', *Heidelberg Journal of International Law* 74 (2014), 367–91 (374, 376).

[3] Letter dated 24 February 2022 from the Permanent Representative of the Russian Federation to the United Nations, addressed to the Secretary-General, containing, as an annex, the text of the address of the President of the Russian Federation, Vladimir Putin, to the citizens of Russia, informing them of the measures taken in accordance with Article 51 of the Charter of the United Nations in exercise of the right of self-defence (UN Doc. S/2022/154).

[4] See letter dated 25 June 2014 from the Permanent Representative of Iraq to the United Nations, addressed to the Secretary-General (UN Doc. S/2014/440):

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the terrorist organisation 'Islamic State' (IS).[5] The Saudi-led military intervention in Yemen (2015) was at the invitation of Yemeni President Abdrabbuh Mansur Hadi.[6] Finally, the operation 'Restore Democracy', launched by the Economic Community of West African States (ECOWAS) in The Gambia in 2017, was in support of President Adama Barrow, who had won democratic elections but been prevented from taking office by the regime of former President Yaha Jammeh.[7]

Such interventions 'by invitation', 'on request', or 'with consent' have long attracted scholarly interest.[8] Still, the state of the law has remained unsettled,

> We have previously requested the assistance of the international community. While we are grateful for what has been done to date, it has not been enough. We therefore call on the United Nations and the international community to recognize the serious threat our country and the international order are facing. . . . [T]he Iraqi Government is seeking to avoid falling into a cycle of violence. To that end, we need your support in order to defeat ISIL and protect our territory and people. In particular, we call on Member States to assist us by providing military training, advanced technology and the weapons required to respond to the situation, with a view to denying terrorists staging areas and safe havens.

See further letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations, addressed to the President of the Security Council of 22 September 2014 (UN Doc. S/2014/691).

5 Letter dated 15 October 2015 from the Permanent Representative of the Russian Federation to the United Nations, addressed to the President of the Security Council (UN Doc. S/2015/792):

> I have the honour to inform you that, in response to a request from the President of the Syrian Arab Republic, Bashar al-Asad, to provide military assistance in combating the terrorist group Islamic State in Iraq and the Levant (ISIL) and other terrorist groups operating in Syria, the Russian Federation began launching air and missile strikes against the assets of terrorist formations in the territory of the Syrian Arab Republic on 30 September 2015.

See also identical letters dated 14 October 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations, addressed to the Secretary-General and the President of the Security Council (UN Doc. A/70/429-S/2015/789): 'The Russian Federation has taken a number of measures in response to a request from the Government of the Syrian Arab Republic to the Government of the Russian Federation to cooperate in countering terrorism and to provide military support for the counter-terrorism efforts of the Syrian Government and the Syrian Arab Army.'

6 Yemeni President Abdrabbuh Mansur Hadi requested support up to military intervention in a text dated 24 March 2015, cited by the intervening governments in identical letters dated 26 March 2015 from the Permanent Representative of Qatar to the United Nations, addressed to the Secretary-General and the President of the Security Council (UN Doc. S/2015/217). See also UN Security Council (UN SC) Res. 2140 of 26 February 2014 and Res. 2201 of 15 February 2015.

7 The ECOWAS initiative was commended by UN SC Res. 2337 of 19 January 2017.

8 Since the contemporary classic study, Georg Nolte, *Eingreifen auf Einladung* (Heidelberg: Springer 1999), three more recent monographs have addressed the topic: Eliav Lieblich, *International Law and Civil Wars: Intervention and Consent* (London: Routledge 2013); Erika de Wet, *Military Assistance on Request and the Use of Force* (Oxford: OUP 2020); Chiara Redaelli, *Intervention in Civil Wars: Effectiveness, Legitimacy and Human Rights* (Oxford: Hart 2021). In addition, all standard books on the use of force devote a chapter to the

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and the interplay of relevant legal elements such as sovereignty and responsibility to protect (R2P), non-intervention, the use of force, self-determination, atrocity crimes, and the scope and relevance of consent might be under revision. These shifts are partly the result of macro changes to the international legal order as a whole, perhaps shaped by the rise of China and a decline of Western power. These changes in the political landscape and the law are likely to impact on the rules governing 'consented' military intervention and assistance such as arms transfer.

Against this background, this book assembles three essays that apply, respectively, a critical historical analysis (Chapter 1, by Dino Kritsiotis), qualitative case studies (Chapter 2, by Olivier Corten), and large-N empirics (Chapter 3, by Gregory H. Fox) to the subject. The different approaches of these three pieces illuminate its less-addressed angles, while confirming its conceptual and factual complexities.

The following sections prepare the ground for the detailed studies to come.

II. SOME KEY ISSUES OF LEGAL CONCERN

Debates relating military intervention by invitation with international law have taken several turns during the twentieth and early twenty-first centuries. Speaking doctrinally, the 'invitation', or request for military support, extended by one of the groups embroiled in a conflictual situation may, under certain

issue: Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge: CUP 6th edn 2017), 125–30; Christine D. Gray, *International Law and the Use of Force* (Oxford: OUP 4th edn 2018), ch. 3, 'Invitation and Intervention' (75–119); Christian Henderson, *The Use of Force and International Law* (Cambridge: CUP 2018), ch. 9, 'Consent to Intervention and Intervention in Civil Wars' (349–78); Olivier Corten, *Le droit contre la guerre: L'interdiction du recours à la force en droit international contemporain* (Paris: Pedone 3rd edn 2020), ch. V, 'L'intervention consentie' (415–515), trans. Olivier Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (Oxford: Hart 2nd edn 2021), ch. 5, 'Intervention by Invitation' (247–315). Moreover, sixteen authors wrote 'Impulses' on the topic in the *Heidelberg Journal of International Law* 79 (2019), 635–711, and the *Journal on the Use of Force and International Law* 7 (2020), 1–155, was a special issue devoted to the problem. The Institut de droit international (IDI) has tackled the issue three times: first in its 1900 session in Neufchâtel, published as IDI, 'Droits et devoirs des Puissances étrangères, au cas de mouvement insurrectional, envers les gouvernements établis et reconnus qui sont aux prises avec l'insurrection' (rapporteurs: M. Arthur Desjardins and Marquis de Olivart), *Annuaire de l'Institut de droit international* 18 (1900), 227–30; second in the 1975 session in Wiesbaden, published as IDI, 'The Principle of Non-Intervention in Civil Wars' (rapporteur: M. Dietrich Schindler), *Annuaire de l'Institut de droit international* 56 (1975), 131–3; and last in the 2011 session in Rhodes, published as IDI, 'Intervention by Invitation' (rapporteur: M. Gerhard Hafner), *Annuaire de l'Institut de droit international* 74 (2011), 359–63. Finally, the International Law Association (ILA) established the Committee on Use of Force: Military Assistance on Request in 2019 (chairs: Claus Kreß and Vera Rusinova): see ILA, 'ILA Committees', available at www.ila-hq.org/index.php/committees.

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conditions, function as a consent to behaviour that would otherwise breach the prohibitions to intervene or to use military force. But the legal explanation of this effect and the exact requirements in law are in flux.

A. *The Power to Consent Revisited*

Generally, consent by the 'owner' of a legal good is said to foreclose any infringement of that legal good (i.e., *volenti non fit iniuria*). It is therefore normally assumed that a government which properly represents the state can allow the use of force and the intervention in 'its' territory. Along this line, the International Court of Justice (ICJ) held, in its *Nicaragua* judgment of 1986, that intervention is 'allowable at the request of the government of a State' but not upon request by the armed opposition.[9] This principle is widely accepted as a cornerstone in the legal field. Nevertheless, several questions about the nature, limits, and legal consequences of such consent remain. Likewise, the power and the possible loss of power to consent have been problematised more recently, especially with a view to the harmful effects of such consent – which, after all, leads to a disregard of territorial integrity, peace, and human rights.

1. The Nature of Consent

There is a rough agreement that consent simultaneously forms the legal basis and defines the legal limits of the exception from the prohibitions on the use of force and on intervention. In its 2005 judgment on *Armed Activities on the Territory of the Congo*, the ICJ explained consent as 'validating that presence [of troops] in law'.[10] The ICJ also stated that such consent is limited in time, 'geographic location and objectives'.[11] When the parameters of the consent are

[9] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), merits, judgment of 27 June 1986, ICJ Reports 1986, 14, para. 246:

> As the Court has stated, the principle of non-intervention derives from customary international law. It would certainly lose its effectiveness as a principle of law if intervention were to be justified by a mere request for assistance made by an opposition group in another State – supposing such a request to have actually been made by an opposition to the regime in Nicaragua in this instance. Indeed, it is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition.

[10] ICJ, *Armed Activities on the Territory of the Congo* (DR Congo v. Uganda), merits, judgment of 19 December 2005, ICJ Reports 2005, 168, para. 105.

[11] *Ibid*., para. 52 (emphasis added). See also *ibid*., para. 105.

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overstepped, an (armed) intervention becomes illegal.[12] But an open question is whether the lawfulness of military intervention by invitation is a negative rule element, such that permissible action does not fall under Article 2(1) and 2(4) of the UN Charter in the first place, or whether a valid invitation (consent) serves only as a ground precluding the wrongfulness of a breach of those principles or, finally, whether it merely forms an excuse, removing the consequence of state responsibility.[13] This question has, until recently, lingered in the background unresolved.[14]

In line with the first view, the official governmental position of the United Kingdom on its military action against the so-called Islamic State of Iraq and the Levant (ISIL) was not only that an invitation is an 'exception' to the prohibition on the use of force in international relations, but also that 'international law is equally clear that this prohibition [on the use of force] *does not apply* to the use of military force by one State on the territory of another if the territorial State so requests or consents'.[15] That view considers an absence of consent as being, in effect, 'intrinsic' in the prohibitions of the use of force and of intervention.[16]

[12] Cf. Art. 20 ARSIWA: consent precludes wrongfulness only 'to the extent that the act remains within the limits of that consent'. Under Art. 8(2) lit. e) of the Statute of the International Criminal Court (ICC), '[t]he use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, *in contravention of the conditions provided for in the agreement* or any extension of their presence in such territory beyond the termination of the agreement' (emphasis added) constitutes the crime of aggression. See also Art. 3 lit. e) of UN General Assembly (UN GA) Res. 3314 (XXIX) of 14 December 1974 ('Definition of Aggression').

[13] For the doctrinal issues, see the references cited at nn. 14–19.

[14] For detailed examinations, see: Florian Kriener, 'Invitation: Excluding ab Initio a Breach of Art. 2(4) UNCh or a Preclusion of Wrongfulness?', *Heidelberg Journal of International Law* 79 (2019), 643–6; Federica Paddeu, 'Military Assistance on Request and General Reasons against Force: Consent as a Defence to the Prohibition of Force', *Journal on the Use of Force and International Law* 7 (2020), 227–69; Patrick M. Butchard, 'Territorial Integrity, Political Independence, and Consent: The Limitations of Military Assistance on Request under the Prohibition of Force', *Journal on the Use of Force and International Law* 7 (2020), 35–73.

[15] Prime Minister's Office, *Summary of the UK Government's Position on the Military Action against ISIL*, Policy paper, 25 September 2014 (emphasis added), available at www.gov.uk/government/publications/military-action-in-iraq-against-isil-government-legal-position/summary-of-the-government-legal-position-on-military-action-in-iraq-against-isil.

[16] For the term 'intrinsic', see Paddeu, 'Military Assistance on Request' (n. 14). The view that the invitation precludes the existence of any intervention or use of force has long been the mainstream in scholarship. See, e.g., Théodore Christakis and Karine Mollard-Bannelier, '*Volenti non fit injuria*? Les effets du consentement à l'intervention militaire', *Annuaire Français de Droit International* 50 (2004), 102–37; Georg Nolte, 'Intervention by Invitation', in Anne Peters and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Public International Law* (Oxford: OUP, online edn 2010), para. 16; International Law Association, *Final Report on Aggression and the Use of Force* (Sydney: ILA 2018), 18; Henderson, *Use of Force* (n. 8), 349; Laura Visser, 'May the Force Be with You: The Legal Classification of Intervention by

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The opposing view is that an invitation merely forms a 'ground precluding the wrongfulness', to use the terminology of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA).[17] At first sight, this conceptualisation seems incompatible with the peremptory character of the prohibition on the use of force: the prohibition cannot, according to Article 26 ARSIWA, be overcome by a simple 'justification' but only by an equally 'peremptory' counter-rule.[18]

One question is therefore whether the host state's request (its invitation) is best understood as consent in terms of the laws of treaties, like the consent to be bound set out in Article 11 of the 1969 Vienna Convention on the Law of Treaties (VCLT), or is more akin to 'consent' in terms of state responsibility (as mentioned in Art. 20 ARSIWA),[19] or whether it is something altogether different. In his contribution to this book, Dino Kritsiotis examines in more detail the nature of consent and its juridical consequences for the legal assessment of a given intervention and invites us to probe how consent relates to the various substantive provisions of international law. His particular point

Invitation', *Netherlands International Law Review* 66 (2019), 21–45; Corten, *Le droit contre la guerre* (n. 8), 420.

[17] Terry D. Gill, 'Military Intervention at the Invitation of a Government', in Terry D. Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford: OUP 2010), 229–32 (229); Gregory H. Fox, 'Intervention by Invitation' in Marc Weller (ed.), *The Oxford Handbook on the Use of Force* (Oxford: OUP 2015), 816–44 (816); Paddeu, 'Military Assistance on Request' (n. 14), esp. 256 and 268; Eliav Lieblich, 'Why Can't We Agree on when Governments Can Consent to External Intervention? A Theoretical Inquiry', *Journal on the Use of Force and International Law* 7 (2020), 5–25 (11). On the additional legal questions raised by the qualification of the invitation as a ground precluding wrongfulness, see n. 19.

[18] Unlike the Charter-based exception of self-defence, it is not clear whether consent operates on the same normative level as the prohibition itself, and therefore ARSIWA does not as obviously as Art. 51 UN Charter 'define' the reach of the peremptory norm: see Dino Kritsiotis, 'Intervention and the Problematisation of Consent', Chapter 1 in this volume, section II.C, pp- 41–47. for Art. 51, see Christian Tams, 'Self-Defence against Non-State Actors: Making Sense of the "Armed Attack" Requirement' in Mary-Ellen O'Connell, Christian Tams and Dire Tladi, *Self-Defence against Non-State Actors*, Max Planck Trialogues on the Law of Peace and War (Anne Peters and Christian Marxsen, series eds), vol. 1 (Cambridge: CUP 2019), 90–173 (95–6; 100, fn. 57; 110–11).

[19] Additionally, the exact doctrinal operation of consent as a 'ground precluding wrongfulness' is still underexplored. It could function as a 'justification' (removing the breach), and it would then be a primary rule (a guide for conduct), properly speaking. It could be a mere 'excuse' for the non-performance and serve only to exclude the consequences of state responsibility (a secondary rule, properly speaking). See Federica Paddeu, 'Clarifying the Concept of Circumstances Precluding Wrongfulness (Justifications) in International Law' in Lorand Bartels and Federica Paddeu (eds), *Exceptions in International Law* (Oxford: OUP 2020), 203–24.

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of focus is the prohibition of force and of intervention, as well as the principle of self-determination, which is now a given under international law.[20]

2. Effectiveness and Legitimacy: Determining the Value of Consent

The *Nicaragua* principle is that only the government's invitation can lead to a lawful intervention.[21] This privilege is, at first sight, in line with the general international law principles on the status of a government, its power to represent the state, and its capacity to engage the state under international law.

However, the legal terrain has been notoriously murky – confused by inconsistent state practice on the identification of governments. On the one hand, a government need not be recognised by other states to 'exist' in international law; on the other hand, outsiders use pronouncing or withholding recognition of a political group as an important political tool that also has legal effects. The absence of a certain 'level of external recognition by other states' seems to undermine a government's ability to consent to the use of force on its territory.[22] And the external recognition of a political group claiming to govern and represent a state depends not only on that group's 'effectiveness' (its territorial control over the country or significant portions) but also on qualitative criteria (often called 'legitimacy'). A fresh example of legitimacy concerns is the international reaction to the Taliban's military victory over the then Afghan government in August 2021. The Taliban's proclamation of a new Sharia-guided government has been met with other states' reluctance to 'recognise' the Taliban as the Afghan government. For example, when evacuating German nationals, Germany relied on the 'continuous consent' of the overthrown and no longer effective government as a legal basis for a German military presence in the country, ignoring whether or not the Taliban government might grant it any fresh consent.[23]

Several authors have considered either the effectiveness *or* the legitimacy of a government as self-sufficient conditions for the power to invite.[24] Relatedly, the effectiveness and legitimacy of a government might be seen as interlinked, so that a lack of effectiveness might be compensated by factors of legitimacy

[20] Kritsiotis, 'Intervention and the Problematisation of Consent', Chapter 1 in this volume.

[21] See above, n. 9 and text. It is a point of discussion in the following chapters whether *Nicaragua* also allows a governmental invitation in the midst of a civil war. See below, section II.B.2.

[22] Henderson, *Use of Force* (n. 8), 357.

[23] *Antrag der Bundesregierung: Einsatz bewaffneter deutscher Streitkräfte zur militärischen Evakuierung aus Afghanistan*, Bundestags-Drucksache 19/32022 of 18 August 2021.

[24] Redaelli, *Intervention in Civil Wars* (n. 8), 151 and 254; de Wet, *Military Assistance on Request* (nn. 8), 73 and 220.

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(which would in turn impact on the government's power to invite military assistance – more on this below in section II.A.3, at pp. 9–11).[25]

The follow-up question then is about the exact parameters of 'legitimacy'. The contemplated legitimacy criteria relate both to the origin of the group's power (whether it emerged from democratic elections or from a military coup) and to the modes by which the group exercises its powers. A special concern is any breach of international law committed by the government that delegitimises it and might lead to a forfeiture of its power to consent (see section II.A.3, pp. 9–11).

The situation becomes even more complicated when various groups compete. The Arab Spring of 2011 – which fuelled the upheavals in Libya and Syria, the constitutional crisis in Venezuela, and further recent political events – has exacerbated the fragility of the relevant principles and confused their application to those cases. While outside states mostly avoided recognising the opposition in those states as 'the government', states officially called and thus recognised certain groups as 'legitimate interlocutor', 'legitimate representative' of the people, 'legitimate opposition', and the like.[26] With such terminology, outside states may have sought both to elevate the political pedigree of the opposition and to mitigate the risk that their delivery of arms to those groups could breach the prohibition on intervention (see section II.B.5, pp. 18–19).[27]

To sum up, the political and legal assessment of military interventions launched as recently as 2017 has taken account of human rights protection, democracy, and rule of law. It remains to be seen whether the expected rise of non-Western state actors – notably, China – will reverse this legal trend. The chapters in this book seek to illuminate the more specific interaction of these

[25] In this sense, see Nolte, 'Intervention by Invitation' (n. 16), para. 20; Lieblich, *International Law and Civil Wars* (n. 8), 235. With a view to the Yemeni case, see Tom Ruys and Luca Ferro, 'Weathering the Storm: Legality and Legal Implications of the Saudi-Led Military Intervention in Yemen', *International and Comparative Law Quarterly* 65 (2016), 61–98 (97), arguing that, 'for purposes of assessing the validity of a request for military assistance, the degree of international recognition can compensate for substantial loss of control over territory'.

[26] Dapo Akande, 'Which Entity is the Government of Libya and Why Does It Matter?' EJIL:Talk!, 16 June 2011, available at www.ejiltalk.org/which-entity-is-the-government-of-libya-and-why-does-it-matter/; Stefan Talmon, 'Recognition of the Libyan National Transitional Council', ASIL Insights, 16 June 2011, available at www.asil.org/insights/volume/15/issue/16/recognition-libyan-national-transitional-council; Sebastián Mantilla Blanco, 'Rival Governments in Venezuela: Democracy and the Question of Recognition', Verfassungsblog, 28 January 2019, available at https://verfassungsblog.de/rival-governments-in-venezuela-democracy-and-the-question-of-recognition/; Federica Paddeu and Alonso Dunkelberg, 'Recognition of Governments: Legitimacy and Control Six Months after Guaidó', OpinioJuris, 18 July 2019, available at http://opiniojuris.org/2019/07/18/recognition-of-governments-legitimacy-and-control-six-months-after-guaido/.

[27] Cf. Henderson, *Use of Force* (n. 8), 358–9.

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principles with the concepts of sovereignty and effectiveness, which stand in tension with human rights protection, democracy, and rule of law.

3. A Government's Loss of the Power to Consent

An outgrowth of the legitimacy debate sketched out thus far is the question if whether an incumbent government's authority to invite military assistance is conditional on that government's respect for certain material principles anchored in international law. A government – despite being 'effective' – arguably loses its power to invite foreign assistance when it exercises its governmental powers in an illegitimate way – notably, by violating international law. Indeed, it is increasingly held that at least some types of international law violation 'can adversely affect the government's legal capacity to express consent to external intervention',[28] or might, under certain conditions, even mean that government 'forfeit[s] its right to ask for foreign intervention'.[29] Relevant breaches are notably those in the realm of ius cogens: atrocity crimes (genocide[30] and crimes against humanity) and violations of other peremptory norms (such as apartheid).[31] It is less likely, but not out of the question, that 'ordinary' violations of the population's human rights[32] and less-than-grave breaches of international humanitarian law (IHL) might also taint the power to invite. Besides violations of ius cogens, the legal debate has attached a special significance to the principle of self-determination. This principle is often conceived of as prohibiting military support for a government that faces intense and widespread popular revolt, because such support would violate the self-determination of the people.[33] Arguably, the principle is also addressed at the government itself and taints its power to invite military assistance in such a situation.[34] Such incapacitation of the government to consent can be

[28] Lieblich, *International Law and Civil Wars* (n. 8), 187–8, 228; Eliav Lieblich, 'The International Wrongfulness of Unlawful Consensual Interventions', *Heidelberg Journal of International Law* 79 (2019), 667–70 (668).

[29] Redaelli, *Intervention in Civil Wars* (n. 8), 160.

[30] De Wet, *Military Assistance on Request* (n. 8), 135, fn. 60.

[31] Nolte, 'Intervention by Invitation' (n. 16), para. 22.

[32] For human rights as parameters of legitimacy and thus of the power to invite, see notably Oona A. Hathaway, Rebecca Crootof, Daniel Hessel, Julia Shu and Sarah Weiner, 'Consent Is Not Enough: Why States Must Respect the Intensity Threshold in Transnational Conflict', *University of Pennsylvania Law Review* 165 (2016), 1–47 (33–4); Redaelli, *Intervention in Civil Wars* (n. 8), 251.

[33] See below, section II.B.2, pp. 12–14, on the doctrine of 'negative equality'.

[34] Nolte, 'Intervention by Invitation' (n. 16), para. 22.

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bolstered by the idea that a state cannot delegate an authority which it itself does not possess (i.e., *nemo plus iuris ad alium transferre potest, quam ipse habet*) – namely, the 'authority' to violate human rights and commit war crimes in its territory.[35]

The request and the accompanying consent to military action inside the requesting state's territory are unilateral acts under international law. A unilateral act of extending an 'invitation' to assist in breaches of international law can defensibly be qualified as being unlawful in itself. If the invitation extends to committing violations of peremptory norms, it can be argued that the invitation (the unilateral act) is in itself invalid.

Generally speaking, unilateral acts that conflict with peremptory norms are invalid (alternatively, 'void' or 'null'). The ILC has stated as much in its Draft Conclusion 16 on Jus Cogens.[36] The ILC has derived this legal qualification from the analogous rule contained in Article 53 VCLT (which uses the term 'void') for a treaty that conflicts with a peremptory norm of general international law.[37] Invalidity (alternatively, 'voidness' or 'nullity') means that the act is deprived of any legal effect.[38] Application of these principles leads to the conclusion that a requesting state may not, as a matter of lex lata, consent to an intervening state joining it, for example, in violating peremptory norms of international law or committing other crimes under international law. Thus requests for assistance and the accompanying consent to military action in such scenarios must be considered illegal or void (i.e., of no legal effect).

The Syrian war that has raged since 2011 does not provide a clear-cut answer to the question of whether a government might forfeit its power to invite. On the one hand, outsider states have never explicitly stated that the criminal and abusive Assad government might have lost its authority to

[35] Gill, 'Military Intervention at the Invitation of a Government' (n. 17), 230; Ashley S. Deeks, 'Consent to the Use of Force and International Law Supremacy', *Harvard International Law Journal* 54 (2013), 1–60 (34–5); Hathaway et al., 'Consent Is Not Enough' (n. 32), 34.

[36] Third Report on Peremptory Norms of General International Law (Jus Cogens) by Dire Tladi, Special Rapporteur, 12 February 2018 (A/CN.4/71).

[37] ILC, Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, with commentaries thereto, UN Doc. A/61/10 (2006), 378: 'The invalidity of a unilateral act which is contrary to a peremptory norm of international law derives from the analogous rule contained in article 53 of the 1969 Vienna Convention on the Law of Treaties. Most members of the Commission agreed that there was no obstacle to the application of this rule to the case of unilateral declarations.' See also Ninth Report on Unilateral Acts of States, by Mr Victor Rodríguez Cedeño, Special Rapporteur, UN Doc. AC/CN.4/569 and Add. 1, 162: 'The provisions of article 53 of the 1969 Vienna Convention apply in general, and again *mutatis mutandis*, to unilateral acts.'

[38] Michael Reisman and Dirk Pulkowski, 'Nullity', in Anne Peters and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of International Law* (Oxford: OUP 2006), para. 1.

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invite help. Nor have they condemned Russia's military support as a violation of the prohibitions on intervention and use of force; rather, they have merely criticised Syrian and Russian violations of human rights and IHL. On the other hand, such states have not explicitly claimed or confirmed a right to intervene in favour of governments that commit massive atrocities against their populations, either. In this book, Gregory H. Fox explores the relevance of the inviter's breaches of international law – notably, with a view to the principle of democracy, twin to the principle of self-determination.[39]

B. *Legal Limits on the Intervener*

The next – and overlapping – legal issue is the limits placed by international law on the intervener. The following section discusses a range of legal strategies to identify such limits, flowing from various sources.

1. Lack of a Valid Invitation

The possible invalidity of a request to intervene (as discussed in the last section) has legal consequences not only for the group making the request but also for the intervening state. Generally speaking, the nullity (invalidity) of a unilateral act does not necessarily entail the nullity of all subsequent acts based on or derived from that invalid act.[40] But neither is there a general rule that acts based on nullities remain valid; rather, courts have 'extended findings of nullity to certain consequential acts, if no further uncertainty is introduced into the system'.[41]

It seems that the key considerations for assessing the validity (and the lawfulness) of such consequential acts are twofold: what matters are good faith and legal certainty. The protection of legal and factual acts performed in reliance on the validity of the consent is warranted only for good faith activities. With regard to the annulment of treaties, this principle is codified in Article 69(2)(b) VCLT, which holds that 'acts performed in good faith before the invalidity was invoked' are not rendered unlawful by the simple fact of the invalidity of the legal basis.

Applied to the situation of an invalid consent to intervene, this means that the subsequent military assistance does not automatically become unlawful itself. But it is unlawful if performed in bad faith (when the intervener knows

[39] Gregory H. Fox, 'Invitations to Intervene after the Cold War: Towards a New Collective Model', Chapter 3 in this volume.

[40] Reisman and Pulkowski, 'Nullity' (n. 38), para. 35.

[41] *Ibid*., para. 38.

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about the crimes of the inviting government), because then the reliance placed on the invitation is not worthy of protection.

The situation of an invalid consent is then similar to the situation in which consent has been withdrawn. The latter case has been characterised by Yoram Dinstein thus: '[W]ithdrawal of consent pulls the rug from under the legality of that presence.'[42] In both instances, there is no consent, legally speaking. It has even been argued that states are legally compelled to reject such an 'invitation' and may not rely on the (flawed) legal title.[43]

2. The Doctrine of Negative Equality

The 1970s and 1980s were marked by constant interventions: one of the world's two superpowers, the United States and the USSR, would intervene in localised armed conflicts, which thus often became proxy wars. In that era, a doctrine that was later baptised 'negative equality',[44] or 'strict abstentionism',[45] was born: that no foreign interference should be allowed when an internal conflict surpasses the threshold of 'civil war'.[46] The rationale of this doctrine was – conceptually – to pay due respect to the principle of self-determination of peoples and – pragmatically – to prevent further military escalation – ultimately, a nuclear world war.[47] As early as 1975, the Institut de droit international (IDI) proclaimed, in its Wiesbaden Resolution III, a 'prohibition from assistance', and that 'third states shall refrain from

[42] Dinstein, *War, Aggression and Self-Defence* (n. 8), 128.

[43] Claus Kreß, 'The Fine Line between Collective Self-Defense and Intervention by Invitation: Reflections on the Use of Force against "IS" in Syria', *Just Security*, 17 February 2015, available at www.justsecurity.org/20118/claus-kreb-force-isil-syria/.

[44] The term was coined in Independent International Fact-Finding Mission on the Conflict in Georgia (IFFMCG), *Report*, vol. II, September 2009, ch. 6, 1–441 (278); for a critical analysis, see Butchard, 'Territorial Integrity, Political Independence, and Consent' (n. 14), 57–60 and 65. Christine Gray used the term for the first time in her 2018 edition and cited Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press 1963), who did not use the term , but not the IFFMCG: Gray, *International Law and the Use of Force* (n. 8), 886–7.

[45] Coined by Lieblich, *International Law and Civil Wars* (n. 8), 130–40.

[46] See the seminal contribution by Louise Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government', *British Yearbook of International Law* 56 (1985), 189–252 (251). Writing as early as 1963, Ian Brownlie had opined that, in the situation in which 'a substantial body of the population is giving support to the insurgents, who thus provide a serious challenge to the government', a 'rigid policy of non-intervention' was 'Latin-American practice', and that aid given to the government 'has a less secure legal basis than appears at first sight': Brownlie, *International Law and the Use of Force by States* (n. 44), 327. Put differently, Brownlie cautiously proposed that abstentionism was the law of his time, but he did not use the term 'negative equality'. (On the relationship between civil war and NIAC, see below, n. 55.)

[47] IFFMCG, *Report* (n. 44), 277.

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giving assistance to parties in a civil war which is being fought in the territory of another State' (Art. 2(1)).[48] Two years later, the second Additional Protocol to the Geneva Conventions (AP II) stated that '[n]othing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs'.[49]

It is, however, doubtful whether the doctrine that Fox calls, in his chapter, the 'IDI view'[50] ever properly reflected the law as it stands. In *Nicaragua*, the ICJ seemed to allow intervention in a non-international armed conflict (NIAC).[51] Only scarce (and older) state practice in the direction of a prohibition to intervene in civil war can be found.[52] Conceptually, the

[48] IDI, 'The Principle of Non-Intervention in Civil Wars' (n. 8). The origins of the putative negative equality principle probably lies in an older (controversial) 'duty of neutrality' vis-à-vis belligerents, and this genealogy also explains the 'civil war' threshold. On the pre-Charter norms on civil wars, see Gregory H. Fox, 'Intervention by Invitation' (n. 17), (821–3) with further references.

[49] Art. 3(2) of the Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the protection of victims in non-international armed conflicts (AP II), 8 June 1977.

[50] Fox, 'Invitations to Intervene after the Cold War', Chapter 3 in this volume.

[51] The Court had qualified the situation (the conflict between the government of Nicaragua and the contras) as a NIAC: *Nicaragua v. United States of America* (n. 9), para. 219. However, it investigated the question not from the perspective of invitation but for the purposes of the application of the Geneva Conventions: see Kritsiotis, 'Intervention and the Problematisation of Consent', Chapter 1 in this volume.

[52] A document by the UK Foreign and Commonwealth Office mentions, as 'one of two major restrictions on the lawfulness of states providing outside assistance to other states', a rule that:

> . . . any form of interference or assistance is prohibited (except possibly of a humanitarian kind) *at a time of civil war and control of the State's territory is divided between parties at war*. However, it is widely accepted that outside interference in favour of one party to the struggle permits counter-intervention on behalf of the other, as happened in the Spanish Civil War and, more recently, in Angola.

See Planning Staff of the Foreign and Commonwealth Office, 'Is Intervention Ever Justified?', Document for internal use of July 1984, released to the public in 1986 as Foreign Policy Document No. 148, reprinted in UK Materials on International Law, *British Yearbook of International Law* 57 (1986), 614–22 (616, para. II.7) (emphasis added), text provided by the Foreign and Commonwealth Office. French President Mitterrand stated in 1990:

> Chaque fois qu'une menace extérieure poindra qui pourrait attenter à votre indépendance, la France sera présente à vos côtes. Elle l'a déjà démontré plusieurs fois et parfois dans des circonstances très difficiles. Mais notre rôle à nous, pays étranger, fut-il ami, *n'est pas d'intervenir dans des conflits intérieurs*. Dans ce cas-là, la France en accord avec les dirigeants, veillera à protéger ses concitoyens, ses ressortissants; mais elle n'entend pas arbitrer les conflits.

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doctrine is under-inclusive in two respects: first, self-determination would warrant protection in situations below the threshold of civil war; and second, an internal armed conflict is not necessarily about self-determination but might nevertheless deserve protection from outside interference.[53] The doctrine also seems unfair because it cements the status quo, and hence what is presented as neutrality in theory privileges the stronger party in practice.[54] Moreover, the application of this putative rule is exceedingly difficult, not least because the threshold between mere internal unrest and NIAC is blurry, and also because states typically seek to deny the existence of any armed conflict on their soil.[55]

In any case, the recent military interventions in fully fledged armed conflicts – notably, by France in Mali and by Russia in Syria – have not attracted any express legal objection on these grounds. In other words, these interventions did not attract condemnation as violations of the ius ad bellum – even though they may have been condemned as violations of IHL. Pointing to this state practice, current scholarship commonly denies the existence of an international legal obligation to abstain from intervention in 'civil war' or NIAC.[56] The three contributions to this trialogue confirm that there is no broad and categorical legal prohibition on intervention in a NIAC.[57]

Declaration of the President of the French Republic at the occasion of the Sixteenth Conference of Heads of State of France and Africa, La Baule, 19–21 June 1990 (emphasis added).

[53] Henderson, *Use of Force* (n. 8), 364; Redaelli, *Intervention in Civil Wars* (n. 8), 96.

[54] Henderson, *Use of Force* (n. 8), 364.

[55] The exact line between mere internal unrest and NIAC – the threshold at which common Art. 3(2) of the Geneva Conventions or (above a higher threshold) AP II additionally applies (cf. Art. 1(2) AP II) – is not easy to draw. On the concept of civil war, which is no longer a technical legal term, see Kritsiotis, 'Intervention and the Problematisation of Consent', Chapter 1 in this volume. And although NIAC has replaced the concept of 'civil war' for IHL purposes, the new terminology does not automatically translate into any meaningful change in the ius ad bellum context. Kritsiotis therefore guards against any ready equation.

[56] Dinstein, *War, Aggression and Self-Defence* (n. 8), 125; Gray, *International Law and the Use of Force* (n. 8), 87–90; de Wet, *Military Assistance on Request* (n. 8), 123 and 221; Redaelli, *Intervention in Civil Wars* (n. 8), 96 and 116; Ruys and Ferro, 'Weathering the Storm' (n. 25), 97; Antonello Tancredi, 'A "Principle-Based" Approach to Intervention by Invitation in Civil Wars', *Heidelberg Journal of International Law* 79 (2019), 659–62 (662). For a policy critique of the negative equality view, see Lieblich, *International Law and Civil Wars* (n. 8), 130–40. In favour of the negative equality rule, cf. Farideh Shaygan, 'Intervention by Invitation as a Tool of New Colonialism', in James Crawford, Abdul G. Koroma, Said Mahmoudi and Alain Pellet (eds), *The International Legal Order* (Leiden: Brill Nijhoff 2017), 766–82 (780). For a nuanced view, see Nolte, 'Intervention by Invitation' (n. 16), paras 20 and 22; Henderson, *Use of Force* (n. 8), 365–8.

[57] Christian Marxsen,' Conclusion: Half-Hearted Multilateralisation of a Unilateral Doctrine', in this volume.

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3. Unlawful 'Purposes'

The 2011 IDI Rhodes Resolution II postulated, in Article 3(1), that:

> Military assistance is prohibited when it is exercised in violation of the Charter of the United Nations, of the principles of non-intervention, of equal rights and self-determination of peoples and generally accepted standards of human rights and in particular when *its object is* to support an established government against its own population.[58]

Article. 2(2) stated: 'The *objective* of military assistance is to assist the requesting State in its struggle against non-State actors or individual persons within its territory, with full respect for human rights and fundamental freedoms.'[59]

Along this line, it has been suggested that the '*finalités*', 'purpose', 'function', or – as the Rhodes Resolution puts it – 'object' and 'objective' of the military intervention should play a crucial role in the assessment of its legality.[60] As a matter of fact, governments intervening on request often invoke noble purposes such as combating terrorism or restoring democracy, even in a civil war context. The question is whether these professed purposes belong only to the realm of politics and apologies or have a bearing on the lawfulness of the intervention. Scholars espousing the latter position can point to the ICJ judgment in *Armed Activities on the Territory of the Congo*, in which – among other things – the Court mentioned the 'objectives' of the host state's consent.[61] They also rely on the wording of the ICJ's dictum in *Nicaragua*. After all, the Court there said that an invitation by the government was 'allowable' (not 'allowed') – which suggests that the invitation is a necessary, but not sufficient, condition of legality.

The key innovation of the 'purpose-based' approach was to limit the permissibility of intervention in favour of the government. The approach thus steered between the traditional blanket privilege of the incumbent 'official' government, on the one hand, and strict abstentionism, on the other. But the approach has come under attack: first, it is an open question whether it

[58] IDI, 'Military Assistance on Request' (2011) (n. 8), Art. 3(1) (emphasis added). Importantly, this Resolution applies only to situations below the threshold of NIAC: see *ibid*., Art. 2(1).

[59] *Ibid*., Art. 3(1) (emphasis added).

[60] See, seminally, Christakis and Mollard-Bannelier, '*Volenti non fit injuria*?' (n. 16), 102–37 (esp. at 119–20); Karine Bannelier-Christakis, 'Military Interventions against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent', *Leiden Journal of International Law* 29 (2016), 743–75. See, extensively, Corten, *Le droit contre la guerre* (n. 8), 481–511.

[61] ICJ, *DR Congo v. Uganda* (n. 10), para. 52.

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correctly reflects the law as it stands;[62] and second, serious legal policy arguments speak against it.[63]

The risk that this doctrine is abused seems very high.[64] There is a danger that the admission of military interventions with noble purposes will erode the prohibitions on intervention and use of force.[65] Such erosion would notably occur if the focus on purposes were taken to its logical conclusion by additionally admitting interventions in favour of the opposition for a 'proper' purpose. In this book, Olivier Corten (Chapter 2) and Gregory H. Fox (Chapter 3) discuss this critique and examine whether state practice reflects the purpose-based approach, but they reach different conclusions.

4. Illegality on Other Grounds

The examination of what has been called the 'purposes' of an intervention might better be slightly refocused to examine the lawfulness of the requester's action in combination with the support given. First, any intervention in favour of a government committing, for example, violations of human rights and of IHL can amount to complicity in those breaches of international law and trigger the intervener's responsibility when the conditions of Article 16 ARSIWA (notably, knowledge of the circumstances) are met.[66]

Second, such an intervention may constitute an independent violation of the intervener's own duties to respect and protect human rights (extraterritorially[67]). Once the threshold to armed conflict is surpassed, the law of armed conflict becomes applicable, the intervener becomes a party to

[62] Gray, *International Law and the Use of Force* (n. 8), 118–19.

[63] Veronika Bílková, 'Reflections on the Purpose-Based Approach', *Heidelberg Journal of International Law* 79 (2019), 681–3; Erika de Wet, 'The (Im)permissibility of Military Assistance on Request during a Civil War', *Journal on the Use of Force and International Law* 7 (2020), 26–34.

[64] Fox, 'Intervention by Invitation' (n. 17), 839; Redaelli, *Intervention in Civil Wars* (n. 8), 103.

[65] De Wet, *Military Assistance on Request* (n. 8), 120–1.

[66] Hathaway et al., 'Consent Is Not Enough' (n. 32), 36–7; in this sense, see also Henderson, *Use of Force* (n. 8), 377. See also Lieblich, 'The International Wrongfulness' (n. 28), 669; cf. de Wet, *Military Assistance on Request* (n. 8), 151.

[67] The intervener's human rights obligations are triggered only based on the premise that these obligations apply extraterritorially to the military action abroad. But, under the law of the European Convention on Human Rights and Fundamental Freedoms (ECHR), this depends on the threshold criterion of the intervener's 'jurisdiction'. 'Jurisdiction' normally demands 'effective control'; boots on the ground may lead to such control. Under the rather restrictive case law of the European Court of Human Rights (ECtHR), mere air strikes and drone strikes do not establish 'control' over territory or persons. Thus extraterritorial jurisdiction is not present and hence no extraterritorial human rights obligations of the intervening military power arise: ECtHR, *Georgia v. Russia* (II) [GC], Judgment (Merits), App. No. 38263/08 (21 January 2021), paras 126 and 133–44, esp. 137.

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the conflict, and the intervention additionally breaches the warring party's obligation to ensure respect for IHL under common Article 1 of the Geneva Conventions.[68]

Third, the R2P is implicated. This responsibility falls, first of all, on the territorial state; if that state fails to honour it, third states may – and arguably must – intervene. Under the law as it stands, military intervention against the atrocious regime is reserved for the UN Security Council,[69] but it would be blatantly inconsistent with the generally accepted idea of R2P to allow any intervention *in favour* of the criminal government.

Finally, under Article 41 (in conjunction with Art. 40) ARSIWA, states are arguably obliged not to recognise as lawful a serious breach of peremptory norms of international law. Massive violations of IHL and of core human rights, such as the right to life, pertain to the body of ius cogens. It is submitted here that the obligation of non-recognition applies not only to territorial status resulting from violations of territorial integrity but also to other violations of ius cogens. Bad faith support given with knowledge of (or an obligation to discover) a criminal government (such as the Assad regime), which commits such serious breaches, may thus amount to a violation of the intervener's obligation of non-recognition.[70]

However – and importantly – the law laid out here is 'inconclusive in light of the diversity of state practice'.[71] In particular, state behaviour in the Syrian war has not reflected these legal principles. Although the United States, Turkey, Saudi Arabia, and other Gulf states have denied the legitimacy of the Assad regime, they have neither questioned its legal capacity to invite outside military assistance nor Russia's right to grant such aid.[72] At the same time, the Western states have not explained their refusal to cooperate with Assad in legal terms. Some observers have therefore concluded that their abstention was not grounded in any opinio iuris that such cooperation would be prohibited but motivated only by political expediency. The three trialogue authors examine this problem in more detail.

68 Redaelli, *Intervention in Civil Wars* (n. 8), 179.
69 Resolution adopted by the General Assembly, World Summit Outcome Document, UN Doc. A/RES/60/1 of 24 October 2005, para. 139.
70 Hathaway et al., 'Consent Is Not Enough' (n. 32), 38; Lieblich, 'The International Wrongfulness' (n. 28), 668.
71 Gray, *International Law and the Use of Force* (n. 8), 100, 104, and 107 (quote at 100).
72 *Ibid*., 107.

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5. Arming the Opposition?

Different yet is the question of whether states would be allowed to intervene *against* a government to combat that government's atrocities. If the purposes of an intervention have any legal relevance, they distinguish the lawfulness of interventions in favour of governments that do not enjoy popular support (see section II.B.3, pp. 15–16). But an excessive focus on 'purposes' might also be used as an argument allowing intervention in favour of a 'legitimate' armed opposition, with the purpose of liquidating a criminal regime. Moreover, the recent practice of arming the 'legitimate' opposition in states such as Syria may have weakened the traditional *Nicaragua* prohibition on intervention in favour of the opposition. The more the incumbent Assad government was seen to violate basic rules of international law (human rights, IHL, and self-determination) and to commit war crimes, including multiple raids with chemical weapons, the less criticism was voiced against the delivery of arms to and military training of an opposition that fought the heinous regime. Still, the massive delivery of weapons to the Syrian armed opposition by the United States and other actors (e.g., the United Kingdom, Saudi Arabia, Qatar, Jordan, Turkey) was either not openly declared or was mispresented as 'non-lethal assistance' and purely 'humanitarian aid'. The states intervening on the side of the armed opposition have never claimed a legal right to do so; instead, they have shrouded their legal position with ambiguous statements.[73]

It is therefore an open question whether the new practice has shaken the prohibition on arming the opposition. The prevailing view is that such interventions in favour of 'legitimate' rebels remain an unlawful intervention and an indirect violation of the prohibition on the use of force.[74] History offers strong policy argument for upholding the prohibition on arming the

[73] For a detailed analysis of the ambiguous statements accompanying the 'humanitarian' aid for the Syrian opposition, see Olivier Corten, *La rébellion en droit international* (Leiden: Brill 2015), 150–60.

[74] Dapo Akande, 'Would It Be Lawful for European (or Other) States to Provide Arms to the Syrian Opposition?', EJIL:Talk!, 17 January 2013, available at www.ejiltalk.org/would-it-be-lawful-for-european-or-other-states-to-provide-arms-to-the-syrian-opposition/; Christian Henderson, 'The Provision of Arms and "Non-Lethal" Assistance to Governmental and Opposition Forces', *University of New South Wales Law Journal* 36 (2013), 642–81; Tom Ruys, 'Of Arms, Funding and Non-Lethal Assistance: Issues Surrounding Third-State Intervention in the Syrian Civil War', *Chinese Journal of International Law* 13 (2014), 13–54; Tom Ruys and Luca Ferro, 'The Enemy of My Enemy: Dutch Non-Lethal Assistance for "Moderate" Syrian Rebels and the Multilevel Violation of International Law', *Netherlands Yearbook of International Law* 50 (2020), 333–76; Redaelli, *Intervention in Civil Wars* (n. 8), 257. For a deep analysis, see Corten, *La rébellion en droit international* (n. 73).

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opposition, such military support of rebels often prolonging armed conflict and the military removal of a repressive regime not always producing a better outcome. And there is the danger, as Christine Gray points out, that any new government will lack legitimacy if it uses outside military assistance to seize power and continues to rely on foreign troops to sustain it.[75]

Other observers have argued that the overt assistance (including military assistance) lent to the Syrian opposition has indeed begun to shape a new rule allowing intervention in favour of rebels against a – roughly speaking – criminal government.[76] But it remains to be explored where the threshold of this criminality lies, which types of assistance might be tolerable, and under which conditions exactly. The chapters of this book seek to clarify this question.

C. *The Combination of Legal Grounds for Intervention and the Involvement of the UN Security Council*

A striking feature of the recent military interventions is that the acting states invoke a multiplicity of legal grounds (titles), only one of which is the invitation. For example, the operations by the United States and its allies, on the one side, and Russia, on the other, in Iraq and Syria were explained both as collective self-defence[77] and as invitations (by Iraq[78] and by Syria[79]). At this point, it has been argued that the title of invitation should best be considered a mere 'complement', or 'subsidiary', to the title of collective self-defence, except when the military assistance would directly or indirectly support international crimes committed by the host – which is the case in Syria.[80]

Most conspicuously, the UN Security Council was also engaged in recent events, either by authorising or commending the military activity, or by making pronouncements on the legitimacy of the requesting actors.[81]

75 Gray, *International Law and the Use of Force* (n. 8), 119.

76 Stacey Henderson, 'The Evolution of the Principle of Non-Intervention? R2P and Overt Assistance to Opposition Groups', *Global Responsibility to Protect* 11 (2019), 365–93 (393).

77 See letters to the UN Security Council: UN Doc. S/2014/695 of 23 September 2014 (United States); UN Doc. S/2015/563 of 24 July 2015 (Turkey); UN Doc. S/2015/688 of 7 September 2015 (United Kingdom); UN Doc. S/2015/745 of 8 September 2015 (France).

78 See n. 4.

79 See n. 5.

80 Gill, 'Military Intervention at the Invitation of a Government' (n. 17), 231; Kreß, 'The Fine Line' (n. 43).

81 See, e.g., on Mali: UN SC Res. 2056 of 5 July 2012; UN SC Res. 2071 of 12 October 2012; UN SC Pres. Statement on Threats to International Peace and Security Caused by Terrorist Acts, UN Doc. S/PRST/2012/7, 26 March 2012; UN SC Pres. Statement on Peace and Security in Africa, UN Doc.

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This has fuelled a proposal that the new generation of UN 'stabilisation missions' to support host states combating armed groups be qualified as a distinct form of UN-mandated intervention by invitation.[82] The role of the Security Council is mostly discussed by Olivier Corten in Chapter 2 and by Gregory H. Fox in Chapter 3, and they identify what Christian Marxsen calls, in his Conclusion, a 'half-hearted multilateralism'.[83]

III. THE TRIALOGUE METHOD

The present volume continues the work of the three earlier volumes of the *Max Planck Trialogues*.[84] The series aims to generate a better and deeper understanding of each legal issue at hand by juxtaposing diverging perspectives – an approach we called 'multiperspectivism'.[85]

The multiperspectivism of this volume does not flow from geographical or gender diversity: all authors are 'Western'-educated men. Rather, the authors employ distinct and diverse scholarly methods: a deep historical and conceptual analysis in Chapter 1 (Dino Kritsiotis); a rich description, coupled with critical positivism, in Chapter 2 (Olivier Corten); and a large-N study, with quantitative methods, in Chapter 3 (Gregory H. Fox).

The three authors work on the basis of diverging *Vorverständnis*. Olivier Corten is deliberately not 'neutral' towards the relevant legal framework. He explicitly favours a restrictive reading of the rules that seeks to limit the lawful options for using military force, because he deems such reading normatively desirable.

In contrast, Gregory H. Fox's chapter has a less normative drive (despite his palpable sympathy for the democratic legitimacy view). His study applies methods of political science and thus goes beyond the usual legal methods.

S/PRST/2012/9, 4 April 2012; UN SC Res. 2085 of 20 December 2012. In scholarship, see Karine Bannelier and Theodore Christakis, 'Under the UN Security Council's Watchful Eyes: Military Intervention by Invitation in the Malian Conflict', *Leiden Journal of International Law* 26 (2013), 855–74.

[82] Patryk I. Labuda, 'UN Peacekeeping as Intervention by Invitation: Host State Consent and the Use of Force in Security Council-Mandated Stabilisation Operations', *Journal on the Use of Force and International Law* 7 (2020), 317–56.

[83] Marxsen, 'Conclusion', in this volume.

[84] See 'Preface', in this volume.

[85] Anne Peters, 'Introduction to the Series: Trialogical International Law', in Mary-Ellen O'Connell, Christian Tams and Dire Tladi, *Self-Defence against Non-State Actors*, Max Planck Trialogues on the Law of Peace and War (Anne Peters and Christian Marxsen, series eds), vol. 1 (Cambridge: CUP 2019), XI–XXV.

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He supplements the legal-doctrinal analysis with quantitative data, and he thereby seeks an empirical validation for findings of opinio iuris and practice.

Dino Kritsiotis is less outspoken about his premises. He does, however, emphasise the importance of cognisance of the overall context – both historical and conceptual – of the rules of international law we ultimately put to use: a more informed understanding of what purpose, or set of purposes, they were originally designed to serve. Thus he consistently engages with the historic trajectory of the relevant legal terms of art to uncover their inherent fluidity.

The three authors also disagree about the legal significance of state pronouncements and ultimately ascribe differing degrees of autonomy to the legal sphere. As Kritsiotis teases out the tensions of substantive law and its overall coherence through time, he seems to question how the actual regulatory power of law can make a difference in the real world.

Corten's close examination exposes the rift between hard-nosed interventionist practice and states' eagerness to explain away their actions through an appropriate discourse. He acknowledges that it is difficult to pin down the *legal* convictions of states from their often deliberately ambiguous statements. Nevertheless, he insists that the legal content of that discourse (however pretextual) exists alongside (in interaction with) the political message and meaning, without being completely swallowed up by politics. Corten therefore deems identification of an opinio iuris possible because the relevant statements are made in the context of a discourse that is both legal and political, and not reducible to politics only. In the end, Corten does indeed extract an opinio iuris from statements that other authors dismiss as pure politics.

In contrast, Fox recognises the UN Security Council in itself (as opposed to its members) as the actual lawmaker whose pronouncements should, as such, count as relevant legal opinion and practice in the process of shaping customary international law.

Those reading the three chapters will hopefully note how the different intellectual styles influence the legal answers given. Moreover, the trialogical structure encourages its participants to decentre their own perspectives. By explicitly focusing on the authors' divergence and disagreement, we hope to achieve a richer understanding of the issue at hand.

IV. AN OVERVIEW OF THE BOOK

Chapter 1, 'Intervention and the Problematisation of Consent' by Dino Kritsiotis, takes a decidedly historical stance in examining the legal functions (or claimed functions) of 'consent' with regard to intervention, in comparison

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to other legal constellations in the areas of both ius in bello and the ius ad bellum. Kritsiotis is a professor of public international law at the University of Nottingham (United Kingdom). His historical approach, imbued with critical theory, allows him to shed light on the history of military intervention on request.

The chapter traces, through historical analysis, the assumptions behind, content of, and ambitions of each relevant rule: the prohibition on the use of force; the prohibition of intervention; and the principle of self-determination. Kritsiotis's method is to combine descriptive points of reference (the outward appearance of an intervention or an act of force) with certain normative components – what public international law has made of, and how it uses, each of these terms (notably, 'intervention' and 'use of force'). His detailed engagement with their respective historical trajectories seeks to bring to light the oscillation between descriptivity and normativity. To that end, Kritsiotis analyses important historical texts such as the IDI's Neuchâtel Resolution II of 1900, the UN General Assembly's Declaration on Friendly Relations of 1970, and the ICJ's *Nicaragua* judgment of 1986, whose hidden methodology he seeks to uncover.

The chapter also seeks to coordinate more precisely how each mentioned rule relates, or should relate, to the matter of 'consent'. It explores – through the historical debates, the ILC materials on state responsibility, and historical practice on piracy and counter-terrorism – whether consent precludes a military action from coming within the scope of the prohibitions on intervention and the use of force or enters as an exception to these basic prohibitions. The chapter also analyses the role of consent in IHL, for example with regard to humanitarian aid.

The chapter's distinct contribution is its emphasis on the totality of international legal stipulations within the ius ad bellum (force and intervention) and beyond (self-determination, as well as the ius in bello). Thus the chapter forces us to reconsider some of the terminology – 'intervention by consent', 'third states' – that has come to occupy the literature. The chapter notably points out a 'crossover' of the rules with regard to 'consent'. These crossovers are identified by foregrounding remnants of the early twentieth-century doctrine of belligerency and the historical concept of 'civil war', which exercise a lasting – confusing – impact on the contemporary law as it stands.

Chapter 2, 'Intervention by Invitation: The Expanding Role of the UN Security Council', by Olivier Corten, is a qualitative study of recent cases: Yemen (2015); Iraq and Syria (2014–15); Mali (2013); and The Gambia (2017). Corten is a professor at the Université libre de Bruxelles (Belgium). Based on his continental training in law and studies in political

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science, he approaches international law with a critical sensibility but interprets the rules on the use of force with the doctrinal tools of legal positivism. He thus seeks to avoid a naive view that would deny or ignore the openness of legal reasoning and the relevance of power in the application and interpretation of international law. At the same time, he conceives of the debate on positive law as a social reality in which the various legal arguments are formally marshalled, assessed, and challenged from within the doctrinal system. This means that the legal discourse is constantly contaminated by the political interests of the speakers and by the political context. However, it is still a special discourse that follows its specific rules. These legal battles themselves may then, inversely, influence and shape the political debate. Based on the assumption that law may matter, Corten's interpretation of the law as it stands seeks to steer far from idealist, utopian, or naive pacifism but represents a conscious strategic choice.

In his contribution to the trialogue, Corten analyses state practice meticulously and takes the statements by the relevant actors seriously, as manifestations of an opinio iuris. The legal parameters, the invoked legal justifications, and their legal problems are dissected, while the role of the UN Security Council is analysed specifically and in detail. Such close reading – complemented by structural arguments on contextual principles such as the right to self-determination – paints a legal picture in which the purposes of the military action appear as a key factor in determining the international legality of a military intervention on request. Yemen is held to be a case of alleged counter-intervention and self-determination; Iraq and Syria are the paradigmatic instances in the fight against terrorism; Mali stands for the purported repression of a secession; The Gambia is a clear example of pro-democratic intervention.

By means of this close and systematic analysis of intervening states' statements and other states', or international organisations', acceptance of those statements, Corten seeks to identify a relevant opinio iuris. He considers Security Council statements to manifest an opinio iuris not as such but only to the extent accepted by states.

In Chapter 3, 'Invitations to Intervene after the Cold War: Towards a New Collective Model', Gregory H. Fox systematically examines how the United Nations, regional organisations, and leading states have reacted to military intervention on request. Fox is a professor of law at Wayne State University School of Law, in Detroit, Michigan (United States). In his previous writing, he has amply demonstrated that international legal texts and practice accommodate democracy, and that – despite its broadness and vagueness – the principle of democracy is not relegated to the domaine réservé of states.

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Fox's discussion relies on a new dataset on all cases of interventions in armed conflicts, spanning 1990 to 2017, compiled for this purpose. A detailed explanation of the coding method is made available in the chapter endmatter, as Appendix I.

The chapter begins by charting contemporary international law on the matter. Fox identifies and sketches out four different views that have emerged in particular historic constellations and which still claim relevance. Fox calls these the 'IDI view', the '*Nicaragua* view', the 'democratic legitimacy view', and the 'anti-terrorism view'. The central research question then explored is whether these views (or 'theories') do in fact guide contemporary state and international organisational practice. Fox relies on his compiled dataset to discover how the international community has received these theories in practice since the end of the Cold War. An important finding is that the UN Security Council and General Assembly made statements on an overwhelming number of these interventions, and that the Security Council is playing a central role in passing judgment on the legality of particular interventions. The chapter therefore specifically asks whether the record of Security Council reactions supports or negates each theory, or points in no direction at all.

V. IN LIEU OF CONCLUSIONS: PRINCIPLE AND PRACTICE REVISITED

Assessments of interventions relying on an 'invitation' or consent are – perhaps more than many other problems of international law – imbued with considerations of political expediency and opportunism. States behave strategically and are especially hesitant to pronounce any discernible legal opinion. It is therefore the task of scholarship to, first, identify properly the possible legal implications in governmental statements even if those are not explicitly couched in the language of the law. Second, scholars can carve out relevant principles and how they are linked to each other in the fabric of international law. In the context of consensual interventions, the legal principles on the recognition of governments, on non-intervention, on the use of force, on the parameters of human rights protection, and finally on the rules of state responsibility need to be interpreted and applied to mutual support, according to the principle of systemic integration.[86] A third scholarly task is to identify new criteria with which to frame the new practice, rather than simply bracketing it (or dismissing it as 'political') and

[86] Cf. Art. 31(1) lit. c) VCLT.

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continuing to rely on outdated doctrines.[87] In this way, scholars are not be doomed to blindly chronicle state practice and diagnose legal gaps; rather, they are empowered to point to inconsistencies and to pronounce with more precision where such practice prevents the emergence of a rule, where it makes law, and where it breaks the law.

At this juncture, a word of caution is warranted. Discussing the Syrian civil war, Dapo Akande and Zachary Vermeer have – not without merit – pointed out that states offer motivations 'as opposed to the legal justification for intervention' and that 'it would be wrong to think that the motivation or reason equates to the legal justification as that would misunderstand the *opinio juris* element of custom'.[88] I agree that observers should not ascribe a legal conviction to a state too lightly. However, states very rarely, if ever, clearly pronounce an opinion that they anchor as their 'legal position'. International lawyers too narrowly determined to find an opinio iuris will be frustrated, and the search will lead to further cutting away of the fabric of international law – cloth that is already thin and dotted with holes. This scholarly tendency – under the flag of scientific method – to shy away from claiming principles and naming the consequences of their breach will dilute international law to its infamous 'vanishing point'.[89] We hope that the following three chapters, each manifesting a different scholarly approach, will be a welcome antidote.

87 Christina Nowak, 'The Changing Law of Non-Intervention in Civil Wars: Assessing the Production of Legality in State Practice after 2011', *Journal on the Use of Force and International Law* 5 (2018), 40–77 (75).

88 Dapo Akande and Zachary Vermeer, 'The Airstrikes against Islamic State in Iraq and the Alleged Prohibition on Military Assistance to Governments in Civil Wars', EJIL:Talk! 2 February 2015, available at www.ejiltalk.org/the-airstrikes-against-islamic-state-in-iraq-and-the-alleged-prohibition-on-military-assistance-to-governments-in-civil-wars/, 5. In this sense, see also Gray, *International Law and the Use of Force* (n. 8), 89–90.

89 Hersch Lauterpacht, 'The Problem of the Revision of the Law of War', *British Yearbook of International Law* 29 (1952), 360–82 (382).

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1

Intervention and the Problematisation of Consent

Dino Kritsiotis*

I. INTRODUCTION

Towards the end of January 2019, in the midst of mass demonstrations against the government of President Nicolás Maduro (successor to Hugo Chávez), Juan Guaidó, the charismatic leader of the National Assembly, declared himself the interim president of Venezuela. A succession of states moved to immediate recognition of him as such and to acceptance of his proclamation: the United States was joined by Canada, Australia, and a host of Latin American countries, including Brazil; Austria, Denmark, France, Germany, Spain, Sweden, and the United Kingdom followed.[1] For his part, President Maduro regarded these developments as a 'gringo coup' inspired by the United States, which he was determined to repel.[2] He responded by closing the Venezuelan Embassy in Washington D.C.; Guaidó, in turn, appointed Carlos A. Vecchio as 'Ambassador of the Bolivarian Republic of Venezuela to the United States of America'.[3]

* I am indebted to my two interlocutors in this enterprise – Olivier Corten and Greg Fox – as I am to Erika de Wet and to Achilles Skordas for their detailed engagement with an earlier version of this chapter. My warm appreciation must also be expressed to Anne Peters and to Christian Marxsen, both of the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, for their very kind invitation to participate in this fourth Trialogue in the series.

[1] Ana Vanessa Herrero, 'Who Supports Venezuela's Opposition, and Why It Matters', *New York Times*, 5 February 2019, A6. By early February 2019, it was estimated that more than twenty states had been forthcoming with their recognition: Ernesto Londono, 'In Venezuela, Insurgent Sees Path to Victory', *New York Times*, 4 February 2019, A1.

[2] Matthew Campbell, 'Defiant Maduro Vows Venezuela Will Crush Any "Gringo Coup"', *The Sunday Times* (London), 27 January 2019, 14.

[3] Vecchio was one of several 'ambassadorial' appointments made by Guaidó: Edward Wong and Nicholas Casey, 'Duelling Diplomats Lobby Nations to Pick Sides in the Venezuelan Conflict', *New York Times*, 2 February 2019, A10.

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The episode was also notable because of the reactions of international organisations – and especially the stark differences between those reactions – to these developments: UN Secretary-General António Guterres declared that the United Nations would continue to offer its 'good offices to the parties to be able at their request to help find a political solution'.[4] In contrast, the Organization of American States wasted no time in indicating its support for Guaidó.[5] Meanwhile, the International Monetary Fund maintained that it would heed the positions of its member states, and the Organization of the Petroleum Exporting Countries (OPEC), of which Venezuela is a founding member, remained silent on the matter.[6]

With indications that 'a parallel government' had been formed in Caracas[7] and that 'a cold war style geopolitical imbroglio' was emerging,[8] the overwhelming impression was one of intractability – the absence of any conceivable breakthrough. The Venezuelan army stood – apparently firmly – on the side of their president,[9] and, yet, as the weeks rolled by, Juan Guaidó came to make a formal request to Admiral Craig S. Faller, Commander of the US Southern Command, for some form of assistance to help Venezuelans cope with conditions worsening 'as a consequence of the corrupt and incompetent regime of Nicolas Maduro'. He did so through his 'Ambassador' to the United States, in a letter dated 11 May 2019, which '[w]elcomed strategic and operational planning so that we may fulfil our constitutional obligation to the Venezuelan people in order to alleviate their suffering and restore our democracy'.[10] In that communication, he also expressed concern at 'the impact of the presence of uninvited foreign forces that place our country and others at risk'.[11]

Moreover, earlier in the year, it had been 'Ambassador' Vecchio who had approached the US Congress for further humanitarian aid to Venezuela – further, that is, to the 20 million USD in food and medical aid already pledged

[4] Herrero, 'Who Supports Venezuela's Opposition' (n. 1), A6.

[5] By way of a tweet from its president, Luis Almagro, on 23 January 2019, even though not all thirty-five members of the OAS were on board: *ibid*.

[6] *Ibid*.

[7] John Paul Rathbone and Gideon Long, 'A Parallel Government', *Financial Times* (London), 2–3 February 2019, 7.

[8] *Ibid*. (for China, Russia, Turkey, and Cuba all continued to back President Maduro).

[9] Stephen Gibbs and Marc Bennetts, 'Army Vows Loyalty to Maduro as Putin tells US to Back Off', *The Times* (London), 25 January 2019, 32–3.

[10] And this is why it was styled as a formal request: Julian Borger, 'Venezuela: Opposition Leader Guaidó asks US Military for "Strategic Planning" Help', *The Guardian* (London), 13 May 2019.

[11] *Ibid*. Undoubtedly a reference to the visit by two Russian military airplanes, 'which landed in broad daylight' in late March: Anatoly Kurmanaev, 'Russia Shows Open Support for Maduro with 2 Planes', *New York Times*, 26 March 2019, A6.

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by the United States since Guaidó had come on the scene.[12] This approach was made on the very day that President Maduro launched a video warning the United States that any intervention in his country 'would lead to a Vietnam worse than they can imagine'.[13] President Maduro closed the border to air and sea traffic from three Caribbean islands – Aruba, Bonaire, and Curaçao – from where the Venezuelan opposition wanted to stage the flow of supplies.[14] The closure represented 'a sovereign decision', according to Venezuelan Vice President Delcy Rodríguez, against the attempt of Venezuela's neighbours to 'ignore the legitimate authority of the country'.[15] This was part of President Maduro's concerted effort to deny that Venezuela was in need of any assistance[16] – but, with malnutrition and infant mortality rates rising explosively in the country, the Maduro government took a decision at the end of March 2019 to allow the Red Cross to deliver medical supplies.[17]

What exactly is public international law to make of these developments? Where does – and where should – it stand in the event of competing, and even contradictory, claims? These developments were no aberration. Nor were they unique in terms of their numbing complexity: they came at a time when Libya was once again convulsed by a struggle for the soul of political power[18] and at the same moment as President Bashar al-Assad's fortunes were shifting in Syria.[19] They came, too, after President Abdo Rabbo Mansour Hadi of Yemen made an 'appeal' to five member states of the Gulf Cooperation Council (GCC) – Saudi Arabia, the United Arab Emirates, Bahrain, Kuwait, and Qatar – in March 2015 'to stand by the Yemeni people as you have always done and come to the country's aid' in the face of what he called 'the ongoing Houthi aggression'.[20] More recently

[12] Wong and Casey, 'Duelling Diplomats' (n. 3), A10.

[13] Ana Vanessa Herrero and Austin Ramzy, 'Maduro Warns that U.S. Intervention Would Create a Vietnam Nightmare', *New York Times*, 31 January 2019, A6.

[14] Nicholas Casey, 'Venezuela Shuts Borders to 3 Islands over Dispute on Aid', *New York Times*, 21 February 2019, A10.

[15] *Ibid*.

[16] Although this should be read against claims of the politicisation of humanitarian provision within the country: Nicholas Casey, 'Trading Lifesaving Treatment for Maduro Votes', *New York Times*, 17 March 2019, A1.

[17] Anatoly Kurmanaev and Isayen Herrera, 'Agreement Allows Red Cross to Deliver Aid to Desperate Venezuelans', *New York Times*, 30 March 2019, A4 (reporting that the Red Cross had considered this to be a 'diplomatic waiver' granted from President Maduro).

[18] David D. Kirkpatrick, 'Militia Advances in Libya, Raising Prospect of Renewed Civil War', *New York Times*, 5 April 2019, A4.

[19] Carlotta Gall and Hwaida Saad, 'Bombs Again Find Fleeing Syrians Trapped Near Closed Border with Turkey', *New York Times*, 31 May 2019, A10.

[20] Contained in the Statement issued by the Kingdom of Saudi Arabia, the United Arab Emirates, the Kingdom of Bahrain, the State of Qatar, and the State of Kuwait: UN Doc. S/2015/217, 27 March 2015, 4.

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still, in March 2020, the *New York Times* reported that both President Ashraf Ghani of Afghanistan and his chief rival, Abdullah Abdullah, had taken the oath of presidential office in duelling inauguration ceremonies that were held in Kabul on the very same day – '[j]ust a few minutes and a thin wall apart'.[21]

To be sure, this is decidedly not a new problem for public international law: over the decades, it has had to contend with situations described variously as 'intervention by consent', 'intervention by invitation', and 'intervention on request', such consent, invitation or request delivered by an incumbent government on behalf of its respective state. Examples range from the Soviet intervention in Hungary of November 1956 and the Oman and Muscat incident of July 1957, through the interventions of the United States in Grenada of October 1983 and in Panama of December 1989, to the Italian-led action in Albania of April 1999 and President Viktor Yanukovych's invitation to the Russian Federation for military assistance in the Ukraine of March 2014. Each of these characterisations relies, of course, on the 'potential legalizing element' or 'substantive element' of consent,[22] but they also gently prompt investigation of the relevant institution under public international law that governs such matters – that is, the law concerning intervention. At other times – although by no means always – the law on force, as it is found in the 1945 Charter of the United Nations, has come into focus,[23] and the argument must surely be made for a systematic engagement of *both* of these prohibitions. In this chapter, I will consider the laws of the ius ad bellum holistically, exploring the assumptions, content, and ambitions of each prohibition, aiming to coordinate more precisely and more deliberately how each relates – or should relate – to the matter of 'consent'.

That consent typically emanates from the government of a state, once said to be 'the most important single criterion of statehood, since all others depend upon it'.[24] That criterion is famously itemised in the 1933

[21] As a consequence of the contested presidential election there six months previous: Mujib Mashal, Fatima Faizi and Najim Rahim, 'Ghani Takes the Oath of Afghan President. His Chief Rival Does, Too', *New York Times*, 10 March 2020, A4. See also Rick Gladstone, 'Quandary at U.N.: Who Gets to Speak for Myanmar and Afghanistan?', *New York Times*, 12 September 2021, A10, and the report on Guinea-Bissau following the election there: 'The Presidents Came in Two by Two', *The Fifth Floor Podcast* (BBC), 21 March 2020, available at www.bbc.co.uk/programmes/w3csyntz.

[22] Eliav Lieblich, *International Law and Civil Wars: Intervention and Consent* (New York: Routledge 2013), 1.

[23] As is done by Heini Tuura, 'The Ambivalence of Armed Intervention by Invitation: Caught between Sovereign and Global Interests', Ph.D. submitted to the University of Helsinki, April 2019 (copy on file with author).

[24] James Crawford, *The Creation of States in International Law* (Oxford: OUP 2nd edn 2006), 56.

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Montevideo Convention on the Rights and Duties of States, alongside 'defined territory' and 'permanent population', as one of the qualifications for statehood (where 'government' and 'independence' have been argued to be 'closely related as criteria' for statehood – and 'in fact may be regarded as different aspects of the requirement of effective separate control').[25] That said, on the independence of the Republic of the Congo in August 1960, it was contended – not unduly, let us admit – that '[a]nything less like effective government it would be hard to imagine',[26] so one must wonder whether there are other contexts in which a 'less stringent' approach can be taken towards the question of the government of a given state[27] – that is, whether a certain release from rigour does and ought to prevail. Naturally, and as the opening of this chapter indicates, the institution of recognition is never far from the sidelines in these situations, and while it might be tempting to think of the role of recognition as dispositive from one case to the next, it has been known to occur prematurely,[28] thereby opening up the recognising state to accusations of unlawful intervention.[29]

At the same time, the incumbent government of state cannot rest on the laurels of its status as such to consent to assistance at any moment of its pleasing. In March 1976, for example, the UN Security Council adopted Resolution 387 on Angola, in which it 'recall[ed] the inherent and lawful right of every State, in the exercise of its sovereignty, to request assistance from any other State or group of States'.[30] That right – 'the inherent and lawful right of every State' – seemed to proceed from 'the exercise of its sovereignty' in the Council's view, which, in turn, was strongly suggestive of the essential conditions in which consent can permissibly be given in law – by the state, as well as on its behalf. Over time, public international law has attempted variously to calibrate what this threshold might be – from the recognition of belligerency to the occurrence of civil war; from the test of effective control to (most recently) the (democratic) legitimacy of the beleaguered government. The chapter takes a decidedly historical stance in examining how and why these limitations on consent took root in the way that they did; as it does so, it will give some consideration to the impact of the laws of not only the ius ad bellum but also the ius in bello – commonly

[25] *Ibid*., 55.
[26] *Ibid*., 57.
[27] *Ibid*.
[28] As suggested by Crawford, *ibid*.
[29] See Stefan Talmon, 'Recognition of Opposition Groups as the Legitimate Representative of a People', *Chinese Journal of International Law* 12 (2013), 219–53 (247).
[30] UN SC Res. 387 of 31 March 1976, cons. 4.

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omitted from the narrative. Reclaiming the latter is critical to the enterprise, for they too trade in the currency of consent.

When the UN Security Council adopted Resolution 387 in March 1976, it did so in the context of 'acts of aggression committed by South Africa against the People's Republic of Angola and the violation of its sovereignty and territorial integrity'.[31] That refrain suggests that the Security Council had Angola's 'inherent right' of self-defence at the top of its mind – and that the reference to the request for assistance implicated the law of collective self-defence under the Charter of the United Nations. This is a crucial line of enquiry for us to pursue, because it is a potent reminder that consent operates elsewhere in the laws of the ius ad bellum: its function and utility is not confined to solicited interventions of the order that frames the focus of this volume. It therefore becomes important to chart the conditions of consent in these other contexts and to examine more closely how consent relates to 'justifications' such as collective self-defence, counter-intervention, and pro-democratic intervention, as well as authorisations from the Security Council.

The chapter is structured as follows.

- In section II, we discuss three preliminary matters: the general relationship between the prohibitions of intervention and force; the terminological question of the 'third state'; and the method(s) that are at work in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua* of June 1986.[32]
- We then move on, in section III, to consider the assumptions and broad ambitions of each prohibition, as well as and their relation with consent more broadly.
- This is followed, in section IV, by an exposition of the actual limitations of consent, primarily as articulated by the Institut de droit international (IDI), but, also with a view to the laws of the ius in bello.
- In the penultimate section of the chapter, section V, we come to examine the function of consent within other components of the ius ad bellum, and it is here that we can observe how the terms and purposes of consent can be structured differently.

[31] *Ibid.*, cons. 6.

[32] ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), merits, judgment of 27 June 1986, ICJ Reports 1986, 14. I identify plural methods, not the singular 'method' intimated by Olivier Corten, 'Intervention by Invitation: The Expanding Role of the UN Security Council', Chapter 2 in this volume, section I.B, 107.

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- In its concluding part, section VI, the chapter offers some general reflections by returning to the significance of the principle of self-determination in this normative context, especially in view of its own evolution since its articulation in the Charter of the United Nations in June 1945.

II. THREE PRELIMINARY MATTERS

A. *Force and Intervention: The Laws of the Ius ad Bellum*

The first preliminary matter to call for our attention is the fact – of long pedigree within the realm of public international law – that the prohibition of intervention, as it applies to states, is 'not, as such, spelt out in the Charter' of the United Nations.[33] Article 2(7) of the Charter does provide that '[n]othing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII'[34] – a provision that notably addresses the prohibition of intervention *to the organisation of the United Nations itself*. In this, the provision is altogether different from the formulation of the prohibition of force contained in Article 2(4), which – very deliberately and quite explicitly – is addressed to all UN member states, although it ought to be said that the *chapeau* to Article 2 of the Charter makes clear that '[t]he Organisation and its Members' shall act in accordance with the principles it sets out.[35]

When it came to the UN General Assembly's enactment of Resolution 2625 (XXV) of October 1970, the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, the General Assembly committed itself to the codification and progressive development of seven principles of public international law, among which were the principle that 'States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other

33 ICJ, *Nicaragua* (n. 32), para. 202.

34 Rosalyn Higgins, Philippa Webb, Dapo Akande, Sandesh Sivakumaran and James Sloan, *Oppenheim's International Law: United Nations*, vol. I (Oxford: OUP 2017), 334.

35 Andreas Paulus, 'Article 2', in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte and Andreas Paulus (eds), *The Charter of the United Nations: A Commentary*, vol. I (Oxford: OUP 3rd edn 2012), 121–32 (123).

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manner inconsistent with the purposes of the United Nations' (the prohibition on force) and '[t]he duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter' (the prohibition on intervention).[36] There are, evidently, shades of the Charter present in both of these iterations, but when the General Assembly came to proclaim each of these principles in greater detail in its text, it directed their application to *states* – and deliberately so, the General Assembly simply repeating the conception of the prohibitions of intervention[37] and force[38] it had already shared in the preamble.[39] This is fully understandable: with Resolution 2625 (XXV), the General Assembly aimed to promote the rule of law among nations, 'and particularly the universal application of the principles embodied in the Charter',[40] since the United Nations was able to boast only 127 member states by the end of that calendar year.[41] The switch to 'states' in the Resolution from the 'member states' of the Charter extricated the principles from their conventional embedding and suggested that these principles were amenable to universal application.

There was some early sense in history of the United Nations that one of these principles could not operate without the other: it had been proposed that Article 2(7) of the Charter 'applied only to intervention by the United Nations, and [that] the intervention by one State in the affairs of another was illicit under the Charter only when it was accompanied by the threat or use of force'.[42] This conjoined reading of the two principles was by no means the preferred view when it was first uttered,[43] nor was it to find much success as time went on. Prompted by the substantive claims made by Nicaragua against the United States in April 1984, the International Court of Justice (ICJ) determined, in the *Nicaragua* case, that one set of facts could result in the

36 UN GA Res. 2625 (XXV) of 24 October 1970, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, cons. 7.

37 *Ibid*., cons. 8.

38 *Ibid*., cons. 10.

39 Importantly, 'coercion' was treated in separate terms in the ninth preambular recital to the Declaration. Its inclusion in this way was an indication, at least for Robert Rosenstock, that 'a restrictive interpretation of the term "force" is called for': Robert Rosenstock, 'The Declaration of Principles of International Law Concerning Friendly Relations: A Survey', *American Journal of International Law* 65 (1971), 713–35 (725).

40 UN GA Res. 2625 (XXV) (n. 36), preamble.

41 So, to give a flavour of the predicament of that time, Bahrain, Bhutan, Oman, Qatar, and the United Arab Emirates were to join in 1971; the Bahamas, the Federal Republic of Germany, and the German Democratic Republic, in 1973.

42 As the United States maintained: UN Doc. A/AC.119/SR.32, 2 October 1964.

43 Rosenstock, 'The Declaration of Principles' (n. 39), 726.

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coterminous application of both principles (it decided that the supply of arms and other support by one state to armed bands located in the territory of another state 'may well constitute a breach of the principle of the non-use of force and an intervention in the internal affairs of a State').[44] To similar effect, in its *Case Concerning Armed Activities on the Territory of the Congo* of December 2005, the ICJ concluded that Uganda's actions had 'constituted an interference in the internal affairs of the [Democratic Republic of the Congo]' – and that, at one and the same time, this 'unlawful military intervention' in Uganda 'was of such a magnitude and duration that the Court considers it to be a grave violation of the use of force expressed in Article 2, paragraph 4 of the Charter'.[45]

We are thus able to appreciate why it has been said of the principle of non-intervention that it 'is an autonomous principle of customary law';[46] it is autonomous of the other principles articulated in the Declaration on Friendly Relations in the sense that it does not depend on them for its activation, meaning or application – although there can be no doubt of its 'close relationship' with the prohibition of force with which it shares an indisputably 'large overlap'.[47] The Declaration enunciates that intervention includes 'armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements'.[48] 'Intervention' therefore knows, or can assume, different forms of state activity.[49] An identical observation cannot, however, be made for 'force', as incorporated in the Charter: as constructed, but also as presently conceived, its compass extends only to

44 ICJ, *Nicaragua* (n. 32), para. 247.

45 ICJ, *Armed Activities on the Territory of the Congo* (DR Congo v. Uganda), merits, judgment of 19 December 2005, ICJ Reports 2005, 168, para. 165.

46 ICJ, *Nicaragua* (n. 32), 534, dissenting opinion of Judge Jennings.

47 Maziar Jamnejad and Michael Wood, 'The Principle of Non-Intervention', *Leiden Journal of International Law* 22 (2009), 345–81 (348–9), viewing '[t]he rules on the use of force [as] a specific application of the principle of non-intervention, indeed the most important application of the principle'.

48 See, especially, Lori Fisler Damrosch, 'Politics across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs', *American Journal of International Law* 83 (1989), 1–50. It is important not to gloss over the seamless transition made from 'intervention' to 'interference' in the Declaration: the clear suggestion is that intervention is but one manifestation of interference – that it is *interference* that is the distinct species of state activity of which intervention forms one part. For Damrosch, 'the sister terms' of 'intervention' and 'interference' are both 'fraught with connotations of illegality and immorality', and she prefers instead 'influence' as the framework for assessing 'forms of conduct' that are 'legal or illegal, benign or misguided': *ibid.*, 12.

49 Hence the Declaration's specification that '[n]o State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind'.

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threats or uses of *armed* force.[50] Furthermore, one cannot mistake the categorical language that accompanies the principle of non-intervention in the Declaration: at face value, this can be read only as ruling out the possibility of any exceptions to the principle,[51] which stands in telling contrast to the prohibition of force and its exceptions, as set forth in the Charter.[52]

It is clear, then, that the Declaration cannot be read independently of the Charter; the Charter is the foundation and raison d'être of the Declaration, and the Declaration is to be read 'in accordance with' the Charter.[53] Yet there is no mention of 'consent' for either of the principles under current discussion: all we are given is a series of detailed perorations, listed in the Declaration,[54] so that for non-intervention, to take one example, '[e]very State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State',[55] and for non-use of force, to take another, '[e]very State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States'. With each peroration, the generality of the specified principle edges towards the practicalities of the particular, but it is still difficult to make meaningful headway on the relevance of consent for either 'intervention' or for 'force', at least as conceived of or announced in the Declaration.[56]

Perhaps the overall idea was that the presence of any consent to an 'intervention' or to an exercise of 'force' disqualifies that act from attracting either of those characterisations. Perhaps it was thought that this understanding was too

[50] Notwithstanding some endeavours made in that very direction: Christine Gray, *International Law and the Use of Force* (Oxford: OUP 4th edn 2018), 10, 34.

[51] That is, for any permissible interventions at all – an approach to be treated with the greatest of caution: Vaughan Lowe, 'The Principle of Non-Intervention: Use of Force', in Colin Warbrick and Vaughan Lowe (eds), *The United Nations and the Principles of International Law: Essays in Memory of Michael Akehurst* (London: Routledge 1994), 66–84. See also Anthony Carty, *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs* (Manchester: Manchester University Press 1986), 87 (writing of the 'remarkably absolute terms' used to express the principle of non-intervention) and 88 ('the tendency to absolutise it the more it is disregarded').

[52] Namely, the right of (individual and collective) self-defence and Security Council authorisation.

[53] As per its title.

[54] Or, much less flatteringly, 'a series of broad statements calculated to mask the divisions that existed among states as to the application of the core principle': Jamnejad and Wood, 'The Principle of Non-Intervention' (n. 47), 353.

[55] A form of words inclined to suggest a synonymy between intervention and interference: see further n. 48.

[56] See further Jacques Noël, *Le principe de non-intervention: théorie et pratique dans les relations inter-américaines* (Brussels: Éditions de l'Université de Bruxelles 1981), 2.

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self-evident to be put into words. Speculations aside, the Declaration does not enter into extensive disquisitions on the 'essence',[57] or the 'core of the mischief',[58] of either of these terms, and we are none the wiser, after reading the Declaration, of the impact that consent has on any intervention or exercise of force in international relations. Equally importantly, however, towards its end, the Declaration goes on to specify that, '[i]n their interpretation and application[,] the above principles are interrelated and each principle should be construed in the context of the other principles'[59] – a pronouncement that is vital, for present purposes, because the principle of self-determination was included as one of the seven principles of the Declaration.[60] That means not only that our deliberations on consent are not – or, at least, are no longer – the exclusive purview of the laws of the ius ad bellum, but also it may be doubly significant for our analysis because, in that Declaration, the General Assembly appeared to develop the Charter's conception of self-determination beyond 'the rights of the peoples of one state to be protected from interference by other states or governments',[61] envisioning additionally its role for peoples subjected to 'alien subjugation, domination and exploitation'.[62] This is somewhat more expansive than the legal right of colonised peoples to obtain 'speedy and unconditional' decolonisation that had already been endorsed by the General Assembly in its earlier Resolution 1514 (XV) of December 1960.[63] The Declaration is thus an example par excellence of the 'numerous faces' of self-determination, quite possibly including a right of secession where there is no 'fully representative form of government' of which to speak.[64]

57 Jamnejad and Wood, 'The Principle of Non-Intervention' (n. 47), 348.

58 *Ibid*.

59 UN GA Res. 2625 (XXV) (n. 36).

60 *Accord* Corten on self-determination as a condition which 'must be taken into account in each particular case': Corten, 'Intervention by Invitation', Chapter 2 in this volume, section I.A, 102. See also Marcelo G. Kohen, 'Self-Determination', in Jorge E. Viñuales (ed.), *The UN Friendly Relations Declaration at 50: An Assessment of the Fundamental Principles of International Law* (Cambridge: CUP 2020), 133–65 (133): self-determination 'constitutes the most important fundamental principle of contemporary international law' – alongside the prohibition of force.

61 Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press 1994), 112 and 113 (referring to 'the cautious way in which self-determination is referred to in the Charter'). Higgins is rather emphatic in stating that '[w]e cannot ignore the coupling of "self-determination" with "equal rights"' in the Charter – since 'it was equal rights of *states* that was being provided for, not of individuals': *ibid.*, 112 (emphasis original).

62 *Ibid*., 115.

63 UN GA Res. 1514 (XV) of 14 December 1960, Declaration on the Granting of Independence to Colonial Countries and Peoples, cons. 12.

64 Frederick L. Kirgis Jr., 'The Degrees of Self-Determination in the United Nations Era', *American Journal of International Law* 88 (1994), 304–10 (306).

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The Declaration is important for our study from one further angle, which might be briefly mentioned here (and returned to in due course): one of its perorations on self-determination stipulates that '[e]very State has the duty to refrain from any forcible action which deprives peoples . . . of their right to self-determination and freedom and independence', and that, '[i]n their actions against, and resistance to, such forcible action in pursuit of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter'.[65] Evidently, the notion of an entitlement – and a legal entitlement at that – to 'seek and to receive support' in the name of self-determination is qualified by reference to the purposes and principles of the Charter,[66] but the formulation is notable for the way in which it fashions this law of response – that is, the response by said peoples *against* any forcible action taken by states that is forbidden under the Declaration[67] – in terms of the right of self-determination rather than of any right of self-defence.[68] In this arrangement, the consent of peoples who are exercising their right to self-determination – 'and freedom and independence', according to the precise terms of the Declaration – is nowhere summoned by that name, but it is not a stretch to imagine the relationship of these peoples' consent to the seeking and receiving of such support.[69]

B. *The Third State*

A second preliminary matter arises in relation to the vocabulary that is often used to address 'intervention' and 'force': the terminology of the so-called third state. This phrase is a frequent staple of the literature on intervention, and it has also made various appearances within that on

[65] UN GA Res. 1514 (XV) (n. 63).

[66] Introduced at the behest of Western powers: see Kohen, 'Self-Determination' (n. 60), 149, who regards that 'this support cannot be considered as a breach of the principle of non-intervention'.

[67] Rosenstock, 'The Declaration of Principles' (n. 39), 732–3: 'a violation of the duty owed', also writing of 'a delict giving rise to rights on the part of the people concerned'.

[68] Georges Abi-Saab has contended that, by virtue of the Declaration, 'liberation movements have a *jus ad bellum* under the Charter': Georges Abi-Saab, 'Wars of National Liberation and the Laws of War', *Annales d'études internationales* 3 (1972), 93–117 (100). For a view contrary to this 'generous interpretation' of the Declaration, see Heather A. Wilson, *International Law and the Use of Force by National Liberation Movements* (Oxford: Clarendon Press 1988), 99. See also Kohen, 'Self-Determination' (n. 60), 149.

[69] Although 'support' was not therein defined – opening up another point of contention between 'arms and men' versus 'only moral and political support': Rosenstock, 'The Declaration of Principles' (n. 39), 732.

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force.[70] Fundamentally, the idea is to depict the *identity* of the intervenor(s) or applier(s) of force in a given situation, so that we find invocations aplenty of the 'third state' or of 'third states'.[71] Sometimes, the term 'third-country intervention' has been used.[72] An eagle-eyed reader might be disoriented for a moment: whom, intuitively, are they to imagine the *second* state in this sequence? Indeed, the 'second state' never seems to earn a mention in the literature, and the reader is left adrift in any breakdown of the respective dramatis personae of a specific situation. We therefore find ourselves in quite different territory from that of the general rule on third states expounded in Article 34 of the Vienna Convention on the Law of Treaties (VCLT), in which the identity of the 'third state' might be said to be self-explanatory.[73]

It may be worth exploring this further, then: why does the 'third state' command the currency it does today? If the phrase may be somehow bound up in the original conception of 'intervention' as foretold in public international law, why has it cascaded unchecked from one generation to the next? Indeed, when we do return to the earlier discourse, we discover that, at its root, an 'intervention' could take place 'in the external as well as in the internal affairs of a State'[74] – a distinction that sheds a shard of light on the Charter's designation of 'matters which are essentially within the domestic jurisdiction of any state'.[75] Yet it is also a distinction that pivots us towards a much better understanding of who the third state might have been, for the

70 See, e.g., Gray, *International Law and the Use of Force* (n. 50), 65. Christine M. Chinkin elects to use the terminology of 'unilateral third-party responses': Christine M. Chinkin, *Third Parties in International Law* (Oxford: Clarendon Press 1993), 315. In a recent and much-valued collection of some sixty-five substantive chapters offering a case-based approach on the use of force in public international law, note the reference to 'the positions of the main protagonists and the reaction of third States and international organisations' for each 'case': Tom Ruys, Olivier Corten and Alexandra Hofer, 'Introduction: The Jus contra Bellum and the Power of Precedent', in Tom Ruys, Olivier Corten and Alexandra Hofer (eds), *The Use of Force in International Law: A Case-Based Approach* (Oxford: OUP 2018), 1–4 (3).

71 See, e.g., Cóman Kenny and Seán Butler, 'The Legality of "Intervention by Invitation" in Situations of R2P Violations', *New York University Journal of International Law and Politics* 51 (2018), 135–78 (142, 159).

72 Robert W. Gomulkiewicz, 'International Law Governing Aid to Opposition Groups in Civil War: Resurrecting the Standards of Belligerency', *Washington Law Review* 63 (1988), 43–68 (48).

73 Consider Luke T. Lee, 'The Law of the Sea Convention and Third States', *American Journal of International Law* 77 (1983), 541–68 (541).

74 According to Lassa Oppenheim, *International Law: A Treatise*, vol. I (London: Longmans, Green and Co. 1905), 182, para. 134; also 183, para. 135.

75 Art. 2(7) UN Charter. See further Georg Nolte, 'Article 2(7)', in Simma et al., *The Charter of the United Nations* (n. 35), 290–307.

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'external' affairs of a state would invariably involve its relations with any other state, and it is into this relationship that yet another state – that is, the *third* state – would make its intervention. Indeed, in an important set of articles published by the *British Yearbook of International Law* early in its history, P.H. Winfield identified what he called 'three disparate significations' for intervention: that of 'interference in the relations of two other states, that of interference in the internal disputes of a single state, and that of some measure of redress falling short of war directed by one state against another for some alleged breach of international law committed by the latter'.[76] In each of these three scenarios – external, internal and punitive intervention[77] – the reader is assured by the clarity of exposition how many states are actually involved, but it is only in the first of these scenarios – 'interference in the relations of two other states'[78] – that any reference to a third state can make sense.[79] To intervene 'in the internal dispute of a single state' can be the work of only one other – or a second – state; 'some measure of redress short of war', too, specifically envisages an intervention by one state against another state.[80]

Certainly, there are obvious persistent echoes in all of this of the terminology of 'third state' in the context of the recognition of belligerency (as known within the laws of the ius in bello).[81] According to this doctrine, 'hostilities waged between two communities, of which one is not or, possibly, both sovereign States, are of such character and scope as to entitle the parties to be treated as belligerents engaged in a war in a sense ordinarily attached to that

[76] P. H. Winfield, 'The History of Intervention in International Law', *British Yearbook of International Law* 3 (1922–23), 130–49 (131). Winfield goes on to label each of these significations as external, internal and punitive intervention, respectively: *ibid.*, 132.

[77] *Ibid.*, 132.

[78] Or Oppenheim's 'intervention' in the 'external … affairs of a State': Oppenheim, *International Law*, vol. I (n. 74), 190, para. 135.

[79] Truth be told, we do not make much of this incantation or possibility today, but it is interesting that, in contentious proceedings before the ICJ, the very language of 'intervention' is employed '[s]hould a state consider that it has an interest of a legal nature which may be affected by the decision in the case' between two other States: Art. 62(1) of the 1945 Statute of the International Court of Justice, Cmd. 7015 (the ICJ Statute). Indeed, '[e]very state so notified [by the Registrar of the Court regarding the construction of a convention to which states other than those concerned in the case are parties in question] has the right to intervene in the proceedings': Art. 63(2). That intervention – or right to intervention – in proceedings must be staged by a third party or, indeed, by third states (as 'states other than those concerned in the case', per Art. 63(1)).

[80] Note the equation that Winfield cultivates between 'interference' and 'intervention': Winfield, 'The History of Intervention in International Law' (n. 76).

[81] See, e.g., the references in Wyndham Legh Walker, 'Recognition of Belligerency and Grant of Belligerent Rights', *Transactions of the Grotius Society* 23 (1937), 177–210.

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term by international law'.[82] The granting of belligerent rights was by no means automatic: the outbreak of 'hostilities waged between [those] two communities' did not, in and of itself, entail the recognition of belligerency; rather, the law set down a series of exacting conditions whereby 'any State can recognise insurgents as a belligerent Power, provided (1) they are in possession of a certain part of the territory of the legitimate Government; (2) they have set up a Government of their own; and (3) they conduct their armed contention with the legitimate Government according to the laws and usages of war'.[83] Satisfaction of these conditions was the basis of the entitlement of which Hersch Lauterpacht was to write in 1947,[84] recognising belligerency as occurring at the behest of either the 'parent State' or of 'outside States'.[85]

The development of the recognition of belligerency would entail a fundamental repurposing of these 'hostilities', such that the laws of war would then become applicable to them on a plenary basis – for, ordinarily, the exclusive provenance of these laws was any 'contention' that was 'going on *between States*',[86] and emphatically so. The recognition of belligerency was thus devised to expand the possible application of the laws of war beyond their original remit; in so doing, a fiction of sorts was indulged whereby 'the contesting parties [were] legally to be treated as if they [were] engaged in a war waged by two sovereign States'.[87] Yet, crucially, the recognition of belligerency should not be mistaken for the recognition of a new state – for it was assuredly not this and was never intended to be this.[88] The 'entities' engaged in those 'hostilities' were to remain as such but were to be treated differently purely from the standpoint of the laws of war (and neutrality): the recognition of belligerency decidedly did not entail 'an entity's matriculation to statehood'.[89] No case can thus be made for recourse to the terminology of the 'third state' in this context, which is why other formulations – such as 'third

[82] Hersch Lauterpacht, *Recognition in International Law* (Cambridge: CUP 1947), 175, para. 56.
[83] Lassa Oppenheim, *International Law: A Treatise*, vol. II (London: Longmans, Green and Co. 1906), 86, para. 76.
[84] To finesse the point, Lauterpacht believed that that entitlement stemmed from 'a duty following from an impartial consideration of the facts of the situation': Lauterpacht, *Recognition in International Law* (n. 82), 329.
[85] Lord Arnold Duncan McNair and Arthur D. Watts, *The Legal Effects of War* (Cambridge: CUP 4th edn 1966), 32. See also Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford: OUP 2012), 10.
[86] Oppenheim, *International Law*, vol. II (n. 83), 58, para. 56 (emphasis original).
[87] Lauterpacht, *Recognition in International Law* (n. 82), 175, para. 56.
[88] McNair and Watts, *The Legal Effects of War* (n. 85), 32. And 'it is a status which [belligerents] possess only in so far as States recognize them to possess it': *ibid.*, 33.
[89] James Crawford, 'Introduction to the Paperback Edition', in Hersch Lauterpacht, *Recognition in International Law* (Cambridge: CUP 2013), xxi–lix (xxxvii).

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Powers'[90] or 'outside States'[91] and, more recently, 'third-party states'[92] and 'third parties'[93] – have properly been put to service. They are most certainly more accurate depictions of the general legal landscape in which the recognition of belligerency has occurred, and they explain why we shall encounter references to one or more 'second' state(s) in much of the analysis that follows, with 'third state' reserved for situations in which three identifiably different states are at issue.

C. *Method and the* Nicaragua *Case*

And so we come to our third and final preliminary consideration, which concerns the manner by which laws within the international system can be posited and successfully argued. In an important passage from its judgment in the *Nicaragua* case, the ICJ adverted to the fact that intervention 'is already allowable at the request of the government of a State'.[94] It did so by way of contrast with an intervention that had been premised on 'a mere request for assistance made by an opposition group in another State' – which, from what the Court then said, is not allowed.[95] Both of these statements occur in a paragraph of the judgment where the ICJ was addressing the question of '*prima facie* acts of intervention' by the United States in relation to the activities of the contras in Nicaragua that 'may nevertheless be justified on some legal ground'.[96] Indeed, they form part of the broader analysis that the Court outlined at the outset of its consideration of the principle of non-intervention – whereby it sought to configure 'the exact content of the principle so accepted'[97] and then to investigate whether 'the practice [is] sufficiently in conformity with [the principle] for this to be a rule of

90 Vernon A. Rourke, 'Recognition of Belligerency and the Spanish Civil War', *American Journal of International Law* 31 (1937), 398–412.

91 As cautious as ever: McNair and Watts, *The Legal Effects of War* (n. 85), 32.

92 Sam Foster Halabi, 'Traditions of Belligerent Recognition: The Libyan Intervention in Historical and Theoretical Context', *American University International Law Review* 27 (2012), 321–90 (325).

93 As is done by Gregory H. Fox, 'Intervention by Invitation', in Marc Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (Oxford: OUP 2015), 816–40 (822 – 'how third parties should relate to civil wars'– and 819 – 'when other states interacted with parties to a civil war'). See also Joseph Klingler, 'Counterintervention on Behalf of the Syrian Opposition? An Illustration of the Need for Greater Clarity in the Law', *Harvard International Law Journal* 55 (2014), 483–523 (487, 509, 520).

94 ICJ, *Nicaragua* (n. 32), para. 246.

95 *Ibid*.

96 *Ibid*.

97 *Ibid*., para. 205.

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customary international law'.[98] Since the ICJ is bound to the terms of its Statute, it was compelled to consider the evidence of 'a general practice accepted as law' for the customary international law on intervention.[99]

We might refer to this as the Court's empirical method: its fundamental commitment – at least as advertised in its Statute and at different intervals in its judgment of June 1986 – to ascertaining the settlement or oscillation of state practice, in terms of both the *content* of the principle (i.e., 'on the nature of prohibited intervention')[100] and its essential *scope* or *parameters* (i.e., to a 'right' or 'exception' to 'the principle of its prohibition'),[101] for the ICJ was mindful that any contrarian practice emerging from its investigation could form the basis of 'a new customary rule'.[102] As the Court was to make clear:

> The significance for the Court of cases of State conduct *prima facie* inconsistent with the principle of non-intervention lies in the nature of the ground offered as justification. Reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law.[103]

At least as a theoretical matter, therefore, cases of 'state conduct' were to become the mainstay of the Court's deliberations when assessing the content, as well as the scope or parameters, of the principle before it. The Court had to be 'satisfied', it said, 'that State practice justifies' the conclusions it would reach on both of these fronts[104] – and the Court felt this especially keenly given the United States' failure to appear during the merits phase of the proceedings and its failure to attend to the accusations of intervention that Nicaragua had made against it. Once the ICJ had found that 'the activities of the United States in relation to the activities of the *contras* in Nicaragua constitute[d] *prima facie* acts of intervention',[105] it was incumbent on the Court – for 'the Court will . . . have to determine',[106] it proclaimed – 'whether there are present any circumstances excluding lawfulness, or whether such acts may be justified upon any other ground'.[107]

98 *Ibid*.
99 Art. 38(1)(b) ICJ Statute.
100 ICJ, *Nicaragua* (n. 32), para. 206.
101 *Ibid*., para. 207.
102 *Ibid*.
103 *Ibid*.
104 *Ibid*., para. 206.
105 *Ibid*., para. 246.
106 *Ibid*., para. 226.
107 *Ibid*.

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These are the bare bones of the framework that the Court articulated within which to examine whether any 'right' or 'exception' to 'the principle of its prohibition' might have supported the legal position of the United States, although (as we have seen) the Court was also attentive in this to the possibility that 'a new customary rule' may have formed[108] – one that could have emerged from the practice of the United States (presumably, among other states). The first such ground or justification that the ICJ examined seriously was 'a kind of general right for States to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another State, whose cause appeared particularly worthy by reason of the political and moral values with which it was identified'.[109] The Court did so, however, immediately after remarking as an aside that it was 'not here concerned with the process of decolonisation'.[110]

What was the point of the Court's binding together, in the same breath, of these two propositions – decolonisation and support for a 'particularly worthy' cause of political or moral values – only to decouple them so very quickly afterwards? Plainly, at base, both of these propositions envisage situations in which 'an internal opposition' is arraigned against the government of its respective state; it is simply the case that Nicaragua was not then involved in an (or any) act of decolonisation, so that the first proposition was an easy point for the Court to defer or dismiss. But why, then, mention it at all? One interpretation of why the ICJ did so is that while 'the process of decolonisation' could suitably have come within the compass of the latter proposition (on supporting the 'political and moral values' of which the Court also spoke), the existence of any such 'process' would have affected the substantive outcome – that is, what the Court found in relation to that proposition.[111] The Court therefore felt it necessary to pry apart one proposition from another, so that the legal validity of each would not be confused or somehow conflated.

108 *Ibid.*, para. 207.

109 *Ibid.*, para. 206.

110 *Ibid.*

111 This interpretation is fuelled by the blistering dissent that Judge Stephen M. Schwebel appended to the judgment in the *Nicaragua* case, asserting that the Court had 'compromised' its judgment 'by its inference that there may be a double standard in the law governing the use of force in international relations: intervention is debarred, except, it appears, in "the process of decolonization"': *ibid.*, 273, para. 16. In a more generous mood, Judge Schwebel admitted that '[p]erhaps the best that can be said of this unnecessary statement of the Court is that it can be read as taking no position on the legality of intervention in support of the process of decolonization, but as merely referring to a phenomenon as to which positions in the international community differ': *ibid.*, 351, para. 181. See also Oscar Schachter, *International Law in Theory and Practice* (Leiden: Martinus Nijhoff 1991), 120.

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Another interpretation might be that this is an example of overreach in that part of the Court's judgment, but we might accept that the Court did offer 'a faint hint in that direction'[112] – that is, on the lawfulness of intervention in the context of decolonisation.[113]

As for the latter proposition appearing in the Court's analysis, this has frequently travelled under the guise of a right of 'political' or 'ideological' intervention as it came to be associated with the high politics of superpower rivalry during the period of the Cold War. We should be clear on this matter, however: the ICJ broached the general idea of 'intervening in the affairs of a foreign State for reasons connected with, for example, . . . its ideology'[114] and, at one point, wrote of 'a legal argument derived from a supposed rule of "ideological intervention"'.[115] Although it did not fully elaborate on what this proposition might (or might not) have entailed at that point in time, it is reasonable to assume that the Court's reach would have extended to cover both the Brezhnev Doctrine and the Reagan Doctrine,[116] with the ICJ wasting little, if any, time concluding that such a 'fundamental modification of the customary law principle of non-intervention' had not in fact transpired in practice.[117] Elsewhere, the Court said, this proposition would have been 'a striking innovation' for the law.[118] And the Court arrived at its conclusions by recourse – at least, to some extent – to its empirical method: its took its cue from the actual conduct of states, observing that '[t]he United States authorities have on some occasions clearly stated their grounds for intervening in the affairs of a foreign State' (grounds that had included the ideological disposition of the target state), but adding that '[t]hese were statements of international policy, and not an assertion of rules of existing international law'.[119] Somewhat fatally, then, from the Court's perspective, the United States had not supplied the requisite opinio iuris in respect of the relevant 'right' for its interventions,[120] and the Court was moved to issue an identical remark in

[112] Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge: CUP 6th edn 2017), 73.

[113] Especially in view of the terms of UN GA Res. 2625 (XXV) (n. 36).

[114] ICJ, *Nicaragua* (n. 32), para. 207.

[115] *Ibid.*, para. 266.

[116] See further W. Michael Reisman, 'Old Wine in New Bottles: The Reagan and Brezhnev Doctrines in Contemporary International Law and Practice', *Yale Journal of International Law* 13 (1988), 171–98.

[117] Such was the Court's description of the potential impact of this proposition: ICJ, *Nicaragua* (n. 32), para. 206.

[118] *Ibid.*, para. 266.

[119] *Ibid.*, para. 208.

[120] Or, as the Court also put it, 'the United States has not claimed that its intervention, which it justified in this way on the political level, was also justified on the legal level, alleging the exercise of a new right of intervention regarded by the United States as existing in such

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respect of the conduct of Nicaragua in El Salvador, Costa Rica, and Honduras.[121] In consequence, the ICJ found against the existence of 'such general right of intervention … in support of an opposition within another State' as a matter of the extant international law.[122]

At a later point in its judgment, the Court reaffirmed its finding – but how it did so warrants much closer attention, because it drew upon considerations other than the actual conduct of states. At this point of its analysis, it moved beyond the empirical method, as the following statement demonstrates:

> However the regime in Nicaragua be defined, adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make [a] nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State. Consequently, Nicaragua's domestic policy options, even assuming that they correspond to the description given of them by the [US] Congress finding, cannot justify on the legal plane the various actions of the Respondent complained of. The Court cannot contemplate the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system.[123]

At stake here was the same 'general right' that the ICJ had assessed earlier in its judgment,[124] but here the Court is appearing to say more – much more – than it had said previously. Indeed, this statement seems to be more than a mere reaffirmation of the law as it had itself stated; rather, it takes us beyond an exposition of accrued or selected evidence towards a deeper appreciation of the 'fundamental principle' of state sovereignty and its consequences for the international system. The Court anchors this part of its analysis in an idea 'on which the whole of international law rests', no less – one eye focused on securing the overall coherence and cohesion of public international law.[125] Evidently, the plan was to mark out the various emendations of the logic of sovereignty as it deemed pertinent to the case. This is quite different from an empirically minded

circumstances': *ibid.*, para. 208. See further Gray, *International Law and the Use of Force* (n. 50), 108–9.

121 ICJ, *Nicaragua* (n. 32), para. 208.

122 *Ibid.*, para. 209.

123 *Ibid.*, para. 263.

124 A framing that would suggest that the right would not obtain simply for the two superpowers but would necessarily apply to all States – in consequence of the sovereign equality of all states, as upheld by Art. 2(1) UN Charter.

125 On coherence as 'connect[ing] to a network of other rules by an underlying general principle', see Thomas M. Franck, 'Legitimacy in the International System', *American Journal of International Law* 82 (1988), 705–59 (741).

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Court calling the conduct of states as it saw it.[126] And, crucially, as the Court did so, it struck a much more strident and unrelenting tone, for not only did it decide against any 'new rule opening up a right of intervention by one state against another on the ground that the latter has opted for some particular ideology or political system' by virtue of the operation of that fundamental principle,[127] but also that – again, by virtue of that very principle – it could not contemplate the existence of that rule at any time hence. Such a rule seemed to be quite beyond the contemplation – beyond the imagination – of the Court.

It is interesting that, in its various deliberations on the matter, the ICJ imparted little on the physiognomy of this right of political or ideological intervention – on what it would look like or how it would really function in practice, especially as far as the 'consent' of the internal opposition in the target state was concerned.[128] This is, of course, understandable in view of the Court's repeated observations that states themselves had not yet begun to debate this proposition in legal terms: it is therefore small wonder that more pragmatic details of this 'right' did not surface anywhere in the Court's judgment. Certainly, the ICJ did make reference to a 'general right' of states when it addressed the matter of political or ideological intervention,[129] and this may be taken to suggest that the proposition was framed without privileging any one ideology – any one form of politics – over any other. The Court was speaking in deliberately general terms here: its remarks were not confined to 'any particular doctrine' but, as it said, to Nicaragua's 'freedom of choice' regarding 'domestic policy options' – or (also in its words) to opt for 'some ideology or political system'.[130] Yet it is notable that the Court spoke too, in the very same breath, of interventions 'in support of an internal opposition in another State',[131] while nowhere translating this consideration into any question of consent by that opposition to intervention. Arguably, for the ICJ, the proposition that it had itself devised for assessment concerned a right *of* – and not a right *to* – political or ideological intervention, as undertaken by states. This would suggest

[126] See, e.g., Stefan Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion', *European Journal of International Law* 26 (2015), 417–43 (422–3), arguing that processes of (normative) deduction guided part of the Court's reasoning.

[127] ICJ, *Nicaragua* (n. 32), para. 263.

[128] Reisman, for one, has questioned what each of these doctrines demanded as a matter of rhetoric: Reisman, 'Old Wine in New Bottles' (n. 116), 172.

[129] Actually, three times in its judgment: ICJ, *Nicaragua* (n. 32), paras 206 (twice) and 209.

[130] *Ibid.*, para. 263. Schachter regards the main tenet of the Reagan Doctrine to be that it 'openly proclaimed the legitimacy of foreign military intervention to overthrow leftist totalitarian governments': Schachter, *International Law in Theory and Practice* (n. 111), 122.

[131] Consider Gray, *International Law and the Use of Force* (n. 50), 108, on the Reagan Doctrine and assistance to 'freedom fighters'.

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that, if such a general right could be said to exist at all, it would have ultimately derived from 'the admitted determination of superpowers'[132] – although, in accordance with the principle and implications of sovereign equality, it is fair to assume that it would have been available to all states.[133] It is this consideration, above all, that seemed to form the 'core of lawfulness'[134] – at least as the ICJ understood it in June 1986 – rather than any consent that may have been forthcoming from the internal opposition in the state targeted for intervention. Admittedly, such an approach would have necessitated a more nuanced conclusion than that which the Court reached elsewhere in its judgment on 'a mere request for assistance made by an opposition group in another State',[135] but it was not, in the end, to be given the categorical position that the Court developed against any right of political or ideological intervention.

III. INTERVENTION, COERCION, AND FORCE

A. *Intervention and Coercion*

Through to this point, we have not given much detailed thought to how the consent of a state can cohere with the very idea of an *intervention*, at least as understood by the UN General Assembly in its Declaration on Friendly Relations of October 1970. That Declaration, we can recall, considered different forms of intervention as interference[136] – that is, those that 'coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind'.[137] The General Assembly then went on immediately to declare that 'no State shall organise, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interference in civil strife in another State'.[138] We might regard this latter cohort of illustrations as instances of the coercion that the Assembly had had in

132 Carty, *The Decay of International Law?* (n. 47), 87. Under President Gorbachev, the Soviet Union was to abandon even the rhetorical value of the Brezhnev Doctrine: Gray, *International Law and the Use of Force* (n. 50), 96.

133 As might be said for the general content of the ius ad bellum.

134 W. Michael Reisman, 'The Brezhnev Doctrine and the Reagan Doctrine: Apples and Oranges?', *Proceedings of the American Society of International Law* 81 (1987), 561–78 (562).

135 ICJ, *Nicaragua* (n. 32), para. 246.

136 UN GA Res. 2625 (XXV) (n. 36).

137 *Ibid.* Said to be a 'criterion' that is 'so vague as to be almost useless': Derek W. Bowett, 'International Law and Economic Coercion', *Virginia Journal of International Law* 16 (1976), 245–59 (248).

138 UN GA Res. 2625 (XXV) (n. 36).

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mind in its elaboration of intervention – although it is worth noting that while 'coercion' had been used to impart some sense of what 'intervention' meant on that occasion, the General Assembly had not yet fully defined its meaning.[139] Still, it should be evident from what the General Assembly said that it was the *intention* behind the alleged coercion (i.e., 'to obtain from it the subordination of the exercise of its sovereign rights', 'to secure from it advantages of any kind')[140] rather than the *effect* of that coercion which mattered more.[141] Indeed, the abject banishment in the Declaration of any organisation, assistance, fomenting, financing, inciting or toleration of subversive, terrorist or armed activities 'directed towards the violent overthrow of the regime of another State' does serve to reinforce this point of view; it is on account of their essential ambition ('directed towards') that such activities could have no redeeming feature in the eyes of the law.[142]

As for its judgment in the *Nicaragua* case, the ICJ seized on '[t]he element of coercion' as 'the very essence' – or so it said – of *prohibited* intervention.[143] According to the Court:

> 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 a 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 form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State.[144]

With this passage, the Court appeared to regard intervention as prohibited when it is 'wrongful' or when it has coercion (or the bearing down on matters

139 Difficult though this must have been to do: Bowett, 'International Law and Economic Coercion' (n. 137), 248 ('To say merely that there must be "coercion" is scarcely adequate, for all forms of economic competition are coercion in the sense that other States are forced to adjust their own policies in response').

140 Problematic though the evidence for this might be for Corten, 'Intervention by Invitation', Chapter 2 in this volume, section I.B, p. 107.

141 See Bowett, 'International Law and Economic Coercion' (n. 137), 248. Consider also Robert J. Art and Kelly M. Greenhill, 'Coercion: An Analytical Overview', in Kelly M. Greenhill and Peter Krause (eds), *Coercion: The Power to Hurt in International Politics* (Oxford: OUP 2018), 3–32 (4).

142 Part of the provisions of the Declaration that 'are declaratory of customary international law': ICJ, *Congo* (n. 45), para. 162.

143 ICJ, *Nicaragua* (n. 32), para. 205.

144 *Ibid*.

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of free choice) at its heart,[145] and the form of words used could be taken to suggest that the Court intended to make a general statement on the core elements of prohibited intervention irrespective of how any intervention in particular manifests itself. We might contrast this approach with the example-led definition of 'armed attack' that the Court provided in the same judgment,[146] but there are those who have contended that coercion is in fact 'just one form of unlawful intervention'.[147] By this token, the ICJ would have had within in its sights only the intervention that had been referred to it by Nicaragua in April 1984: its concern was not to set down a definitional metric for *all* prohibited interventions as a matter of law.[148] However, the forthright way in which the Court expressed itself on that occasion (where coercion 'defines, *and indeed forms the very essence of*, prohibited intervention'[149]), taken together with the immediate context in which the above passage was framed,[150] appears to implicate the Court in stapling into place a formulation of generic application, with 'a stricter meaning' emerging for 'intervention' beyond its use in common parlance.[151] And all of this as a prelude to the Court's investigation of 'cases of State conduct *prima facie* inconsistent with the principle of non-intervention' and 'the nature of the ground offered as justification' for those actions.[152]

145 See further Jamnejad and Wood, 'The Principle of Non-Intervention' (n. 47), 348: 'The non-intervention principle is sometimes criticised for apparently precluding all state-to-state interaction; the requirement of coercion properly delimits the principle.'

146 ICJ, *Nicaragua* (n. 32), para. 195, where interestingly, at one point in its definition, the Court made reference to 'the prohibition of armed attacks'.

147 Marcelo Kohen, 'The Principle of Non-Intervention 25 Years after the *Nicaragua* Judgment', *Leiden Journal of International Law* 25 (2012), 157–64 (161). See further the dissent of Judge Schwebel in the *Nicaragua* case, where he drew a distinction between 'the sweeping provisions of the [Organisation of American States (OAS)] Charter' and 'customary and general international law': ICJ, *Nicaragua* (n. 32), 305, para. 98. See also Jean Michel Arrighi, 'The Prohibition of the Use of Force and Non-Intervention: Ambition and Practice in the OAS Region', in Weller, *The Oxford Handbook of the Use of Force in International Law* (n. 93), 507–32.

148 With the Court focusing on 'generally accepted formulations' of the principle of non-intervention: ICJ, *Nicaragua* (n. 32), para. 205.

149 *Ibid*. (emphasis added).

150 *Ibid*.

151 Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law*, vol. I (London: Longman 9th edn 1992), 430, para. 129, offering the example of criticism of another state's conduct (and emphasising behaviour 'calculated to impose certain conduct or consequences on that other state').

152 ICJ, *Nicaragua* (n. 32), para. 207. See further Dire Tladi, 'The Duty Not to Intervene in Matters within Domestic Jurisdiction', in Viñuales, *The UN Friendly Relations Declaration at 50* (n. 60), 87–104 (101–3).

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B. *Dictatorial Interference*

For what it is worth, 'coercion' has not always commanded this degree of prominence in fashioning a metric for 'intervention' in public international law. It is therefore instructive to return to an earlier period of the discipline's history to try to appreciate how 'intervention' was then understood, explained, rationalised. We do so, additionally, because of the framework of regulation that has resulted for the practice of intervention, which is not just 'a series of broad statements' floated towards a single end,[153] but a more intricate set of ideas about intervention. Our reference point for this exercise is the landmark treatise of Lassa Oppenheim, which was published at the beginning of the twentieth century – in particular, the first of his two volumes, which concerned the laws of peace. I have selected this work not only because of the effort its author made to provide a systemic treatment of the relevant practice up to that point in time[154] – something that understandably eluded the jurisprudence of the ICJ in June 1986[155] – but also because of the temporal dimension brought about as a consequence of its successive editions: its most recent, the ninth, appeared in 1992.[156]

In the first volume of his original treatise, published in 1905, in the chapter devoted to the position of states within the Family of Nations, Oppenheim allocates an entire section to the law and practice of intervention – 'a dictatorial interference', as he so memorably called it, 'by a State in the affairs of another State for the purpose of maintaining or altering the actual condition of things'.[157] With this definition in hand, Oppenheim proceeded to distinguish between those interventions that he thought could 'take place by right or without a right':[158]

> That intervention is a rule forbidden by the Law of Nations which protects the International Personality of the States, there is little doubt. On the other hand, there is just as little doubt that this rule has exceptions, for there are interventions which take place by right, and there are others which, although they do not take

[153] Jamnejad and Wood, 'The Principle of Non-Intervention' (n. 47).
[154] Indeed, in the preface to the work, Oppenheim mentions the objective of 'a complete survey of the subject': Oppenheim, *International Law: A Treatise*, vol. I (n. 47), vii.
[155] So, e.g., in the *Nicaragua* case, the Court admitted that 'the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised' and that, in consequence, it 'expressed no view on that issue': ICJ, *Nicaragua* (n. 32), para. 194.
[156] Jennings and Watts, *Oppenheim's International Law*, vol. I (n. 151), 430–2, para. 129.
[157] Oppenheim, *International Law*, vol. I (n. 47), 181, para. 134 (intervention 'always concerns the external independence or the territorial or personal supremacy of the respective State').
[158] *Ibid*. *Accord* Henry Wheaton, *Elements of International Law* (Boston: Little, Brown, and Co. 8th edn by Richard Henry Dana 1866), 1210, para. 72.

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> place by right, are nevertheless admitted by the Law of Nations and are excused in spite of the violation of the Personality of the respective States they involve.[159]

For Oppenheim, when intervention 'takes place by right', it is not to be regarded as a violation of the external or internal affairs of a state, 'because the right of intervention is always based on a legal restriction upon the independence or territorial or personal supremacy of the State concerned, and because the latter is in duty bound to submit to the intervention'.[160]

Oppenheim then identified 'several grounds' whereby interventions could occur as a matter of right:[161]

- where the suzerain state has 'a right to intervene in many affairs of the vassal, and the State which holds a protectorate has a right to intervene in all the external affairs of the protected State';[162]
- should 'the right of protection of its citizens abroad, which a State holds, ... cause an intervention by right to which the other party is legally bound to submit';[163]
- 'if a State which is restricted by an international treaty in its internal independence or its territorial or personal supremacy, does not comply with the restrictions concerned, [in which case] the other party or parties have a right to intervene';[164]
- 'if an external affair of a State is at the same time by right an affair of another State, [in which case] the latter has a right to intervene in case the former deals with that affair unilaterally';[165] and

[159] Oppenheim, *International Law*, vol. I (n. 47), 182, para. 134. Certainly, there are traces of this approach ('by right' vs 'admitted'/'excused') in the modern scholarship on intervention with the dichotomy regarding the legality vs legitimacy of intervention: see Anthea Roberts, 'Legality versus Legitimacy: Can Uses of Force be Illegal but Justified?', in Philip Alston and Euan MacDonald (eds), *Human Rights, Intervention, and the Use of Force* (Oxford: OUP 2008), 179–214.

[160] Oppenheim, *International Law*, vol. I (n. 47), 183, para. 135.

[161] *Ibid*.

[162] *Ibid.* For an explication of the nature of such relationships, consider Zhang Shiming, 'A Historical and Jurisprudential Analysis of Suzerain–Vassal State Relationships in the Qing Dynasty', *Frontiers of History in China* 1 (2006), 124–57.

[163] Oppenheim, *International Law*, vol. I (n. 47), 183, para. 135. For an appreciation of this strand of thinking and its place in practice, consider Natalino Ronzitti, *Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity* (Leiden: Martinus Nijhoff 1985). See, however, the position – in reviewing this work – of D.W. Bowett, *British Yearbook of International Law* 57 (1986), 398–9 (398) (on 'the views of many States (and authors) that rescue operations were regarded as legitimate self-defence prior to 1945').

[164] Oppenheim, *International Law*, vol. I (n. 47), 183, para. 135.

[165] *Ibid*.

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- 'if a State in time of peace or war violates those principles of the Law of Nations which are universally recognised, [in which case] other States have a right to intervene and to make the delinquent submit to the respective principles'.[166]

These interventions were to be contrasted with circumstances in which there existed 'no right to intervention' at all, but in which the intervention 'may be admissible and excused',[167] and where, Oppenheim claimed, 'such State has by no means any legal duty to submit patiently and suffer the intervention'.[168] Within this register, Oppenheim placed those acts necessary for self-preservation[169] and those undertaken in the interest of the balance of power[170] – two 'kinds' of intervention that exemplified intervention 'in default of right', in his view.[171] A third kind of intervention – intervention in the interest of humanity – was also mooted, but Oppenheim felt that 'whether there is really a rule of the Law of Nations which admits such interventions may well be doubted'.[172]

Significantly, for our purposes, Oppenheim proceeded from a most crucial assumption: at the outset of his assessment of this topic, he made a point of emphasising the difference between 'dictatorial interference' and what he called 'interference pure and simple' – for 'many writers', he insisted, 'constantly commit this confusion'.[173] And it is a distinction that has been sustained right through to the present edition of the treatise,[174] notwithstanding the fact that – at least in the parlance of the UN General Assembly – 'intervention' and 'interference' have somehow come to be treated as

166 *Ibid*.

167 *Ibid*. (where the intervention *does* violate either the external independence or the territorial or the personal supremacy of said state).

168 *Ibid*., 185, para. 136.

169 *Ibid*. (where 'if any necessary violation committed in self-preservation of the International Personality of other States is . . . excused, such violation must also be excused as is contained in an intervention').

170 *Ibid*. (remarking that, alongside self-preservation, 'it is likewise obvious that it must be excused').

171 *Ibid*.

172 *Ibid*., 186, para. 137.

173 *Ibid*., 182, para. 134. See David Wippman, 'Pro-Democratic Intervention', in Weller, *The Oxford Handbook of the Use of Force in International Law* (n. 93), 797–815 (805): 'It is "dictatorial interference" in the internal affairs of another state that is impermissible, not intervention per se.' See further Klingler, 'Counterintervention on Behalf of the Syrian Opposition?' (n. 93), 488.

174 Where Jennings and Watts distinguish between 'loose' invocations ('to cover such matters as criticism of another state's conduct') and its 'stricter meaning' ('intervention is forcible or dictatorial interference by a state in the affairs of another state'): Jennings and Watts, *Oppenheim's International Law*, vol. I (n. 151), 430, para. 129.

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normative synonyms.[175] Yet Oppenheim was quite adamant that there was *purpose* in intervention as dictatorial interference and that there was *purpose* in ensuring that this term was not put to use indiscriminately:

> [I]ntervention must neither be confounded with good offices, nor with mediation, nor with intercession, nor with co-operation, because none of these imply a *dictatorial* interference. Good offices is the name for such acts of friendly Powers interfering in a conflict between two other States as tend to call negotiations into existence for the peaceable settlement of the conflict, and mediation is the name for the direct conduct on the part of a friendly Power of such negotiations. Intercession is the name for the interference consisting in friendly advice given or friendly offers made with regard to the domestic affairs of another State. And, lastly, co-operation is the appellation of such interference as consists in help and assistance lent by one State to another at the latter's request for the purpose of suppressing an internal revolution.[176]

For Oppenheim, then, one state's 'request' for help from another state could not count as 'intervention' in the sense developed by public international law: the presence of any request – or, more broadly, of consent – by, or on behalf of, the 'target state' of the intervention meant that there was really no 'dictatorial interference' of which to speak.[177] Indeed, in the ninth edition of his treatise, 'dictatorial' interference is actually described as a 'requirement' if an interference is indeed to 'amount to an intervention',[178] although it is also stated there that 'the interference must be forcible or dictatorial, or otherwise coercive'.[179] Satisfaction of this requirement, it is reasoned, 'excludes from intervention assistance rendered by one state to another at the latter's request and with its consent',[180] so that it may be not only preferable but also advisable to speak in terms of (military) 'assistance on

175 Jamnejad and Wood, 'The Principle of Non-Intervention' (n. 47), 347.

176 Oppenheim, *International Law*, vol. I (n. 47), 182–3, para. 134 (emphasis original).

177 Oppenheim gave as a solitary example of this Russia's sending of troops to Hungary in May 1849 at the request of Austria to suppress the Hungarian revolt: *ibid*., 183, para. 134. See further Eugene Horváth, 'Russia and the Hungarian Revolution (1848–49)', *Slavonic and Eastern European Review* 12 (1934), 628–45.

178 Jennings and Watts, *Oppenheim's International Law*, vol. I (n. 151), 435, para. 130.

179 *Ibid*., 432, para. 129 (critically, 'in effect depriving the state intervened against of control over the matter in question'). Importantly, coercion is regarded on its own terms in the ninth preambular recital of UN GA Res. 2625 (XXV) (n. 36) ('military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any State'), as separate from 'intervention' (cons. 8) and 'force' (cons. 10) – although it was not one of the seven principles the General Assembly articulated in October 1970. See also above, n. 39 and n. 49.

180 Jennings and Watts, *Oppenheim's International Law*, vol. I (n. 151), 435, para. 130 (even though this may include 'detachments of armed forces or the supply of military equipment').

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request',[181] among other possibilities. Even the notion of 'consensual intervention' will not do,[182] because it conflates the *descriptive* component of this practice (the presence of consent) with its *normative* component (the idea of intervention itself, at least on the reading given here from public international law). Intervention by consent – whether through request or invitation – is therefore better regarded as something of a 'misnomer' that is really best avoided,[183] for it is apt to convey the impression that a state can admit to its own coercion. The descriptive and normative components contained in that formulation – of an 'intervention by consent' – await to be disentangled, and the terminological anointing of the proposition in question deserves to be reconceived.[184]

C. *Consent and Force*

This brings us to the topic of 'force' and what may be said of its basic relationship with 'consent'.[185] Article 2(4) of the Charter says nothing of the matter of 'consent' when it enjoins all UN member states to 'refrain in their international relations from the threat or use of force against the territorial integrity of political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations', but the wording of this formulation might give us pause for thought: can any force that has been consented to properly be quantified as force that is *against* the territorial integrity or political independence of the target state?[186] Certainly, it is an

[181] As Jennings and Watts do: *ibid.* See also James W. Garner, 'Questions of International Law in the Spanish Civil War', *American Journal of International Law* 31 (1937), 66–73 (68) ('rendering assistance to the established legitimate government').

[182] Although this phraseology is adopted by Gregory H. Fox throughout his chapter, 'Invitations to Intervene after the Cold War', Chapter 3 in this volume. See also Lieblich, *International Law and Civil Wars* (n. 22), 1; David Wippman, 'Treaty-Based Intervention: Who Can Say No?', *University of Chicago Law Review* 62 (1995), 607–87 (611) ('state consent to intervention'); André de Hoogh, 'Jus Cogens and the Use of Armed Force', in Weller, *The Oxford Handbook of the Use of Force in International Law* (n. 93), 1161–86 (1167–8) ('consensual rights of intervention').

[183] An appellation used by IDI Rapporteur Gerhard Hafner (University of Vienna): see *Annuaire de l'Institut de droit international* 79 (2009), 297–447 (309).

[184] See the useful interventions to this effect made by Agata Kleczkowska, 'The Misconception about the Term "Intervention by Invitation"', *Heidelberg Journal of International Law* 79 (2019), 647–9, and Laura Visser, 'What's in a Name? The Terminology of Intervention by Invitation', *Heidelberg Journal of International Law* 79 (2019), 651–3.

[185] See further Ashley S. Deeks, 'Consent to the Use of Force and International Law Supremacy', *Harvard International Law Journal* 54 (2013), 1–60.

[186] See, especially, Schachter, *International Law in Theory and Practice* (n. 111), 114, and Philip C. Jessup, *A Modern Law of Nations: An Introduction* (New York: Macmillan 1948), 162–3.

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approach that appears to assume that every word of that provision shall be accorded weight or relevance in the final interpretative reckoning, but, in this, we must test whether states have developed such precious inclinations in their respective practices: at the time of Operation Urgent Fury in Grenada in October 1983, for example, the legal adviser to the US Department of State claimed that he was 'not aware of any authority for the proposition that military assistance in response to the request of lawful authority is contrary to the prohibitions of Article 2(4) of the U.N. Charter'.[187] If this were the case, the ius ad bellum would not thereby become engaged.[188]

Another possibility is to consider that force occurring with consent *does* come within the terms of Article 2(4) of the Charter, but that it forms an *exception* to that provision – akin to the inherent right of individual and collective self-defence, as contained in Article 51.[189] This would serve as the basis of its allowability. Along this line of thinking, the literature usually invokes the Articles on the Responsibility of States for Internationally Wrongful Acts published by the International Law Commission (ILC) in August 2001 – and, specifically, one of the six circumstances that the Commission identified for the preclusion of wrongfulness.[190] So, when he considered consent and force in his classic text, *War, Aggression and Self-Defence*, Yoram Dinstein refers reflexively and without comment to Article 20 of the ILC Articles,[191] which provides that '[v]alid consent by a State to the commission of a given act by another State precludes the wrongfulness of that

[187] Davis R. Robinson, 'Letter from the Legal Adviser, United States Department of State', *International Lawyer* 18 (1984), 381–7 (382–3) (yes; referring to 'prohibitions' in the plural).

[188] See further Prime Minister's Office, *Summary of the UK Government's Position on the Military Action against ISIL*, Policy paper, 25 September 2014, available at www.gov.uk/government/publications/military-action-in-iraq-against-isil-government-legal-position/summary-of-the-government-legal-position-on-military-action-in-iraq-against-isil: '[I]nternational law is equally clear that this prohibition [of force] does not apply to military force by one State on the territory of another if the territorial State so requests or consents.'

[189] Cassese discusses the possibility of 'an implicit exception' to the Charter: Antonio Cassese, *International Law in a Divided World* (Oxford: Clarendon Press 1986), 239, para. 141. Consider also Federica I. Paddeu, 'Military Assistance on Request and General Reasons against Force: Consent as a Defence to the Prohibition of Force', *Journal on the Use of Force and International Law* 7 (2020), 227–69.

[190] ILC, Articles on the Responsibility of States for Internationally Wrongful Acts of the International Law Commission, August 2001: Arts. 20 (consent), 21 (self-defence), 22 (countermeasures), 23 (force majeure), 24 (distress), and 25 (necessity). See further Federica Paddeu, *Justification and Excuse in International Law: Concept and Theory of General Defences* (Cambridge: CUP 2018), 131–74.

[191] Dinstein, *War, Aggression and Self-Defence* (n. 112), 125. Note how Fox refers to 'the general role of consent as a circumstance precluding wrongfulness of state action': Fox, 'Invitations to Intervene after the Cold War', Chapter 3 in this volume, section II.B, 193; See also Fox, 'Intervention by Invitation' (n. 93), 821.

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act in relation to the former State to the extent that the act remains within the limits of that consent'.[192] There might well be a certain logic to this reasoning, since the very next provision (Article 21) positions the circumstance of self-defence as an instance of the preclusion of wrongfulness ('The wrongfulness of an act of a State is precluded if the act constitutes a lawfulness measure of self-defence taken in conformity with the Charter of the United Nations').[193] However, is it really true to maintain that consent to force precludes the wrongfulness of that force?

In the Commentaries to Article 20, we are given a number of '[s]imple examples' of the 'daily occurrence' whereby 'States consent to conduct of other States which, without such consent, would constitute a breach of an international obligation': transit through the airspace or internal waters of a state; the location of facilities on a state's territory; the conduct of official investigations or inquiries within a state.[194] The ILC presents additional examples later in its analysis, and these directly relate to 'force': whether the consent expressed by a regional authority can legitimise the sending of foreign troops into the territory of a state; whether such consent can be given only by the central government of the relevant state; whether the government in question has the 'legitimacy' to issue that consent.[195] 'These questions', the Commentaries observe, 'depend on the rules of international law relating to the expression of the will of the State, as well as rules of internal law to which, in certain circumstances, international law refers.'[196]

In addition to 'the rules of international law relating to the expression of the will of the State', the Commentaries also draw our attention to the primary obligation that is at stake in any given situation and to 'consent in relation to the underlying obligation itself'.[197] In this context, that primary or underlying obligation is, of course, Article 2(4) of the UN Charter and its customary counterpart, which, we might recall, makes no utterance on consent. Yet the seamless juxtaposition of the ILC's provision on 'valid consent' and 'force' encountered in Dinstein's *War, Aggression and Self-Defence* does not fully acknowledge the considerable unease that marked deliberations within the Commission itself in respect of that very provision, such that Special

[192] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: CUP 2002), 163.

[193] *Ibid.*, 166.

[194] *Ibid.*, 163. Also: on consent to a search of embassy premises and to the establishment of a military base on the territory of a state, *ibid.*, 164. Further examples are provided by James Crawford, *State Responsibility: The General Part* (Cambridge: CUP 2013), 285–6.

[195] Crawford, *The International Law Commission's Articles* (n. 192), 164.

[196] *Ibid.*

[197] *Ibid.*, 163.

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Rapporteur James Crawford was moved to remark that there might be a 'deeper problem' in existence – more than 'one simply of formulation'.[198] Such admission invites the user of the ILC Articles to dissect their contents more closely, alert not only to questions of formulation but also to the authority and persuasion steering each proposition of law. It is therefore worthwhile – and, arguably, necessary – to return to the account that Crawford gave of *his* misgivings:

> Is it possible to distinguish between, on the one hand, the issue of consent as an element in the application of a rule (which is accordingly part of the *definition* of the relevant obligation) and, on the other hand, the issue of consent as a basis for precluding the wrongfulness of conduct inconsistent with the obligation? . . . [I]f consent must be given in advance, and if it is only validly given in some cases and not in others, and if the authority to consent varies with the rule in question, then it may be asked whether the element of consent should not be seen as incorporated in the different primary rules, possibly in different terms for different rules. For example, the rule that a State has the exclusive right to exercise jurisdiction or authority on its territory is subject to the proviso that foreign jurisdiction may be exercised with the consent of the host State, and such cases are very common (e.g. commissions of enquiry sitting on the territory of another State, the exercise of jurisdiction over visiting forces, etc.). They do not involve, even prima facie, conduct not in conformity with the international obligation, and thus they fall outside the scope of [circumstances precluding wrongfulness], and indeed outside the scope of the draft articles as a whole.[199]

Note how the 'daily occurrence' of the Commentaries to Article 20 is rendered here as practice that was 'very common' in view of 'the proviso that foreign jurisdiction may be exercised with the consent of the host State': some of the same examples (e.g., commissions of enquiry sitting on the territory of another state) were rallied but to somewhat different effect. What is most striking, though, is the Special Rapporteur's tone in staking out his position: he is adamant that the cases he mentions 'do not involve, even prima facie, conduct not in conformity with the international obligation', such that the primary rule does not even come into play. So these were no ordinary misgivings: these were not merely aesthetic differences or differences of style; rather, they were points of disagreement that went to the very heart of the exercises of

198 James Crawford, *Second Report on State Responsibility*, Doc. A/CN.4/498 and Add.1-4, 17 March, 1 and 30 April, 19 July 1999, reproduced in *Yearbook of the International Law Commission* I (1999), 3–99 (61, para. 238).

199 *Ibid.*, 61–2, para. 238 (emphasis original). See also Crawford, *State Responsibility* (n. 194), 275 (on the negative definition of circumstances precluding wrongfulness).

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conceptualisation and categorisation. And, in point of fact, they are what led the Special Rapporteur to propose the *deletion* of the provision on consent from the final inventory of circumstances precluding wrongfulness:

> [I]t seems to me that to treat consent in advance as a circumstance precluding wrongfulness is to confuse the content of the substantive obligation with the operation of the secondary rules of responsibility, whereas to treat consent given in arrears as such a circumstance is to confuse the origins of responsibility with its implementation (*mise en oeuvre*).[200]

Before proposing this path forward, Crawford cited the rules on both intervention and force as crucial examples of rules 'which are not absolute prohibitions but which allow that the conduct in question may be validly consented to by the target State'.[201] These were, he said, to be contrasted with obligations that had been 'properly formulated in absolute terms':[202]

> In the absence of identifiable intermediate cases (i.e. cases where consent might validly be given in advance but where it is not part of the definition of the obligation) the position appears to be as follows: either the obligation in question allows that consent may be given in advance to conduct which, in the absence of such consent, would conflict with the obligation, or it does not. In the former case, and consent is validly given, the issue whether wrongfulness is precluded does not arise. In the latter, consent cannot be given at all. Both cases are distinguishable from waiver after a breach has occurred, giving rise to State responsibility.[203]

The Special Rapporteur's misgivings do seem to tap into a broader series of concerns that have been expressed about the very category of circumstances precluding wrongfulness and its place in the overall architecture of the law of state responsibility – that, on the one hand, the category purports to identify 'behaviour that is right' (and, presumably, right *ab initio*), but, on the other hand, it also incorporates 'behaviour that, though wrong, is understandable and excusable'.[204] Others have argued against confusing the 'preclusion' of

[200] Crawford, *Second Report on State Responsibility* (n. 198), 62, para. 241. Again, see Crawford, *State Responsibility* (n. 194), 275.

[201] Crawford, *Second Report on State Responsibility* (n. 198), 62, para. 240.

[202] *Ibid*. – '(i.e., without any condition or qualification relating to consent), but nonetheless the consent of the State concerned precludes the wrongfulness of conduct' – in which case, Art. 20 (as it now is) 'might have a valid, though limited, scope of application': *ibid.* The Special Rapporteur was not aware of any such case.

[203] *Ibid*.

[204] Vaughan Lowe, 'Precluding Wrongfulness or Responsibility: A Plea for Excuses', *European Journal of International Law* 10 (1999), 405–11 (406).

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a primary obligation with 'defences to breach it',[205] and there is some sense of the distinctiveness of consent that emerges from the requirement that it be given beforehand (for 'such consent validly given implies that the conduct is perfectly lawful at the time it occurs').[206] That idiom of perfect lawfulness is an arresting choice of words with which the Special Rapporteur unpacks the significance of consent, and he continued:

> By contrast, where a State acts inconsistently with an obligation and its conduct is excused on grounds such as necessity, force majeure or distress, one is not inclined to say that the conduct is 'perfectly lawful'. Rather there is an apparent or prima facie breach which is or may be excused. Even in the case of self-defence or countermeasures, where the conduct may be intrinsically lawful in the circumstances, at least there is a situation which requires some explanation and some justification.[207]

All of this might well place us on the back foot of the actual demands of the primary obligation,[208] but it is difficult to take issue with Crawford's observation in respect of the instinctive interpretations that states have tended to make on consenting to force – and on the prohibition of force that is dealing fundamentally with 'hostile military action'.[209]

Consent for force is issued principally on an ad hoc basis or via prior conventional arrangement – that is, what may be termed 'attenuated consent', for the state is providing its consent to force in advance and as a matter of principle (the consent determining the circumstances for force, as set out in conventional form).[210] However, as we approach these specimens of consent,

[205] Higgins, *Problems and Process* (n. 61), 161. See further Ademola Abass, 'Consent Precluding State Responsibility: A Critical Analysis', *International and Comparative Law Quarterly* 53 (2004), 211–25 (223–4).

[206] Crawford, *Second Report on State Responsibility* (n. 198), 62, para. 239. See also Crawford, *State Responsibility* (n. 194), 287.

[207] Crawford, *Second Report on State Responsibility* (n. 198), 62, para. 239. See also Crawford, *State Responsibility* (n. 194), 288.

[208] See, e.g., de Hoogh, '*Jus Cogens* and the Use of Armed Force' (n. 182), 1167, who contends that 'the prohibitions of the use of armed force and (armed) intervention do not stand in the way of [foreign] troops engaging in the use of armed force on a state's territory with a government's consent'. See also Wippman, 'Treaty-Based Intervention' (n. 182), 622.

[209] Higgins, *Problems and Process* (n. 61), 243.

[210] Ditto for intervention. Much has been made in this respect of Art. 4(h) of the 2000 Constitutive Act of the African Union, OAU Doc. CAB/LEG/23.15, which provides for 'the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity'. Note how this has been separately conceived from 'the right of Member States to request intervention from the Union in order to restore peace and security' (Art. 4(j)). See Ben Kioko, 'The Right of Intervention under the African Union's Constitutive Act: From Non-Interference to Non-Intervention', *International Review of the Red Cross* 85 (2003), 807–26.

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we need to be clear on what it is conceptually or as a matter of legal categorisation that the state is consenting to, for not all acts or actions count as 'force' even if that is how they might appear initially.

Much like intervention, then, 'force' is a legal term of art that comes with its own set of assumptions and shared appreciations, its historical background imbued with much meaning and relevance for the present discussion.[211] We do not, for example, consider the right of hot pursuit as an exception to the prohibition of force; this is because it is generally regarded as an exception to the principle of flag state jurisdiction, even though it is meant to be exercised 'only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect'.[212] Here, evidently, we are in the realm of the maritime enforcement of the laws and regulations of the coastal (and pursuing) state,[213] with the right established to facilitate the arrest of the offending ship[214] – but 'it is the mission, not the uniform worn by the actor, that determines how force should be classified and which doctrine controls that use of force'.[215]

Consider, too, the arrangements that have been made under the 1982 UN Convention on the Law of the Sea with respect to the controlling of piracy on the high seas, which have developed in something of the same vein.[216] There, 'every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize property on board',[217] with a right of visit envisaged for warships that encounter a foreign ship on the high seas, where there is reasonable ground for suspecting that ship's involvement

[211] See, most importantly, Tom Ruys, 'The Meaning of "Force" and the Boundaries of the *Jus ad Bellum*: Are "Minimal" Uses of Force Excluded from UN Charter Article 2(4)?', *American Journal of International Law* 108 (2014), 159–210. See also Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge: CUP 2009), 272–7.

[212] Art. 111(5) of the United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3 (UNCLOS). See also Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press 1963), 302 (hot pursuit as a 'particular customary right' that is 'independent of the legal category of self-defence').

[213] Art. 111(1) UNCLOS. See also Art. 111(2) UNCLOS.

[214] Art. 111(6)(b), 111(7) and 111(8) UNCLOS. Ditto the right of constructive presence, as discussed by Robin R. Churchill, Vaughan Lowe and Amy Sander, *The Law of the Sea* (Manchester: Manchester University Press 4th edn 2022), 408.

[215] Craig H. Allen, 'Limits on the Use of Force in Maritime Operations in Support of WMD Counter-Proliferation Initiatives', *International Law Studies* 81 (2006), 77–139 (82). Consider, too, the logic of so-called shiprider agreements: Holger W. Henke, 'Drugs in the Caribbean: The "Shiprider" Controversy and the Question of Sovereignty', *European Review of Latin American and Caribbean Studies* 64 (1998), 27–47.

[216] Following on from Arts. 14–22 of the Geneva Convention on the High Seas, 29 April 1958, 450 UNTS 11.

[217] Also in any place outside the jurisdiction of any state: Art. 105 UNCLOS.

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with piracy.[218] With this Convention, states seem to have consented to a rare 'capacity' to enforce the universal jurisdiction they possess on the high seas[219] – again governed by the function, rather than the appearance, of the operation at hand. The resulting acts are thus not considered to be acts of 'force' and Article 2(4) is not generally considered to be implicated.[220] Given this context, and by way of contrast, it may be well worth recalling the 'discordant note'[221] sounded by the Arbitral Tribunal in the *Guyana/Suriname* arbitration, in which it described the communication of June 2000 from two patrol boats from the Surinamese Navy made in respect of drill ship *C.E. Thornton* and its service vessels as 'more akin to a threat of military action rather than a mere law enforcement activity'.[222]

Importantly, in the last decade or so, these arrangements had proven wholly insufficient to deal with the exponential increase in piratical action that had occurred off the coast of Somalia at a time when its government – the Transitional Federal Government (TFG) – could not take effective or appropriate action.[223] In its Resolution 1816 of June 2008, the UN Security Council recognised the 'lack of capacity of the [TFG] to interdict pirates or patrol and secure either the international sea lanes off the coast of Somalia or Somalia's territorial waters',[224] and acknowledged that the TFG had written to the UN Secretary-General, specifying that it 'needs and would welcome international assistance to address the problem'.[225] A separate communication of February 2008 from the Permanent Representative of the Somali Republic to the United Nations, addressed to the President of the Security Council, had 'convey[ed] the consent of the TFG to the Security Council for urgent assistance in securing the territorial and international waters off the coast of Somalia for the safe conduct of shipping and navigation',[226] so there could be

218 Art. 110(1)(a) UNCLOS.

219 James Crawford, *Brownlie's Principles of Public International Law* (Oxford: OUP 9th edn 2019), 286.

220 Ditto abductions undertaken across international boundaries: Ruys, 'The Meaning of "Force"' (n. 211), 193.

221 Vasco Becker-Weinberg and Guglielmo Verdirame, 'Proliferation of Weapons of Mass Destruction and Shipping Interdiction', in Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (n. 93), 1017–33 (1024).

222 *Guyana/Suriname* Arbitration, Award of the Arbitral Tribunal Constituted Pursuant to Article 287, and in Accordance with Annex VII, of the United Nations Convention on the Law of the Sea (17 September 2007), 147, para. 445.

223 UN Doc. SC/9344, 2 June 2008.

224 UN SC Res. 1816 of 2 June 2008, cons. 7.

225 *Ibid*., cons. 10.

226 *Ibid*., cons. 11.

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no doubt that Somalia's consent had been given – and given purposefully – for outside assistance.

Acting under Chapter VII of the Charter, the Security Council thus decided that, for a six-month period:

> 7. . . . States co-operating with the TFG in the fight against piracy and armed robbery off the coast of Somalia, for which advance notification has been provided by the TFG to the Secretary General [of the United Nations], may:
>
> (a) Enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; and
>
> (b) Use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery . . . [227]

In a subsequent enactment of the Security Council – Resolution 1851 of December 2008 – it provided further authorisation under Chapter VII of the Charter to states and regional organisations acting with the advance notification, provided by the TFG to the Secretary-General, to take 'all necessary measures that are appropriate *in Somalia*, for the purpose of suppressing acts of piracy and armed robbery at sea, pursuant to the request of the TFG, provided, however, that any measures undertaken pursuant to the authority of this paragraph shall be undertaken consistent with applicable international humanitarian and human rights law'.[228]

Both of these resolutions proceeded from the consent of (the government of) Somalia, but it is important to stress that this applied at two separate levels of engagement: one was its reaching out to the Council for assistance in the first place;[229] the other was the operational relevance of the individual actions that participating states and regional organisations planned to take.[230] Given that Resolution 1816 contemplated the use of all necessary means to repress acts of

[227] *Ibid.*, para. 7.

[228] UN SC Res. 1851 of 16 December 2008, para. 8 (emphasis added).

[229] According to Treves, the reference 'to the authorization of the coastal state' in both Resolution 1816 and Resolution 1851 'takes away all, or much of, the revolutionary content of the resolutions': Tullio Treves, 'Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia', *European Journal of International Law* 20 (2009), 399–414 (406).

[230] Hence the requirement of advance notification. Indeed, in the Security Council debate that preceded the adoption of Resolution 1816, Indonesia emphasised that actions envisaged 'shall only apply to the territorial waters of Somalia, based on its prior consent': UN Doc. S/PV. 5902, 2 June 2008, 2. See further Douglas Guilfoyle, 'The Use of Force against Pirates', in Weller, *The Oxford Handbook of the Use of Force in International Law* (n. 93), 1057–76 (1062).

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piracy and armed robbery, 'in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law', it is arguable that what the Security Council was doing here was conducting an intra-territorial expansion of the conventional regime of 'police powers'[231] – that is, first, into the territorial waters (or better, the territorial sea) of Somalia, with Resolution 1816 and then, with Resolution 1851, into the territory of Somalia itself.[232] Without the consent of the TFG or the authorisation of the Council, any action in these allocated spaces was at very real risk of being interpreted (and potentially reclassified) by states as an act of force under Article 2(4) of the Charter – and as an unlawful act of force at that.

This brings us to the practice of inter-state counter-terrorist operations and the particular example of the force deployed by the United States against Osama bin Laden, as leader of al-Qaeda, after his whereabouts had been pinned to Abbottabad in northeastern Pakistan. The raid was successfully undertaken in May 2011 by twenty-three US Navy SEALs, belonging to the Naval Special Warfare Development Group – who, apparently, 'had surreptitiously entered the country on ten to twelve previous occasions'.[233] Quite apart from the position the United States took on its relationship with al-Qaeda under the laws of the ius in bello and the importance of those laws in determining the lawfulness of the raid, the United States did accept that the sovereignty of Pakistan was also in contention by virtue of the laws of the ius ad bellum. Naturally, the United States considered whether Pakistan's consent could be one way around 'the sovereignty problem':[234] at an earlier point in time, Pakistan had issued its consent for air strikes in the tribal areas adjacent to Afghanistan.[235] However, secrecy was regarded as integral and indispensable to the ultimate success of the operation, and this meant that the United States had to explore the option of claiming its right of self-defence in the absence of consent.[236] With the Foreign Office of Pakistan taking the view that '[t]his event of unauthorized unilateral action cannot be taken as a rule',[237] the episode

[231] As put by Guilfoyle, *ibid*., 1063.
[232] Indonesia made reference to 'the inability of [Somalia's] law enforcement to maintain stability and security' as the overall context of UN SC Resolution 1816: UN Doc. S/PV. 5902, 2 June 2008, 3.
[233] According to Nicholas Schmidle, 'Getting Bin Laden', *The New Yorker*, 8 August 2011 (and reporting that the raid was by far the deepest stretch into the territory of Pakistan).
[234] See Charlie Savage, *Power Wars: Inside Obama's Post-9/11 Presidency* (Boston: Little, Brown & Co. 2015), 263.
[235] 'U.S. Embassy Cables: Pakistan Backs US Drone Strikes on Tribal Areas', *The Guardian*, 30 November 2010.
[236] Savage, *Power Wars* (n. 234), 264 (under the so-called unwilling or unable doctrine).
[237] Tom Wright, 'Pakistan Criticizes U.S. Raid on bin Laden', *Wall Street Journal*, 3 May 2011, noting a 'change in tone' from the statement made in the immediate wake of the action (indicating Pakistan's cooperation with intelligence-gathering in the past).

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revealed the abiding worth of consent in the dynamics of the laws of the ius ad bellum, but it also spoke to its fragility: its presence cannot be assumed or extended.[238] This is not to mention any difficulty in getting at or establishing the facts of consent – which may well remain elusive, and even permanently so. Fundamentally, once given, the remit of consent cannot be generalised but is instead wrapped in the politics and normativity of the particular.[239]

IV. THE LIMITATIONS OF CONSENT

A. *The Basis of Allowability*

We have thus far attended to the idea of the 'allowability' of military assistance 'at the request of the government of a State', as the ICJ expressed it in June 1986 – although it should be sufficiently clear by now that considerable difficulties surround the exact juridical basis of that proposition. What is of concern to us at this juncture is the Court's employment of the word 'allowability' in its analysis: this seems to be different from saying that military assistance in such circumstances is 'allowed'; still less that it is allowed no matter what the prevailing facts are or how enfeebled the government of the day might be. By contrast, 'allowability' injects an aspect of contingency – of negotiability, if you will – into the overall equation: the immediate implication is that certain conditions must be met if such assistance is to be deemed allowable as a matter of law. In the context of this Trialogue, I am therefore more in agreement with the reading of Corten ('allowable' and not 'allowed'[240]) than that of Fox on this point, who writes of the 'unqualified statement'[241] of the Court and of its 'sweeping language',[242] providing 'blanket approval of governmental invitations'.[243] For, as a more general matter emerging from that judgment, the Court proceeded to discerningly identify the legal propositions it brought to its analysis, including propositions that were not at issue before it.[244] In any event, with an eye to the relevant evidence, we have already seen how the

[238] Jane Perlez, 'U.S. Relations with Pakistan Falter in Rift over Drone Strikes', *New York Times*, 18 April 2011, A8.

[239] See further Zohra Ahmed, 'Strengthening Standards for Consent: The Case of U.S. Drone Strikes in Pakistan', *Michigan State International Law Review* 23 (2015), 459–517.

[240] For this point of emphasis, see Corten, 'Intervention by Invitation', Chapter 2 in this volume.

[241] Fox, 'Invitations to Intervene after the Cold War', Chapter 3 in this volume, section I, 183.

[242] *Ibid*, section II.B, 194.

[243] *Ibid*, 193.

[244] For example, 'the lawfulness of a response to the imminent threat of armed attack': ICJ, *Nicaragua* (n. 32), para. 194. See also the discussion of 'the process of decolonization' at n. 110.

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UN General Assembly expressly struck out against intervention 'in civil strife in another state' in its enunciation of the principle of non-intervention in Resolution 2625 (XXV).[245] And we have canvassed the consequences of neutrality in the event of an (external) recognition of belligerency,[246] so the preliminary proofs suggest that the allowability of such assistance to the government of a state is not unlimited.[247]

In this section, we shall try to probe in more detail what these conditions for – these dynamics of – consent in law are, or could be, and we shall once again have recourse to historical material to guide our analysis. I shall concentrate on three IDI resolutions adopted over the course of a century or so. The first of these, the Neuchâtel Resolution II (Droits et devoirs des Puissances étrangères, au cas de mouvement insurrectional, envers les gouvernements établis et reconnus qui sont aux prises avec l'insurrection), was adopted in September 1900. The second, the Wiesbaden Resolution III (Le principe de non-intervention dans les guerres civiles), was adopted in August 1975. The third and most recent, the Rhodes Resolution II (Assistance militaire sollicitée), was adopted in September 2011. Much like the successive editions of Oppenheim's treatise on public international law at which we looked for the definition of 'intervention' in section III, these IDI resolutions are a most useful mechanism through which to assess changing ideas and expectations of consent in and across time. The resolutions are significant because they are concerned with invitations made by states, but also, and equally importantly, because they speak to the crossover that occurs – or is meant to occur – from the laws of the ius ad bellum to the laws of the ius in bello. As we shall see, that latter corpus also has relevance to the matter of consent.

[245] The terminology might seem rather dated today, but it has historical bearing on our topic: see the 1928 Convention on Duties and Rights of States in the Event of Civil Strife, 134 LNTS 45. See also Quincy Wright, 'International Law and Civil Strife', *Proceedings of the American Society of International Law* 53 (1959), 145–53.

[246] See discussion accompanying n. 89. During the Spanish Civil War, a Non-Intervention 'Agreement' was formed in August 1936, which involved a series of individual declarations made by twenty-seven governments on non-intervention in the Spanish Civil War: Norman J. Padelford, 'The International Non-Intervention Agreement and the Spanish Civil War', *American Journal of International Law* 31 (1937), 578–603 (580). For obvious reasons, this development brings to mind Talleyrand's famous observation that 'non-intervention is a term of political metaphysics signifying the same as intervention': quoted in Deon Gueldenhuys, *Foreign Political Engagement: Remaking States in the Post-Cold War World* (London: Macmillan 1998), 15.

[247] Jennings and Watts, *Oppenheim's International Law*, vol. I (n. 151), 437–9, para. 130 (noting that '[s]o long as the government is in overall control of the state and internal disturbances are essentially limited to matters of local law and order or isolated guerrilla or terrorist activities, it may seek assistance from other states which are entitled to provide it').

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Before we examine the content of these resolutions, reference should be made to Louise Doswald-Beck's important study, published in the *British Yearbook of International Law* in 1985, in which she concluded that 'there is, at the least, a very serious doubt whether a State may validly aid another government to suppress a rebellion, particularly if the rebellion is widespread and seriously aimed at the overthrow of the incumbent regime'.[248] That conclusion was propelled by a detailed appreciation of both practice and principle,[249] and it is these elements that forged the 'substantial evidence' she found 'to support a theory that intervention to prop up a beleaguered government is illegal'.[250] It therefore matters – and it matters a great deal – that the relative successes of a given rebellion in a given territory (or territorial state) be calibrated, for therein lies the gauge whereby the lawfulness of an action that claims the consent of the relevant state through its government can be measured. To put it another way, the challenge is to benchmark how beleaguered a government may be against the rebellious activity. Problematic though it is to implement this in practice, we ought not to miss the essential point: that, as far as historic and contemporary public international law is concerned, the ebbing of governmental power more or less correlates with the authority of that government to consent to any outside action. And, to make fuller sense of this position, Doswald-Beck refers us to one of the 'basic assumptions of international law',[251] which reflects the notion of the actual representation of the state:

> The duty not to intervene in the civil strife of another State can only be rationalized by perceiving the recipient of the duty as the State *in abstracto*. The personality of the State as such thus holds the right and for the purpose of this norm [of self-determination] the government does not exclusively represent the State. [. . .] The personality of the State, having as its components

[248] Louise Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government', *British Yearbook of International Law* 56 (1985), 189–252 (251).

[249] And the principles she mentioned there were independence, self-determination, and non-intervention in internal affairs: *ibid*., 251. As for the prohibition of force, see *ibid*., 244:

> [I]t would seem unlikely that an action to aid a government against rebels was perceived as contrary to Article 2(4) when it was drafted, given the fact that generally accepted customary law at that time did not forbid it. Such a prohibition has therefore arisen as a newly developed and separate customary norm and tends to be referred to as such, although it is, of course, possible for the interpretation of Article 2(4) to evolve so as to include a wide prohibition against intervention. One would have to rely on the words 'political independence' to encompass such a rule as a government is, of course, perfectly entitled to invite lawful military assistance which does not violate the norms of self-determination and non-intervention in internal affairs.

[250] *Ibid*., 251.

[251] *Ibid*., 242.

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> territory and people, could thus be represented by a body other than the regime in power, if that body is perceived as more truly representing the State [. . .] Such a body would be in a position to complain of the breach of the duty of non-intervention against the State. [. . .] A successor government would also be able to bring a claim in law against another State on the basis that it had violated international law by keeping in power a previous regime in the face of popular insurrection.[252]

B. *Resolutions of the Institut de droit international*

The first major statement from the IDI appeared in the form of its Neuchâtel Resolution II of September 1900, which concerned the imposition on 'third Powers', in the event of an insurrection or civil war, of 'certain obligations towards established and recognised governments, which are struggling with an insurrection'. Insurrection formed part of the focus of the Resolution, as per its title,[253] and reference was made in due course to 'civil war' (Articles 1 and 3–5) and to 'recognition of belligerency' (Articles 4–9). The general idea behind the initiative was to calibrate the normative arrangements for foreign powers in accordance with the changing fortunes and status of what was termed 'a revolutionary party'[254] – namely, any party pitted against an established and recognised government within a state. The Resolution was therefore dedicated to mapping the various stages of struggle – insurrection, civil war, and recognition of belligerency – of that cause and, of course, of setting forth the corresponding legal regimen.[255]

Given this brief background, it is perhaps surprising that nowhere did the Resolution commit to a definition of either 'insurrection' or 'civil war', with the picture emerging of a commanding hand afforded by law to any government of an 'independent nation' setting about 'the reestablishing of internal peace'.[256] In matter of fact, at one point, the Resolution referred to the 'armed *defence* against

[252] *Ibid.*, 243.

[253] Consider, too, Resolution I, also adopted at Neuchâtel: IDI, Règlement sur la responsabilité des Etats à raison des dommages soufferts par des étrangers en cas d'émeute, d'insurrection ou de guerre civile (Neuchâtel Resolution I), 10 September 1900.

[254] IDI, Rights and Duties of Foreign Powers and their *ressortissants* towards Established and Recognized Governments in Case of Insurrection (Neuchâtel Resolution II), 8 September 1900, Art. 8 (my translation; in the original French version, 'au parti révolté').

[255] Hence the focus of Chapter I (on insurrection) and of Chapter II (on recognition of belligerency) – and typified by the statement that '[t]he simple fact of applying, for humanitarian reasons, certain laws of war to the insurgents, does not in itself constitute a recognition of a state of belligerency': *ibid.*, Art. 4(2). For further discussion, see Roscoe R. Oglesby, *Internal War and the Search for Normative Order* (Leiden: Martinus Nijhoff 1971).

[256] IDI, Neuchâtel Resolution II (n. 254), Art. 2(1).

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insurrection' – namely, the armed defence of 'the State within whose territory an insurrection has broken out'[257] – as if a government facing down an insurrection were to be treated as one and the same thing as 'the State' itself. By omitting definitions, it may initially be thought that the Resolution was the IDI's attempt to establish a certain equivalence of meaning between 'civil war' and 'a recognition of a state of belligerency',[258] but the Resolution moved quite quickly to disabuse the reader of any such notion and to affirm that these were actually to be treated as separate propositions: 'The government of a country where a civil war has broken out may recognize the insurgents as belligerents either explicitly or by categorical declaration, or implicitly by a series of acts which leave no doubt as to intentions.'[259]

This apparent discretion of a government to 'recognize the insurgents as belligerents'[260] should be juxtaposed with the recognition of belligerency taking place at the hands of '[t]hird Powers',[261] which became a matter of close regulation under the Resolution. Such recognition was not to occur:

> Section 1. If [a revolutionary party] has not acquired a distinct territorial existence through the possession of a definite portion of the national territory;
>
> Section 2. If it has not the elements of a regular government exercising in fact the manifest rights of sovereignty over this portion of the territory;

[257] *Ibid*., Art. 3 (emphasis added).

[258] As it is put *ibid*., Art. 4(2). See also especially, *ibid*., Art. 1 ('in case of insurrection or civil war'). It might be helpful in this regard to recall Oppenheim's distinction between civil wars that are wars 'in a wider sense of the term' and those that are wars '[i]n the proper meaning of that term'. In his view:

> [A] civil war exists when two opposing parties within a State have recourse to arms for the purpose of obtaining power in the State or when a large fraction of the population of a State rises in arms against the legitimate Government. As war is an armed contention between *States*, such a civil war need not be from the beginning, nor become at all, war in the technical sense of the term. But it may become war through the recognition of each of the contending parties or of the insurgents, as the case may be, as a belligerent Power. Through this recognition a body of individuals receives in so far as an international position as it is for some part and in some points treated as though it were a subject of International Law.

Oppenheim, *International Law*, vol. II (n. 83), 65, para. 59 (emphasis original). Elsewhere, Oppenheim had written '[t]hat in every case of civil war a foreign State can recognise the insurgents as a belligerent Power if they succeed in keeping a part of the country in their hands and set up a Government of their own': Oppenheim, *International Law*, vol. I (n. 47), 112, para. 74.

[259] IDI, Neuchâtel Resolution II (n. 254), Art. 4(1).

[260] *Ibid*.

[261] The preferred nomenclature of Art. 8 (as opposed to 'third States').

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> Section 3. If the fight is not carried on in its name by organized troops, subject to military discipline and conforming to the laws and customs of war.[262]

This was the fulcrum around which the main legal change would result for 'third Powers': 'such recognition', the Resolution maintained, would entail 'all the usual consequences of neutrality',[263] including – we can presume – the stopping of supplies of arms, munitions, military goods, or financial aid to the beleaguered government.[264] Yet it was in terms of the idiom of neutrality – and not intervention – that the core change in consequences was framed.[265]

Let us now move forward to the next instrument in the IDI series, Wiesbaden Resolution III of August 1975, which *was* explicitly framed in terms of the principle of non-intervention and which *did* position 'civil wars' front and centre – so much so, in fact, that the very first provision of that Resolution announced its definition of 'civil war' as:

> . . . any armed conflict, not of an international character, which breaks out in the territory of a State and in which there is opposition between
>
> a) the established government and one or more insurgent movements whose aim is to overthrow the government or the political, economic or social order of the State, or to achieve secession or self-government for any party of that State, or
> b) two or more groups which in the absence of any established government contend with one another for the control of the State.[266]

Thus it was the occurrence of civil war and not the recognition of belligerency that would ultimately prove legally significant, for Article 2 of the Resolution made clear that '[t]hird States' – yes, problematically, *third* states – were prohibited from 'giving assistance to parties to a civil war which is being fought in the territory of another State'.[267] In effect, this meant the prohibition of

[262] *Ibid.*, Art. 8. Importantly, however, according to Art. 4(3), '[a] government which has recognised its revolting nationals either explicitly or implicitly as belligerents, becomes powerless to criticise the recognition accorded by a third Power'.

[263] *Ibid.*, Art. 7 (although a 'third Power' may 'withdraw such recognition even when the situation of the parties in the struggle has not been changed', such retraction would have no retroactive effect: *ibid.*, Art. 9).

[264] Prohibited for insurgents *ibid.*, Art. 2(2), but not for the government.

[265] Art. 2(1), did, however, make clear that '[e]very third Power, at peace with an independent nation, is bound not to interfere with the measures which this nation takes for the reestablishing of internal peace'.

[266] IDI, The Principle of Non-Intervention in Civil Wars (Wiesbaden Resolution III), 14 August 1975, Art. 1(1).

[267] *Ibid.*, Art. 2(1).

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assistance related to any and all parties to a civil war, *including those aligned with the government*, and the Resolution elaborated that this prohibition would extend to the sending of armed forces or military volunteers, instructors or technicians to any party to a civil war, or allowing them to be sent or to set out,[268] as well as the supply of weapons or other war material to any party to a civil war, or allowing them to be supplied,[269] among numerous other activities.[270]

Also problematic for our analysis – perhaps even more so – is the fact that, in its attempt to define 'civil war' and hence regulate the conduct of states under the ius ad bellum, the Resolution pivoted to the language of 'armed conflict, not of an international character' found in common Article 3 of the Geneva Conventions of August 1949 under the ius in bello.[271] It did so at the very moment when that concept was being repurposed and redefined to mark out an enhanced threshold for the material field of application of Additional Protocol II to the Geneva Conventions of June 1977.[272] This activity was tied up with building the necessary diplomatic consensus for its adoption.[273] This process – of, first, the development of a specific concept so as to expand the opportunities for application of the laws of war as they were originally known and, second, of the dichotomisation of that concept so as to secure the adoption of Additional Protocol II – speaks volumes about the particularity of function (or functions) that certain laws may have.[274] And it gives real pause for thought: can

[268] *Ibid.*, Art. 2(2)(a).

[269] *Ibid.*, Art. 2(2)(c).

[270] Certainly, Art. 3 did go on to outline three 'exceptions' to the prohibition set out in Art. 2:

> Notwithstanding the provisions of Article 2, third States may:
>
> a) grant humanitarian aid in accordance with Article 4;
> b) continue to give any technical or economic aid which is not likely to have any substantial impact on the outcome of the civil war;
> c) give any assistance prescribed, authorized or recommended by the United Nations in accordance with its Charter and other rules of international law.

[271] Common Article 3 of the Geneva Conventions of August 1949, 75 UNTS 31; 75 UNTS 85; 75 UNTS 135; 75 UNTS 278.

[272] Additional Protocol II to the Geneva Conventions of June 1977, 1125 UNTS 609, Art. 1(1): '[A]rmed conflicts . . . which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.' On the relation between this threshold and that for the recognition of belligerency, see Sivakumaran, *The Law of Non-International Armed Conflict* (n. 85), 191.

[273] See Sylvie Junod, 'Additional Protocol II: History and Scope', *American University Law Review* 33 (1983–84), 29–40.

[274] Consider, again, the customary definition of non-international armed conflict: Dino Kritsiotis, 'The Tremors of Tadic', *Israel Law Review* 43 (2010), 262–300.

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one aspect of the lex specialis for the ius in bello be conscripted and grafted without more onto the lex specialis of the ius ad bellum? They are, after all, striving for different ambitions and outcomes; they are setting out to do very different things.[275] Yet this seamless juxtaposition of propositions from one lex specialis to the next has scarcely caused a ripple in the literature.[276]

A final word really ought to be shared on Wiesbaden Resolution III's invocation of the principle of non-intervention, upon which we touched earlier. While it appears in the title of the Resolution and in two preambular indulgences, 'intervention' is mentioned only once in its substantive body – in Article 5 – in relation to remedial foreign intervention (or counter-intervention). As we have seen, the mainstay of the Resolution is the prohibition of assistance contained in Article 3,[277] but it is telling that, in making accommodation for counter-intervention in Article 5, the formulation used is that 'third States may give assistance to the other party [in the civil war] only in compliance with the Charter and any other relevant rule of international law'.[278] Is 'assistance'

[275] And there very much is a ius ad bellum 'feel' to the contents of the Resolution, notwithstanding what is said on humanitarian aid: IDI, Wiesbaden Resolution III (n. 266), Art. 4.

[276] In her analysis of 'intervention and invitation', and in a subsection entitled 'classification of conflicts', Gray, *International Law and the Use of Force* (n. 50), 85–6, for example, writes that '[q]uestions as to classification – is the conflict civil or international? – may be decisive as to the applicable law and as to the legality of the use of force' (noting that '[t]he issue of classification [is] also central to the application of the laws of war'). For his part, Fox does intimate, early on in his chapter in this volume, that 'internal conflict' and 'civil wars' are interchangeable: see Fox, 'Invitations to Intervene after the Cold War', Chapter 3 in this volume. See also the discussion of the Court's designation of non-international armed conflict in *Nicaragua* and, later on the same page, the reference to 'no civil war threshold (as in *Nicaragua*)': *ibid*., section II.B, 196. See also section II.D *ibid*., 205 ('a civil war intensity threshold'). Fox, however, then makes a persuasive case for the distinct context in which these terms have come about, concluding that '[o]ne could well imagine the threshold for recognising such polarisation [i.e., in civil wars] being much higher than the threshold for applying individual IHL protections': *ibid*., section III.B, 218. Yet he proceeds to invoke the terminology of international humanitarian law for the purpose of dissecting his dataset. There may well be a 'lack of clarity on legal thresholds' – but note the acceptance of the IDI's use of 'civil war' and its relation to the Uppsala Conflict Data Program episteme (which 'requires at least twenty-five battle-related deaths per conflict year'): a 'difference [that] is again marginal', according to Fox (*ibid*., 222). The correlation between 'older belligerency doctrine' and 'civil wars' (*ibid*., section I, 185) dissipates as the chapter evolves.

[277] Presumably following through from the observation made in the second preambular recital that 'any civil war may affect the interests of other States and may therefore result in an international conflict if no provision is made for very stringent obligations of non-intervention'.

[278] Further, that is, to the third preambular recital of the Resolution ('the violation of the principle of non-intervention for the benefit of a party to a civil war often leads in practice to interference for the benefit of the opposite party').

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therefore to be taken as coterminous with 'intervention'? Examples of assistance were neatly assembled in Article 2 of the Resolution, of course, but each of these invites further examination as to whether they can be said to constitute 'intervention' in the eyes of the law. The 'sending [of] armed forces or military volunteers, instructors or technicians to any party to a civil war, or allowing them to be sent or to set out'?[279] Almost certainly, yes. But what about 'prematurely recognizing a provisional government which has no effective control over a substantial area of the territory of the State in question'?[280] And what of the 'exception' of humanitarian aid?[281] Exception to *what*, exactly?

Finally, for this section, we turn to Rhodes Resolution II of September 2011 – on military assistance on request (defined as 'direct military assistance by the sending of armed forces by one State to another State upon the latter's request').[282] For reasons articulated earlier in this chapter, this Resolution signals a most welcome recalibration of the relevant terms of reference,[283] the Resolution designed to address some of the more practical matters (or, as it calls them, 'terms and modalities')[284] that attend such situations: the author and nature of requests;[285] the notification of requests to the UN Secretary-General;[286] and the possibility of their withdrawal.[287] The Resolution is significant in adopting a teleological approach towards the practice of military assistance on request ('The objective of military assistance is to assist the requesting State in its struggle against non-State actors or individual persons within its territory, with full respect for human rights and fundamental freedoms'),[288] and, in so doing, it reconnects with the holistic assessment of relevant international laws set out by the UN General Assembly in its

279 IDI, Wiesbaden Resolution III (n. 266), Art. 2(2)(a).

280 *Ibid.*, Art. 2(2)(f). Oppenheim, *International Law*, vol. I (n. 47), 112, para. 74, did not think so: 'It is frequently maintained that such untimely recognition contains an intervention. But this is not correct, since intervention is . . . *dictatorial* interference in the affairs of another State.'

281 IDI, Wiesbaden Resolution III (n. 266), Arts. 3(a) and 4. Consider in particular that, in the *Nicaragua* case, the ICJ concluded that '[t]here 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': ICJ, *Nicaragua* (n. 32), para. 242.

282 IDI, Military Assistance on Request (Rhodes Resolution II), 8 September 2011, Art. 1(a).

283 *Pace* the 'existing State practice on military assistance on request' that is noted in the fourth preambular recital of the Resolution: *ibid*. See also Erika de Wet, *Military Assistance on Request and the Use of Force* (Oxford: OUP 2020).

284 IDI, Rhodes Resolution II (n. 282), Art. 1(b).

285 *Ibid.*, Art. 4(1)–(3).

286 *Ibid.*, Art. 4(4).

287 *Ibid.*, Art. 5.

288 *Ibid.*, Art. 2(2). See also Art. 3(1).

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Resolution 2625.[289] The fact that Rhodes Resolution II confines itself to 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, including acts of terrorism, below the threshold of non-international armed conflict in the sense of Article 1 of [Additional] Protocol II'[290] might be thought to be anomalous: this formulation has relevance for the definition of non-international armed conflict (NIAC) more generally,[291] and we should ask which part of the resolution is contemplated by this – the prohibition of military assistance under Article 2 or the details of its provision under Article 4?[292] – especially in view of the stipulation in Additional Protocol II that '[n]othing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the States'.[293]

C. *Consent within Non-International Armed Conflicts*

The invocation of the concept of NIAC (as found in common Article 3 of the Geneva Conventions and Additional Protocol II) becomes significant for the purposes of consent from another perspective altogether: the question of humanitarian relief. Article 18(2) of Additional Protocol II provides that:

> If 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.

289 UN GA Res. 2625 (XXV) (n. 36). In fact, this Resolution is specifically recalled in the second preambular recital of Rhodes Resolution II. See also IDI, Rhodes Resolution II (n. 282), Art. 3(1): 'Military assistance is prohibited when it is exercised in violation of the Charter of the United Nations, of the principles of non-intervention, of equal rights and self-determination of peoples and generally accepted standards of human rights and in particular when its object is to support an established government against its own population.'

290 As part of its scope under *ibid*., Art. 2(1).

291 Sivakumaran, *The Law of Non-International Armed Conflict* (n. 85), 162. And might be thus taken to safeguard the practice of military assistance upon request: Yoram Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge: CUP 2nd edn 2021), 100.

292 Dinstein regards the qualification as 'blunted' by Art. 2(1): *ibid*.

293 Additional Protocol II (n. 272), Art. 3(1). There are, of course, echoes here of Neuchâtel Resolution II (n. 257).

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There is no equivalent stipulation for consent made in common Article 3,[294] and the immediate impression cast by these words is that the 'High Contracting Party' – whose armed forces are arraigned against 'dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol'[295] – retains the full and unadulterated liberty to deny its consent as it sees fit and so chooses. Acting through its government, any High Contracting Party thus has the ultimate say over whether or not humanitarian relief is to be delivered on its territory.[296]

To interpret the provision in this way would, however, hollow out the obligation of Article 18(2) ('shall be undertaken') – to pull any teeth it was designed to have: it would make that obligation subject not only to the consent but also to the slightest whim of any High Contracting Party.[297] And that was not the intention behind the provision, as the Commentary on the Additional Protocols makes adamantly clear: '[t]he fact that consent is required does not mean that the decision is left to the discretion of the parties', for '[t]he authorities responsible for safeguarding the population in the whole of the territory of the State cannot refuse such relief without good grounds'.[298] This means that there can be no arbitrary withholding of consent once the preconditions of the obligations are fulfilled.[299] The Commentary is also notable for its acceptance of the fact that – in exceptional, although unspecified, cases – 'when it is not possible to determine

[294] Common Art. 3 does provide, however, that '[a]n impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict'. The silence on consent in this provision has been regarded as 'understandable' because 'the liberty of parties to such a [non-international armed conflict] to accept or not the "offers" of services by "any impartial organization" is *in re ipsa*': Flavia Lattanzi, 'Humanitarian Assistance', in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (Oxford: OUP 2015), 231–55 (250).

[295] As *per* Art. 1(1) of Additional Protocol II (n. 272).

[296] To be contrasted with the 'ironclad' obligation of Art. 59(1) of Geneva Convention (IV) Relative to the Protection of Civilians in Time of War. 'If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal': Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge: CUP 4th edn 2022), 291. On the use of the word 'agreement' as opposed to 'consent' in Art. 70(1) of Additional Protocol I ('relief actions ... shall be undertaken subject to the agreement of the Parties concerned'), see Lattanzi, 'Humanitarian Assistance' (n. 294), 242–3.

[297] Dinstein, *Non-International Armed Conflicts in International Law* (n. 291), 202.

[298] Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: ICRC/Martinus Nijhoff 1987), 1479, para. 4885.

[299] Sivakumaran, *The Law of Non-International Armed Conflict* (n. 85), 331. See also Lattanzi, 'Humanitarian Assistance' (n. 294), 251; Dapo Akande and Emanuela-Chiara Gillard, 'Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict',

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which are the authorities concerned, consent is to be presumed in view of the fact that assistance for the victims is of paramount importance and should not suffer any delay'.[300] Thus even the laws of the ius in bello are alert to the signal complexities that may belie the untidy transition from one government to another.[301] The matter of exceptionality becomes an occasion for some ambiguity regarding 'which are the authorities concerned' – but also for the articulation of an important principle: the presumption of consent.

Subsequently, the Study of the International Committee of the Red Cross on customary international humanitarian law, published in March 2005, concludes that the arrangement set forth in Additional Protocol II for humanitarian relief applies to *all* NIACs – because the Study does not discriminate between different forms of NIAC as per the conventional arrangements discussed here (i.e., the Geneva Conventions and Additional Protocol II).[302] Rule 55 of the Study provides that '[t]he parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control'.[303] This might not be evident from what is said in common Article 3 of

International Law Studies 92 (2016), 483–511. Consider the much more explicit formulation in Art. 13(2) of the International Law Commission's 2016 Draft Articles on the Protection of Persons in the Event of Disasters: 'Consent to external assistance shall not be withheld arbitrarily.' See further Craig Allan and Thérèse O'Donnell, 'A Call to Alms? Natural Disasters, R2P, Duties of Cooperation and Uncharted Consequences', *Journal of Conflict and Security Law* 17 (2012), 337–71 (359–65). The IDI has concluded, in Art. VIII(1) of Resolution II ('L'assistance humanitaire') adopted at Bruges in September 2003, that:

> Affected States are under an obligation not arbitrarily and unjustifiably to reject a *bona fide* offer exclusively intended to provide humanitarian assistance or to refuse access to the victims. In particular, they may not reject an offer nor refuse access if such refusal is likely to endanger the fundamental human rights of the victims or would amount to a violation of the ban on starvation of civilians as a method of warfare.

300 Sandoz et al., *Commentary on the Additional Protocols* (n. 298), 1479, para. 4884 (as distinct from 'the government in power').

301 Art. 6(5) of Additional Protocol II speaks of 'the authorities in power' at the end of hostilities: *ibid*., 1402.

302 Note that, in its discussion of an offer of services from common Art. 3, the most recent Commentary makes reference to how 'exceptional circumstances' may render the seeking and obtaining of consent 'problematic' – which may be the case, 'for example, when there is uncertainty with regard to the government in control, or when the State authorities have collapsed or ceased to function': International Committee of the Red Cross (ICRC), *Commentary on the First Geneva Convention* (Cambridge: CUP 2016), 279, para. 830.

303 Stylistically, at least, the emphasis has shifted from 'consent' to the 'right of control' of the parties to the conflict. According to the ICRC, the 'right of control' could include measures of verification on the nature of the assistance; the prescription of technical arrangements for delivery, and the temporary restriction of humanitarian activities by virtue of imperative military necessity: *ibid*., 281–2, para. 839.

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the Geneva Conventions;[304] let it also be observed that Rule 55 actually makes no reference to consent.[305] Still, the Study could not be clearer in articulating that consent is nevertheless required for humanitarian relief for civilians in need: it describes the value of consent as 'self-evident' in practical terms;[306] equally, it maintains that consent may not be refused on arbitrary grounds – for '[i]f it is established that a civilian population is threatened with starvation and a humanitarian organisation which provides relief on an impartial and non-discriminatory basis is able to remedy the situation, a party is obliged to give consent'.[307]

V. THE FUNCTION OF CONSENT WITHIN THE IUS AD BELLUM

We shall now examine four justifications for force or intervention under the ius ad bellum in which consent either has or is claimed to have a function, aiming to test alternative conditions in which consent can permissibly be given and to explore why differences may exist.

A. *Collective Self-Defence*

The first justification is collective self-defence. At one point in its decision in the *Nicaragua* case, the ICJ addressed the question of 'whether the lawfulness of the use of collective self-defence by the third State for the benefit of the attacked State ... depends on a request addressed by that State to the third State'.[308] This question succeeded the Court's conclusion that a state 'for whose benefit [the] right [of collective self-defence] is must have declared

[304] See above, n. 294. After remarking that the right of humanitarian initiative announced in common Art. 3 ('An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict') may 'appear at first sight to be merely decorative and without any real significance', the Commentary characterises it as 'of great moral and practical value', which has 'placed matters on a different footing, an impartial humanitarian organization now being legally entitled to offer its services. The Parties to the conflict can, of course, decline the offer *if they can do without it*. But they can no longer look upon it as an unfriendly act, nor resent the fact that the organization making the offer has tried to come to the aid of the victims of the conflict': Jean S. Pictet (ed.), *Commentary to Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Geneva: ICRC 1952), 58 (emphasis added).

[305] *Ibid*.

[306] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. I (Cambridge: CUP 2005), 196: 'It is nonetheless self-evident that a humanitarian organization cannot operate without the consent of the party concerned.'

[307] *Ibid*., 197.

[308] ICJ, *Nicaragua* (n. 32), para. 196 – an appropriate invocation of the 'third State'.

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itself to be the victim of an armed attack';[309] out of concern for the potential abuse of the right of collective self-defence, it observed that '[t]here is no rule in customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation'.[310] Whatever else the right of collective self-defence might have meant, it did not mean 'vicarious defence by champions' as far as the ICJ was concerned.[311]

To reach this conclusion, the Court pored over a series of provisions from select regional arrangements – Articles 3(f) and 27 from the 1948 Charter of the Organisation of American States (the Bogota Charter), and Article 3(1) and 3(2) of the 1947 Inter-American Treaty of Reciprocal Assistance (the Treaty of Rio de Janeiro).[312] In its analysis, the Court centred the 'requirement of a request on the part of the attacked State', as found in the last of these provisions,[313] which it considered to be significant because the Treaty of Rio de Janeiro was 'particularly devoted to these matters of mutual assistance'.[314] And, from here and without further ado, the Court went on to find that, 'in customary international law, whether of a general kind or that particular to the inter-American legal system, there is no rule permitting the exercise of collective self-defence in the absence of a request by the State which regards itself as the victim of an armed attack'.[315] Other than the manner in

[309] *Ibid.*, para. 195.

[310] *Ibid*.

[311] *Ibid*., 545, dissenting opinion of Judge Robert Jennings. Note Brownlie's description of 'a customary right or, more precisely, a power to aid third states which have become the object of an unlawful use of force': Brownlie, *International Law and the Use of Force by States* (n. 212), 330.

[312] As modified by the 1975 Protocol of San José – although this was not in force at the time of the Court's decision.

[313] Art. 3(2) of the Treaty of Rio de Janeiro, 21 UNTS 77, reads in full:

> On the request of the State or States directly attacked and until the decision of the Organ of Consultation of the Inter-American System, each one of the Contracting Parties may determine the immediate measures which it may individually take in fulfilment of the obligation contained in the preceding paragraph and in accordance with the principle of continental solidarity.

The Court gave little shrift to whether a collective defence agreement might be evidence of attenuated consent by virtue of the development of a vicarious armed attack or act of aggression – as in the 1949 North Atlantic Treaty (obligation of assistance) and the 1955 Warsaw Pact ('immediate assistance'). See further Schachter, *International Law in Theory and Practice* (n. 111), 155.

[314] ICJ, *Nicaragua* (n. 32), para. 198.

[315] *Ibid*., para. 199.

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which the ICJ framed the relevant rule (i.e., the non-existence of a rule of *permission*) and its failure to share more of the details of its empirical mooring,[316] what is noteworthy is that it nowhere specified the conditions in which such requests could permissibly be made – in which the consent of the state for collective self-defence can be given.

It was to be only a matter of time before this law was put to the test. In the first hours of the Iraqi invasion of Kuwait on 2 August 1990, the UN Security Council met in New York, where Ambassador Mohammed Abdulhasan, the Permanent Representative of Kuwait to the United Nations, ended his urgent opening statement to the Council thus:

> Kuwait's request is very clear. We ask the Security Council to put an immediate halt to this invasion and to exercise its duty to ensure, by every means available, that Iraq withdraw immediately and unconditionally to the international boundaries that existed before the invasion. Kuwait appeals to and urges the Council in the name of justice and the sovereignty of the United Nations Charter to adopt a resolution in conformity with the Charter and with international law and norms.[317]

At this stage, the ambassador assured the Council that the amir or crown prince of Kuwait (Sheikh Jaber Al-Ahmed Al-Sabah), the prime minister of Kuwait (Sheikh Sa'ad Al-Abdulla Al-Sabah), and the government of Kuwait 'remain in control in Kuwait and are defending the country's security'.[318] Yet that situation changed rapidly: the crown prince was reported to have fled Kuwait by car for Saudi Arabia minutes before the first Iraqi soldiers entered the grounds of Dasman Palace in Kuwait City.[319]

Separate to the ambassador's request of the Security Council, it is believed that – some three hours after the invasion commenced – the crown prince had approached the US Embassy in Kuwait for assistance.[320] We might appreciate the importance of this transaction occurring outside of the Security Council setting, but – as a component of its quasi-informality – let it be noted that an

[316] Certainly, at a later point in its judgment, the Court did admit that 'if the victim State wishes another State to come to its help in the exercise of the right of collective self-defence, it will normally make an express request to that effect': *ibid.*, para. 232.

[317] UN Doc. S/PV. 2932, 2 August 1990, 8–10.

[318] *Ibid.*, 6.

[319] Reports differ on this. One suggests that Iraqi armed forces may have crossed the border with Kuwait at 2.00 a.m. local time, when 'Kuwait's ruling emir … fled to Saudi Arabia as the invasion was beginning, but his younger brother Fahd reportedly was killed defending the emir's palace, where some of the heaviest fighting took place': Carlyle Murphy, 'Iraqi Invasion Forces Seize Control of Kuwait', *Washington Post*, 3 August 1990.

[320] As per the account of Lawrence Freedman and Efraim Karsh, *The Gulf Conflict 1990–1991: Diplomacy and War in the New World Order* (Princeton: Princeton University Press 1994), 67.

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appeal was made, too, for confidentiality at a crucial and uncertain moment in time. On 12 August 1990, a much more formal letter from the crown prince made its way to US President George H.W. Bush, which read in part:

> I therefore request on behalf of my government and in the exercise of the inherent right of individual and collective self defense as recognized in Article 51 of the UN Charter that the United States Government take such military or other steps as are necessary to ensure that economic measures designed to fully restore our rights are effectively implemented.[321]

Evidently, then, this communication was part of a sequence of requests from Kuwait, differing in both timing and form, made in the interval since the invasion,[322] but whether the crown prince had authority or effective control never became a point on which the validity of the requests was challenged.[323] Furthermore, it was never called into question whether 'the rights of the peoples' of Kuwait – including their self-determination – were directly in issue.[324]

Legally speaking, it therefore matters a great deal what legal justification (or set of justifications) are being pleaded for a given action: these should not be assumed or imagined, because they come to define the normative minutiae that are to be applied in line with the respective justification.[325] The 'appeal',

[321] The source of this letter is Thomas K. Plofchan, Jr., 'Article 51: Limits on Self-Defense?', *Michigan Journal of International Law* 13 (1992), 336–73 (336, fn. 1). The letter was also reported and summarised in the Statement of White House Press Secretary Marlin Fitzwater on 12 August 1990: *Public Papers of the Presidents of the United States: George Bush – 1990* (1 July–31 December 1990), 1128–9 (1128). This formal request was separate from the invitation issued to the United States by Saudi Arabia: Diane T. Putney, *Airpower Advantage: Planning the Gulf Air Campaign, 1989–1991* (Honolulu: University Press of the Pacific 2006), 28.

[322] For Thomas R. Pickering, the Permanent Representative of the United States of America to the United Nations, had addressed a letter to the President of the Security Council on 9 August 1990, in which he informed the Council of the deployment of military forces to the Persian Gulf region – and that '[t]hese forces have been despatched in exercise of the inherent right of individual and collective self-defense, recognized in Article 51, including requests from Kuwait and Saudi Arabia for assistance': UN Doc. S/21492, 10 August 1990.

[323] Quite the contrary, in fact; rather, concern centred on Iraq's claim to the Security Council that 'the Free Provisional Government of Kuwait requested my Government to assist it to establish security and order so that the Kuwaitis would not have to suffer. My Government decided to provide such assistance solely on that basis': UN Doc. S/PV. 2932, 2 August 1990, 11. See further Christopher Greenwood, 'New World Order or Old? The Invasion of Kuwait and the Rule of Law', *Modern Law Review* 55 (1992), 153–78 (155).

[324] Higgins, *Problems and Process* (n. 61), 115–16.

[325] Consider the 'analogy' of consent as a ground precluding wrongfulness within the context of 'intervention by invitation', as presented by Tom Ruys and Luca Ferro, 'Weathering the Storm: Legality and Legal Implications of the Saudi-Led Military Intervention in Yemen', *International and Comparative Law Quarterly* 65 (2016), 61–98 (72, 84–5).

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cited at the outset of this chapter, which President Abdo Rabbo Mansour Hadi of Yemen made to GCC member states in March 2015, bore all the hallmarks of an invitation as a preface to intervention, but, in reaching out to these five member states 'to stand by the Yemeni people . . . and come to the country's aid',[326] President Hadi specifically invoked the right of self-defence set out in the UN Charter; he also made reference to the 1945 Charter of the League of Arab States and its 1950 Treaty on Joint Defence and Economic Co-operation. He requested 'immediate support in every form and [taking] necessary measures, including military intervention, to protect Yemen and its people from the ongoing Houthi aggression, repel the attack that is expected at any moment on Aden and the other cities of the South, and help Yemen to confront Al-Qaida and Islamic State in Iraq and the Levant'.[327] The appeal was made the day before President Hadi himself fled Aden for Riyadh to avoid advancing 'Houthi coup orchestrators'[328] and two days before Saudi Arabia led the multinational action of Operation Decisive Storm into Yemen.[329]

There is therefore a 'fine line' to be drawn, from the legal standpoint, between the consent offered for collective self-defence and that offered for an 'intervention by invitation',[330] as was made clear in a quick succession of events relating

[326] UN Doc. S/2015/217, 27 March 2015, 4.

[327] *Ibid*., 4–5.

[328] As President Hadi labelled them: *ibid*., 4 (militias who were 'being supported by regional Powers that are seeking to impose their control over the country and turn it into a tool by which they can extend their influence in the region'). See also Robert F. Worth, 'How the War in Yemen Became a Bloody Stalemate – And the Worst Humanitarian Crisis in the World', *New York Times Magazine*, 4 November 2018.

[329] Ruys and Ferro, 'Weathering the Storm' (n. 325), 62. The possibility of 'counter-intervention', as 'reflected in the leading protagonists' discourse justifying the action' in Yemen, is proposed by Corten: see Corten, 'Intervention by Invitation', Chapter 2 in this volume, section II.B, 116. It is indeed possible to extract this 'logic' from the letter of President Hadi of 24 March 2015 ('Houthi coup orchestrators'), but we might question whether the specific framing of that letter effectively privileged Yemen's claim of (collective) self-defence as the foundation for 'immediate support in every form': *ibid*. In any event, we ought to question whether an invitation by the Yemeni president occurring in the context of a claim of counter-intervention must satisfy any test of effective control, or whether the fact of the 'counter' is sufficient in and of itself to deem the resulting counter-intervention permissible, even if '*all* effective control had disappeared' – one of the factors Corten raises in that analysis (*ibid*., section II.C, 122). The raison d'être of any justification of counter-intervention must surely be the fact of its response to 'prior military support' (*ibid*., section III.C.1, 136) above and beyond any regulatory framework designed for intervention by invitation (and effective control).

[330] Claus Kreß, 'The Fine Line between Collective Self-Defense and Intervention by Invitation: Reflection on the Use of Force against "IS" in Syria', *Just Security*, 17 February 2015, available at www.justsecurity.org/20118/claus-kreb-force-isil-syria/. See also Masoud Zamani and Majid Nikouei, 'Intervention by Invitation, Collective Self-Defence and the Enigma of Effective Control', *Chinese Journal of International Law* (2017), 663–94, and Doswald-Beck, 'The Legal Validity of Military Intervention' (n. 248), 213.

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to Iraq as the so-called Islamic State of Iraq and the Levant (ISIL) emerged there – seizing strategic facilities in Baiji, as well as the cities of Mosul and Tikrit. At the end of June 2014, Iraq requested assistance from the United Nations, calling upon its member states 'to assist us by providing military training, advanced technology and the weapons required to respond to the situation, with a view to denying terrorists staging areas and safe havens'.[331] On 7 August 2014, US President Barack Obama announced that targeted air-strikes had been launched within Iraq in respect of two operations: the protection of American personnel located in Erbil and Baghdad and a humanitarian effort to save thousands of Iraqi civilians trapped on Mount Sinjar and facing almost certain death. While this latter aspect might be suggestive of the right of humanitarian intervention in action, President Obama claimed that, 'when we have a mandate to help, *in this case a request from the Iraqi government*, and when we have the unique capabilities to help avert a massacre, then I believe the United States cannot turn a blind eye'.[332] This is to be contrasted with the (separate) request that the Iraqi government had extended to the United States to 'lead international efforts to strike ISIL sites and military strongholds in Syria in order to end the continuing attacks on Iraq, to protect Iraqi citizens, and ultimately to enable and arm Iraqi forces to perform their task of regaining control of Iraqi borders' – all apparently in the name of the right of collective self-defence.[333]

Set alongside one another in this way, these episodes are most convenient illustrations of how consent functions in different parts of the constellation of the ius ad bellum – and of how different conditions have come to regulate the issue of consent depending on the legal justification invoked for a given action.[334]

[331] UN Doc. S/2014/440, 25 June 2014.

[332] Helene Cooper, Marker Lander and Alissa J. Rubin, 'Obama Allows Airstrikes against Iraq Rebels', *New York Times*, 8 August 2014, A1 (emphasis added). See further Oona A. Hathaway, Julia Brower, Ryan Liss, Tina Thomas and Jacob Victor, 'Consent-Based Humanitarian Intervention: Giving Sovereign Responsibility back to the Sovereign', *Cornell International Law Journal* 46 (2013), 499–568.

[333] UN Doc. S/2014/695, 23 September 2014. See also Somini Sengupta and Charlie Savage, 'U.S. Invokes Defense of Iraq in Legal Justification for Syria Strikes', *New York Times*, 24 September 2014, A19.

[334] Where, to repeat, effective territorial control does feature for intervention by invitation but not for (collective) self-defence. Corten has contemplated, however, that, in requesting assistance for their fight against so-called Islamic State, Iraq and Syria 'both had lost control over substantial parts of their respective territory' but that their respective authorities were 'recognized as representing their states': Olivier Corten, 'The Military Operation against the "Islamic State" (ISIL or Da'esh) – 2014', in Ruys et al., *The Use of Force in International Law* (n. 70), 873–98 (887). This may well have been one of the 'elements' guiding the reactions of other states to these developments, but one must wonder whether any latitude afforded to intervening states was informed by the nature of the enemy faced in both Iraq and Syria.

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B. *Counter-Intervention*

After rejecting the United States' claim to collective self-defence in the *Nicaragua* case, the ICJ turned to consider the predicament in which one state acts towards another state with 'less grave forms' of force (i.e., those not constituting 'armed attacks'),[335] but where there has been 'a breach of the principle of non-intervention'.[336] What would obtain in such cases, from the standpoint of the law, for any 'third state'? The Court said that it might be suggested 'that, in such a situation, the United States' – here, rightly described as a third state, given the context announced in the case – 'might have been permitted to intervene in Nicaragua in the exercise of some right analogous to the right of collective self-defence, one which might be resorted to in a case of intervention short of an armed attack'.[337] We might appreciate why the Court might have ploughed this furrow even if it did so for only the most cursory of moments: because the United States did not appear in contentious proceedings to which it was a party, the Court had to be satisfied that the claim before it was 'well founded in fact and law'.[338] However, no sooner had the ICJ floated this possibility than it moved to dismiss it, concluding that the acts of which Nicaragua had been accused 'could not justify counter-measures taken by a third State, the United States, and particularly could not justify intervention involving the use of force'.[339] If this was and remains an accurate statement of the law, then the clear implication is that there exists a crucial limitation on the power of a third state to consent to any collective counter-measures in another state, notwithstanding any 'less grave form'[340] of force – or intervention – that may have been committed against it.[341] The analogy with collective self-defence

[335] As per ICJ, *Nicaragua* (n. 32), para. 191.

[336] *Ibid.*, para. 210. See further Gray, *International Law and the Use of Force* (n. 50), 85.

[337] ICJ, *Nicaragua* (n. 32), para. 210.

[338] As per Art. 53(2) of its Statute.

[339] ICJ, *Nicaragua* (n. 32), para. 249.

[340] As per *ibid.*, para. 191.

[341] Although the Court did not rule out individual counter-measures – that is, action taken by the 'immediate victim', as pronounced by Judge Bruno Simma in his Separate Opinion in *Case Concerning Oil Platforms* (Islamic Republic of Iran v. USA), judgment of 6 November 2003, ICJ Reports 2003, 161, 332, para. 12. Importantly, and for the record, Judge Simma reasoned that:

> [B]y such proportionate counter-measures the Court [in the *Nicaragua* case] cannot have understood mere pacific reprisals, more recently, and also in the terminology used by the International Law Commission, called 'counter-measures'. Rather in the circumstances of the *Nicaragua* case, the Court can only have meant what I have just referred to as defensive military action 'short of' full-scale self-defence.

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could be taken only so far, it transpires – and, for the Court, that was not very far at all.

Consider, in contrast, the 'right' of counter-intervention, where 'otherwise illegal actions can be justified by the need to counter [an] illegal intervention'.[342] Counter-intervention is therefore 'occasioned by a violation of law and is in turn governed by law',[343] and – as we saw earlier in this chapter – it was endorsed by the IDI at Wiesbaden in August 1975 ('Whenever it appears that intervention has taken place during a civil war in violation of [this Resolution], third States may give assistance to the other party only in compliance with the Charter and any other relevant rule of international law, subject to any such measures as are prescribed, authorized, or recommended by the United Nations').[344] Oscar Schachter, too, has written of counter-intervention as '[a]n important qualification' of the rule that 'prohibits States from intervening on either side in a civil war, defined as an internal conflict in which insurgents are supported by a large number of people or occupy a substantial part of the territory'.[345]

Tellingly, counter-intervention did not make an appearance in the *Nicaragua* case, and this is perhaps because, as a general idea, it 'should be limited to the territory of the state' where 'the prior intervention was illegal'.[346] The involvement of El Salvador as the venue of an alleged armed attack by Nicaragua – at least as the United States presented it to the Court – meant that, as a legal justification, counter-invention was out of the running. We might now have a better grasp of why the Court sought out an 'analogy' with collective self-defence at all: it was more immediately relevant to the facts before it, as the Court saw them. Oscar Schachter regards '[t]his territorial limitation' as one of the principles that has been accepted as a limit on counter-intervention; the other is the principle of proportionality.[347] Writing before the *Nicaragua* judgment but after Nicaragua had initiated proceedings

342 John A. Perkins, 'The Right of Counterintervention', *Georgia Journal of International and Comparative Law* 17 (1986), 171–227 (173).

343 *Ibid.*, 176.

344 IDI, Wiesbaden Resolution III (n. 266). Again, this is another occasion where 'third States' has been appropriately used – because it anticipates the 'intervention' of another (i.e., second) state. This 'right' may also be incorporated as an institutional power of action, as it is in Art. 18 of the 1981 Economic Community of West African States Protocol Relating to Mutual Assistance of Defence, 29 May 1981, UN Doc. A/SP3/5/81.

345 Schachter, *International Law in Theory and Practice* (n. 111), 115. The IDI did not consider counter-intervention in terms as an 'exception' to its prohibition of assistance in Art. 2 – even though Art. 3 is addressed to third states on what they may do.

346 Oscar Schachter, 'The Right of States to Use Armed Force', *Michigan Law Review* 82 (1984), 1620–46 (1643).

347 *Ibid.*, 1644.

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in the ICJ in April 1984, Schachter surmised that the United States had 'abandoned' the former limitation 'insofar as its "counter-intervention" on the side of the El Salvador regime has extended to support of anti-Sandinista forces fighting on Nicaraguan soil'.[348] In his reading of events, the United States had justified its actions in and against Nicaragua on the basis of collective self-defence, but it had also 'counter-intervened' against Nicaragua 'by mining approaches to Nicaraguan ports'.[349]

What is supremely interesting from this account is why it does not examine the behaviour of the United States in respect of Nicaragua as itself an instance of counter-intervention, even though the analysis hints at such ('Concretely, if the Nicaraguan Sandinista regime receives Cuban and Soviet military supplies and advisors, is the United States free to support the armed opposition by training, armed and technical advice?').[350] One might also mention in this regard the weapons and training supplied to the Sandinistas by Venezuela and Panama.[351] The critical matter from our perspective is that, to make any credible legal sense of these events, it is imperative to gain a firm handle of the exact chronologies of each and every 'intervention', for this will form the prerequisite to any chronology of the lawfulness of those respective actions. Counter-intervention thus emerges as an exercise in determining the 'precise point[s]' of state activity,[352] such as the temporal relation between the assistance awarded to President Bashar al-Assad of Syria by Russia, Iran, and Hizbollah, and that made available to his opponents (by, among others, Turkey, the United Kingdom, the United States, Qatar, Saudi Arabia, and France).[353] However, to make any serious headway on this front, we need also to understand very clearly the relative authority of the relevant government; only then can it be determined whether there has occurred any 'violation of law' in the first place[354] – the necessary prequel to any lawful act of counter-intervention.

[348] *Ibid.*, 1643.
[349] *Ibid.* Indeed, in June 1979, Zbigniew Brzezinski argued in the National Security Council for military intervention by the United States in view of 'the major domestic and international implications of a Castroite takeover of Nicaragua': Betty Glad, *An Outsider in the White House: Jimmy Carter, His Advisors, and the Making of American Foreign Policy* (Ithaca, NY: Cornell University Press 2009), 243.
[350] Schachter, 'The Right of States to Use Armed Force' (n. 346), 1642.
[351] Odd Arne Westad, *The Global Cold War* (Cambridge: CUP 2007), 340.
[352] Klingler, 'Counterintervention on Behalf of the Syrian Opposition?' (n. 93), 516.
[353] As is done by Klingler for Syria in terms of 'this loss of presumptive legitimacy': *ibid.*, 500 and 508–9.
[354] Schachter, *International Law in Theory and Practice* (n. 111), 159.

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There is a complicating factor, too, that shades these assessments: the pluralist conception of 'intervention', as endorsed by the UN General Assembly in October 1970 – a conception that extends not only to armed intervention but also to 'all other forms of interference'.[355] This is sufficient to extend to 'arms or active participation',[356] as is the conception of 'assistance' developed by the IDI in August 1975 (which also includes the premature recognition of a provisional government).[357] If each of these instances can indeed qualify as an 'intervention' in law, why can any of the other instances not serve as an acceptable instance of 'counter' intervention? Schachter has insisted that '[t]here is good reason' to support a principle of proportionality for counter-intervention 'as a legal restriction and not merely as a prudential principle', which would require 'some rough equivalence between the counter-intervention and the illicit aid given the other side'.[358] That rough equivalence may be very difficult to achieve if 'intervention' knows of various forms, in contrast to the idea of 'force',[359] quite apart from any variations that might exist among ideas of what intervention itself encompasses.[360] There also appears to be a key assumption in this law that 'the quantum and character of outside aid' is known at all times to the opposing side,[361] and this is not always – if ever – the case. Finally, in this hypothesis, we might ask a genuine question about how the fracturing of the 'self' of self-determination can be reconciled with any dialectic of intervention vs counter-intervention – and whether the broader interest of 'friendly relations' might require a hierarchy in which self-determination supersedes any notion of prohibited intervention.[362]

355 Damrosch, 'Politics across Borders' (n. 48).
356 Rosalyn Higgins, 'Internal War and International Law', in Cyril E. Black and Richard A. Falk (eds), *The Future of the International Legal Order*, vol. 3 (Princeton: Princeton University Press 1971), 81–121 (94).
357 IDI, Wiesbaden Resolution III (n. 266).
358 Schachter, *International Law in Theory and Practice* (n. 111), 162.
359 See above, n. 50.
360 See further Doswald-Beck, 'The Legal Validity of Military Intervention' (n. 248), 251: 'There appears to be no prohibition against States providing governments with weapons and other military supplies during a civil war.' See also Schachter, *International Law in Theory and Practice* (n. 111), 115: 'It appears that States generally accord the *de jure* government the benefit of the doubt as to its right to receive military aid to be used against internal opponents.'
361 *Ibid.*, 162.
362 That is, an ordering among the fundamental principles: Kohen, 'Self-Determination' (n. 60). Corten usefully observes that counter-intervention 'may even take place in the name of *protecting* the people's right to self-determination': Corten, 'Intervention by Invitation', Chapter 2 in this volume, section II.A, 113 (emphasis original).

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C. *Pro-Democratic Intervention*

We next turn to the so-called right of pro-democratic intervention. Reference was made earlier in the chapter to the possibility of a right of political or ideological intervention – a proposition that the ICJ raised but then rejected in 1986 – so we ought to explore why there is a need for a separate proposition of a right of 'pro-democratic intervention', which the Court did not deal with as such.[363]

Christine Gray has discussed this latter proposition in terms of both 'pro-democratic intervention' and 'pro-democratic invasion',[364] writing that '[t]he political goals underlying the use of force may include the re-establishment of "democratic" government'.[365] At the conceptual level, then, a broad berth is accorded to the right of pro-democratic intervention, which appears to include practices that would come within the compass of the right of political or ideological intervention, as discussed by the ICJ in the *Nicaragua* case.[366] Yet, in truth, it does seem to be the case that these propositions – the right of political or ideological intervention and the right of pro-democratic intervention – proceed from very different factual premises and thus deserve to be treated individually in normative terms.The difference may be specified thus:

- The right of political or ideological intervention was essentially a creation of the politics of the Cold War, designed to facilitate the installation of a democratic or socialist government where none existed previously. In other words, at its base, it offered the option for what might be called changes of ideological regime and/or constitutional infrastructure.[367]
- The right of pro-democratic intervention, on the other hand, assumes that a democratic constitutional order is already established in the target state – no argument is being made for either its instalment or dethronement, as it were – and that it has encountered certain existential challenges, which the right of pro-democratic intervention is there to fix or to

363 Although, in its *Nicaragua* judgment, the ICJ did conclude that 'the use of force could not be the appropriate method to monitor or ensure such respect [for human rights]': ICJ, *Nicaragua* (n. 32), para. 268.

364 Doubtlessly *pace* Oscar Schachter, 'The Legality of Pro-Democratic Invasion', *American Journal of International Law* 78 (1984), 645–50.

365 Gray, *International Law and the Use of Force* (n. 50), 64.

366 *Ibid.*, 65. An even broader berth is adopted by David Wippman, who regards 'pro-democratic intervention' in essentially descriptive terms and as separate from the question of 'legal bases': Wippman, 'Pro-Democratic Intervention' (n. 173), 802.

367 See James Crawford, 'Democracy and International Law', *British Yearbook of International Law* 64 (1993), 113–33 (126).

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> otherwise remedy. In this instance, self-determination might be read as an affirmation of the decision of 'self-direction of each society by its people', as well as the operation of 'the principle of democracy at the collective level'.[368]

In probing the premise underpinning any right of pro-democratic intervention, it is important to observe that the Security Council has authorised an intervention to reverse the effects of a coup d'état and reinstate the democratically elected government of a country; where the Council does so, there is no legal need to have recourse to that right. This is precisely what happened in Haiti in July 1994, when the Council, acting under Chapter VII of the Charter, authorised 'Member States to form a multinational force under unified command and control and . . . to use all necessary means to facilitate the departure of the military leadership [of General Raoul Cédras], the prompt return of the legitimately elected President [Bertrand Aristide] and the restoration of the legitimate authorities of the Government of Haiti'.[369] In September 1991, General Cédras had seized power from President Aristide following his resounding electoral win in December of the previous year, so that the language of 'restoration' becomes important: it more closely approximates the organising value for which the intervention of Operation Uphold Democracy was devised,[370] although the Council proved keen to promote the circumstances in which it found itself as exceptional ('the unique character of the present situation in Haiti and its deteriorating, complex and extraordinary nature, requiring an exceptional response').[371]

Equally, it is important to consider what legal significance any consent might have had for Operation Uphold Democracy: in enacting Resolution

[368] *Ibid.*, 116.

[369] Among other things: UN SC Res. 940 of 31 July 1994, para. 4. In cons. 3, 4 and 9 of the same Resolution, the Council had referred to 'the illegal de facto regime' and to 'the military authorities in Haiti'.

[370] See also UN SC Res. 940 of 31 July 1994, cons. 8: 'Reaffirming that the goal of the international community remains the restoration of democracy in Haiti and the prompt return of the legitimately elected President.' Arguably, there is an important dividing line to be drawn between the installation and the 'restoration' of democratic government, for the United States made use of the latter terminology in Operation Just Cause in Panama in December 1989 in circumstances in which General Noriega had nullified the election of May 1989 mid-count but remained in effective control of the country. Still, as Gray has observed, the United States distinguished between 'its legal justification and its goals', and, apparently, it is to the latter that the restoration of democracy pertained: Gray, *International Law and the Use of Force* (n. 50), 65.

[371] UN SC Res. 940 of 31 July 1994, para. 2. See also Brad R. Roth, 'Secessions, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine', *Melbourne Journal of International Law* 11 (2010), 393–440 (430) (on 'outlier cases').

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940, the Council took note of the letter dated 29 July 1994 that it had received from President Aristide while he was in exile in the United States.[372] In that letter, President Aristide informed the Council that:

> . . . the military authorities [in Haiti], continuing to display their contempt for national sovereignty, have adopted an arrogant, provocative attitude and have stepped up their acts of defiance against the international community, as witnessed by the illegal installation of a provisional president and the expulsion of the United Nations International Civilian Mission to Haiti.[373]

Aristide reminded the Council of his own scrupulous respect for the commitments set out in the Governors Island Agreement of July 1993[374] and said that, to this end, he felt 'the time has come for the international community, as a party in the process which led to that Agreement, to take prompt and decisive action, under the authority of the United Nations, to allow for its full implementation'.[375] While this may be regarded as an instance of consent by the exiled president to Operation Uphold Democracy,[376] the Security Council ultimately rested its argument on implementation of the Governors Island Agreement and, to that extent, this invitation is out of line with the other examples that we have considered so far.[377] In any event, the invocation of Chapter VII of the Charter in Resolution 940 does suggest that the Council 'was unwilling to treat that consent as either a necessary or a sufficient legal basis for intervention'.[378]

An altogether different legal situation arose in May 1997, following the ouster from power in Sierra Leone of democratically elected President Ahmed Tejan Kabbah by mutinous troops who joined the Revolutionary United Front of Major Johnny Paul Koroma. After taking flight by helicopter to Guinea,

[372] UN SC Res. 940 of 31 July 1994, cons. 6.
[373] UN Doc. S/1994/905, 29 July 1994, 2.
[374] UN Doc. S/26063, 12 July 1993 (which envisaged the return to Haiti of President Aristide by 30 October 1993).
[375] UN Doc. S/1994/905, 29 July 1994, 2. See also the letter dated 30 July 1994 from the Permanent Representative of Haiti to the United Nations, addressed to the President of the Security Council (UN Doc. S/1994/910), which is also mentioned in UN SC Res. 940 of 31 July 1994, cons. 6.
[376] Wippman, 'Pro-Democratic Intervention' (n. 173), 807.
[377] Very much the line taken by the Permanent Representative of Haiti to the United Nations when addressing the Council: UN Doc. S/PV. 3413, 31 July 1994, 3: 'An agreement is a contract. Those who sign it must respect if or pay the price.' Note, too, the remark 'stating the consent of the Government of President Aristide to the draft resolution before the Council': *ibid*., 4.
[378] Wippman, 'Pro-Democratic Intervention' (n. 173), 807. Although Spain did contend that 'the clear position taken by the legitimate authorities of Haiti' was part of the reason it supported Resolution 940: UN Doc. S/PV. 3413, 31 July 1994, 20.

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President Kabbah launched an appeal to the chair of the Economic Community of West African States (ECOWAS), President Sani Abacha of Nigeria, for immediate assistance in restoring civilian rule in his country.[379] As it happened, a contingent of some 900 troops was already stationed in Sierra Leone, in accordance with pre-existing treaty commitments regarding a battalion attached to the Economic Community of West African States Monitoring Group (ECOMOG), but 'no agreement had made provision for intervention to reverse a coup'.[380] This did not stop Nigerian naval vessels from shelling the Army headquarters in Freetown in early June; Nigerian troops also seized the international airport and brought in reinforcements.[381] This was followed by the Conakry Peace Agreement of October 1997, as well as by further multilateral military action;[382] in March 1998, President Kabbah was finally returned to power in Freetown, the capital of Sierra Leone.[383]

These developments were accompanied by a statement from United Nations Secretary-General Kofi Annan in which he contemplated the use of force as 'a last resort' – saying that 'it is inevitable it may have to come to that' – but denied that there was any question of a UN force entering Sierra Leone.[384] In June 1997, member states of ECOWAS, meeting in Conakry, Guinea, issued a Final Communiqué, in which they recognised the objectives to be pursued by ECOWAS as comprising the 'early reinstatement of the legitimate government of President Ahmed Tejan Kabbah, the return of peace and security and the resolution of the issues of refugees and displaced persons'.[385] Furthermore, they stressed that 'no country should grant recognition to the regime that emerged following the *coup d'état* of 25 May 1997, and that they would 'work towards the reinstatement of the legitimate government

379 Press Briefing by Permanent Representative of Sierra Leone to the United Nations, 27 May 1997. Kabbah had been elected president in the general and presidential elections held in Sierra Leone in February and March 1996.

380 'Nigeria Imperatrix', *The Economist* (London), 5 June 1997. (This included the 1975 Treaty of the Economic Community of West African States itself: 1010 UNTS 17.)

381 Apparently acting under the authority of ECOWAS: James Rupert, 'Nigerians Welcomed in Freetown', *Washington Post*, 15 February 1998, A27. Ghana warned coup leaders that they had 24 hours to step down, and Nigeria, Ghana, and Guinea dispatched troops and armoured personnel carriers to Sierra Leone: Claudia McElroy and Peter Beaumont, 'Invasion Ultimatum to Freetown Mutineers', *The Observer* (London), 1 June 1997, 2. See also Michael Binyon, 'Nigerian Gunboats Shell Freetown Coup Leaders' Base', *The Times* (London), 3 June 1997, 11.

382 Howard W. French, 'Nigerian Troops Near Sierra Leone's Capital', *New York Times*, 11 February 1998, A8.

383 James Rupert, 'Sierra Leone's President Reinstalled', *Washington Post*, 11 March 1998, A26.

384 Michael Binyon, 'Annan Hints at Use of Force to Topple Sierra Leone Coup', *The Times* (London), 5 June 1997, 17.

385 UN Doc. S/1997/499, 27 June 1997, 2–3.

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by a combination of three measures, namely, dialogue, imposition of sanctions and enforcement of an embargo and the use of force'.[386]

The fact that 'objectives' for an intervention are specified is not to say that its legal justification (or justifications) have thereby been articulated,[387] and yet – in a thorough and rewarding examination of the possible justifications for that intervention by Karsten Nowrot and Emily Schabacker – it has been claimed that '[t]he primary justification offered by Nigeria and ECOWAS for the military intervention in Sierra Leone was the overthrow of the military junta and the restoration of the democratically elected government of President Kabbah'.[388] Those same authors, however, then conclude that 'the ECOWAS intervention in Sierra Leone can be regarded as a lawful exercise of the use of force in light of the changing concept of government legitimacy and the resulting modified doctrine of intervention by invitation under contemporary international law'.[389] There is an oddity to this claim, of course, because a 'modified'[390] doctrine of intervention by invitation does not explain why any need would then exist for recourse to – still less the innovation of – a 'right of pro-democratic intervention' as the authors initially proposed: the 'doctrine' itself, in its modified form, would presumably serve as *the* legal justification for intervention on this account.[391] And the task of the international lawyer is further complicated by the fact that, in Resolution 1156 of March 1998, the UN Security Council welcomed 'the return to Sierra Leone of its democratically elected President' – uttering not a word on the process that got him there.[392] Given the remarkably broad

386 *Ibid.*, 3.

387 See the discussion of Gray, *International Law and the Use of Force* (n. 50) at n. 370.

388 Karsten Nowrot and Emily W. Schabacker, 'The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone', *American University International Law Review* 14 (1998), 321–412 (378) (in the section entitled 'The Right of Pro-Democratic Intervention'). Note the reference, too, to 'primary basis': *ibid.*, 385.

389 *Ibid.*, 401–2. See also Jeremy Levitt, 'Pro-Democratic Intervention in Africa', *Wisconsin International Law Journal* 24 (2006), 785–833 (788), who presents a 'norm' of pro-democratic intervention but blends it with, among other things, 'the *consent* doctrine' (emphasis original).

390 For this would entail 'foreign military interventions based on the consent of the democratically elected government-in-exile': Nowrot and Schabacker, 'The Use of Force to Restore Democracy' (n. 388), 401.

391 See further *ibid.*, 386 ('consent of the legitimate government as the decisive factor'). The authors nevertheless persist with a 'legal construction' of the right 'capable of explaining the changed reactions of the international community from condemnation … to acceptance': *ibid*. See also Susan Breau, 'The ECOWAS Intervention in Sierra Leone – 1997–99', in Ruys et al., *The Use of Force in International Law* (n. 70), 527–40 (535).

392 UN SC Res. 1156 of 16 March 1998, para. 1. The Security Council had earlier deplored 'the fact that the military junta has not taken steps to allow the restoration of the democratically-elected Government and a return to constitutional order': UN SC Res. 1132 of 8 October 1997, cons. 7.

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support showered on the intervention that occurred in Sierra Leone between June 1997 and March 1998, it may very well be that the real oddity is that the legal justification of this intervention somehow remains elusive all these many years later.[393]

If the restoration of a democratically elected, but exiled, government presents one possible calibration for a right of pro-democratic intervention in practice,[394] then another might derive from the situation in which an incumbent government refuses to leave office after suffering defeat at the polls. This is precisely what happened in Côte d'Ivoire following the victory of Alassane Ouattara of the Rally of the Republicans in the presidential elections of November 2010, when (incumbent) President Laurent Gbagbo of the Ivorian Popular Front made it known that he was not going anywhere.[395] In January 2011, from his blockaded hotel room in Abidjan, President-elect Ouattara requested that ECOWAS intervene to unseat Gbagbo: 'Legitimate force', he claimed, 'doesn't mean a force against Ivorians.'[396] Be this as it may, the complication here was that Gbagbo remained in effective control of the country, with 'the sole authority to give consent to military force because the facts are not clear in terms of whom the population, by a high majority, supports'.[397] A further complication had

393 See Nowrot and Schabacker, 'The Use of Force to Restore Democracy' (n. 388), 379, who write of an 'overwhelmingly positive international reaction'. Cf. Wippman, 'Pro-Democratic Intervention' (n. 173), 808: '[T]he Council, and most states, tacitly approved or at least acquiesced in ECOMOG's decision, treating it more or less as another instance of an acceptable – or at least accepted – breach.' The critical element is to ascertain whether a right of pro-democratic intervention was indeed pleaded as 'an autonomous justification for the use of force': Jean d'Aspremont, 'Mapping the Concepts behind the Contemporary Liberalization of the Use of Force in International Law', *University of Pennsylvania Journal of International Law* 31 (2010), 1089–149 (1110).

394 Nowrot and Schabacker helpfully recognise the difference with interventions 'designed, at least in part, to establish a democratic government': Nowrot and Schabacker, 'The Use of Force to Restore Democracy' (n. 388), 385. See further Schachter, *International Law in Theory and Practice* (n. 111), 120, referring to this as the 'overthrow of repressive régimes'.

395 See further Julie Dubé Gagnon, 'ECOWAS's Right to Intervene in Côte d'Ivoire to Install Alassane Ouattara as President-Elect', *Notre Dame Journal of International and Comparative Law* 3 (2013), 51–72 (52), examining the intervention from the angle of '[t]he right to intervene using military force by a regional organization for pro-democratic motives'.

396 'Ivory Coast: Ouattara Wants Commandos to Snatch Gbagbo', *Modern Ghana*, 6 January 2011, available at www.modernghana.com/news/311101/ivory-coast-ouattara-wants-commandos-to-snatch-gbagbo.html, also reporting the limited nature of the intervention: '[T]here are non-violent special operations which allow simply to take the unwanted person and take him elsewhere.' See also Adam Nossiter, 'Ivory Coast Leader's Rival Remains under Blockade', *New York Times*, 6 January 2011, A8, describing the Hotel du Golf in Abidjan as 'the alternative seat of government of this West African nation'.

397 At least according to Gagnon, 'ECOWAS's Right to Intervene' (n. 395), 67. See further Yejoon Rim, 'Two Governments and One Legitimacy: International Responses to the Post-Election Crisis in Côte d'Ivoire', *Leiden Journal of International Law* 25 (2012), 683–705.

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already arisen the previous month when ECOWAS had advised President Gbagbo to stand down or expect to face 'legitimate force',[398] because – as the ICJ pointed out in its advisory opinion in *Legality of the Threat or Use of Nuclear Weapons* in July 1996 '[i]f the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4 [of the UN Charter]'.[399] We might regard this as a broader value of a right of pro-democratic intervention when compared with the intricacies involved in an 'invitation' from a government in circumstances such as those of Côte d'Ivoire – separate, of course, from action taken pursuant to any conventional framework or, indeed, to any authorisation forthcoming from the Security Council.[400]

There are many echoes of this episode in the events leading up to and including Operation Restore Democracy – note the language, once again – in The Gambia in January 2017, after President Yahya Jammeh refused to cede power to Adama Barrow, who had won the presidential election of December 2016. President Jammeh had initially acknowledged defeat in that election, but he then underwent something of a change of heart.[401] Acting soon after the election, the African Union recalled its 2000 Constitutive Act, as well as the 2007 African Charter on Democracy, Elections and Governance ('on the total rejection . . . of unconstitutional changes of government, in particular any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections'),[402] emphasising its determination 'to take all necessary measures, in line with relevant [Union] instruments, with a view to ensuring full respect and compliance with the will and desire expressed by the people of the Gambia'.[403] This appeared to locate the basis of any planned action in *casus foederis*, in the law of the institution of the African Union. For its part, ECOWAS announced that, '[i]f [Jammeh] is not going, we have stand-by forces already alerted and these stand-by forces have to be able to intervene to restore the people's wish'.[404] That ECOWAS delivered an

398 'ECOWAS Bloc Threatens Ivory Coast's Gbagbo with Force', *BBC News*, 25 December 2010.

399 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, advisory opinion of 8 July 1996, ICJ Reports 1996, 226, para. 47.

400 Since Security Council authorisation is ultimately what brought President Gbagbo to heel: UN SC Res. 1464 of 4 February 2003; UN SC Res. 1975 of 30 March 2011. See further Dire Tladi, 'The Intervention in Côte d'Ivoire – 2011', in Ruys et al., *The Use of Force in International Law* (n. 70), 783–94 (786–7).

401 Citing voting irregularities: Jaime Yaya Barry and Dionne Searcey, 'Uncertainty in Gambia after President Rejects Defeat', *New York Times*, 11 December 2016, A4.

402 African Union Communiqué, PSC/PR/COMM. (DCXLIV) of 12 December 2016, 1 (citing Art. 23(4) of the Charter).

403 *Ibid.*, 3.

404 'Gambia Crisis: Senegal Troops on Alert if Jammeh Stays On', *BBC News*, 23 December 2016.

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ultimatum to President Jammeh, as well as the fact that Senegalese troops amassed on the border with The Gambia and Nigeria deployed its air force to Senegal to help with the transfer of power,[405] makes it difficult to doubt the existence of a threat of force as far as The Gambia was concerned.

There was an important difference between the situation in The Gambia and that in Côte d'Ivoire, however: apparently, as Operation Restore Democracy was taking its very first strides, Adama Barrow was being sworn into office in a brief ceremony about 240 kilometres outside of The Gambia – 'in a nondescript room at the Gambian Embassy in Dakar, Senegal, because [he] has so little control over his country that he did not go home for the funeral of his son'.[406] In this, the episode had some echoes of Operation Just Cause in Panama in December 1989, where Guillermo Endara had been sworn in as the president of Panama at a US military base just as that intervention was getting under way.[407] That intervention had also followed a highly contested election, which the country's president, General Manuel Noriega, had decided to nullify in May 1989.[408] With Operation Restore Democracy, however, the Security Council adopted a resolution in which it referred to Adama Barrow as both 'President-elect'[409] and 'President'.[410] Contrary to some of its previous practice, the Security Council did not go on to authorise an intervention in The Gambia in Resolution 2337 of January 2017, but it did express its 'full support' of ECOWAS 'in its commitment to ensure, by political means first, the respect of the will of the people of The Gambia as expressed in the results of the … elections'.[411] Within two days of the intervention, President Jammeh announced he would be stepping down after all,[412] and it was reported that, following his

[405] 'Senegal Troops Amass on Gambia Border as Deadline for President to Step down Nears', *France24*, 18 January 2017, reporting that residents of two Senegalese border towns had commented on the heavy troop movements close to the frontier.

[406] Dionne Searcey and Jaime Yaya Barry, 'Troops Enter Gambia to Dislodge Leader', *New York Times*, 20 January 2017, A3: 'Mr. Barrow's team ultimately decided that the embassy in Dakar was the closest they could safely get to Gambian soil to start the new administration.' Corten rightly refers to the 'fragile' authority of Barrow: Corten, 'Intervention by Invitation', Chapter 2 in this volume, section V.C, 167.

[407] Despite assertions that the ceremony had occurred on Panamanian territory: Associated Press, 'Panamanians in Secret Pact on Oath-Taking', *Los Angeles Times*, 27 December 1989.

[408] Lindsey Gruson, '3 Top Opponents of Noriega Assaulted in Street Melee; Disputed Election Nullified', *New York Times*, 11 May 1989, A1.

[409] UN SC Res. 2337 of 19 January 2017, para. 1.

[410] *Ibid.*, para. 3.

[411] *Ibid.*, para. 6.

[412] Dionne Searcey and Jaime Yaya Berry, 'In Speech, Gambia's Defeated Leader Agrees to Step Down', *New York Times*, 21 January 2017, A8.

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return to the country, President Barrow asked ECOWAS forces to stay in the country for six months to help him consolidate his authority.[413]

One can therefore appreciate why 'intervention by invitation' has been considered to be the 'primary argument'[414] behind the ECOWAS intervention of January 2017: the Permanent Representative of Senegal to the United Nations had indeed informed the Security Council moments before it adopted Resolution 2337 that an 'appeal' had been made that day – the day of 'the oath-taking ceremony' at the Gambian Embassy in Senegal – by 'President Adama Barrow to the international community, and in particular ECOWAS, the African Union and the United Nations, to help ensure respect for the sovereign will of the people of The Gambia'.[415] One must query, though, not only the *generality* of the consent underpinning this appeal, issued as it was to the international community as a whole, but also its *timing*, coming as it did when President Barrow 'exercised no control, whether effective or otherwise, over The Gambia'.[416] Still, the considerations of 'the will of the Gambian people and therefore their right to self-determination', as well as 'respect for democracy', have been taken as shoring up the validity of the intervention by virtue of that invitation.[417] Significantly, however, this approach will invariably mean the relaxing of requirements for solicited interventions when undertaken in such circumstances.[418] Furthermore, any invitation of the incoming (or actual) president of The Gambia needed to contend with the verbal and physical actions of ECOWAS, as well as other actors, before it was even given and, to this extent, it is worth heeding the assessment that Resolution 2337 was 'elegantly formulated to express support for the possibility of a military solution called for and threatened by Senegal, ECOWAS and the [African Union]'.[419]

[413] Lamin Jahateh, 'Gambians Celebrate New President's Arrival after Veteran Ruler Flees', *Yahoo! News*, 26 January 2017.

[414] As claimed by Mohamed S. Helal, 'The ECOWAS Intervention in The Gambia – 2016', in Ruys et al., *The Use of Force in International Law* (n. 70), 921–32 (919). See also Corten, 'Intervention by Invitation', Chapter 2 in this volume, section V.

[415] UN Doc. S/PV. 7866, 19 January 2017, 2.

[416] Helal, 'The ECOWAS Intervention in The Gambia' (n. 414), 921–2, having formed the view that practice has not 'conclusively settled the debate between "effective control" and "democratic legitimacy"'.

[417] As per Corten, 'Intervention by Invitation', Chapter 2 in this volume, section V.B, 165. Note, too, the contrast between the 'primary argument' advanced (of intervention by invitation) and the 'potential' legal justification (of pro-democratic intervention): Helal, 'The ECOWAS Intervention in The Gambia' (n. 414), 922.

[418] See Fox's discussion of the 'democratic legitimacy' view: Fox, 'Invitations to Intervene after the Cold War', Chapter 3 in this volume, section II.

[419] Claus Kreß and Benjamin Nußberger, 'Pro-Democratic Intervention in Current International Law: The Case of The Gambia in January 2017', *Journal on the Use of Force and International Law* 4 (2017), 239–52 (244). Fox also emphasises the 'threatened' aspect of

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D. *Authorisation from the UN Security Council*

The final justification to consider in this section is authorisation for intervention from the UN Security Council, in accordance with the powers awarded to it under Chapter VII of the Charter, for there have been situations in which the Council has provided such authorisation even though the incumbent government has proved amenable – and, indeed, has actually offered its consent – to the intervention at a time when it finds itself in potentially terminal peril. There have thus been no coups d'état or fallen governments in this hypothesis; rather, it centres the situation in which a government is facing maximum instability because its overall authority is being undermined.

When the Security Council adopted Resolution 1101 for Albania in March 1997, it referred to a letter that the President of the Security Council had received from the Permanent Representative of Albania to the United Nations, which had identified the situation in the country as 'serious', such that '[t]he control of the Government, law and order have yet to be achieved in a significant part of the country'.[420] That situation had arisen following support given by the government of President Sali Berisha to an investment pyramid scheme, which had collapsed in spectacular fashion,[421] with the letter mentioning 'the official appeal of the Government of Albania to a group of countries … to participate with a military or a police force in the protection of humanitarian activities in Albania'.[422]

Italy had taken the initiative in promoting the creation of such a force and 'the conditions for launching a prompt, important and complex effort to assist Albania in this difficult phase'; in its own letter to the President of the Security Council, it considered that the 'objectives' of the force would be 'to help create a safe and secure environment for the action of international organisations to provide support in areas of international assistance. The force will also ensure the protection and safety of international personnel operating in Albania.'[423] The helping hand extended to the government of Albania was not, however,

Operation Restore Democracy: Fox, 'Invitations to Intervene after the Cold War', Chapter 3 in this volume, section II.D, 205.

420 UN Doc. S/1997/259, 28 March 1997, 1. See also UN SC Res. 1101 of 28 March 1997, cons. 1.

421 As detailed in Dino Kritsiotis, 'Security Council Resolution 1101 (1997) and the Multinational Protection Force of Operation Alba in Albania', *Leiden Journal of International Law* 12 (1999), 511–47.

422 UN Doc. S/1997/259, 28 March 1997, 1: 'Albania is looking forward to the arrival of such a force.'

423 UN Doc. S/1997/258, 27 March 1997, 1.

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identified as part of the mission; rather, 'a legal framework for the provision of this assistance was envisaged' and, Italy maintained, '[t]his framework should ... take the form of a resolution by the Security Council authorizing Member States who are willing to participate in such a multinational force to conduct the operation to achieve the [specified] objectives'.[424] This is the authorisation that came to pass in Resolution 1101.[425] It may immediately be appreciated that, given the worsening conditions in Albania at that time, it would have been precarious in the extreme for any intervention to have proceeded on the basis of an invitation from that country's government. Its fate could not then be known – and its authority was dissipating with each passing hour. Still, even though it had extended its invitation to outside help, Albania understood the need for Security Council authorisation.[426]

Now let us move forward in time to the situation in Mali in January 2013, when the Permanent Representative of France wrote to the UN Secretary-General and the President of the Security Council thus:

> France has responded today to a request for assistance from the Interim President of the Republic of Mali, Mr. Dioncounda Traoré. Mali is facing terrorist elements from the north, which are currently threatening the territorial integrity and very existence of the State and the security of its population. ... [T]he French armed forces, in response to that request and in coordination with our partners, particularly those in the region, are supporting Malian units in combating those terrorist elements. The operation, which is in conformity with international law, will last as long as necessary.[427]

The reference to 'terrorist elements from the north' is to what has elsewhere been described as 'the Islamic seizure of northern Mali' – whereby 'a vast territory roughly twice the size of Germany [had] so easily fallen into the hands of extremists'.[428] In the second week of January 2013, these elements had suddenly begun to charge southward, 'taking over a frontier town [Konna] that had been the *de facto* line of government control'.[429] French President François Hollande held off dispatching French troops to Mali

424 *Ibid.*, 2.
425 UN SC Res. 1101 of 28 March 1997, para. 4.
426 UN Doc. S/1997/259, 28 March 1997, 1: 'Taking into consideration the situation in Albania, we feel that such a force must also have the necessary support and authorization of the Security Council of the United Nations.'
427 UN Doc. S/1013/17, 11 January 2013.
428 Adam Nossiter and Eric Schmitt, 'France Battling Islamists in Mali', *New York Times*, 12 January 2013, A1.
429 *Ibid.*

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until it seemed that governmental collapse in Bamako was now on the horizon – developments that explain the letter to the Security Council and the commencement of Operation Serval.[430] In this case, then, the government's evident vulnerability and '[t]he partial lack of effectiveness of the Malian authorities'[431] did not inspire critical reactions to the 'assistance' – note particularly that France avoided the term 'intervention' in its communication to the Council – afforded to Mali with its consent.[432] In fact, the Security Council later welcomed 'the swift action by the French forces, at the request of the transitional authorities of Mali, to stop the offensive of terrorist, extremist and armed groups towards the south of Mali'[433] – an action that was separate to the African-led International Support Mission in Mali, which the Council had authorised in Resolution 2085 of December 2012.[434] Mali had consented to that action, too,[435] perhaps unsure of the assistance it would obtain from states independent of the Security Council and perhaps, too, because of the Malian transitional authorities' assessment of their own chances of survival. Once again, with both of these cases (Albania and Mali), it can be tempting to consider the 'self' as fracturing, or fractured, at its core – making it difficult to configure how the principle of self-determination can and should exert a 'tight rein' on the 'legitimating power of consent'.[436]

430 Lydia Polgreen, Peter Tinti and Alan Cowell, 'As Troops Advance in Mali, U.S. Begins Airlift', *New York Times*, 23 January 2013.

431 Karine Bannelier and Theodore Christakis, 'Under the UN Security Council's Watchful Eyes: Military Intervention by Invitation in the Malian Conflict', *Leiden Journal of International Law* 26 (2013), 855–74 (865).

432 '[A] type of justification', Christine Gray maintains, that 'enabled France to avoid accusations of neo-colonial interference': Gray, *International Law and the Use of Force* (n. 50), 87.

433 UN SC Res. 2100 of 25 April 2013, cons. 5. See further Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes' (n. 431), 868 ('the informal praise' of the Security Council).

434 Among other things, '[t]o support the Malian authorities in recovering the areas in the north of its territory under the control of terrorist, extremist and armed groups and in reducing the threat posed by terrorist organizations, including AQIM, MUJWA and associated extreme groups, while taking appropriate measures to reduce the impact of military action upon the civilian population': UN SC Res. 2085 of 20 December 2012, para. 9(b).

435 For Resolution 2085 had recalled, in its seventh preambular recital, the letter from the transitional authorities of Mali dated 18 September 2012 requesting the authorisation of deployment through a Security Council resolution, under Chapter VII as provided by the United Nations Charter, of an international military force to assist the Armed Forces of Mali to recover the occupied regions in north of Mali: UN SC Res. 2085 of 20 December 2012.

436 Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes' (n. 431), 860 – although rejected for Mali: *ibid.*, 859.

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VI. CONCLUSION

Over four decades ago now, Derek Bowett wrote that intervention by the consent of the established or incumbent government was 'basically unsound' as a proposition for public international law – an unsoundness that stemmed, or so he claimed, from the subjectivity of recognition ('since an intervening State is free to recognize as the "government" whichever faction in an internal struggle it wishes to support and which will request intervention'), from the 'inevitable conflict' that 'such a doctrine arouses with the principle of self-determination of peoples', and from the 'fact' that 'such intervention frequently induces counter-intervention by some other state, with a consequent escalation of the conflict and greater risk to international peace'.[437] Bowett was of the view that it ought to be rejected from the system outright[438] – but it is worth noting that part of his contribution served to underscore the reality that 'intervention by consent' does not operate on its own; rather, it assumes its position within the laws of the ius ad bellum, as it does among the other principles and rules of public international law that have occupied much of the intellectual interest of this chapter.

It was one of the driving tasks of the chapter to investigate more fully the assumptions behind, and particulars of, the prohibitions of both intervention and force, as announced in the UN Charter and the Declaration of Friendly Relations of October 1970. As we have done so, it has become clear that traditional analysis of the topic – whether that topic be intervention by consent, intervention by invitation or intervention upon request – is itself the source of considerable difficulty because of the combination of descriptive points of reference (the outward appearance of an intervention or an act of force, let us say) with certain normative components (what public international law has made of, and how it uses, each of these terms). Remember that both of the terms that have shaped this chapter – 'intervention' and also 'force' – are invested with technical meaning. They are legal terms of art carrying specific connotations, and detailed engagement with their respective historical trajectories has brought more fully to light the oscillation between the *descriptivity* and the *normativity* of each. When all is said and done, I therefore prefer the term 'military assistance upon request' as advanced by the IDI in one of its more recent (and more helpful) contributions to this topic. Yet while these two prohibitions (of intervention and force) have tended

437 Derek W. Bowett, 'The Interrelation of Theories of Intervention and Self-Defense', in John Norton Moore (ed.), *Law and Civil War in the Modern World* (Baltimore: Johns Hopkins University Press 1974), 38–50 (42).

438 *Ibid.*

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to dominate much of the analysis, they no longer hold the duopolistic sway they once did, because of the growing impact of the law on self-determination first in the Charter and then, as we have seen, in many subsequent iterations.

This approach might work well to the extent that one can be confident of 'a single relevant "self" serving as the epistemic unit of any claim to self-determination (as one might maintain for Kuwait in the situation with Iraq after August 1990),[439] but more than once in these pages we have seen how the 'self' can become a hotly contested idea – because it is formed in opposition to the idea of the state and its government, as seen with the 'process of decolonisation',[440] or because it is locked in a headlong struggle for the soul of that state. There is also the question of secession occurring beyond situations of decolonisation: the situation in Crimea of March 2014 was one in which both the Ukraine and the Russian Federation rallied to the principle (or right) of self-determination for their cause,[441] in circumstances that included the infamous request for military assistance made by Ukrainian President Viktor Yanukovych to the Russian Federation.[442] This calls on us to question what good 'self-determination' can be in this set of deliberations if it means nothing more than that the determination of the self – or the selves – must take its course, free from all extraneous agents and agitators. Still, this chapter has reflected – as surely any serious study must do – on the changing shape of self-determination since it was first enunciated in the UN Charter all those years ago and on its many faces thus far.

It is instructive to recall in all of this that, when the Declaration on Friendly Relations provided that nothing 'shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of [self-determination]', it made reference to states 'thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour'.[443] This is proof positive that public international law has a theory of representation of some sort – one that is 'simple, but not

439 Christine Chinkin and Hilary Charlesworth, *The Boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press 2000), 162.

440 As discussed in the text accompanying n. 110.

441 Christian Marxsen, 'The Crimea Crisis: An International Law Perspective', *Heidelberg Journal of International Law* 74 (2014), 367–91 (384).

442 UN Doc. S/2014/146, 3 March 2014. A copy of the letter containing the request was waved before the Security Council by Vitaly I. Churkin, Russian Ambassador to the United Nations: Steven Erlanger and David M. Herszenhorn, 'Kiev Cites Campaign of Pressure by Russia', *New York Times*, 4 March 2014, A7.

443 UN GA Res. 2625 (XXV) (n. 36).

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necessarily simple-minded': the theory that 'an established government stands for, and has responsibility for, the State and its people for all or virtually all purposes'.[444] Through an array of formalist devices of varying degrees of coherence and of success, ranging from the recognition of belligerency to civil strife and civil war, from effective control to democracy legitimacy, public international law has entered a struggle of its own as it endeavours to define the life span of a government in the history of a given state. What if a government refuses to represent the people as a whole? What if representation gives in to distinction and to discrimination? What if the system of representation within a country is violently challenged – if it exists one day but not the next? What is the appropriate moment – the tipping point, if you will – for an internal transition of power? And what, if anything, is to be said about outside support for that cause? It is these and other questions that public international law has wrestled with, and with which it will continue to wrestle, as it seeks to make the giving of a state's consent a principled or regulated activity, so that governments the world over cannot always expect the fact of consent to be an end to the matter – to be the last word of the law.

444 Crawford, 'Democracy and International Law' (n. 367), 129.

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2

Intervention by Invitation

The Expanding Role of the UN Security Council

Olivier Corten

I. INTRODUCTION

At first sight, securing consent for outside military operations is an attractive argument inasmuch as it appears to make such interventions incontrovertibly lawful. As the text of Article 2(4) of the 1945 Charter of the United Nations indicates, the prohibition of the use of force relates only to military interventions conducted by one state *against* another state.[1] If we argue *a contrario*, an operation conducted with the consent of the state in question is not prohibited under the Charter insofar as it is not an infringement on any state's political independence or sovereignty.[2] Accordingly, there would be no need for one state to justify or excuse any such intervention at the invitation of another state. Under the classical conception of international law, a state is represented by its government, and if that government invites another state to intervene in its territory, then such action is in the area of cooperation.[3] The effects of consent are therefore decisive: they tip the situation out of the domain of the use of force and into the domain of friendly relations.

The existence of an invitation may also make it possible to escape the intricate debates that beset other aspects of ius contra bellum. This is a familiar point. For example, controversy has arisen – especially in recent years – over the possibility of invoking self-defence when interpreting the meaning of Article 51 of the UN Charter with respect to non-state groups.

[1] Théodore Christakis and Karine Bannelier, '*Volenti non fit injuria*? Les effets du consentement à l'intervention militaire', *Annuaire français de droit international* 50 (2004), 102–37 (112–13).

[2] James Crawford, *Second Report on State Responsibility*, 30 April 1999, UN Doc. A/CN.4/498/Add.2, 12–13, para. 240(b).

[3] See, e.g., UN Security Council (UN SC) Resolution 387 of 31 March 1976, recalling 'the inherent and lawful right of every State, in the exercise of its sovereignty, to request assistance from any other State or group of States'.

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This includes, by way of military intervention, the state in whose territory the group is supposedly located.[4] Legal writers are deeply divided over this specific issue;[5] by comparison, they seem to unanimously accept that armed action against non-state groups such as so-called Islamic State in Iraq and the Levant (ISIL) raises no legal problem if it is conducted with the consent of the government of the state in which territory such actions are conducted.[6] We shall return to this specific instance in examining the cases of Iraq and Syria.[7] What it is important to understand at this stage is that the argument of consent appears particularly forceful because it cannot readily be contested in principle. And yet it does not resolve all of our problems, for two reasons that will be evoked in turn:

- first, we must remind ourselves that the argument of consent is valid only if certain legal conditions are met, and these are often a matter of interpretation – particularly when the right of peoples to self-determination comes into play (section A); and
- second, it must be noted that this domain of international law also raises certain questions of methodology that will be addressed in the last part of this introduction (section B).

A. *Legal Conditions: What Legal Effects Exist for the Right of Peoples to Self-Determination?*

Debates about the conditions in which the legality of intervention by invitation is rooted mainly concern the importance of the right to the self-determination of peoples, which must be taken into account in each particular case. Two major doctrinal trends can be identified when addressing this question. The first tends to deny any such limit of the kind – at least if consent has been given by the government of a state; in contrast, the second asserts that

[4] Mary Ellen O'Connell, Christian Tams and Dire Tladi, *Self-Defence against Non-State Actors*, Max Planck Trialogues on the Law of Peace and War (Anne Peters and Christian Marxsen, series eds), vol. 1 (Cambridge: CUP 2019).

[5] See the different contributions in the special issue 'Self-Defence against Non-State Actors: Impulses from the Max Planck Trialogues on the Law of Peace and War', *Heidelberg Journal of International Law* 77 (2017), 1–93; Olivier Corten, 'A Plea against the Abusive Invocation of Self-Defence as a Response to Terrorism', *Revue belge de droit international* 51 (2016), 10–11 (text signed by some 300 authors).

[6] Karine Bannelier-Christakis, 'Military Interventions against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent', *Leiden Journal of International Law* 29 (2016), 743–5.

[7] See below, section III.

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the lawfulness of an intervention depends in part on respect for the obligation not to interfere with a people's choice of political regime.[8]

For those subscribing to the first trend, if a government has consented to an outside military intervention, that intervention is not prohibited by Article 2(4) of the UN Charter, no matter its object and effects.[9] They rely on well-established practice to argue that military cooperation between governments is generally well accepted, including when it is a matter of intervening in internal conflicts. They base this argument on an excerpt from the case concerning *Military and Paramilitary Activities in and against Nicaragua*, in which the International Court of Justice (ICJ) affirmed that:

> [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. This would permit any State *to intervene at any moment in the internal affairs of another State*, whether *at the request of the government* or at the request of its opposition.[10]

The only condition the Court laid down that a state must meet if it is to 'intervene at any moment in the internal affairs of another State' is that it must receive a 'request' from the 'government of the State'. No restriction on the object or effects of the intervention by such invitation is set out.

Those subscribing to the second trend, meanwhile, propose a different interpretation of existing international law. In the *Nicaragua* case, the ICJ does not deal directly with intervention at the invitation of a government, although it does condemn intervention in favour of the rebels. The only thing the Court specifies is that an intervention at the request of the government is 'allowable' (not 'allowed') – an expression that leaves the door open for various

[8] See Rudolf Randelzhofer and Oliver Dörr, 'Article 2 (4)', in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus and Nikolai Wessendorf (eds), *The Charter of the United Nations: A Commentary*, vol. I (Oxford: OUP 3rd edn 2009), 200–34 (214–15).

[9] L.C. Green, 'Le statut des forces rebelles en droit international', *Revue générale de droit international public* 66 (1962), 5–33 (17); James H. Leurdijk, 'Civil War and Intervention in International Law', *Netherlands International Law Review* 24 (1977), 143–59 (159); Antonio Tanca, *Foreign Armed Intervention in Internal Conflict* (Leiden: Martinus Nijhoff 1993), 26; Christopher Le Mon, 'Unilateral Intervention by Invitation in Civil Wars: The Effective Control Test Tested', *International Law and Politics* 35 (2003), 741–93 (742); Gregory H. Fox, 'Intervention by Invitation', in Marc Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (Oxford: OUP 2015), 816–40 (827); Pietro Pustorino, 'The Principle of Non-Intervention in Recent Non-International Armed Conflicts', *Questions of International Law* 3 (2018), 17–31.

[10] ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), merits, judgment of 27 June 1986, ICJ Reports 1986, 126, para. 246 (emphasis added).

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circumstances surrounding the invitation, including in connection with its object and effects.[11] In that respect, this second position underscores the principle of the right of peoples to self-determination, as is notably set out in Article 1 common to the United Nations' International Covenants on Civil and Political Rights (ICCPR), and on Economic, Social, and Cultural Rights (ICESCR):[12] 'All peoples have the right to self-determination. By virtue of that right, they *freely* determine their political status, and they freely pursue their economic, social, and cultural development'.[13]

In the same vein, Resolution 2625 (XXV) of the UN General Assembly states that 'all peoples have the right freely to determine, *without external interference*, their political status and to pursue their economic, social and cultural development'.[14] This Resolution also enounces that 'no State shall organise, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, *or interfere in civil strife in another State*'.[15] As these last words confirm, the principle of non-intervention may prohibit not only foreign military support in favour of the rebels but also, in some circumstances, that in favour of the governmental authorities. From this perspective, the state cannot be reduced to its government alone; its other constituent parts must also be taken into account, including its territory and its population.[16] By intervening in an internal conflict, even at the invitation of government authorities, a state would indeed be using force in international relations in a manner 'inconsistent with the Purposes of the United Nations', which purposes include establishing respect for the peoples' right to self-determination.[17]

The Institut de droit international (IDI) has adopted two resolutions enshrining such reasoning. The first dates back to 1975 and is entitled

11 Christakis and Bannelier, '*Volenti non fit injuria?*' (n. 1), 118; Eliav Lieblich, *International Law and Civil Wars: Intervention and Consent* (London: Routledge 2013), 150–1.

12 UN General Assembly (UN GA) Res. 2200A (XXI) and UN GA Res. 2200A (XXI), respectively, both of 16 December 1966.

13 See Théodore Christakis, *Le droit à l'autodétermination en dehors des situations de décolonisation* (Paris: Economica 1999), 336 (emphasis added).

14 UN GA Res. 2625 (XXV), 24 October 1970 (emphasis added).

15 *Ibid*. (emphasis added).

16 Louise Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government', *British Yearbook of International Law* 56 (1985), 189–252 (243); Mohamed Bennouna, *Le consentement à l'ingérence dans les conflits internes* (Paris: LGDJ 1974), 213.

17 Doswald-Beck, 'Legal Validity of Military Intervention' (n. 16), 207. See also Georg Nolte, 'Intervention by Invitation', in Anne Peters and Rüdiger Wolfrum (eds), *Max Planck Encyclopaedia of Public International Law* (Oxford: OUP, online edn 2010), para. 20.

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'The Principle of Non-Intervention in Civil Wars', Article 2 of which provides that:

1. Third States shall refrain from giving assistance to *parties to a civil war* which is being fought in the territory of another State.
2. They shall in particular refrain from:

   a) sending armed forces or military volunteers, instructors or technicians to *any party to a civil war*, or allowing them to be sent or to set out;
   b) drawing up or training regular or irregular forces with a view to supporting *any party to a civil war*, or allowing them to be drawn up or trained;
   c) supplying weapons or other war material to *any party to a civil war*, or allowing them to be supplied . . . [18]

According to this provision of what is known as the Wiesbaden Resolution III, intervention in civil wars is prohibited whether it is in support of the rebels (which no one contests) or in support of the government. Even if it were criticised as not reflecting customary law, it is submitted that, to some extent, this provision reflects established practice: as will be observed below, states never avowedly support a government acting against its own population.[19] At the same time, a reading of the IDI's Wiesbaden Resolution III might suggest that there exists a 'negative equality' between the rebels and the government in the given contexts.[20] Some have even evoked a 'strict abstentionist' approach, prohibiting any form of external support, whether in favour of the rebels or of the government.[21] Such terminology is misleading, however. The IDI recognised that possibilities for providing certain forms of help in favour of the authorities subsisted – notably, in the case of 'counter-intervention' (Article 5). We will return to that notion later, but it must be understood from the start that, in customary international law, there is a radical distinction between military support in favour of the rebels, which is presumably unlawful, and military support in favour of the government, which is presumably lawful. This does not mean that international law does not establish any limit to such support,

[18] IDI, 'The Principle of Non-Intervention in Civil Wars', *Annuaire de l'Institut de droit international* 56 (1975), 545–9 (Wiesbaden Resolution III) (emphasis added).

[19] Dietrich Schindler, 'Le principe de non-intervention dans les guerres civiles, Rapport définitif', *Annuaire de l'Institut de droit international* 55 (1973), 545, 56 (1975), 413 and 445–6; Christakis and Bannelier, '*Volenti non fit injuria*?' (n. 1), 128.

[20] Independent International Fact-Finding Mission on the Conflict in Georgia (IFFMCG), *Report*, vol. II, September 2009, 276–7. See Christian Henderson, *The Use of Force and International Law* (Oxford: OUP 2018), 362.

[21] Elias Lieblich, 'The International Wrongfulness of Unlawful Consensual Interventions', *Heidelberg Journal of International Law* 79 (2019), 667–70 (667). See also Gregory H. Fox, 'Invitations to Intervene after the Cold War: Towards a New Collective Model', Chapter 3 in this volume.

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precisely because the right to the self-determination of peoples must be respected. At its Rhodes session in 2011, the IDI followed that line of reasoning and adopted a more nuanced drafting of its Resolution, entitled 'Military Assistance on Request', which was applicable to 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, including acts of terrorism, below the threshold of non-international armed conflict'.[22] Article 3(1) of what is known as the Rhodes Resolution II reads:

> Military assistance is prohibited when it is exercised in violation of the Charter of the United Nations, of the principles of non-intervention, of equal rights and self-determination of peoples and generally accepted standards of human rights and in particular when its object is to support an established government against its own population.[23]

Accordingly, many legal writers emphasise the need to ensure that outside intervention – even if it is based on consent validly given by a government – is not designed to interfere in internal affairs.[24] This doctrinal trend – which can be characterised as the 'IDI view' – is *not* limited to situations of civil wars or non-international armed conflict (NIAC), as is sometimes suggested.[25] Logically, the principle of self-determination has a general scope of application, and it must be respected in any situation, whether an armed conflict or not. The cases of The Gambia, which will be examined in this chapter, or of Venezuela, as evoked in another chapter in this volume,[26] confirm this conclusion.

Finally, a terminological clarification must be made.[27] Some authors have evoked a 'purpose-based approach', in which the purpose of an (invited) intervention (its 'object', as the IDI puts it) may never interfere in an internal conflict.[28] Yet the problem with this terminology lies in the difficulty of

[22] IDI, 'Military Assistance on Request', *Annuaire de l'Institut de droit international* 74 (2011), 359–61 (Rhodes Resolution II), Art. 1.

[23] See Georg Nolte, 'The Resolution of the Institut de droit international on Military Assistance on Request', *Revue belge de droit international* 47 (2012), 241–62.

[24] See also IIFFMCG, *Report* (n. 20), 275.

[25] Fox, 'Invitations to Intervene after the Cold War', Chapter 3 in this volume.

[26] Dino Kritsiotis, 'Intervention and the Problematisation of Consent', Chapter 1 in this volume.

[27] Olivier Corten, 'Is an Intervention at the Request of a Government Always Allowed? From a "Purpose-Based Approach" to the Respect of Self-Determination', *Heidelberg Journal of International Law* 79 (2019), 677–9. This clarification was inspired by Veronika Bílková, 'Reflections on the Purpose-Based Approach', *Heidelberg Journal of International Law* 79 (2019), 681–3. See also Henderson, *The Use of Force and International Law* (n. 20), 365–8.

[28] Karine Bannelier and Théodore Christakis, 'Under the UN Security Council's Watchful Eyes: Military Intervention by Invitation in the Malian Conflict', *Leiden Journal of International Law* 26 (2013), 855–74.

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establishing the purpose and, to some extent, the intention of the intervening state. It seems preferable, then, to refer to the more objective criterion of the 'object and effects' of the intervention, which must not violate the right of the population in the inviting state to exercise its right to self-determination. Thus what matters most is determining whether or not this right has been respected considering the *effects* of the intervention, whatever the *intentions* of the intervening state may have been.

B. *Aim and Methodology*

This chapter resides within the framework of this debate regarding intervention by invitation and pursues two key objectives. First, it aligns with the doctrinal trend embodied by the IDI view in emphasising that intervention by invitation is unlawful if it implies interference in an internal situation that would be contrary to the right of peoples to self-determination. An attempt shall therefore be made to show that, in practice, states never avowedly provide military support for a government to help it to quell internal disorder. Without reproducing all the elements that I have developed in my previous writing on that topic,[29] I shall concentrate more specifically on practice subsequent to the adoption of the Rhodes Resolution II in 2011. Instead of referring to a large number of cases,[30] with all the difficulties that follow in providing in-depth analysis of the states' legal positions, I have selected a few emblematic cases to examine in great detail. Our focus will mostly be on military operations in Mali (2013), Iraq (2014), Syria (2015), Yemen (2015), and The Gambia (2017). Each example will concentrate on the basis of the local authorities' consent and, in each of these case studies, I will attempt to identify what arguments the intervening states made and to what extent third states, as well as the competent international organisations, accepted those arguments. In this way, emphasis shall be placed on the criterion of the opinio iuris as a constituent component of custom, pursuant to the method followed by the ICJ[31] and reflected in the works of the International Law Commission (ILC) on the identification of customary international law.[32]

As will be seen, in practice, it is often difficult to identify the legal component of justification. It is well known that states invoke ambiguous discourses without clearly distinguishing their legal, political, or moral components; as

[29] Olivier Corten, *The Law against War* (Oxford: Hart 2nd edn 2021), ch. 5.
[30] Fox, 'Invitations to Intervene after the Cold War', Chapter 3 in this volume.
[31] ICJ, *Nicaragua* (n. 10), 98, para. 186.
[32] ILC, 'Draft Conclusions on Identification of Customary International Law', *Yearbook of the International Law Commission*, II (2018), Pt 2.

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jurists, it is our task to try to determine to what extent those discourses reveal a legal conviction that the right to self-determination limits the lawful possibilities to intervene in an internal conflict. Given the systematic reference to arguments aimed at reconciling the practice of intervention with this right, I strongly believe they *do* limit the lawfulness of a given intervention. However, we must be perfectly aware that other interpretations tend to reduce relevant official discourses to mere political statements. Thus a careful reading of the justifications given by the intervening states is necessary and must be undertaken on a case-by-case basis, even if other interpretations of those cases could, of course, also be proposed. In sum, in view of the difficulty of separating law from politics in this field, we must be both ambitious and modest. What follows should therefore be considered one possible – even if it is, in my view, the more convincing – interpretation of a practice that is particularly difficult to apprehend in legal terms.

Second, this research will highlight the growing role of the UN Security Council in appraising and characterising the conditions relevant to the legal validity of intervention by invitation. As shall be observed, the Security Council intervened in all the recent case studies on which this chapter will focus. By adopting resolutions, it pronounced on the authority that was entitled to give its consent, and in parallel on the legitimacy of the object and effects of the intervention. These two features are intrinsically connected: depending on its interpretation of the right of peoples to self-determination, the Security Council can disqualify certain groups from representing all or part of a state's population; at the same time, it will justify support for the authorities fighting against these groups. The case of ISIL is undoubtedly the most emblematic in this respect, but it is far from the only one. This practice of the Security Council is relatively innovative. To make sense of its political reasons, we might remember that, during the Cold War period, the Council was unable to make pronouncements on interventions conducted on the basis of the argument of consent given by the local authorities, such as Belgium's intervention in the Democratic Republic of the Congo in 1964, that of the USSR in Afghanistan in 1979 or of the United States in the Dominican Republic in 1965.[33] In the 1990s, the Security Council tended to proceed by way of authorisation, even when the official authorities had given their consent, as was the case in Somalia in 1992, Haiti in 1994, and Albania in 1996.[34] In recent years, a new practice seems to have emerged: no longer does the Council necessarily authorise any military intervention, but rather it

33 See all the examples mentioned in Corten, *The Law against War* (n. 29), 302–6.
34 *Ibid.*, 306–9.

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centralises and multilateralises the appraisal of the circumstances in which the invitation has been formulated.[35]

To explore these two key threads, we shall consider in turn the official justifications invoked by intervening states on the basis of an invitation. The aim is not to assess the sincerity of those justifications in each case but rather to show to what extent they confirm the legal limits that can be deduced from the right to the self-determination of peoples. We will first examine 'counter-intervention' – that is, the intervention designed to fight against irregular forces that have received prior aid from abroad (section II) – and continue by looking at the fight against international terrorism (section III). We shall then consider whether the repression of secession (section IV) or the protection of democracy (section V) are arguments that have been both invoked and accepted as justifying military intervention by invitation, without infringing on the right to the self-determination of peoples.

Despite the diverse case studies analysed in this chapter, I submit that a common line of argument will emerge: an outside intervention is not prohibited – and may even be required – when its object is to support a government faced with military actions against it, perpetrated by rebels linked with terrorist groups containing foreign elements that threaten the security of third states. In such a situation, the right of peoples to self-determination does not prevent a foreign intervention in favour of the official authorities – especially when the UN Security Council has recommended and recognised it as legitimate. For precisely this reason, we shall return, in the final part of the chapter, to the importance of the Security Council's role and to the implications of its actions (section VI).

Before expanding on each of these points, three preliminary observations might usefully be made. First is the strong presumption of legality that characterises a situation in which an intervention has been conducted at the invitation of an official government. If a state intervenes against the will of a state and invokes an exception to the prohibition on the use of force (such as self-defence), it must prove that the legal conditions of this exception are met (such as the existence of an 'armed attack'). By contrast, an intervention by invitation (at least if the latter has been given by the official government of a state) is presumed to be perfectly legal: as mentioned earlier, it is generally conceived of as an act of cooperation, not as a 'use of force' against a state. Consequently, the intervening state is not obliged to establish the legitimacy of its purpose nor is there any pre-existing list of legitimate purposes. Still,

[35] Nabil Hajjami, 'Le consentement à l'intervention étrangère. Essai d'évaluation au regard de la pratique récente', *Revue générale de droit international public* 122 (2018), 617–40.

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anyone who challenges the legality of the intervention has to establish that, in the circumstances, the intervention is incompatible with the right (of the people concerned) to self-determination. This burden of proof is difficult to bear, because states will systematically present their interventions as perfectly compatible with this right. Thus this official discourse tends, as we will see, to confirm that there are at least some theoretical legal limits to the possibilities of outside intervention in an internal conflict.

Second, it should be clarified that I will adopt a classical perspective in the chapter, tending to interpret existing positive law.[36] The limitations of such an approach are familiar enough and have been decried in studies that take a critical approach.[37] They relate essentially to the open interpretation of texts stating the relevant legal principles and of texts expressing the position of the states concerned. For some, rhetorical reference to the right to self-determination reveals a utopian view, disconnected from practice that reveals an unlimited right to intervene on the basis of an invitation given by a government; for others, to reduce law to a mere practice of intervention would simply be 'apologetic' of the power of the states – and, for this cohort, the necessity of respect for the universally recognised right to self-determination should therefore be emphasised. Faced with such indeterminate legal reasoning, another – more critical – approach might be envisaged, highlighting the tensions surrounding the classical legal debate. This is a perfectly legitimate and feasible avenue of investigation, and I have explored it elsewhere.[38] Yet the debate in positive law does indeed exist and, within it, the various legal arguments are marshalled, evaluated, and challenged, even if they are sometimes difficult to assess.[39] In this sense, even if it cannot be separated from it, law cannot be simply *reduced* to politics. There is a battlefield in the legal domain too (sometimes characterised as 'lawfare'), and interpretations arise from it that, at a given moment in time and in

[36] Olivier Corten, 'Breach and Evolution of the International Customary Law on the Use of Force', in Enzo Cannizaro and Paolo Palchetti (eds), *Customary International Law on the Use of Force: A Methodological Approach* (Leiden/Boston: Martinus Nijhoff 2005), 119–44.

[37] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: CUP 2nd edn 2006), 224 *et seq*.

[38] Olivier Corten, 'Droit d'intervention v. Souveraineté: antécédents et actualités d'une tension protéiforme', *Droits* 56 (2012), 33–48; Olivier Corten, 'Les visions des internationalistes du droit des peuples à disposer d'eux-mêmes: une approche critique', *Civitas Europa* 32 (2014), 96–111; Olivier Corten, 'La rébellion et le droit international. Le principe de neutralité en tension', *Recueil des Cours* 374 (2014), 53–312.

[39] Christina Nowak, 'The Changing Law of Non-Intervention in Civil Wars: Assessing the Production of Legality in State Practice after 2011', *Journal on the Use of Force and International Law* 5 (2018), 40–77.

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a precise context, tend to influence political debate.[40] From this perspective, far from an idealist, utopian, or naive conception, taking up a position in positive law may be a conscious strategic choice tending to restrict the possibilities that justify the use of force.

Based on the classical elements of custom recognised by the ICJ and the ILC, I have taken a positivist approach to appraising the practices of the UN Security Council.[41] As Vera Gowland-Debbas states:

> Generally speaking, the Council's resolutions are not legislative in the sense of applying outside the framework of particular cases of restoration of international peace and security. Moreover, they cannot – by analogy with General Assembly resolutions – be said to reflect either *opinio juris*, nor the generality of the requisite state practice.[42]

This perspective differs to a large extent from that espoused by Gregory Fox elsewhere in this volume:[43] the UN Security Council is not systematically considered a vehicle for expressing customary law when it makes a decision in a specific case. The organ has not been conceived of as a judge or a 'jury',[44] designed to deliver judicial review of the practices of states. It rarely makes any legal pronouncement; rather, it acts pragmatically, as a political body.[45] The relevant provisions of the UN Charter also support argument that the Council is not a legislative body. Despite acting on 'behalf' of its member states (Article 24) and being entitled to take mandatory decisions that those members must respect (Article 25), the Security Council is not supposed to elaborate general norms or rules beyond specific situations envisaged in Articles 33 and 39 of the Charter.[46] Article 39 even more specifically states that the Council's role is to 'decide what measures shall be taken … to maintain or restore international peace and security', and hence Security Council resolutions must be considered a lex specialis that, according to Article 103 of the Charter, shall prevail over any other

[40] Olivier Corten, *Le discours du droit international. Pour un positivisme critique* (Paris: Pedone 2009).

[41] Olivier Corten, 'La participation du Conseil de sécurité à l'élaboration, à la cristallisation ou à la consolidation de règles coutumières', *Revue belge de droit international* 39 (2004), 552–67.

[42] Vera Gowlland-Debbas, 'The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance', *European Journal of International Law* 11 (2000), 361–83 (377). See also Michael Wood, 'Assessing Practice on the Use of Force', *Heidelberg Journal of International Law* 79 (2019), 655–8 (655–6).

[43] Fox, 'Invitations to Intervene after the Cold War', Chapter 3 in this volume.

[44] Cf. Tom Franck, *Recourse to Force: State Actions against Threats and Armed Attacks* (Cambridge: CUP 2002), 67.

[45] Jean Combacau, *Le pouvoir de sanction du Conseil de sécurité* (Paris: Pedone 1974).

[46] Catherine Denis, *Le pouvoir normatif du Conseil de sécurité. Portée et limites* (Brussels: Bruylant 2005).

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legal obligation applicable in the case at hand.[47] This does not mean, of course, that Council practice cannot be used to identify a customary norm – although this would require not only the establishment of a constant practice but also the identification of an opinio iuris that can be deduced from both the resolutions adopted and the positions taken by the UN member states in relation to those resolutions.[48] More concretely, this means that the Security Council's approval or condemnation of a specific intervention does not, as such, reveal anything about the state of customary law.[49] All will depend on the reasons for its approval or condemnation: was it motivated by a 'legal duty',[50] a 'sense of legal right or obligation'?[51] Or rather by 'extralegal motives for action, such as comity, political expediency or convenience'?[52] It is only in the first hypothesis that a (new) norm of customary law can be identified.

The present chapter was devised along the following lines. Each section will follow the same line of reasoning:

- in each section A, it will set out the general relations between the main argument (i.e., counter-intervention, the fight against international terrorism, the repression of secession, and the protection of democracy) and self-determination in broad terms (section A);
- this exposition of the legal framework will make it easier to understand the argument as it has been concretely invoked in the case at hand (in section B), as well as to highlight the problems it has caused (in section C); and
- on this basis, in each section D, we will be able to envisage the decisive role of the Security Council in addressing (or circumventing) those problems.

All in all, the aim is not to demonstrate the illegality of a given intervention, but to establish to what extent each of the cases analysed reveals an opinio iuris confirming the importance of self-determination and the decisive role of the Security Council in appraising it in each particular situation.

47 ICJ, *Aerial Incident at Lockerbie* (Libya v. United Kingdom), preliminary objections, judgment of 27 February 1998, ICJ Reports 1992, 15, para. 39.

48 Gérard Cahin, *La coutume internationale et les organisations internationales. L'incidence de la dimension institutionnelle sur le processus coutumier* (Paris: Pedone 2001), 182–3.

49 Here, again, a significant difference can be identified with the approach followed by Fox, 'Invitations to Intervene after the Cold War', Chapter 3 in this volume.

50 ICJ, *North Sea Continental Shelf* (Federal Republic of Germany v. Netherlands), judgment of 20 February 1969, ICJ Reports 1969, 44, para. 77.

51 ILC, *Draft Conclusions* (n. 32), concl. 9.1.

52 ILC, *Draft Conclusions on Identification of Customary International Law with Commentaries*, UN Doc. A/73/10, 2018, para. 139.

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Finally, it must be stressed that this chapter is limited to an interpretation of the rule prohibiting the use of force (ius contra bellum); it does not extend to other rules, such as the principle of non-intervention in general, or rules of international humanitarian law (IHL) (ius in bello). In this sense, it differs from the approach Dino Kritsiotis follows elsewhere in this volume.[53]

II. COUNTER-INTERVENTION: THE SAUDI-LED INTERVENTION IN YEMEN

A. *The Existing Legal Framework: Counter-Intervention and Self-Determination*

According to Article 5 of the IDI's Wiesbaden Resolution III (titled 'Foreign Intervention'):

> Whenever it appears that intervention has taken place during a civil war in violation of the preceding provisions, third States may give assistance to the other party only in compliance with the Charter and any other relevant rule of international law, subject to any such measures as are prescribed, authorized or recommended by the United Nations.[54]

The provision clearly exposes the logic of the mechanism behind counter-intervention. If one party – in particular, the irregular forces – has been supported by a foreign state, the government party may legitimately obtain backing to quell the rebellion and, by the same token, the initial outside intervention.[55] In such a situation, support for irregular forces has called into question the right of the people of the state concerned to determine its political regime without outside interference. By supporting the government so that it is able to restore its authority, a party cannot therefore be accused of infringing upon the people's right to self-determination; on the contrary, such support is designed instead to end the violation of this principle. The 'counter-intervention' may even take place in the name of *protecting* the people's right to self-determination.

In this context, it should be noted that the initial support for the rebel forces may take on a variety of more or less intense forms. The most serious of these may be characterised as an armed attack – that is, when a foreign state 'sends' irregular forces into the territory of another state or has 'substantial involvement'

[53] Kritsiotis, 'Intervention and the Problematisation of Consent', Chapter 1 in this volume.
[54] IDI, 'The Principle of Non-Intervention in Civil Wars' (n. 18).
[55] Christakis and Bannelier, '*Volenti non fit injuria*?' (n. 1), 132–3.

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in such an action, to refer to the criteria used by states when defining aggression.[56] The state attacked by a foreign state's irregular forces may then call for help from other states to exercise its right of collective self-defence. In this exceptional situation, Article 51 of the UN Charter provides that such third states then have grounds to act not only in the territory of the state where the civil war is being waged but also in the territory of the state to which an armed attack can be imputed because of the military actions by rebel forces.

A more limited form of intervention may arise when a foreign state tolerates its territory being used by armed bands to attack the authorities of a state, or provides financial support for such irregular forces, or even supplies them with weapons. If we confine ourselves to the ICJ precedents,[57] we are then dealing with a violation of the prohibition of the threat or use of force, according to Article 2(4) of the Charter, but not an 'armed attack' within the meaning of Article 51. The consequence is that the state targeted by armed bands does not have a right of self-defence, but it can nonetheless call on other states to intervene against such bands in its own territory (i.e., not in the territory of the infringing state).[58]

A third hypothesis exists when rebels are themselves foreign, or have found support among foreign private persons or entities, but are not assisted or tolerated by any state. In this particular instance, not only is there no 'armed attack' within the meaning of Article 51, but neither is there any 'use of force' within the meaning of Article 2(4). All the same, it is very difficult to consider liability for the rebel movement as the will of all or part of the population of the state concerned. The population might even consider its right to determine its political future without outside interference to be infringed upon by the actions of foreign private actors. It is logical, then, to accept that the government might validly request military aid from another state to put down such incursions by irregular forces. That request would not be in violation of the right to self-determination of the people concerned but rather an attempt to uphold it. As in the second hypothesis, military intervention must obviously remain confined within the territorial boundaries of the concerned state.

The counter-intervention mechanism may be illustrated by substantial practice. Beyond the first hypothesis, which is aimed less at intervention by invitation in the technical sense than at collective self-defence (the case of the

[56] Art. 3.g) ('Definition of Aggression'), annexed to UN GA Res. 3314 (XXIX), 14 December 1974.

[57] ICJ, *Nicaragua* (n. 10), para. 247; ICJ, *Armed Activities on the Territory of the Congo* (DR Congo v. Uganda), merits, judgment of 19 December 2005, ICJ Reports 2005, 53, paras 146–7.

[58] Christakis and Bannelier, '*Volenti non fit injuria?*' (n. 1).

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Democratic Republic of the Congo comes to mind, which was supported by Angola, Zimbabwe, and Chad in reaction to the armed attack on it by Rwanda and Uganda in 1998[59]), it might be worth mentioning the examples of the intervention by the United Kingdom and the United States in Lebanon and Jordan in 1958,[60] by France in Chad in the 1970s,[61] or by the forces of the Commonwealth of Independent States in Tajikistan in the 1990s.[62] In this respect (as the last of these examples illustrates), it was not necessary to claim that irregular forces had been sent in, or even helped, by a foreign state to justify the intervention by invitation. Even if it cannot always be readily distinguished from the second hypothesis, the third hypothesis does seem to have been reflected in practice for some time now.

Some legal commentators think that if the state has received a valid invitation from the government of another state, it is allowed to intervene in an internal conflict with no legal limit deriving from an additional condition. To my mind, the practice just mentioned hardly squares with this traditionalist position; rather, it reduces the state to the will of its current government alone, potentially justifying massive outside interference in a conflict or an essentially internal crisis. By reading the discourse from the states in question, what is significant is that they do not assume such a hard-nosed, or even cynical, view of international relations; on the contrary, they insistently present their action as a 'counter-intervention' by linking the rebel forces to foreign states or elements. And this observation holds both for the government that intervenes in the conflict and the government calling for aid. The same pattern prevails in recent practice, as the Yemen case study will now demonstrate more clearly, illustrating both the difficulties that may surround the argument of counter-intervention and the role that the Security Council may play in this context.

B. *Invocation of Counter-Intervention in the Yemeni Context*

The events of what has been called the Arab Spring in 2011 did not concern only Tunisia, Egypt, Libya, Syria, and Bahrain; in Yemen, violent demonstrations broke out in the capital, Sana'a, protestors demanding the departure of Ali Abdallah Saleh, president of the reunited state (and, before that, of North

[59] See, e.g., John F. Clark (ed.), *The African Stakes in the Congo War* (New York: Palgrave Macmillan 2002).

[60] Georg Nolte, *Eingreifen auf Einladung* (Berlin, Heidelberg: Springer 1999), 630.

[61] Christiane Alibert, 'L'affaire du Tchad', *Revue générale de droit international public* 90 (1986), 374–98.

[62] Report of the Secretary-General on the Situation in Tajikistan, UN Doc. S/26311, 16 August 1993, para. 4. See Corten, *The Law against War* (n. 29), 307.

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Yemen) since 1990.[63] Through mediation led by the Gulf Cooperation Council (GCC), the parties accepted a transition plan and Vice-President Abdo Rabbo Mansour Hadi was designated interim president on 4 June 2011. His appointment was confirmed by elections held the following year (he was the sole candidate and won 99.8 per cent of the vote), and he is officially still in office at the time of writing. Hadi's rule, however, was contested from the outset – especially by the 'Houthis', a rebel force in the northwest of the country, who contend that the Zaidite tribes have been marginalised by the central authorities since reunification.[64] In point of fact, these forces have exerted their control over the mountainous regions close to Saudi Arabia since 2004; after engaging in the Arab Spring in 2011 to overthrow President Saleh, they became his allies, with the common objective of bringing down his successor. In September 2014, making the most of a lack of resistance to certain factions of the army that had remained loyal to former President Saleh, the Houthi forces gained ground and occupied the capital, Sana'a. President Hadi and those close to him were arrested, forced to resign, and imprisoned.[65] However, the president managed to escape and take refuge in the coastal city of Aden. From there, on 24 March 2015, he called on Saudi Arabia and other members of the GCC for help. He then fled to Riyadh, and Saudi Arabia launched Operation 'Decisive Storm' on 26 March 2015.[66] This massive military operation – subsequently renamed 'Renewal of Hope', then 'Golden Arrow' – was directed against the Houthi rebels and continues at the time of writing.[67]

From the outset, the 'counter-intervention' argument has been reflected in the leading protagonists' discourse justifying the action. The letter from President Hadi inviting the GCC states to intervene is indicative:

> Dear brothers, I write this letter to you with great sadness and sorrow in my heart owing to the serious and extremely dangerous decline in security in the Republic of Yemen, a decline caused by the *ongoing acts of aggression and*

[63] Philippe Fabri, 'La licéité de l'intervention de la coalition internationale menée par l'Arabie saoudite au Yémen au regard des principes de l'interdiction du recours à la force et de non-intervention dans les guerres civiles', *Revue belge de droit international* 51 (2016), 69–102 (72–3).

[64] Tom Ruys and Luca Ferro, 'Weathering the Storm: Legality and Legal Implications of the Saudi-Led Military Intervention in Yemen', *International and Comparative Law Quarterly* 65 (2016), 61–98 (63–4).

[65] *Keesing's Record of World Events* 61 (2015), 53822.

[66] *Ibid.*, 53944–5.

[67] Anon., 'Chronology: Yemen', *The Middle East Journal* 69 (2015), 622–4; Luca Ferro and Tom Ruys, 'The Saudi-Led Military Intervention in Yemen's Civil War – 2015', in Tom Ruys, Olivier Corten and Alexandra Hofer (eds), *The Use of Force in International Law: A Case-Based Approach* (Oxford: OUP 2018), 899–911 (899–901).

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the incessant attacks against the country's sovereignty that are being committed by the Houthi coup orchestrators . . .

[. . .]

. . . I urge you, in accordance with the right of self-defence set forth in Article 51 of the Charter of the United Nations, and with the Charter of the League of Arab States and the Treaty on Joint Defence, to provide immediate support in every form and take the necessary measures, including military intervention, to protect Yemen and its people from the ongoing Houthi aggression.[68]

A similar logic is reflected in the statement issued by the Kingdom of Saudi Arabia, the United Arab Emirates, the Kingdom of Bahrain, the State of Qatar, and the State of Kuwait, which they sent to the UN Security Council shortly after receiving the letter from President Hadi:

. . . We note the contents of President Hadi's letter, which asks for immediate support in every form and for the necessary action to be taken in order to protect Yemen and its people from *the aggression of the Houthi militias. The latter are supported by regional forces, which are seeking to extend their hegemony over Yemen and use the country as a base from which to influence the region . . .*

[. . .]

. . . Our countries have therefore decided to respond to President Hadi's appeal to protect Yemen and its great people *from the aggression of the Houthi militias, which have always been a tool of outside forces that have constantly sought to undermine the safety and stability of Yemen.*[69]

These declarations were not without their ambiguities. Although somewhat allusively so, counter-intervention does appear in the denunciation of support from abroad for the Houthi forces. Iran – the state accused of supporting the Houthis – is not actually named, and the nature and extent of the support it has supposedly provided to these irregular forces is not specified.[70] President Hadi's reference to Article 51 of the UN Charter seems to refer to the first of the hypotheses evoked above – that of collective self-defence – even if it is broadly interpreted. In this sense, the League of Arab States has:

. . . fully welcome[d] and support[ed] the military operations in defence of legitimate authority in Yemen undertaken, at the invitation of the President of the Republic of Yemen, by the coalition composed of the States members of

68 Abdo Rabbo Mansour Hadi, UN Doc. S/2015/2017, 27 March 2015, 4–5 (emphasis added). See also UN Doc. S/PV.7426, 14 April 2015, 9.

69 *Ibid*., 5 (emphasis added).

70 Ferro and Ruys, 'The Saudi-Led Military Intervention' (n. 67), 905.

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> the Gulf Cooperation Council and a number of Arab States. Such action is grounded in the Arab Treaty of Joint Defence and Article 51 of the Charter of the United Nations.[71]

On 21 May 2015, the Permanent Representative of Saudi Arabia to the United Nations again asserted that the purpose of the operation was 'to rescue Yemen and protect its people and legitimacy, in accordance with the principle of self-defence'.[72]

At the same time, Article 51 of the Charter was not cited in the letter the intervening powers initially sent to the Security Council – unusually so for a state invoking self-defence within the meaning of that provision.[73] Perhaps the defence in question here might be considered in a broader sense. The reference to the second hypothesis – that of support contrary to Article 2(4) of the Charter – does not entitle the intervening states to riposte beyond the territory of Yemen, which the intervening states did not, for that matter, seek.[74] It is noteworthy that Saudi Arabia also claims to be protecting itself against attacks by the Houthi forces. From this perspective, there is no need to invoke the argument of counter-intervention: in accepting that its border can be crossed to prevent irregular forces based in its own territory from committing acts of force in the territory of another state, Yemen would merely be abiding by its international obligations, pursuant to existing international judicial precedent.[75] Saudi Arabia would not, then, be intervening in an internal conflict but instead exercising its own rights against irregular armed bands. Mention of the presence of terrorist groups in Yemeni territory in connection with peace and stability in the region is an argument along the same lines: this is supposedly no longer a matter of support for a government against rebel groups in receipt of prior support from abroad but an operation designed to help that state to prevent irregular forces from attacking neighbouring states.

The fact the counter-intervention argument was nonetheless subsequently maintained as one of the essential elements in the discourse with

[71] UN Doc. S/2015/232, 15 April 2015, 14. See also Final Communique of the 26th Arab Summit, 29 March 2015.

[72] UN Doc. S/2015/359, 21 May 2015.

[73] Fabri, 'La licéité de l'intervention' (n. 63), 98.

[74] See Ferro and Ruys, 'The Saudi-Led Military Intervention' (n. 67), 906–7.

[75] Christakis and Bannelier, '*Volenti non fit injuria?*' (n. 1), 126–7. See also François Dubuisson, 'Vers un renforcement des obligations de diligence en matière de lutte contre le terrorisme?', in Karine Bannelier, Olivier Corten, Théodore Christakis and Barbara Delcourt (eds), *Le droit international face au terrorisme* (Paris: Pedone 2002), 141–58.

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which coalition led by Saudi Arabia justified its actions. The Permanent Representative of Yemen to the United Nations requested help to 'find a solution to the Yemeni crisis that would end the coup d'état against the authority and legitimate institutions in Yemen, as well as the aggressive interference by Iran in the affairs of Yemen and of the wider region', then denounced an 'ongoing war of annihilation, which was launched by Iran for the sake of its expansionist policies'.[76] '[T]hose gangs', he claimed, would have never been able to continue rejecting those proposals if they had not been receiving financial, logistical and military support from Iran. Thanks to that support and smuggled Iranian weapons, the militias are now turning into a serious threat to Yemenis and neighbouring countries, in particular the Kingdom of Saudi Arabia.'[77] It was, he alleged, 'an international terrorist plot masterminded by Iran – a rogue State that sponsors international terrorism and continues to spend billions of dollars to support terrorist organizations in the region, including the Houthis in Yemen.'[78]

In more measured tones, admittedly, other states also pointed the finger at the Republic of Iran. The United Kingdom stated that 'Iran failed to take the necessary measures to prevent the direct or indirect supply, sale or transfer of short-range ballistic missiles, missile propellant and unmanned aerial vehicles to what was then the Houthi-Saleh alliance'.[79] Likewise, the United States spoke out against 'Iran's efforts to destabilise the region and spread its malign influence', asserting that 'Iranian weapons are getting into the hands of Yemeni militias, and these militias are using them to target the capitals of Yemen's neighbours,'[80] before repeating that the 'Houthi aggression, with the support of Iran, threatens stability in the region'.[81]

If we were to limit our analysis to these declarations, we would clearly be dealing with the second hypothesis – that of Iranian involvement – which would not necessarily amount to an armed attack within the meaning of Article 51 of the Charter. In any case, it would incontrovertibly justify the intervention on Yemeni territory by Saudi Arabia and its allies on the basis of the invitation from the president of Yemen.

[76] UN Doc. S/PV.7871, 26 January 2017, 8. See also UN Doc. S/PV.7954, 30 May 2017, 11; UN Doc. S/PV.7999, 12 July 2017, 12.
[77] UN Doc. S/PV.8017, 18 August 2017, 11.
[78] UN Doc. S/PV.8191, 27 February 2018, 20.
[79] UN Doc. S/PV.8190, 26 February 2018, 2.
[80] *Ibid.*, 4.
[81] UN Doc. S/PV.8191, 27 February 2018, 10.

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C. *Problems Raised by the Invocation of Counter-Intervention in the Yemeni Context*

The example of Yemen is evidence, though, of all the problems to which the counter-intervention argument gives rise. Three points ought to be made in this respect – not to demonstrate the illegality of the intervention, but to amplify some legal problems that the Security Council has avoided, as we will observe below.

First is the question of proof.[82] Iran has consistently and vehemently denied providing military support for Houthi rebels, denouncing 'unfounded allegations',[83] which it claims were 'fabricated to distract attention from the misguided and failed policies that have led to the current political and humanitarian crisis in Yemen':[84]

> The conflict in Yemen is entirely local, not regional … As there could never be a military solution for the conflict in that country, the immediate cessation of the bombing campaign and a genuine push for a political solution is the only responsible approach to the crisis. A Yemenite-led dialogue and conciliation process among all Yemeni political and social groups is the only way to resolve the Yemeni predicament.[85]

Teheran views the conflict as essentially internal and denounced the intervention of the coalition led by Saudi Arabia as contrary to 'international law … in particular the obligation to refrain from the threat or use of force',[86] and an 'aggression against Yemen'.[87] Without showing themselves to be so critical, other states have expressed a nuanced position, calling for moderation and underscoring the need to abide by the principle of non-intervention in the affairs of Yemen.[88] In any event, no proof had been provided of active military support from Iran to the Houthi rebels at the time when the Gulf states launched their intervention. Indeed, the intervening states had not yet even named Iran. Instead, they advanced a somewhat ambiguous line of argument, both regarding acts of outside interference that supposedly justified their operation and connecting the counter-intervention

[82] Fabri, 'La licéité de l'intervention' (n. 63), 91; Ruys and Ferro, 'Weathering the Storm' (n. 64), 75–7.
[83] UN Doc. S/2015/207, 24 March 2015.
[84] UN Doc. S/2015/249, 13 April 2015.
[85] *Ibid.*
[86] UN Doc. S/2015/263, 17 April 2015.
[87] UN Doc. S/PV.7527, 30 September 2015, 7.
[88] See, e.g., Uruguay (UN Doc. S/PV.7954, 30 May 2017, 10; UN Doc. S/PV.7999, 12 July 2017, 8) and Bolivia (*ibid.*, 9; UN Doc. S/PV.8017, 18 August 2017, 9).

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argument with others – especially those involving the fight against terrorist groups, or in defence of Saudi Arabia's sovereignty.

Second, and in this context, some commentators have questioned the proportionality of the Gulf states' military operation.[89] To remain within the bounds of international law, an action in self-defence must always comply with the customary criteria of necessity and proportionality.[90] Some authors contend that the same condition should also limit an action conducted as a counter-intervention. Should an intervention to put an end to limited outside support of a rebellion be massive, that scale would cast doubt on official justification. In reality, the intervening states might support a government not only against outside interference but also against rebel forces as such. The right of peoples to self-determination may, in other terms, justify a counter-intervention intended to restore equilibrium – that is, to nullify the effects of outside interference. But it cannot legitimise measures that go beyond that and interfere directly in the internal conflict. Now, in the present case, the scale of the military intervention by Saudi Arabia and its allies (mass bombings, presence of troops on the ground, naval blockade, etc.) is hardly comparable to the aid the Iranian state is alleged to have provided to the Houthi rebels. Luca Ferro and Tom Ruys infer from these factors that:

> Accordingly, the Yemeni people were arguably not allowed to *freely decide their* [*political*] *future* through a 'physical contest if necessary', inasmuch as the intervention did not aim exclusively at cancelling out alleged interference by Iran, but rather sought to defeat the Houthi rebel movement and restore Hadi to power.[91]

This criticism leads us to a third factor casting doubt on the relevance of the counter-intervention argument: the lack of effective control of the authority who formulated the consent.[92] At the time Abdo Rabbo Mansour Hadi issued his invitation, he had lost all control over the capital, Sana'a, and had fled to Aden, from where he eventually departed for Riyadh. Traditionally, it seems that a degree of effective control is required if a party is to be able to validly consent to a foreign military intervention;

89 Ferro and Ruys, 'The Saudi-Led Military Intervention' (n. 67), 910.
90 Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge: CUP 2004).
91 Ferro and Ruys, 'The Saudi-Led Military Intervention' (n. 67), 910 (footnote omitted) (emphasis added).
92 Fabri, 'La licéité de l'intervention' (n. 63), 87–9 ('effectivité', in the French); Ruys and Ferro, 'Weathering the Storm' (n. 64), 84–6.

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several other actions support this conclusion. In the 1990s, the UN Security Council successively authorised military operations in Somalia (1992), Haiti (1994), and Albania (1996), where consent to the intervening states had been given by official leaders who, at the time, did not possess effective authority.[93] It can therefore be argued that this consent was not thought sufficient as such, since a Security Council resolution seemed to be additionally required. This condition of effective control can be understood thus: if a government no longer has any authority over its territory, it is difficult for it to claim to represent the will of the entire population, in accordance with the people's right to self-determination.[94]

However, this condition of effective control must be relativised in several respects. First, in the three examples just mentioned, the authorities no longer exercised control over virtually any part of their national territory. In other instances, such as those of Syria and Jordan in 1958, the Democratic Republic of the Congo in 1964 and in 1998, or of Chad in the 1970s, the governments in place retained some limited degree of effective control, which explains why no one questioned, in principle, their capacity to formulate consent.[95] In the case of Yemen, it is difficult to ascertain precisely how much of the national territory the forces of President Hadi still controlled at the time the invitation was issued. It would seem excessive, at any rate, to claim that *all* effective control had disappeared. Besides, under certain circumstances, a total absence of effective power is not an impediment to the valid formulation of consent: for example, when a state is entirely occupied because of an armed attack by another state (Kuwait in the months after its invasion by Iraq in 1990 comes to mind), a government in exile may validly launch an appeal for help in the context of collective self-defence. The lack of effective control in the Yemeni case is not the result of a lack of internal representation but solely of outside interference contrary to the UN Charter. The same reasoning can certainly be transposed to a lower threshold of intervention: when a foreign state unlawfully supports rebels in what was initially an internal conflict and, because of that support, the government loses all or part of its effective control, it would be paradoxical to argue that this government would no longer be in a position to invite third states to intervene on its behalf. Thus, in the case of Yemen, it could be considered that the loss of effective control by President Hadi's regime is only the consequence of the support granted to the Houthis by Iran, in violation of the prohibition of the use of force. Here, again, the logic of

93 Corten, *The Law against War* (n. 29), 285–91.
94 Lieblich, *International Law and Civil Wars* (n. 11), 163.
95 Corten, *The Law against War* (n. 29), 308–9.

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a ‘counter-intervention’ must be fully respected. However, the difficulty with this argument is that it relies only on a contestable factual basis: it is difficult to assert that, without such backing, the president would have maintained effective control over the whole of his territory. There are therefore a multitude of factors that seem to have influenced the outcome of what was, at least initially, a civil war. In this context, it is doubtful that the invitation is a valid one.

Criticism of the GCC’s military intervention has nonetheless remained rare and muted.[96] Debates in the United Nations have, above all, concerned violations of IHL observed on the ground by various non-government organisations.[97] The conflict in Yemen has proved especially deadly for civilians, who are subjected not only to a blockade with disastrous effects on their health but also to largely indiscriminate bombings, which have hit schools or hospitals on several occasions.[98] In principle, however, the legality of the intervention with respect to ius contra bellum seems to have gone largely unchallenged[99] – a circumstance that, as we shall now observe, can be explained by the position taken by the Security Council in the context of this conflict.

D. *The Decisive Role of the UN Security Council in the Yemeni Context*

Traditionally, the use of force within a state is neither allowed nor prohibited by international law. Article 2(4) of the UN Charter prohibits it only in ‘international relations’, leaving municipal law to govern internal violence.[100] In terms of ius contra bellum (and not of ius in bello or of human rights, which are obviously applicable to all situations of internal crisis or conflict), a regime of ‘legal neutrality’ has been evoked in which nothing prohibits part of the population from rebelling nor government

[96] Ferro and Ruys, ‘The Saudi-Led Military Intervention’ (n. 67), 902–3.

[97] See, e.g., United Kingdom, UN Doc. S/PV.7954, 30 May 2017, 7.

[98] See, e.g., Mark Tran, ‘Four Patients among Dead after Explosion at Hospital in Yemen’, *The Guardian*, 10 January 2016; Bethan McKernan, ‘Saudi-Led Coalition Air Strikes “Hit Yemen School”’, *The Independent*, 22 January 2017; Saeed Al-Batati and Rick Gladstone, ‘Saudi Bombing Is Said to Kill Yemeni Civilians Seeking Relief from the Heat’, *The New York Times*, 2 April 2018.

[99] Ruys and Ferro, ‘Weathering the Storm’ (n. 64), 68–70; Fabri, ‘La licéité de l’intervention’ (n. 63), 94.

[100] Klaus Kreß, ‘Major Post-Westphalian Shifts and Some Important Neo-Westphalian Hesitations in the State Practice on the International Law on the Use of Force’, *Journal on the Use of Force and International Law* 1 (2014), 11–54 (14). See ICJ, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain), judgment of 16 March 2001, ICJ Reports 2001, 69, para. 96.

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forces from attempting to put down such a rebellion.[101] However, this classical regime is without prejudice in the Security Council's adoption of the resolutions with which it tries to frame, stifle or prohibit violence within a state, or takes sides – in the name of maintaining international peace and security – with one of the factions that are engaged in the use of force.[102] For many years, the UN Security Council has thus adopted resolutions that, depending on the specificities of the situation, introduce obligations and rules for the parties to an internal conflict.

In the case of Yemen, the Security Council took a position long before the intervention by Saudi Arabia and its allies was triggered. In February 2014, when the Houthi rebellion was developing, it adopted a resolution based on Chapter VII of the Charter in which it:

> *Reaffirm*[ed] the need for the full and timely implementation of the political transition following the comprehensive National Dialogue Conference, in line with the GCC Initiative and Implementation Mechanism, and in accordance with resolution 2014 (2011) and 2051 (2012), and with regard to the expectations of the Yemeni people . . .

It then:

> *Emphasize*[d] that the transition agreed upon by the parties to the GCC Initiative and Implementation Mechanism Agreement has not yet been fully achieved and calls upon all Yemenis to fully respect the implementation of the political transition and adhere to the values of the Implementation Mechanism Agreement . . . [103]

In the same resolution, the Security Council decided on sanctions against 'individuals or entities . . . as engaging in or providing support for acts that threaten the peace, security or stability of Yemen'.[104] At this stage, it is clear that, for the Security Council, the only legitimate holder of authority in Yemen is the one arising from the peaceful transition mechanism supervised by the GCC. A *contrario*, the acts of violence committed by the rebel forces are prohibited in the name of maintaining international peace and security.

[101] Roger Pinto, 'Les règles du droit international concernant la guerre civile', *Recueil des Cours* 114 (1965), 455–553 (466); Yoram Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge: CUP 2014), 5.

[102] Corten, 'La rébellion et le droit international' (n. 38), 138–42.

[103] UN SC Res. 2140 of 26 February 2014, paras 1 and 10.

[104] *Ibid.*, para. 17.

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It should come as no surprise, then, that – one year later – the Security Council reacted in the following terms to the Houthis' taking the capital by violence:

> *Deploring* the unilateral actions taken by the Houthis to dissolve parliament and take over Yemen's government institutions . . .
> [. . .]
> 1. *Strongly deplores* actions taken by the Houthis . . .
> [. . .]
> 8. *Demands* that all parties in Yemen cease all armed hostilities against the people and the legitimate authorities of Yemen and relinquish the arms seized from Yemen's military and security institutions . . . [105]

At this stage, President Hadi and his government were explicitly designated the official authorities of Yemen, even though they had lost much of their effective control over the territory. Support for these authorities and the correlative condemnation of irregular forces were justified by the need to maintain stability in the region, as indicated by the comments of the Permanent Representative of France to the United Nations in the debate that preceded the Council's adoption of the Resolution:

> Lastly, the resolution sends a firm message in favour of the unity, integrity and stability of Yemen. The political vacuum in the country promotes the manifestation of violent discord that threatens its integrity. This is true not only politically, with the divisions that I have just mentioned, and at the regional level with the *disturbing ascendency of secessionist tendencies, but also in terms of security, with the strengthening of the threat posed by Al-Qaida in the Arabian Peninsula*. France is particularly concerned about this aspect in the light of the violent attacks sponsored by that terrorist organization in early January.[106]

France, like other members of the Security Council,[107] echoes another paragraph of the Resolution in which the Security Council '[c]ondemns the growing number of attacks carried out or sponsored by Al-Qaida in the Arabian Peninsula,' and '[e]xpresses concern at the ability of Al-Qaida in the Arabian Peninsula to benefit from the deterioration of the political and security situation in Yemen'.[108]

The logic behind the Security Council's position can be summarised as follows: maintaining Yemen's stability is essential to avoid the secessionist trends that might otherwise create an area favourable to terrorist activities. Support for government-elected authorities further to a peace process supervised by

[105] UN SC Res. 2201 of 15 February 2015, cons. 4, paras 1 and 8 (adopted unanimously).
[106] UN Doc. S/PV.7382, 15 February 2015, 4 (emphasis added).
[107] See, e.g., Malaysia (*ibid.*, 5) and Angola (*ibid.*, 7).
[108] UN SC Res. 2201 of 15 February 2015, cons. 13–14.

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a regional security organisation can therefore be explained by specific considerations relating to international peacekeeping motives. Yet the Council never mentions outside support for the Houthi rebel forces nor, a fortiori, Iran – or any state that might be accused of interfering in the internal conflict.[109]

The same logic is reflected in the Declaration of the President of the UN Security Council of 22 March 2015:

> The Security Council supports the legitimacy of the President of Yemen, Abdo Rabbo Mansour Hadi, and calls upon all parties and Member States to refrain from taking any actions that undermine the unity, sovereignty, independence and territorial integrity of Yemen, and the legitimacy of the President of Yemen.[110]

Firm backing for President Hadi can also be found in the first resolution the Security Council adopted on the issue – Resolution 2216, adopted on 14 April 2015 – triggered by Operation Decisive Storm:

> *Noting* the . . . letter from the President of Yemen . . .
>
> [. . .]
>
> *Condemning* the growing number of and scale of the attacks by Al-Qaida in the Arabian Peninsula (AQAP),
>
> *Expressing* concern at the ability of AQAP to benefit from the deterioration of the political and security situation in Yemen, . . .
>
> [. . .]
>
> *Reaffirming its support for the legitimacy of the President of Yemen, Abdo Rabbo Mansour Hadi* . . .
>
> [. . .]
>
> 1. *Demands* that all Yemeni parties, in particular the Houthis, fully implement resolution 2201 (2015), refrain from further unilateral actions that could undermine the political transition in Yemen, and further demands that the Houthis immediately and unconditionally:
>
>   (a) end the use of violence;
>
>   (b) withdraw their forces from all areas they have seized, including the capital Sana'a; . . . [111]

Once again, support from the President of the UN Security Council and the GCC is warranted to maintain peace and fight international terrorism.

[109] See also UN SC Res. 2204 of 24 February 2015; Fox, 'Invitations to Intervene after the Cold War', Chapter 3 in this volume.

[110] UN SC Pres. Statement on the Middle East, S/PRST/2015/8, 22 March 2015, 1.

[111] UN SC Res. 2216 of 14 April 2015, cons. 2, 5, 6, 8 and para. 1 (emphasis added).

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It is also worth noting that the Security Council makes no mention of outside support for irregular forces in the texts it adopted at that date nor had it mentioned them in the debates that preceded adoption of those texts.[112] When the Council refers to the letter of 24 March written by the Permanent Representative for Yemen, it carefully selects an excerpt consistent with the logic it has been defending for months, never mentioning the reference to self-defence that can be found elsewhere in the letter. The same remark holds for its reference to the resolution of the Arab League of 29 March 2015, which also evokes self-defence within the meaning of Article 51 of the Charter.[113] The Security Council does not reproduce this argument. True, the Security Council does establish control mechanisms and sanctions, so that no military support can be provided to the irregular forces operating in Yemen,[114] but it does not denounce any state for interfering in the conflict – especially not Iran.

Confining ourselves to the relevant resolutions and presidential declarations, the military operation by Saudi Arabia and its allies is justified not with respect to this argument nor, more generally, to the argument of counter-intervention, but rather as a measure designed to ensure a process of peace and stability supervised by the Security Council itself – a process that is capable of preventing destabilisation, especially in the evolving context of the activities of terrorist groups such as Al-Qaeda.[115] The whole justification is based on the defence of the will of the 'people of Yemen',[116] which may be interpreted as an allusion to the right of peoples to self-determination. When procedures are undertaken to implement it under international supervision, this right excludes the use of force by any group that would call into question these procedures, especially if it has been characterised as a terrorist group.

At this stage, we might draw two intermediate conclusions from the Yemen case study. First, the intervening states did not merely settle for mentioning the invitation from the country's president to justify their operation. Of course, in this case, as in others on the international plane, states often emphasise the political rather than the legal. However, when expressing their views about the legitimacy of their action, the intervening states insisted on its legitimate

112 Yemen is the only state denouncing Iran during the debates: see UN Doc. S/PV.7411, 22 March 2015, 4; UN Doc. S/PV.7426, 14 April 2015, 9.

113 Final Communiqué of the 26th Arab League Summit, 29 March 2015.

114 See also UN SC Pres. Statement on the Middle East (Yemen), S/PRST/2017/7, 15 June 2017.

115 UN SC Res. 2266 of 24 February 2016; UN SC Res. 2342 of 23 February 2017; UN SC Res. 2402 of 26 February 2018.

116 See, e.g., UN SC Res. 2216 of 14 April 2015; UN SC Res. 2342 of 23 February 2017, UN SC Res. 2402 of 26 February 2018. See also several statements made by states, e.g., Uruguay (UN Doc. S/PV.7999, 12 July 2017, 8) and Bolivia (*ibid.*, 9; UN Doc. S/PV.8017, 18 August 2017, 9; UN Doc. S/PV.8066, 10 October 2017, 6).

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object, which was allegedly to put an end to outside interference in the conflict – or perhaps even end an actual armed attack – as indicated by the meaning of Article 51 of the Charter. Given the characteristics of this discourse, it can be argued that the full respect of the right of peoples to self-determination recommended by the IDI and by numerous legal instruments was confirmed in this particular instance.[117]

Second, all of the difficulties that attach to this counter-intervention argument (the impossibility of proving any military implication and, a fortiori, an armed attack by Iran, lack of effective control by the president at the time he made the appeal, etc.) were avoided by the Security Council, which carefully abstained from enshrining the collective self-defence argument – or, more generally, the counter-intervention argument. Of course, this reluctance can also be explained by political motivations and the difficulty of reaching an agreement between its permanent members. In any event, the Security Council instead preferred to emphasise the legitimacy of the government in place because of its origins, which were anchored in a peace process conducted under the United Nations' own supervision. It also denounced the risks of destabilisation in the region that any challenge to the process would entail – especially given the developing activity of terrorist groups related to Al-Qaeda in the territory of Yemen. When a civil war deteriorates and threatens international peace, especially as a result of the involvement of foreign terrorist groups, the classical scheme of neutrality is no longer tenable.

In short, beyond ius contra bellum in general international law, we are faced here with an illustration of the Security Council's prerogatives in the area of maintaining international peace and security – especially in the context of the fight against international terrorism: a characteristic that can be further illustrated by analysis of the fight against ISIL in Iraq and Syria.

III. THE FIGHT AGAINST INTERNATIONAL TERRORISM: THE WAR AGAINST ISIL IN IRAQ AND SYRIA

A. *The Existing Legal Framework: Self-Determination and the Fight against International Terrorism*

Whereas they do contain a direct trace of the argument of counter-intervention, the IDI resolutions adopted during its sessions at Wiesbaden in 1975 and in Rhodes in 2011 do not evoke the fight against terror as a valid

[117] Ferro and Ruys, 'The Saudi-Led Military Intervention' (n. 67), 911; Fabri, 'La licéité de l'intervention' (n. 63), 93–4.

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argument. Acts of terrorism are mentioned only in the scope of Rhodes, which applies to 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, including acts of terrorism'.[118] As for Wiesbaden, its field of application extends to all situations of civil war – especially when government forces oppose 'insurgent movements whose aim is to overthrow the government or the political, economic, or social order of the State, or to achieve secession or self-government for any part of that State'.[119] This definition is also applicable to foreign terrorist groups. However, a terrorist group – especially one composed of foreign elements – cannot, by definition, claim to express the will of all or part of the population of a state. Terrorism is stigmatised as a crime and not characterised as a political struggle or a rebellion.[120] In this context, helping a state to fight against an international terrorist movement is in no way incompatible with the right to self-determination of the people of the state.[121] Quite the contrary: to help public authorities to repress such criminal acts, as perpetrated by foreign elements, is to defend the most fundamental rights of the population – the rights to security, to freedom of expression, and to choose leaders through the peaceful exercise of political rights without external interference. In this context, the fight against international terrorism appears closely linked to the argument of 'counter-intervention', as set out above.[122]

This legal logic can be reflected in practice by two main forms of support for the authorities engaged in the fight against disturbances or disorder, especially when acts of international terrorism are in question. These forms may be distinguished by their increasing degrees of intensity.

First, it is very common for states to engage in military cooperation programmes – that is, to supply weapons, train officers, take part in joint manoeuvres, etc. In addition to mechanisms involved in regional collective security organisations – such as the North Atlantic Treaty Organization (NATO), the Organization of American States (OAS), the Association of Southeast Asian Nations (ASEAN), and the African Union – many bilateral treaties have been concluded along these lines, whether between France and the United Kingdom, with regard to certain of their former colonial possessions in Africa, or by the United States with countries of Latin

[118] IDI, Rhodes Resolution II (n. 22), Art. 2(1).
[119] IDI, Wiesbaden Resolution III (n. 18), Art. 1(1)(a).
[120] See Denis Duez, 'De la définition à la labellisation: le terrorisme comme construction sociale', in Bannelier et al., *Le droit international face au terrorisme* (n. 75), 105–11.
[121] Christakis and Bannelier, '*Volenti non fit injuria?*' (n. 1), 124.
[122] See above, section II.

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America or Asia, or by China with various developing states.[123] This practice may be observed more broadly in international relations, and it is generally aimed simply at allowing the state receiving assistance both to defend itself against foreign interference and, more generally, to maintain order within its own territory, pursuant to its international commitments in the matter of human rights.[124] This obligation to maintain order may apply not only in normal situations but also in the event of civil war. Article 3 of the Wiesbaden Resolution of 1975 provides that 'third States may . . . : b) continue to give any technical or economic aid *which is not likely to have any substantial impact on the outcome of the civil war*'.[125] It is difficult to show that this restriction reflects customary law and it is particularly difficult to evaluate in practice – but it does mean at least that, even in a situation of civil war, a foreign state may continue to cooperate militarily with a government challenged by an irregular group: an observation that applies a fortiori if it is a terrorist group containing elements from abroad.[126] In the latter case, it may additionally be doubted whether cooperation is limited as to its effects, as we shall subsequently observe in view of existing practice.

Another form of cooperation, beyond the supply of weapons or training, is the leading of military action in support of an operation to maintain order. Examples of this are legion. In the 1960s, the British Army supported the authorities of several African states confronted with mutinies by officers. The United Kingdom justified its actions by recalling that it was not a matter of helping those authorities in the context of civil war but of assisting with simple operations to maintain order, with no political character.[127] In 2011, Saudi Arabia and the United Arab Emirates responded to a request from the Bahrain authorities looking to put down local demonstrations that it denounced as violent and which it said were supported from outside. The GCC immediately sent troops 'to contribute to the maintenance of order and security' under an 'agreement on defence and cooperation by which the GCC countries share a responsibility for the preservation of security and stability.'[128] Here, again,

[123] See, e.g., Jacques Basso and Julia Nechifor, 'Les accords militaires entre la France et l'Afrique sub-saharienne', in Louis Balmond (ed.), *Les interventions militaires françaises en Afrique* (Paris: Pedone 1998), 41–67; Corten, *The Law against War* (n. 29), 255–7.

[124] See, e.g., ECtHR, *Issaieva and Others v. Russia*, judgment of 24 February 2005, app. nos 57947/00, 57948/00, and 57949/00, para. 180.

[125] IDI, Wiesbaden Resolution III (n. 18), Art. 3 (emphasis added).

[126] Christakis and Bannelier, '*Volenti non fit injuria?*' (n. 1), 125–56.

[127] Bennouna, *Le consentement à l'ingérence militaire* (n. 16), 43; Schindler, 'Le principe de non-intervention dans les guerres civiles' (n. 19), 450–1.

[128] Agatha Verdebout, 'The Intervention of the Gulf Cooperation Council in Bahrain – 2011', in Ruys et al., *Use of Force* (n. 67), 795–802 (797, fn. 14). See Statement of GCC Foreign

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support for the authorities is meant to ensure the maintenance of order by means of the effective repression of criminal or tortious acts supported by foreign actors; it is not presented as intervention in a purely domestic political conflict.[129]

Whatever form it takes, this practice is widespread and is generally aimed at restoring law and order, without the represented repressed acts being characterised as terrorist acts. When this is the case, it is self-evident that military cooperation is not considered a fortiori to be contrary to international law. In her reference work, Christine Gray evokes the United States' military support of the Colombian government, which was officially to counter drug-trafficking and terrorism.[130] Likewise, in a bilateral agreement in 2008 between the two states, the presence of US troops in Iraq is justified by 'efforts to maintain security and stability in Iraq, including cooperation against Al-Qaeda and other terrorist groups'.[131]

Of course, it would be easy to denounce some of the operations just mentioned by pointing out that, in actual fact, the actions taken by the government and the state it called on for backing went well beyond the repression of serious crimes or offences – that, quite simply, they punished a peaceful political opposition movement. Some months after the military intervention in Bahrain, the IDI adopted the Rhodes Resolution II, denouncing such assistance when 'its object is to support an established government against its own population'.[132] The whole difference, then, lies in appreciation of the facts – of the true motives of those intervening, or the means and effects of the intervention. However, if we confine ourselves to the states' pronouncements, we observe significantly that – even though the argument is open to criticism – states prefer to invoke the argument of maintaining law and order and the fight against international terrorism rather than to assume responsibility for a direct intervention in an internal conflict. Here, too, it is the necessity of respect for the right of peoples to self-determination that seems to reflect customary practice.

It is important now to test this hypothesis in the context of a case study: the fight against ISIL that developed in the 2010s, primarily in Iraq and Syria.

Ministers following 119th Ministerial Council Session, 15 June 2011, Royal Embassy of Saudi Arabia in Washington, D.C.

129 Corten, 'La rébellion et le droit international' (n. 38), 161–4.

130 Christine Gray, *International Law and the Use of Force* (Oxford: OUP 4th edn 2018), 91–2.

131 Quoted in Lieblich, *International Law and Civil Wars* (n. 11), 149.

132 IDI, Rhodes Resolution II (n. 22), Art. 2(1).

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B. *Invocation of the Fight against International Terrorism in the Iraqi and Syrian Context*

ISIL was created by armed opponents of the Iraqi government, which was installed in the aftermath of the 2003 US-led intervention in that country.[133] Originally, its members essentially opposed the Baghdad authorities, which they accused of providing Iraq's Shi'a majority with disproportionate benefits and of oppressing the Sunni minority with the support of foreign powers. However, ISIL quickly expressed broader ambitions: from 2013 onwards, it claimed exclusive political and theological authority over the world's Muslims, and it succeeded in attracting many fighters from foreign countries – mainly from the Arab world, Western Europe, Russia (particularly Chechnya), and North Africa. Some sources also suggest that ISIL has been supported by – or from – other states such as Saudi Arabia or Turkey, either financially or even through the provision of arms.[134] Moreover, the gains made against the Iraqi Army, facilitated by the massive withdrawal of US troops in 2011, enabled the organisation to acquire a considerable amount of military equipment, as well as control of numerous oil facilities. Another important element in this situation was the development of the Syrian war, which led to a power vacuum in substantial parts of the Syrian territory that ISIL would exploit. Those factors help to explain why, in 2014, ISIL was able to control an impressive stretch of territory, crossing the Iraqi–Syria boundary – a boundary ISIL denounced as a product of the colonial division of the world.[135] This self-proclaimed 'Islamic State' thus managed to control a vast amount of territory, in which it installed a de facto government and elaborated a domestic political, legal, and judicial system based on a particularly radical interpretation and application of sharia law.

Numerous sources have denounced massive violations of human rights in the ISIL-controlled territories.[136] The United Nations has labelled ISIL a terrorist organisation, as have numerous other organisations and

[133] See, generally, Patrick Cockburn, *The Rise of Islamic State: ISIS and the New Sunni Revolution* (London: Verso Books 2015). See also Olivier Corten, 'The Military Operations against the "Islamic State" (ISIL or Da'esh) – 2014', in Ruys et al., *Use of Force* (n. 67), 873–98 (873–7).

[134] See, e.g., the Iraq crisis: Patrick Cockburn, 'How Saudi Arabia Helped Isis Take Over the North of the Country', *The Independent* (London), 13 July 2014; David L. Phillips, 'Research Paper: ISIS–Turkey Links', *The Huffington Post*, 8 September 2016.

[135] *Keesing's Record of World Events* (2014), 53494–5. See Tom Ruys, Nele Verlinden and Luca Ferro, 'Digest of State Practice 1 January–30 June 2014', *Journal on the Use of Force and International Law* 1 (2014), 323–73 (356); Tom Ruys and Nele Verlinden, 'Digest of State Practice 1 July–31 December 2014', *Journal on the Use of Force and International Law* 2 (2015), 119–62 (131–2).

[136] *Keesing's Record of World Events* (2014), 53535–6, 53441.

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states.[137] By contrast, and unsurprisingly, it has itself never been recognised as a 'state'[138] – even though a massive military intervention was launched against it by several states. In the summer of 2014, the United States formed an international coalition against ISIL at the invitation from the Iraqi authorities. Then, a year later, Russia answered a call from the Syrian authorities and actively cooperated with them in what, officially, was also designated as an armed fight against terror. Successive defeats of ISIL marked 2017 and 2018, and, at the time of writing, it controls very few, small areas of territory in Syria and Iraq, if any. The fight against terrorism has thus formed the essential argument justifying the intervention of states in Iraq and Syria.

1. Invocation of the Argument by Iraq and Syria

The two governments of these states were particularly clear in this regard. The Iraqi authorities sent a letter to the Security Council on 25 June 2014, saying:

> ISIL has ... been terrorizing citizens, carrying out mass executions, persecuting minorities and women, and destroying mosques, shrines and churches. This group now threatens several governorates, including Baghdad, *thanks to external support and the influx of thousands of foreign terrorists of various nationalities from across the border in Syria*.
>
> [...]
>
> ... We therefore call on the United Nations and the international community to recognize the serious threat our country and the international order are facing. ... To that end, we need your support in order to defeat ISIL and protect our territory and people ... [139]

At this stage, Baghdad asked for logistical aid to 'protect [its] territory and people' against a terrorist group that had been infiltrated by foreign elements, mainly (but not exclusively) from Syria. In a letter dated 25 September 2014, it called for a more robust form of support, but still for the same reasons.[140]

137 See, e.g., the lists of designated persons and entities of the United Nations: UN Security Council, ISIL (Da'esh) & Al-Qaeda Sanctions List (Sanctions List Materials).

138 See, e.g., the positions expressed by several states during the debates within the Security Council: UN SC Verbatim Records (19 September 2014), UN Doc. S/PV.7271; UN SC Verbatim Records (24 September 2014), UN Doc. S/PV.7272. Concerning the United States, see also 'Statement by the President on ISIL', The White House – Office of the Press Secretary (10 September 2014).

139 Letter dated 25 June 2014 from the Permanent Representative of Iraq to the United Nations, addressed to the Secretary-General (UN Doc. S/2014/440) (emphasis added).

140 Letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council (22 September 2014), UN Doc. S/2014/691.

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For its part, the Syrian government also called on third states for aid in militarily quelling ISIL forces. On 25 August 2014, it affirmed that:

> Syria is ready to cooperate and coordinate with regional and international efforts to combat terror in accordance with UN resolutions and respect of Syrian sovereignty ... Everyone is welcome, including Britain and the United States, to take action against ISIS and Nusra with a prior full coordination with the Syrian government.[141]

On 25 May 2015, Damascus reaffirmed its readiness 'to cooperate bilaterally and at the regional and international levels to combat terrorism'.[142]

2. Invocation of the Argument by the Intervening States

The intervening states relied on these invitations as a basis for their military operations. Russia sent a letter to the United Nations specifying that 'in response to a request from the President of the Syrian Arab Republic, [... it had begun] launching air and missile strikes against the assets of terrorist formations in the territory of the Syrian Arab Republic on 30 September 2015'.[143] Syria then confirmed that:

> The Russian Federation has taken a number of measures in response to a request from the Government of the Syrian Arab Republic to the Government of the Russian Federation *to cooperate in countering terrorism and to provide military support for the counter-terrorism efforts* of the Syrian Government and the Syrian Arab Army ... This support, which is being provided in response to a request from the Government of the Syrian Arab Republic, is fully consistent with international law ... [144]

The states of the Western coalition developed an ambiguous discourse. As a matter of principle, it is incontrovertible that they referred to intervention by

[141] *CBS News* (25 August 2014), quoting a press conference made in Damascus by the Syrian Minister of Foreign Affairs Wallid al-Moallem. See also *BBC News*, 25 August 2014.

[142] Identical letters dated 25 May 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council (1 June 2015) UN Doc. A/69/912–S/2015/371.

[143] Letter dated 15 October 2015 from the Permanent Representative of the Russian Federation to the United Nations, addressed to the President of the Security Council (UN Doc. S/2015/792). See also UN SC Verbatim Record (30 September 2015), UN Doc. S/PV.7527, 4. For its part, Iran did not send a letter justifying its – more limited – military involvement in support of the Syrian authorities: see Ruys et al., 'Digest of State Practice 1 January–30 June 2014' (n. 135), 351.

[144] Identical letters dated 14 October 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations, addressed to the Secretary-General and the President of the Security Council (UN Docs A/70/429 and S/2015/789) (emphasis added).

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invitation, relating it to the fight against ISIL. The United Kingdom's position is significant in this respect:

> International law is clear that the use of force in international relations is prohibited, subject to limited exceptions. However, international law is equally clear that this prohibition does not apply to the use of military force by one State on the territory of another if the territorial State so requests or consents. It is clear in this case that Iraq has consented to the use of military force to defend itself against ISIL in Iraq.[145]

As for the United States, it declared that:

> Iraq has asked that the United States lead international efforts to strike ISIL sites and military strongholds in Syria in order to end the continuing attacks on Iraq, to protect Iraqi citizens, and ultimately to enable and arm Iraqi forces to perform their task of regaining control of the Iraqi borders.[146]

Two remarks should be made at this point, after reading the Iraqi position.

- It is apparent that ISIL is denounced not only as a terrorist group but also as a group connected with foreign elements, either from Syria or from many other states through which terrorists allegedly find passage. A close connection with the counter-intervention argument can therefore be established.
- It is also apparent that the Iraqi government's invitation was interpreted as justification for military operations against ISIL not only in Iraq but also in Syrian territory, on the basis of Article 51 of the Charter, as invoked by several states in this context.[147]

In short, intervention by invitation would *in itself* supposedly justify the military operations by Russia in Syria and by the Western powers in Iraq. Besides, the notion of collective self-defence would allegedly warrant Western strikes not only in Iraqi, but also in Syrian, territory. In both instances, the fight against terrorism is claimed as a legitimate purpose, associated in part with that of counter-intervention. However, in both instances, such an argument undeniably

[145] Prime Minister's Office, *Summary of the UK Government's Position on the Military Action against ISIL*, Policy paper, 25 September 2014 (emphasis added), available at www.gov.uk/government/publications/military-action-in-iraq-against-isil-government-legal-position/summary-of-the-government-legal-position-on-military-action-in-iraq-against-isil.

[146] Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations, addressed to the Secretary-General (UN Doc. S/2014/695). See also UN Doc. S/PV.7271 (n. 138), 16.

[147] See, particularly, the letters sent to the Security Council by the United States (UN Doc. S/2014/695, 23 September 2014), the United Kingdom (UN Doc. S/2014/851, 26 November 2014) and France (UN Doc., S/2015/745, 9 September 2015).

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raises problems that should be underscored – notably, by mentioning the criticism emanating from certain states.

C. *Problems Raised by the Invocation of the Fight against International Terrorism in the Iraqi and Syrian Context*

The main problem with the fight against international terrorism as a justification for intervention relates to the very definition of this controversial concept;[148] others can be highlighted too. Here, again, the aim is not to demonstrate the illegality of the interventions that have taken place in Iraq and Syria, but rather to highlight certain legal problems that have been circumvented thanks to the resolutions adopted by the Security Council.

1. A Definition of 'Terrorism'?

A first illustration of a state citing the fight against terrorism as justification is the way in which Russia argued for its military intervention in Syria not only against ISIL but also against other irregular forces, which were also characterised as 'terrorists'[149] – in particular, the groups who had been supported, including militarily, by the Western and Arab states since the beginning of 2013, if not before. It is significant that Russia has not justified its joint military operations with the Syrian Army by relying on the argument of prior military support, which it could have claimed by referring to the argument of counter-intervention. Moscow preferred to encompass all of the Syrian opposition movement under the heading of 'international terrorism', since the close connections among these different movements made any distinction impossible. This characterisation is far from universally accepted, however, and many states have consequently called on Russia to abstain from targeting what are described as 'moderate' Syrian opposition forces. From 3 October 2015 – that is, slightly after the beginning of the Russian engagement – the Western and Arab coalition states issued an appeal: 'We call on the Russian Federation to immediately cease its attacks on the Syrian opposition and civilians and to focus its efforts on fighting ISIL.'[150] On 12 October, the

[148] Bannelier-Christakis, 'Military Interventions against ISIL' (n. 6), 747. See Pierre Klein, 'Le droit international à l'épreuve du terrorisme', *Recueil des Cours* 321 (2006), 209–484.

[149] See Olivier Corten, 'L'intervention de la Russie en Syrie: que reste-t-il du principe de non-intervention dans les guerres civiles?', *Questions of International Law* 5 (2018), 3–16.

[150] France, Germany, Qatar, Saudi Arabia, Turkey, the United Kingdom, and United States, Joint Declaration of Recent Military Actions of the Russian Federation on Syria (2 October 2015).

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Council of the European Union adopted a resolution whereby it declared that '[t]he recent Russian military attacks that go beyond Da'esh and other UN-designated terrorist groups, as well as on the moderate opposition, are of deep concern, and must cease immediately'.[151] On 16 December 2016, the UN General Assembly adopted a resolution in which it:

> . . . strongly condemn[ed] *all attacks* against the Syrian moderate opposition, and call[ed] for their immediate cessation, given that such attacks benefit so-called ISIL-Da'esh and other terrorist groups, such as Al-Nusrah Front, and contribute to a further deterioration of the humanitarian situation.[152]

In the context in which they were adopted, those resolutions were probably motivated by the serious violations of IHL attributed to the Russian forces. However, their condemnation is framed in broad terms as covering 'all attacks' against the 'moderate opposition'. We therefore cannot exclude its application, to some extent, to aspects of ius contra bellum. What is sure is that there is a deep disagreement between Russia and its allies, on the one side, and most states, on the other, about whether or not opposition groups in Syria can be characterised as 'terrorists'.[153] Moreover, and more importantly, it would be excessive to assert that an unlimited right to intervene in favour of a government in a civil war would have been recognised in the Syrian instance. On the contrary, even if those statements are not expressed in strictly legal terms, it is submitted that they suggest a legal conviction that the Russian intervention breached the right of the Syrian people to determine its own political regime without outside interference.

2. Other Problems Raised by the Russian Argument

A second problem raised by the Russian argument relates to the characterisation not of the rebel forces but of the government forces. It may be questioned whether the Damascus authorities could validly formulate an invitation to intervene in Syria. Many states deny that the regime of Bashar El Assad has legitimacy to represent the Syrian people. Yet those same states, whether Western or Arab, continue to deal with representatives of the regime as the representatives of the state. At the United Nations, it is the Damascus delegation

[151] Council of the European Union, 'Council Conclusions on Syria', Press release, 12 October 2015.

[152] UN GA Res. 71/203 of 19 December 2016 ('Situation of human rights in the Syrian Arab Republic'), UN Doc. A/RES/71/203 (emphasis added); UN GA Res. 72/191 of 19 December 2017 ('Situation of human rights in the Syrian Arab Republic'), para. 28.

[153] Bannelier-Christakis, 'Military Interventions against ISIL' (n. 6), 764–6.

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that continues to exercise the rights of Syria – and yet when, for example, the General Assembly '[d]eplores and condemns in the strongest terms the continued armed violence by the Syrian authorities against its own people since the beginning of the peaceful protests in 2011',[154] it is clear that the 'Syrian authorities' are those acting under the leadership of Bashar El-Assad. The Syrian government has therefore continued to be recognised continuously as such since the beginning of the conflict, even at times when it held only weak effective control over its territory.[155] This is a far cry from the interventions in Somalia (1992), Haiti (1994), or Albania (1996), for which invitation was expressed by a government or a leader that had no longer any authority, so that the Security Council was called upon to adopt a resolution authorising third states to intervene. In those cases, it was evidently understood that no one was in any position to formulate valid consent.[156] The case of Syria seems closer in this respect to more recent instances, such as those of Yemen or Mali, examined as case studies in this chapter.

3. Problems Raised by Western Intervention in Syria and Iraq

What of the flaws in the argument on the invitation to fight against international terrorism invoked not by Russia but by the Western states? It is notable that the question can be framed differently depending on whether it concerns Syria or Iraq.

On the one hand, in the case of Syria, Iraq's consent seems, according to Western states, to justify military action. Yet the letters sent by Baghdad to the United Nations do not mention this possibility nor is it easy to see how Iraq could 'invite' third states to intervene militarily in a territory over which it has no sovereignty. It is without a doubt in view of these difficulties that the United States, followed by some of its allies, combined the reference to Iraqi consent with a call to collective self-defence.[157] Thus the idea was to defend Iraq against armed attack by ISIL from Syria on the grounds of a broad

[154] UN GA Res. 71/203 (n. 152), para. 25.

[155] Bannelier-Christakis, 'Military Interventions against ISIL' (n. 6), 762; Stefan Talmon, 'Recognition of Opposition Groups as the Legitimate Representative of a People', *Chinese Journal of International Law* 12 (2013), 219–53 (219); Corten, 'The Military Operations against the "Islamic State"' (n. 133), 887.

[156] Olivier Corten, *Le droit contre la guerre* (Paris: Pedone 3rd edn 2020), 471 *et seq*.

[157] Olivier Corten, 'The "Unwilling or Unable" Theory: Has It Been, and Could It Be, Accepted?', *Leiden Journal of International Law* 29 (2016), 1–23; Olivier Corten, 'L'argumentation des États européens pour justifier une intervention militaire contre l' "État islamique" en Syrie: vers une reconfiguration de la notion de légitime défense?', *Revue belge de droit international* 51 (2016), 31–67.

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interpretation of Article 51 of the UN Charter. Of course, it would have been easier to legally combine the invitation from Baghdad and that very real one from Damascus, but this option was excluded for political reasons, since Western states did not want to be perceived as in any way working with the government led by Bashar El-Assad.

The problem is that, if we confine ourselves to traditional international law, the validity of the argument of self-defence would involve demonstrating that Syria 'sent' ISIL forces into Iraqi territory, or had 'substantial involvement' with the group's actions, which would constitute an armed attack by Syria.[158] As it was plainly impossible to prove as much (because, quite to the contrary, Syria too has been fighting against ISIL), the coalition states proposed an extensive interpretation of self-defence, insisting both on the indirect responsibility of Syria – which would, from a literal perspective, have been 'unwilling or unable' to end ISIL's activities in its territory – and on an assertion that the attacks were not aimed at Syria but only at ISIL forces. The relevance of these particularly extensive interpretations – which many states[159] and writers[160] have called into question – goes beyond the context of the present chapter.[161] Suffice it to say that, in them, there is an obvious shift away from the argument of intervention by invitation towards the argument of self-defence, within the meaning of Article 51 of the Charter, and that this argument raises some serious questions.

On the other hand, in the case of the military intervention against ISIL in Iraq, it is indeed the invitation from the Baghdad authorities that forms the essential argument of the Western and Arab states. This does not mean, though, that every problem has been overcome. First, it should be observed that the Iraqi government itself could see that its legitimacy would be challenged insofar as it came to power only as the result of the war in 2003 against the regime of Saddam Hussein – a war that the majority of UN member states considered plainly contrary to international law.[162] By application of the

[158] Article 3.g) ('Definition of Aggression'), annexed to UN GA Res. 3314 (XXIX) of 14 December 1974; Corten, 'The Military Operations against the "Islamic State"' (n. 133), 889–96.

[159] See, e.g., Non-Aligned Movement, 17th Summit of Heads of State or Government, Final Document, September 2016, para. 25.2.

[160] Olivier Corten, 'A Plea against the Abusive Invocation of Self-Defence as a Response to Terrorism', *Revue belge de droit international* 51 (2016), 10–11.

[161] See O'Connell et al., *Self-Defence against Non-State Actors* (n. 4).

[162] Letter dated 19 March 2003 from the Chargé d'affaires a.i. of the Permanent Mission of Malaysia to the United Nations, transmitting a statement of the Troika of the Non-aligned Countries, UN Doc. A/58/68-S/2003/357, 21 March 2003. See Olivier Corten, 'Opération *Iraqi Freedom*: peut-on accepter l'argument de "l'autorisation implicite" du Conseil de sécurité?', *Revue belge de droit international* 38 (2003), 205–47.

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principle that illegal acts cannot create law (i.e., *ex iniuria ius non oritur*), there might have been an obligation not to recognise this government, as well as an obligation not to assist in or contribute to maintaining its authority.[163] This was not the position adopted by third states, including those that had vigorously criticised the war triggered by the United States. The new Iraqi government was considered to be representative of the state and, like its Syrian counterpart, it has continued to be recognised as such in recent years.[164]

Next, and in parallel, we should recall that ISIL originated in opposition to measures taken by the Iraqi authorities against a large part of the population, which were said to be discriminatory or excessive. Various opposition forces initially rose against these policies, which were thought to be dictated and supported by the foreign occupying forces – particularly, the United States. In other words, the evolution of the situation in Iraq could have been interpreted as an armed opposition movement rising against a repressive government – a government supported, for that matter, by foreign states. But this was not the case: ISIL, as well as the other movements from which it arose, was characterised from the outset as a terrorist group. It was denied any form of representative or political legitimacy, and internal debate on the legitimacy of the Baghdad authorities was simply ignored. This choice was widely accepted, with no state truly challenging whether it was legally apt to help the Iraqi government to end ISIL activities in its territory.

Ultimately, these two situations must be explored independently.

- When outside military intervention is limited to the territory of the state whose government has issued the invitation (Iraq, for the coalition states; Syria, for Russia), the legal validity of the invitation is not challenged.[165] Criticism is aimed at certain forms of intervention, such as military action against the 'moderate' Syrian opposition, which many states could not identify as a form of international terrorism. Yet the principle by which help can be given to a government to quell acts of international terrorism is never called into question.
- When outside military intervention targets a state that has not issued an invitation – or, rather, whose invitation has not been accepted (as was the case of Syria and the coalition states) – it is not consent that is invoked autonomously. Other arguments, such as self-defence, are additionally

[163] See Anne Lagerwall, *Le principe ex injuria jus non oritur en droit international contemporain* (Brussels: Bruylant 2016).

[164] Olivier Corten, 'Le *jus post bellum* remet-il en cause les règles traditionnelles du *jus contra bellum*', *Revue belge de droit international* 46 (2011), 38–69 (54–60).

[165] Bannelier-Christakis, 'Military Interventions against ISIL' (n. 6), 751–2.

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> evoked, with all the problems this entails for the particularly extensive interpretation that they presuppose in existing international law. The debates that then take place no longer countenance the possibility, in principle, of combating terrorism only with the consent of the government of the state and the territory in which the intervention occurs.

The lack of any such challenge can largely be explained by the Security Council's characterisations of the circumstances, which have manifestly made it possible to mitigate the traditional problem: the absence of any universally accepted definition of 'terrorism'.

D. *The Decisive Role of the UN Security Council in the Iraqi and Syrian Context*

1. Iraq

The UN Security Council has played a particularly active part in the case of Iraq for many years now. Although its members were deeply divided over the expediency of authorising an intervention in late 2002 and early 2003, they did agree to manage the fallout of the invasion and occupation of the territory by the United States and some of its allies. On 22 May 2003, the Security Council called on states to 'assist the people of Iraq in their efforts to reform their institutions and rebuild their country, and to contribute to conditions of stability and security in Iraq';[166] some months later, it called on the Provisional Authority 'to return governing responsibilities and authorities to the people of Iraq as soon as practicable'.[167] At this stage, the Council already seemed to be centring the Iraqi people and their right to self-determination – but its members did not hesitate to make a pronouncement regarding the legitimacy of the relevant authorities. On 8 June 2004, the Security Council explicitly insisted on the validity on the power of a new government to further local elections:

> 1. *Endorses* the formation of a sovereign Interim Government of Iraq, as presented on 1 June 2004, which will assume full responsibility and authority by 30 June 2004 for governing Iraq . . . ;
> 2. *Welcomes* that, also by 30 June 2004, the occupation will end and the Coalition Provisional Authority will cease to exist, and that Iraq will reassert its full sovereignty . . . [168]

[166] UN SC Res. 1483 of 22 May 2003, para. 1.
[167] UN SC Res. 1511 of 16 October 2003, para. 6.
[168] UN SC Res. 1546 of 8 June 2004.

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From that date on, the Baghdad government was recognised as an authority capable of legitimately expressing the will of the Iraqi people. The origins of this government – in particular, its formation from a foreign military intervention instituted under the direct control of the occupying forces – was, at the very least, not mentioned and may even have been deliberately omitted.

This pragmatic approach was dictated by concern for maintaining peace in the region, which required the establishment of a stable and secure state, and led to the creation of a UN force, the United Nations Assistance Mission for Iraq (UNAMI), which was tasked with assisting the Iraqi government in various matters relating directly to security.[169] In this context, it was logical for the Security Council to condemn the violent opposition forces – and it would soon dismiss them as terrorists. Thus, as early as 7 August 2009, the Security Council 'commend[ed] the important efforts made by the Government of Iraq ... to improve security and public order and to combat terrorism and sectarian violence across the country';[170] a year later, it '[e]ncourag[ed] the Government of Iraq to continue ... improving security and public order and combating terrorism and sectarian violence across the country'.[171] On 30 July 2014, the Security Council more specifically targeted ISIL – by then extending its activities – by:

> *Expressing* grave concern at the current security situation in Iraq as a result of a large-scale offensive carried out by terrorist groups, in particular the Islamic State in Iraq and the Levant (ISIL), and associated armed groups, involving a steep escalation of attacks, heavy human casualties ..., *condemning* the attacks perpetrated by these terrorist groups and associated armed groups, ... against the people of Iraq in an attempt to destabilize the country and region, and reiterating its commitment to Iraq's security and territorial integrity.[172]

Later that year, on 19 September, the Security Council 'urge[d] the international community, in accordance with international law to further strengthen and expand support for the Government of Iraq as it fights ISIL and associated armed groups';[173] on 15 July 2016, it '[e]mphasiz[ed] the need to continue efforts to promote international and regional cooperation aimed at

[169] UN SC Res. 1500 of 14 August 2003; UN SC Res. 1770 of 10 August 2007; UN SC Res. 1883 of 7 August 2009. See also UN SC Res. 2421 of 14 June 2018.

[170] UN SC Res. 1883 of 7 August 2009.

[171] UN SC Res. 1936 of 5 August 2010. See also UN SC Res. 2001 of 28 July 2011; UN SC Res. 2061 of 25 July 2012; UN SC Res. 2110 of 24 July 2013.

[172] UN SC Res. 2169 of 30 July 2014. See also UN SC Res. 2233 of 29 July 2015; UN SC Res. 2367 of 14 July 2017.

[173] UN SC Pres. Statement on Iraq, S/PRST/2014/20, 19 September 2014. See also UN SC Res. 2233 of 29 July 2015; UN SC Res. 2299 of 25 July 2016; UN SC Res. 2367 of 14 July 2017.

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supporting Iraq both in its reconciliation and political dialogue and in its fight against ISIL (Da'esh)'.[174]

These words leave no doubt whether the Security Council's was willing to present the conflict as an altercation between legitimate authorities that emerged from a mechanism supervised by the United Nations, on the one hand, and criminal terrorist groups, on the other. Under no circumstances could those terrorist groups claim to reflect the will of all, or even part, of the Iraqi population. In this context, and beyond all the limits that the argument might present in the absence of any Security Council resolution, the outside interventions in support of the government are not only not prohibited but also explicitly encouraged.

Even if the two situations are in many ways different (especially as far as the legitimacy of the government is concerned), the same general view was, to some extent, reproduced in the Syrian case.

2. Syria

The divisions among permanent members of the UN Security Council led to relatively limited Council activity with respect to the conflict in Syria. However, a few days after the attacks in Paris of 13 November 2015, fifteen member states adopted Resolution 2249 (2015), whereby the Security Council:

> *Determin*[ed] that . . . the Islamic State in Iraq and the Levant (ISIL, also known as Da'esh), constitutes a global and unprecedented threat to international peace and security, . . .
>
> [. . .]
>
> 5. *Call*[ed] *upon* 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, in Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL . . . and to eradicate the safe haven they have established over significant parts of Iraq and Syria . . . [175]

The Security Council's discourse could not be more typical: international terrorism (and, more specifically, ISIL and other named groups) are a threat to international peace and it is essential to fight them 'in compliance with

174 UN SC Res. 2299 of 25 July 2016. See also UN SC Res. 2367 of 14 July 2017.

175 UN SC Res. 2249 of 20 November 2015. See also UN SC Res. 2254 of 18 December 2015, para. 8.

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international law, in particular with the United Nations Charter'. For the coalition states, this means they are invited to exercise self-defence in Syrian territory; for Russia, it implies that its action must be based on the consent given by the Syrian government. Beyond the differences in interpretation (which this chapter does not aim to settle), it is noteworthy that it occurred to no one to challenge the possibility of intervening in Iraq or Syria at the call of the concerned authorities. This helps to explain why, when the Security Council called for a ceasefire, it stated explicitly that the ceasefire:

> . . . shall not apply to military operations against the Islamic State in Iraq and the Levant (ISIL, also known as Da'esh), Al Qaeda and Al Nusra Front (ANF), and all other individuals, groups, undertakings and entities associated with Al Qaeda or ISIL, and other terrorist groups, as designated by the Security Council;[176]

The fight against these groups is held to be an incontrovertible and legitimate objective. The governments of directly targeted states can pursue this objective by validly calling on third states to intervene.

At this point, we might draw three intermediate conclusions from the case study of the fight against ISIL. First, and as in the case of Yemen, it is clear that the need to respect the right of peoples to self-determination is again reaffirmed.[177] The intervening states did not merely settle for reference to the validly issued consent from the recognised authorities of Iraq and Syria, which would have been sufficient if we were to accept the argument that no condition deduced from the right to self-determination need be fulfilled. On the contrary, all of the intervening states insisted on the legitimacy of the object of their action: the fight against international terrorism. In this sense, insofar as the intervening states also claimed to be acting to protect themselves against terrorist attacks, the consent given by Iraq and Syria is nothing more than the implementation of their international obligation to take all appropriate measures so that their territories are not used by irregular forces infringing the rights of other states.[178] Thus the legitimacy of the intervention against terrorist groups is further strengthened. All in all, we find a similar line of reasoning to that exercised in the Yemeni case.

The traditional problems that the argument of the fight against international terrorism raises (a unilateral characterisation of terrorism, the legitimacy of the government itself, etc.) have sometimes been formulated by

[176] UN SC Res. 2401 of 24 February 2018. See also UN SC Res. 2532 of 1 July 2020.
[177] Bannelier-Christakis, 'Military Interventions against ISIL' (n. 6), 754–6.
[178] UN GA Res. 2625 (XXV) of 24 October 1970.

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states, but never has the possibility of targeting international terrorism at the invitation of the relevant government been called into question. This can probably be explained by the decisive role played by the Security Council, which supported the legality of the governments (explicitly for Iraq, implicitly for Syria) and, above all, denounced the irregular groups as terrorists, unequivocally calling for outside military intervention. This intervention was not 'authorised', which would presuppose the Security Council had provided a legal ground that is missing at first sight; rather, the Council merely recommended the intervention, '*call*[ing] *upon* Member States . . . to take all necessary measures, in compliance with international law' and hence presupposing that a legal basis might be found elsewhere.[179] In this respect, there is no question that the Council unanimously considered the government invitation, in principle, sufficient.

Second, we must position ourselves again here not in the context of general international law but in relation to the Security Council's powers under Chapter VII of the UN Charter. The Council establishes a link between the processes of pacification and securitisation under its aegis (especially in Iraq), and denounces terrorist groups, as well as certain kinds of outside interference related to the recruitment of jihadists from various states. The expression 'international terrorism', and the way it describes entities such as ISIL or Al-Qaeda, show that it is a case of denouncing not only criminals but also a transnational destabilising movement. Even if the transnational dimension of those groups were limited (the leadership of ISIL being mainly Iraqis and Syrians), it was undoubtedly one of the preoccupations of third states, some nationals of which were implicated in terrorist activities. Therefore, to some extent, the argument that intervention is justified in the fight against international terrorism might then be associated with that of counter-intervention – with states protecting the right to self-determination of the Iraqi and Syrian peoples against a challenge that is both criminal and marked by foreign involvement, threatening international peace and security.

[179] Michael P. Scharf, 'How the War against ISIS Changed International Law', *Case Western Reserve Journal of International Law* 48 (2016), 1–54 (51); Nabil Hajjami, 'De la légalité de l'engagement militaire de la France en Syrie,' *Revue du droit public* 1 (2017), 169–73; Michael Wood, 'The Use of Force in 2015 with Particular Reference to Syria', Hebrew University of Jerusalem Legal Studies Research Paper Series No. 16–05 (2016), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2714064; Jean-Christophe Martin, 'Les frappes de la France contre l'EIIL en Syrie à la lumière de la résolution 2249 (2015) du Conseil de sécurité', *Questions of International Law* 3 (2016), 11–14; Laurie O'Connor, 'Legality of the Use of Force in Syria against Islamic State and the Khorasan Group', *Journal on the Use of Force and International Law* 3 (2016), 70–96 (77); Corten, 'The Military Operations against the "Islamic State"' (n. 133), 888–9.

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Third, in emphasising respect for the territorial integrity of Iraq and Syria, the Security Council's resolutions and declarations seem to condemn the secessionist dimension of ISIL – a dimension we can examine further, in another case study, as a legitimate argument justifying intervention by invitation.

IV. Repression of Secession? The French-Led Intervention in Mali

A. *The Existing Legal Framework: Secession and Self-Determination*

If we confine ourselves to general international law, it is difficult to consider outside military intervention against secession compatible with the right to the self-determination of peoples. The phenomenon of a new state can be contemplated in two ways: in *law* (in relation to a right to self-determination); and in *fact* (in relation to the existence of a state).[180] In both cases, and supposing the secessionist claim has not been supported by foreign actors, it seems difficult to accept that outside military aid should be given to help put down attempts to gain independence.

The first hypothesis in this scenario, of secession in law, deals with a people who have the right to self-determination: a right that implies the right to create a new state – by violence, if need be – against the will of a colonial or occupying power.[181] Third states, then, cannot have the power to quell what is designated a legitimate national liberation movement. This is not in the context of a classical civil war, in which the principle of legal neutrality prevails.[182] The people have a genuine right, which implies a corresponding duty to allow it to be exercised as a choice in self-determination, and that choice is obviously incompatible with an intervention meant to maintain the grip of a colonial or occupying power.[183] For some, it might even be possible to

[180] James Crawford, *The Creation of States in International Law* (Oxford: OUP 2nd edn 2007); Théodore Christakis, 'L'État en tant que "fait primaire": réflexions sur la portée du principe d'effectivité', in Marcelo Kohen (ed.), *Secession: International Law Perspectives* (Cambridge: CUP 2006), 138–70 (142–3); Olivier Corten, François Dubuisson, Vaios Koutroulis and Anne Lagerwall, *A Critical Introduction to International Law* (Brussels: éditions de l'Université de Bruxelles 2019), 55 *et seq*.

[181] UN GA Res. 1514 (XV) of 14 December 1960; UN GA Res. 1541 (XV) of 15 December 1960.

[182] Corten, 'La rébellion et le droit international' (n. 38), 74–81.

[183] See UN GA Res. 2625 (XXV) of 24 October 1970; UN GA Res. 1514 (XV) of 14 December 1960, para. 4; 'Definition of Aggression' annexed to UN GA Res. 3314 (XXIX) of 14 December 1974, Art. 7. See also Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: CUP 1995).

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contemplate one or more third states supporting the oppressed people,[184] even if it is far from obvious that such support should extend to a military intervention.[185] Support for the government, though, is excluded.

The second hypothesis, of de facto secession, covers not a people subject to colonial power or a foreign occupation but a minority living in an existing state.[186] This context is not a people exercising its right to self-determination but an attempt at secession: an attempt to create an entity that in fact claims to fulfil all the characteristics of the state (territory, population, and sovereign government) – that is, an entity that manages to exercise its power in an effective and stable way, independently of any higher authority.[187] The situation is akin to civil war, as the IDI confirmed in its Wiesbaden Resolution III.[188] The principle of legal neutrality reflected in the Resolution – prohibiting support for either party in a civil war – applies.[189] At first sight, providing military aid to a government to quell the choice of a part of its population to secede does not seem readily compatible with the principle of non-intervention in civil wars.

In this hypothesis of de facto secession – that which we will consider here – the right of people to self-determination should no longer be envisioned as conferring the right to create a *new* state but as a protection of the right of the population in an *existing* state to determine its political regime without outside interference. The choice of the form in a federal or confederal state, or even its division into two or more entities, is incontrovertibly a matter of its national competence. From this perspective, if an internal political debate arises and bears on the expediency of such a choice, third states are supposed to abstain from any interference and let the population of the state in question determine

[184] Gregory Starouchenko, 'La liquidation du colonialisme et le droit international', in G. Tounkine (ed.), *Droit international contemporain* (Moscow: éd. du progrès 1972), 134–5; ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, advisory opinion of 21 June 1971, separate opinion of Judge Ammoun, ICJ Reports 1971, 70; Julio Faúndez, 'International Law and Wars of National Liberation: Use of Force and Intervention', *African Journal of International and Comparative Law* 1 (1989), 85–98.

[185] Corten, *Le droit contre la guerre* (n. 156), 235–6.

[186] Schindler, 'Le principe de non-intervention dans les guerres civiles' (n. 19), 454–5; Helen Quane, 'The United Nations and the Evolving Right to Self-Determination', *International and Comparative Law Quarterly*, 47 (1998), 537–72 (554 and 555–6).

[187] Crawford, *The Creation of States in International Law* (n. 180).

[188] IDI, Wiesbaden Resolution III (n. 18), Art. 1(1)(a).

[189] Marcelo Kohen, 'La création des états en droit international contemporain', *Cours Euro-Mediterranéens Bancaja de Droit International* 6 (2002), 546-635 (596); Antonio Tancredi, 'Secession and the Use of Force', in Christian Walter, Antje von Ungern-Sternberg and Kavus Abushov (eds), *Self-Determination and Secession in International Law* (Oxford: OUP 2014), 68–94 (68).

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its own future. One objection might be that a unilateral attempt at secession challenges the territorial integrity of a state, especially if this attempt is made by violent means. Such reasoning, though, has been dismissed by the ICJ in its advisory opinion on the *Unilateral Declaration of Independence of Kosovo*, in which it affirmed that:

> Several participants in the proceedings before the Court have contended that a prohibition of unilateral declarations of independence is implicit in the principle of territorial integrity. The Court recalls that the principle of territorial integrity is an important part of the international legal order and is enshrined in the Charter of the United Nations, in particular in Article 2, paragraph 4 … Thus, the scope of the principle of territorial integrity is confined to the sphere of relations between States.[190]

Accordingly, an attempt at secession does not a priori violate any principle of international law but falls within the national competence of the state concerned. The group that is located there and claims its independence cannot rely on any *right* nor is secession *prohibited* by international law. It is logical, from this perspective, to consider that third states should therefore refrain from supporting any of the parties in internal conflicts.

Some writers have argued that practice tends to recognise the right to intervene against a secessionist movement.[191] Yet practice does not seem to plead unequivocally along these lines, because it is marked by a degree of ambiguity. Some outside military operations have been conducted in support of governments against secessionist entities, but without openly declaring such support. Thus the intervention by the UN Operation in the Congo (ONUC) in the early 1960s was not presented as an intervention in favour of the Congolese government in the internal conflict opposing the secessionist forces of Katanga; rather, the repression of the secession was justified both as a peacekeeping operation, pursuant to the principle of neutrality, and as a counter-intervention, in reaction to the outside support Belgium had provided to the secessionist forces.[192] The same observation can be drawn from the NATO intervention against the Serbs in Bosnia-Herzegovina in 1995: that

[190] ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, advisory opinion of 22 July 2010, ICJ Reports 2010, 438, paras 82–3.

[191] See Christakis and Bannelier, '*Volenti non fit injuria*?' (n. 1), 133–5; Nolte, *Eingreifen auf Einladung* (n. 60), 637.

[192] Bennouna, *Le consentement à l'ingérence militaire* (n. 16), 108–22; Donald W. McNemar, 'The Postindependence War in the Congo', in Richard A. Falk (ed.), *The International Law of Civil War* (Baltimore: Johns Hopkins University Press 1971), 244–302 (292 and 295–6); Corten, 'La rébellion et le droit international' (n. 38), 114–20.

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intervention was not justified by the right of government authorities acting to put down the attempted secession but by the implementation of Security Council resolutions authorising military operations for humanitarian purposes.[193] Accordingly, it seems difficult to identify instances in which the fight against secession has been seen as an *autonomous* legitimate ground for intervention with the consent of the government. The case of Mali in 2013, however, might tend to challenge this established practice – and we examine that question in what follows.

B. *Was the Repression of Secession Invoked in the Malian Context?*

Early in 2012, the National Movement for the Liberation of Azawad (Mouvement national de libération de l'Azawad, or MNLA), a Tuareg movement that originally emerged in October 2011,[194] successively took control of several localities in northern Mali, with the aim of establishing an independent secular state.[195] On 6 April 2012, the MNLA proclaimed 'Azawad' independent, with reference to the 'main international legal instruments governing the right of people to self-determination, and especially the United Nations Charter'.[196]

1. Condemnation of the Declaration of Independence

This reference to the right to self-determination outside a decolonised situation did not convince international organisations and states. Aside from the UN Security Council, to whose action we will return, we might mention the following illustrations.

- The Economic Community of West African States (ECOWAS):

> ... denounce[d] the declaration and consider[ed] it null and void, and of no effect. The Commission wishes to remind all the armed groups in the North of Mali that Mali is one and indivisible entity, and ECOWAS shall take all necessary measures, including the use of force, to ensure the territorial integrity of the country. ECOWAS wishes to reaffirm its commitment to

[193] Pierre Klein, 'The Intervention in Bosnia and Herzegovina – 1992–1995', in Ruys et al., *Use of Force* (n. 67), 495–503 (499–500).

[194] *Keesing´s Record of World Events* (2011), 50695.

[195] *Keesing's Record of World Events* (2012), 50852; Julia Dufour and Claire Kupper, 'Groupes armés au Nord Mali: état des lieux', *Groupe de recherche et d'information sur la paix et la sécurité*, 6 July 2012, 4.

[196] Déclaration d'indépendance de l'Azawad, prononcée par le secrétaire général du MNLA Bilal Ag Achérif, Gao, 6 April 2012, available at www.mnlamov.net/component/content/article/169-declaration-dindependance-de-lazawad.html.

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the unity and territorial integrity of Mali. In this regard, it wishes to put all on guard against any temptation to proclaim any part of Mali as a sovereign State, as it will never recognise any such State.[197]

- The African Union (AU), through the chair of the Commission:

... expresse[d] AU's total rejection of the statement made by an armed group, the 'National Movement for the Liberation of Azawad (MNLA)', regarding the so-called 'independence' of 'Azawad'. [The chair] firmly condemns this announcement, which is null and of no value whatsoever. ...

The [chair] recalls the fundamental principle of the intangibility of borders inherited by the African countries at their accession to independence and reiterates AU's unwavering commitment to the national unity and territorial integrity of the Republic of Mali. He stresses that the AU and its Member States will spare no efforts to contribute to the restoration of the authority of the Republic of Mali on its entire territory ... [198]

- The Organization of the Islamic Conference (OIC) dismissed the declaration of independence, 'recalling the attachment of the OIC as a matter of principle to the territorial integrity and inalienable sovereignty of Mali over its internationally recognised borders'.[199]

States such as France,[200] China,[201] Algeria,[202] and Egypt[203] made similar declarations. A reading of them offers a vision of international law that seems somewhat remote from the concept the ICJ defended in its advisory opinion on Kosovo. The question of territorial integrity does not seem to be a purely domestic matter, which a secession would not infringe upon as such.[204] As ECOWAS mentioned, some months after the declaration of independence: 'Authority recalls its commitment to the unity and territorial integrity of Mali ...

[197] ECOWAS Commission Declaration following the declaration of independence of Northern Mali by the MLNA, M. Ouédraogo, Abuja, 6 April 2012. See also Extraordinary Summit of ECOWAS Heads of State and Government, Abidjan, 26 April 2012, evoking an 'occupied territory' by the rebels in the North of Mali (para. 17).

[198] African Union Press Statement, 6 April 2012, available at www.peaceau.org/en/.

[199] Secretary General of the Organisation of Islamic Cooperation, Ekmeleddin Ihsanoglude, 7 April 2012, available at www.oic-oci.org/.

[200] Press communiqué, 6 April 2012, available at www.diplomatie.gouv.fr/fr.

[201] Liu Weimin, Foreign Minister, 9 April 2012, available at www.gov.cn.

[202] Ahmed Ouyahia, Foreign Minister, 6 April 2012, available at www.premier-ministre.gov.dz/fr.

[203] Mohamed Amr, Minister of Foreign Affairs, 10 April 2012, available at http://mfa.gov.eg/.

[204] See, more generally, Christakis, *Le droit à l'autodétermination en dehors des situations de décolonisation* (n. 13), 177 *et seq.*; Georg Nolte, 'Secession and External Intervention', in Kohen, *Secession* (n. 180), 65–93 (68–9); John Dugard, 'The Secession of States and Their Recognition in the Wake of Kosovo', *Recueil des Cours* 357 (2013), 133–40.

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To this end, Authority demands the disarmament of all armed groups, including the MNLA.'[205] From this perspective, far from excluding it in the name of the right of the Malian people to determine their own political future without external interference, ECOWAS explicitly affirmed the possibility of an outside intervention in favour of the government authorities.

2. Justification of the French-Led Intervention

A military intervention did indeed occur in January 2013.[206] 'Operation Serval' – led by France, with the participation of Chad – precipitated the failure of the attempted secession and ensured the restoration (admittedly relative, the region still being unstable at the time of writing) of Bamako's authority over the territory of northern Mali. It is essential to point out that Paris did not invoke the fight against secession as the object of its intervention. Initially, the French minister of foreign affairs preferred to rely on the following arguments: 'Firstly, the appeal and the request made by Mali's legitimate government, so here this is a case of legitimate self-defence; and secondly, all the United Nations resolutions, which not only allow but require those countries capable of doing so to support the fight against the terrorists in this matter.'[207]

It is no easy matter to identify the legal basis for France's action with any precision, especially from an analysis of the Security Council resolutions to which reference is made: they contain no authorisation for France's use of force. In any case, France did not simply refer to the repression of secession; rather, it invoked the argument for the fight against international terrorism, combined with that of self-defence as a form of counter-intervention.[208] The French foreign minister evoked the specifics of what may generally be referred to as the 'Malian rebellion', which comprised two quite separate groups: the Tuareg independence movement, the MNLA; and forces linked to the Movement of Unity and Jihad in Western Africa (MUJWA) or to Al-Qaeda in Islamic Maghreb (AQIM), whose purpose was not to create a new state in the north, but to take control of all of Mali in relation to the expansion of political

[205] Forty-Second Ordinary Session of the ECOWAS Authority of Heads of State and Government, Yamoussoukro, 27–28 February 2013, Final Communiqué, para. 37.

[206] Karine Bannelier and Théodore Christakis, 'The Intervention of France and African Countries in Mali – 2013', in Ruys et al., *Use of Force* (n. 67), 812–27 (812–15).

[207] Laurent Fabius, Minister of Foreign Affairs (11 January 2013), available at www.basedoc.diplomatie.gouv.fr/.

[208] Raphaël van Steenberghe, 'Les interventions française et africaine au Mali au nom de la lutte armée contre le terrorisme', *Revue générale de droit international public* 118 (2014), 273–302 (276–7).

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Islam.[209] Because of these connections, Azawad was not considered the result of a 'simple' secessionist movement operating within a state but instead as intrinsically linked to international criminal activities threatening peace and security in the region.[210] And it was these criminal activities that were to justify support for the Malian government, as the French authorities expressed more clearly in a letter sent to the United Nations on the day the operation was triggered:

> France has responded today to a request for assistance from the Interim President of the Republic of Mali, Mr Dioncounda Traoré. *Mali is facing terrorist elements from the north, which are currently threatening the territorial integrity and very existence of the State and the security of its population*.[211]

The fight against secession is therefore not mentioned as an autonomous argument.[212] Likewise, it is interesting to note that the MNLA, for its part, supported Operation Serval in various declarations, promising to contribute to the 'operations against terrorism'.[213] The Tuareg movement then became allied with the French military forces in the north of the country, while waiving its declaration of independence and still claiming autonomy.

3. A Precedent in Favour of Repressing an Internal Secession?

In analysis, it is therefore difficult to consider Mali a precedent for intervening militarily to help a government put down an attempted internal secession. Even the position of ECOWAS, which seemed to move in this direction, was in fact more measured. From April 2012, the Community insisted on the international dimension of the Malian rebellion and on the criminal activity that characterised it:

> The secessionist onslaught and criminality has turned the northern parts of Mali into the most insecure zone in West Africa today. *The situation not only poses a serious threat to the unity and territorial integrity of Mali, but also, and*

[209] See, e.g., Serge Daniel, *AQMI. Al-Qaeda au Maghreb islamique. L'industrie de l'enlèvement* (Paris: Fayard 2012); cf. the MNLA's website, available at www.mnlamov.net.

[210] Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes' (n. 28), 866–7; Tancredi, 'Secession and the Use of Force' (n. 189), 83.

[211] Identical letters dated 11 January 2013 from the Permanent Representative of France to the United Nations, addressed to the Secretary-General and the President of the Security Council (UN Doc. S/1013/17) (emphasis added).

[212] See also letter dated 23 January 2013 from the Permanent Representative of the UK to the United Nations, addressed to the President of the UN Security Council (UN Doc. S/2013/58).

[213] Press releases from the MNLA: 'Communiqué N-46 – Protection des victimes civiles et respect de la frontière entre l'Azawad et Mali', Tinzawatane (Azawad), 12 January 2013; 'Communiqué N-47 – Récupérations des villes', Ougadougou, 28 January 2013; 'Mise au point concernant la situation dans l'Azawad au 28.01.2013', Ougadougou, 28 January 2013.

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> *more critically, a danger to regional and international peace and security*. In that respect, the Authority [i.e., the executive ECOWAS body] views the rebellion in the north of Mali as an aggression directed against a Member State of the Community and, as such, *an aggression against the Community*.[214]

The scheme of things evoked in this discourse moves a considerable way from that of a secession supposedly developed in a purely internal context. On the contrary, ECOWAS appeals to the idea of aggression as it derives from various instruments relating to Chapters VII and VIII of the UN Charter, albeit somewhat elliptically. Either way, the Malian president was to make an official appeal for 'ECOWAS aid in recovering the occupied territories of the North and in the fight against terrorism'.[215]

In short, it does not seem that the fight against secession as such was invoked as a legitimate ground for intervention by consent; rather, it was a combination of the fight against terrorism and counter-intervention that states set about, with the latter element depending on the point that the forces of AQMI and other terrorist movements active in northern Mali were largely of foreign origin. As was the case in relation to Yemen, Iraq, and Syria, those groups were also denounced as a threat to international peace and security. The consent of the inviting government appears to be not only the exercise of a right but also the implementation of a legal obligation to not let territory be used by irregular groups in contravention with the rights of other states. Accordingly, the arguments in support of Operation Serval seem to fit the context of positive law. It is not purely a matter of settling an internal dispute between the Bamako authorities and the Tuareg movement, but of protecting both the right of the Malian people to determine their political regime freely by protecting it from terrorist forces from abroad, and the other states' right to security.

Even so, the Malian case study exposes certain problems when invoking the argument of intervention by invitation, which will now be briefly explored.

C. *Problems Raised by the Invocation of Intervention by Invitation in the Malian Context*

Among the problems raised by the argument of intervention by invitation as it was invoked in the Malian case are limits concerning the power and status of the Malian authorities at the time of the intervention.

214 Letter dated 5 April 2012 from the President of the Commission of the Economic Community of West African States, addressed to the Secretary-General, 19 April 2012 (emphasis added).

215 Letter dated 1 September 2012, Bamako; text reproduced in *Le Monde*, 7 September 2012.

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First, it might be observed that the Bamako government no longer had substantial effective control over Malian territory at the time when the French intervention occurred – although it would be going too far to deny its legitimacy for that reason alone. The right to request outside military intervention to protect the Malian people is an exercise of the right of self-determination and we have already discussed the limited requirements of effective control in discussion of the Yemen context. Only those situations in which the consenting authority no longer had any power at all (e.g., Somalia in 1992) have been considered problematic.[216] In the case of Mali, the situation was not so extreme, with the capital and a substantial part of the country still under the control of the central government at the critical point in time.[217]

Next, we must return to the problem of whether or not the government could be considered representative in the circumstances at hand. The authorities that made the application for intervention stemmed from a coup d'état that drove former President Amadou Toumani Touré from power on 22 March 2012.[218] The military junta, styled the 'Comité national de redressement de la démocratie et de la restauration de l'État' (CNRDRE), justified their action in terms of the need to fight more effectively against the rebellion in the north of the country. Various actors called its legitimacy into question.

- The African Union reacted immediately by suspending Mali under Article 30 of its constituent instrument, which states that 'Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union'.[219]
- ECOWAS 'refused to attribute any form of legitimacy' to the CNRDRE, and suspended Mali from all its decision-making organs under the additional protocol on democracy and good governance (Articles 1 and 45(2)), and from the African Charter on Democracy, Elections, and Governance. It adopted various political, diplomatic, economic, and financial sanctions, while reiterating its 'firm commitment to support Mali in defending its territorial integrity upon the return to constitutional order'.[220]

[216] See above, section II.
[217] Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes' (n. 28), 865–6; Bannelier and Christakis, 'The Intervention of France and African Countries in Mali' (n. 206), 822–3.
[218] *Keesing's Record of World Events* (2012), 50968.
[219] See Erika de Wet, *Military Assistance on Request and the Use of Force* (Oxford: OUP 2020), 58.
[220] ECOWAS, Extraordinary Summit of ECOWAS Heads of State and Government, 27 March 2012.

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In light of these measures and their justifications, it was doubtful that the Malian government that came to power unconstitutionally would be able to express the will of the Malian population. Admittedly, the CNRDRE clearly remains a 'government' (if one reads Article 30 of the constituent instrument of the African Union) to which requests and demands are made – but such recognition does not seem to extend beyond de facto power, which can be exercised only provisionally and with limitations. It would be hard to understand how, by this logic, such a government could call on other states to support it against irregular forces.

And yet this is what happened on the ground: first, for ECOWAS, in September 2012; and then, for France, in January 2013. Of equal significance is that, far from being criticised, the military intervention conducted on this basis was largely welcomed, including by those who questioned the legitimacy of the Bamako authorities. While some states may have been reluctant to trumpet their involvement, most congratulated themselves on the launch of Operation Serval. On that same day, the ECOWAS chair thanked the 'French Government for [its] expeditious reaction aimed to stabilise the military situation in Mali'.[221] Some days later, the ECOWAS heads of state and government expressed their 'immense gratitude to France for having successfully launched operations, while observing Malian sovereignty and international legality, that contained the advance of terrorist and extremist groups'.[222] Likewise, on 25 January, the Peace and Security Council of the African Union:

> . . . expresse[d] satisfaction at the fact that the prompt and efficient assistance extended by France at the request of the Malian authorities, within the framework of Security Council resolution 2085 (2012) and article 51 of the United Nations Charter, has made it possible to block the military offensive launched by these groups.[223]

Is the legality of the French intervention founded on the consent of the Malian government? Or is it founded on Security Council Resolution 2085 (2012) and/or Article 51 of the UN Charter? Or both? What is assured is that this intervention, which is based on invitation issued by the otherwise contested authorities of Bamako, is considered to be lawful.

To better understand why states might refuse to accord any legitimacy to the government and yet consider this (illegitimate) government capable of

221 ECOWAS, Press release no. 005/2013, 11 January 2013.

222 ECOWAS, Extraordinary Session of the Authority of ECOWAS Heads of State and Government, 19 January 2013. See also Forty-Second Ordinary Session of the ECOWAS Authority of Heads of State and Government, Yamassoukro, 27–28 February 2013, para. 25.

223 Assembly/AU/Decl.3 (XX), para. 5.

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expressing the will of the Malian population when requesting military intervention from the outside, as well as thereby to evaluate the scope of this instance, it is essential to analyse in detail the Security Council's changed position in respect of Mali.

D. *The Decisive Role of the UN Security Council in the Malian Context*

The UN Security Council was particularly active in the Malian crisis.[224] By deciding on certain intricate questions with which it characterised the situation in Mali, the Security Council seemed to allow France to rely on the invitation from the Bamako authorities.[225]

Initially, it appears that the Security Council denied all parties in the civil war the right to validly represent the will of the Malian population. Characteristic of this was the following presidential declaration of 26 March 2012, by which:

> The Security Council condemns the acts initiated and carried out by mutinous troops against the democratically-elected government and demands they cease all violence and return to their barracks. The Security Council calls for the restoration of constitutional order, and the holding of elections as previously scheduled.
>
> The Security Council condemns the attacks initiated and carried out by rebel groups against Malian Government forces and calls on the rebels to cease all violence and to seek a peaceful solution through appropriate political dialogue.
>
> The Security Council emphasizes the need to uphold and respect the sovereignty, unity and territorial integrity of Mali.[226]

Accordingly, the Security Council denounced both the new authorities in Bamako and the irregular forces out of respect for Mali's territorial integrity.

In this regard, the connection between the Malian rebels and terrorist groups from abroad was rapidly established. As early as 10 April 2012, members of the Security Council were demanding 'an immediate cessation of hostilities in the north of Mali by rebel groups', and expressing their 'deep concern at the increased terrorist threat in the north of Mali due to the presence among the rebels of members of Al-Qaida in the Islamic Maghreb and extremist

[224] See Bannelier and Christakis, 'The Intervention of France and African Countries in Mali' (n. 206), 824–7.

[225] Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes' (n. 28), section 2.

[226] UN SC Pres. Statement on Peace and Security in Africa, S/PRST/2012/7, 26 March 2012. See also Security Council Press Statement on the Mali Crisis, SC/10590-AFR/2359, 22 March 2012, in which the members of the Security Council 'strongly condemn[ed] the forcible seizure of power from the democratically-elected Government of Mali by some elements of the Malian armed forces'.

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elements'.[227] In this context, the Security Council provided its resolute support for the measures adopted by ECOWAS.[228] On 18 June, it took note of ECOWAS's request for authorisation 'to ensure the protection of Malian State institutions and assist in upholding the territorial integrity of Mali and in combating terrorism'.[229] In the absence of any authority capable of issuing an invitation to intervene in the conflict, the Security Council, like the competent regional organisations, seemed to require authorisation under Chapter VII of the UN Charter to justify assistance of the 'Malian State' rather than the 'government'. Of course, it is difficult to determine whether this request was inspired only by political motives of by a genuine legal conviction. In any event, such authorisation was forthcoming on 20 December 2012, with the adoption of Resolution 2085 (2012), whereby the Security Council:

> *Reaffirming* its strong commitment to the sovereignty, unity and territorial integrity of Mali,
>
> [. . .]
>
> 2. *Demands* that Malian rebel groups cut off all ties to terrorist organizations, notably Al-Qaida in Islamic Maghreb (AQIM) and associated groups, . . .
>
> [. . .]
>
> 9. *Decides* to authorize the deployment of an African-led International Support Mission in Mali (AFISMA) for an initial period of one year, which shall take all necessary measures . . .
>
>   (b) To support the Malian authorities in recovering the areas in the north of its territory under the control of terrorist, extremist and armed groups and in reducing the threat posed by terrorist organizations, including AQIM, MUJWA and associated extremist groups, . . . [230]

At this stage, the Security Council's logic was not difficult to identify. The Malian crisis was not considered a civil war but a threat to peace in the region, because of the involvement of terrorist groups, some of which came from abroad. It was therefore because of these particular circumstances that irregular forces were called upon to relinquish their demands, including their demands for secession, as can be inferred from the reference in para. 3 of the Resolution to the territorial integrity of Mali. As for the Bamako authorities, it appears that – because it would be difficult for them to represent the will of the Malian people

227 Security Council Press Statement on the Mali Crisis, SC/10603-AFR/2370, 10 April 2012.
228 UN SC Pres. Statement on Peace and Security in Africa, S/PRST/2012/9, 4 April 2012.
229 Security Council Press Statement on Mali Crisis, SC/10676-AFR/2407, 18 June 2012.
230 UN SC Res. 2085 of 20 December 2012.

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in conformity with the principle of self-determination – they were not considered sufficiently legitimate to issue an invitation validating foreign intervention, which is why they asked the Security Council to authorise it. Alongside this, and contrary to what a reading of some of its earlier statements might suggest, ECOWAS could plainly intervene only on the basis of such authorisation. Neither the provisions of its constituent instrument nor its collective security instrument nor self-defence could apparently provide autonomous legal grounds. In other words, the Security Council seems here, in the absence of any validly issued invitation, to have reasserted its authority pursuant to Chapters VII and VIII of the UN Charter – in particular, Article 53.

However, and second, it seems that the Security Council decided an outside military intervention could indeed be conducted, without authorisation, solely on the basis of an invitation from the Malian government. It is important to know that the African forces authorised to intervene under Resolution 2085 (2013) were not ready, for operational reasons, to take action. Making the most of this situation, the forces of AQIM and their allies launched a big offensive in late 2012 and early 2013; it was then that Paris decided, in cooperation with Bamako, to intervene on the ground. It was under these circumstances that, on 10 January 2013 (i.e., on the eve of the launch of Operation Serval), the Security Council members recalled 'the urgent need to counter the increasing terrorist threat in Mali' and 'reiterate[d] their call to Member States to assist the settlement of the crisis in Mali and, in particular, to provide assistance to the Malian Defence and Security Forces in order to reduce the threat posed by terrorist organizations and associated groups'.[231]

In the context in which it was adopted, a press release of this kind could hardly be interpreted as anything other than a green light for French intervention. Legally, it appears the Security Council justified this in the name of assistance to the authorities in their fight against international terrorism. A reading of Resolution 2100 (2013), adopted on 25 April 2013, leaves little doubt about this, since the Security Council:

> . . . welcom[es] the swift action by the French forces, at the request of the transitional authorities of Mali, to stop the offensive of terrorist, extremist and armed groups towards the south of Mali and commending the efforts to restore the territorial integrity of Mali by the Malian Defence and Security Forces, with the support of French forces and the troops of the African-led International Support Mission in Mali (AFISMA).[232]

[231] Security Council Press Statement on the Mali Crisis, SC/10878-AFR/2502, 10 January 2013.
[232] UN SC Res. 2100 of 25 April 2013 (emphasis added).

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In the same Resolution, the Council reiterated its denunciation of terrorist groups and called for most rebel groups to lay down their arms while the peacekeeping operation (AFISMA) was set up, which was authorised to use force in carrying out its mandate. France itself was authorised to use force in support of the UN forces and in coordination with the UN Secretary-General, all without the legal basis of consent from the Malian government being called into question.[233]

The shifting of the position of the Security Council raises questions. In the period before the launch of Operation Serval on 10 January 2013, the Council seems to have thought that only the authorisation technique could provide a legal foundation for an outside military intervention, in light of the difficulty of relying on an invitation from the Malian authorities. After the intervention, such an invitation appears to have been considered sufficient, in consideration of the seriousness of the situation, with terrorist forces arriving at least partially from abroad. In this context, the only way of restoring a degree of coherence was to position the Bamako authorities as engaged in a normalisation process, which would suffice to enable them to validly issue an invitation in January 2013. It is important to realise that, as of 10 April 2012, a 'framework agreement providing for a series of steps for the restoration of constitutional order' had been concluded between the perpetrators of the coup d'état in Mali and the mediation of ECOWAS, which the Security Council welcomed.[234] The Council members also 'welcome[d] the appointment of a Government of National Unity in Mali' and 'expressed their support to the work of the Interim President of Mali, Dioncounda Traoré';[235] on 12 October 2012, the Security Council also '[w]elcome[d] the appointment of a Government of National Unity in Mali'.[236]

Ultimately, the Malian case study is interesting in more than one way. First, it does not challenge the IDI approach, according to which a valid intervention by invitation must respect the right of peoples to self-determination: the intervening authorities did not settle for a reference to consent provided by government authorities.[237] Like the international collective security organisations involved in the crisis, they constantly relied instead on the fight against

[233] Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes' (n. 28), section 2.2.
[234] Security Council Press Statement on the Mali Crisis, SC/10603-AFR/2370, 10 April 2012. See also Security Council Press Statement on Mali, SC/10741-AFR/2430, 10 August 2012.
[235] Security Council Press Statement on Mali, SC/10772-AFR/2443, 21 September 2012. See also Security Council Press Statement on Mali, SC/10851-AFR/2487, 11 December 2012.
[236] UN SC Res. 2071 of 12 October 2012.
[237] Bannelier and Christakis, 'The Intervention of France and African Countries in Mali' (n. 206), 827.

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international terrorism. This is a comparable scheme to that found in the case studies of Yemen, Iraq, and Syria. Once again, to the extent that it is a matter of preventing the perpetration of terrorist acts throughout the region (or even beyond), the consent given by the Malian government can be considered an implementation of its international obligation to not allow its territory to be used for ends contrary to the rights of other states.

Second, it was not the fight against secession, as such, that was evoked as direct and autonomous justification. Beyond the claims of the Tuareg minority in Mali, ties with groups explicitly listed as terrorist organisations were denounced. The fact that those groups included in their ranks elements from abroad seems to have been decisive. It is within this context that it is possible to understand the reference to respect for Mali's territorial integrity and even, in some instances, the reference to a very broadly defined concept of 'aggression'. Such factors move us far away from a situation of 'civil war', or of classical secessionist conflict, within the meaning of the IDI's Wiesbaden Resolution III.

Third, the role of the Security Council was once again decisive in the case of Mali.[238] This time – and this factor is absent in the other cases analysed so far – both rebel groups and the government authorities were denied the right to express the will of all or part of the population of the state concerned. This double accusation logically led the Security Council to accept responsibility and, in the absence of any consent that might be validly issued, to authorise an intervention itself. However, in light of the changing situation on the ground, the Security Council suddenly accepted that an invitation from the Bamako authorities, while engaged in a normalisation process, could provisionally provide a basis for the French military operation. It is therefore pragmatism, rather than formal legal logic, that characterises the Security Council's action in the Malian context – an attitude we shall see again in exploring ECOWAS's intervention in The Gambia a few years later.

V. PROTECTION OF DEMOCRACY? THE ECOWAS INTERVENTION IN THE GAMBIA

A. *The Existing Legal Framework: Democracy and Self-Determination*

As we saw at the start of the chapter, common Article 1 ICCPR and Article 1 ICESCR states that '[a]ll peoples have the right to self-determination. By virtue of that right they freely determine their political status.' Self-determination is not

[238] Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes' (n. 28), 867 *et seq*.

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envisaged here in its 'external' aspect – that is, with respect to another state – but rather 'internally', within the state itself.[239] Thus each people within a state has the right to choose its leaders. Article 1 is often connected with various other rights, such as freedom of thought or assembly, or of speech, and the right to free elections at reasonable intervals, as well as other political rights.[240] It is therefore fairly logical to associate self-determination with democracy, and it is on this basis that coups d'état or unconstitutional changes of government are increasingly condemned,[241] as just seen in the example of Mali in 2012. At the same time, it is difficult to present the protection of democracy as a legitimate ground for outside intervention. This is obvious for any unilateral military intervention conducted without authorisation from the UN Security Council or invitation issued by the local authorities.[242] Even in the event of an invitation, the lawfulness of such a military intervention may appear dubious.

The problem lies in defining what is meant by 'democracy' and in identifying those who can claim to be 'democratic' authorities. In the event of a civil war, each of the parties systematically claims to represent the will of the people, thereby denying such capacity to the other party. The very purpose of the internal struggle or debate is therefore to determine who can represent the will of the population (and how). Pursuant to the general principles set out above, international law in this respect is

[239] Edmond Jouve, *Le droit des peuples* (Paris: PUF 1986), 81 *et seq*.; James Crawford, 'Democracy and International Law', *British Yearbook of International Law* 64 (1993), 113–33 (116); Thomas Franck, 'The Emerging Right to Democratic Governance', *American Journal of International Law* 86 (1992), 46–91 (52–60).

[240] Antonio Cassese, 'The Self-Determination of Peoples', in Louis Henkin (ed.), *The International Bill of Human Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press 1981), 92–113 (154–5).

[241] Ndiva Kofele-Kale, 'Participatory Rights in Africa: A Brief Overview of an Emerging Regional Custom', *Netherlands International Law Review* 55 (2008), 233–59; Joseph Kazadi Mpiana, 'L'Union africaine face à la gestion des changements anticonstitutionnels de gouvernement', *Revue québecoise de droit international* 25 (2012), 101–41; Armel Lali, 'La perception de l'état de droit dans le droit et la pratique de l'Union africaine', in Société française pour le droit international (SFDI), *L'État de droit et le droit international* (Paris: Pedone 2009), 287–300; Romuald Likibi, *La Charte africaine pour la démocratie, les élections et la gouvernance. Analyse et commentaires* (Paris: Publibook 2012); P.J. Glen, 'Institutionalising Democracy in Africa: A Comment on the African Charter on Democracy, Elections and Governance', *African Journal of Legal Studies* 5 (2012), 149–75; Blaise Tchikaya, 'La Charte africaine de la démocratie, des élections et de la gouvernance', *Annuaire français de droit international* 55 (2009), 515–28.

[242] See Oscar Schachter, 'The Legality of Pro-Democratic Invasion', *American Journal of International Law* 78 (1984), 645–50; Michael Byers and Simon Chesterman. '"You, the People": Pro-Democratic Intervention in International Law', in Gregory H. Fox and Brad R. Roth (eds), *Democratic Governance and International Law* (Cambridge: CUP 2000), 259–92.

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generally characterised by neutrality – and this is the case, in any event, when ius contra bellum comes into play. Here, a connection must be made between the internal and external aspects of the right to self-determination: without outside interference, each people has the right to determine its own political regime, including the ability to choose its own conception of democracy and the individuals who are best able to embody it. Third states cannot therefore use, as a pretext, the supposedly democratic character of one or other party, whether they are rebels or government authorities, to interfere in this debate.[243]

Some authors have, however, called this conception into question, observing that democracy has been regularly invoked in support of interventions conducted at the invitation of governments.[244] This argument does not readily square with the discourse of intervening and third states in the three precedents so far evoked along these lines. In the case of Haiti, too, the restoration of the legitimate president who had been overthrown by a coup d'état came about only as a consequence of the Security Council's authorisation, since the consent of President Aristide was plainly not sufficient.[245] The situation in Sierra Leone was different, ECOWAS forces intervening *without* authorisation from the Security Council against a military junta that had toppled the elected government.[246] At the same time, these forces – thought to be working to maintain peace[247] – did not directly invoke the consent of the government but rather relied on self-defence, with the organisation's troops present on the spot under an agreement previously accepted by all of the parties that had supposedly been attacked by the authorities in power.[248] Lastly, in the Côte d'Ivoire, it is recognised that the dispute in 2011 between incumbent President Laurent Gbagbo and his challenger, Allassane Ouattara, over the election results led to an outside military operation that enabled the latter to come to power.[249] However, the operation was not conducted on the basis of a call from Ouattara (whom the United Nations had designated the winner of the elections), but because the Security Council adopted a resolution authorising

[243] See ICJ, *Nicaragua* (n. 10), 133, para. 263.
[244] See Lieblich, *International Law and Civil Wars* (n. 11), 209 *et seq*.
[245] Corten, *The Law against War* (n. 28.), 306–9.
[246] *Keesing's Record of World Events* (1997), 41672. See ECOWAS, Communiqué, UN Doc. S/1997/499 of 27 June 1997, paras 9 and 14.
[247] UN SC Res. 1162 of 17 April 1998; UN SC Res. 1171 of 5 June 1998.
[248] Corten, *The Law against War* (n. 29), 286–7 and 379–82. See particularly the Conakry Agreement of 23 October 1997, UN Doc. S/1997/824, 28 October 1997.
[249] Julie Dubé Gagnon, 'ECOWAS's Right to Intervene in Cote d'Ivoire to Install Alassane Ouattara as President-Elect', *Notre Dame Journal of International and Comparative Law* 3 (2013), 51–72.

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states to take all necessary measures to protect civilians affected by the conflict.[250] In short, the protection of democracy has been used only in support of another classical legal argument: Security Council authorisation, in the cases of Haiti and Côte d'Ivoire; and self-defence of the peacekeeping forces, in the case of Sierra Leone. Has this practice been called into question? This is the question that we will examine in what follows, in the context of the ECOWAS intervention in The Gambia – an intervention explicitly named 'Restore Democracy'.[251]

B. *Was the Protection of Democracy Invoked in the Gambian Context?*

The Gambia is a fine illustration of the controversies that may arise from democracy: it was a matter of making a pronouncement on the result of elections held in the country on 1 December 2016. According to the Independent Electoral Commission of The Gambia, one of the candidates, Adama Barrow, had won the most votes – more than incumbent President Yahya Jammeh.[252] But, after initially conceding defeat, the latter had had a change of heart: on 10 December, he suddenly denounced irregularities in the electoral process, refused to give up power, and instead called for new elections.[253]

This move was swiftly denounced by other African states.[254] As early as 11 December – that is, the day after Yahya Jammeh announced he was refusing to stand down – the chair of the ECOWAS Authority of Heads of State and Government reacted forcefully:

> [T]he will of the Gambian people, freely expressed in exercise of their franchise, must be respected by all without precondition. This includes President Jammeh and officials of his Government ... Our common commitment to the precepts in the Charters and Treaties of these regional, continental and global institutions are binding and prescribe consequences for non-compliance.[255]

[250] UN SC Res. 1975 of 30 March 2011.

[251] Mohamed S. Helal, 'The ECOWAS Intervention in The Gambia', in Ruys et al., *Use of Force* (n. 67), 912–32 (932).

[252] Muhammed Jay, 'The Total Final Election Results, Independent Electoral Commission of The Gambia', *Independent Electoral Commission*, 5 December 2016.

[253] 'Gambia Leader Yahya Jammeh Rejects Election Result', *BBC News*, 10 December 2016.

[254] Helal, 'The ECOWAS Intervention in the Gambia' (n. 251), 912–19.

[255] ECOWAS, 'The Chairperson of ECOWAS Speaks on the Current Political Situation in The Gambia', *ReliefWeb*, 11 December 2016, available at https://reliefweb.int/report/gambia/chairperson-ecowas-speaks-current-political-situation-gambia.

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Some days later, the ECOWAS Authority called on President Jammeh to 'accept the result of the polls and refrain from any action likely to compromise the transition and peaceful transfer of power to the President-elect', and it committed to taking the following measures:

a) To uphold the result of 1 December 2016 election in the Republic of The Gambia.
b) Guarantee the Safety and protection of the President-elect Mr. Adama Barrow.
c) The Head of States will attend the inauguration of the President-elect Adama Barrow who must be sworn in on 19 January 2017 in conformity with the Gambian constitution.

[. . .]

h) The Authority shall take all necessary measures to strictly enforce the results of the 1 December 2016 elections.[256]

In parallel, Dr Nkosazana Dlamini-Zuma, chair of the African Union Commission, reaffirmed 'the imperative need for the concerned Gambian stakeholders to strictly comply with the rule of law and respect of the will of their people',[257] while the Union's Peace and Security Council called upon 'the Government of The Gambia and all other concerned Gambian stakeholders to work together to facilitate a peaceful and orderly transfer of power to the new President of The Gambia', and stressed the 'determination of the AU to take all necessary measures, in line with the relevant AU Instruments, with a view to ensuring full respect and compliance with the will and desire expressed by the people of The Gambia on 1 December 2016'.[258] In another decision, the AU Council affirmed its 'zero tolerance policy with regard to coup d'état and unconstitutional changes of government in Africa', and specified that, 'as of 19 January 2017, President Yahya Jammeh would no longer be recognised as the legitimate Head of State of The Gambia'. That Council then threatened Yahya Jammeh with 'serious consequences in the event that his action causes any crisis that could lead to political disorder, humanitarian or human rights disaster, including loss of innocent lives and destruction of properties'. Lastly, it

[256] ECOWAS, Fiftieth Ordinary Session of the Authority of Heads of State and Government of the Economic Community of West African States (17 December 2016) (emphasis added).

[257] African Union, 'The AU Calls for a Speedy, Orderly and Peaceful Transition and Transfer of Power to the New Authorities in The Gambia', 10 December 2016, available at www.peaceau.org/en/article/the-au-calls-for-a-speedy-orderly-and-peaceful-transition-and-transfer-of-power-to-the-new-authorities-in-the-gambia.

[258] African Union Peace and Security Council, Communiqué of the Peace and Security Council on the Post-Election Situation in the Islamic Republic of The Gambia, 13 December 2016.

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commended 'ECOWAS for its principled stand with regard to the situation in The Gambia, and reaffirm[ed]s its full support to the decisions adopted by ECOWAS … including the consideration to use all necessary means to ensure the respect of the will of the people of The Gambia.'[259]

Despite these condemnations and this pressure, Yahya Jammeh still had not left office by 19 January. On that day, Adama Barrow was nevertheless solemnly sworn in as the new president in the premises of the Gambian Embassy in Dakar, Senegal.[260] Hours later, at the invitation of new President Barrow, ECOWAS forces announced its launch of Operation 'Restore Democracy', Senegalese military units crossing the boundary with The Gambia without meeting any resistance.[261] It was in this context that, after some ultimate negotiations, Jammeh left the country for Equatorial Guinea on 21 January 2017. Since that date, Adama Barrow has effectively held office as president of the Republic of The Gambia, with no further contest.

So it is both in the name of the will of the Gambian people and therefore their right to self-determination, as well as in the name of respect for democracy, that this intervention by invitation was justified – an argument that, under the circumstances, raised certain questions, as the intervening powers themselves recognised.

C. *Problems Raised by the Invocation of Intervention by Invitation in the Gambian Context*

First of all, it should be pointed out that the operation was conducted in observance of the results in a contestable Gambian electoral procedure. Even before the vote was held, organisations for the defence of human rights denounced the conditions surrounding the electoral campaign, which were said to favour the incumbent president (Yammeh).[262] ECOWAS announced

[259] African Union, 'The 647th Meeting of the AU Peace and Security Council on the Post-Election Situation in The Islamic Republic of The Gambia', 17 January 2017, available at www.peaceau.org/en/article/the-647th-meeting-of-the-au-peace-and-security-council-on-the-post-election-situation-in-the-islamic-republic-of-the-gambia.

[260] 'Adama Barrow Sworn in as Gambia's President in Senegal', *Al Jazeera*, 19 January 2017, available at www.aljazeera.com/news/2017/1/19/adama-barrow-sworn-in-as-gambias-president-in-senegal.

[261] Ruth Maclean, 'Troops Enter The Gambia after Adama Barrow is Inaugurated in Senegal', *The Guardian*, 19 January 2017, available at www.theguardian.com/world/2017/jan/19/new-gambian-leader-adama-barrow-sworn-in-at-ceremony-in-senegal.

[262] See *Human Rights Watch*, 'More Fear Than Fair: Gambia's 2016 Presidential Election', 2 November 2016, available at www.hrw.org/report/2016/11/02/more-fear-fair/gambias-2016-presidential-election.

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that it would refuse to supervise, and therefore legitimise, the process;[263] observers from the European Union were prevented from entering The Gambia.[264] Only a small contingent from the African Union was finally able to act as impartial observer.[265] As for the Gambian Electoral Commission, it denounced irregularities, determining that they did not affect the outcome of the vote.[266] It was on this basis that Yahya Jammeh seized on 'serious and unacceptable abnormalities which have reportedly transpired during the electoral process', going on to 'recommend fresh and transparent elections which will be officiated by a God-fearing and independent electoral commission'.[267] An appeal was immediately laid before the Supreme Court[268] and the National Assembly. Given the exceptional circumstances, those domestic bodies decided to formally extend the incumbent president's term of office for three months.[269]

Was it legitimate for outside actors to substitute their own assessment regarding the legality of the elections for that of a competent Gambian court of law or legislative assembly? This is the paradox of an international norm meant to protect the 'rule of law', since it is in the name of respect for Gambian law that procedures and courts instituted by that same law were ultimately called into question.[270] In this case, outside actors questioned the independence of the Supreme Court judges, who allegedly had been subjected to strong pressure from the powers that be[271] – but it may be questioned whether the judicial systems of every member state of ECOWAS, or of the African Union, and all the electoral processes within those countries

[263] African News Agency, 'ECOWAS to Boycott Gambian Presidential Elections on Thursday', *Polity*, 30 November 2016, available at www.polity.org.za/article/ecowas-to-boycott-gambian-presidential-elections-on-thursday-2016-11-30.

[264] Reuters Staff, 'EU Says Refused Access to Observe Gambia's December 1 Election', *Reuters*, 18 November 2016, available at www.reuters.com/article/us-gambia-election-idUSKBN13D29N.

[265] 'Gambia's Jammeh Loses to Adama Barrow in Shock Election Result', *BBC News*, 2 December 2016, available at www.bbc.com/news/world-africa-38183906.

[266] Jay, 'The Total Final Election Results' (n. 252).

[267] 'Gambia Leader Yahya Jammeh Rejects Election Result', *BBC News*, 10 December 2016, available at www.bbc.com/news/world-africa-38271480.

[268] Edward McAllister, 'Gambia's President Jammeh to Challenge Election Loss at Top Court', *Reuters*, 11 December 2016, available at www.reuters.com/article/us-gambia-election-idUSKBN1400LN.

[269] 'The Gambia's Yahya Jammeh's Term Extended by Parliament', *BBC News*, 18 January 2017, available at www.bbc.com/news/world-africa-38662000.

[270] Barbara Delcourt, 'L'État de droit, pierre angulaire de la coexistence pacifique en Europe?', in Cao-Huy Thuan and Alain Fenet (eds), *La coexistence, enjeu européen* (Paris: PUF 1998), 241–57 (249).

[271] 'Gambia: Jammeh Trying to Use Nigerian Lawyers to Remain in Office – Gambian Lawyers', *AfricaNews*, 13 December 2016.

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are themselves beyond reproach. This difficulty seems to plead in favour of the traditional principle of neutrality in situations of civil war or internal disorder, without prejudice to the action of the Security Council, which shall be examined below.

A second difficulty raised by Operation 'Restore Democracy' is that of the fragile – to say the least – authority of the person who issued the invitation, Adama Barrow.[272] He became president only after hastily swearing the oath in Senegalese territory.[273] It is difficult to state an opinion on the legality of this act under Gambian law, but one cannot help harbouring a few doubts[274] – particularly as another oath was later sworn on 18 February 2017, in the capital Banjul, at the national festival celebration.[275] And we might add that Adama Barrow's first political act was to consent to an outside military intervention in The Gambia. According to some sources,[276] the operation may even have begun before that consent was issued, which may legitimately cast doubt on its validity.[277]

Beyond these formal considerations, what prompts more questions in the case of Adama Barrow is his total lack of effective control at the time when he invited ECOWAS troops from Dakar to intervene. Barrow did so without controlling the tiniest parcel of Gambian territory. This plainly poses a problem with respect to the condition of effective control being exercised by the inviting authority.[278] The situation is not comparable to that which prevailed in Mali, Syria, Iraq, or even in Yemen, where President Hadi, even though driven from the capital, still held a degree of control over part of the

[272] Helal, 'The ECOWAS Intervention in the Gambia' (n. 251), 920–2.

[273] Callum Paton, 'Adama Barrow Inaugurated as President of Gambia amid Standoff with Predecessor Yahya Jammeh', *International Business Times*, 19 January 2017, available at www.ibtimes.co.uk/adama-barrow-inaugurated-president-gambia-amid-standoff-predecessor-yahya-jammeh-1602051.

[274] See also Claus Kreß and Benjamin Nußberger, 'Pro-Democratic Intervention in Current International Law: The Case of The Gambia in January 2017', *Journal on the Use of Force and International Law* 4 (2017), 239–52 (248); Sâ Benjamin Traoré and Alimata Diallo, 'De la légalité de l'intervention militaire de janvier 2017 en Gambie', *Revue belge de droit international* 52 (2017), 666–707 (675–7).

[275] Michael Oduor, 'Thousands of Gambians Flock Barrow's Inauguration and Independence Day', *Africa News*, 18 February 2017, available at www.africanews.com/2017/02/18/thousands-of-gambians-flock-barrow-s-inauguration-and-independence-day.

[276] Dionne Searcey, 'Why Democracy Prevailed in Gambia', *New York Times*, 30 January 2017.

[277] Kreß and Nußberger, 'Pro-Democratic Intervention in Current International Law' (n. 274), 251; de Wet, *Military Assistance on Request* (n. 219), 89.

[278] Georg Nolte, 'Intervention by Invitation', in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopaedia of Public International Law* (Oxford: OUP 2017), 587 (see also online edition, directed by Anne Peters, available at https://opil.ouplaw.com/home/mpil).

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territory.[279] Here, instead we are faced with an authority in exile – an exile following not a foreign intervention or occupation but purely the result of internal conflict. And as a simple opposition candidate claiming victory in the elections, Adama Barrow *never* exercised any effective control, which again separates this from the other comparable case studies. Under the circumstances, as already pointed out, custom would seem to consecrate the need to rely on Security Council authorisation, as in Somalia, Haiti, or even Côte d'Ivoire. Never has an authority devoid of any effective control been able to issue an invitation capable of forming an autonomous legal basis for outside military intervention.

In the case of The Gambia, the intervening forces implicitly admitted the weakness of the intervention by invitation argument. In its decision of 15 December 2016, ECOWAS 'Request[ed] the endorsement of the AU and the UN on all decisions taken on the matter of The Gambia'.[280] Two days later, Senegal filed a draft resolution with the Security Council, by which draft approval was to be given to the will manifested by ECOWAS to take 'all necessary means' to settle the situation in The Gambia.[281] On 13 January 2017, during a Security Council debate, Mohamed Ibn Chambas, the UN Secretary-General's Special Representative for West Africa, confirmed that 'ECOWAS intends to seek the endorsement of the African Union Peace and Security Council *and the formal approval of the Security Council* to deploy troops to the Gambia'.[282]

This position is perfectly in keeping with the terms of the appeal made by Adama Barrow himself: 'I hereby make a special appeal to ECOWAS, AU, *and the UN*, *particularly the Security Council*, to support the government and people of the Gambia in enforcing their will, restore their sovereignty and constitutional legitimacy.'[283] The invitation was made very generally to the two regional organisations, ECOWAS and the African Union, but more 'particularly' to the Security Council.[284]

It might even be argued that the invitation does not cover an action by the two regional organisations without authorisation from the UN Security Council. Even so, this constant and resolute concern for the inviting authority

[279] Traoré and Diallo, 'De la légalité de l'intervention' (n. 274), 678–80.
[280] ECOWAS, Fiftieth Ordinary Session of the Authority of Heads of State and Government of the Economic Community of West African States, 17 December 2016.
[281] Security Council Report, 'Resolution on The Gambia', 19 January 2017, available at www.securitycouncilreport.org/whatsinblue/2017/01/resolution-on-the-gambia.php.
[282] UN SC Verbatim Record, UN Doc. S/PV.7862 of 13 January 2017 (emphasis added).
[283] See Maclean, 'Troops Enter The Gambia' (n. 261) (emphasis added).
[284] See Traoré and Diallo, 'De la légalité de l'intervention' (n. 274), 675–6.

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and the invited powers to refer to the Security Council is significant: the invitation itself does not seem to be an autonomous and sufficient legal basis for intervention[285] – a position that is easy to understand in the context of customary law. It cannot readily be claimed, then, that the invocation of the restoration of democracy is sufficient to circumvent the necessity to respect the right of a people to determine their own political regime without external interference. If this had been the case, the constant reference to the requirement of the authorisation – or at least the support – of the Security Council would have been meaningless, legally speaking. The case of The Gambia therefore relates more particularly to the need to take the Council's position into account, which may also reveal why the lawfulness of this intervention has not been called into question.[286]

D. *The Decisive Role of the UN Security Council in the Gambian Context*

The UN Security Council showed itself to be particularly active in the case of The Gambia. Three key points emerge from a reading of the resolutions or declarations that it adopted during the crisis. First, the Council denied all legitimacy to President Jammeh's refusal to recognise the outcome of the elections of 1 December 2016. A statement released to the press on 10 December reads:

> [T]he members of the Security Council strongly condemned the statement by the outgoing President of the Gambia, Yahya Jammeh, on 9 December rejecting the 1 December official election results . . .
>
> They called on him to respect the choice of the sovereign people of the Gambia, as he did on 2 December 2016, and to transfer, without condition and undue delay, power to the President-elect, Adama Barrow.[287]

Accordingly, the Security Council members considered the elections transparent and that the decision of the Gambian Independent Electoral Commission was entirely legitimate. They called for compliance with the will of the Gambian people and hence, in a certain way, with the right to self-determination internally. They based their position on the regional instruments of international law adopted by ECOWAS and the African Union.

[285] *Ibid*., 681–2.
[286] Helal, 'The ECOWAS Intervention in the Gambia' (n. 251), 931.
[287] Security Council Press Statement on the Gambia Elections, SC/12616-AFR/3501, 10 December 2016.

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Second, and alongside this, the Security Council recognised Adama Barrow as the legitimate president-elect. In a presidential declaration of 21 December 2016, while reiterating its position with respect to Yahya Jammeh:

> The Security Council welcomes and is encouraged by the decisions on the political situation in the Gambia of the Fiftieth Ordinary Session of the ECOWAS Authority held in Abuja on 17 December 2016 and the decisions of the AU Peace and Security Council, at its 644th meeting held on 12 December 2016, and the African Union to *recognize Mr. Adama Barrow as President-elect of the Gambia*.[288]

This recognition was reiterated on the day Barrow was first invested in Dakar, when the Security Council adopted a resolution in which it:

> 1. *Urges* all Gambian parties and stakeholders to respect the will of the people and the outcome of the election which recognized Adama Barrow as President-elect . . . ;
> 2. *Endorses* the decisions of ECOWAS and the African Union to recognize Mr. Adama Barrow as President of the Gambia;
> 3. *Calls upon* the countries in the region and the relevant regional organisation to cooperate with President Barrow in his efforts to realize the transition of power.[289]

The Security Council therefore called on the states and organisations of the region to 'cooperate' with 'President Barrow', who was plainly considered to be an authority in a position to represent the Gambian people and express their will.[290]

Yet – and this third is a significant factor – the Security Council did not give any 'authorisation' to those states or organisations to intervene.[291] True, it 'commends', 'welcomes', and 'expresses its full support to' the action of ECOWAS and the African Union – but, in spite of the will initially expressed by Senegal,[292] no authorisation to use 'all necessary means' is to be found in the final text of the Resolution, which does not refer either to Chapter VII of the UN Charter, or to

[288] UN SC Pres. Statement on Peace Consolidation in West Africa, S/PRST/2016/19, 21 December 2016 (emphasis added).

[289] UN SC Res. 2337 of 19 January 2017. See the declaration of the Peace and Security Council of the African Union in a letter dated 13 January 2017 from the Chargé d'affaires a.i. of the Permanent Mission of Senegal to the United Nations, addressed to the President of the Security Council, UN Doc. S/2017/43, 16 January 2017.

[290] Traoré and Diallo, 'De la légalité de l'intervention' (n. 274), 677.

[291] *Ibid.*, 680–7; Helal, 'The ECOWAS Intervention in the Gambia' (n. 251), 926; Kritsiotis, 'Intervention and the Problematisation of Consent', Chapter 1 in this volume.

[292] Senegal renounced asking the Council to authorise 'necessary measures' in its draft dated 19 January 2017, UN Doc. S/2017/55.

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the existence of a threat to international peace. An examination of the debates that surrounded the adoption of this Resolution confirms that several states rejected the argument of authorisation.[293] Those states developed a narrative presenting the measures as non-coercive (under Article 52 of the UN Charter) and not as coercive measures requiring Security Council authorisation (under Article 53).[294] The Council also evoked ECOWAS's 'mediation', preferring not to categorise the military operations as such. This does not mean that military intervention was excluded, but, under such circumstances, it would be on the basis of another legal foundation rather than its own resolution that such an intervention would unfold.[295] The invitation from the president is explicitly evoked, with, for example, the United Kingdom's affirmation: '[I]t's very clear that if President Barrow asks for assistance, then that's something as the legitimate president of Gambia he's perfectly entitled to do.'[296] Thus the Security Council – or at least some of its members – followed the line taken in other instances, such as Sierra Leone in the 1990s, in which it had, without authorising them, given its blessing to military operations by ECOWAS aiming to restore power to authorities that had won the elections but been victims of a coup d'état.[297] Unlike in Sierra Leone, however, the Security Council made its pronouncement *before* the intervention in The Gambia was launched.

To conclude, it is worth underscoring a number of lessons that both diverge and converge with those of the recent practice examined above. First, the intervening states did not settle for the invitation from the president of The Gambia, particularly since his status was somewhat open to debate. This is probably why Senegal and ECOWAS insisted on the legitimacy of their objective to restore democracy – that is, to protect the internal right of the Gambian people to self-determination.

Second, at the same time, it is not certain if argument of self-determination would again be considered sufficient to justify an intervention by invitation, which can be understood both for reasons of principle (in the name of what outside powers could claim to impose their own conception of democracy) and because of the specific circumstances of the case at hand (especially the doubtful validity of the office of Adama Barrow and his complete absence of any effective control).

293 Uruguay (UN Doc. S/PV.7866, 3); Bolivia (*ibid.*); Egypt (*ibid.*, 6). See also the Russian position: Security Council Report, 'Resolution on The Gambia' (n. 281).
294 UN Doc. S/PV.7866, 19 January 2017, paras 2, 3, 6.
295 Kreß and Nußberger, 'Pro-Democratic Intervention in Current International Law' (n. 274), 244.
296 Edith M. Lederer, 'UN Adopts Resolution Backing Gambia's New President Barrow', *APnews*, 19 January 2017.
297 Corten, *The Law against War* (n. 29), 372–80.

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The connection was therefore systematically made with the support of the Security Council, which seized on the matter from the outset. As in other cases, this strategy can be explained by political considerations – especially the broad legitimacy provided by such support. But, given the terms contained in some of the discourses at which we have looked in this chapter, it cannot be excluded that the obtention of an authorisation (or at least an approval) was considered as a legal requirement. In this sense, and even if it is not exempt from certain ambiguities, I argue that this case study exposes as problematic any outside military interference in an internal conflict without the approval of the Security Council.

The Security Council adopted a somewhat ambiguous position. Declining the request for authorisation from Senegal, which would have brought the operation within the ambit of Article 53 of the Charter, the Council preferred to validate the authority of the new president of The Gambia, apparently conceiving the ECOWAS action as non-coercive, pursuant to Article 52. This avoided the creation of a (new) precedent of authorisation to use force in an internal electoral dispute, for the benefit of a decentralised action carried out by regional organisations, pursuant to Chapter VIII of the UN Charter. Perhaps even more so than in respect of Yemen, Syria, Iraq, and Mali, then, the Security Council seems, to have played a decisive part in appraising the conditions surrounding the intervention by invitation in The Gambia[298] – a role that does, however, raise a number of questions at which we will now look in the final part of the chapter.

VI. THE EXPANDING ROLE OF THE UN SECURITY COUNCIL

A. *Towards a Rationalisation of the Appraisal of the Right to Self-Determination of Peoples?*

Finally, it is submitted that practices in recent years do not challenge the IDI position, which establishes that an outside intervention in favour of a government must respect the right of the concerned people to exercise their right to self-determination. Whether in Yemen, Iraq, Syria, Mali, or The Gambia, states that have intervened on the basis of an invitation have not merely mentioned the existence of that invitation and pointed out that it was issued by an official authority of the state. There is no trace of cynical discourse, whereby it would suffice for two governments to cooperate militarily to enable one or other to help to put down an insurrection or internal challenge, while denying third states the

[298] Kreß and Nußberger, 'Pro-Democratic Intervention in Current International Law' (n. 274), 250.

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capacity to criticise them in the name of international law. On the contrary, those systematically intervening relied on additional arguments related to the right to the self-determination of the people in the state in which the intervention occurred. In the case of Yemen and Saudi Arabia, the GCC claimed to act in response to an earlier intervention by Iran because of its alleged support of the Houthi rebels. In the case of Iraq and Syria, with the Western states on one side and Russia on the other, more emphasis was placed on the fight against international terrorism. France finally invoked the same reason in the case of Mali, too. In these three instances, terrorist activities were also denounced as threats to the security of third states – a factor that definitively excludes the principle of neutrality traditionally applied in cases of purely internal conflicts. Lastly, with respect to the unique context of intervention in The Gambia, Senegal and ECOWAS claimed to be acting to restore democracy – but, given the intricate character of that ground, at the same time they called for an authorisation, or at least the backing, of the Security Council.

This brings us to the second lesson of this study: the UN Security Council played a crucial role in each of the cases examined. First, it appraised and sometimes reconfigured the objectives as they were advanced by the intervening states. In the case of Yemen, the Council did not mention the implication of Iran but emphasised the fight against international terrorism as a decisive factor. In the cases of Iraq, Syria, and Mali, this was again the objective given precedence: it was understood that the involvement of foreign elements in the terrorist groups was not unrelated to the idea of counter-intervention. In this context, the Security Council also logically discredited these groups in political terms, denying them the right to claim to represent all or part of the population of the state concerned – as was the case for ISIL and for AQIM, for example. In parallel, the Security Council also legitimised certain contested public authorities, such as President Hadi in Yemen, the Malian government that came to power by a coup d'état, or President Barrow in The Gambia. In all three cases, limited, precarious, or even non-existent effective control was evident. And, in all of the precedents examined, the argument of consent was thus evaluated, reshaped, and reinforced according to Security Council action. In this way – as it had in the past, especially in Côte d'Ivoire[299] – the Council decided on conflicting claims concerning both the interpretation of internal law and the result of the electoral process. Thus

[299] Olivier Corten and Pierre Klein, 'L'action des Nations Unies en Côte d'Ivoire: jusqu'où le Conseil de sécurité peut-il intervenir dans l'ordre juridique interne des États?', in *L'Afrique et le droit international: variations sur l'organisation internationale, Liber Amicorum Raymond Ranjeva* (Paris: Pedone 2013), 55–81.

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it is unsurprising that the intervening states systematically invoked the positions taken by the Security Council.

Backing from the Security Council for these interventions tends to both multilateralise and rationalise the interpretation of the right of peoples to self-determination.[300] It also answers criticisms of subjectivity that might be made of it: because what is the meaning of this right if it is left to be determined sovereignly and subjectively by the intervening states themselves? To measure the advance that the role of the Security Council may represent, one need only compare the different cases analysed in this chapter with that of the 2014 Russian intervention in Ukraine. In the instances in which the Security Council played a decisive role, there was very little criticism of the military interventions consented to, in Yemen, Iraq and Syria, and Mali or The Gambia. By contrast, during the Ukrainian crisis, when the Security Council was unable to act because one of its five permanent members was directly involved, the intervention drew strong criticism.[301] Russia relied on the consent of a president whom it claimed had been illegally ousted, who had fled to Moscow, and who no longer had any effective authority over any part of Ukrainian territory. Russian troops unilaterally moved into Crimea,[302] resulting in the proclamation of independence in this part of the Ukraine and its annexation by Russia. The UN General Assembly, seized by the question,[303] firmly condemned the annexation and asked states not to recognise its effects.[304] It can be readily seen in this particular case, then, that paralysis of the Security Council leaves the door open to unilateral and subjective interpretations, and that serious disagreements among states are logically apparent. This is a situation that seemed to be the norm during the Cold War period; by contrast, the other cases examined in this chapter attest to a growing trend towards objectification of the condition of respect for the right of peoples to self-determination, which frames intervention by invitation.

[300] Fox, 'Invitations to Intervene after the Cold War', Chapter 3 in this volume.

[301] Olivier Corten, 'The Russian Intervention in the Ukrainian Crisis: Was *Jus Contra Bellum* "Confirmed Rather Than Weakened"?', *Journal on the Use of Force and International Law* 2 (2015), 17–41; Enrico Milano, 'The Non-Recognition of Russia's Annexation of Crimea: Three Different Legal Approaches and One Unanswered Question', *Questions of International Law* 1 (2014), 35–55; Antonello Tancredi, 'The Russian Annexation of Crimea: Questions Relating to the Use of Force', *Questions of International Law* 1 (2014), 5–34; Christian Marxsen, 'Territorial Integrity and International Law: Its Concept and Implications for Crimea', *Heidelberg Journal of International Law* 75 (2015), 7–26.

[302] *Keesing's Record of World Events* (2014), 53188.

[303] UN Doc. S/PV.7138, 15 March 2014; UN Doc. S/2014/189, 15 March 2014.

[304] UN GA Res. 68/262 of 27 March 2014.

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However, this trend towards increased objectivity should not be overestimated. By simply making incidental pronouncements on certain legal conditions of this type of intervention, the Security Council leaves the states concerned unsupervised. It no longer proceeds, as it did in the 1990s, to authorise the use of force by defining its objectives nor does it establish any control mechanisms to contain the resulting military actions.[305] It should not be forgotten that – other than in a few cases, such as Iraq in 1990 or Libya in 2011 – the technique of authorisation has mostly been grafted onto invitation issued by the states concerned, whether in Somalia, Bosnia-Herzegovina, Haiti, Albania, Yugoslavia, Afghanistan, or Iraq (in the last three instances, after military operations were conducted unilaterally).[306] This practice had already been perceived as a form of retreat from the spirit of the UN Charter, which requires instead that the Security Council should itself undertake actions to maintain or restore international peace.[307] But in instances like those of Yemen, Iraq, Syria, Mali, or The Gambia, not only does the Security Council decline to act directly, but also it declines to authorise and supervise the actions of states. Instead, it gives them carte blanche to act in a decentralised manner, merely validating the argument of intervention with consent. In this sense, the centralisation that can be deduced from recent practice must be understood in a very relative way.[308] Moreover, it is reasonable to question the legality and the legal effects of such practice.

B. *A Lawful Practice? What Legal Effects?*

Other than in the particular instance of collective self-defence, there is often a tendency to consider consent an autonomous legal basis for military intervention. Yet the connection between consent and Security Council action appears quite obvious, if we follow the logic of the UN Charter. Thus three situations can be identified, which appear have been accepted by the UN member states.

[305] Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Oxford: Hart 2004), 265 *et seq.*; Théodore Christakis and Karine Bannelier, 'Acteur vigilant ou spectateur impuissant? Le contrôle exercé par le Conseil de sécurité sur les états autorisés à recourir à la force', *Revue belge de droit international* 39 (2004), 498–527. See also IDI, Rhodes Resolution II (n. 22), Art. 2.

[306] Lieblich, *International Law and Civil Wars* (n. 11), 30–5 and 183.

[307] Burns H. Weston, 'Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy', *American Journal of International Law* 85 (1991), 516–35 (526); Yves Le Bouthillier and Michel Morin, 'Réflexions sur la validité des opérations entreprises contre l'Iraq en regard de la Charte des Nations Unies et du droit canadien', *Canadian Yearbook of International Law* 29 (1991), 155–64.

[308] See de Wet, *Military Assistance on Request* (n. 219), 219 *et seq.*

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1. It may be that the Security Council decides to *limit* the possibilities of outside military intervention by deciding on an arms embargo, for example. A decision of the kind may exclude military action on the basis of self-defence (as in the case of Bosnia-Herzegovina, during the 1992–95 war),[309] but also on the basis of an intervention by consent (as in the case of Somalia in 2006).[310] The Security Council may also more directly require the withdrawal of foreign forces, even though they have been invited in by a state; this is how it acted in 2004, when Syrian troops were stationed in Lebanon, with the consent of the Lebanese government.[311] In such cases, it is clear that compliance with Security Council resolutions must prevail over any other possible legal justification for the use of force.
2. The Security Council may give an *authorisation* to justify intervention in states whose government or authorities no longer exercise sufficient effective control. Its action then makes the military operation lawful, independently and, as the case may be, above and beyond the invitation issued by the official representatives of the concerned state. We can place in this category a long string of peacekeeping operations conducted both with the consent of the parties and under the supervision of the Security Council, which may also, in some instances, grant UN forces on the ground authorisation to use force to perform their mission.[312] This is then a hybrid arrangement combining government consent and Security Council action, pursuant to the UN Charter.
3. As the cases analysed have demonstrated, in recent years the Security Council seems to have given precedence to a new arrangement consisting of the informal *validation* of interventions by consent to be conducted without its formal *authorisation*. The exceptional scheme of things already observed in the case of Sierra Leone in 1996 seems to be

[309] See Craig Scott, Abid Qureshi, Jasminka Kalajdzic, Francis Chang, Paul Michell and Peter Copeland, 'A Memorial for Bosnia: Framework of Legal Arguments Concerning the Lawfulness of the Maintenance of the United Nations Security Council's Arms Embargo on Bosnia and Herzegovina', *Michigan Journal of International law* 16 (2004), 1–140.

[310] Olivier Corten, 'La licéité douteuse de l'action militaire de l'Ethiopie en Somalie et ses implications sur l'argument de l'intervention consentie', *Revue générale de droit international public* 111 (2007), 513–37 (529 *et seq.*).

[311] UN SC Res. 1559 of 2 September 2004. See Christakis and Bannelier, '*Volenti non fit injuria*?' (n. 1), 131.

[312] See, e.g., UN SC Res. 836 of 4 June 1993, para. 9 (Bosnia-Herzegovina); UN SC Res. 814 of 26 March 1993, para. 4 (Somalia); UN SC Res. 1270 of 22 October 1999, para. 14 (Sierra Leone); UN SC Res. 1493 of 28 July 2003, para. 25 (DR Congo); UN SC Res. 1528 of 27 February 2004, para. 8 (Côte d'Ivoire).

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> repeating itself. It has transformed into standard practice without ever becoming the subject of any real controversy.

Accordingly, the discretionary competence conferred on the Security Council by the Charter seems to have led to a new arrangement in institutional customs.

If it is accepted that this possibility now constitutes a customary practice, what remains is to ask: what legal effects may follow in each particular case of intervention by invitation? In this respect, two hypotheses may be posited.

1. If the Security Council has validated the argument of consent prior to the triggering of an operation, then its validity cannot readily be called into question. It is hard to imagine, however fragile the argument in the abstract, that the consent of an authority should be challenged when the Security Council has clearly validated the possibility that the authority might invite a third state to intervene, whether in the name of legitimate purposes that it sets out in its resolutions or in other statements of its position.
2. Then – and here we move into the prospective domain – the question arises whether the states that intervene on the strength of an invitation should not also seek a sort of prior approval from the Security Council. The practice whereby states (such as Saudi Arabia in Yemen, the United States in Iraq, Russia in Syria, France in Mali, or Senegal in The Gambia) inform the Security Council about their actions could be an argument in favour of this.[313] But the procedural requirement set out in Article 51 of the Charter is not systematically reflected in practice with respect to intervention by invitation, with the consequence that it is not easy to claim that this is, at present, a customary norm.[314] A fortiori, care is required when it comes to asserting that the Security Council's validation might, from now on, be a substantive criterion on which the lawfulness of an intervention by consent depends. Taking into account the probable use of the right to veto in situations in which a permanent member is involved, this condition would lead to a radical restriction of the right to intervene at the invitation of a government. Such a reduction would undeniably challenge the classical presumption in favour of the legality of such an intervention – and this is why it seems premature to plead in favour of it.

[313] Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes' (n. 28), 860 *et seq*.

[314] See IDI, Rhodes Resolution II (n. 22), Art. 4(4), prescribing the notification of the request to the Secretary-General of the United Nations. See also Larissa van den Herik, 'Replicating Article 51: A Reporting Requirement for Consent-Based Use of Force?', *Heidelberg Journal of International Law* 79 (2019), 707–11.

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For these reasons, while the recent practice of intervention by invitation may cast some light on the legal context, it simultaneously raises further questions. Looking beyond positive law, it is difficult not to be mindful of the tension that persists between deeds and words – between a commonplace, hard-nosed interventionist practice and states' eagerness to explain away their actions through an appropriate discourse. Against this background, this practice also suggests that the various alternative justifications (counter-intervention, counter-terrorism, self-determination, etc.) given by the intervening states largely deprive the doctrine of non-intervention of all normative constraining effect.

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3

Invitations to Intervene after the Cold War

Towards a New Collective Model

Gregory H. Fox*

I. INTRODUCTION

The argument supporting a right to intervene at a government's request would seem straightforward. The UN Charter endows a state with a virtually absolute right to bar outside forces from entering upon its territory. But a government, as the state's agent, has broad discretion to exercise this right or not to do so – and, if not, to invite foreigners to assist in any actions the government could lawfully undertake itself. That choice is simply an example of states' general ability to consent to actions otherwise considered unlawful. Consent – so the argument goes – precludes the wrongfulness of the foreigners' presence and vitiates any violation of the state's territorial integrity.

Despite this appealing logic, few scholars believe the claim accurately describes contemporary international law.[1] The debates are legion and wide-ranging. Some address doctrinal issues, such as the disagreement about how a regime's consent to intervention operates: as conduct simply not prohibited by the primary norm against aggressive force, or as a

* I would like to thank Ewelina Sawicka, Lillian Belanger-Katzman, and Yezi Yan for outstanding research assistance. I am very grateful to Mazen Hajali for assistance with data visualisations.

[1] See the citations collected in Antonio Coco and Jean-Baptiste Maillart, 'The Conflict with Islamic State: A Critical Review of International Legal Issues', in Annyssa Bellal (ed.), *The War Report: Armed Conflict in 2014* (Oxford: OUP 2015), 388–419 (394, fn. 27); Erika de Wet, 'The Modern Practice of Intervention by Invitation in Africa and Its Implications for the Prohibition of the Use of Force', *European Journal of International Law* 26 (2016), 979–98 (992, fn. 80); Benjamin Nussberger, 'Military Strikes in Yemen in 2015: Intervention by Invitation and Self-Defence in the Course of Yemen's "Model Transitional Process"', *Journal on the Use of Force and International Law* 4 (2017), 110–60 (130, fn. 124). But see Yoram Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge: CUP 2014), 76–81 (supporting the consent theory).

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circumstance precluding wrongfulness under the secondary norm of state responsibility.[2] Others concern how the consent theory relates to cognate principles of international law. For example, the prohibition on the use of military force across borders is widely recognised as a ius cogens norm, prohibiting contrary agreements;[3] if that is correct, then – by definition – a state cannot consent to the violation of its own territorial integrity by inviting outside forces.[4] But a broad ius cogens prohibition on consensual intervention is not widely accepted,[5] and indeed the problem may be avoided altogether if one views lack of consent as an element of the primary norm against aggressive force, since then consent would not operate to set aside a purportedly absolute rule.

Another criticism drawing on a cognate doctrine concerns the interests to be furthered by an invitation. The consent theory is agnostic on the reasons why an invitation is issued and the goals to be sought by the intervening state. An internal conflict may involve a pure contest of power and not implicate any significant interests of international law apart from ending the human

[2] International Law Commission (ILC) Special Rapporteur James Crawford took the former view, arguing that the Articles on State Responsibility should not include a consent defence. 'It seems that to treat consent in advance as a circumstance precluding wrongfulness is to confuse the content of the substantive obligation with the operation of the secondary rules of responsibility, whereas to treat consent given in arrears as such a circumstance is to confuse the origins of responsibility with its implementation (mise en oeuvre)': James Crawford, *Second Report on State Responsibility*, UN Doc. A/CN.4/498, 30 April 1999, 2401st Meeting, Add.1–4. But the ILC ultimately rejected this idea and provided, in Art. 20, that consent is a circumstance precluding wrongfulness, relying on a variety of practical and theoretical arguments: ILC, *Report on the Work of Its Fifty-Third Session*, UN Doc. A/56/10, 121, Art. 20 (2001). See Federica Paddeu, *Justification and Excuse in International Law* (Cambridge: CUP 2018), 152–3. See also Florian Kriener, 'Invitation: Excluding ab Initio a Breach of Art. 2(4) UNCh or a Preclusion of Wrongfulness?', *Heidelberg Journal of International Law* 80 (2020), 643–6; Jure Vidmar, 'The Use of Force and Defences in the Law of State Responsibility', Jean Monnet Working Paper 05/15 (2015), 4–6; Cliff Farhang, 'The Notion of Consent in Part One of the Draft Articles on State Responsibility', *Leiden Journal of International Law* 27 (2014), 55–73 (69–71).

[3] See ILC, Articles on the Responsibility of States for Internationally Wrongful Acts, GAOR, 56th Sess., Suppl. 10, 43 *et seq*., Art. 26, cmt. 5, 85, UN Doc. A/56/10 (2001) (ILC Draft Articles).

[4] See Paddeu, *Justification and Excuse* (n. 2), 163–4. The United States took the position that if a treaty between the Soviet Union and Afghanistan were understood to authorise the 1979 Soviet intervention, that treaty would be void as contrary to ius cogens. See Olivier Corten, *The Law against War* (Oxford: Hart 2010, transl. by Christopher Sutcliffe), 257. The argument is more widely accepted in reference to treaties that allow consent to interventions prospectively. See Brad R. Roth, 'The Illegality of "Pro-Democratic" Invasion Pacts', in Gregory H. Fox and Brad R. Roth (eds), *Democratic Governance and International Law* (Cambridge: CUP 2000), 328–42.

[5] The ILC noted, in commentary to Art. 26 of the Articles on State Responsibility, concerning peremptory norms, that 'in applying some peremptory norms the consent of a particular State may be relevant. For example, a State may validly consent to a foreign military presence on its territory for a lawful purpose.' See ILC Draft Articles (n. 3), Art. 26, cmt. 6.

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tragedy that attends any war. But other conflicts may implicate those objectives directly. A government may be challenged by rebels tied to transnational terrorist networks.[6] Or a legitimately elected leader may be ousted from power and take up arms to regain her office.[7] Or an insurgency may challenge a regime engaged in mass human rights violations.[8] All these scenarios raise the question of whether international law should be concerned not with the simple *fact* of intervention by invitation but with the *reasons for* intervention.[9] The consent theory set out above does not take such substantive objectives into account.

A third set of critiques focus on the policy consequences of consent theory. One argues that a party to an internal conflict is most likely to seek assistance at precisely the time outside intervention in national politics is least desirable. Governments and opposition parties to an internal conflict need help when they are unable to prevail on their own. But such weakness, especially on the part of incumbent governments, evidences a deep division among citizens on fundamental questions of national policy and leadership.[10] Should the balance in such circumstances be tipped by outside forces? Or should the principle of internal self-determination protect the citizenry as a whole from intrusions on their political autonomy?[11] Relatedly, if external assistance enhances the strength of the weaker party, then the addition of foreign forces is likely to prolong the conflict.[12] Some argue that civil wars

[6] See Karine Bannelier and Theodore Christakis, 'Under the UN Security Council's Watchful Eyes: Military Intervention by Invitation in the Malian Conflict', *Leiden Journal of International Law* 26 (2013), 855–74 (866) (arguing that 'external intervention by invitation is normally legal when the purpose of the intervening state is not to settle an internal political strife in favour of the established government, but to realize other objectives, such as helping the requesting government in the fight against terrorism').

[7] See David Wippman, 'Pro-Democratic Intervention by Invitation', in Fox and Roth, *Democratic Governance* (n. 4), 293–327.

[8] See Oona A. Hathaway, Rebecca Crootof, Daniel Hessel, Julia Shu and Sarah Weiner, 'Consent Is Not Enough: Why States Must Respect the Intensity Threshold in Transnational Conflict', *University of Pennsylvania Law Review* 165 (2016), 1–47 (34) (arguing that '[just as a principal cannot delegate authority to an agent that the principal does not have, a host state cannot grant an extraterritorial state permission to act in contravention of the host state's human rights obligations').

[9] See Olivier Corten, 'Intervention by Invitation: The Expanding Role of the UN Security Council', Chapter 2 in this volume, section I.A.

[10] See de Wet, 'Modern Practice of Intervention by Invitation' (n. 1), 995.

[11] See Simone van den Driest, '"Pro-Democratic" Intervention and the Right to Political Self-Determination: The Case of Operation Iraqi Freedom', *Netherlands International Law Review* 29 (2010), 57–72.

[12] Patrick M. Regan, 'Third-Party Interventions and the Duration of Intrastate Conflicts', *Journal of Conflict Resolution* 46 (2002), 55–73.

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fought to conclusion solely among national parties are both shorter and less likely to reoccur.[13]

A final critique, cutting across all categories, is that a rule permitting consensual intervention is ripe for abuse.[14] Requests for assistance may come after the fact or, as happened during the Cold War, from groups created specifically for the purposes of issuing invitations.[15] In some conflicts, it may be difficult to tell which faction is in effective control of the state and thus, under traditional doctrine, empowered to issue an invitation.[16] A solution that relies on the extent to which one faction or another is recognised by other states only replicates the problem in another legal domain, since an intervening state will almost certainly recognise the faction issuing the invitation as the target state's legitimate government.

If there is unity in the criticism of consensual intervention – or at least the version described above – there is little in describing the actual content of contemporary international law.[17] Primary sources, state practice, and

[13] See Edward N. Luttwak, 'Give War a Chance', *Foreign Affairs* 78 (1999), 36–44; Robert Harrison Wagner, 'The Causes of Peace', in Roy Licklider (ed.), *Stopping the Killing: How Civil Wars End* (New York: New York University Press 1993), 235–68. For a critique of this view, see Monica Duffy Toft, 'Ending Civil Wars: A Case for Rebel Victory?', *International Security* 34 (2010), 7–36.

[14] Georg Nolte, 'Intervention by Invitation', in Anne Peters and Rüdiger Wolfrum (eds), *Max Planck Encyclopaedia of Public International Law* (Oxford: OUP, online edn 2010): 'The possibility of abuse has always been one of the main objections against the permissibility of invitations by governments as a justification for intervention.' The 1979 Soviet invasion of Afghanistan is one of the more notorious examples. 'The UN did not bother to question the credentials of the Afghan delegation, despite substantial evidence that the recognized (Communist) government of Afghanistan on the date of the invasion had not consented to and had in fact been overthrown by the Soviet troop presence, and the new government issuing those credentials had actually been installed by the Soviet invasion': Brad R. Roth, *Governmental Illegitimacy in International Law* (Oxford: Clarendon Press 1999), 289.

[15] An example is the invitation supposedly issued to Vietnam to intervene in Cambodia in late 1978 by the United Front for the Salvation of Kampuchea. See Gregory H. Fox, 'Vietnamese Intervention in Cambodia 1978', in Tom Ruys, Olivier Corten and Alexandra Hofer (eds), *The Use of Force in International Law: A Case-Based Approach* (Oxford: Oxford University Press 2018), 242–54.

[16] See Masoud Zamani and Majid Nikouei, 'Intervention by Invitation, Collective Self-Defence and the Enigma of Effective Control', *Chinese Journal of International Law* 16 (2017), 663–94; Brad R. Roth, 'Secessions, Coups, and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine', *Melbourne Journal of International Law* 11 (2010), 393–440.

[17] Gerhard Hafner, 'II. 10th Commission: Present Problems of the Use of Force in International Law – sub-group: Intervention by Invitation', *Annuaire de l'Institut de droit international* 73 (2009), 302–447 (304): '[T]he only matter that is undisputed is that present international law does not provide an unequivocal answer to the question of the rules governing such activities. Doctrine is divided into a wide variety of opinions on this issue, reaching from the admissibility of such intervention, to their admissibility only under certain narrowly described circumstances and to the total exclusion.' See also Ashley S. Deeks, 'Consent to the Use of Force and International Law

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scholarship on this topic have been described as 'scattered and incomplete,'[18] 'profoundly divided,'[19] 'all over the map,'[20] 'a tangle of opinions',[21] and providing 'no conclusive guidance'.[22] How is one to find coherence, for example, among:

- statements in three UN General Assembly resolutions prohibiting 'interference in civil strife in another State' and 'assisting or participating in acts of civil strife';[23]
- the UN Security Council's proclamation of 'the inherent and lawful right of every State, in the exercise of its sovereignty, to request assistance from any other State or group of States';[24] and
- the unqualified statement of the International Court of Justice (ICJ) that intervention is 'allowable at the request of the government of a State'?[25]

The lessons of recent state practice are particularly contested, and one finds authors citing the same practice to support completely opposite views of the law.[26] In 2011, the Institut de droit international (IDI) decided to revisit its 1975 Wiesbaden Resolution III, which famously forbade assistance to

Supremacy', *Harvard International Law Journal* 54 (2013), 2–60 (15): 'The limited governmental and scholarly discussion of consent to the use of force in international law has produced disagreement and imprecision.' This is not to say that all aspects of the doctrine are contested. There seems to be consensus, for example, that invitations from sub-state entities or entities whose claim to statehood is dubious cannot constitute valid consent. This appears to be the lesson of international reaction to the alleged invitation to Russia from Crimea in 2014 and the invitation from South Ossetia to Russia in 2008. See Thomas D. Grant, *Aggression against Ukraine: Territory, Responsibility, and International Law* (London: Palgrave MacMillan 2015).

[18] Heini Tuura, 'Intervention by Invitation and the Principle of Self-Determination in the Crimean Crisis', *Finnish Yearbook of International Law* 24 (2013–14), 183–226 (189).

[19] Karine Bannelier, 'Military Interventions against ISIL in Iraq, Syria and Libya and the Legal Basis of Consent', *Leiden Journal of International Law* 29 (2014), 743–75 (746).

[20] Monica Hakimi, 'The Jus ad Bellum's Regulatory Format', *American Journal of International Law* 112 (2018), 151–90 (169).

[21] Nussberger, 'Military Strikes in Yemen in 2015' (n. 1), 126.

[22] Independent International Fact-Finding Mission on the Conflict in Georgia (IFFMCG), Report, vol. II, September 2009, 278 (referring to state practice). See also Zamani and Nikouei, 'Intervention by Invitation' (n. 16), 663: 'If one ever endeavours to state one uncontroversial fact about the practice of intervention by invitation, that statement must certainly be along the lines of "everything about intervention by invitation is controversial".'

[23] UN General Assembly (UN GA) Res. 2131 (XX) of 21 December 1965, 1–2; UN GA Res. 2625 (XXV) of 24 October 1970, 1–2; UN GA Res. 36/103 of 9 December 1981, 1, Art. 1–2.

[24] UN SC Res. 387 of 31 March 1976.

[25] ICJ, *Case Concerning Military and Paramilitary Operations in and against Nicaragua* (Nicaragua v. United States of America), merits, judgment of 27 June 1986, ICJ Reports 1986, 14, para. 246.

[26] Compare, e.g., Maziar Jamnejad and Michael Wood, 'Current Legal Developments: The Principle of Non-intervention', *Leiden Journal of International Law* 22 (2009), 345–81 (378) ('It is sometimes suggested that intervention in a civil war on the side of the government and at its

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governments engaged in civil wars.[27] But divisions among IDI members effectively led to its paralysis and the new 2011 Rhodes Resolution II did not even address the permissibility of intervention in civil wars.[28]

One steps gingerly into such swirling waters. There seems little point in another effort to harmonise the small set of canonical sources that have so far defied synthesis. And an effort to find coherence among scholars – among whom disagreement abounds – seems even more futile. Instead, this chapter will focus on two aspects of consensual interventions that recent scholarship has not addressed at length. First, it will ask whether any of the various theories of consent find support in a comprehensive assessment of post-Cold War practice. To my knowledge, no effort has been made to compile all examples of consensual intervention after the end of the Cold War and examine systematically how the United Nations, regional organisations, and leading states have reacted. The discussion of this practice will rely on a new dataset compiled for this purpose.

Second, the chapter will focus particular attention on the practice of the UN Security Council. The data reveal that the Council has issued resolutions or presidential statements on an overwhelming proportion (82 per cent) of consensual interventions since 1990. Many scholars have focused on the international community's inability to agree on factual aspects of contested interventions. These include whether an invitation was in fact issued, whether the inviting party exercised effective control over a state, and whether a conflict had reached the level of a 'civil war'. But controversies over these factual predicates for a valid invitation are rendered largely irrelevant through collective determinations by the Council, which enjoys an authority to characterise legally significant facts and to distinguish between lawful and unlawful uses of force.

request is unlawful but there is little support for this view in practice') with Gabor Kajtar, 'The Use of Force against ISIL in Iraq and Syria: A Legal Battlefield', *Wisconsin International Law Journal* 34 (2017), 535–84 (560) ('[T]he view that a government can issue a valid invitation even in civil war … seems to contradict state practice').

[27] Institut de droit international (IDI), 'The Principle of Non-Intervention in Civil Wars' (Wiesbaden Resolution III), *Annuaire de l'Institut de droit international* 56 (1975), 545–9.

[28] Hafner, 'II. 10th Commission' (n. 17); Georg Nolte, 'The Resolution of the Institut de Droit International on Military Assistance on Request', *Revue Belge de Droit International* 45 (2012), 241–62 (255) ('The most notable question left open [by the 2011 Resolution] is whether military assistance can be requested by a government which is implicated in a non-international armed conflict. This is, in fact, the most important question of the topic, and the decision to exclude it from the scope of the resolution reduces its value most significantly.').

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The Council's heretofore unexamined record on consensual interventions also provides important support for this chapter's particular focus on the post-Cold War era. The view that governments cannot invite outside forces to assist in a civil war came to prominence in the mid-to-late Cold War, building on older belligerency doctrine,[29] but drawing new support from a series of General Assembly resolutions on the right to internal self-determination and two widely cited secondary sources: the IDI's 1975 Wiesbaden Resolution III and Louise Doswald-Beck's extraordinary 1986 article in the *British Yearbook of International Law*.[30] Both the IDI and, in particular, Doswald-Beck proceeded from the then widely shared (and objectively correct) observation that – as a matter of fact, not law – no international organisation – especially the Security Council – could effectively review the factual basis for claimed consensual interventions. The very reason why consensual intervention was highly problematic in practice – the polarised camps in the Cold War made a series of dubious claims of invitation to secure and further their spheres of influence – was also the reason why international organisations were paralysed and unable to react.[31] The IDI and Doswald-Beck advocated a strong prophylactic rule intended to reach the most consequential interventions (when the government feared it might be losing a civil war) and render them all unlawful, regardless of the purported justification. The need for 'objective' review by an international organisation was thereby diminished.

[29] Belligerency doctrine described three levels of domestic unrest: rebellion, insurgency, and belligerency. 'A rebellion was an uprising of limited duration and intensity which could have been successfully resolved with regular police action. Insurgency involved "the existence of an armed revolt of grave character and the incapacity, at least temporarily, of the lawful Government to maintain public order and exercise authority over all parts of the national territory"': Marko Milanovic and Vidan Hadzi-Vidanovic, 'A Taxonomy of Armed Conflict', in Nigel White and Christian Henderson (eds), *Research Handbook on International Conflict and Security Law: Jus ad Bellum, Jus in Bello and Jus Post Bellum* (Cheltenham: Edward Elgar: 2013), 256–314 (263), quoting a pre-press version of Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford: OUP 2012). A belligerency was achieved when a conflict passed a threshold indicated by a series of objective criteria: Yair M. Lotsteen, 'The Concept of Belligerency in International Law', *Military Law Review* 166 (2000), 109–41 (114). Recognition of a belligerency triggered neutrality obligation for third parties: *ibid*., 112. The doctrine is generally understood to have fallen into disuse and rendered obsolete, because no belligerency has been officially recognised since the American Civil War: Christopher J. Le Mon, 'Unilateral Intervention by Invitation in Civil Wars: The Effective Control Test Tested', *New York University Journal of International Law and Politics* 35 (2003), 741–93 (748–9).

[30] Louise Doswald-Beck, 'The Legal Validity of Military Intervention by the Invitation of the Government', *British Yearbook of International Law* 56 (1986), 189–252; IDI, Wiesbaden Resolution III (n. 27).

[31] Corten, *The Law against War* (n. 4), 301.

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But we are no longer in an era in which the Security Council and other international organisations are mere peripheral players in legal determinations on the use of force.[32] To the contrary, the Security Council now regularly addresses almost all non-international armed conflicts (NIACs), long the most prevalent form of conflict.[33] From 1990 to 2013, the Council passed resolutions on 76 per cent of all NIACs, increasing to 80 per cent for conflicts that began after 1990.[34] Further, the Council aggressively shaped the legal framework for ending and remediating NIACs by imposing a series of binding legal obligations on the conflict parties that, in some cases, deviated from existing international law.[35] Of course, the Council has remained deadlocked on Crimea and Syria, two widely discussed cases that share many attributes of superpower interventions during the Cold War. But the data show these to be a distinct minority. While the Council's reactions in the majority of cases have varied, the critical point is that, in most cases, the Council faces few political obstacles to engagement. As a result, not only has Council paralysis ended in responding to NIACs, but also the Council has become aggressive and omnipresent.

The new Council activism vastly complicates the assumptions of Cold War-era doctrine on consensual interventions. If the Council is, in theory, available to pass judgment on the legality of interventions, is the prophylactic rule advocated by the IDI and Doswald-Beck still necessary? One may well answer 'yes' if a conflict involves one or more of the five permanent members of the Council or their close allies. But the data will show that these are in a distinct minority, meaning that whatever rule exists in customary law, the Council can override it in the majority of conflicts. The utility of a rule that actually ends up governing few conflicts is certainly open to question.

Further, if the Council regularly approves certain types of request for assistance but not others, should we not only reassess a general prohibition on interventions in civil wars but also ask whether customary international law should now be understood as allowing, or even favouring, interventions to accomplish particular goals? Post-Cold War international law has coalesced

32 See Nolte, 'The Resolution of the Institut de Droit International' (n. 28), 243: 'While the Cold War types of internal conflicts often divided other states and the international community at large into different camps, post-Cold War types of conflict have often generated a common effort in their resolution.'

33 See Gregory H. Fox, Kristen Boon and Isaac Jenkins, 'The Contributions of United Nations Security Council Resolutions to the Law of Non-International Armed Conflict: New Evidence of Customary International Law', *American University Law Review* 67 (2018), 649–732.

34 *Ibid*., 663.

35 *Ibid*., 667–92.

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around a series of policy objectives unknown in the prior era. Collective action against terrorist groups and the promotion of democratic elections are two examples, both of which find support in Council practice. Has customary law, so understood, moved towards supporting interventions in furtherance of those policies?

In sum, Security Council activism in the post-Cold War era makes examining its record essential to understanding the content of international law. While this chapter will review older practice and scholarship for the purposes of understanding the various theories contending for pre-eminence, it will focus most of its attention on new Council practice and the conclusions to be drawn from aggregated data about that practice.

After first discussing in more detail the reasons for focusing exclusively on the post-Cold War era, this chapter will review the major theories on intervention by invitation (section II). After explaining the methodology used in collecting and sorting the data (section III), it will then test each of these theories by asking whether the record of Security Council reactions supports or negates each theory or does not point in either direction (sections IV–V). Finally, it will ask how the new Council practice should be seen as affecting international law (sections VI and VII): as a self-enclosed lex specialis, or as evidence of customary international law of a particularly useful kind?

II. THE STATE OF DEBATE

One can discern three critical periods in the Charter era during which doctrine on intervention by invitation evolved in tandem with the legal and political landscape of the times: (i) the mid to late-Cold War era; (ii) the post-Cold War era up to the 9/11 terror attacks; and (iii) the post-9/11 period. While this typology may be inexact at the margins, each period is readily identified with political developments that spurred legal innovations. Understanding how each doctrinal shift corresponded to these specific challenges is important, since there is a tendency in the literature to present the current lack of legal clarity as an inexplicable set of contradictions – a rift between groups of states with competing interests, or simply an unfortunate failure of political will. Each of the four major theories identified in the literature – discussed in this section and then tested against international reaction – bears a clear mark of the era in which it emerged.

Two preliminary observations are necessary. First, the four major theories described are not equal in terms of the scope of actions they encompass; rather, they are partially overlapping. The final three involve circumstances that

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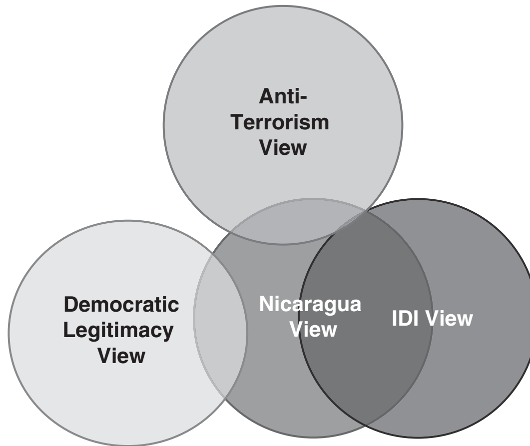

FIGURE 3.1. Interrelation between Major Theories on Consensual Intervention

represent subsets of the conditions encompassed by the first. Their relationship is illustrated in Figure 3.1.

- The first, the '*Nicaragua* view',[36] which permits invitations by governments in all cases, is the broadest theory.
- The second, the 'IDI view', addresses a subset of cases permitted by *Nicaragua* in which a government invites outside forces into a conflict that has not yet reached the level of a 'civil war'. Invitations to intervene in civil wars are thus encompassed (and permitted) by the *Nicaragua* view but not the IDI view.
- The third, the 'democratic legitimacy view', permits interventions only when requested by governments or rebel groups that have won an election verified as free and fair by credible international actors. This is best seen as another subset of the *Nicaragua* view since, as I will argue, the civil war threshold imposed by the IDI view is not consistent with the fully legitimising nature of an invitation from an elected government. However, the democratic legitimacy view covers fewer cases than the IDI view.
- Finally, the 'anti-terrorism view' also represents a small subset of the *Nicaragua* view, but that subset is different from those captured by the IDI view. The IDI view permits interventions in domestic conflicts not rising to the level of a civil war, such as riots or widespread criminal

[36] See ICJ, *Nicaragua* (n. 25).

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> activity. While the anti-terrorism view also does not legitimise intervention in a civil war either, the reason is different: the terrorist groups involved are almost always transnational in nature. Their challenge to governments does not involve the fracturing of *domestic* political opinion that is the hallmark of a civil war.

The second observation is that the descriptions of the various theories here provided are not intended to be comprehensive. Such efforts have been ably undertaken by other scholars. Instead, the descriptions are designed only to highlight the central question raised by the data on international reaction to modern invitations: do the theories' underlying assumptions and circumstances of origin remain relevant to contemporary state and international organisation practice?

A. *The Cold War Setting*

The fracturing of international law on invitations to intervene into various doctrinal and policy-driven schools did not emerge in a vacuum; rather, it followed a period during the mid-to-late Cold War in which scholars struggled to find coherence in shifting normative currents.[37] Some writers invoked pre-Charter doctrine as effectively unchanged – in particular, the rules of belligerency.[38] According to Wolfgang Friedman, writing in 1965, '[w]hat is probably still the prevailing view is that the incumbent government, but not insurgents, has the right to ask for assistance from foreign governments, at least as long as insurgents are not recognised as "belligerents" or "insurgents"'.[39] Others recognised that belligerency doctrine had fallen into desuetude and that the UN Charter pointed towards a collective response to internal conflicts through decisions of the Security Council, but they bemoaned its dysfunction.[40] Still others focused

[37] See, e.g., Ian Brownlie, *International Law and the Use of Force by States* (Oxford: OUP 1981), 326–7 ('It would be presumptuous to essay any statement of the legal position which purported to be definitive after a survey of such diverse and contradictory trends in the practice of states'); Arnold Fraleigh, 'The Algerian Revolution as a Case Study in International Law', in Richard A. Falk (ed.), *The International Law of Civil War (Foundations of the Laws of War)* (Baltimore: Johns Hopkins University Press 2010), 179–243 (179–80).

[38] See, e.g., Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, vol. 2 (London: Stevens and Sons 1968), 673–719; Lassa Oppenheim, *International Law: A Treatise*, vol. 2 (Hersch Lauterpacht ed.) (London: Longman 7th edn 1948), 209–10.

[39] Wolfgang Friedman, 'Intervention, Civil War and the Role of International Law', *Proceedings of the American Society of International Law* 59 (1965), 67–75 (72).

[40] John Norton Moore, 'The Control of Foreign Intervention in Internal Conflict', *Virginia Journal of International Law* 9 (1969), 205–342 (274) (classic belligerency doctrine 'is vague, outdated for current internal conflict, and suspect in that belligerency was never really

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primarily on the stark disconnect between prohibitions of intervention on either the government or rebel side and the avalanche of interventions practised by the competing East–West camps.[41] Finally, many found, in the recent rise of decolonisation and norms of self-determination, fresh justifications for the prohibitory approach of belligerency doctrine, but they expressed caution about their salience in the face of so much contrary state practice.[42]

The scholarship of this era was hesitant, uncertain about how to reconcile the cacophony of new and old norms and state practice that could arguably support multiple positions.[43] Many concluded their review of this unhappy situation with suggestions that law should follow wise policy and minimise the spread of violence by replicating the old belligerency rules, albeit without the futile requirement of recognition.[44]

intended as an absolute bar to participation'); Tom Farer, 'Intervention in Civil Wars: A Modest Proposal', *Columbia Law Review* 67 (1967), 266–79 (271) (classical belligerency doctrine 'is wholly out of joint with actual practice'); Schwarzenberger, *International Law as Applied by International Courts and Tribunals* (n. 38), 716 ('The impact of the Charter of the United Nations on the law of internal armed conflicts is contradictory, indirect and potential, rather than actual').

[41] Friedman, *Intervention, Civil War* (n. 39), 72 ('So deep are the political conflicts leading to intervention and counter-intervention, that in this writer's submission, the distinction between the rights of incumbent governments and of substantial movements of rebellion has lost all meaning'); Farer, *Intervention in Civil Wars* (n. 40), 273 ('The central truth of the matter is that today there are no real norms governing intervention by third parties in civil wars, and, as long as the United States insists on its right to intervene in any revolution with whatever scale of force is required to suppress it, no coherent norm for the regulation of intervention can be articulated').

[42] Fraleigh, *The Algerian Revolution* (n. 37), 10; Michael Akehurst, *A Modern Introduction to International Law* (Winchester: Allen & Unwin 4th edn 1982), 246.

[43] John Norton Moore well summarised the state of play in 1969:

> The traditional rule is said to be that it is lawful to assist a widely recognized government at its request, at least until belligerency is attained. Presumably once belligerency is attained it is lawful to aid either side if the assisting state is willing itself to become a belligerent. A competing rule first espoused by Sir William Hall at about the turn of the century, and subsequently echoed by a number of contemporary scholars, is that it is unlawful to assist either the recognized government or insurgents once an insurgency breaks out and the outcome is uncertain. Newer theories espoused by a few scholars or officials also include those proscribing all intervention absent prior United Nations authorization, proscribing tactical assistance only, and legitimating intervention for purposes of wars of national liberation, modernization, anti-colonialism, or 'socialist self-determination.' The impact of the Charter on the customary law or on these newer proposals has largely been ignored – a strange testament to the duality of the framework for appraisal of intervention.

Moore, 'The Control of Foreign Intervention in Internal Conflict' (n. 40), 245–6 (footnotes omitted).

[44] See, e.g., Akehurst, *A Modern Introduction to International Law* (n. 42), 243.

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B. *The* Nicaragua *View*

The first view I will test using Security Council practice arose during the late Cold War era. It categorically favours governmental requests for assistance over those of opposition groups.[45] This view is most closely associated with a brief passage in the ICJ's 1986 *Nicaragua* decision:

> [T]he principle of non-intervention derives from customary international law. It would certainly lose its effectiveness as a principle of law if intervention were to be justified by a mere request for assistance made by an opposition group in another State – supposing such a request to have actually been made by an opposition to the regime in Nicaragua in this instance. Indeed. It is difficult to see what would remain of the principle of non-intervention in international law if intervention *which is already allowable at the request of the government of a State*, were also to be allowed at the request of the opposition. This would permit any State to intervene at any moment in the internaı affairs of another State, whether at the request of the government or at the request of its opposition. Such a situation does not in the Court's view correspond to the present state of international law.[46]

The passage is famously cryptic and there are good reasons why its normative value might be seen as limited.[47] Yet when the Court had an opportunity to clarify the *Nicaragua* language almost twenty years later in its *Congo/Uganda*

[45] Some scholars have argued that international law emphasises the 'purpose' or 'object and effect' of an intervention, finding interventions permissible when their purpose or object is not to interfere in the self-determination of the state's population. See Corten, 'Intervention by Invitation', Chapter 2 in this volume, section I.B. I do not test this view for several reasons. First, given this chapter's focus on the Security Council, one would need to determine this view's presence or absence in Council resolutions and debates. But the Council and its members do not speak of the 'purpose' of interventions in general terms; rather, they focus on the specific objective being sought in each case. I do test for those objectives, such as supporting a government, supporting rebels, fighting terrorism, and supported democratically legitimate regimes. Second, determining the purpose of a given intervention would simply return the inquiry to these more specific purposes, since only ascertaining the specific purpose involved can answer the question of whether the intervention is intended to interfere with citizens' self-determination. Finally, the view of self-determination invoked by the purpose-based theory appears to be that of the IDI's 1975 Wiesbaden Resolution III (n. 27): complete abstention from inquiry into whether a regime inviting military assistance finds support among citizens. I argue that while this abstention view was an understandable reaction to the zero-sum logic of Cold War interventions, it has become anachronistic in an era of omnipresent information about citizens' *actual* preferences.

[46] ICJ, *Nicaragua* (n. 25), para. 246 (emphasis added).

[47] Since the United States did not seek to justify its assistance to Nicaraguan opposition groups on the basis of their having issued an invitation, the passage is clearly dicta. In addition, the

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case, it failed to do so.[48] The question in that case was whether, at certain points in time, Ugandan troops were lawfully present on Congolese territory. The Court found that, in an early period, the Democratic Republic of the Congo had failed to object to the troops' presence and thus effectively gave its consent, which it could have withdrawn at any time.[49] The Court thoroughly reviewed the record of negotiation and the agreement between the two parties, and it determined that a later modus operandi for the withdrawal of Ugandan troops did not embody consent to their continued presence. It concluded that Congo had in fact withdrawn its consent.[50] The *Congo/Uganda* opinion thus assumed the validity of a governmental invitation in the same underanalysed manner as *Nicaragua*.

The *Nicaragua* view is grounded in the idea that the ius ad bellum of UN Charter Article 2(4) and its progeny exist to secure states against coercive intrusions upon their political independence and territorial integrity. Neither, this view argues, is infringed by a consensual intervention.[51] This view is echoed in language in the General Assembly's 1970 Friendly Relations Declaration[52] and its 1974 Definition of Aggression,[53] both of which juxtapose the consensual and non-consensual presence of foreign troops, singling out

reference to a governmental invitation is simply an aside to the main point being made. Finally, because the Court was not presented with a claim of invitation, it had no need (or, apparently, inclination) to specify whether a government's right to assistance is valid in all cases or, in accordance with the IDI view, ends when the civil war threshold is reached. An invitation claim by the United States would presumably have forced the Court to specify the scope of the right more precisely.

48 ICJ, *Case Concerning Armed Activities on the Territory of the Congo* (DR Congo v. Uganda), merits, judgment of 19 December 2005, ICJ Reports 2005, 168, paras 46–7.

49 *Ibid*.

50 *Ibid*., paras 46–9, 95–106. The Court also referred to consent as a valid basis for the Ugandan presence: *ibid*., paras 113 and 149.

51 Ademola Abass, 'Consent Precluding State Responsibility: A Critical Analysis', *International and Comparative Law Quarterly* 53 (2004), 211–25 (224): 'States have the power to consent to limitations on their independence, and may surrender their independence altogether to merge with other states. Therefore, it would seem strange if a state could not consent to a less drastic curtailment of its sovereignty by releasing its right of non-intervention' (notes and internal quotes omitted). See also Dinstein, *Non-International Armed Conflicts in International Law* (n. 1), 119; Coco and Maillart, 'The Conflict with Islamic State' (n. 1), 5.

52 UN GA Res. 36/103 (n. 23), §II(d) (describing '[t]he duty of a State to refrain from any economic, political or military activity in the territory of another State without its consent').

53 GA Res 3314 (XXIX) of 14 December 1974, Art. 3(e), describing as an act of aggression '[t]he use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement'. See Hafner, 'II. 10th Commission' (n. 17), 9: '[T]his language in the Definition of Aggression obviously attests [to] the legality of the use of armed forces of a State within the territory of a foreign State provided that this use is in conformity with the latter's consent.'

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the latter as impermissible.[54] The legitimacy of consent would also seem to underlie every bilateral and multilateral status-of-forces agreement, which remain in force during civil wars, as well as UN and regional peacekeeping missions that are frequently based (at least in part) on governmental consent and which are either initially sent to states in which civil wars are ongoing or remain in place after civil wars break out.[55]

Finally, the *Nicaragua* view is arguably consistent with the general role of consent in state responsibility law as a circumstance precluding wrongfulness of state action.[56] The requirements that consent be given authoritatively by a state, that it be given freely, and that the acts in question stay within the bounds of the consent are reflected in Article 20 of the International Law Commission (ILC) Articles on State Responsibility.[57] A host of questions specific to consent to the use of force are widely debated and will be addressed in this chapter – but few argue that these principles of consent do not apply as a general matter to the use of force.[58]

Given the categorical phrasing of the General Assembly resolutions and the two ICJ decisions, the *Nicaragua* view has come to connote a blanket approval of governmental invitations and a blanket disapproval of invitations from

54 See also UN SC Res. 387 of 31 March 1976, in which the Security Council recalls 'the inherent and lawful right of every State, in the exercise of its sovereignty, to request assistance from any other State or group of States'.

55 The many UN-based missions with Chapter VII authorisations would obviously not rely on consent as their sole legal basis. But the fact that the United Nations has always sought such consent even when a Chapter VII mandate is forthcoming suggests that the organisation finds it to be legally significant. See Ian Johnstone, 'Managing Consent in Contemporary Peacekeeping Operations', *International Peacekeeping* 18 (2011), 168–82.

56 ILC Draft Articles (n. 3), Art. 20. But see Deeks, 'Consent to the Use of Force and International Law Supremacy' (n. 17), 15–16: '[I]n certain contemporary contexts, an assertion that consent may validate an otherwise unlawful use of force is at best incomplete and at worst inaccurate.'

57 ILC Draft Articles (n. 3), 72. Article 20 provides in full: 'Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.' See generally Affef Ben Mansour, 'Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Consent', in James Crawford, Alain Pellet, Simon Olleson and Kate Parlet (eds), *The Law of International Responsibility* (Oxford: OUP 2010), 439–47.

58 For example, the ILC's commentary to its Articles on State Responsibility, in addressing consent as a circumstance precluding wrongfulness, consistently uses examples of the use of force to illustrate elements of the consent defence: see ILC Draft Articles (n. 3), Art. 20, comments 5, 8, 9. See also Corten, *The Law against War* (n. 4), 250: 'During its work on State responsibility, the International Law Commission envisaged a State's consent as a circumstance precluding wrongfulness, citing by way of example cases of military interventions that had been consented to.'

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opposition groups.[59] Three doctrinal consequences would seem to follow. First, the *Nicaragua* view is incompatible with both pre-Charter belligerency doctrine and the IDI view, both of which hold that when a conflict reaches a certain intensity threshold, intervention at the request of the government is prohibited.[60] Some argue that because the Court in *Nicaragua* was concerned, first and foremost, with non-intervention doctrine, its language referred to invitations in general and not specifically to civil wars, which would have required it to address the existence, or not, of an intensity threshold. But this view is hard to square with the Court's sweeping language, not to mention its failure to limit that language in the *Congo/Uganda* case.[61] Moreover, just twelve pages earlier, the Court had found that hostilities between the contras and the Nicaraguan government amounted to a

[59] Bannelier, 'Military Interventions against ISIL' (n. 19), 27. Both Olivier Corten and Dino Kritsiotis suggest a more limited reading, arguing that, by stating intervention is 'allowable' rather than 'allowed', the Court suggested that additional conditions must be met before a government's invitation is deemed lawful. See Dino Kritsiotis, 'Intervention and the Problematisation of Consent', Chapter 1 in this volume, section IV.A.; Corten, 'Intervention by Invitation', Chapter 2 in this volume, section I.A. Could this reading render the *Nicaragua* opinion consistent with the IDI view? The claim would be that an 'allowable' invitation is 'allowed' only if a conflict has not reached the civil war threshold. This is a plausible reading but not, in my view, a persuasive one. First, if this enormously important doctrinal distinction were lurking in the *Nicaragua* language, the Court certainly would have clarified its meaning in the subsequent *Congo/Uganda* case, which it did not. Second, even if one were to accept that an 'allowable' invitation has an additional contingency, why would it not be the more obvious and widely-accepted one that an invitation must be genuine (i.e., not fictitious and come from an entity plausibly claiming to be the government)? Third, because, in an earlier portion of its opinion, the *Nicaragua* Court had found the war to be a NIAC for IHL purposes, the effect of reading the IDI view into the subsequent passage would be that the Nicaraguan government could not itself have lawfully received assistance from Cuba. The opinion is replete with references to Cuban assistance, but the Court nowhere suggests it was unlawful. Finally, the categorical nature of the *Nicaragua* holding, while frustratingly cursory, is accepted by many scholars. See, e.g., Cóman Kenny and Seán Butler, 'The Legality of "Intervention by Invitation" in Situations of R2P Violations', *New York University Journal of International Law and Politics* 51 (2018), 135–78 (140) (' Most strikingly, the Court suggested no limitations to the asserted right of a government to invite intervention'); Hafner, 'II. 10th Commission' (n. 17), 306 ('this phrase which speaks of intervention on request does not provide any limit to such activities'). It is important to note that reaching a definitive understanding of the *Nicaragua* language is not critical to my conclusions in this chapter. I use the '*Nicaragua* view' (and the other three theories of consensual intervention) as hypotheses to be tested by the data, not as authoritative descriptions of prevailing law. If one believes that the *Nicaragua* opinion is, in fact, coextensive with the IDI view, then one can simply focus on the data testing the viability of IDI.

[60] Zamani and Nikouei, 'Intervention by Invitation' (n. 16), 668: '[G]iven the ICJ's categorical denunciation of foreign aid to armed groups in conflicts of non-international character, it seems that the Nicaragua case really puts an end to the belligerency doctrine.' See also Le Mon, 'Unilateral Intervention by Invitation in Civil Wars' (n. 29), 751.

[61] Kajtar, 'The Use of Force against ISIL in Iraq and Syria' (n. 26), 560.

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NIAC.[62] It seems unlikely that the Court would have crafted the rest of its opinion without regard to its prior legal characterisation of the conflict.

Second, the *Nicaragua* view is incompatible with limitations on consent based on the argument that an inviting or invited state is pursuing an unlawful objective. Some have suggested that a request to assist in committing widespread human rights abuses would contravene the legal obligations of both states.[63] The request would be incompatible with the requesting state's obligations to its own citizens under customary and treaty-based human rights norms. For the invited state, two arguments are possible: that it would incur responsibility for assisting in the inviting state's violation of the latter's human rights obligations within its own territory; or that the invited state's own human rights obligations would apply extraterritorially.[64] Such qualitative limitations on the reach of state consent are compelling, but they would need to be grounded in sources other than the *Nicaragua* opinion itself, which contains no limitation on invitations based on the objective the invited state would seek to achieve.[65]

Third, *Nicaragua* has an uncertain relationship with norms more directly concerned with the legitimacy of inviting governments. The categorical nature of the *Nicaragua* view does not necessarily validate all invitations issued by 'the government'. The not-uncommon scenario in which competing factions claim to speak for a state during a civil war was one of the critical factors underlying the belligerency doctrine, as well as the IDI view (discussed next). The *Nicaragua* view does not itself resolve competition among different would-be governing factions, since the United States simply did not raise the question of governmental legitimacy before the ICJ nor did the Court address the issue in its brief aside. To adopt the *Nicaragua* view, then, is simply to default to an entirely separate set of norms on questions of governmental legitimacy. Much scholarship on intervention by invitation takes a significant

[62] ICJ, *Nicaragua* (n. 25), para. 219: 'The conflict between the contras' forces and those of the Government of *Nicaragua* is an armed conflict which is "not of an international character".'

[63] De Wet, 'Modern Practice of Intervention by Invitation' (n. 1), 290–1; Claus Kress, 'Major Post-Westphalian Shifts and Some Important Neo-Westphalian Hesitations in the State Practice on the International Law on the Use of Force', *Journal on the Use of Force and International Law* 1 (2014), 11–54 (26).

[64] For the requisites of aid or assistance in the commission of an internationally wrongful act, see ILC Draft Articles (n. 3), Art. 16; de Wet, 'Modern Practice of Intervention by Invitation' (n. 1), 296–308. For a discussion of extraterritorial human rights obligations in the context of a request for intervention, see Hathaway et al., 'Consent Is Not Enough' (n. 8), 21.

[65] Given that human rights law in general and the idea that an intervening state might be bound by its human rights obligations extraterritorially were both in their infancy in 1986, this omission from the *Nicaragua* opinion is hardly surprising.

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detour to discuss this question. Whether a specific theory of governmental legitimacy might apply to certain invitations is the subject of section D. But *Nicaragua* itself should be understood as agnostic on the subject.

Can one ascribe a particular worldview or historical provenance to the *Nicaragua* view? Given the opinion's extraordinary brevity, one can only speculate. But in light of (i) the ICJ's traditional aversion to advancing the law in bold leaps, (ii) the relatively new and unsettled nature in 1986 of the self-determination limitation on intervention in civil wars, and (iii) the Court's determination that the *Nicaragua* conflict constituted a NIAC, one could argue the following. The Court was addressing the permissibility of invitations by rebel groups, which it wanted to reject in no uncertain terms. How better to make clear the destabilising and unacceptably intrusive nature of invitations to rebels than to place them in stark contrast to the right of the government to invite assistance? If one assumes the Court was well aware that many NIACs during the Cold War were internationalised by assistance to rebels, one might understand its language as an effort to address rampant interventionism without departing in any significant way from existing law. The Court could well have understood the law of the time not to have absorbed the self-determination view but to have left belligerency doctrine behind. That combination would result in no extant limit on interventions based on a civil war threshold. In addition, even Louise Doswald-Beck (whose article was published in the same year as the *Nicaragua* judgment) believed that international law accorded a presumption of continuity to governments that had lost territory to rebels.[66] So a rule (such as *Nicaragua*) containing no civil war threshold might, in practice, produce results only marginally different from a situation in which a government did not lose its authority to act for the state even when rebels controlled significant portions of territory. In other words, the categorical *Nicaragua* approach might not, in fact, permit more interventions supporting governments than did existing law on recognition. Both *Nicaragua* and international law on recognition in the 1980s would continue to view a government as legitimate (and thus empowered to invite foreign forces) even when it was in conflict with a well-organised rebel force in control of substantial territory.

C. *The IDI View*

The second view involves a full prohibition of intervention in civil wars. Once a conflict becomes a 'civil war', the government joins opposition groups in being unable to invite external assistance. This view encompasses a subset of cases

66 Doswald-Beck, 'The Legal Validity of Military Intervention' (n. 30), 199.

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captured by the *Nicaragua* view by excluding those invitations by governments that *Nicaragua* would permit. This view was most famously articulated in the IDI's 1975 Wiesbaden Resolution III: 'Third States shall refrain from giving assistance to parties to a civil war which is being fought in the territory of another State.'[67] I shall refer to this as the 'IDI view'.

While the IDI view shared much in common with traditional belligerency doctrine, which required third-party neutrality when rebels reached a certain level of organisation and territorial control, it emerged from a new set of concerns. Coming to fruition in the mid-Cold War period, the IDI view arose in reaction to the superpowers' use of invitations as a pretext under which to maintain or expand their spheres of influence in the developing world. The conflicts in which 'invitations' were cited as justification were seen by the superpowers as zero-sum contests: either an allied government was threatened by opponents seen as sympathetic to the other superpower, in which case the country might be 'lost', or a government allied with the other side was threatened by ideologically sympathetic opponents, in which case the country might be 'gained'. In either case, the niceties of an invitation to defend the government were decidedly secondary to the perceived need to intervene and 'save' the state for one's own side.[68] Invitations not infrequently came from groups not actually exercising any governmental authority.[69] Some such groups were created for the specific purpose of issuing an invitation.[70] Some issued invitations after the fact.[71] Some invitations were coerced.[72] The point of creating the appearance of consent was to align the purpose of the intervention with 'the will of the people'. External support thus became not a break with legitimate government but support for the true 'legitimate authority', whose claim to a popular mandate was somehow superior to that of the regime being ousted. Of course, such claims of legitimacy were purely instrumental.

67 IDI, Wiesbaden Resolution III (n. 27), Art. 2(1).

68 Roger Fisher's 1968 summary of the US approach encapsulates this view. 'Simply to refrain from intervention ourselves is not likely to produce restraint in other governments. Our bad example will surely be followed; our good example, by itself, will not': Roger Fisher, 'Intervention: Three Problems of Law and Policy', in Richard A. Falk (ed.), *The Vietnam War and International Law*, vol. 1 (Princeton, NJ: Princeton University Press 1968), 135–50 (140).

69 See Nabil Hajjami, 'The Intervention of the United States and other Eastern Caribbean States in Grenada – 1983', in Ruys et al., *The Use of Force in International Law* (n. 15), 385–94 (385).

70 See Fox, 'Vietnamese Intervention in Cambodia 1978' (n. 15).

71 See Georg Nolte and Janina Barkholdt, 'The Soviet Intervention in Afghanistan – 1979–1980', in Ruys et al., *The Use of Force in International Law* (n. 15), 297–305 (301); Corten, *The Law against War* (n. 4), 268 (Kadar government in Hungary said to have requested 1956 Soviet intervention 'was formed *after* the beginning of the military operation, which explains why the argument was not accepted in the UN', emphasis original).

72 Corten, *The Law against War* (n. 4), 269–70 (discussing the 1968 Czech interventions).

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Given the zero-sum terms in which the Cold War protagonists viewed internal conflicts, as well as the lengths they were willing to go to ensure favourable outcomes, a rule that permitted interventions at the invitation of the government was doomed to ineffectiveness. Requirements of effective control and issuance by appropriate authorities simply led to the elaborate fictions noted above.[73] Continuing to permit consensual interventions in those circumstances would end up undermining a value it purported to protect: a 'legitimate' government's freedom to control the presence of foreign troops on its territory. What was needed was a rule that prohibited interventions by invitation once it was clear that civil authority in a state had broken down or was imminently threatened – that is, when the Cold War camp aligned with that authority was most likely to intervene.

The rise of the right to self-determination in the late 1950s – culminating in its codification in common Art. 1 of the United Nations' International Covenants on Civil and Political Rights (ICCPR), and on Economic, Social, and Cultural Rights (ICESCR) in 1966 – provided an important doctrinal foundation for this view.[74] First and foremost, self-determination was the legal vehicle facilitating decolonisation. But, in the view of newly independent states (and many others), external independence was hardly adequate to protect autonomous political decision-making. Continued interference by former colonial powers and Cold War antagonists deprived citizens of the ability to choose their own political direction. That choice might be manifest in the relatively orderly conduct

[73] See Doswald-Beck, 'The Legal Validity of Military Intervention' (n. 30), 213: 'Instances of intervention where there is serious doubt as to both the existence of an invitation and the legal capacity of the allegedly inviting regime to request military aid are those in Hungary 1956, the Dominican Republic 1965, Afghanistan 1979 and Grenada 1983.'

[74] International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 Art. 1(1) ('All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'); International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3, Art. 1(1) (same). For collected citations to scholars supporting a prohibition on intervention based on self-determination, see Coco and Maillart, 'The Conflict with Islamic State' (n. 1), 394; Erika de Wet, 'Complicity in Violations of Human Rights and Humanitarian Law by Incumbent Governments through Direct Military Assistance on Request', *International and Comparative Law Quarterly* 67 (2018), 287–313 (300, fn. 80); Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes' (n. 6), 862; Bannelier, 'Military Interventions against ISIL' (n. 19), 747. Interestingly, the IDI Resolution itself did not mention self-determination as goal to be furthered by non-intervention; rather, it focused on the metastasising effect of intervention to assist one civil war party, which 'often leads in practice to interference for the benefit of the opposite party'. See IDI, Wiesbaden Resolution III (n. 27).

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of elections or in the violent outcome of a civil war. However citizens manifested their choice, it was theirs to make. What, after all, is the point of joining the ranks of autonomous states if the most fundamental act of sovereignty – choosing the national leadership – is influenced or indeed fully determined by outsiders?

It is important to emphasise that the IDI view protected the *opportunity* for national choice of regimes rather than any actual choice. The idea that non-democratic means of choosing a government might nonetheless represent a legitimate choice by citizens sits uneasily with international law's contemporary emphasis on free and fair elections. But the argument by proponents of the IDI view stressed 'the absence of outside interference rather than the quality of internal government'.[75]

The self-determination rationale for prohibiting assistance to governments in civil wars also created a useful symmetry with the wholly non-controversial prohibition of assisting rebel groups: 'Once a considerable [number] of people starts a civil rebellion in an attempt to change its political status, intervening from the outside on the government's side would mean meddling in that State's internal affairs as much as helping the rebels.'[76]

But not all instances of unrest are manifestations of discontent with an incumbent government. Riots, other kinds of low-level disturbances, or widespread criminal activity do not necessarily indicate a fundamental rift in the body politic. Proponents of the IDI view thus mirrored belligerency doctrine – which they acknowledged had fallen into desuetude[77] – by imposing a threshold of a civil war.[78] The Wiesbaden Resolution III itself provided that its prohibition did not apply to 'local disorders or riots' but rather required armed conflict not of an international character for control of the state.[79]

75 Doswald-Beck, 'The Legal Validity of Military Intervention' (n. 30), 207.

76 Coco and Maillart, 'The Conflict with Islamic State' (n. 1), 394.

77 Doswald-Beck, 'The Legal Validity of Military Intervention' (n. 30), 197 (likely reason for lack of belligerency recognition 'is the replacement of the doctrine of belligerency in modern international law by the doctrine of non-intervention in the internal affairs of States'). See also Corten, *The Law against War* (n. 4), 260 (belligerency doctrine 'has not been applied in practice since the UN Charter was adopted').

78 Christine Gray, *International Law and the Use of Force* (Cambridge: CUP 4th edn 2018), 85.

79 IDI, Wiesbaden Resolution III (n. 27), Art. 1(2)(a) and (b). This could take the form of opposition between either 'the established government and one or more insurgent movements whose aim is to overthrow the government or the political, economic or social order of the State, or to achieve secession or self-government for any part of that State,' or 'two or more groups which in the absence of any established government contend with one another for the control of the State'.

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Once that level of organised and sustained violence was reached, the government lost its capacity to invite outside forces.[80] Stated another way, up to the point of civil war, a government could validly represent the state externally for purposes of issuing an invitation; past that point, the interests of the government and the interests of the people were deemed to be presumptively at odds. While a government generally enjoys a presumption of continued legitimacy even when its effective control is diminished, once a civil war commences, the government loses its ability to subordinate the interest of (again potentially) a majority of its people to its own interest in survival.[81]

The genesis for the self-determination rationale lay in a series of General Assembly resolutions passed between 1965 and 1981.[82] Each of these resolutions articulated a prohibition of intervention in states' internal affairs, including interference in 'civil strife'.[83] Each also grounded this prohibition in every state's 'inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State'. The Friendly Relations Declaration of 1970 most famously linked these non-interference principles to the right of self-determination: 'By virtue of the principle of equal rights and self-determination of peoples enshrined in the Chapter of the UN, all peoples have the right to determine, without external interference, their political status.'[84]

The Wiesbaden Resolution III – in opaque, but hardly obscure, language – also cited pervasive Cold War realities as justification: the zero-sum way in

80 Zamani and Nikouei, 'Intervention by Invitation' (n. 16), 677: '[I]f the privileges of a government really flow from its territorial control, then it is only reasonable to expect the loss of such privileges once a government's control is eradicated.'

81 Hafner, 'II. 10th Commission' (n. 17), 336: 'Since the right to self-determination is a right appertaining to the people the State cannot dispose of it by its consent to military assistance.'

82 Some authors also cite supportive statements by France and the United Kingdom. See Declaration of the President of France on the Occasion of the Sixteenth Conference of Heads of States of France and Africa, La Baule, 19–21 June 1990 ('[N]otre rôle à nous, pays étranger, fut-il ami, n'est pas d'intervenir dans les conflits intérieurs. Dans ce cas là, la France, en accord avec les dirigeants, veillera à protéger ses concitoyens, ses ressortissants; mais elle n'entend pas arbitrer les conflits'); Foreign Policy Document No. 148, 57 *British Yearbook of International Law* 57 (1986), 614–20 (616), Par. II.7 ('[A]ny form of interference or assistance is prohibited (except possibly of a humanitarian kind) when a civil war is taking place and control of the State's territory is divided between warring parties. But it is widely accepted that outside interference in favour of one party to the struggle permits counter-intervention on behalf of the other, as happened in the Spanish Civil War and, more recently, in Angola'). Both statements are cited by Corten, *The Law against War* (n. 4), 306, fn. 377 (France), 290 (the United Kingdom).

83 UN GA Res. 2131 (XX) of 21 December 1965, Arts 1 and 2; UN GA Res. 36/103 (n. 23); UN GA Res. 2625 (XXV) of 24 October 1970.

84 *Ibid*.

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which the superpowers viewed civil wars and the reality that intervention on one side inevitably led to counter-intervention on the other.[85] While the IDI's members were far from unanimous and Special Rapporteur Dietrich Schindler expressed doubt that the Resolution accurately reflected settled law,[86] it has acquired a semi-authoritative status. The IDI view also found resonance in a widely cited report, commissioned by the European Union, of the Independent International Fact-Finding Mission on the Conflict in Georgia (IFFMCG). After reviewing the canonical sources and acknowledging their uncertainty, the report articulated a 'negative equality' principle that parallels the IDI view: '[A] military intervention by a third state in a state torn by civil war will always remain an illegal use of force, which cannot be justified by an invitation.'[87] Like Cold War-era sources, the IFFMCG justifies its position as a response to self-interested interventions. Negative equality, it asserts, 'removes the pretext of "invitation" relied on by third states in order to camouflage interventions motivated by their own policy objectives' and 'relieves lawyers of the difficult task of identifying and proving a valid invitation'.[88]

D. *The Democratic Legitimacy View*

The third theory posits that principles of democratic legitimacy should play a limited, but significant, role in evaluating the lawfulness of invitations.[89] The theory is limited because it is restricted to cases in which one party (usually the opposition) claims an electoral mandate to govern but is prevented from taking office or is ousted from office. The theory is nonetheless significant because traditional international law emphatically rejected democratic legitimacy criteria in favour of the effective control doctrine in evaluating a

[85] IDI, Wiesbaden Resolution III (n. 27), 1: '[A]ny civil war may affect the interests of other States and may therefore result in an international conflict if no provision is made for very stringent obligations of non-intervention'; '[T]he violation of the principle of non-intervention for the benefit of a party to a civil war often leads in practice to interference for the benefit of the opposite party.'

[86] See Nolte, 'The Resolution of the Institut de Droit International' (n. 28), 242–3. The vote on the 1975 Resolution was sixteen in favour, six against, and sixteen abstaining: Hafner, 'II. 10th Commission' (n. 17), 7, fn. 11.

[87] IFFMCG, *Report* (n. 22), 278. The Report cites the IDI Resolution in support of this principle: *ibid.*

[88] *Ibid.*, 279.

[89] See generally David Wippman, 'Pro-Democratic Intervention', in Marc Weller (ed.), *The Oxford Handbook on the Use of Force in International Law* (Oxford: OUP 2015), 797–815 (805).

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regime's capacity to issue invitations.[90] The new theory does precisely the opposite.

Advocates of the democratic legitimacy approach – and they are few – ground their claim in the pervasiveness of democratic principles in international law after the end of the Cold War. Three trends are particularly relevant. The first is the pervasiveness of election monitoring. As Susan Hyde reports, as of 2011, '80% of all national elections are now monitored' by international observers.[91] The chances that any given regime's claim to democratic legitimacy can be empirically validated are thus substantially higher than they were in the Cold War period. The second is the modest, but real, impact that principles of democratic legitimacy have had on state practice in the recognition of states and of governments.[92] Regional organisations such as the Organization of American States (OAS), the European Union, the African Union, the Southern Common Market (Mercado Común del Sur, or Mercosur), and the Economic Community of West African States (ECOWAS) have established 'democracy protection' mechanisms that permit the collective non-recognition of regimes that depose or otherwise interrupt elected governments.[93]

These regional mechanisms complement election monitoring in two ways. First, they seek prospectively to ensure the stability of elected governments after they take office by threatening to sanction anti-democratic actors who undermine or overthrow those governments.[94] In other words, they address anti-democratic events well beyond the election itself. Second, they provide collective judgments on when democratic

90 Roth, *Governmental Illegitimacy* (n. 14), 289.

91 Susan D. Hyde, 'Catch Us If You Can: Election Monitoring and International Norm Diffusion', *American Journal of Political Science* 55 (2011) 356–69 (356). The figure was somewhat higher (albeit during a slightly different period) for newly democratic states. See Christina Binder, 'Two Decades of International Electoral Support: Challenges and Added Value', *Max Planck Yearbook of United Nations Law* 13 (2009), 213–46 (214): 'Between 1987 and 2002, observers were present for 86 per cent of the national elections in 95 newly democratic or semi-authoritarian regimes.'

92 See generally Sean D. Murphy, 'Democratic Legitimacy and the Recognition of States and Governments', in Gregory H. Fox and Brad R. Roth (eds), *Democratic Governance and International Law* (Cambridge: CUP 2000), 123–54.

93 See Patrick J. Glen, 'Institutionalizing Democracy in Africa: A Comment on the African Charter on Democracy, Elections and Governance', *African Journal of Legal Studies* 5 (2012), 119–46; Thomas Legler and Thomas Kwasi Tieku, 'What Difference Can a Path Make? Regional Democracy Promotion Regimes in the Americas and Africa', *Democratization* 17 (2010), 465–91; Gregory H. Fox, 'Democracy, Right to, International Protection', in Peters and Wolfrum, *Max Planck Encyclopaedia*, online edn (n. 14).

94 See Jacob Wobig, 'Defending Democracy with International Law: Preventing Coup Attempts with Democracy Clauses', *Democratization* 22 (2015), 631–54.

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governance has been interrupted. The question of when a regime, once elected, loses its 'democratic' character has remained highly controversial.[95] Military coups are obvious cases, but what of suspending civil liberties, removing judges, dissolving the legislature or closing opposition media outlets? If international law is now expressing a preference for 'democratic' governments, then whether one characterises any or all of these actions as 'non-democratic' takes on great significance. The regional regimes avoid the cacophony of individual states answering these questions by providing for collective determinations, undertaken by bodies such as the African Union Peace and Security Council or the OAS Permanent Council.[96] Just as election monitoring is intended to move the question of a new government's entitlement to hold power from the domestic to the international realm, the democracy protection regimes similarly internationalise the question of an elected regime's *ongoing* democratic bona fides.

The third trend underlying the democratic legitimacy view is the practice of UN-sponsored post-conflict missions to states emerging from NIACs, which have consistently emphasised the importance of elections, human rights, and other democratic principles in the new institutions they help to establish.[97] The Security Council has unanimously approved most of these missions.

This ascension of democratic legitimacy criteria inevitably leads to the following question: why should the legitimacy of an elected regime not include a capacity to invite foreign forces to uphold an electoral

[95] In the case of Venezuela, for example, it has been argued that, despite Presidents Chavez and Maduro being elected by substantial majorities, the government has 'dismantled all democratic institutions': Diego A. Zambrano, 'The Constitutional Path to Dictatorship in Venezuela', *Lawfare*, 8 March 2019, available at www.lawfareblog.com/constitutional-path-dictatorship-venezuela.

[96] The African Charter on Democracy, Elections and Governance provides a list of 'illegal means of accessing or maintaining power' that constitute an 'an unconstitutional change of government': African Charter on Democracy, Elections and Good Governance, 30 January 2007, available at www.un.org/democracyfund/Docs/AfricanCharterDemocracy.pdf, Art. 23. When the Peace and Security Council finds that there has been an unconstitutional change of government, it 'shall suspend the said State Party from the exercise of its right to participate in the activities of the Union': *ibid*. Art. 25(1). The Inter-American Democratic Charter refers to an 'unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state': Inter-American Democratic Charter, 11 September 2001, OAS Doc. OEA/SerP/AG/Res.1,40 I.L.M. 1289 (2001), Art. 20. When the OAS General Assembly 'determines that there has been an unconstitutional interruption of the democratic order of a member state, and that diplomatic initiatives have failed, the special session shall take the decision to suspend said member state from the exercise of its right to participate in the OAS': *ibid*. Art. 21.

[97] See Gregory H. Fox, *Humanitarian Occupation* (Cambridge: CUP 2008), 52–8.

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outcome?[98] If the effective control principle was challenged in other contexts, why not here? Sceptics of the democratic legitimacy approach are probably correct that these trends do not supersede some, or even all, competing values in evaluating invitations to intervene.[99] Glaring failures to challenge coups in cases such as Egypt (2013) or Thailand (2014), as well as the recent 'democratic recession', are common critiques. But democracy is a sufficiently significant presence in Security Council practices, in particular, to justify their empirical study.

The specific role accorded to democratic legitimacy depends on the nature of each case and how one understands the reach of the 'democratic entitlement' in international law more broadly.[100] There may be interventions in which democratic principles play no role whatever, such as where both an incumbent regime and opposition groups lack an electoral mandate, and the opposition group makes no promise of democracy once in power. From that 'democratic vacuum', one can imagine a continuum of increasingly well-grounded claims of democratic legitimacy on which an invitation to intervene might be based:

(i) one side in a conflict was elected at some point in the past without international monitors;
(ii) one side was elected recently, with international monitors certifying the process as free and fair; and
(iii) not only did one side win an internationally monitored election, but also international organisations – perhaps including the Security Council – affirmed their support for that side as the legitimate government.

[98] As Brad Roth put it, '[a]s the norm of popular sovereignty becomes more fully elaborated in the international system, one would expect an assessment of the legality of an invited intervention (along with the associated recognition decision) to turn expressly on an empirical evaluation of the representativeness of the regime soliciting foreign assistance, as compared to the representativeness of its opponent': Roth, *Governmental Illegitimacy* (n. 14), 289.

[99] Corten, *The Law against War* (n. 4), 36; de Wet, 'Modern Practice of Intervention by Invitation' (n. 1), 983–90; Mohamed Helal, 'The ECOWAS Intervention in The Gambia – 2017', The Ohio State University Moritz College of Law Public Law and Legal Theory Working Paper No. 414 (2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3046628, 12.

[100] This phrase was famously coined by Thomas Franck, 'The Emerging Right to Democratic Governance', *American Journal of International Law* 86 (1992), 46–91. For a contemporary assessment of Franck's article, see the recent collection of essays in the 'Symposium on Thomas Franck's "Emerging Right to Democratic Governance"', *AJIL Unbound* 112 (2018), 64–93.

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Which of these scenarios should qualify as validating an invitation because it furthers the democratic legitimacy view?

In addition, the question of *when* a government may issue an invitation is separate from the question of *who* qualifies as the government of a state for the purposes of issuing an invitation. Democratic legitimacy criteria clearly answer the latter question but not necessarily the former. The questions of 'who' and 'when' could interact in several different ways. In each instance, let us assume the paradigmatic case of an elected regime ousted in a military coup. That regime then takes up arms to regain power. The conflict then becomes a civil war. Therefore, the regime invites in foreign forces.

First, the law could contain a civil war intensity threshold but (unlike under the IDI view) find it satisfied by the electoral mandate. In other words, the electoral mandate resolves the question of whether the state is actually divided over its future leadership, which was the basis for the IDI/self-determination rule of abstention during civil wars. This approach would thus conclude that electoral mandate both qualifies the regime as the legitimate government and endows it with authority to invite foreign support, despite the conflict having crossed the civil war threshold.

Second, the democratic legitimacy view, paired with the *Nicaragua* view, would also permit assistance to the ousted elected regime. This is because no intensity threshold would be imposed, thus making the existence of a civil war irrelevant to the validity of the invitation. The democratic legitimacy view would designate the ousted group as 'the government' for the purposes of issuing an invitation, despite it not exercising actual power.

Third, the elected, but ousted, group would qualify as the 'government' but, pursuant to the IDI view, still not be permitted to issue an invitation. This view would emphasise that internal self-determination is not equivalent to democratic choice and instead functions as a shield for states to resolve their internal disputes by any and all means, free from outside influence. That this particular dispute was resolved by the forceful removal of an elected regime is of no consequence.

Any one of these modes of integrating democracy criteria is plausible. One might look for guidance in the few cases in which they have been invoked – namely, the ECOWAS interventions in Liberia in 1992, the ECOWAS intervention in Sierra Leone in 1998, and the threatened ECOWAS intervention in

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The Gambia in 2017.[101] But these cases are so factually distinct from one another that one cannot imply a common legal template for the use of a democracy justification. In Liberia in 1992, besieged President Samuel Doe consented to the ECOWAS intervention in the midst of a NIAC, but his democratic bona fides were highly questionable.[102] In Sierra Leone in 1998, the Security Council praised the ECOWAS intervention that restored elected President Ahmed Tejan Kabbah to power.[103] A NIAC was in progress at the time of the intervention, and the Council had previously denounced a military coup that deposed the elected Kabbah government and called for that government to be restored.[104] President Kabbah appealed from exile to the chair of ECOWAS for assistance.[105] After the ECOWAS action, the Council issued a presidential statement welcoming 'the fact that the rule of the military junta has been brought to an end', and commended 'the important role' of ECOWAS.[106] Some have questioned whether the Council statement amounted to an ex post ratification of the ECOWAS intervention.[107]

Finally, in The Gambia in 2017, Adama Barrow defeated long-time President Yahya Jammeh in an election that Jammeh initially conceded but later denounced, refusing to leave office.[108] Barrow, after somehow being sworn into office in the Gambian Embassy in Senegal on 17 January 2017, asked the United Nations, the African Union, and ECOWAS for assistance in taking office.[109] On 19 January, the Security Council adopted a resolution condemning Jammeh's refusal to leave office and urging respect

[101] While the Security Council's 1994 authorisation of the use of force to restore President Aristide to the presidency of Haiti is an important case, it is not helpful on this question, because Haiti was not experiencing armed conflict at the time of the authorisation.

[102] See Peter Blackburn, 'Fraud Charged in Liberia's First One-Man, One-Vote Election', *Christian Science Monitor* 25 October 1985, available at www.csmonitor.com/1985/1025/olib.html. See also 'Liberia: Election and Coup Attempt – 1985', *Global Security*, n.d., available at www.globalsecurity.org/military/world/war/liberia-1985.htm.

[103] See generally Karsten Nowrot and Emily W. Schabacker, 'The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone', *American University of International Law Review* 14 (1998), 321–412.

[104] UN SC Res. 1132 of 8 October 1997.

[105] Nowrot and Schabacker, 'The Use of Force to Restore Democracy' (n. 103), 386.

[106] UN Doc. S/PST/1998/5, 26 February 1998.

[107] See Nowrot and Schabacker, The Use of Force to Restore Democracy' (n. 103), 364–5.

[108] Helal, 'The ECOWAS Intervention in The Gambia' (n. 99), 2–3. Many international observers criticised the elections for procedural irregularities. See Corten, 'Intervention by Invitation', Chapter 2 in this volume, section V.C. But these problems were all observed to favour the incumbent Jammeh. It is therefore difficult to claim that Barrow lacked a clear democratic mandate because the election was unfair; he had a clear democratic mandate *despite* the election being unfairly rigged against him.

[109] Antenor Hallo de Wolf, 'Rattling Sabers to Save Democracy in The Gambia', *EJIL:Talk!*, 1 February 2017, available at www.ejiltalk.org/rattling-sabers-to-save-democracy-in-the-gambia/.

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for the electoral results, urging 'all Gambian parties and stakeholders to respect the will of the people and the outcome of the election which recognised Adama Barrow as the President-elect of the Gambia'.[110] The Council tied its conclusions to similar determinations by regional international organisations, endorsing 'the decisions of ECOWAS and the African Union to recognise Mr. Adama Barrow as president of the Gambia'.[111] The Council did not, however, authorise the use of force. With ECOWAS troops massing in Senegal on the Gambian border, Jammeh left the country on 21 January. The significant factors in the Gambian case that differ from those of Liberia and Sierra Leone are that no foreign troops actually entered the territory and the person issuing the invitation had never actually held power.

Despite this ambiguity in state practice – essentially a problem of too many variables to support a one-size-fits-all rule – one can make a strong argument for a version of the first option above. This is the claim that a democratically legitimate regime ousted from power can still issue a valid invitation despite the existence of a NIAC. The central objections to this view fall into two categories. The first is doctrinal – that the international law of recognition of governments still favours the effective control test, even if that support has weakened in the post-Cold War era; the second is normative – during a NIAC, no outsider can presume to judge which competing faction should be permitted to entrench itself in power by inviting outside forces, and external efforts to designate one faction as legitimate are likely to be more subjectively political than empirically objective. Both of these critiques originated prior to the end of the Cold War and the rise of democratic legitimacy criteria.[112] More importantly, neither of the critiques appears valid where an international organisation – often the Security Council, but also a regional organisation – determines that an electoral result entitles one faction to hold power and the other not. The first objection, relying on the effective control test, would have to argue that such a collective determination of legitimacy would be valid for all purposes *except* inviting outside forces. Prior such determinations by

[110] UN SC Res. 2337 of 19 January 2017.

[111] *Ibid.*

[112] In 1963, arguing against the lawfulness of invitations, Brownlie assumed that the legitimacy of an inviting government could be determined only by reference to the state's domestic law – and since 'there is in international law no definition of "legitimate government"', this would put outsiders in the improper position of making their own determinations about how the internal law should operate in times of extreme crisis: Brownlie, *International Law and the Use of Force by States* (n. 37), 324.

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international organisations contain no such distinction.[113] On what basis could the winning faction, for example, be entitled to appoint ambassadors, enter into treaties or exercise diplomatic protection, but not consent to the use of force on its territory? The entire purpose of multilateral validation of one faction's entitlement to rule is to grant it exclusive access to all aspects of the state's sovereign prerogatives.

The second critique – that outsiders simply cannot presume to judge the legitimacy or illegitimacy of competing national factions – is simply of no consequence if an international organisation has already observed an election and determined the winner. The intervening state does not make its own subjective determination that the inviting regime is democratically legitimate; it simply acts on a prior determination by an international organisation to that effect.[114]

This multilateral component is, of course, critical. Such validations would (hopefully) remove the feared politicisation of a recognition decision. Cases with no involvement by an international organisation would be more susceptible to Cold War critiques. But in cases addressed by the Security Council and/or regional 'democracy protection regimes' – under which member states agree in advance to non-recognition and sanctions where democratic government is interrupted – recognition would be less political and a matter of legal obligation.[115] That the losing faction resists such a determination and begins

[113] See, e.g., UN SC Res. 867 of 23 September 1993, para. 12 (describing 'the legally constituted Government of Haiti'); UN SC Pres. Statement on Sierra Leone, S/PRST/1997/36, 11 July 1997 ('the attempt to overthrow the democratically elected [Liberian] Government of President Ahmad Tejan Kabbah is unacceptable and [the Security Council] calls again for the immediate and unconditional restoration of constitutional order in the country'); UN SC Res. 1962 of 20 December 2010 (in which the Council 'Urges all the Ivorian parties and stakeholders to respect the will of the people and the outcome of the election in view of ECOWAS and African Union's recognition of Alassane Dramane Ouattara as President-elect of Côte d'Ivoire and representative of the freely expressed voice of the Ivorian people as proclaimed by the Independent Electoral Commission'); UN SC Res. 2337 of 19 January 2017, para. i (in which the Council 'Urges all Gambian parties and stakeholders to respect the will of the people and the outcome of the election which recognized Adama Barrow as President-elect of The Gambia and representative of the freely expressed voice of the Gambian people as proclaimed by the Independent Electoral Commission').

[114] Thus the admitted indeterminacy of 'democracy' as a general philosophical concept, as well as the related problem of multiple factions in a state potentially claiming the mantle of 'democratic legitimacy', are not reasons to critique the standard suggested here. See Corten, 'Intervention by Invitation', Chapter 2 in this volume, section V.A. The intervention would have taken place only after outside observers had empirically verified the inviting regime's democratic bona fides.

[115] The regional regimes are discussed in Enrique Lagos and Timothy D. Rudy, 'In Defense of Democracy', *University of Miami Inter-American Law Review* 35 (2004), 283–309; Patrick J. Glen, 'Institutionalizing Democracy in Africa: A Comment on the African Charter on

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an armed resistance is not a reason for the international organisation to retract its legitimacy determination.[116]

If the democratic legitimacy view is thus seen as not subject to the IDI view's exclusion of invitations issued in civil wars, it represents a subset of cases coming within the *Nicaragua* view. That subset would likely include some cases of civil war and thus, as shown in Figure 3.1, the democratic legitimacy view overlaps with in both the IDI and *Nicaragua* categories.

E. *Anti-Terrorist Operations*

The final view holds that invitations to assist governments in conflict with transnational terrorist groups are legitimate in all cases.[117] This claim is perhaps the least controversial of the four presented.[118] While there is some question as to whether counter-terrorism was the sole reason for some interventions in the dataset, there is little, if any, evidence of state reaction against the legitimacy of counter-terrorist intervention.

Democracy, Elections and Governance', *African Journal of Legal Studies* 5 (2012), 119–46; Eliav Lieblich, 'Intervention and Consent: Consensual Forcible Interventions in Internal Armed Conflicts as International Agreements', *Boston University in International Law Journal* 29 (2011), 337–82 (ECOWAS).

116 To capture all cases that arguably support a democratic legitimacy element in assessing invitations, the dataset counted all cases in which the intervening party made such a claim. But, in assessing the weight of those cases, I will emphasise those with multilateral determinations.

117 For discussions, see Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes' (n. 6), 12; Kajtar, 'The Use of Force against ISIL in Iraq and Syria (n. 26), 30; Nussberger, 'Military Strikes in Yemen in 2015' (n. 1), 27.

118 Dino Kritsiotis adds a layer of complexity when discussing the 2011 US raid in Pakistan that killed Osama bin Laden: see Kritsiotis, 'Intervention and the Problematisation of Consent', Chapter 1 in this volume, section III.C. Although Pakistan had consented to earlier US strikes on its territory against terrorist targets, it publicly condemned the bin Laden raid. Without a public invitation, the United States relied on other legal grounds in defending its operation: *ibid*. Kritsiotis argues that 'the episode revealed the abiding worth of consent in the dynamics of the laws of the ius ad bellum, but it also spoke to its fragility: its presence cannot be assumed or extended. Its function cannot be generalised but is instead wrapped in the politics and normativity of the particular': *ibid*. (footnotes omitted). It is certainly true that, absent explicit consent, outside observers seeking to place an episode in the 'invitation' category must be careful that theoretical constructs do not overtake facts on the ground. But this is a problem with any reliance on consent, not only that for anti-terrorist operations. The bin Laden episode is particularly fraught, with Pakistan in the years since 2001 frequently giving private consent to US operations on its territory but publicly condemning them as unlawful: see Sean D. Murphy, 'The International Legality of U.S. Military Cross-Border Operations from Afghanistan into Pakistan', *Israel Yearbook on Human Rights* 39 (2009), 281–314 (289).

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The terrorism view is primarily asserted as an exception to the IDI view. Unlike rebel groups representing some portion of a state's citizens dissatisfied with their government, terrorist groups frequently count foreign fighters among their ranks and operate across different states simultaneously.[119] As a result, 'terrorist groups cannot be regarded as a "People", denying any claim to the right of self-determination'.[120] The IDI view, seeking to secure the integrity of autonomous political decision-making within states, is unaffected by assistance to governments in conflict with groups not part of the national body politic.[121]

A rule permitting counter-terrorist interventions confronts the common problem of the term's lack of a clear definition.[122] The malleability and highly political nature of a 'terrorist' designation presents the obvious danger of incentivising governments to label their civil war opponents 'terrorists' to legitimise external assistance. Definitional ambiguity also creates problems for coding: if one were to count as relevant state practice all cases in which the inviting state designated its opponents 'terrorists', one could not ensure uniformity across cases.

Fortunately, the cases in the dataset coded as anti-terrorist interventions do not suffer from definitional ambiguity. Since 1999, the Security Council's 1267 Committee has maintained a list of individuals and organisations associated with the Taliban and Al-Qaeda.[123] Those on the list are subject to a comprehensive set of sanctions, overseen by the Committee.[124] The list began as an effort to combat the harbouring of terrorist groups in Afghanistan and was later expanded to encompass many 'associated' groups elsewhere, including so-called Islamic State in Iraq and the Levant (ISIL) in 2015.[125]

[119] Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes' (n. 6), 854: 'If external intervention by invitation is normally unlawful when its objective is to settle an exclusively internal political strife in favour of the established government, it goes otherwise when the purpose of the intervention is different.'

[120] Kajtar, 'The Use of Force against ISIL in Iraq and Syria' (n. 26), 563.

[121] See Corten, 'Intervention by Invitation', Chapter 2 in this volume, section III.A.

[122] See Christian Walter, 'Terrorism', in Peters and Wolfrum, *Max Planck Encyclopaedia*, online edn (n. 14), para. 1: 'International law has been grappling with the definition of terrorism ever since it first started to deal with the issue.'

[123] See Dire Tladi and Gillian Taylor, 'On the Al Qaida/Taliban Sanctions Regime: Due Process and Sunsetting', *Chinese Journal of International Law* 10 (2011), 771–89.

[124] See Security Council Committee Pursuant to Resolutions 1267 (1999), 1989 (2011) and 2253 (2015) Concerning ISIL (Da'esh) Al-Qaeda and Associated Individuals Groups Undertakings and Entities, available at www.un.org/securitycouncil/sanctions/1267.

[125] See UN SC Res. 2253 of 17 December 2015; UN SC Res. 1267 of 15 October 1999. For the lengthy list of sanctioned individuals and groups, see UN Security Council, 'Narrative Summaries of Reasons for Listing', available at www.un.org/securitycouncil/sanctions/1267/aq_sanctions_list/summaries.

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The Council has articulated criteria for listing individuals and groups, and it created an ombudsperson to review requests for delisting from those who claim to have been listed erroneously.[126] The 1267 sanctions list, in other words, reflects a collective effort to identify and sanction specific 'terrorists' in the name of the international community as a whole. The Council repeatedly underlines this latter point by employing the terminology of international criminal law and the ius ad bellum to describe the acts of listed terrorists.[127]

As detailed in Table 3.1, all but three of the non-state-conflict parties in interventions coded as 'anti-terrorist' have appeared on the 1267 list. The three exceptions do not involve disagreements over whether the groups involved were 'terrorists'.[128] Of course, future conflicts may involve non-listed groups, or alleged terrorist groups may participate in conflicts the Security Council has not yet addressed. But, for the purposes of assessing Council practice to date, the definitional debates plaguing other areas of international law are not a complicating factor here.

[126] As described in UN SC Res. 2368 of 20 July 2017, para. 2, for the purposes of being added to the sanctions list, acts indicating an individual or group is associated with Al-Qaeda or ISIL include:

(a) Participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of;
(b) Supplying, selling or transferring arms and related materiel to;
(c) Recruiting for; or otherwise supporting acts or activities of Al-Qaida, ISIL, or any cell, affiliate, splinter group or derivative thereof.

The Office of the Ombudsperson was established by UN SC Res. 1904 of 17 December 2009. See the discussion of the Ombudsperson in Tladi and Taylor, 'On the Al Qaida/Taliban Sanctions Regime' (n. 123), 782.

[127] See, e.g., UN SC Res. 2379 of 21 September 2017 (ISIL acts in Iraq 'may amount to crimes against humanity'); UN SC Res. 2347 of 24 March 2017 (condemning attacks by listed groups against cultural sites and buildings and affirming that such attacks 'may constitute, under certain circumstances and pursuant to international law a war crime'); UN SC Res. 2379 of 21 September 2017 (condemning litany of acts by ISIL and expressing determination that 'those responsible in this group for such acts, including those that may amount to war crimes, crimes against humanity, and genocide, must be held accountable'); UN SC Res. 1390 of 28 January 2002 ('Reaffirming further that acts of international terrorism constitute a threat to international peace and security').

[128] One group, Hizb-I Islami-yi Afghanistan, was much more akin to a traditional rebel group than transnational terrorism. See Institute for the Study of War, 'Hizb-I Islami-yi Afghanistan', available at www.understandingwar.org/hizb-i-islami-gulbuddin-hig. The other two – the Lord's Resistance Army and the Allied Democratic Forces, both active in Uganda – were subject to separate sanctions regimes: see UN SC Res. 2078 of 28 November 2021; UN SC Res. 2262 of 27 January 2016.

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TABLE 3.1 *Terrorist Groups Participating in Coded Conflicts*

Conflict Name	Terrorist Groups	1267 List [Y if on the list; N if not on the list]	Criteria for Inclusion*
Afghanistan	Taleban	Y	1, 2, 3
	Hizb-I Islami-yi Afghanistan	N	
Afghanistan	IS	Y	1, 2, 3
Algeria	AQIM	Y	1
Cameroon	Jama'atu	Y	1
Cameroon	IS	Y	1, 2, 3
Libya	IS	Y	1, 2, 3
Mali	Ansar Dine	Y	1, 2, 3
	AQIM	Y	1
	MUJAO	Y	1
	Signed-in-Blood Battalion	Y	1, 3
	al-Murabitum	Y	1, 3
Mauritania	AQIM	Y	1
Niger	IS	Y	1, 2, 3
Nigeria	Jama'atu	Y	1
Nigeria	IS	Y	1, 2, 3
Syria v. IS	IS	Y	1, 2, 3
Uganda	LRA	*N [Listed instead pursuant to Res. 2262 (2016)]	
	ADF	*N [Listed instead pursuant to Res. 2078 (2012)]	
Uzbekistan	IMU	Y	1, 2, 3
Yemen (North Yemen)	AQAP	Y	1, 2, 3

Note

Listing criteria taken from UN Security Council, 'Sanctions: Security Council Committee pursuant to resolutions 1267 (1999) 1989 (2011) and 2253 (2015) concerning Islamic State in Iraq and the Levant (Da'esh), Al-Qaida and associated individuals, groups, undertakings and entities – Summary of Listing Criteria', available at www.un.org/securitycouncil/sanctions/1267#listing_criteria:

1. Participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of –
2. Supplying, selling or transferring arms and related material to –
3. Recruiting for –

or otherwise supporting acts or activities of, ISIL (Da'esh), Al-Qaida or any cell, affiliate, splinter group or derivative thereof.

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III. METHODOLOGY FOR ASSESSING RECENT STATE PRACTICE

We have now reviewed four theories that can plausibly claim grounding in contemporary international law: the IDI view, the *Nicaragua* view, the democratic legitimacy view, and the anti-terrorism view. How have these theories been received by the international community in practice since the end of the Cold War? To answer this question, we coded interventions in armed conflicts from 1990 to 2017 and the reaction of critical international actors to those interventions.[129] Among international organisations, we coded the UN Security Council and General Assembly, the European Union, the OAS and the African Union. Among states, we coded the United States, the United Kingdom, France, South Africa, Argentina, Australia, and Japan. For each intervention, we asked whether each actor approved, disapproved or issued a statement evidencing neither approval nor disapproval.[130]

Before discussing the data, it is first important to describe how the cases of consensual intervention were selected, with attention to two aspects in particular.

A. *Selecting Conflicts*

All cases included in the dataset are taken from the Uppsala Conflict Data Program (UCDP), which creates widely used compilations of historical and contemporary data about armed conflict.[131] We began with the UCDP External Support Dataset, which provides 'information on the existence, type, and provider of external support for all warring parties (actors) coded as

[129] A detailed explanation of the coding method can be found in Appendix I, the Coding Manual. In summary, the coding was divided into two parts: the first concerns the characteristics of the intervention – the purpose of the intervention, the nature of the conflict, the severity of the conflict, and the length of the conflict; the second concerns international reaction to the intervention. For all the actors whose reactions we measured, we asked if they approved an intervention, disapproved an intervention, issued a statement containing neither approval nor disapproval, or issued no statement at all.

[130] Because of the Security Council's ability to issue authoritative determinations on uses of force and because every state has the opportunity to vote in the General Assembly, we did not go on to code reactions by individual states if either of those bodies reacted to an intervention.

[131] See Uppsala Conflict Data Program, available at http://ucdp.uu.se/. For an overview of this and other conflict datasets, see Charles H. Anderton and John R. Carter, 'Conflict Datasets: A Primer for Academics, Policymakers, and Practitioners', *Defence and Peace Economics* 22 (2011), 21–42. In some cases, Uppsala identifies more than one conflict as occurring in a single country. Sometimes, this is simply a matter of different conflicts with different parties erupting at different times; at other times, it is a matter of distinct parties fighting each other at the same time. The DR Congo and Syria are two countries that Uppsala and the dataset for this chapter list as hosting more than one conflict.

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active in UCDP data, on an annual basis, between 1975 and 2009'.[132] The dataset for this chapter is modified in three ways.

1. We eliminated all cases prior to 1990, using that year as a proxy for the end of the Cold War and the beginning of an era in which the UN Security Council was capable (with obvious and notable exceptions) of addressing most armed conflicts around the world.
2. Although the UCDP codes a wide variety of forms of external support for warring parties, our dataset includes only cases in which troops were supplied to a primary warring party.[133]
3. Because the Uppsala External Support dataset ends in 2009, our dataset adds post-2009 NIACs from a second Uppsala dataset. We used the UCDP's main dataset – UCDP/PRIO Armed Conflict Dataset, version 17.2 – to supply cases of external support from 2009 through its end date of 31 December 2016 (as of 22 January 2018).[134] Because this later data includes international armed conflicts and NIACs, we eliminated the former from our data.[135]
4. Finally, the UCDP does not code for whether the interventions in either dataset were invited or not. However, a member of the Uppsala project clarified that an intervention in an NIAC would not have been coded as such unless the party receiving assistance consented to that assistance.[136] That assurance meant that all the interventions we coded using these criteria were consensual interventions.

[132] UCDP External Support Dataset, available at http://ucdp.uu.se/downloads/.

[133] Uppsala also codes for support in the form of granting access to territory, access to military or intelligence infrastructure, weapons, materiel/logistics, training/expertise, funding/economic support, and intelligence material: UCDP External Support Project Primary Warring Party Dataset Codebook, version I-2011 8 (2011), available at http://ucdp.uu.se/downloads/extsup/ucdp_external_support_primary_warring_party_codebook_1.0.pdf.

[134] Since this data was originally accessed, it has been updated to version 18.1, available at http://ucdp.uu.se/downloads/ucdpprio/ucdp-prio-acd-181.xlsx. This dataset indicates external involvement using two variables: 'Side a 2nd' and 'Side b 2nd'. The 'a' and 'b' designations indicate which side in the conflict is supported by an external actor; '2nd' refers to second-party support. UCDP codes intervention in these categories only if (i) the intervention takes the form of supplying troops and (ii) the external supporter is a state. We eliminated all conflicts except those in either of these two categories.

[135] The 2010–16 dataset contains four types of conflict: extrasystemic, interstate, internal, and internationalised internal. Only the third and fourth of these involve the conflicts implicated by the non-intervention norm in international law, so we eliminated conflicts in the first and second categories. See UCDP/PRIO Armed Conflict Dataset Codebook, version 18.1, (2018), available at http://ucdp.uu.se/downloads/ucdpprio/ucdp-prio-acd-181.pdf, 9–10.

[136] Email dated 30 May 2018, from Therése Pettersson, project leader of the Uppsala Conflict Data Program (on file with author).

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The final set of cases resulting from these modifications is set out as Appendix II. That table includes information on the invited and inviting states, the party being supported, the nature of the intervention, and the reaction, if any, by the UN Security Council.

B. *Defining Civil Wars*

The second methodological question involves how to define a 'civil war'. To investigate the IDI view prohibiting interventions in civil wars, it is necessary to define which conflicts in our data set qualify as such. The IDI's 1975 Wiesbaden Resolution III itself employs a definition with three elements: rebels must have a minimum level of organisation; the conflict must pass an 'intensity threshold'; and the rebel groups must have certain specific goals.[137] But whether the IDI view aligns with how the international community generally – and the Security Council in particular – defines 'civil wars' is an exceedingly complex question.[138]

'Civil war' is not a term of art in international law.[139] International humanitarian law (IHL) refers instead to NIACs, with competing definitions

[137] The full definition appears in Art. 1 of the Resolution:

> For the purposes of this Resolution, the term 'civil war' shall apply to any armed conflict, not of an international character, which breaks out in the territory of a State and in which there is opposition between:
>
> a) the established government and one or more insurgent movements whose aim is to overthrow the government or the political, economic or social order of the State, or to achieve secession or self-government for any part of that State, or
> b) two or more groups which in the absence of any established government contend with one another for the control of the State.
>
> 2. Within the meaning of this Resolution, the term 'civil war' shall not cover:
>
> a) local disorders or riots;
> b) armed conflicts between political entities which are separated by an international demarcation line or which have existed de facto as States over a prolonged period of time, or conflicts between any such entity and a State;
> c) conflicts arising from decolonization.

IDI, Wiesbaden Resolution III (n. 27), 1–2.

[138] This is true not least because it is possible for an international armed conflict and a NIAC to exist simultaneously in the same state: Thomas Liefländer, 'The *Lubanga* Judgment of the ICC: More Than Just the First Step?', *Cambridge Journal of International and Comparative Law* 1 (2012), 191–212 (194) (discussing these circumstances as analysed in ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Judgment Pursuant to Art. 74 of the Statute, 14 March 2012).

[139] Eliav Lieblich, *International Law and Civil Wars: Intervention and Consent* (London: Routledge 2013), 161–2 (term 'seems incompatible with modern law'). Traditional belligerency

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grounded in two different international instruments.[140] The first is common Article 3 to the four Geneva Conventions of 1949, which refers to 'armed conflict not of an international character occurring in the territory of one of the High Contracting Parties'.[141] The most widely accepted definition of a NIAC as the term is used in common Article 3 appears in the 1995 *Tadić* decision of the International Criminal Tribunal for the former Yugoslavia (ICTY) – that is, 'protracted armed violence between governmental authorities and organised armed groups or between such groups within a State'.[142]

The second is found in the Additional Protocol II (AP II) on Non-International Armed Conflicts, which sets out narrower criteria for application than those found in *Tadić*. The Protocol applies to armed conflicts:

> … which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.[143]

The *Tadić* definition and AP II criteria share two common elements: the opposition groups must have some minimum level of organisation or

doctrine also fails to provide definitional clarity: see Milanovic and Hadzi-Vidanovic, 'A Taxonomy of Armed Conflict' (n. 29), 264 ('Internal armed struggles came to be seen through three legal categories – rebellion, insurgency and belligerency. Any one of these could have been characterised in common parlance as a civil war'). Even political scientists who compile conflict datasets employ a wide range of definitions: see Nicholas Sambanis, 'What Is Civil War? Conceptual and Empirical Complexities of an Operational Definition', *Journal of Conflict Resolution* 48 (2004), 814–58 (814–15) ('Currently, about a dozen research projects have produced civil war lists based on apparently divergent definitions of civil war').

140 The San Remo Manual on Non-International Armed Conflicts provides yet another definition that is much less precise: 'Non-international armed conflicts are armed confrontations occurring within the territory of a single State and in which the armed forces of no other State are engaged against the central government'. See International Institute of Humanitarian Law (IIHL), *The Manual on the Law of Non-International Armed Conflict* (San Remo: IIHL 2006), 2, quoted in Rogier Bartels, 'Timelines, Borderlines and Conflicts: The Historical Evolution of the Legal Divide between International and Non-International Armed Conflicts', *International Review of the Red Cross* 873 (2009), 35–67 (39).

141 See, e.g., Geneva Convention [No. IV] Relative to the Protection of Civilian Persons in Time of War, Art. 3, 12 August 1949, 75 UNTS 287.

142 ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1, decision on defence motion for interlocutory appeal on jurisdiction of 2 October 1995, para. 70.

143 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS 609, Art. 1(1) (8 June 1977).

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structure;[144] and the conflicts must have reached a certain level of intensity.[145] The Protocol adds a third: the rebel groups must exert control over a part of the state's territory. Each definition seeks to distinguish internal armed conflicts from lower-level disturbances, which few doubt a government can quell with external assistance.[146]

While the *Tadić* test is widely understood as reflecting customary international law, its use as a metric to identify the NIACs in our dataset presents a number of difficulties.[147] First, the specific factors relevant to the 'intensity threshold' are quite unclear and thus that aspect of the definition is not easily quantified.[148] One metric that would seem especially well-suited to clear line-drawing – the number of fatalities at the time of an intervention – is not uniformly employed by tribunals applying the *Tadić* test.[149]

144 The opposition must consist of 'organized armed groups' for *Tadić* and must be 'under responsible command' for AP II.

145 *Tadić* (n. 142) requires that there be 'protracted armed violence'; AP II provides in Art. 1(2) that the Protocol shall 'not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature', meaning that NIACs must involve a greater degree of violence.

146 See ICTY, *Tadić*, Case No. IT-94-1-T, opinion and judgment in Trial Chamber (7 May 1997), para. 562 (NIAC test employed 'for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law').

147 The International Committee of the Red Cross (ICRC) has endorsed *Tadić* in its explanation of what constitutes a NIAC: ICRC, *How Is the Term 'Armed Conflict' Defined in International Humanitarian Law?*, Opinion paper, 17 March 2008, 3, fn. 10, available at www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf. See also Milanovic and Hadzi-Vidanovic, 'A Taxonomy of Armed Conflict' (n. 29), 24–5.

148 In the *Boškoski* case, the ICTY reviewed a long list of factors to determine whether the level of violence had met the *Tadić* intensity threshold: the seriousness of the conflict; the increase and spread of clashes over territory and time; the distribution and type of weapons employed; the presence of government forces and their use of force; the number of casualties; the incidence of civilians fleeing from the combat zone; the extent of destruction; the blocking, besieging, and heavy shelling of towns; the existence and change of front lines; the occupation of territory; the imposition of road closures; and the attention of the UN Security Council. See ICTY, *Prosecutor v. Boškoski*, Case No. IT-04-82-T, judgment of 10 July 2008, para. 177. But many other decisions issued by the ICTY and the International Criminal Court (ICC), applying the *Tadić* definition, discussed only a few of these factors. See ICTY, *Prosecutor v. Haradinaj*, Case No. IT-04-84-T, Trial Chamber I judgment of 3 April 2008, paras 49, 90–100; ICTY, *Prosecutor v. Limaj*, Case No. IT-03-66-T, Trial Chamber II judgment of 30 November 2005, paras 135–73; ICTY, *Prosecutor v. Mucic*, Case No. IT-96-21-T, Trial Chamber judgment of 16 November 1998, paras 186–92.

149 ICTY opinions in *Limaj*, *Tadić*, *Boškoski*, and *Kordic and Cerkez* looked to casualty levels, while opinions in *Haradinaj*, *Matrić*, and *Mucic* did not. See *Limaj* (n. 148), paras 135, 138, 140, 141, 147, 155, 157; *Tadić* (n. 146), para. 565; *Boškoski* (n. 148), para. 239; ICTY, *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2-A, Appeals Chamber judgment of 17 December 2004, para. 339; *Haradinaj* (n. 148); *Prosecutor v. Matrić*, Case No. IT-95-11-T, Trial Chamber I judgment of 12 June 2007; *Mucic* (n. 148).

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Second, it is not at all clear that a test developed for IHL purposes is appropriate for defining a 'civil war' for ius ad bellum purposes. The argument for applying IHL to an internal conflict is that the individuals affected – civilians in particular – deserve protection from violence in which they play no role. This concern for individual dignity, it is argued, remains compelling whether a conflict is inter-state or intra-state.[150] By contrast, the ius ad bellum argument for prohibiting external assistance during 'civil wars' rests on the collective entitlement of a citizenry to determine its political future during periods of extreme polarisation. One could well imagine the threshold for recognising such polarisation being much higher than the threshold for applying individual IHL protections. The point at which the level of individual suffering becomes intolerable, such that IHL protections are necessary, could be much lower than the level at which it is clear that a substantial portion of the population finds the government so unacceptable that its violent removal becomes justified.[151]

Third, it seems unlikely that states and international organisations regularly employ a legal test for civil wars when issuing political reactions to interventions. Even if they did, it would be unclear which of the two tests (*Tadić* or AP II) they would use.

Given this lack of clarity on legal thresholds, this chapter will employ the rather straightforward UCDP definition of an 'internal armed conflict'[152] – namely, that it is one that 'occurs between the government of a state and one or more internal opposition group(s)',[153] with two additional characteristics: it must involve at least twenty-five battle-related deaths in a calendar

150 See Milanovic and Hadzi-Vidanovic, 'A Taxonomy of Armed Conflict' (n. 29), 28.

151 Dino Kritsiotis makes a similar point concerning the 1975 IDI Wiesbaden Resolution III adopting a IHL definition of civil war: Kritsiotis, 'Intervention and the Problematisation of Consent', Chapter 1 in this volume, section IV.B.

152 Two additional factors serve as a robustness check on the Uppsala definition. First, many international tribunals applying the *Tadić* test look to whether the United Nations engaged with the conflict in analysing the intensity threshold. See *Matrić* (n. 149); ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Public with annexes I, II, and A to F, judgment pursuant to Art. 74 of the Statute of 21 March 2016. As discussed below, the UN Security Council has been involved in the overwhelming percentage of conflicts in our dataset. Second, many of the more recent conflicts in the dataset have been designated as NIACs by the Geneva Academy of International Humanitarian Law and Human Rights for IHL purposes. The Geneva Academy uses the *Tadić* test. See Annyssa Bellal, 'The War Report: Armed Conflicts in 2017', in *Geneva Academy War Report 2017*. (Geneva: The Geneva Academy of International Humanitarian Law and Human Rights 2018), available at www.geneva-academy.ch/joomlatools-files/docman-files/The%20War%20Report%202017.pdf, 24.

153 UCDP/PRIO Armed Conflict Dataset Codebook (n. 133), §3.14, 10. The UCDP further subdivides internal armed conflicts into those with and without external intervention. This distinction has implications for data on the IDI view, which are discussed below.

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year;[154] and the dispute must concern *government* (the 'type of political system, the replacement of the central government or the change of its composition') or *territory* ('the change of the state in control of a certain territory (interstate conflict), secession or autonomy (intrastate conflict)').

The UCDP definition does not include the first element of the *Tadić* test concerning the opposition group's level of organisation. But the requirement that the conflict be about either government or territory can be seen as making up for this omission in performing the similar function of distinguishing politically oriented violence from mere criminal activity or low-level unrest. Uppsala requires that conflicts concern either government or territory because those are the root causes of most significant armed conflicts. To the extent that the international community seeks to resolve those conflicts, it must also engage with issues of territory or governance. The types of internal conflict that Uppsala codes, in other words, are those most likely to engage the international community.[155]

In sum, the problem of defining civil wars arises because of the need to test the IDI view, which relies on a particular definition of 'civil war'. But unless the Uppsala definition employed here is coextensive with the IDI definition, showing international approval of interventions in 'civil wars' would not necessarily demonstrate disapproval of the IDI view. Is that the case?

Table 3.2 shows how each of the definitions of civil war discussed above – Uppsala, IDI, common Article 3/*Tadić*, APII – employs the four elements common to some, but not all, of them: the rebels' level of organisation, the conflict's intensity threshold, whether rebels hold significant territory, and the rebels' goals. The critical comparison of the Uppsala and IDI definitions, located in the third column in the table, shows that the two largely overlap. Neither requires rebel control of territory. The nature of the rebels' goals is virtually identical. The differences in the rebels' level of organisation is marginal: IDI has no such requirement and Uppsala requires only that the rebels be an 'internal opposition group'.

[154] While the death-count threshold is the minimum for inclusion in the Uppsala dataset, conflicts are further categorised depending on the number of deaths. See Peter Wallensteen, *Understanding Conflict Resolution* (London: Sage 4th edn 2002), 24: '*Minor armed conflicts*, conflicts are those with more than twenty-five deaths, but less than 1,000 for the year and for the duration of the conflict. *Intermediate armed conflicts*, conflicts with more than twenty-five deaths, less than 1,000 for a year, but more than 1,000 for the duration of the conflict; and *wars*, conflicts with more than 1,000 battle-related deaths in one year.'

[155] *Ibid.*, 25: 'Conflict exists, the parties will say, because there are particular grievances and, thus, the conflict cannot end until such grievances are resolved, ended or at least attended to. With its categories, the Uppsala project attempts to capture some such basic grievances.'

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TABLE 3.2 *Civil War Definitions*

Criteria	Uppsala	IDI	Uppsala or IDI Broader?	CA 3/*Tadić*	AP II
Rebels have minimum level of organisation	Rebels must be 'internal opposition group'	None	IDI	Rebels must be 'organised armed groups'	Rebels must be 'under responsible command'
Intensity threshold	At least 25 battle-related deaths per conflict year	Does not cover 'local disorders or riots'	Unclear	Must be 'protracted armed violence'	Instrument does 'not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature'
Rebel control of territory	None	None	Same	Rebels must 'exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol'	None

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Rebel goals	Conflict must concern either the 'type of political system, the replacement of the central government or the change of its composition' or 'the change of the state in control of a certain territory (interstate conflict), secession or autonomy (intrastate conflict)'	'[O]ne or more insurgent movements whose aim is to overthrow the government or the political, economic or social order of the State, or to achieve secession or self-government for any part of that State'	Same	None	None

There is arguably a divergence in the final factor, the intensity threshold. For IDI, conflicts must rise above 'local disorders or riots'; Uppsala requires at least twenty-five battle-related deaths per conflict year. One could argue that conflicts which are somewhat more intense than local riots or disorders would not produce twenty-five deaths per year, meaning that using the IDI definition would produce more conflicts than Uppsala's – but this difference is again marginal.

The comparison between the Uppsala and IDI definitions is the only one that matters. Their virtual identity ensures that data employing Uppsala can properly be used to assess international approval or disapproval of interventions in civil wars.

IV. POST-COLD WAR PRACTICE: AN OVERVIEW

What does the data show about post-Cold War practice?[156] Using the criteria described above, we coded a total of forty-four interventions by invitation in conflicts that were ongoing between 1990 and 2016. The most important conclusion to emerge is that the UN Security Council and General Assembly made statements on an overwhelming number of these interventions. As shown on Chart 3.1, the Council reacted to 82 per cent (36/44) of the

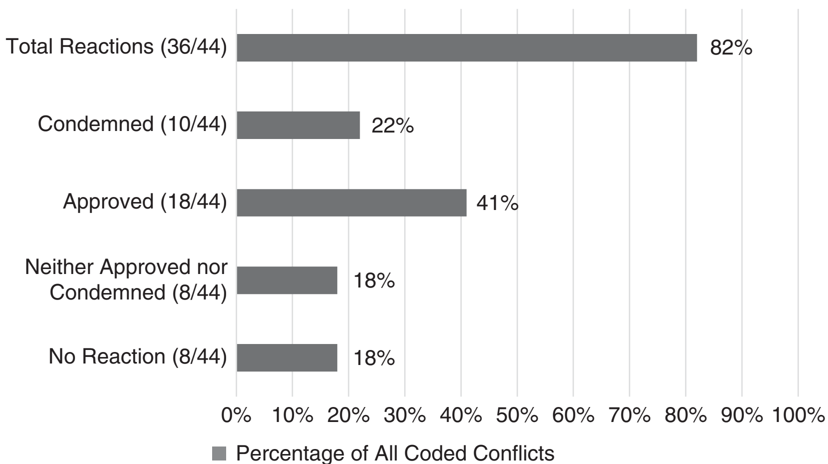

CHART 3.1 Overview of Security Council Reaction to Interventions

156 Each coded case is described in some detail in Appendix II, including the Security Council reaction, if any, to each intervention.

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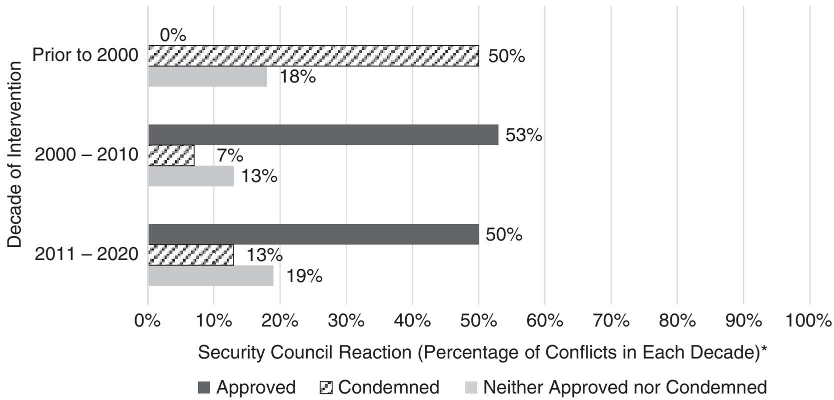

CHART 3.2 Security Council Reaction to Interventions by Decade

interventions, condemning 22 per cent (10/44), approving 41 per cent (18/44), and issuing statements that neither approved nor condemned in 18 per cent (8/44).[157] The Council had no reaction to 18 per cent (8/44) of the interventions, none of which began after 2010.[158]

The second conclusion is that patterns in Council actions are difficult to discern. As shown on Chart 3.2, the Council most frequently condemned interventions that began prior to 2000 (50 per cent). It most frequently approved interventions from 2000 to 2010 (53 per cent), although this was quite close to its approval of 50 per cent of the interventions it addressed from 2011 to 2020. The Council's decision to approve or condemn does not appear connected to the severity of the conflicts, measured by the number of fatalities at the time of the intervention.[159] As shown in Chart 3.3, the Council approved of 50 per cent of the interventions it addressed in conflicts with 500–1,000 fatalities and 35 per cent in conflicts with 1,000–5,000 fatalities. The Council reviewed only four interventions in conflicts with more than 5,000 fatalities

[157] All percentages noted in this chapter are rounded down to the nearest whole digit.

[158] Five of these interventions about which the Council issued no statement occurred in the 1990s (Mozambique, Rwanda v. FPR, Sri Lanka, Abkhazia, and Lesotho); five began between 2000 and 2010 (Algeria, Mauritania, Uganda, Yemen, and South Ossetia); one began in 2013 (South Sudan).

[159] Fatality figures for each conflict year are provided by the UCDP in the extended view version of the summary of each conflict. For example, figures on the Iraq-al-Mahdi Army conflict are available at http://ucdp.uu.se/additionalinfo?id=13891&entityType=4.

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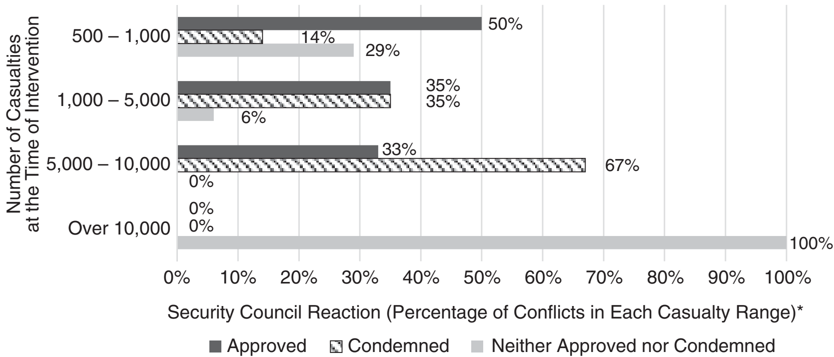

CHART 3.3 Security Council Reaction to Interventions by Severity of Conflict

and one cannot say the greater severity was correlated with a specific Council reaction.[160]

Third, patterns are also difficult to discern based on conflict length. The vast majority of conflicts were either of short or long duration at the time of the intervention: twenty-one had been active less than one month and eighteen had been active for more than twelve months.[161] As shown in Chart 3.4, for conflicts spanning up to one month, the Council condemned 37 per cent of those interventions and approved of 42 per cent.[162] For conflicts lasting twelve months or longer, the Council condemned 15 per cent, approved 35 per cent, and either made no statement or a non-committal statement in 25 per cent.

The General Assembly reacted to fewer of the interventions, passing resolutions in 34 per cent (15/44) of the cases. None of these reactions came in the eleven cases in which the Council did not issue a statement. Indeed, the six cases met with silence by the two UN bodies were also

[160] For conflicts with 5,000–10,000 fatalities, the Council condemned one intervention (Republic of Congo) and approved of two (Angola and Afghanistan v. Taliban). The Council issued a non-committal statement in the only conflict with more than 10,000 fatalities (Syria v. Syrian Insurgents).

[161] Two conflicts were active for between two and six months; three were active for between six and twelve months.

[162] The Council made no statement in three conflicts of this duration and issued non-committal statements in two others.

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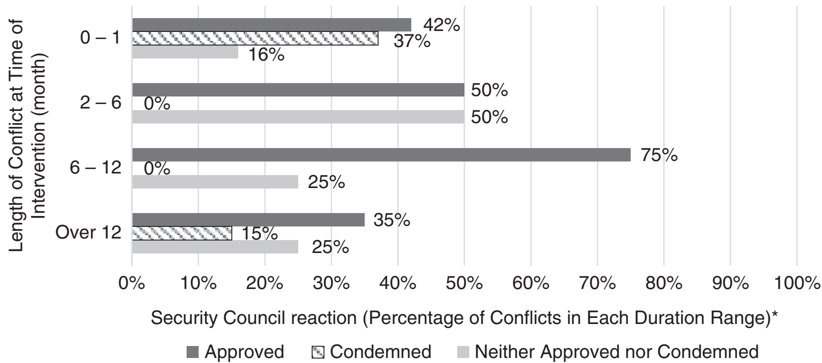

CHART 3.4 Security Council Reaction to Interventions by Duration of Conflict

ignored in all but a few instances by major regional organisations and states whose reactions we also coded.[163]

Of the forty-four cases of intervention, the largest groupings consisted of assistance to governments in conflict with rebels seeking to overthrow that government – 36 per cent (16/44) – and assistance to governments in a conflict with one or more terrorist organisations – 32 per cent (14/44) (see Chart 3.5). Next were cases of assistance to rebels seeking to overthrow a government, which occurred in 22 per cent (10/44) of the cases. Finally, assistance to an individual or group not in effective control of the government but which claimed an electoral mandate to hold office, or assistance to a regime that is in effective control and claims a democratic mandate occurred in 9 per cent (4/44) of the cases.

What general conclusions can we draw from these data? First, the Security Council has been a central player in reacting to post-Cold War consensual interventions. It has issued statements in the overwhelming majority of conflicts coded (82 per cent), condemning 22 per cent of the interventions it addressed (10/44) and approving 41 per cent (18/44) of those interventions (see Chart 3.1). The post-Cold War era has thus been dominated by a collective approach to interventions, in stark contrast to the atomised reactions of earlier eras, when

[163] The United States alone issued a statement on Mali, Niger, and Chad's intervention to support the Algerian government, and it was neither supportive nor condemnatory; South Africa, not surprisingly, supported its own intervention in support of the Government of Lesotho in 1998; the United States alone issued a statement (neither supportive nor condemnatory) on France's support of the Mauritanian government in 2010.

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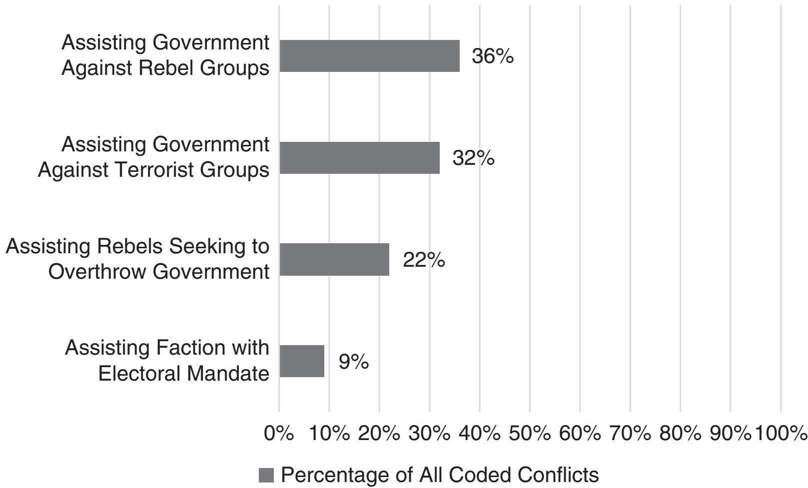

CHART 3.5 Purpose of Intervention

either no mechanism for collective reaction existed (pre-1945) or such mechanisms were effectively paralysed (1945–90).

Second, because the Council either condemned or approved of 63 per cent (28/44) of the interventions it addressed, a strong argument can be made that Council practice ought to inform our understanding of contemporary norms. If the Council had been non-committal in reacting to most interventions – which one could well understand, given the delicate diplomacy necessary to resolve NIACs – then its reactions could be seen as simply an example of largely extralegal diplomatic manoeuvring. Instead, the Council took clear positions on most interventions.

Third, as we might have predicted, Council reactions appear to be case-specific. One might have predicted that the length and severity of conflicts in which interventions occurred would have been important factors in determining (i) whether the Council reacted and (ii) the nature of its reaction. But those factors are more or less evenly distributed across the conflicts we coded.

V. UN SECURITY COUNCIL VIEWS ON THE PREVALENT LEGAL THEORIES

None of this general analysis tells us whether the Council has affirmed or rejected the major legal theories on consensual intervention. In this section, we will assess the relevance of Council practice to each theory.

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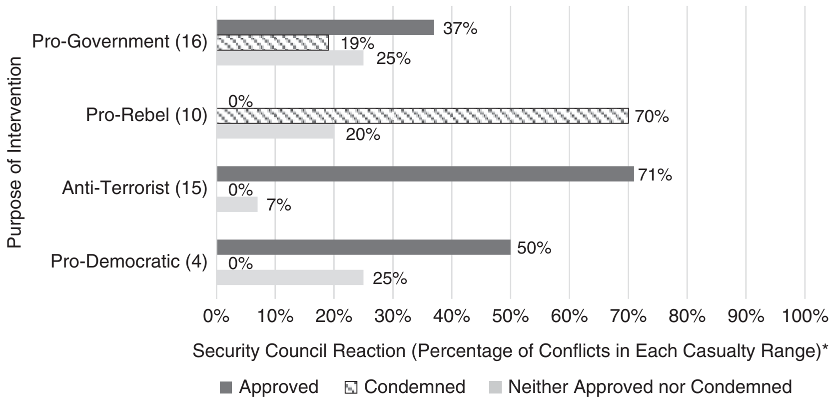

CHART 3.6 Security Council Reaction to Different Types of Intervention

A. *The* Nicaragua *View*

The first is the *Nicaragua* view, which would permit a government to invite foreign forces in all circumstances and never permit rebel groups to do so. The government portion of this view has not been borne out by Council practice. As shown on Chart 3.6, in the sixteen cases of assistance to a government in conflict with rebel groups, the Council condemned 19 per cent (3/16), approved of 37 per cent (6/16), and neither approved nor condemned in 25 per cent (4/16).[164] Clearly, there are circumstances in which the Council believes governmental invitations are permissible and others in which they are not.

The United States' support for the government of Iraq from 2004 to 2008 provides a good example of the Council's approving aid to a government fighting rebels in the midst of a NIAC. The Iraqi government was in conflict with the Al-Mahdi Army, a group formed in 2003 by Shi'a cleric Moqtada Al-Sadr.[165] Critical indicators of a NIAC were present: the International Committee of the Red Cross (ICRC) concluded that IHL applied to the conflict and the UCDP estimates the conflict resulted in 1,258 fatalities that year, undoubtedly meeting the intensity threshold.[166]

[164] The cases in which the Council issued documents that neither condemned nor approved of the interventions were Angola, the Central African Republic, Sudan, and Syria v. Syrian Insurgents.

[165] See UCDP, 'al-Mahdi Army', available at http://ucdp.uu.se/#/actor/5659.

[166] See ICRC, *Annual Report 2004*, June 2005, 281, available at https://reliefweb.int/sites/reliefweb.int/files/resources/6F2862481BBD26C88525717F0064680C-icrc-global-31may.pdf, 281 ('The ICRC reminded all those involved in the armed confrontation in Iraq that IHL prohibits targeted attacks against civilians who are not taking a direct part in hostilities'); UCDP,

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Following the official end of the US/UK occupation of Iraq on 30 June 2004 and after the Coalition Provisional Authority handed governmental control over to an elected Iraqi regime, the Security Council approved a continued US presence under the umbrella of a 'multinational force'.[167] The resolution was accompanied by a letter from the US secretary of state offering military assistance and a letter from the Iraqi prime minister accepting the offer. The United States' letter described the troop's mission as involving, among other tasks, 'combat operations against members of these groups, internment where this is necessary for imperative reasons of security, and the continued search for and securing of weapons that threaten Iraq's security'.[168] This authorisation was renewed several times until 31 December 2008.[169]

A second example of Council support for the *Nicaragua* view is the 2006 Ethiopian intervention in Somalia, which involved tacit, rather than explicit, Council approval.[170] After the anarchy of the 1990s, a regional initiative established a Transitional Federal Government (TFG) for Somalia. But it failed to exercise any substantial control over Somali territory and the TFG fell into conflict with the Islamic Courts Union (ICU), an extremist Islamist group.[171] In 2004, the leader of the TFG requested the deployment of regional forces to assist his regime – a request that was soon endorsed by most member states of the Intergovernmental Authority on Development (IGAD), a Horn of

'Government of Iraq – al-Mahdi Army', available at http://ucdp.uu.se/additionalinfo?id=13891&entityType=4#2004.

167 UN SC Res. 1546 of 8 June 2004.

168 *Ibid.*, Annex, 11. The United States' letter described the 'groups' concerned as 'forces seeking to influence Iraq's political future through violence': *ibid.* In his first report to the Security Council pursuant to Resolution 1546, the UN Secretary-General observed that 'notwithstanding the restoration of sovereignty and the holding of the National Conference, the overall security environment has not seen any significant improvement. Coupled with a tragic pattern of hostage-takings and indiscriminate killings of innocent civilians, there has been renewed activity on the part of various insurgent groups throughout the country': Report of the Secretary-General Pursuant to Paragraph 30 of Resolution 1546 of 3 September 2004, UN Doc. S/2004/710, 13.

169 See UN SC Res. 1790 of 18 December 2007; UN SC Res. 1723 of 28 November 2006; UN SC Res. 1637 of 11 November 2005. In 2008, the United States and Iraq entered into a status-of-forces agreement, which lasted until 2011. See Sahar Issa, Jenan Hussein and Hussein Kadhim, 'Unofficial Translation of U.S.–Iraq Troop Agreement from the Arabic Text', *McClatchy Newspapers*, 18 November 2008, available at www.mcclatchydc.com/news/nation-world/world/article24511081.html. The Agreement provided that Council authorisation under Chapter VII of the UN Charter for the US presence would terminate on 31 December 2008: *ibid.*, 4, Art. 25.

170 See generally Lieblich, 'International Law and Civil Wars' (n. 139), 165–9.

171 See *ibid.*, 165–6.

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Africa regional organisation, as well as a body of the African Union.[172] The UN Security Council had previously imposed an arms embargo on Somalia and such an intervention would require that an exception be made to the embargo. This exception came in the form of Resolution 1725, in which the Council permitted the deployment of an IGAD peacekeeping mission to Somalia.[173]

While this process played out, Ethiopian troops entered the country to support the TFG.[174] Their presence allowed the TFG to survive.[175] It seems virtually inconceivable that Ethiopian forces were in Somalia without the consent of the TFG. In several reports to the Council, the UN Secretary-General noted that TFG forces were frequently supported by Ethiopian troops in key battles.[176] Ethiopian forces provided crucial support for the TFG while it waited for, first, the IGAD and, then, the African Union to deploy forces. For its part, the UN Security Council had numerous opportunities to condemn the Ethiopian presence, which the UN Secretary-General specifically noted in his reports – yet it issued no such condemnation. As Eliav Lieblich concludes,

[172] International Crisis Group, *Can the Somali Crisis Be Contained?*, Africa Report No. 116, 10 August 2006, available at www.crisisgroup.org/africa/horn-africa/somalia/can-somali-crisis-be-contained.

[173] UN SC Res. 1725 of 6 December 2006. The IGAD troops were never deployed and, in February 2007, the Security Council approved an African Union mission with an identical mandate: UN SC Res. 1744 of 21 February 2007.

[174] See UCDP, http://ucdp.uu.se/#/statebased/749.

[175] See International Crisis Group, *Somalia: The Tough Part Is Ahead*, Africa Briefing No. 45, 26 January 2007, available at www.crisisgroup.org/africa/horn-africa/somalia/somalia-tough-part-ahead, 2: 'Its military intervention has achieved Ethiopia's primary objective: to eliminate the immediate security threat posed by the Islamic Courts.' In August 2006, the International Crisis Group reported that '[t]he single most important foreign actor in Somali affairs, Ethiopia, is the TFG's patron and principal advocate in the international community': International Crisis Group, *Can the Somalia Crisis Be Contained?* (n. 172), 19.

[176] Report of the Secretary-General on the Situation in Somalia pursuant to paragraphs 3 and 9 of Security Council Resolution 1744, UN Doc. S/2007/204 (20 April 2007), paras 19 ('On 22 December 2006, intense fighting broke out near Baidoa between the Union and Transitional Federal Government forces supported by Ethiopian troops') and 23 ('On 21 March 2007, Transitional Federal Government forces, supported by Ethiopian troops, commenced operations in Mogadishu with the aim of disarming militias and the population and removing insurgents'). See also *ibid.*, para. 21 (noting that government and Ethiopian troops were housed together); Report of the Secretary-General on the Situation in Somalia, UN Doc. S/2007/115 (28 February 2007), paras 1 (describing 'the dislodging of the Union of Islamic Courts by the forces of the Transitional Federal Government assisted by Ethiopian troops'), 5 ('The Transitional Federal Government forces, supported by Ethiopian ground and air forces, engaged with the Union of Islamic Courts forces on a front stretching more than 400 km, from the lower Juba Valley in the south to the region of Galkayo in central Somalia') and 6 (referring to the 'Transitional Federal Government/Ethiopian coalition').

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'[t]he international response to the intervention by Ethiopia was largely one of acquiescence'.[177]

An example of the Council acting *inconsistently* with the *Nicaragua* view is its reaction to Senegal's assistance to the government of Guinea-Bissau. While the Council did not reiterate the self-determination rationale for disapproving of the intervention, its actions tracked one of the classic arguments against the *Nicaragua* view: that foreign assistance to a government will simply prolong a conflict. The 1998 conflict in Guinea-Bissau involved a military junta seeking to dislodge increasingly unpopular President João Bernardo Vieira. Vieira had earlier halted his country's support for rebels in neighbouring Senegal and, in recognition of this action, the Senegalese government provided 2,000 troops to support Vieira within 48 hours of the junta's rebellion.[178] At one point, government forces managed to hold the presidential palace only with the assistance of Senegalese soldiers.[179] After the parties signed a series of peace documents in mid-to-late 1998, the Security Council commended the end of violence and called for 'the withdrawal of all foreign troops in Guinea-Bissau'.[180]

In contrast to its failure to follow the *Nicaragua* view on assistance to governments, the Council does appear to agree with *Nicaragua*'s blanket disapproval of assistance to rebel groups. The Council did not approve any of the nine interventions assisting rebel groups and specifically disapproved of seven.[181] The Council used quite general language in many of these cases, condemning all outside intervention in the states.[182]

[177] Lieblich, 'International Law and Civil Wars' (n. 139), 168. For a contrary view, see Olivier Corten, 'La licéité douteuse de l'action militaire de l'Ethiopie en Somalie et ses implications sur l'argument de l'intervention consentie', *Revue Générale de Droit Internationale Public* 111 (2007), 513–37.

[178] UCDP, 'Government of Guinea-Bissau: Military Junta for the Consolidation of Democracy, Peace and Justice', available at http://ucdp.uu.se/#/statebased/866.

[179] *Ibid.*

[180] UN SC Res. 1216 of 21 December 1998.

[181] The Council condemned interventions favouring rebels in Angola, DR Congo v. M23, DR Congo v. RCD, DR Congo v. RCD/ML, DR Congo v. MLC, DR Congo v. AFDL, and Congo. The Council issued no statement in one other case and issued non-committal statements in the remaining two cases.

[182] See, e.g., UN SC Res. 804 of 29 January 1993 (expressing concern over 'foreign support for and involvement in military actions in Angola'). See also UN SC Pres. Statement on the Great Lakes Region, S/PRST/1996/44, 1 November 1996 (including DR Congo), 'call[ing] on all States to respect the sovereignty and territorial integrity of neighbouring States in accordance with their obligations under the United Nations Charter. In this connection, it urges all parties to refrain from the use of force as well as cross-border incursions and to engage in a process of negotiation.'

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B. *The IDI View*

The second view is the IDI claim that responding to invitations from governments is permissible up until a conflict becomes a civil war. The IDI view would permit intervention in only a subset of conflicts encompassed by the *Nicaragua* view. On first blush, the Council seems to have almost wholly ignored the IDI 'civil war' limitation. As noted earlier, all cases in the dataset qualify as internal conflicts, according to Uppsala criteria, which I argue largely correlate to the contemporary understanding of a NIAC in international law. The Council approved 41 per cent (18/44) of all interventions in the dataset (see Chart 3.1). Even limiting our examination to the cases in which interventions are designed to assist governments fighting rebels – the same cases considered for the *Nicaragua* view – the Council approved 37 per cent.[183] As a result, one could well conclude that the IDI view finds no support in Council practice.[184]

But this obscures a difficulty in testing the IDI view. Although all forty-four cases qualify as internal conflicts according to UCDP, Uppsala classified 84 per cent (37/44) of those conflicts as 'internationalised internal conflicts' – that is, as internal conflicts 'with intervention from other states … on one or both sides'.[185] Of course, one would assume that these conflicts were 'internationalised' because of the consensual intervention – but that is not the case: Uppsala codes six conflicts in the dataset as pure 'internal conflicts' despite the presence of a consensual intervention.[186] And the Council approved only one of

[183] As noted above, the Council's full record in cases of assistance to governments in conflict with rebel groups is as follows: of the sixteen total cases, the Council condemned 18 per cent (3/16), approved of 37 per cent (6/16), issued equivocal statements in 25 per cent (4/16), and issued no statement in 18 per cent (3/15).

[184] This would be consistent with some commentators' view of state practice more generally. See Dapo Akande, 'Would It Be Lawful for European (or Other) States to Provide Arms to the Syrian Opposition?', *EJIL:Talk!*, 17 January 2013, available at www.ejiltalk.org/would-it-be-lawful-for-european-or-other-states-to-provide-arms-to-the-syrian-opposition/: 'There seems to be limited evidence that States accept that they are obliged not to support governments in a civil war situation.'

[185] Gleditsch et al., UCDP/PRIO Armed Conflict Dataset Codebook, version 18 (January 2018), available at http://ucdp.uu.se/downloads/ucdpprio/ucdp-prio-acd-181.pdf, 11, §3.14. While Uppsala codes many types of intervention (e.g., supplying materiel, airspace, military advisers), it considers an internal conflict 'internationalized' only if another state supplies troops: Therése Pettersson and Peter Wallensteen, 'Armed Conflicts, 1946–2014', *Journal of Peace Research* 52 (2015), 536–50 (549).

[186] UCDP coded the following conflicts as purely internal: Angola, Sri Lanka, Sudan, Algeria, Georgia (Abkhazia), and Central African Republic.

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those interventions (in the Central African Republic[187]), suggesting that an IDI civil war limitation might be operating in cases of 'pure' internal conflict.

An alternative view is that these conflicts were internationalised because of an intervention to assist rebel groups that preceded the consensual intervention on the government side. Under the Uppsala coding scheme, this seems unlikely.[188] But if there were a prior intervention supporting rebels, the government would not need to invoke the intervention by invitation doctrine to support a counter-intervention in its favour; it could rely instead on collective self-defence in response to the armed attack represented by the initial assistance to the rebels.[189]

These considerations do not, however, alter the conclusion that the Council has not disapproved of intervention in civil war – that is, that it has not adopted the IDI limitation. First, the Council's views on an invitation justification are not made irrelevant by the existence of an alternative theory of justification. Indeed, if one were to insist that the only legally useful cases were those in which an invitation was the *sole* justification advanced for the use of force, one would be left with very little state practice at all.[190] Second, it is not clear in these cases that the Council was aware of prior interventions when it gave its approval, or that any prior interventions rose to the level of an 'armed attack' triggering a right of collective self-defence.[191] Finally, if the IDI view truly guided Council actions, then the Council would have disapproved of all six interventions in 'pure internal conflicts'. In fact, the Council disapproved only in the case of Angola.[192]

Another way of approaching how the IDI view fared in Council practice is to ask whether, in any of the three cases in which the Council disapproved of pro-government interventions, it did so because the conflict had reached the threshold of a 'civil war'. The Council did not do so explicitly. Its resolutions on South Sudan, Guinea-Bissau, and DR Congo (Kabila) condemned

[187] Security Council Press Statement on Central African Republic, SC/10880-AFR/2503, 11 January 2013.

[188] Uppsala also codes interventions at the invitation of rebel groups, and such interventions would be coded along with any later counter-intervention on the government side. In the case of DR Congo (Kabila), for example, included in this dataset, interventions are coded both for the government and rebel sides in the same conflict – designated as 'DR Congo (Kabila) 1' and 'DR Congo (Kabila) 2'. Uppsala did not code a prior intervention in support of rebels in any of the cases of invitation by governments that were approved by the Security Council.

[189] ICJ, *Nicaragua* (n. 25), para. 193. This claim would also need to demonstrate that support for the rebels rose to the level of an 'armed attack'.

[190] See Lieblich, 'International Law and Civil Wars' (n. 139), 13: '[I]n most scenarios of consensual interventions the consent justification will frequently be explicitly or implicitly advanced in conjunction with other, substantive justifications for the intervention.'

[191] Art. 51 UN Charter.

[192] The Council had no reaction in three of those cases and issued equivocal reactions in another two.

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external intervention as part of an overall condemnation of ongoing or renewed conflict.[193] One might interpret the Council's call for ending hostilities as consistent with favouring an indigenous resolution to the conflicts, free from the skewing effect of foreign support for the government. But bringing an end to fighting and facilitating peace negotiations are goals the Council pursues in *every* NIAC, whether or not foreign forces are involved.[194] The involvement of foreign forces in these civil wars, in other words, does not appear to be the reason the Council condemned the interventions.

The case of France's 2013 intervention in Mali has been cited both as an example of the Security Council rejecting the IDI view and as an example of its endorsement of the anti-terrorist view.[195] A review of the Council's reaction and that of its members suggests that the case may plausibly support both theories. The Mali case begins with discontent on the part of the Tuareg people, a nomadic group with origins in northern Mali, near the borders of Algeria, Niger, and Libya.[196] After the overthrow and death of Libyan leader Muammar Gaddafi in 2011, many Tuareg who had been living in Libya returned to northern Mali and founded a Tuareg separatist group, the National Movement for the Liberation of Azawad (MNLA). Those forming the MNLA rejected a potential leader, Iyad Ag Ghali, alienating him from the group.[197] Shortly thereafter, Ghali formed Ansar Dine, a group that was also predominantly Tuareg but which sought to bring a fundamentalist form of Islam to Mali. Despite their separate origins, MNLA and Ansar Dine both

[193] See Security Council Press Statement on South Sudan, SC/11244-AFR/2792, 10 January 2014 (for South Sudan, '[t]he members of the Security Council also strongly discouraged external intervention that could exacerbate the military and political tensions'); UN SC Res. 1216 of 21 December 1998, para. ii (in which the Council calls for 'withdrawal of all foreign troops in Guinea-Bissau' as part of a long list of requests designed to de-escalate the conflict); One might view the Council's statement on the withdrawal of foreign forces not as acondemnation of the initial intervention but simply as a remedial step needed to restore peace in Guinea-Bissau. UN SC Res. 1304 of 16 June 2000 (for DR Congo, the Council expresses 'deep concern at the continuation of the hostilities in the country' and its 'outrage at renewed fighting between Ugandan and Rwandan forces in Kisangani, Democratic Republic of the Congo', and demands 'that Uganda and Rwanda, which have violated the sovereignty and territorial integrity of the Democratic Republic of the Congo, withdraw all their forces from the territory of the Democratic Republic of the Congo without further delay').

[194] See Fox et al., 'The Contributions of United Nations Security Council Resolutions' (n. 33), 683–92 (detailing Council's evident support for a ius ad bellum-type norm for NIACs).

[195] See Gregory H. Fox, 'Intervention by Invitation', in Weller, *Use of Force* (n. 89), 816–40 (824–6) (rejecting the IDI view); Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes' (n. 6), 866 (supporting the anti-terrorism view).

[196] Stephanie Pezard and Michael Shurkin, *Toward a Secure and Stable Northern Mali: Approaches to Engaging Local Actors* (Washington, D.C.: Rand Corporation 2013), 6.

[197] UCDP, 'Government of Mali v. AQIM', available at http://ucdp.uu.se/#/statebased/12575.

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fought against Malian troops in the north. By mid-March 2012, the Malian Army had lost a third of the country's territory to the two rebel groups.[198]

The growing lack of confidence in the Malian government led to protests in Bamako, culminating in a coup d'état on 22 March 2012.[199] Malian Army Captain Amadou Sanogo and his followers seized power and suspended Mali's constitution.[200] The coup was widely condemned and, after negotiations led by ECOWAS, Sanogo agreed to a transitional political process under the leadership of interim President Dioncounda Traoré.[201]

On 6 April 2012, having occupied a series of towns in the north, the MNLA declared independence for the state of Azawad.[202] From this point, the dynamics of the conflict became fluid. In May, Ansar Dine and several other Islamist groups fighting in the north formed an alliance with the MNLA.[203] Shortly thereafter, the relationship soured. Ansar Dine had secured support from Al-Qaeda in the Islamic Maghreb (AQIM) and its splinter group MUJAO. In June, these groups forced MNLA out of many of the occupied towns in the north of the country and began advancing south.[204]

The UN Security Council began to react in the spring of 2012. Its resolutions and presidential statements initially addressed only the rebel groups, but then later expanded to address both rebel and 'terrorist' groups.[205] Critically, in other words, the Council did not refer to 'rebel' and 'terrorist'

198 *Ibid.*

199 *Ibid.*

200 Andy Morgan, 'Coup Threatens to Plunge Mali Back into the Darkness of Dictatorship', *The Guardian*, 23 March 2012, available at www.theguardian.com/commentisfree/2012/mar/23/coup-mali-dictatorship-tuareg.

201 'ECOWAS Threatens Mali Coup Leaders with New Sanctions', *BBC News*, 14 May 2012, available at www.bbc.com/news/world-africa-18065684; 'Mali Profile: Timeline', *BBC News*, 26 August 2020, available at www.bbc.com/news/world-africa-13881978.

202 Dan E. Stigall, 'The French Military Intervention in Mali, Counter-Terrorism, and the Law of Armed Conflict', *Military Law Review* 223 (2015), 1–40 (10–11).

203 *Ibid.*, 11.

204 Laura Grossman, 'Into the Abyss in Mali', *Journal of International Security Affairs* 25 (2013), 65–74 (68).

205 See UN SC Pres. Statement on Peace and Security in Africa, S/PRST/2012/7, 26 March 2012 ('The Security Council condemns the attacks initiated and carried out by rebel groups against Malian Government forces and calls on the rebels to cease all violence and to seek a peaceful solution through appropriate political dialogue'); UN SC Pres. Statement on Peace and Security in Africa, S/PRST/2012/9, 3 April 2012 ('The Security Council strongly condemns the continued attacks, looting and seizure of territory carried out by rebel groups in the North of Mali and demands an immediate cessation of hostilities. The Council is alarmed by the presence in the region of the terrorist group Al Qaida in the Islamic Maghreb, which could lead to a further destabilization of the security situation.').

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groups as one and the same, but as distinct. In Resolution 2056 on 5 July, for example, the Council expressed its 'categorical rejection of statements made by the National Movement for the Liberation of Azawad (MNLA) regarding the so-called "independence" of Northern Mali, and further reiterating that it considers such announcements as null and void'.[206] In the same Resolution, it called on all groups in northern Mali, including the MNLA, Ansar Dine, and foreign combatants on Malian soil, 'to renounce all affiliations incompatible with peace, security, the rule of law and the territorial integrity of Mali'.[207] As the terrorist groups advanced south, they became the focus of Council attention, although it still occasionally mentioned the 'rebels'.[208]

With the security situation in the north deteriorating, the transitional authorities requested military assistance from ECOWAS on 1 September 2012.[209] This was followed by requests from both the transitional authorities and ECOWAS that the UN Security Council authorise the deployment of an international military force.[210] On 12 October, the Security Council did so, in Resolution 2071.[211] On 20 December, the Council created the African-led International Support Mission in Mali (AFISMA), '[t]o support the Malian authorities in recovering the areas in the north of its territory under the control of *terrorist, extremist and armed groups*'.[212] The disjunctive listing of the three types of group suggests that the Council did not consider them one and the same.

But the international force came together slowly and, by early January 2013, the armed groups were only 700 kilometres from Bamako. On 11 January, French President François Hollande announced that he had received a

206 UN SC Res. 2056 of 5 July 2012, cons. 9.
207 *Ibid.*, para. 10.
208 See UN SC Res. 2071 of 12 October 2012, paras 1 (where the Council '[u]rges the Transitional authorities of Mali, the Malian rebel groups and legitimate representatives of the local population in the north of Mali, to engage, as soon as possible') and 2 (where the Council '[c]alls upon Malian rebel groups to cut off all ties to terrorist organizations, notably AQIM and affiliated groups'); UN SC Res. 2085 of 20 December 2012 (in which the Council '[d]emands that Malian rebel groups cut off all ties to terrorist organizations, notably Al-Qaida in Islamic Maghreb (AQIM) and associated groups').
209 Report of the Secretary-General on the Situation in Mali, UN Doc. S/2012/894, 28 November 2012, para. 49.
210 *Ibid.*
211 UN SC Res. 2071 of 12 October 2012, para. 7: 'Request[ing] the Secretary-General to immediately provide military and security planners to assist ECOWAS and the African Union … to respond to the request of the Transitional authorities of Mali regarding an international military force.'
212 UN SC Res. 2085 of 20 December 2012, cons. 4 (emphasis added).

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request for assistance from the transitional government and that France had agreed to help.[213] The intervention effectively stopped the groups' advances.[214] The Council discussed the French intervention on 22 January. Many speakers praised the French action only for halting 'terrorist' advances.[215] Others, following the Council's lead, referred to both terrorist and rebel groups.[216]

In Resolution 2100, the UN Security Council welcomed 'the swift action by the French forces, at the request of the transitional authorities of Mali, to stop the offensive of *terrorist, extremist and armed groups* towards the south of Mali'.[217] The Permanent Representative from Mali repeated the distinction between terrorist-affiliated groups, on the one hand, and the Tuareg separatists, on the other, describing the French intervention as supporting the government in opposing both.[218] The Council did not authorise the French intervention: although Resolution 2100 invoked Chapter VII of the UN Charter, the French action is mentioned only in the preambular

[213] 'France Launches Mali Military Intervention', *Al Jazeera*, 11 January 2013, available at www.aljazeera.com/news/africa/2013/01/20131111135659836345.html.

[214] Stigall, 'The French Military Intervention in Mali' (n. 202), 14.

[215] UN SCOR, 68th Session, 6905th Meeting, UN Doc. S/PV.6905, 22 January 2013, 9 (the ECOWAS representative describes '[t]he intervention of French troops, at the request of the legal authorities of Mali, to assist the Malian armed forces in beating back the offensive by terrorist groups underscores the urgent need for such international solidarity'); *ibid.*, 6 (the Malian representative thanks France and the French president, who, 'taking stock of the threat posed by the southward march of the terrorist groups, immediately granted the Malian President's request, thereby making it possible to save Mali as a State and to restore hope to the people and the army of Mali'); *ibid.*, 11 (Senegal 'welcome[s] the rapid intervention by one of Mali's historic allies – France – upon that country's request and with the support of countries of the subregion, to halt and neutralize the jihadists' offensive against the large urban centres of the country'); *ibid.*, 13 (Burkina Faso 'takes this opportunity to thank France for its diligent response to Mali's requests to contain the advance of terrorist groups').

[216] *Ibid.*, 6 (Mali describes how 'terrorist and extremist groups, as well as irredentist movements and criminal networks, continue to defy the international community'); *ibid.*, 10 ('ECOWAS would like to reiterate that the Tuareg issue and the question of the north of Mali cannot be hijacked by terrorist forces. All mingling between Tuareg and narco-terrorists must be avoided, and the settlement of the underlying causes of the conflict must be approached with pragmatism'); *ibid.*, 14–15 (Benin describes the situation in Mali as a result of 'the inflow of hegemonistic outside elements with ties to criminal networks and religious extremists, who have sought to subjugate a free and independent State by making use of a tiny subgroup of one of the ethnic minorities').

[217] UN SC Res. 2100 of 25 April 2013, cons. 5 (emphasis added).

[218] UN SCOR, 68th Session, 6952nd Meeting, UN Doc. S/PV.6952, 22 January 2013, 3 (the Malian ambassador describes the Resolution as 'an important step in a process to stem the activities of terrorists and rebel groups in Mali – Al-Qaida in the Islamic Maghreb, the Movement for Unity and Jihad in Western Africa, Ansar Dine and the National Movement for the Liberation of Azawad').

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paragraphs in the language quoted above. Legal authority for the request could thus emanate only from the invitation by the Malian transitional authorities. Despite the transitional regime being unelected and the Council urging it 'to hold free, fair, transparent and inclusive presidential and legislative elections as soon as technically possible,'[219] Resolution 2100 does not treat them as incapable of issuing the invitation.

Thus the Council and its members clearly distinguished between the two sets of antagonists in Mali. There was good reason for them to do so: as noted, the Tuareg-focused MNLA had broken with the jihadist-focused groups (Ansar Dine and MUJAO) prior the French intervention, and the two factions began fighting with each other even as they were also fighting with the Malian Army and its French allies.[220] It is thus difficult to conclude that the Council viewed the French intervention as assisting only in repelling the Islamist groups. Moreover, Mali is not a case in which ordinary rebels were rebranded as 'terrorists', so that the government could gain international support. The Council had already distinguished the groups by listing both AQIM and MUAO, but not MNLA, as terrorist groups subject to sanctions under Resolution 1267.[221]

Finally, the ongoing efforts by various international actors to facilitate a political solution to the conflict appears incompatible with viewing Mali as solely an intervention concerned with terrorism. As the Under-Secretary-General for Political Affairs told the Council on 5 December 2012, the Secretary-General's Special Representative:

> … has significantly increased his political engagement with the authorities in Mali and key regional stakeholders to provide momentum to a Malian-owned political process focused on three main objectives: first, broad-based and inclusive national dialogue aimed at formulating a road map for the transition;

[219] UN SC Res. 2100 of 25 April 2013, para. 3.

[220] As Stigall recounts:

> The opposing alliance of non-state armed groups also degraded and splintered. The relationship had already begun to deteriorate between the more secular MNLA and the more Islamist groups, Ansar Dine and MUJAO – and, after a schism emerged, the Islamists expelled MNLA from the city of Gao. Reports further indicate that Ansar Dine and MUJAO began fighting one another. In fact, by the time the French were intervening in Mali, Ansar Dine had abandoned Timbuktu to MUJAO, and MNLA was openly seeking an alliance with French forces.

Stigall, 'The French Military Intervention in Mali' (n. 202), 14–15 (footnotes omitted).

[221] See UN Security Council, 'The Organization of Al-Qaida in the Islamic Maghreb', available at www.un.org/securitycouncil/sanctions/1267/aq_sanctions_list/summaries/entity/the-organization-of-al-qaida-in-the-islamic. Ansar Dine was listed as being 'associated' with Al-Qaeda: UN Security Council, 'Ansar Eddine', available at www.un.org/securitycouncil/sanctions/1267/aq_sanctions_list/summaries/entity/ansar-eddine.

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> secondly, negotiations with armed groups in the north that renounce violence and terrorism; and thirdly, preparations for the holding of elections.[222]

Critically, that peace process is described as one involving reconciliation among competing Malian opposition groups:

> Despite concerted international efforts, the political landscape in Mali remains complex and fragmented. It is critical that the key political actors arrive at a unified vision as soon as possible if they are to effectively focus efforts on the main transition challenges, in particular national dialogue and negotiations with the armed groups. The support of the international community will continue to be critical in helping the Malians to bridge differences and arrive at a national consensus.[223]

A conflict involving a 'complex and fragmented' political landscape that requires citizens to 'bridge differences and arrive at a national consensus' sounds very much like a civil war.[224] Terrorist groups, as noted, are generally seen as operating outside such a process of national self-determination. Anti-terrorism was certainly an objective articulated by virtually all international actors who characterised the intervention – but it was decidedly not the only objective. Mali thus stands as a substantial obstacle to grounding the IDI view in Council practice.

C. *The Democratic Legitimacy View*

The third theory is the democratic legitimacy view, finding invitations to be valid when they come from individuals or parties with a clear electoral mandate, who have been denied their office. One drawback of the data on

[222] UN Doc. S/PV.6879 (5 December 2012), 3 (statement of Jeffrey Feltman, Under-Secretary-General for Political Affairs).

[223] *Ibid*.

[224] The UN Secretary-General's vision of political reconciliation in Mali, submitted to the Council several months after the French intervention, similarly focused on creating political processes that would bridge deep gaps between conflicting national groups:

> It will be equally important to support Malian efforts to establish a political order that enjoys the consent of the governed on the basis of inclusive dialogue, political participation, accountable governance and safeguards for all communities. A critical factor, in this regard, is the restoration of constitutional order through free, fair, credible and peaceful presidential, legislative and municipal elections. Political dialogue at the local and national levels will need to result in a greater consensus around the reforms needed to address the root causes of the conflict.

Report of the Secretary-General on the Situation in Mali, UN Doc. S/2013/189, 26 March 2013, para. 66.

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this question is the small number of coded cases involving claims of democratic legitimacy: the Central African Republic (2002), Lesotho (1998), Sierra Leone (1997), and Yemen (2015) (see Appendix II).[225]

The record from this small sample size is mixed. The Council approved two pro-democratic interventions (Sierra Leone and Yemen) and either issued no statement or an equivocal statement for the remaining two.

1. Sierra Leone (2000)

The United Kingdom intervened in Sierra Leone in May 2000, after the failure of a peace agreement between the elected government of Ahmad Tejan Kabbah and the brutal Revolutionary United Front (RUF).[226] With RUF forces threatening both Kabbah's hold on the presidency and a newly deployed UN peacekeeping mission, the United Kingdom made a series of troop deployments with the consent of the Kabbah regime.[227] The deployments are credited with halting a RUF advance that would almost certainly have toppled the regime.[228] It also brought the RUF back to the negotiating table and eventually led to new elections in 2002.[229] Protection of the elected regime was one of several justifications given by the UK government.[230] Importantly, when Kabbah consented to the UK intervention, the RUF controlled at least 40 per cent of the country – one factor in the NIAC threshold.[231] Although the UN Security Council did not refer to the UK intervention in a resolution or presidential statement, the overwhelming number of states present expressed their approval at a Council meeting on 11

225 While the case of Haiti (1994) is often cited in support of the propriety of invitations issued by elected governments in exile, Haiti is not included in our dataset because no troops were sent to Haitian territory. The sending of troops – as opposed to other forms of assistance – was one of my central coding criteria. The 2011 invitation by President-Elect Alassane Ouattara of Côte d'Ivoire is also not included here because the invitation was issued to a regional organisation (ECOWAS), not an individual state. See the discussion in Kritsiotis, 'Intervention and the Problematisation of Consent', Chapter 1 in this volume, section V.C.

226 See David H. Ucko, 'Can Limited Intervention Work? Lessons from Britain's Success Story in Sierra Leone', *Journal of Strategic Studies* 39 (2016), 847–77.

227 UN Secretary-General, *Implementing the Responsibility to Protect*, UN Doc. A/63/677, 12 January 2009, para. 42: 'In 2000, with the consent of the Government, a modest British-led intervention force helped to protect Freetown, boost the [UN Peacekeeping] Mission and restore stability to the beleaguered West African State.'

228 Gray, *International Law and the Use of Force* (n. 78), **327**; Ucko, 'Can Limited Intervention Work?' (n. 226), 853 (Sierra Leone's army at the time 'numbered only 2000–3000 poorly trained soldiers and crumbled in the face of the rebel advance').

229 Ucko, 'Can Limited Intervention Work?' (n. 226), 851.

230 *Ibid.*, 855.

231 *Ibid.*, 850.

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May 2000.[232] Many also described the RUF as threatening, in the words of the United States, 'yet again to undermine the democratically elected government of President Kabbah'.[233] The lack of a collective endorsement weakens Sierra Leone as support for the democratic legitimacy theory, but it does not undermine it altogether.

2. Yemen (2015)

The 2015 intervention in Yemen followed a three-year long deterioration in the country's internal security. In November 2011, in the midst of the Arab Spring uprisings, President Ali Abdullah Saleh resigned pursuant to a Gulf Cooperation Council (GCC) initiative that included a long-term political transition process.[234] Then Vice-President Hadi stood for election on 21 February 2012 and won, with 99.8 per cent of the vote.[235] Hadi then formed a government of national unity.[236]

The UN Security Council gave its full support to the GCC-led transition process in its Resolution 2014.[237] However, the Houthis (a Zaydist group based in the north of Yemen) rejected the GCC process, claiming it did not include the entire Yemeni people, and boycotted the election.[238] The Houthis aligned themselves with the still-influential former President Saleh and his remaining supporters.[239] They soon moved from the north to expand their territorial

232 UN SCOR, 55th Session, 4139th Meeting, UN Doc. S/PV.4139, 11 May 2000, 8 (Canada), 11 (United States), 14 (Namibia), 15 (Argentina), 18 (Ukraine and France), and 22 (Portugal, speaking on behalf of the European Union, Slovakia, Hungary, the Czech Republic, and Poland). See also *ibid.*, 2, where the UN Secretary-General states that 'the United Kingdom has made an invaluable contribution by securing the airport. The presence of British troops, even for a limited time and with a limited mandate, is a very important stabilizing factor.'

233 *Ibid.*, 11. See also *ibid.*, 14 (Namibia), 15 (Argentina), 18 (France), and 26 (Japan).

234 Marwa Rashad, 'Yemen's Saleh Signs Deal to Give up Power', *Reuters*, 23 November 2011, available at www.reuters.com/article/us-yemen/yemens-saleh-signs-deal-to-give-up-power-idUSTRE7AM0D020111123.

235 AFP, 'Yémen: Hadi élu président (99,8%)', *Le Figaro*, 24 February 2012, available at www.lefigaro.fr/flash-actu/2012/02/24/97001-20120224FILWWW00604-yemen-hadi-president-elu-a-998-des-voix.php.

236 Decree No. 184 for the Year 2011 to Form a Government of National Reconciliation, 7 December 2011, Abdo Rabbo Mansour Hadi (Yemen).

237 UN SC Res. 2014 of 21 October 2011. The Council repeated this support the next year in Resolution 2051 of 12 June 2012.

238 Zachary Vermeer, 'The Jus ad Bellum and the Airstrikes in Yemen: Double Standards for Decamping Presidents?', *EJIL:Talk!*, 30 April 2015, available at www.ejiltalk.org/the-jus-ad-bellum-and-the-airstrikes-in-yemen-double-standards-for-decamping-presidents/.

239 See letter dated 20 February 2015 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/2015/125 of 20 February 2015, paras 72–81 (setting out Saleh's role).

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control.[240] By September, the Houthis had taken control of the capital, Sana'a.[241] The Security Council condemned the Houthis' action, imposed sanctions, and maintained its support for Hadi.[242]

Against this background, on 21 September 2014, Hadi's government and the Houthis signed the Peace and National Partnership Agreement (PNPA), which was intended to create a unity government with Houthi representation in the cabinet.[243] The Security Council welcomed the agreement, and it once again stressed that 'Hadi is the legitimate authority based on election results and the terms of the GCC Initiative and Implementation Mechanism'.[244]

But the Houthis failed to realign their forces, as required in the agreement,[245] and rejected a draft constitution submitted to Hadi on 7 January 2015.[246] In early 2015, President Hadi and his cabinet were put under house arrest, and they collectively resigned on 22 January. Houthi forces once again took control of Sana'a.[247] In February, an expert panel created by the Security Council concluded that the Yemeni conflict had risen to 'the threshold of internal armed conflict in accordance with the international definition'.[248] On 6 February, the Houthis terminated the then-ongoing UN-led negotiations, and announced the dissolution of Parliament and the establishment of a 'presidential council' to run the country temporarily.[249] On 24 March, President Hadi requested military assistance from the GCC.[250] Two days later, Saudi Arabia and other GCC states launched Operation 'Decisive

[240] *Ibid.*, paras 84–93.

[241] 'How Yemen's Capital Sanaa Was Seized by Houthi Rebels', *BBC News*, 27 September 2014, available at www.bbc.com/news/world-29380668.

[242] See UN SC Res. 2051 of 12 June 2012; UN SC Pres. Statement on the Situation in the Middle East, S/PRST/2013/3, 15 February 2013; UN SC Pres. Statement on the Middle East, S/PRST/2014/18, 29 August 2014; Security Council Press Statement on Fighting in Yemen, SC/11470, 11 July 2014.

[243] Peace and National Partnership Agreement, 21 September 2014, Art. 1, available at http://peacemaker.un.org/yemen-national-partnership-2014; Mareike Transfeld, 'Gescheiterte Transformation im Jemen', *SWP-Aktuell*, February 2015, available at www.swp-berlin.org/fileadmin/contents/products/aktuell/2015A08_tfd.pdf.

[244] Security Council Press Statement on Yemen, SC/11578, 23 September 2014.

[245] See Letter from the Panel of Experts on Yemen (n. 239), para. 39.

[246] United Nations, Human Rights Office of the High Commissioner, Situation of Human Rights in Yemen: Report of the OHCHR, UN Doc. A/HRC/30/31, 7 September 2015, para 12.

[247] The Security Council condemned these actions in UN SC Res. 2201 of 15 February 2015.

[248] Letter from the Panel of Experts on Yemen (n. 239), paras 60, 62.

[249] Houthi Constitutional Declaration issued in Yemen on 6 February 2015, International IDEA (6 February 2015), available at www.constitutionnet.org/vl/item/yemen-revolutionary-committee-issues-constitutional-declaration-organize-foundations.

[250] Identical letters dated 26 March 2015 from the Permanent Representative of Qatar to the United Nations, addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2015/217 (Enclosure to Annex) (Hadi Letters).

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Storm'.[251] The intervention tilted the balance of the civil war in favour of the exiled government forces.[252]

In his letter requesting intervention, Hadi referred, first and foremost, to the acts of 'Houthi coup orchestrators'.[253] Hadi stated that while he had sought a peaceful solution to the conflict, 'our peaceful and constant efforts have been categorically rejected by the Houthi coup orchestrators, who are continuing their campaign of aggression aimed at subjugating the rest of the country's regions, particularly the south'.[254] The Houthi actions are described as 'acts of aggression' – a phrase from the UN Charter normally applied to inter-state actions. While the letter then continues to focus on Houthi actions, it also states that the Houthis were supported 'by internal forces that have sold their souls and are concerned only with their own interests'. This appears to be a reference to Al-Qaeda in the Arabian Peninsula (AQAP). Finally, Hadi states that the Houthis were 'being supported by regional Powers that are seeking to impose their control over the country and turn it into a tool by which they can extend their influence in the region'.[255] This appears to be a reference to Iran.

At the end of the letter, Hadi summarised his request to the GCC thus:

> I urge you, in accordance with the right of self-defence set forth in Article 51 of the Charter of the United Nations, and with the Charter of the League of Arab States and the Treaty on Joint Defence, to provide immediate support in every form and take the necessary measures, including military intervention, to protect Yemen and its people from the ongoing Houthi aggression, repel the attack that is expected at any moment on Aden and the other cities of the South, and help Yemen to confront Al-Qaida and Islamic State in Iraq and the Levant.[256]

Saudi Arabia and the other GCC states described their acceptance of Hadi's invitation in the same document submitted to the Security Council. The relevant passages are worth quoting in full:

> We note the contents of President Hadi's letter, which asks for immediate support in every form and for the necessary action to be taken in order to protect Yemen and its people from the aggression of the Houthi militias.

[251] Luca Ferro and Tom Ruys, 'The Military Intervention in Yemen's Civil War', in Ruys et al., *The Use of Force in International Law* (n. 15), 899–911 (900).

[252] 'Anti-Houthi Forces Retake Yemen's Largest Army Base', *Al Jazeera*, 4 August 2015, available at www.aljazeera.com/news/2015/8/4/anti-houthi-forces-retake-yemens-largest-army-base.

[253] Hadi Letters (n. 250), 3.

[254] *Ibid.*, 4.

[255] *Ibid.*

[256] *Ibid.*, 4–5.

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> The latter are supported by regional forces, which are seeking to extend their hegemony over Yemen and use the country as a base from which to influence the region. The threat is therefore not only to the security, stability and sovereignty of Yemen, but also to the security of the region as a whole and to international peace and security. President Hadi has also appealed for help in confronting terrorist organizations.
>
> The Houthi militias have failed to respond to repeated warnings from the States members of the Gulf Cooperation Council and the Security Council. They have continued to violate international law and norms, and to build up a military presence, including heavy weapons and missiles, on the border of Saudi Arabia. They recently carried out large-scale military exercises using medium and heavy weapons, with live ammunition, near the Saudi Arabian border. The Houthi militias have already carried out a bare-faced and unjustified attack on the territory of Saudi Arabia, in November 2009, and their current actions make it clear that they intend to do so again. Our countries have therefore decided to respond to President Hadi's appeal to protect Yemen and its great people from the aggression of the Houthi militias, which have always been a tool of outside forces that have constantly sought to undermine the safety and stability of Yemen.[257]

Resolution 2216 – the first adopted after the Saudi-led intervention – did not explicitly support the military action, although it noted Hadi's request and the Saudi response.[258] The Council did reiterate 'its support for the legitimacy of the President of Yemen, Abdo Rabbo Mansour Hadi', and called for the end to any actions that undermine 'the legitimacy of the President of Yemen'.[259] The Council also declared its 'support for the efforts of the Gulf Cooperation Council in assisting the political transition in Yemen and commend[] its engagement in this regard'.[260] In a debate over the Resolution, 'no single Council member (not even Russia) explicitly questioned the legality of Operation Decisive Storm'.[261] The United Kingdom was the only state to address the Saudi intervention directly: it expressed support and tied the intervention to Houthi aggression.[262]

257 *Ibid.*, 5.
258 UN SC Res. 2216 of 14 April 2015, cons. 2.
259 *Ibid.*
260 *Ibid.*, cons. 1.
261 Tom Ruys and Luca Ferro, 'Weathering the Storm: Legality and Legal Implications of the Saudi-Led Military Intervention in Yemen', *International and Comparative Law Quarterly* 65 (2016), 61–98 (70).
262 UN Doc. S/PV.7426 (14 April 2015), 2: 'In February, the Security Council made it very clear that further measures would be taken if the Houthis failed to cease their intimidation, aggression and expansion. As their actions have shown, the Houthis ignored this warning.

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How should the Yemen intervention be classified? Hadi's request and the Saudi response articulated three grounds for the intervention: defending the legitimate government against Houthi advances, countering terrorist forces, and responding to a prior intervention by 'regional powers' (i.e., Iran). Of these three, the claim of support for Hadi's legitimate governmental authority best accords with the facts described in the letters, the reactions of other states, and the facts on the ground. For that reason, Yemen is coded as a pro-democracy intervention. But because both Hadi and the Saudis also mention 'external' intervention, Yemen may also be seen as a counter-intervention. This is a tenuous claim at best, however, as discussed below.

A) HADI'S INVITATION AND THE SAUDI RESPONSE The two letters from Hadi and Saudi Arabia (on behalf of the GCC) are overwhelmingly devoted to buttressing the legitimacy of Hadi's presidency and countering the threat of the Houthi offensive. Hadi describes the threat as coming from 'Houthi coup orchestrators'. The references to terrorist groups and external support for the Houthis are almost afterthoughts, asserted without supporting facts. Indeed, the closing paragraph of Hadi's letter, while citing Article 51 of the UN Charter, makes no reference to an attack by Iran or any other state. Similarly, the Saudi letter summarises Hadi's request as seeking 'immediate support in every form and for the necessary action to be taken in order to protect Yemen and its people from the aggression of the Houthi militias'. The Saudis speak of their decision 'to respond to President Hadi's appeal to protect Yemen and its great people from the aggression of the Houthi militias'. While the Saudis also refer vaguely to 'support' from 'regional forces', they do not describe this support as involving troops or as a military intervention. The letter also notes that 'President Hadi has also appealed for help in confronting terrorist organizations', but says no more about the threat posed.[263]

B) STATE REACTION TO THE INTERVENTION An assessment of state reaction to the intervention begins with that of the UN Security Council itself. As Ruys and Ferro note, Resolution 2216 supported the two essential predicates for the democratic legitimacy rationale: the legitimacy of President Hadi;[264]

The United Kingdom therefore supports the Saudi-led military intervention in Yemen taking place at the request of President Hadi.'

263 Hadi Letters (n. 250), 5.

264 UN SC Res. 2216 of 14 April 2015, cons. 8: Council reaffirms 'its support for the legitimacy of the President of Yemen, Abdo Rabbo Mansour Hadi, and reiterating its call to all parties and Member States to refrain from taking any actions that undermine the unity, sovereignty, independence and territorial integrity of Yemen, and the legitimacy of the President of Yemen'.

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and the illegitimacy of Houthi actions (including a demand that they cease 'all actions that are exclusively within the authority of the legitimate Government of Yemen').[265] The Resolution's first operative paragraph focused on the Houthi threat to the democratic transition process.[266] The Council imposed sanctions only on Houthi leaders, not on terrorist groups or Iran.[267] Indeed, the Resolution makes no mention whatsoever of Iran, external support for the Houthis or Yemen's right to self-defence.[268] The Resolution condemns acts by AQAP but takes no action in response.

Outside the Council setting, the states supporting the intervention based their position largely on the Houthi threat to Hadi's legitimate government. Most did not refer to terrorism or a prior intervention. This was true of the Arab League,[269] the United States,[270] the United

[265] Ruys and Ferro, 'Weathering the Storm' (n. 261), 69–70 (quoting UN SC Res. 2216 of 14 April 2015, para. 1(d)).

[266] UN SC Res. 2216 of 14 April 2015, para. 1: Council '[d]emands that all Yemeni parties, in particular the Houthis … refrain from further unilateral actions that could undermine the political transition in Yemen'.

[267] *Ibid.*, para. 3.

[268] Corten, 'Intervention by Invitation', Chapter 2 in this volume, section II.D.

[269] In its Resolution, the Arab League decided:

> To assert its ongoing support for the constitutional authorities represented by His Excellency President Abdrabuh Mansour Hadi Mansour of the Republic of Yemen and his patriotic endeavour to preserve the Yemeni State and institutions and to re-launch the political process;
>
> 3. To reject and condemn the steps taken by the Houthi group in an act of unilateral escalation, steps that amount to a coup, ignore constitutional authority and the popular will as expressed in the outcomes of the National Dialogue Conference, and obstruct the political transition process.
>
> 4. To fully welcome and support the military operations in defence of legitimate authority in Yemen undertaken, at the invitation of the President of the Republic of Yemen, by the coalition composed of the States members of the Gulf Cooperation Council and a number of Arab States. Such action is grounded in the Arab Treaty of Joint Defence and Art. 51 of the Charter of the United Nations. It stems from the coalition's responsibility to preserve the safety, national unity, sovereignty and independence of the Arab countries.

Permanent Observer of the League of Arab States to the United Nations, Note verbale dated 2 April 2015 from the Permanent Observer of the League of Arab States to the United Nations, addressed to the President of the Security Council, UN Doc. S/2015/232 (15 April 2015), 14.

[270] The US National Security Council stated:

> The United States strongly condemns ongoing military actions taken by the Houthis against the elected government of Yemen. These actions have caused widespread instability and chaos that threaten the safety and well-being of all Yemeni citizens. The United States has been in close contact with President Hadi and our regional

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Kingdom,[271] France,[272] and Canada,[273] among others. Russia and the European Union criticised the intervention but focused on the potential for escalation rather than the invalidity of Hadi's invitation.[274] Importantly, none of the critics argued that the intervention was unlawful because the Yemen conflict had passed the NIAC threshold. A UN expert panel had determined one month prior to the intervention that the

> partners. In response to the deteriorating security situation, Saudi Arabia, Gulf Cooperation Council (GCC) members, and others will undertake military action to defend Saudi Arabia's border and to protect Yemen's legitimate government. As announced by GCC members earlier tonight, they are taking this action at the request of Yemeni President Abdo Rabbo Mansour Hadi.

White House Office of the Press Secretary, 'Statement by NSC Spokesperson Bernadette Meehan on the Situation in Yemen', 25 March 2015, available at https://obamawhitehouse.archives.gov/the-press-office/2015/03/25/statement-nsc-spokesperson-bernadette-meehan-situation-yemen.

[271] Recounting the prime minister's call with the Saudi king, the United Kingdom stated:

> The Prime Minister emphasised the UK's firm political support for the Saudi action in Yemen, noting that it was right to do everything possible to deter Houthi aggression, to support President Hadi and his legitimate government. They both expressed concern that Houthi action would lead to an escalation in terrorism and extremism enabling AQAP and ISIL to find a foothold in Yemen, which would pose a serious threat to both our nations.

Prime Minister's Office, 'PM Call with King Salman of Saudi Arabia', 27 March 2015, available at www.gov.uk/government/news/pm-call-with-king-salman-of-saudi-arabia-27-march-2015. Note that the threat from AQAP and ISIL is described as a possible *consequence* of Houthi action and not itself the threat being addressed by the intervention.

[272] France Diplomatie, 'Yemen – Situation', 26 March 2015, available at www.diplomatie.gouv.fr/en/country-files/yemen/events/article/yemen-situation-26-03-15:

> Military operations were carried out last night by several countries in the region in response to the request by the legitimate authorities of Yemen. France reaffirms its support for Yemen's government and for President Hadi. It strongly condemns the destabilizing actions by the Houthi rebels and calls on their supporters to immediately disassociate themselves from the rebels and to return to the political process.

[273] Canada Department of Foreign Affairs, Trade and Development, 'Minister Nicholson Concerned by Crisis in Yemen', 27 March 2015, http://news.gc.ca/web/article-en.do?nid=956649: 'Canada supports the military action by Saudi Arabia and its Gulf Cooperation Council [GCC] partners and others to defend Saudi Arabia's border and to protect Yemen's recognized government at the request of the Yemeni president.'

[274] Naharnet Newsdesk, 'EU Says Military Action Not the Solution in Yemen', *Naharnet*, 26 March 2015, available at www.naharnet.com/stories/en/173220; Damien Sharkov, 'Saudi Arabia Accuse Putin of Hypocrisy after Letter to Arab League', *Newsweek*, 20 March 2015, available at www.newsweek.com/saudi-arabia-accuse-putin-hypocrisy-after-letter-arab-league-317899.

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Yemen conflict constituted a NIAC.[275] Yemen may thus contribute to the view that the democratic legitimacy theory – to the extent that it is accepted – is not constrained by the IDI view.

Since the intervention, the Council has continued to demand that the Houthis abide by the GCC transition process and has reaffirmed the centrality of that process to political reconciliation in Yemen.[276] In particular, at the time of writing, the Council has not deviated from its support in Resolution 2216 for 'the legitimacy of the President of Yemen, Abdo Rabbo Mansour Hadi'.[277]

C) FACTS ON THE GROUND Finally, do the facts described by independent observers support the offhand, yet undeniably articulated, counter-intervention and anti-terrorist justifications for the Saudi intervention? The UCDP does not list an intervention by Iran (or any other state) prior to the Saudi intervention. The UN Panel of Experts on Yemen also does not mention an Iranian intervention in its 2015 and 2016 reports.[278] The Panel did find that anti-tank missiles supplied to the Houthis were 'likely to have been maintained or overhauled in the Islamic Republic of Iran', but it did not mention Iranian personnel in Yemen.[279] External observers of the war's origins describe Iranian assistance to the Houthis as 'minor and irrelevant to the balance of power in the ongoing war'.[280] Some suggest that Saudi

[275] Letter from the Panel of Experts on Yemen (n. 239), 16: 'Because of intensity of the armed violence, the level of organization of the involved armed groups and the duration of the violence, these incidents have reached the threshold of internal armed conflicts in accordance with the international definition.'

[276] See UN SC Res. 2456 of 26 February 2019; UN SC Res. 2216 of 14 April 2015; UN SC Res. 2201 of 15 February 2015.

[277] UN SC Res. 2451 of 21 December 2018, in which the Council reaffirms 'that the conflict in Yemen can be resolved only through an inclusive political process, as called for by relevant Security Council resolutions, including its resolution 2216 (2015)'.

[278] Letter from the Panel of Experts on Yemen (n. 239); *Final Report of the Panel of Experts on Yemen Established Pursuant to Security Council Resolution 2140 (2014)*, UN Doc. S/2018/192, 26 January 2016.

[279] *Final Report of the Panel of Experts* (n. 278), para. 82.

[280] Hubert Swietek, 'The Yemen War: A Proxy War, or a Self-Fulfilling Prophecy', *Polish Quarterly of International Affairs* 26 (2017), 38–54 (52). See also International Crisis Group, *Yemen at War*, Middle East and North Africa Briefing No. 45, 28 March 2015, available at www.crisisgroup.org/middle-east-north-africa/gulf-and-arabian-peninsula/yemen/yemen-war, 2 (Houthis 'are less dependent on Tehran than Hadi and his allies are on Riyadh, but on today's trajectory, their relative self-sufficiency will not last long'); International Crisis Group, *Yemen: Is Peace Possible?*, Middle East and North Africa Report No. 167, 9 February 2016, available at www.crisisgroup.org/middle-east-north-africa/gulf-and-arabian-peninsula/yemen/yemen-peace-possible, 10–11; Thomas Juneau, 'Iran's Policy towards the Houthis in Yemen: A

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Arabia in fact exaggerated Iranian assistance to the Houthis to further justify its intervention.[281]

As for AQAP, the UCDP does not list it as a party to the Yemeni conflict. The Panel of Experts describes AQAP as primarily engaged in conflict with the Houthis, complicating an anti-terrorism rationale on the part of the Saudis, who were also fighting the Houthis.[282] It appears that AQAP was not so much a presence in the main conflict between supporters of Hadi and the Houthis as it was a beneficiary of the power vacuum left by the breakdown of state authority brought on by the war.[283]

D) ASSESSING THE YEMENI CASE The rationale dominating Hadi's request for assistance was support for his government against a Houthi rebellion that undermined the GCC- and UN-backed transitional process. That rationale also dominates the Saudi response, the response of the UN Security Council, and the reaction of other states to the Saudi intervention. It is also the view most consistent with the facts on the ground. The UCDP does not identify either Iran or AQAP as party to the Yemeni conflict. Their absence is consistent with the marginal status of the counter-intervention and anti-terrorism justifications in the Hadi and Saudi letters.

Yet if Yemen is not a weak case for the democratic legitimacy view, neither is it an unambiguously strong one. First, Yemen presents the difficult question of how international law should process rationales for intervention that are either pretextual or only minimally grounded in fact. The Saudi claims to have responded to terrorists or a prior Iranian intervention simply are not supported by the facts. During the Cold War, such abuses of intervention by invitation were the primary justification for the restrictive IDI approach. I have argued that such factual conflicts are precisely the ones the Council can now resolve, meaning that the IDI limitations have lost much of their rationale.

Limited Return on a Modest Investment', *International Affairs* 92 (2016), 647–63 (658) (evidence supports 'the assessment that Iran started providing the Houthis with very limited amounts of military and financial support some time in 2009 and has probably increased this assistance in recent years, especially after 2014. Yet whatever the precise nature of Iran's budding relationship with the Houthis, by all indications its support remains limited and unlikely to buy Iran more than marginal influence.').

281 Swietek, 'The Yemen War' (n. 280), 49: 'It is Saudi Arabia that has imposed the dominant interpretation of the conflict in Yemen, as a proxy war conducted by Iran through its protégés in furtherance of its own interests.'

282 Letter from the Panel of Experts on Yemen (n. 239), paras 24–6.

283 *Ibid.*, para. 47; Razvan Munteanu, 'Saudi Arabia, Iran and the Geopolitical Game in Yemen', *Research and Science Today* 10 (2015), 57–62 (57–61).

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Second, while the Council did not explicitly approve the GCC action, it did affirm the essential elements of the democratic invitation theory: the democratic legitimacy of the Hadi regime, the unacceptability (owing to the lack of democratic bona fides) of Houthi control, the continuing validity of Hadi's claim to power despite his lack of effective control, and the validity (i.e., non-fictitious nature of) his invitation to the GCC states. That all of these factors were affirmed by the Council, as opposed to only the intervening state, adds credibility to the claim.

Third, much international support for Hadi and, by extension, his GCC benefactors was phrased not as favouring democratic legitimacy as such but as supporting the transitional process that the Houthi offensive had interrupted. That process was intended to culminate in a 'democratic' constitution and elections, so this may be a distinction without a difference. But it does somewhat attenuate the invention from a specific democratic outcome.

In sum, at a minimum, both Sierra Leone and Yemen presented the Council with opportunities to reject the democratic legitimacy theory in favour of the traditional effective control test. The Council did not do so in either case.

D. *Anti-Terrorism*

The fourth theory supports invitations by governments for assistance in conflicts with transnational terrorist groups. In the fourteen such cases in the dataset, the Council approved intervention in 71 per cent (10/14) and disapproved none (see Chart 3.6).[284] In the case of the United States aiding the government of Yemen in its conflict with AQAP, while the Council issued no statement, the European Union approved of the action. If one were to take the EU approval as indicative of larger international opinion, the percentage of anti-terrorist interventions receiving international approval would rise to 78 per cent (11/14).

Since the Council appears to have accepted anti-terrorism interventions, there is little need to review individual cases. As noted above and shown in Table 3.1, all but three of the groups involved in anti-terrorist interventions had appeared on the Council's 1267 list of terrorist organisations.[285] The interventions have ranged from troops provided by one state (Mali), to troops provided by a small group of states (the Multinational Joint Task force that sent Chadian forces into Cameroon in 2015 to counter Boko Haram[286]), to troops provided

284 The Council issued no statement in three cases (Algeria, Mauritania, and Uzbekistan) and issued a non-committal statement in one case (Syria v. IS).

285 See text accompanying nn. 121–6, above.

286 UN SC Pres. Statement on Threats to International Peace and Security Caused by Terrorist Acts, S/PRST/2015/14, 28 July 2015.

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by a larger group of states (the United States and its allies in Afghanistan, to counter the Taliban and other groups[287]).

E. *Conclusions*

Security Council practice does not reveal a preference for one dominant theory. The Council's consistent approval of counter-terrorism interventions is obviously relevant only to a limited number of cases, as is its approval of pro-democracy interventions. Both the *Nicaragua* and IDI views are applicable to all possible conflicts, but the Council has not unequivocally endorsed either one.

VI. A NEW PARADIGM? THE MULTILATERALISATION OF CONSENSUAL INTERVENTIONS

Both general theories of consensual intervention – IDI and *Nicaragua* – emerged during the Cold War. I argue that while the rise of UN Security Council practice does not resolve the competition between the two on their merits, it does reveal that their historically bound assumptions have been substantially eroded. I will argue further that, as a result, the international community should be open to treating Security Council practice as important evidence of customary international law in evaluating the lawfulness of consensual interventions.

A. *The Demise of Rules for a Polarised World*

1. The IDI and *Nicaragua* Views in Contemporary Context

Section II described how both the IDI and *Nicaragua* views were deeply embedded in the realities of Cold War politics.

Those realities have changed and the theories built upon their assumed continuation face two important challenges. First, both theories were premised on the absence of collective mechanisms to sort legitimate from illegitimate invitations. Despite the obvious desirability of centralised decision-making by the United Nations, the organisation was all but irrelevant to most NIACs.[288] Individual states, largely divided into Cold War camps, were left

[287] UN SC Res. 1386 of 20 December 2001.

[288] See Edwin Brown Firmage, 'Summary and Interpretation', in Richard Falk (ed.), *The International Law of Civil War* (Baltimore: Johns Hopkins University Press 1971), 405–28 (426): 'There is a compelling necessity for increased community control over the

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to judge the legality of interventions for themselves. The solution devised by the IDI was to impose a broad prophylactic rule to minimise the number of divisive factual questions surrounding interventions. Highly politicised issues, such as whether an invitation was real or fictitious, whether a government exercised effective control, and whether a regime had 'popular mandate', were not to be entrusted to the self-judgment of states invested in the conflict; instead, they were made irrelevant in the most consequential cases – when a civil war had broken out. Taking the opposite approach, the *Nicaragua* view dealt with these divisive questions by ignoring them.

With the end of Cold War polarisation, multilateral engagement with NIACs increased as superpower investment in their outcomes receded. As the data has shown, the Council and some regional organisations regularly take positions on NIACs, including on questions of regime legitimacy. They have done so in a variety of ways: by condemning foreign intervention, by supporting particular sides in NIACs, by supervising elections in post-conflict states, and by designating the winners of those elections as the legitimate leaders of the state. In each case, the unilateral and self-interested views of Cold War antagonists have been replaced by a collective judgment. As a result, categorical prophylactic rules such as the IDI and *Nicaragua* views seem unnecessary to check the good faith of the antagonist states.

The diminished importance of the two theories may be seen as an illustration of Thomas Franck's distinction between the legitimacy of 'categorical rules' and 'complex elastic rules'.[289] Franck argued that categorical rules, addressing problems with a simple and definite clarity, are most useful when no 'authoritative interpreter' of a norm is available – that is, when no entity is empowered to apply a complex scheme of rules to unclear facts and reach a determinate conclusion. Simple rules can effectively apply themselves and thus have less need of adjudicatory or evaluative institutions to achieve compliance. When such credible institutions do exist, however, more nuanced rules can be substituted if the institution is perceived as legitimate. Such 'process legitimacy' may 'credibly mitigate the elastic quality' of more complex rules.[290]

The IDI and *Nicaragua* views have the virtue of simplicity and clarity. Their lack of complexity minimised states' ability to evade compliance. During the

international aspects of civil strife. There has also emerged, however, the essential inability of international and regional organizations to meet this need, caused not only by their structural deficiencies but more basically by the unwillingness of states to cede sufficient power to them to permit effective action.'

289 Thomas M. Franck, *The Power of Legitimacy among Nations* (Oxford: OUP 1990), 85–90.

290 *Ibid*., 88.

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Cold War, those attributes were clearly essential. But since the Security Council has emerged as the authoritative interpreter of ius ad bellum norms (obviously not all cases), more nuanced rules may be appropriate.

Second, the more widely subscribed IDI view rests on a needlessly shallow conception of state autonomy. The IDI view prevents an inquiry into the question of how states actually choose their leaders, substituting the legal fiction that prohibiting foreign intervention allows a national 'choice' to be made. As Brad Roth has observed, conventional wisdom during the Cold War 'held that empirical investigations to ascertain public opinion in a foreign state was most often impracticable; that "popular will" itself was a complex and normatively loaded concept; and that any imposition from abroad of procedures calculated to measure "popular will" was presumptuous at best, and a usurpation at worst'.[291] Preserving 'autonomy' through non-intervention, in other words, involved not creating opportunities for actual popular choice but indulging a presumption that any leadership in effective control had, for the rest of the international community, been acceptably 'chosen'.

In an era when disagreements on theories of political legitimacy lay at the very heart of the superpower divide, this disinterest made sense. International law of the period did not 'generally address domestic constitutional issues, such as how a national government is formed'.[292] Moreover, most, if not all, superpower interventions at the behest of 'legitimate' governments were assumed to support unpopular regimes that might otherwise fall. In such circumstances, a rule permitting intervention would become 'an instrument to prevent social change, which is a vital aspect of national self-determination'.[293]

But international law is no longer deliberately indifferent to questions of regime legitimacy and how governments treat (or mistreat) their citizens.[294] In an era of normative commitment to democratic elections and human rights, as well as the omnipresence of election monitors and human rights reporting, deliberately avoiding the question of whether a given regime is actually

[291] Brad R. Roth, *Sovereign Equality and Moral Disagreement* (Oxford: OUP 2011), 140.

[292] American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (1987), §203, comment e.

[293] Wolfgang Friedmann, 'United States Policy and the Crisis of International Law', *American Journal of International Law* 59 (1965), 857–68 (866).

[294] See the discussion of the various legal developments underpinning the democratic legitimacy view in the text accompanying nn. 89–112, above. See also Guidance Note of the Secretary-General on Democracy (2009), setting out 'the United Nations framework for democracy based on universal principles, norms and standards, emphasizing the internationally agreed normative content'.

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supported by its citizens seems anachronistic.[295] Certainly, the Council has not practised democratic avoidance: 'Since 1993 approximately a hundred resolutions referred to "democracy" as a form of governance that needs to be enhanced, strengthened or supported.'[296] Consider the remarkable growth in election monitoring since the end of the Cold War, which has made information on most elections available for external scrutiny: 'During the Cold War, only one in five elections outside of the consolidated democracies was monitored by international observers, whereas by 2010 the share of monitored elections increased to four in five.'[297] Even when elections have been successfully stolen or an elected regime ousted from power, states, international organisations, and non-government organisations frequently (although not always) issue critiques that make it clear that international standards have been violated.[298] In some cases, their reactions result in the restoration of elected regimes; in other cases, not. But the success of these critiques is not the relevant measure of how legitimacy pronouncements affect the non-intervention doctrine; rather, it is that international standards of regime legitimacy, are consistently reaffirmed and demands made that they be respected. The IDI

[295] See Christina Binder and Christian Pippan, 'Election Monitoring, International', in Peters and Wolfrum, *Max Planck Encyclopaedia*, online edn (n. 14).

[296] Francesco Mancini, 'Promoting Democracy', in Sebastian von Einsiedel, David M. Malone and Bruno Stagno Ugarte (eds), *The UN Security Council in the 21st Century* (London: Lynne Rienner 2016), 235–57 (235). One could hardly find a clearer example of the distinction between democratically legitimate and illegitimate regimes than Council Resolution 2337 on The Gambia, in which the Council '[s]trongly condemn[ed] the statement by former President Jammeh, on 9 December rejecting the 1 December official election results' and urged 'all Gambian parties and stakeholders to respect the will of the people and the outcome of the election which recognized Adama Barrow as President-elect of The Gambia and representative of the freely expressed voice of the Gambian people as proclaimed by the Independent Electoral Commission'. The Council made clear that its engagement with the question of which leader had won the election was an effort to respect the will of the Gambian people as a whole. The Council condemned 'in the strongest possible terms the attempts to usurp the will of the people and undermine the integrity of the electoral process in The Gambia': UN SC Res. 2337 of 19 January 2017.

[297] Zhaotian Luo and Arturas Rozenas, 'The Election Monitor's Curse', *American Journal of Political Science* 62 (2017), 148–60 (148–9).

[298] Consider two examples of anti-democratic coups often cited as evidence of a 'democratic regression': the 2014 coup in Thailand and the 2013 coup in Egypt. In the case of Egypt, the African Union Peace and Security Council condemned 'the overthrow of the democratically elected President' Mohammed Morsi and suspended Egypt 'until the restoration of constitutional order': Peace and Security Council of the African Union, Communiqué of the 384th Meeting of the Peace and Security Council, PSC/PR/COMM (CCCLXXXIV) (5 July 2013). In the case of Thailand, the United States, Australia, and Japan individually condemned the coup, as did the European Union collectively: Pavin Chachavalpongpun, 'The Politics of International Sanctions: The 2014 Coup in Thailand', *Journal of International Affairs* 68 (2014), 169–85 (173–6).

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policy of deliberate indifference is difficult to reconcile with this body of state and international organisation practice.

It is true that, in the past decade, there has been a widely noted decline in both electoral democracy and human rights observance.[299] But the effect of these developments should not be overstated. In particular, they do not support a claim that international law has returned to the era of IDI's agnosticism on regime legitimacy. First, these developments have not involved states repudiating the regional 'democracy protection' regimes that most clearly codify principles of regime legitimacy. The OAS regime, for example, was employed in 2019 to deny a seat to the ambassador appointed by Venezuelan President Nicolas Maduro on the grounds that Maduro's election 'lacked legitimacy'.[300] Also in 2019, the African Union regime was used to condemn 'the overthrow of the democratically elected President' of Sudan.[301]

Second, recent anti-democratic practices may be seen as adaptive strategies that reflect the success of the first generation of pro-democratic norms and institutions. The two most important events those norms sought to confront – military coups and blatant election-day fraud – have dramatically declined in recent years.[302] Military coups have been replaced in many instances by what Nancy Bermo has called 'promissory coups', in which regimes 'frame the ouster of an elected government as a defence of democratic legality and make a public promise to hold elections and restore democracy as soon as

[299] See Larry Diamond, 'Facing up to the Democratic Recession', *Journal of Democracy* 26 (2015), 141–55; Freedom House, *Freedom in the World 2019* (2019), available at https://freedomhouse.org/sites/default/files/Feb2019_FH_FITW_2019_Report_ForWeb-compressed.pdf.

[300] OAS Permanent Council, Resolution on the Situation in Venezuela, OEA/Ser.G, CP/RES. 1124 (2217/19), 10 April 2019, corr. 1, where the OAS General Council seats the ambassador appointed by the leader of Venezuelan National Assembly, rather than the ambassador appointed by the president, based on view that the 'May 20, 2018 electoral process in Venezuela lacked legitimacy for not having included the participation of all Venezuelan political actors, its failure to comply with international standards, and for being carried out without the necessary guarantees for a free, fair, transparent, and democratic process'.

[301] Communiqué adopted by the African Union Peace and Security Council at its 840th Meeting held on 15 April 2019 on the Situation in Sudan, AU Doc. PSC/PR/COMM.(DCCCXL), 15 April 2019, in which it '[a]ffirms that the overthrow of the democratically elected President does not conform to the relevant provisions of the July 2005 Sudanese Constitution and, therefore, falls under the definition of an unconstitutional change of Government as provided for in the AU instruments mentioned above'.

[302] '[T]he probability that a democracy will be targeted by any sort of coup has … reached a thirty-year low after 1995, and although it rose slightly as the first decade of the new century ended, it is still significantly less than it was during the 1960s': Nancy Bermo, 'On Democratic Backsliding', *Journal of Democracy* 27 (2016), 5–19 (7). '[O]pen fraud on election day has decreased': *ibid*., 8.

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possible'.[303] Election-day fraud has diminished in the face of extensive international election monitoring. It has been replaced as a tool of democratic usurpation by 'a range of actions aimed at tilting the electoral playing field in favour of incumbents'.[304] If the decline of coups and blatant election fraud is understood as a 'rational response[] to local and international incentives',[305] then international law confronts not a wholesale challenge to democratic legitimacy principles but a problem of normative and institutional design. Instruments such as the Inter-American Democratic Charter, invoked in the Venezuela case, may need to be reworked to confront the rise of smarter and more adaptive anti-democratic actors.

Third, the relevant baseline for purposes of reassessing the IDI view is not the mid-2000s, when the 'democratic recession' arguably began; rather, it is the Cold War era in which democratic legitimacy and liberal principles of governance were almost wholly absent from international legal discourse.[306] This was the legal milieu in which IDI's mandatory agnosticism arose. None of the legal infrastructure now supporting democratic legitimacy existed (or could have existed) at that time.

Finally, the argument for a departure from IDI and *Nicaragua* is not that every NIAC presents a clear binary choice between democratically legitimate and illegitimate factions; rather, it is that there is enough international consensus on democratic and human rights norms, as well as enough information from reliable sources on their implementation, that international law need no longer avoid, in every case, asking whether a regime is democratically legitimate. That the Security Council cannot make a binary choice in *all* cases is not a reason to return to the Cold War approach of not giving an answer in *any* case.

2. The Defence of the IDI View

Olivier Corten argues that the IDI's 1975 Wiesbaden Resolution III 'reflects established practice' because 'states never avowedly support a government acting against its own population'.[307] But this claim begs two questions.

303 *Ibid.*

304 *Ibid.*, 14: 'These include hampering media access, using government funds for incumbent campaigns, keeping opposition candidates off the ballot, hampering voter registration, packing electoral commissions, changing electoral rules to favor incumbents, and harassing opponents – but all done in such a way that the elections themselves do not appear fraudulent.'

305 *Ibid.*, 15.

306 See Henry J. Steiner, 'Political Participation as a Human Right', *Harvard Human Rights Yearbook* 1 (1988), 77–134.

307 Corten, 'Intervention by Invitation', Chapter 2 in this volume, section I.A.

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First, which practice is being consulted? During the Cold War, the major powers intervened regularly to support favoured governments and insurgents. Commentators, as noted earlier, despaired that this practice rendered the law incoherent.[308] The IDI Resolution was, in effect, a remedial response to these interventions.

Whatever one thinks of the wisdom of this approach, the 1975 Resolution cannot be cited as a *reflection* of custom; it was instead a *reaction to* uncertain and unhelpful state practice. Division among members of the IDI reflected the law's uncertainty. The vote was sixteen in favour, six opposed, and sixteen abstaining.[309] Then Special Rapporteur Dietrich Schindler believed that the prohibition of assistance to governments during civil wars under Article 2 of the Resolution 'deviates from the classical rule, according to which assistance to the established government is lawful, at least until when the third state recognizes the insurgents as belligerent'.[310] Gerhard Hafner, the next IDI Special Rapporteur on the subject, believed that 'there was no certainty on whether the [1975] resolution reflected lex lata or proposed articles de lege ferenda'.[311] Reviewing the 1975 Resolution and its 2011 successor, the Rhodes Resolution II, Georg Nolte similarly concluded that, because of divisions among IDI members, 'the 1975 resolution of the Institut did not lead to a clarification of existing law'.[312]

What of practice since 1975? Corten reviews 'a few emblematic cases'.[313] In each – Yemen, Iraq and Syria, Mali, and The Gambia – he analyses the reaction of states and international organisations separately, with no explanation of how the two relate to each other. The practice of international organisations seems not to enter into the legal conclusions to be drawn from each case. This is a highly incomplete picture. These four cases in fact demonstrate the *importance* of international organisation practice.

The UN Security Council was deeply involved in each case and, contrary to the IDI view, did not condemn any of the invited interventions. Indeed, as Corten notes, recent Council practice evidences 'a new arrangement consisting of the informal *validation* of interventions by consent'.[314]

[308] See text accompanying nn. 38–44, above.
[309] *Annuaire de l'Institut de Droit International* 56 (1975), 474.
[310] *Ibid*., 413 (in the original French, 's'écarte de la règle classique, d'après laquelle l'assistance au gouvernement établi est licite, du moins jusqu'au moment où l'État tiers reconnaît les insurgés comme belligérants').
[311] Hafner, 'II. 10th Commission' (n. 17), 303.
[312] Nolte, 'The Resolution of the Institut de Droit International' (n. 28), 243.
[313] Corten, 'Intervention by Invitation', Chapter 2 in this volume, section I.B.
[314] *Ibid.* (emphasis original).

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Take the 2017 ECOWAS intervention in The Gambia. ECOWAS, the African Union, and the Security Council all condemned President Yahya Jammeh's refusal to leave office after losing an election to Adama Barrow. Each international organisation also declared Barrow the legitimate president of the country.[315] ECOWAS troops responded to Barrow's request for assistance, precipitating Jammeh's departure. Shortly thereafter, the Security Council expressed support for the ECOWAS process and for the African Union Peace and Security Council's declaration that 'outgoing President, Yahya Jammeh, will cease to be recognized by the AU as legitimate President of the Republic of the Gambia'.[316] Surely the most distinctive feature of the Gambian episode is the absence of individual states as the dominant actors. Two regional and one global international organisation spoke essentially in unison, from the initial declaration of Jammeh's illegitimacy to their support for an intervention. Yet Corten excludes these collective actions from relevant practice.

In sum, an assessment of practice that (i) assumes the 1975 IDI Resolution reflected customary law of the time, (ii) focuses on a few high-profile recent cases, and (iii) wholly excludes the reaction of international organisations is simply incomplete. Why not assess all practice, both of individual states and of international organisations? The need for such a holistic, empirical assessment, done with methodological rigour, is the starting premise of this chapter.

The second question raised by reliance on the IDI Resolution is why the mere fact of external support for 'a government against its own population' should violate citizens' right to self-determination. Corten endorses the IDI view of self-determination as a legal fiction, which supports the *opportunity* for citizens to choose their own government but ignores any *actual* choice they may have made. According to this view, while elections may be acts of *internal* self-determination, they do not alter the barrier erected by *external* self-determination to exclude invitations by those who win elections.[317]

This distinction, rooted in the Cold War, was attractive when claims of democratic legitimacy were often little more than subjective assertions by the

[315] The UN Security Council notably deferred to the African Union's and ECOWAS's prior decisions 'to recognize Mr. Adama Barrow as President of the Gambia': UN SC Res. 2337 of 19 January 2017, preamble.

[316] UN SC Pres. Statement on Peace Consolidation in West Africa, S/PRST/2017/2, 20 January 2017.

[317] See Corten, 'Intervention by Invitation', Chapter 2 in this volume, section V.A: '[E]ach people has the right to determine its own political regime, including the ability to choose its own conception of democracy and the individuals who are best able to embody it. Third states cannot therefore use, as a pretext, the supposedly democratic character of one or other party, whether they are rebels or government authorities, to interfere in this debate.'

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intervening states. But the post-Cold War era has mostly (although not completely) erased the line between internal and external notions of democratic legitimacy. Most elections in emerging or nascent democracies are monitored by outside groups. Regional organisations in the Americas and Africa have well-established legal regimes to respond to interruptions of democratic government. The Security Council regularly congratulates electoral winners and emphasises that their victories bestow an entitlement to govern.

In such cases, there is no need to invoke self-determination as a legal fiction to protect a hypothetical popular 'choice'. Citizens voting in an election will have made an *actual* choice. The legitimacy of that choice will have been verified by multilateral actors. The international community is thus fully aware of citizens' preferences in a conflict pitting 'a government against its own population'. To pretend that choice is unknowable to outsiders, and therefore in need of protection against their subjective judgments, is to ignore the immense body of international practice directed precisely at that resolving question. To put it another way, there is no need, in such cases, to invoke external self-determination to protect the integrity of internal self-determination.

The Gambia is again illustrative. ECOWAS and the African Union invoked their democracy protection regimes to declare Barrow the winner of the election. Those regimes, when invoked, are premised on the organisations' ability to distinguish between democratically legitimate and illegitimate regimes. Following on from those determinations, the UN Security Council affirmed, in Resolution 2337, the primacy of actual electoral choice, urging 'all Gambian parties and stakeholders to respect the will of the people and the outcome of the election which recognized Adama Barrow as President-elect of the Gambia and representative of the freely expressed voice of the Gambian people as proclaimed by the Independent Electoral Commission'.[318] And the Council extended this internal act of self-determination externally, urging 'countries in the region' to 'cooperate with President Barrow in his efforts to realize the transition of power'.[319]

Of course, these are the easy cases. Others exist on a spectrum, ranging from cases of undoubtedly free and fair elections monitored by objective observers, the results of which are affirmed by international organisations, to those in which election outcomes are disputed and no multilateral institutions identify victory by one party or another. Then there are breakdowns in democratic institutions short of defying electoral outcomes. In such cases, the nature of

318 UN SC Res. 2337 of 19 January 2017, para. 1.
319 *Ibid.*, para. 3.

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the popular choice is much less clear. As a result, the lawfulness of an intervention by one of the disputing parties will have only a tenuous connection to principles of democratic legitimacy.

But this distinction between easy and harder cases is one of fact. All internal conflicts are not the same. An inquiry, where possible, into the fairness of elections and the position of international organisations should allow principled distinctions to be made. Where international opinion is united, no further resort to the legal fiction of protecting 'choice' is necessary.

B. *The Contribution of UN Security Council Practice*

The data discussed earlier makes clear that the Security Council is now a consistent presence in evaluating the lawfulness of invitations. As Olivier Corten highlights in his chapter title, the recent era has been marked by 'the expanding role of the UN Security Council'.[320] This is a marked change from the pre-1990 period. But the data do not reveal any consistent patterns in Council views on IDI and *Nicaragua*, the two theories that might cover all cases. This is in contrast to evident Council support for anti-terrorist interventions and, in an admittedly few cases, pro-democratic interventions.

How should international law react to, and perhaps assimilate, this body of Council practice? Because Council practice on consensual intervention is not yet uniform, this question is one of legal process and not substantive doctrine. In this section, I discuss two possible responses: viewing the practice as a lex specialis, with no relevance to the ius ad bellum; or – quite differently – viewing the practice as evidence of customary law directly relevant to the ius ad bellum.

1. Council Practice as Lex Specialis

The first position sees Council practice as a lex specialis, deriving from the Council's unique power to bind conflict parties and to legitimise or delegitimise particular uses of force. The practice can be seen as a lex specialis in that its effects are limited to the conflicts and actors the Council addresses in specific resolutions. Council practice, according to this view, would have no effect on the direction or substance of customary international law.

The UN Charter describes the Security Council has having competence to deal with particular incidents threatening or breaching international peace and security, not authority to alter the law applicable to state behaviour more

[320] Corten, 'Intervention by Invitation', Chapter 2 in this volume.

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generally.[321] To be sure, the Council has extraordinarily broad political authority to resolve particular conflicts. But, the lex specialis view would assert, one should not mistake a broad authority to resolve particular conflicts for an authority to reach beyond their resolution and shape the direction of the customary ius ad bellum. If that were the case, one would expect some evidence of opinio iuris. But neither the Charter nor the resolutions underlying the data contain any evidence of an intent to affect the content of custom.

The core of the lex specialis argument is a distinction between the powers of the Council and those of states acting individually. The Council enjoys the unique authority to deem an intervention lawful or unlawful. In Thomas Franck's description, when the Council addresses an armed conflict, it acts as a kind of jury, hearing evidence both for and against the legality of state action and coming to an authoritative conclusion.[322] This unique power is by design. The Council's expansive powers derive precisely from it *not* being a self-interested state with a national policy agenda and territory to protect.[323] The Council, by definition, cannot materially benefit from its decisions, either in specific cases or more generally through the interpretations of international law underlying its decisions. Unlike states, whose authority to use force is extraordinarily limited precisely because their self-interest poses a danger of abuse, the

[321] Art. 39 UN Charter, setting out the jurisdiction prerequisites for the Council to utilise Chapter VII powers, refers only to specific incidents. While the Council has passed several so-called legislative resolutions, the lex specialis view would distinguish these few (three, to date) deliberate impositions of obligations on all states from the vast majority of resolutions, which are directed at specific actors in specific conflicts. See Stefan Talmon, 'The Security Council as World Legislature', *American Journal of International Law* 99 (2005), 175–93.

[322] Thomas M. Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (Cambridge: CUP 2002), 187. Franck also extends this view to the General Assembly in certain circumstances. See also Ian Johnstone, 'The Security Council and International Law', in von Einsiedel et al., *The UN Security Council in the 21st Century* (n. 296), 771–91 (777), describing how the Council has 'acted like a court. It has done this in two ways: by determining legal liability and by interpreting the law.'

[323] Art. 24 UN Charter provides in relevant part:

1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.
2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.

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Council's authority is broad because it is understood to lack narrow self-interest.[324]

The separate domains of state and Council authority to judge and utilise military force, the argument goes, should extend to the normative consequences of their respective actions. If the Council has vastly more discretion to authorise or employ force, how can its actions inform the narrower legal grounds governing state behaviour? A Council decision to permit an elected, but ousted, regime to invite foreign assistance, for example, does not support that regime's ability to issue an identical invitation absent Council authority. The collective judgment of the Council in such a case cannot be delegated to states, which would be the consequence of interpolating Council practice into the ius ad bellum. Indeed, the Council's ability to authorise force in circumstances in which a state could not act is an important argument against expanding the realm of unilateral action. Why expand that realm, with all its attendant dangers of self-judgement and motivated reasoning, when a much safer multilateral option exists? This point is often made in reference to humanitarian intervention: it is precisely the Council's willingness, in some cases, to authorise force in response to mass human rights violations that negates the existence of states' unilateral right to engage in the same action.[325]

Beyond the argument that the Council and states inhabit separate normative domains, there are also process-based critiques of treating Council actions as evidence of customary international law. As the United States argued in a comment to the ILC:

> It is axiomatic that customary international law results from the general and consistent practice of *States* followed by them out of a sense of legal obligation. This basic requirement has long been reflected in the jurisprudence of the International Court of Justice. It is also reflected in the practice of States

[324] Even the authority reserved to states is suffused with deference to the Council's primary position. It is telling that one of the only two lawful grounds for state use of force in the UN Charter is authorisation by the Security Council. A state benefiting from such an authorisation obviously does not control the scope of the authorisation. As for the other – self-defence – at least one proposal to expand its scope by allowing pre-emptive action has been rejected because it would grant states authority properly reserved to the Council. *See* Report of the High-Level Panel on Threats, Challenges and Change, UN Doc. A/59/565, 2 December 2004, para. 191: '[I]f there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorise such action if it chooses to.'

[325] See, e.g., Sean D. Murphy, *Humanitarian Intervention* (Philadelphia: University of Pennsylvania Press 1996), 381–2.

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> in their own statements about the elements required to establish the existence of a rule of customary international law.[326]

More specifically, one can argue that Security Council resolutions lack critical attributes that have led the ICJ and others to treat certain General Assembly resolutions as evidence of customary international law.[327] Those General Assembly resolutions are structured much like treaties, setting out broad and prospective rules of general application. Articulating broad standards is precisely the purpose of General Assembly resolutions such as the Friendly Relations Declaration.[328] Council resolutions, however, are almost always conflict-specific. Moreover, while every state in the world may vote on a General Assembly resolution, the Council is a small, elite body.

Finally, knowing that Council resolutions may affect custom might cause some Council members to vote against resolutions they might otherwise support. Many conflicts on the Council's agenda are of marginal strategic significance to at least some Council members. Those members may nonetheless support Council initiatives for the simple reason that there are no compelling reasons to withhold their support. But knowing that provisions of such resolutions may become building blocks for new or enhanced customary norms could change that calculus and lead to negative votes.

Although the lex specialis view is clear about the role Security Council practice on consensual interventions *should not* play, it is less clear about how it *should* be relevant, if at all, to international law. Perhaps it could serve a quasi-precedential function – not in the sense of formal *stare decisis*, but as a repertoire of successful best practices. If the Council is, as is often remarked, an essentially political body, perhaps this kind of political consensus on acceptable grounds for invitations is the most the body can offer.

2. Council Practice as Evidence of Customary International Law

The second view takes the opposite perspective: Council practice *can* serve as evidence of customary international law for purposes of understanding

[326] Comments from the United States on the International Law Commission's Draft Conclusions on the Identification of Customary International Law as Adopted by the Commission in 2016 on First Reading, 2018, available at http://legal.un.org/docs/?path=./ilc/sessions/70/pdfs/english/icil_usa.pdf&lang=E, 2 (emphasis original).

[327] For a discussion of how the ICJ has used General Assembly resolutions, see Marko Divac Öberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ', *European Journal of International Law* 16 (2005), 879–906.

[328] UN GA Res. 2625 (XXV) of 24 October 1970.

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norms on consensual intervention.[329] This view, which colleagues and I have discussed at length elsewhere, relies on three propositions.[330] First, when the Council imposes obligations on conflict parties, it acts as an agent for all UN member states. Article 24(1) of the UN Charter provides that member states 'confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council *acts on their behalf*'.[331] Viewing the Council as an agent for member states embodies the logic of the Charter's collective security regime. The Charter famously discarded the traditional view of armed conflict as primarily (and often solely) the concern of the warring parties, providing instead that all member states share an interest in maintaining the peace.[332] The agency theory ensures that the official positions of member states on conflicts do not diverge from executive decisions of the Council on the same conflicts by making the two legally indistinguishable. The Special Court for Sierra Leone relied on an Article 24(1) agency theory to hold that an agreement between Sierra Leone and the United Nations was, as a result of Council approval, 'an agreement between *all* members of the United Nations and Sierra Leone'.[333]

Does the agency theory mean that member states have delegated to the Council a capacity to contribute to customary international law? In its ILC submission, the United States argued emphatically not: the mandates of

[329] The following section derives from Gregory H. Fox, 'Security Council Resolutions as Evidence of Customary International Law', *EJIL:Talk!*, 1 March 2018, available at www.ejiltalk.org/security-council-resolutions-as-evidence-of-customary-international-law/.

[330] See Fox et al., 'The Contributions of United Nations Security Council Resolutions' (n. 33).

[331] Art. 24(1) UN Charter (emphasis added). Early in the United Nations' history, several member states explicitly adopted an agency view of the Council; more recently, others have taken a more indirect approach: Fox et al., 'The Contributions of United Nations Security Council Resolutions' (n. 33), 708.

[332] See Nicholas Tsagourias and Nigel D. White, *Collective Security: Theory, Law and Practice* (Cambridge: CUP 2013), 26. Of course, traditional law prescribed an extensive set of rules for neutral states. But the law of neutrality did not give third states an interest in the cessation or outcome of the conflicts.

[333] The passage provides in full:

> It is to be observed that in carrying out its duties under its responsibilities for the maintenance of international peace and security, the Security Council acts on behalf of the Members of the United Nations. The Agreement between the United Nations and Sierra Leone is thus an agreement between *all* members of the United Nations and Sierra Leone. This fact makes the agreement an expression of the will of the international community. The Special Court established in such circumstances is truly international.

Special Court for Sierra Leone, *Prosecutor v. Taylor*, Case No. SCSL-2003-01-I, decision on immunity from jurisdiction of 31 May 2004, para. 38 (emphasis original).

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international organisations are 'carefully negotiated treaties' that 'rarely, if ever', provide an express authorisation 'that the organization exercise the powers of member states to generate practice for purposes of customary international law'.[334] This was obviously true when the UN Charter was negotiated, but the US position seems anachronistic today.

First, consider the consequences, since 1990, of states having delegated to the Council the *authority* to address an extraordinary range of legal questions arising from NIACs but withholding any customary international law *consequences* of that delegation. Those consequences (i.e., evidence of custom) would not be attributable to the Council. But neither would they be attributable to member states who delegated authority to the Council to act on their behalf. For customary international law purposes, they would be neither acts of the Council nor acts of individual member states. An entire realm of rich international practice on NIACs would be lost to customary international law. That idea would lead to an unacceptable result, as my co-authors and I have written elsewhere:

> For member states to authorize the Council to act on their behalf but withhold normative consequences of that action would consign the 'acts concerned' to a legal black hole: U.N. member states would not be acting in their own capacities, and thus no 'state practice' would be created, but, with normative consequences withheld, the Council's corporate acts would make no contribution to customary law. As a result, no actor could claim as its own the potentially significant contributions to custom.[335]

Second, new data show the Council has been involved in almost all contemporary NIACs.[336] The Council has addressed NIACs in every year, in every region, of varying duration, of varying numbers of actors, of varying battle deaths and civilian casualties, at various points in the conflicts, and both inside and outside the spheres of influence of every hegemonic state. No state or group of states comes close to matching this breadth of practice. The Council's involvement in NIACs has also been remarkably deep, ranging from simply imposing obligations of conduct, to dispatching peacekeeping missions, to imposing sanctions. To take sanctions as an example, only four of the sixteen Council sanctions regimes in place in 2017 targeted state actors exclusively; the rest targeted non-state actors or both state and non-state actors. Obviously, no state or group of states has addressed NIACS more broadly or more comprehensively.

334 Comments from the United States (n. 326), 4.
335 Fox et al., 'The Contributions of United Nations Security Council Resolutions' (n. 33), 712–13.
336 For details on the points in this paragraph, see *ibid.*, 714–18.

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Viewing Council practice as evidence of custom may appear controversial when applied to customary norms not directly linked to the Council's core set of competences. For example, the Council now regularly takes positions on issues of human rights, IHL, and treaty law. The Charter prescribes no special role for the Council in these areas. But finding evidence of custom should be much less controversial when the Council addresses the ius ad bellum. The UN Charter both revolutionised the substance of that law and empowered the Council to respond to virtually every significant use of force. Of course, the Charter's scheme for authorised force was never implemented, but the UN system's evolutionary adaptations – primarily peacekeeping and 'authorised operations' – have retained the Security Council as the central decision-maker.[337] The idea of Security Council primacy in evaluating uses of force is even accepted by those states that have, on occasion, supported unilateral force when the Council is unable or unwilling to act.[338]

Thus Council actions and inaction have become central to debates over the non-annexation norm,[339] self-defence against non-state actors,[340] humanitarian intervention,[341] and other ius ad bellum questions. Participants in these debates do not argue that while the Council is the central actor in contemporary peace and security law, its views are irrelevant to the substance of that law when applied purely between states.

Of course, not all Council resolutions can be understood as interpretations or applications of Article 2(4) and its doctrinal progeny. Many scholars argue that, when the Council describes state acts as 'threats to the peace' under Charter Article 39, it may venture beyond the ius ad bellum and exercise a general discretion that is unmoored from specific norms restricting state behaviour.[342] But it is difficult to argue that the legality of an invitation to intervene falls into a zone of Council discretion beyond the ius ad bellum. Among other problems with such a claim is that none of the condemnatory resolutions in the dataset describes the interventions as a 'threat to the peace'.

337 See Scott Sheeran, 'The Use of Force in United Nations Peacekeeping Operations', in Weller, *The Oxford Handbook on the Use of Force* (n. 89), 347–74; Neils Blokker, 'Outsourcing the Use of Force: Towards More Security Council Control of Authorized Operations', in Weller, *The Oxford Handbook on the Use of Force* (n. 89), 202–26 (202).

338 See Monica Hakimi and Jacob Katz Cogan, 'Two Codes on the Use of Force', *European Journal of International Law* 27 (2016), 257–91 (267–8).

339 Grant, *Aggression against Ukraine* (n. 17), 127–8.

340 Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter* (Cambridge: CUP 2010), 433–43.

341 Gray, *International Law and the Use of Force* (n. 78), xxx–xx.

342 See Nicholas Tsagourias and Nigel D. White, *Collective Security: Theory, Law and Practice* (Cambridge: CUP 2013), 95–8.

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3. Critiques of Council Practice as Evidence of Custom

Olivier Corten's position on the legal significance of Security Council practice is puzzling. On the one hand, he argues in his contribution to this volume that the Council has become a central actor in addressing invitations to intervene. In the case of Iraq, for example, he describes the Council as playing a 'decisive' role.[343] On the other hand, he consigns that practice to a lex specialis, walled off from the development of customary international law. This view – that the Council is politically paramount but legally irrelevant – presents several problems.

First, it stifles the development of customary law, disconnecting its evolution from the reality of international practice. The Security Council has passed resolutions on 80 per cent of NIACs started after 1990.[344] More specifically, it has been omnipresent in three of the four conflicts Corten analyses: Yemen (twelve resolutions since 2015[345]), Mali (thirteen resolutions since 2013[346]), and The Gambia (one critical resolution in 2017 endorsing the ECOWAS intervention[347]).[348] As Corten himself observes, 'the Security Council intervened in all the recent case studies on which this chapter [focuses]. By adopting resolutions, it pronounced on the authority that was entitled to give its consent, and in parallel on the legitimacy of the object and effects of the intervention.'[349]

States, in other words, have chosen the Council as their vehicle for articulating and executing policies towards these conflicts. Did they also choose to deprive Council actions of any relevance to custom? No evidence exists to support this claim. If it did, the results would be unfortunate. The customary law on invitations would either stagnate (because it would not take into account the most consequential actor involved in NIACs) or develop in directions reflecting only minority views (because it would credit only acts of the few states directly engaged with NIACs independently of the Council).

343 Corten, 'Intervention by Invitation', Chapter 2 in this volume, section III.D.1.
344 Fox et al., 'The Contributions of United Nations Security Council Resolutions' (n. 33), 663.
345 Security Council Report, 'UN Documents for Yemen: Security Council Resolutions', available at www.securitycouncilreport.org/un_documents_type/security-council-resolutions/?ctype=Yemen&cbtype=yemen.
346 Security Council Report, 'UN Documents for Mali: Security Council Resolutions', available at www.securitycouncilreport.org/un_documents_type/security-council-resolutions/?ctype=Mali&cbtype=mali.
347 UN SC Res. 2337 of 19 January 2017.
348 While the Council has passed twenty-six resolutions on Syria (Corten's fourth case study) since the civil war started in 2011, the Council has not addressed the invitations by the government to Iran and Russia: Security Council Report, 'UN Documents for Syria: Security Council Resolutions', available at www.securitycouncilreport.org/un_documents_type/security-council-resolutions/page/1?ctype=Syria&cbtype=syria#038;cbtype=syria.
349 Corten, 'Intervention by Invitation', Chapter 2 in this volume, section I.B.

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In either case, custom would become marginalised as it diverges from the reality of international practice. Perhaps for this reason, international courts and other bodies have regularly cited Security Council practice as evidence of customary law.[350]

Second, and relatedly, analysing interventions without reference to legal frameworks established by the Council allows arguments to be raised that the Council had already foreclosed. In Mali, for example, the Council determined that the transitional government was competent to invite both a regional force and French troops. This was despite the government not controlling substantial portions of the national territory and lacking democratic legitimacy. In Yemen, the Council repeatedly supported the legitimacy of President Hadi, who issued the invitation to the GCC. Similarly, in The Gambia, the Council sided with two regional organisations in affirming the democratic bona fides of elected President Barrow. And in Iraq, the Council directly approved the post-occupation government's invitation to a multinational force to assist in its internal conflict with the Al-Mahdi Army and other forces.[351] With the exception of Resolution 2337 on The Gambia, all of these determinations came in the form of resolutions passed under Chapter VII of the UN Charter.[352]

What legal issues are left for individual states to resolve after the Council took these steps? Very few – and that was the Council's intent. In each case, the Council sought to unify the international community around a single legal conclusion. Yet, without using Council practice as evidence of custom, the issues decided by the Council can be treated (as does Corten) as open questions. In the case of The Gambia, for example, Corten asks whether the election won by Adama Barrow was really free and fair, and whether Barrow's

[350] See Fox et al., 'The Contributions of United Nations Security Council Resolutions' (n. 33), 657 (collecting citations to Council resolutions by the ICJ, the ICRC, the ICTY, the ILC, and the Inter-American Court of Human Rights).

[351] UN SC Res. 1546 of 3 September 2004.

[352] Resolution 2337 was nonetheless remarkably clear on the question of Barrow's democratic legitimacy. The Council urged 'all Gambian parties and stakeholders to respect the will of the people and the outcome of the election which recognized Adama Barrow as President-elect of The Gambia and representative of the freely expressed voice of the Gambian people as proclaimed by the Independent Electoral Commission': UN SC Res. 2337 of 19 January 2017, para. 1. The Council further sought to ensure that states with the greatest interest in the election would take the same position, calling on 'the countries in the region and the relevant regional organisation to cooperate with President Barrow in his efforts to realize the transition of power': *ibid*., para. 3. Senegal, the sponsor of Resolution 2337, described it as 'part and parcel of the ongoing diplomatic and political efforts of ECOWAS, the African Union and the United Nations to find a solution to the post-electoral situation in the sisterly Islamic Republic of The Gambia': UN Doc. S/PV.7866, 10 January 2017, 2. The Resolution was thus intended to universalise the recognition of Barrow.

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failure to control Gambian territory at the time he invited in ECOWAS troops presented 'a problem with respect to the condition of effective control being exercised by the inviting authority'.[353] But the Council had addressed both these issues and hence the result is confusion. How can Council decisions reflect consensus views of the international community at the moment they are issued but remain open to criticism for the purposes of assessing their customary law consequences?

Third, ignoring Council practice seeks to prioritise state practice that may not, in fact, exist, or may exist only at the margins. When the Security Council addresses NIACs in a comprehensive fashion, states have less of a need to take their own unilateral actions, or even to comment on actions by other states. It is quite telling that Corten's comprehensive review of the four cases contains no mention of unilateral actions or statements by Germany, Italy, Spain, Turkey, Japan, Nigeria, South Africa, Canada, Australia, Brazil, Mexico, Pakistan, Indonesia, or North or South Korea (to mention only a few major military powers). The single cited statements by China, Egypt, and India relate only to Mali, and they do not address the French intervention. No statements of Saudi Arabia appear beyond those related to its own intervention in Yemen.

This should not be surprising. With these and other states ceding leadership to the Council, any need for unilateral action on the four conflicts diminished substantially. So customary law will not be shaped by these states' actions or statements. But if Council actions are excluded, the authority they ceded to the Council will also not produce relevant practice. As a result, *there will be little or no international practice* relevant to custom emerging from these cases. This is a highly troubling outcome. It is the legal black hole to which I referred earlier.

One might respond that statements in debate over Council resolutions represent individual state practice. But there are two problems with this response: first, only fifteen states sit on the Council, meaning its debate cannot contain a representative sampling of state opinions on a given conflict; and, second, these are statements divorced from state action. Any acts resulting from Council debate would be corporate acts of the United Nations, not of the individual states making the statements.

VII. CONCLUSIONS

The four prevalent theories on the legitimacy of intervention by invitation emerged from specific historical circumstances. Those settings carried with them a set of assumptions about the relations between inviting and intervening

[353] Corten, 'Intervention by Invitation', Chapter 2 in this volume, section V.C.

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states, the capacity of the international community to respond collectively to such interventions, and the propriety of pursuing certain substantive goals by military force. We have not yet left the historical moments in which the anti-terrorism and democratic legitimacy theories were incubated. Perhaps as a result, as the data shows, the Security Council has been favourably disposed towards both, although it has not accepted the democratic legitimacy view in all cases.

The anti-terrorism and democratic legitimacy views, however, apply only in a narrow set of circumstances. The IDI and *Nicaragua* views are the main competitors for a general framework regulating consensual interventions, potentially applicable to all interventions. The IDI view appears inconsistent not only with the Security Council's approval of several interventions in NIACs but also its own record of intervening in NIACs in a variety of ways. This practice simply cannot be reconciled with the idea that civil wars are purely internal affairs. After almost thirty years of the Council finding NIACs to be a 'threat to the peace' and recommending liberal democratic institutions for post-conflict societies, can it really be said that all locally chosen options for governance are due equal respect?

But neither is the *Nicaragua* view wholly supported by Council practice. In several cases, the Council has disapproved of interventions requested by governments in effective control of their territories. While the *Nicaragua* view rejects the IDI view that governments in civil wars lack the capacity to invite outside forces, it defers questions of legitimate governance to other bodies of international law. As a result, *Nicaragua* may not, in practice, result in approving all interventions requested by a regime in effective control. International law on recognition of governments could well deem some of those requests illegitimate.

But the international reaction to post-Cold War interventions is not significant primarily for its acceptance or rejection of either theory; rather, it demonstrates that the Security Council has assumed a central role in passing on the legality of particular interventions. This collectivisation of global reaction requires us to be sceptical of theories premised precisely on the unavailability of such mechanisms. While one might dismiss Council practice as a lex specialis of limited relevance to norms resulting solely from state practice, this is not, in my view, the most compelling approach. Instead, Council practice should occupy a position in customary international law commensurate with the primacy UN member states have accorded the Council in responding to NIACs.

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Appendix I Coding Manual

COLUMNS AND CODES

A. **Conflict Name**: Taken from Uppsala Conflict Data Program (UCDP).
B. **Conflict ID**: Taken from UCDP.
C. **Warring Party**: Taken from UCDP.
D. **Year of Intervention**: Taken from UCDP.
E. **Party Receiving Support**: Taken from UCDP. The party that is the recipient of assistance from the intervening party.
F. **ID of Actor Receiving Support**: Taken from UCDP.
G. **Invitation**: Whether the intervening party sent troops on to the territory of the target state with the consent of one or more warring parties. The consent can be given in advance of the intervention or at the time of the intervention. Consent cannot be given after the fact.
H. **Purpose of the Intervention:** What is the reason for the intervention? Five options are given below.
   1. If purpose is to assist government in conflict with rebels seeking to overthrow the government or to secede from the state, code as 1.
   2. If purpose is to assist the government in putting down low-level disturbances, such as riots or crime, code as 2.
   3. If purpose is to assist government in conflict with terrorist organisation(s), code as 3.
   4. If purpose is to assist rebels seeking to overthrow the government or to secede from the state, code as 4.
   5. If the purpose is to assist an individual or group not in effective control of the government but which claims an electoral mandate to hold office, **or** to assist a regime that is in effective control and claims a democratic mandate and seeks to defend that mandate against an opposition group or groups, code as 5.
   6. If there is another purpose for the intervention not described above, code as 6.
I. **Severity of the Conflict – Number of casualties as of the date of the intervention:** This involves the number of fatalities in the conflict at the time of the intervention.
   - If the number of casualties is 0–500, code as 1.
   - If the number of casualties is 500–1,000, code as 2.
   - If the number of casualties is 1,000–5,000, code as 3.

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- If the number of casualties is 5,000–10,000, code as 4.
- If the number of casualties is more than 10,000, code as 5.

J. **Length of the Conflict**: Taken from UCDP. This variable asks for the length of the conflict at the time of the intervention. One of the criteria for determining whether a conflict has become a 'civil war' is its length. Several sources say that a conflict needs to be 'protracted' to qualify as such.
   - If on the date of intervention, the conflict has lasted 0–1 month, code as 1.
   - If on the date of intervention, the conflict has lasted 2–6 months, code as 2.
   - If on the date of intervention, the conflict has lasted 6–12 months, code as 3.
   - If on the date of intervention, the conflict has lasted more than 12 months, code as 4.

K. **Level of Organisation of Rebel Group**: Following the criteria for a NIAC set out in Common Article 3 of the Geneva Conventions and Additional Protocol II to those Conventions, this variable asks whether (i) the rebel group has an overall command structure, apart from having just one single leader, (ii) whether orders are given through the command structure, and (iii) whether those orders are usually obeyed.
   - If the rebel group involved in the conflict is well organised, code as 1.
   - If the rebel group involved in the conflict is moderately organised, code as 2.
   - If the rebel group involved in the conflict is disorganised, code as 3.

L. **International Reaction**: How did international organisations (global or regional) and individual states react to the intervention? The question here is whether ANY international actor condemned or supported the intervention. Columns below deal with how *individual international actors* responded.
   - If at least one international actor condemns the intervention, code as 1.
   - If at least one international actor supports the intervention, code as 2.
   - If at least one international actor issues a statement/resolution/comment that expresses neither condemnation nor support, code as 3.
   - If no international actor reacts, code as 0.

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M. **Who is Reacting to an Intervention?** Which international actor or actors reacted to an intervention, either positively or negatively. The coding covers both situations in which only a single actor reacts and those in which more than one actor reacts.

- If no international actor reacts, code as 0.
- If the UN Security Council reacts, code as 1.
- If only the UN General Assembly reacts, code as 2.
- If both the UN Security Council and the UN General Assembly react, code as 3.
- If only one or more regional organisation reacts, code as 4.
- If one or more regional organisations and at least one state reacts, code as 5.
- If only one or more states react, code as 6.

N. **Reaction by the UN Security Council**: The Council's reaction can come in either a resolution or a presidential statement. We looked for reactions no more than six months after the date of the intervention.

- If the Council condemns an intervention, code as 1.
- If the Council supports or approves of an intervention, code as 2.
- If the Council issues a statement, resolution or other document that neither condemns nor approves of an intervention, code as 3.
- If the Council issues no statement at all on an intervention, code as 0.

O. **Reaction by the UN General Assembly**: If the Council did not comment, we coded for relevant UN General Assembly resolutions. We looked for resolutions issued up to one year after the date of the intervention.

- If the General Assembly condemns an intervention, code as 1.
- If the General Assembly supports or approves of an intervention, code as 2.
- If the General Assembly issues a statement, resolution or other document that neither condemns nor approves of an intervention, code as 3.
- If the General Assembly issues no statement at all on an intervention, code as 0.

P. **Reaction by the European Union**: The reaction could come in any document issued by an EU body or official authorised to comment on foreign relations matters. We looked for such documents issued within 6 months of the date of the intervention.

- If the European Union condemns an intervention, code as 1.

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- If the European Union supports or approves of an intervention, code as 2.
- If the European Union issues a statement, resolution or other document that neither condemns nor approves of an intervention, code as 3.
- If the European Union issues no statement at all on an intervention, code as 0.

Q. **Reaction by the African Union**: The reaction could come in any document issued by an AU body or official authorised to comment on foreign relations matters. We looked for such documents issued within 6 months of the date of the intervention.
- If the African Union condemns an intervention, code as 1.
- If the African Union supports or approves of an intervention, code as 2.
- If the African Union issues a statement, resolution or other document that neither condemns nor approves of an intervention, code as 3.
- If the African Union issues no statement at all on an intervention, code as 0.

R. **Reaction by the Organization of American States**: The reaction may come in any document issued by an OAS body or official authorised to comment on foreign relations matters. We looked for such documents issued within 6 months of the date of the intervention.
- If the OAS condemns an intervention, code as 1.
- If the OAS supports or approves of an intervention, code as 2.
- If the OAS issues a statement, resolution or other document that neither condemns nor approves of an intervention, code as 3.
- If the OAS issues no statement at all on an intervention, code as 0.

S. **Reaction by the United States**: The reaction may come from any agency or official authorised to comment on behalf of the United States on foreign relations matters.
- If the United States condemns an intervention, code as 1.
- If the United States supports or approves of an intervention, code as 2.
- If the United States issues a statement, resolution or other document that neither condemns nor approves of an intervention, code as 3.
- If the United States issues no statement at all on an intervention, code as 0.

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T. **Reaction by Russia**: The reaction may come from any agency or official authorised to comment on behalf of Russia on foreign relations matters.
- If Russia condemns an intervention, code as 1.
- If Russia supports or approves of an intervention, code as 2.
- If Russia issues a statement, resolution or other document that neither condemns nor approves of an intervention, code as 3.
- If Russia issues no statement at all on an intervention, code as 0.

U. **Reaction by China**: The reaction may come from any agency or official authorised to comment on behalf of China on foreign relations matters.
- If China condemns an intervention, code as 1.
- If China supports or approves of an intervention, code as 2.
- If China issues a statement, resolution or other document that neither condemns nor approves of an intervention, code as 3.
- If China issues no statement at all on an intervention, code as 0.

V. **Reaction by the United Kingdom**: The reaction may come from any agency or official authorised to comment on behalf of the United Kingdom on foreign relations matters.
- If the United Kingdom condemns an intervention, code as 1.
- If the United Kingdom supports or approves of an intervention, code as 2.
- If the United Kingdom issues a statement, resolution or other document that neither condemns nor approves of an intervention, code as 3.
- If the United Kingdom issues no statement at all on an intervention, code as 0.

W. **Reaction by France:** The reaction may come from any agency or official authorised to comment on behalf of France on foreign relations matters.
- If France condemns an intervention, code as 1.
- If France supports or approves of an intervention, code as 2.
- If France issues a statement, resolution or other document that neither condemns nor approves of an intervention, code as 3.
- If France issues no statement at all on an intervention, code as 0.

X. **Reaction by Argentina**: The reaction may come from any agency or official authorised to comment on behalf of Argentina on foreign relations matters.
- If Argentina condemns an intervention, code as 1.

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- If Argentina supports or approves of an intervention, code as 2.
- If Argentina issues a statement, resolution or other document that neither condemns nor approves of an intervention, code as 3.
- If Argentina issues no statement at all on an intervention, code as 0.

Y. **Reaction by South Africa**: The reaction may come from any agency or official authorised to comment on behalf of South Africa on foreign relations matters.
- If South Africa condemns an intervention, code as 1.
- If South Africa supports or approves of an intervention, code as 2.
- If South Africa issues a statement, resolution or other document that neither condemns nor approves of an intervention, code as 3.
- If South Africa issues no statement at all on an intervention, code as 0.

Z. **Reaction by Australia**: The reaction may come from any agency or official authorised to comment on behalf of Australia on foreign relations matters.
- If Australia condemns an intervention, code as 1.
- If Australia supports or approves of an intervention, code as 2.
- If Australia issues a statement, resolution or other document that neither condemns nor approves of an intervention, code as 3.
- If Australia issues no statement at all on an intervention, code as 0.

AA. **Reaction by Japan**: The reaction may come from any agency or official authorised to comment on behalf of Japan on foreign relations matters.
- If Japan condemns an intervention, code as 1.
- If Japan supports or approves of an intervention, code as 2.
- If Japan issues a statement, resolution or other document that neither condemns nor approves of an intervention, code as 3.
- If Japan issues no statement at all on an intervention, code as 0.

AB. **State of Intra-State Conflict**: Taken from UCDP.

AC. **Location ID**: Taken from UCDP.

AD. **Dyad in Which Primary Warring Party Involved**: Taken from UCDP.

AE. **Name of Dyad in Which Primary Warring Party Involved:** Taken from UCDP. The name of the dyad in which the primary warring party is involved, as listed in the UCDP Dyadic Dataset.

AF. **External Supporter:** Taken from UCDP.

AG. **External Type:** Taken from UCDP.

AH. **External Type X:** Taken from UCDP. Contains an English-language description of external supporters, together with the types of support they provided, for added legibility of the dataset. Each type of support

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provided by an external supporter is listed in the cell using standardised phrasing. The general format of the text is: '(It is alleged that) external supporter 1 supported receiver of support with types of support. (It is alleged that) external supporter 2 supported receiver of support with types of support.'

AI. **External Comments:** Taken from UCDP.

AJ. **Changes Made:** Taken from UCDP.

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Appendix II Cases of Intervention by Invitation, 1990–2017

State in Which Intervention Occurred	Conflict	Party Being Supported	Intervening State(s)	Date(s) of Intervention	Purpose(s) of Intervention[354]	Description	Security Council Reaction
Afghanistan	Government of Afghanistan v. Taliban & Hizb-i Islami-yi Afghanistan	Government of Afghanistan	United States and coalition of 42 other states	2001–present	(3) Counter-terrorism [outlined in Bonn Agreement]	Bonn Agreement, Annex 1, para. 3 : 'Conscious that some time may be required for the new Afghan security and armed forces to be fully constituted and functioning, the participants in the UN Talks on Afghanistan request the United Nations Security Council to consider authorizing the early deployment to Afghanistan of a United Nations mandated force.'[355]	UN SC Res. 1378 calls for international assistance to Afghanistan. UN SC Res. 1378 is cited in §V(5) of the Bonn Agreement. Council endorses the Bonn Agreement in UN SC Res. 1383. Council responds to Bonn Annex 1, para. 3, in UN SC Res. 1386, which creates ISAF.

354 The numbers at the start of this column are the designations used in the Coding Manual: (1) if the purpose is to assist government in conflict with rebels seeking to overthrow the government or to secede from the state; (2) if the purpose is to assist the government in putting down low-level disturbances, such as riots or crime; (3) if the purpose is to assist government in conflict with terrorist organisation(s); (4) if the purpose is to assist rebels seeking to overthrow the government or to secede from the state; (5) if the purpose is to assist an individual or group not in effective control of the government but which claims an electoral mandate to hold office, or to assist a regime that is in effective control and claims a democratic mandate and seeks to defend that mandate against an opposition group or groups; (6) if there is another purpose for the intervention not described above.

355 https://peacemaker.un.org/afghanistan-bonnagreement2001.

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(*continued*)

State in Which Intervention Occurred	Conflict	Party Being Supported	Intervening State(s)	Date(s) of Intervention	Purpose(s) of Intervention	Description	Security Council Reaction
Afghanistan	Government of Afghanistan v. IS	Government of Afghanistan	Pakistan, United States	2015–17	(3) Counter-terrorism [outlined in US–Afghan and Afghan–NATO Agreements]	United States and Afghanistan entered into a security agreement on 30 September 2014.[356] Afghanistan and NATO entered into a status-of-force agreement on 30 September 2014.[357]	Council commends Afghan–NATO partnership in UN SC Res. 2210. UN SC Res. 2274 '*calls upon* the Afghan Government, with the assistance of the international community, to continue to address the threat to the security and stability of Afghanistan posed by the Taliban, including the Haqqani Network, as well as Al-Qaida and other violent and extremist groups'.
Algeria	Government of Algeria v. AQIM	Government of Algeria	Mali, Niger, Chad	2004, 2009	(3) Counter-terrorism [described in agreement]	The governments of Chad, Niger, and Algeria signed an agreement in early	None

356 www.afghanistan-analysts.org/wp-content/uploads/2014/10/BSA-ENGLISH-AFG.pdf.

357 North Atlantic Treaty Organization (NATO), Agreement between the North Atlantic Treaty Organization and the Islamic Republic of Afghanistan on the Status of NATO Forces and NATO Personnel Conducting Mutually Agreed NATO-Led Activities in Afghanistan, 30 September 2014, available at www.nato.int/cps/en/natohq/official_texts_116072.htm?selectedLocale=en.

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						July 2003 on cooperation and joint operations for counter terrorism. The governments of Mali and Algeria agreed to coordinate their counter-terrorism efforts along their shared borders.[358]	
Angola	Government of Angola v. UNITA	Government of Angola, UNITA	Soviet Union, Cuba, South Africa, United States	1975–88, 2000–01	Support to government against UNITA and FNLA rebels Support to UNITA against government	The MPLA government received substantial military assistance from the Soviet Union and, during the first half of 1975, Cuban troops had already begun to arrive in aid of the leftist movement. They would remain in the country over the next 14 years, increasing in number until reaching a peak of 50,000 in 1988.	In S/Res/626 (1988) and S/Res/628 (1989), the Council noted 'the decision of Angola and Cuba to conclude a bilateral agreement … for the redeployment to the north and the staged and total withdrawal of Cuban troops from Angola' and emphasised 'the importance of these … agreements in strengthening international peace and security'. It did not condemn or approve of this intervention in any of its resolutions.

[358] S. Ellis, 'Briefing: the Pan-Sahel Initiative', *African Affairs: The Journal of the Royal African Society* 103 (2004), 459–64, available at https://hdl.handle.net/1887/9538.

(*continued*)

State in Which Intervention Occurred	Conflict	Party Being Supported	Intervening State(s)	Date(s) of Intervention	Purpose(s) of Intervention	Description	Security Council Reaction
						The United States and South Africa supplied the FNLA (UNITA's predecessor), and then UNITA, with troops. The South African assistance to the FNLA/UNITA came first, and was followed by Cuban and Soviet aid to the government.[359]	
Cameroon	Government of Cameroon v. Jama'atu Ahlis Sunna Lidda'awati wal-Jihad (Boko Haram)	Government of Cameroon	Chad	2015	(3) Anti-terrorism [UN SC Pres. Statement 2015/14]	Fighting started with Cameroon supporting Nigeria against Boko Haram in 2014. In January 2015, Boko Haram demanded that Cameroon scrap its	'The Security Council commends the LCBC Member States [which include Chad] and Benin for their continued efforts to fully operationalize the MNJTF in order to collectively enhance regional military

[359] http://ucdp.uu.se/#statebased/714.

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						constitution and embrace Islam. In the following two months, Cameroon fought battles with supporting troops from Chad.[360]	cooperation and coordination to more effectively combat the threat posed by the Boko Haram terrorist group to the Lake Chad Basin region.'[361]
Cameroon	Government of Government of Cameroon v. IS	Government of Cameroon	Chad	2015	(3) Counter-terrorism [Chad as part of AU Multinational Joint Task Force, which was created '[i]n response to the rising threat posed by Boko Haram'][362]	'In response to the rising threat posed by Boko Haram, the African Union Peace and Security Council authorized, on 29 January, the deployment of the Multinational Joint Task Force for an initial period of 12 months, with a mandated strength of up to 7,500 military personnel.'[363]	See above.

[360] https://ucdp.uu.se/#/statebased/12422.

[361] UN SC Pres. Statement on Threats to International Peace and Security Caused by Terrorist Acts, S/PRST/2015/14, 28 July 2015.

[362] Report of the Secretary-General on the Situation in Central Africa and the Activities of the United Nations Regional Office for Central Africa, UN Doc. S/2015/339, 14 May 2015, para. 14.

[363] *Ibid*., para. 15.

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(*continued*)

State in Which Intervention Occurred	Conflict	Party Being Supported	Intervening State(s)	Date(s) of Intervention	Purpose(s) of Intervention	Description	Security Council Reaction
Central African Republic	Government of CAR v. Forces of André Kolingba; Forces of François Bozizé; UFDR	Government of Central African Republic	Chad, Libya, France	2001, 2002, 2006	(1) Forces from Libya supported the president against a challenge by rebels[364] Forces from Sudan and Djibouti announced as supporting democratic institutions[365] French forces supported President Patassé in conflict with rebel group UFDR, which broke away from the forces of François Bozizé[366]	Libyan forces in 2001 supported President Patassé in conflict with forces led by former Army Chief of Staff François Bozizé. Sudan and Djibouti sent forces pursuant to decisions by two regional organisations, Community of Sahel and Saharan States (CEN-SAD) and Central African Economic and Monetary Community (CEMAC).[367]	None

364 http://ucdp.uu.se/#/statebased/874.

365 *Ibid.*: 'In December 2001 CEN-SAD held an extraordinary summit in Khartoum where it was decided that a small contingent was to be dispatched to CAR in view to safeguard the democratically elected institutions of the country.'

366 UCDP, 'External Support: Primary Warring Party Dataset', available at http://ucdp.uu.se/downloads/extsup/extsup_small.xls.

367 https://ucdp.uu.se/#/statebased/874.

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						Pursuant to a military accord, France had troops stationed in the CAR and 220 French troops were deployed in 2006 against the UFDR.	
Central African Republic	Government of CAR v. Seleka	Government of CAR	Chad	2012	(1) To support government offensive against the UFDR	'Elements of the Chadian National Army crossed into the Central African Republic in the Ouham prefecture on 17 December at the request of the Government of the Central African Republic to support the counteroffensive of the Central African Armed Forces (FACA).'[368]	'The Members of the Security Council commended the swift efforts made by the Economic Community of the Central African States, by the African Union and by the countries in the region to solve the recent crisis.'[369]

[368] Report of the Secretary-General on the Situation in the Central African Republic and on the Activities of the United Nations Integrated Peacebuilding Office in That Country, UN Doc. S/2012/956, 21 December 2012, para. 9.

[369] Security Council Press Statement on Central African Republic, SC/10880-AFR/2503, 11 January 2013. See also UN SC Res. 2088 of 24 January 2013 (same language).

(*continued*)

State in Which Intervention Occurred	Conflict	Party Being Supported	Intervening State(s)	Date(s) of Intervention	Purpose(s) of Intervention	Description	Security Council Reaction
Republic of Congo	Sassaou (Cobras; later Govt of Congo) v. Lissouba (Cocoyes; former Govt of Congo), Ntsiloulous	Sassou – at the time, a rebel leader	Angola, Chad	1997–99, 2002	(4) Angola joined the fight on the side of Sassou because Lissouba's government had supported UNITA, a rebel group fighting against the Angolan government Chadian troops also joined and supported Sassou, because he was France's president of choice in earlier years[370]	Sassou sought to overthrow Lissouba's elected regime, which he did in October 1997.[371] In 2002, fighting erupted between Sassou and the Ntsiloulous rebels. 'The remains of 2002 and the first three months of 2003 saw low-scale fighting … Only at one point was Ntoumi able to seriously threaten Sassou's regime; when his Ntsiloulous launched a surprise attack on	Council 'condemns all external interference in the Republic of the Congo, including the intervention of foreign forces, in violation of the Charter of the United Nations, and calls for the immediate withdrawal of all foreign forces including mercenaries'.[372]

370 http://ucdp.uu.se/#/statebased/861.
371 *Ibid*.
372 UN SC Pres. Statement on Republic of the Congo, S/PRST/1997/47, 16 October 1997.

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						Brazzaville's Maya-Maya Airport in June. After heavy fighting, the Cobra elements, supported by Angolan troops and army artillery fire, were able to push the Ntsiloulous back into the bush.'[373]	
DR Congo	Government of Zaire – AFDL (the First Congo War)	AFDL	Uganda, Rwanda, Angola	1997	(4) Three states support Laurent Kabila's AFDL, which sought to oust President Mobutu	Uganda provided troops to AFDL Most analysts conclude that Uganda's involvement was mainly based on security concerns, as anti-Museveni rebel groups operated out of Zairian territory.[374] Rwandan troops assisted AFDL, aiming both to root out the Hutu	'The Council calls on all States to respect the sovereignty and territorial integrity of neighbouring States in accordance with their obligations under the United Nations Charter. In this connection, it urges all parties to refrain from the use of force as well as cross-border incursions and to engage in a process of negotiation.'[375]

373 http://ucdp.uu.se/#/statebased/861.

374 http://ucdp.uu.se/#/statebased/584.

375 UN SC Pres. Statement on Republic of the Congo, S/PRST/1996/44, 1 November 1996. See also UN SC Res. 1097 of 18 February 1997 (Council '[r]eaffirm[s] the obligation to respect national sovereignty and territorial integrity of the States of the Great Lakes region and the need for the States of the region to refrain from any interference in each other's internal affairs …' and 'Endorses … Withdrawal of all external forces, including mercenaries').

(*continued*)

State in Which Intervention Occurred	Conflict	Party Being Supported	Intervening State(s)	Date(s) of Intervention	Purpose(s) of Intervention	Description	Security Council Reaction
						militia operating from Zairian territory and to topple Mobutu, who had supported the previous regime in Rwanda, and who accepted the presence of the armed Hutu groups on Zairian soil.[376] The only state openly admitting to sending troops in aid of AFDL was Angola, who had the same motivation as Rwanda and Uganda. Mobutu had for years supported Angolan rebel	

[376] *Ibid*.

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						group UNITA, allowing the rebels to launch attacks from Zairian territory.[377]	
DR Congo	Government of DR Congo v. RCD	RCD	Rwanda, Uganda	1998	(4) To overthrow Kabila regime, which had turned hostile to Rwanda and Uganda[378]	After assuming power, Kabila quickly alienated many of his former allies and external supporters. In August 1998, the RCD was formed. It was a group composed of various political elements opposing the government. When the fighting began in August 1998, alliances had shifted, and Kabila's former main backers Rwanda and Uganda now supported the rebels.[379]	'The Security Council reaffirms the obligation to respect the territorial integrity and national sovereignty of the Democratic Republic of the Congo and other States in the region and the need for all States to refrain from any interference in each other's internal affairs.'[380]

377 *Ibid*.
378 John F. Clark, 'Ugandan Intervention in Congo: Evidence and Interpretations', *Journal of Modern African Studies* 39 (2001), 261–87.
379 http://ucdp.uu.se/#/statebased/586.
380 UN SC Pres. Statement on Democratic Republic of the Congo, S/PRST/1998/26, 31 August 1998.

(*continued*)

State in Which Intervention Occurred	Conflict	Party Being Supported	Intervening State(s)	Date(s) of Intervention	Purpose(s) of Intervention	Description	Security Council Reaction
DR Congo[381]	Government of DR Congo v. RCD	Government of DR Congo	Chad, Angola, Zimbabwe, Namibia	1998	(1) To support Kabilia government's war against multiple rebel groups	Chad had 'no clear reason' for supporting the government.' Angola, Zimbabwe, and Namibia sent troops under a SADC banner. Angola intervened to refuse UNITA a safe haven on Congolese territory and also because of DR Congo's diamond sector. Re Zimbabwe: while Mugabe claimed the troops were protecting central Zimbabwean interests such as a vital electricity supply line, it is also obvious	'The Security Council reaffirms the obligation to respect the territorial integrity and national sovereignty of the Democratic Republic of the Congo and other States in the region and the need for all States to refrain from any interference in each other's internal affairs.'[382]

[381] This is the same conflict as the prior conflict on this table. The first entry concerns intervention to support the rebels; the second concerns intervention to support the government.
[382] UN SC Pres. Statement on Democratic Republic of the Congo, S/PRST/1998/26, 31 August 1998.

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						that the support given proved very beneficial economically for the country. Namibia's troop deployment was the smallest.[383]	
DR Congo	Government of DR Congo – RCD-ML	RCD–ML	Uganda	1999–2002	(4) The conflict grew increasingly complex during its second phase, as former allies turned on each other and new groups and supporters emerged. When the fighting began in August 1998, alliances had shifted and Kabila's former main backers Rwanda and Uganda now supported the rebels.[384]	Originally, one of the main causes behind the internal splits was divisions between the movement's main backers, Uganda and Rwanda. Subsequently, in May 1999, RCD split into the two groups: RCD-Goma, which in this database is seen as the continuation of RCD; and RCD-ML. The former was backed by Rwanda and the latter, by Uganda.[385]	Council '[d]eplores the continuing fighting and the presence of forces of foreign States in the Democratic Republic of the Congo in a manner inconsistent with the principles of the Charter of the United Nations'.[386]

383 http://ucdp.uu.se/#/statebased/586.

384 *Ibid*.

385 *Ibid*.

386 UN SC Res. 1234 of 9 April 1999, para. 2. See also UN SC Res. 1304 of 16 June 2000, para. 4 (Council demands 'that Uganda and Rwanda, which have violated the sovereignty and territorial integrity of the Democratic Republic of the Congo, withdraw all their forces from the territory of the Democratic Republic of the Congo without further delay' and that 'all other foreign military presence and activity, direct and indirect, in the territory of the Democratic Republic of the Congo be brought to an end in conformity with the provisions of the Ceasefire Agreement').

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(*continued*)

State in Which Intervention Occurred	Conflict	Party Being Supported	Intervening State(s)	Date(s) of Intervention	Purpose(s) of Intervention	Description	Security Council Reaction
DR Congo	Government of DR Congo – MLC	MLC	Uganda	1999	(4) To assist rebel group seeking to topple Kabila government.	Created by Jean-Pierre Bemba in September 1998 with the aim of overthrowing Kabila, MLC launched its rebellion in November the same year. In mid-2002, an agreement was signed by the government, MLC, and most of the opposition parties, under which rebel leader Jean Pierre Bemba was to become prime minister in a new transitional government. Negotiations continued in late 2002, aiming	Council '[d]eplores the continuing fighting and the presence of forces of foreign States in the Democratic Republic of the Congo in a manner inconsistent with the principles of the Charter of the United Nations.'[387]

[387] UN SC Res. 1234 of 9 April 1999, para. 2. See also UN SC Res. 1304 of 16 June 2000, para. 4 (Council demands 'that Uganda and Rwanda, which have violated the sovereignty and territorial integrity of the Democratic Republic of the Congo, withdraw all their forces from the territory of the Democratic Republic of the Congo without further delay' and that 'all other foreign military presence and activity, direct and indirect, in the territory of the Democratic Republic of the Congo be brought to an end in conformity with the provisions of the Ceasefire Agreement').

						to also include the various RCD groups in the accord and, in December, an all-inclusive agreement was reached.[388]	
DR Congo	Government of DR Congo v. M23	M23	Rwanda, Uganda	2012–13	(4) On 2 July 2012, Lieutenant Colonel Vianney Kazarama, M23's military spokesman, told Think Africa Press: '[W]e are upset by the Congolese government's fraudulent election and failure to improve the living conditions of the Congolese people; we want to chase the government in Kinshasa from power. We are calling for a revolution.'[389]	M23 was an armed group active in the North Kivu Province of DR Congo. The group was formed by defectors from the Congolese Army, most of whom had been part of the former rebel group CNDP that had been allowed to integrate into the Congolese Army as part of the 23 March 2009 Peace Agreement.[390]	Council '[expresses deep concern at reports indicating that external support continues to be provided to the M23, including through troop reinforcement, tactical advice and the supply of equipment, causing a significant increase of the military abilities of the M23, and reiterates its demand that any and all outside support to the M23 cease immediately'.[391]

388 http://ucdp.uu.se/#/statebased/585.
389 http://ucdp.uu.se/#/actor/1160.
390 *Ibid*.
391 UN SC Res. 2078 of 28 November 2012, para. 8.

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State in Which Intervention Occurred	Conflict	Party Being Supported	Intervening State(s)	Date(s) of Intervention	Purpose(s) of Intervention	Description	Security Council Reaction
Georgia	Government of Georgia v. Republic of Abkhazia	Republic of Abkhazia	Russia	1992–93	(4) Support for Abkhaz independence, although Russia acted inconsistently	Russia's role in the conflict was widely perceived to be inconsistent. Divisions between factions within the Russian government resulted in a situation in which, at some points, both sides to the conflict received substantial help.[392]	Council '[w]elcomes … the continued efforts of the Secretary-General … and with the assistance of the Government of the Russian Federation as facilitator, to carry forward the peace process with the aim of achieving an overall political settlement'.[393]
Georgia	Government of Georgia v. Republic of South Ossetia	Republic of South Ossetia	Russia	1998	(4) Russia justified its intervention on both humanitarian grounds and upon consent of the breakaway authorities of South Ossetia[394]	After a few clashes between South Ossetian and Georgian troops in the first days of August, tensions culminated on 7 August 2008.	None

392 http://ucdp.uu.se/#statebased/839.
393 UN SC Res. 881 of 4 November 1993.
394 Eliav Lieblich, *International Law and Civil Wars: Intervention and Consent* (London: Routledge 2014), 14.

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						Georgian President Saakashvili launched a large-scale military offensive on Tskhinvali, the capital of South Ossetia. Immediately, Russia sent troops, tanks, and bomber planes to repel the Georgian Army.[395]	
Guinea-Bissau	Government of Guinea-Bissau v. Military Junta for the Consolidation of Democracy, Peace and Justice (MJDC)	Government of Guinea-Bissau	Senegal, Guinea	1998–99	(1) Senegal and Guinea support government in aspect of conflict with MJDC[396]	The conflict concerned Senegalese rebels in Casamançe, which borders Guinea-Bissau. Guinean Army offices in MJDC had supported Casamançe rebels. President Veira reversed prior policy and opposed the rebels. Senegal and Guinea sent troops to assist Viera's efforts.[397]	Security Council '[c]alls upon the Government and the Self-Proclaimed Military Junta to implement fully all the provisions of the agreements, including … in cooperation with all concerned, the withdrawal of all foreign troops in Guinea-Bissau'.[398]

395 http://ucdp.uu.se/#/statebased/840.
396 http://ucdp.uu.se/#/statebased/866.
397 *Ibid*.
398 UN SC Res. 1216 of 21 December 1998.

(*continued*)

State in Which Intervention Occurred	Conflict	Party Being Supported	Intervening State(s)	Date(s) of Intervention	Purpose(s) of Intervention	Description	Security Council Reaction
Iraq	Government of Iraq v. Ansar al-Islam	Government of Iraq	United States and others[399]	2004–08	(1) To support the Iraqi government against an insurgency movement	In 2004–09, the Iraqi government was supported by troops from a multinational coalition headed by the United States. During these years, the foreign troops provided the majority of the military and security forces on the government side. In early 2007, the Iraqi government and the US supporting troops initiated an offensive against insurgents, as well as other violent actors. This so-called surge led to an intensification of the	Council approves of presence of multinational force in Iraq. UN SC Res. 1546 is accompanied by a letter from the United States offering assistance and a letter from Iraq accepting that assistance.[400]

[399] http://ucdp.uu.se/#/statebased/523. The other states supporting the Iraqi government with troops were: Albania; Australia; Azerbaijan; Bulgaria; Czech Republic; Denmark; Dominican Republic; Egypt; El Salvador; Estonia; Georgia; Honduras; Italy; Jordan; Kazakhstan; Latvia; Lithuania; Macedonia; Mongolia; Netherlands; Norway; Philippines; Poland; Portugal; Romania; Slovakia; South Korea; Spain; Tonga; Ukraine; United Arab Emirates; United Kingdom.

[400] UN SC Res. 1546 of 8 June 2004.

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						conflict as insurgents were being pushed north from Baghdad.[401]	
Lebanon	Government of Lebanon v. Forces of Michel Aoun	Government of Lebanon	Syria	1990	(1) To support the government of Sunni Muslim Prime Minister Selim Hoss in a conflict with Michel Aoun, leader of the mainly Christian Lebanese Army.[402]	Fighting between the Lebanese Army under Aoun and the Government of Lebanon began in early March, as the Lebanese Army launched a blockade on what it considered to be illegal militia posts in Beirut. In response, forces controlled by Syria and the Hoss government attacked Lebanese Army positions with mortars and artillery.[403] The new and the old governments claimed that they	In 1990, the Council '[r]eiterates its strong support for the territorial integrity, sovereignty and independence of Lebanon within its internationally recognized boundaries'.[404] In 2004, the Council repeated this language in a preambular paragraph, reaffirming 'its call for the strict respect of the sovereignty, territorial integrity, unity, and political independence of Lebanon under the sole and exclusive authority of the Government of Lebanon throughout Lebanon', and calling upon 'all remaining foreign forces

401 http://ucdp.uu.se/#/statebased/523.
402 http://ucdp.uu.se/#statebased/532.
403 *Ibid*.
404 UN SC Res. 659 of 31 July 1990, para. 2.

(*continued*)

State in Which Intervention Occurred	Conflict	Party Being Supported	Intervening State(s)	Date(s) of Intervention	Purpose(s) of Intervention	Description	Security Council Reaction
						had acted according to constitutional law. The constitution did not provide an immediate solution to the problem, because it was tradition that dictated that the president should be a Christian and the prime minister a Sunni Muslim. Internationally, the government led by Hoss came to be seen as having the most legitimacy; UCDP also treats the Hoss-led administration as the government of Lebanon.[405]	to withdraw from Lebanon'.[406]

405 http://ucdp.uu.se/#statebased/532.
406 UN SC Res. 1559 of 2 September 2004.

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Lesotho	Government of Lesotho v. Military faction (Lesotho)	Government of Lesotho	South Africa, Botswana	1998	(5) South African and Botswanan troops supported elected government in challenge by mutinous army officers dissatisfied with electoral results[407]	In 1998, conflict arose in Lesotho as a controversy over election results and the dismissal of a colonel triggered a mutiny within the armed forces. Even though independent observers declared the process to have been free and fair, it provoked legal challenges from the main opposition parties in 20 constituencies. The government of Lesotho called for assistance from SADC countries and, following the deployment of South African and Botswanan troops, the mutinous military faction could eventually be contained.[408]	None

407 http://ucdp.uu.se/#statebased/867.
408 *Ibid*.

(*continued*)

State in Which Intervention Occurred	Conflict	Party Being Supported	Intervening State(s)	Date(s) of Intervention	Purpose(s) of Intervention	Description	Security Council Reaction
Libya	Government of Libya v. IS	Government of Libya	United States	2016	(3) To support Libyan Government of National Accord in conflict with IS[409]	A critical turning point in the conflict came in May 2016, when IS fighters attacked government-loyal militias from the town of Misrata at Abu Grein. By June, the Misratan forces loyal to the Government of Libya were deeply engaged in fierce street battles against IS inside Sirte. On 1 August, US aircraft and naval forces began bombing targets in Sirte. The fighting continued for several months, amid more US airstrikes, before the Bunyan Marsous	On 14 June 2016, the Council, in a resolution concerning Libya, '[u]rge[d] Member States to combat by all means, in accordance with their obligations under the Charter of the United Nations and other obligations under international law, including international human rights law, international refugee law and international humanitarian law, threats to international peace and security caused by terrorist acts'.[410] The Resolution further welcomed the Vienna Communiqué of 16 May 2016, which declares that '[t]he GNA [Government of National Accord] is the sole legitimate recipient of international security

409 http://ucdp.uu.se/#statebased/14745.
410 UN SC Res. 2292 of 14 June 2016.

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						Operations Room finally captured Sirte on 6 December.[411]	assistance' and that '[w]e fully support the PC's requests for security assistance to counter Da'esh and other UN-designated terrorist groups for a united national security force'.[412] This favourable statement came three months prior to the commencement of the US bombing campaign.
Mali	Government of Mali v. Ansar Dine, AQIM, MUJAO, Signed-in-Blood Battalion, al-Murabitun; CMA; MNLA	Government of Mali	France	2013	(1) (3) Anti-terrorism and support of Malian government against Tuareg rebel movement[413]	Malian government faced challenge in the north from both Tuareg rebel groups and Islamist groups. After first the Tuaregs and then the Islamists took control of significant portions of the country, a transitional government requested and received assistance from France.[414]	Council welcomed 'the swift action by the French forces, at the request of the transitional authorities of Mali, to stop the offensive of terrorist, extremist and armed groups towards the south of Mali'.[415]

[411] *Ibid*.

[412] The communiqué was issued on behalf of Algeria, Canada, Chad, China, Egypt, France, Germany, Jordan, Italy, Malta, Morocco, Niger, Qatar, Russia, Saudi Arabia, Spain, Sudan, Tunisia, Turkey, the United Arab Emirates, the United Kingdom, the United States, the European Union, United Nations, the League of Arab States, and the African Union. See Joint Communiqué on Libya, 22 September 2016, available at https://reliefweb.int/report/libya/joint-communique-libya-22-september-2016.

[413] UN SC Res. 2056 of 5 July 2012, 1; UN SC Res. 2071 of 12 October 2012; UN SC Res. 2085 of 20 December 2012; UN SC Res. 2100 of 25 April 2013.

[414] http://ucdp.uu.se/#statebased/12575; http://ucdp.uu.se/#/statebased/11985.

[415] UN SC Res. 2100 of 25 April 2013.

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State in Which Intervention Occurred	Conflict	Party Being Supported	Intervening State(s)	Date(s) of Intervention	Purpose(s) of Intervention	Description	Security Council Reaction
Mauritania	Government of Mauritania v. AQIM	Government of Mauritania	France	2010	(3) Assist Mauritanian government in attacking AQIM enclave and rescue a French citizen held hostage[416]	On 22 June 2010, the Mauritanian military attacked AQIM in neighbouring Mali, in what was officially claimed to be a pre-emptive strike attempting to deter a suspected AQIM attack on strategic Mauritanian interests. French troops took part in the operation, with a goal of releasing Michel Germaneau, a French aid worker taken captive by AQIM in Niger and held in Mali.[417]	None

[416] http://ucdp.uu.se/#statebased/909; Modibo Goita, 'West Africa's Growing Terrorist Threat: Confronting AQIM's Sahelian Strategy', Africa Security Brief No. 11, February 2011, available at www.files.ethz.ch/isn/133688/AfricaBriefFinal_11.pdf.

[417] http://ucdp.uu.se/#statebased/909.

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Mozambique	Government of Mozambique v. Renamo	Government of Mozambique	Zimbabwe, USSR, Tanzania, United Kingdom	1985–92	(1) Provided combat troops and military advisers to Frelimo government in conflict with Renamo rebels[418]	Three neighbouring states – Zimbabwe, Tanzania, and Malawi – eventually deployed troops into Mozambique to defend their own economic interests against Renamo attacks. Until 1991, the Soviet Union, together with other Eastern bloc countries constituted the Mozambican government's main backers. From the mid-1980s, military aid was also forthcoming from a number of Western countries, of which the United Kingdom was the leading one.[419]	None
Niger	Government of Niger v. IS	Government of Niger	Chad, Nigeria	2015–16	(3) Formed multinational joint forces, first against	Soon after Boko Haram's transformation into IS, the	Security Council issued a presidential statement reaffirming 'Member States'

418 http://ucdp.uu.se/#/statebased/722.
419 *Ibid*.

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State in Which Intervention Occurred	Conflict	Party Being Supported	Intervening State(s)	Date(s) of Intervention	Purpose(s) of Intervention	Description	Security Council Reaction
					Boko Haram, later against IS	group's attacks on Niger intensified. Late March and April saw the most large-scale attacks in 2015. On 30 March, IS fighters launched a significant cross-border attack on Bosso village from Nigeria, but they were pushed back after sustaining heavy losses. In early June, Bosso once again became the target of an IS attack; hundreds of heavily armed IS fighters were able to temporarily defeat the Army and briefly occupy the town.	determination to continue to do all they can to resolve conflict and to deny terrorist groups the ability to put down roots and establish safe havens to address better the growing threat posed by terrorism'. Council also 'expresse[d] its concern at the continued threat posed to international peace and security by Jama'atu Ahlis Sunna Lidda'awati Wal-Jihad (also known as "Boko Haram") … and all other individuals, groups, undertakings and entities associated with Al-Qaida'.[420]

[420] UN SC Pres. Statement on Threats to International Peace and Security Caused by Terrorist Acts, S/PRST/2015/14, 28 July 2015.

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						Subsequently, the Army launched a large-scale counter-attack, using air and land forces, succeeding in pushing the militants out of Bosso. The following months also saw high levels of violence, with a government offensive scoring victories against the Islamists.[421]	
Nigeria	Government of Nigeria v. Jama'atu Ahlis Sunna Lidda'awati wal-Jihad (Boko Haram)	Government of Nigeria	Chad, Niger, Cameroon	2015–16	(3) The three states formed a so-called Multinational Joint Task Force (MNJTF), first against Boko Haram, later against IS	In January 2015, Boko Haram carried out an attack on the town of Baga and its surrounding area, which was the base of the so-called MNJTF. In late January, a major unified offensive was launched from Chad and Nigeria.	The Council stated it was '[w]elcoming the commitment expressed by the Governments in the Region to combat Boko Haram, in order to create a safe and secure environment for civilians'.[422]

421 http://ucdp.uu.se/#statebased/14668.
422 UN SC Res. 2349 of 31 March 2017.

(*continued*)

State in Which Intervention Occurred	Conflict	Party Being Supported	Intervening State(s)	Date(s) of Intervention	Purpose(s) of Intervention	Description	Security Council Reaction
						A few days later, Niger joined in. Boko Haram reformed in 2016 after splitting from IS. With the split in the movement, analysts agree that IS is mostly based in the Nigeria–Niger–Chad–Cameroon border region. In December 2016, the government announced that the last Boko Haram base had been captured.[423]	
Nigeria	Government of Nigeria v. IS	Government of Nigeria	Chad, Niger, Cameroon	2015–16	(3) See above	See above.[424]	See above.[425]

423 http://ucdp.uu.se/#statebased/640.
424 http://ucdp.uu.se/#statebased/14669.
425 UN SC Res. 2349 of 31 March 2017.

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Rwanda	Government of Rwanda v. FDLR	Government of Rwanda	DR Congo	2009–16	(1) Formed regional alliance against FDLR and a Congolese rebel group previously supported by Rwanda DR Congo then seen as a secondary warring party supporting the Rwandan side in the conflict	In 2009, a new regional alliance was built as Rwanda signed an agreement with the government of DR Congo. DR Congo (Zaire) was then seen as a secondary warring party supporting the Rwandan side in the conflict. This alliance continued between 2010 and 2012, when the regional context again changed dramatically. On 23 September 2015, Rwanda and DR Congo (Zaire) launched a fresh round of security talks to start 'a new chapter' in their bilateral relations. Clashes between the Congolese	Council stated that it was '[e]ncouraging the countries of the Great Lakes region to maintain a high level of commitment to jointly promote peace and stability in the region and welcoming the recent improvements in the relations between the Governments of the Democratic Republic of the Congo and Rwanda, Uganda and Burundi'.[426]

[426] UN SC Res. 1906 of 23 December 2009.

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State in Which Intervention Occurred	Conflict	Party Being Supported	Intervening State(s)	Date(s) of Intervention	Purpose(s) of Intervention	Description	Security Council Reaction
						government and FDLR in the Nord Kivu Province of DR Congo (Zaire) activated the conflict again in 2016.[427]	
Rwanda	Government of Rwanda v. FPR	Government of Rwanda	France, Zaire	1990	(1) French troops were deployed at checkpoints and also interrogated military prisoners, provided military intelligence, and trained the presidential guard, as well as other troops. In addition, France was also Rwanda's main arms provider.	Since 1975, France had a military cooperation agreement with Rwanda, and relations between the presidents of the respective countries were close. Thus, when FPR launched its invasion, President Habyarimana invoked the agreement, and France subsequently sent troops in aid of the government.[428]	None

427 http://ucdp.uu.se/#statebased/12102.
428 http://ucdp.uu.se/#statebased/804.

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Sierra Leone	Government of Sierra Leone v. RUF	Government of Sierra Leone	United Kingdom	2000	(5) British forces engaged in an escalating series of acts to support the Lomé peace agreement and counter spoiler activity by the RUF	In May 2000, the Lomé peace accord unravelled. The United Kingdom, a chief sponsor of the peace in Sierra Leone, deployed a reconnaissance team in early May to prepare to evacuate its citizens. The UK forces first secured the airport and then began to support UNAMSIL and the Sierra Leone Army against RUF. They were successful in pushing RUF forces eastwards. In mid-June, the UK force was replaced with a 200-strong advice-and-assist team. In September, they successfully rescued	No collective statement issued on UK intervention, but support given at 11 May 2000 Council meeting by Secretary-General and nine member states, including Portugal speaking for the European Union.[429]

[429] UN SCOR, 55th Session, 4139th Meeting, UN Doc. S/PV.4139, 11 May 2000, 8 (supportive statements by the UN Secretary-General, Canada, Namibia, Argentina, Ukraine, France, Portugal [speaking for European Union], Malaysia, the United States, and Jamaica).

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State in Which Intervention Occurred	Conflict	Party Being Supported	Intervening State(s)	Date(s) of Intervention	Purpose(s) of Intervention	Description	Security Council Reaction
						British hostages taken by another faction. British elements then remained in Sierra Leone to advise the Sierra Leonean government and military, to support the growing UN mission, and to send a clear signal to any force intent on renewed violence.[430]	
Somalia	Government of Somalia v. ARS/ UIC; Al-Shabaab	Government of Somalia	Ethiopia	2006–08	(1) (3) Ethiopian troops supported the Transitional Federal Government (TFG) against challenges by the Union of Islamic Courts and Al-Shebab	In 2004, the TFG was created, but it almost immediately fell into conflict with a series of Islamist groups. In that same year, the TFG requested the deployment of regional forces from	Council had numerous opportunities to condemn the Ethiopian presence, which the Secretary-General specifically noted in his reports. Yet it issued no such condemnation.[431]

[430] http://ucdp.uu.se/#/statebased/818. See also David H. Ucko, 'Can Limited Intervention Work? Lessons from Britain's Success Story in Sierra Leone', *Journal of Strategic Studies* 39 (2016), 847–77.

[431] Report of the Secretary-General on the Situation in Somalia pursuant to paragraphs 3 and 9 of Security Council Resolution 1744, UN Doc. S/2007/204, 20 April 2007, para. 19; Report of the Secretary-General on the Situation in Somalia, UN Doc. S/2007/115, 28 February 2007, para. 1.

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the Intergovernmental Authority on Development (IGAD) and the African Union.

The Security Council had previously imposed an arms embargo on Somalia, and such an intervention would require that an exception be made. This exception came in UN SC Res. 1725, in which the Council permitted the deployment of an IGAD peacekeeping mission to Somalia.

While this process played out, Ethiopian troops entered the country to support the TFG and played a decisive role in conflicts, first with the Union of Islamic Courts and, after 2007, with Al-Shebab.[432]

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432 http://ucdp.uu.se/#statebased/750.

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South Sudan	Government of South Sudan v. Sudan People's Liberation Movement/ Army (SPLM/A) in Opposition	Government of Sudan	Uganda	2013–15	(1) Uganda sent troops into South Sudan five days after the fighting had broken out and claimed that the government of South Sudan extended an invitation to intervene	With the help of Ugandan troops, government forces wrested control of the towns of Bor, Bentiu, and Malakal back from rebel troops.[433]	'The members of the Security Council also strongly discouraged external intervention that could exacerbate the military and political tensions.'[434]
Sri Lanka (Eelam)	Government of Sri Lanka (Ceylon) v. Liberation Tigers of Tamil Eelam (LTTE, or Tamil Tigers)	Government of Sri Lanka	India	1987–90	(1) Indian Peacekeeping Force (IPKF), numbering 75,000–90,000 troops, engaged in fighting in Sri Lanka	On 29 July 1987, the Indo–Sri Lankan Accord was signed. The terms of the truce specified that the Sri Lankan troops withdraw from the north and the Tamil rebels disarm. It also provided for the introduction of the	None

433 Kasaija P. Apuuli, 'Explaining the (Il)legality of Uganda's Intervention in the Current South Sudan Conflict', *African Security Review* 23 (2014), 352–69.

434 Security Council Press Statement on South Sudan, SC/11244-AFR/2792, 10 January 2014.

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						IPKF in Sri Lanka. The Indo–Sri Lanka Accord, however, did not include LTTE and, soon after it arrived, the IPKF became deeply entangled in regular warfare with the Tamil Tigers. The last IPKF troops withdrew from Sri Lanka in March 1990.[435]	
Sudan	Government of Sudan v. SPLM/A	SPLM/A	Chad	2003/ 2004–06	(1) Chad deployed troops in Darfur which fought, together with the Sudanese government, against the SPLM/A	The SPLM/A, a rebel group based in southern Sudan, took up arms against the Khartoum regime in 1983. Chadian troops fought, together with the Sudanese government, in Darfur against the SPLM/A in 2003.[436]	Council praises the efforts by the African Union to facilitate peace talks in Sudan, as well as the 'humanitarian forces' that have been deployed to Sudan and Darfur specifically. But although the Council takes note of Chad's efforts, it offers no specific condemnation or approval of Chad's military support of Sudan.[437]

[435] http://ucdp.uu.se/#statebased/776.

[436] https://ucdp.uu.se/#/statebased/663.

[437] UN SC Res. 1574 of 19 November 2004.

(continued)

State in Which Intervention Occurred	Conflict	Party Being Supported	Intervening State(s)	Date(s) of Intervention	Purpose(s) of Intervention	Description	Security Council Reaction
Syria	Government of Syria v. IS	Government of Syria	Russia, Iran	2015–16	(3) Military aid to government to counter rebel and jihadist groups	Syria lost territory to ISIS. On 29 June 2014, ISIS proclaimed a caliphate; at the same time, it changed its name to the 'Islamic State'. Russia intervened in the Syrian conflicts on 30 September 2015 after an official request from the Assad government. Russian planes conducted air strikes. From the outset, Teheran supported several pro-regime militia groups, which were transformed into the National Defense Forces in 2013 with the help	Council addresses a variety of issues in the conflict but not external intervention by states.[438]

[438] UN SC Res. 2249 of 20 November 2015; UN SC Res. 2254 of 18 December 2015; UN SC Res. 2258 of 22 December 2015; UN SC Res. 2268 of 26 February 2015.

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						and training from Iran. Further, the Lebanese group Hezbollah and various Shi'ite groupings hailing from Iraq, as well as from within Syria, also participated on the government's side. These were considered Iranian proxy forces.[439]	
Syria	Syria v. Syrian insurgents	Government of Syria	Russia, Iran	2015–16	(1) While Russia and Iran's stated goal was to counter IS insurgents, they also targeted non-IS rebel groups	Russia received invitation from Assad government. The 'Syrian insurgents' includes actors with different ideological perspectives – from relative moderates to Salafi hardliners (including al-Qaeda affiliates).[440]	Council adopted multiple resolutions in regard to Syria during this time. It '[r]eaffirm[ed] the primary responsibility of the Syrian authorities to protect the population in Syria and, reiterat[ed] that parties to armed conflict must take all feasible steps to protect civilians'. It '[s]trongly condemn[ed] the arbitrary detention and torture of individuals in Syria,

439 https://ucdp.uu.se/#statebased/14620.

440 https://ucdp.uu.se/#/actor/4456.

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State in Which Intervention Occurred	Conflict	Party Being Supported	Intervening State(s)	Date(s) of Intervention	Purpose(s) of Intervention	Description	Security Council Reaction
							notably in prisons and detention facilities, as well as the kidnappings, abductions, hostage taking and forced disappearances'.[441]
Uganda	Government of Uganda v. Lord's Resistance Army (LRA)	Government of Uganda	South Sudan, DR Congo	2008–09	(3) The armed forces of Uganda, DR Congo, and Southern Sudan launched Operation Lightning Thunder to push out the LRA members	In 2002, Uganda and Sudan signed an agreement aimed at containing the LRA. On 14 December 2008, the armed forces of Uganda, DR Congo, and South Sudan launched Operation Lightning Thunder, beginning with a surprise air strike against Camp Swahili, LRA's main camp in the DR Congo.	'The Security Council strongly condemns the recent attacks by the LRA in the Democratic Republic of the Congo and Southern Sudan, which pose a continuing threat to regional security … The Security Council commends the States in the region for their increased cooperation, and welcomes the joint efforts they have made to address the security threat posed by the LRA.'[442]

[441] UN SC Pres. Statement on the Central African Region, S/PRST/2012/18, 29 June 2012.
[442] UN SC Pres. Statement on the Great Lakes Region, S/PRST/2008/48, 22 December 2008.

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						Operation Lightning Thunder continued through the rest of December and into 2009, amidst massive violence carried out by LRA against the civilian Congolese population. Operation Lightning Thunder was ended on 15 March 2009, and the Ugandan troops officially left DR Congo. The armed campaign continued through the rest of the year, however, albeit more covertly.[443]	
Uzbekistan	Government of Uzbekistan v. Islamic Movement of Uzbekistan (IMU)	Government of Uzbekistan	Kyrgyzstan	2000	(3) Forming a new cooperative security initiative; pushing out IMU	IMU is an Uzbek rebel group fighting for the establishment of an Islamic state in Uzbekistan. However, its operations have taken place not only in	None

443 https://ucdp.uu.se/#statebased/688.

(*continued*)

State in Which Intervention Occurred	Conflict	Party Being Supported	Intervening State(s)	Date(s) of Intervention	Purpose(s) of Intervention	Description	Security Council Reaction
						Uzbekistan but in the whole region of Central Asia. The two-year conflict in Uzbekistan was fought as much in the neighbouring countries as in Uzbekistan itself. The IMU had bases in Tajikistan, and several clashes took place between IMU and the Kyrgyz Army on Kyrgyz territory.[444]	
Yemen	Government of Yemen v. Forces of Hadi	Forces of Hadi	Bahrain, UAE, Egypt, Jordan, Kuwait, Morocco, Qatar, Saudi Arabia, Sudan	2015–16	(5) Gulf Cooperation Council (GCC), led by Saudi Arabia, responded to an invitation from President Hadi to assist in fighting against Huthi rebels[445]	Then Vice-President Hadi stood for election on 21 February 2012 and won 99.8% of votes. However, the Houthis (a Zaydi Shi'ite group based in the north of Yemen) rejected the GCC process,	In Resolution 2216, the Council affirmed the democratic legitimacy of Hadi's government and condemned Houthi actions that could undermine the transition. However, the Council did not explicitly endorse the GCC action.[446]

444 https://ucdp.uu.se/#actor/359.
445 Statement issued by the Kingdom of Saudi Arabia, the United Arab Emirates, the Kingdom of Bahrain, the State of Qatar and the State of Kuwait, UN Doc. S/2015/217 (Annex), 3.
446 UN SC Res. 2216 of 14 April 2015.

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claiming it did not represent the entire Yemeni people, and boycotted the election. The Houthis aligned themselves with still-influential former President Saleh and his remaining supporters, and moved from the north to expand their territorial control. By September, the Houthis had taken control of the capital, Sana'a. The Houthis later signed, but then violated, a peace agreement.

On 24 March 2015, President Hadi requested foreign military aid from the GCC.

Two days later, Saudi Arabia and other GCC states launched Operation 'Decisive Storm'.[447]

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[447] https://ucdp.uu.se/#statebased/14595. See also Luca Ferro and Tom Ruys, 'The Military Intervention in Yemen's Civil War', in Tom Ruys, Olivier Corten and Alexandra Hofer (eds), *The Use of Force in International Law: A Case-Based Approach* (Oxford: OUP 2018), 899–911 (899–900).

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(*continued*)

State in Which Intervention Occurred	Conflict	Party Being Supported	Intervening State(s)	Date(s) of Intervention	Purpose(s) of Intervention	Description	Security Council Reaction
Yugoslavia	Government of Yugoslavia v. Kosovo Liberation Army (UKC)	Government of Yugoslavia	NATO	1999	(4) Supported Kosovo against Serbian military incursions	On 24 March 1999, NATO launched an air bombardment campaign on Yugoslavian military installations in Kosovo and Serbia. The offensive was designed to force Yugoslavian capitulation to a peace plan.[448]	Council passed a series of resolutions demanding a halt to Serbian actions and, after the bombing campaign ended, effectively put Kosovo under an international trustreeship. But it never explicitly approved or disapproved of the NATO action – although a Russian resolution to disapprove was defeated.[449]

448 https://ucdp.uu.se/#conflict/412.

449 UN SC Res. 1160 of 31 March 1998; UN SC Res. 1199 of 23 September 1998; UN SC Res. 1203 of 24 October 1998; UN SC Res. 1239 of 14 May 1999; UN SC Res. 1244 of 10 June 1999.

Conclusion

Half-Hearted Multilateralisation of a Unilateral Doctrine

Christian Marxsen

This Trialogue has shed light on the legal problems surrounding armed intervention and consent from three different angles:

- historical and conceptual analysis aiming to uncover the origins and links of the current doctrine of consensual military intervention (Dino Kritsiotis);
- in-depth case studies of recent state practice (Olivier Corten); and
- large-N case analysis of instances from state practice (Gregory H. Fox).

Based on their distinct methodologies, each author has made a specific contribution.

- Kritsiotis provided contextual information, tracing the evolution of concepts and uncovering links to, and potential conflicts with, other concepts of public international law. He has provided a substantive and nuanced account, taking an overarching perspective.
- Corten used case analysis to uncover how legal concepts operate in practice and he traced – through the detailed scrutiny of precedents – that practice, as well as the opinio iuris of states.
- Fox tested prominent legal concepts by referencing a comprehensive assessment of state practice. He did so by working with existing databases of conflict research – namely, the Uppsala Conflict Data Program (UCDP).

This concluding chapter aims to draw the important threads of this book together. It proceeds in five steps, offering conclusions on the limitation of consensual military interventions (section I) and the institutionalisation triggered by the increased importance of the UN Security Council in the operation of the law (section II). It then takes up the question of whether Security Council practice may contribute to the development of the law (section III), and it addresses the politicisation of the practice of consensual military interventions (section IV). Lastly, it turns to the limits of multilateralisation (section V).

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I. LIMITATION: THE STATE OF NEGATIVE EQUALITY

One contested issue regarding a state's right to invite foreign military intervention concerns the question of whether – and, if so, which – limitations exist under current international law.[1] One traditional question that the authors contributing to this Trialogue address remains a focal point of the academic debate: whether this right is limited in situations in which foreign troops would become involved in a civil war. This (potential) limitation has been discussed as the doctrine of 'strict abstentionism',[2] or 'negative equality',[3] and it has long been strongly supported by scholarship.[4]

The three authors have discussed these limitations from different perspectives. Kritsiotis traced the emergence and evolution of the doctrine of abstentionism by analysing the resolutions of the Institut de droit international (IDI).[5] In its 1975 Wiesbaden Declaration, the IDI postulated that '[t]hird States shall refrain from giving assistance to parties to a civil war which is being fought in the territory of another State'.[6] In its 2011 Rhodes Resolution, the IDI found that:

> Military assistance is prohibited when it is exercised in violation of the Charter of the United Nations, of the principles of non-intervention, of

[1] See the general overview on limitations discussed in Anne Peters, 'Introduction: Principle and Practice of Armed Intervention and Conflict', in this volume, section II.B, pp. 11–19.

[2] Eliav Lieblich, *International Law and Civil Wars: Intervention and Consent* (London: Routledge 2013), 130–40.

[3] The equality referred to in this term is between the government and its internal adversary, the non-state actor. When the armed adversary is prohibited from inviting foreign assistance, so must be – according to this doctrine – the state. This doctrine is premised on the assumption that the support for the government would otherwise take position in an internal conflict and therefore interfere with the right of self-determination of the respective population. See Independent International Fact-Finding Mission on the Conflict in Georgia (IFFMCG), *Report*, vol. II, September 2009, 278.

[4] Derek W. Bowett, 'The Interrelation of Theories of Intervention and Self-Defense', in John N. Moore (ed.), *Law and Civil War in the Modern World* (Baltimore: Johns Hopkins University Press 1974), 38–50 (41); Oscar Schachter, 'International Law in Theory and Practice', *Recueil des Cours* 178 (1982), 9–396 (160); Louise Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government', *British Yearbook of International Law* 56 (1985), 189–252 (195–6); Rein Müllerson, 'Intervention by Invitation', in Lori Fisler Damrosch and David J. Scheffer (eds), *Law and Force in the New International Order* (Boulder: Westview Press 1991), 127–34 (132); Brad Roth, *Governmental Illegitimacy in International Law* (Oxford: OUP 2000), 181; Tom Ruys, 'Of Arms, Funding and "Non-Lethal Assistance": Issues Surrounding Third-State Intervention in the Syrian Civil War', *Chinese Journal of International Law* 13 (2014), 13–53 (42).

[5] Dino Kritsiotis, 'Intervention and the Problematisation of Consent', Chapter 1 in this volume, sections IV.A and IV.B pp. 64–73.

[6] IDI, 'The Principle of Non-Intervention in Civil Wars', *Annuaire de l'Institut de Droit International* 56 (1975), 545–9 (547) (Art. 2(1)).

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equal rights and self-determination of peoples and generally accepted standards of human rights and in particular when its object is to support an established government against its own population.[7]

Fox labelled this position the 'IDI view' and tested whether it is confirmed or disproven by international practice – particularly that of the UN Security Council.[8] Based on his case analysis of consensual military interventions upon request and Security Council involvement in each instance, Fox clearly finds that the IDI view is not established practice: the Security Council approved outside intervention in 18 of the 44 internal conflicts under investigation in the chapter. The assessment of a large number of conflicts thus confirms an apparent trend in state practice, according to which interventions in civil wars are the rule rather than the exception.

But there is, as Fox acknowledges, a difficulty. Fox's dataset clearly shows that interventions in civil war situations are frequent, which provides prima facie clear evidence against a comprehensive prohibition of intervention in such situations. However, the data does not readily answer the question of whether the Security Council may have supported certain interventions because an established exception to the general prohibitory rule applied. Even in the IDI view, it is acknowledged that this rule would not apply in cases of 'counter-intervention'[9] – that is, where non-state actors have already received support from other states.[10] In this case, military assistance upon government request would be lawful. As Fox concedes, it is difficult to test this exception.[11] In the end, however, he argues that the element of counter-intervention was not essential to the Security Council, and he therefore concludes that the doctrine of negative equality is disproven.[12]

Here, Fox essentially provides a large-N proof for a commonly held position – namely, that strict abstentionism is untenable because states often regard interventions in civil war situations as lawful.[13] One finding of

[7] IDI, 'Military Assistance on Request', *Annuaire de l'Institut de droit international* 74 (2011), 359–61 (360) (Art. 3(1)).

[8] Gregory H. Fox, 'Invitations to Intervene after the Cold War: Towards a New Collective Model', Chapter 3 in this volume, section II.C, pp. 196–201.

[9] On this concept comprehensively, see Kritsiotis, 'Intervention and the Problematisation of Consent', Chapter 1 in this volume, section V.B, pp. 82–85.

[10] IDI, 'The Principle of Non-Intervention in Civil Wars' (n. 6), 549 (Art. 5).

[11] Fox, 'Invitations to Intervene after the Cold War', Chapter 3 in this volume, section V.B, p. 231.

[12] *Ibid*, p. 233.

[13] Chiara Redaelli, *Intervention in Civil Wars* (Oxford: Hart 2021), 150–1; Erika de Wet, *Military Assistance on Request and the Use of Force* (Oxford: OUP 2020), 123. See also Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge: CUP 6th edn 2017), 125.

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the Trialogue is therefore that there is no general and rigorous prohibition of intervention in a situation of civil war.

More recent scholarship has, however, taken a more fine-grained approach towards the limits of consensual military interventions.[14] Such limitations have been suggested by supporters of the 'purpose-based approach'.[15] According to this approach, an invitation to intervene would be unlawful if its purpose were to support a government in settling an internal political strife. The reason for this is that such an intervention would be incompatible with the right to self-determination. The starting point is thus different: there is no general prohibition to intervene in civil wars, but by contrast – and as Corten puts it – there is a 'strong presumption of legality that characterises a situation in which an intervention has been conducted at the invitation of an official government'.[16] However, when the deployment conflicts with the right to self-determination, the invitation is – according to the purpose-based approach – rendered unlawful. What matters, as the name already signals, is the *purpose* pursued by an intervention.

Corten's own position shares many of the general assumptions of the purpose-based approach, but he suggests a different terminology and a different way of determining the limitations. He responds to concerns regarding the difficulty of establishing a state's purpose.[17] Not only may such a purpose be hard to identify because it is an essentially subjective criterion, but also it may be difficult to assess the legality of a purpose such as the fight against terrorism because that assessment depends on unsettled legal concepts such as 'terrorism' itself.[18] Corten therefore takes up the proposal of Veronika Bílková, who has suggested an 'effect-based approach'.[19] Accordingly, Corten refers to 'the more objective criterion of the "object and effects" of the intervention, which must not violate the right of the population in the inviting state to exercise its right to self-determination'.[20] Based on analysis of the military interventions in Mali

[14] Peters, 'Introduction', in this volume, section II.C, pp. 15–16.

[15] This approach has been developed by Karine Bannelier and Theodore Christakis, 'Under the UN Security Council's Watchful Eyes: Military Intervention by Invitation in the Malian Conflict', *Leiden Journal of International Law* 26 (2013), 855–74 (860); Karine Bannelier-Christakis, 'Military Interventions against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent', *Leiden Journal of International Law* 29 (2016), 743–75 (747).

[16] Olivier Corten, 'Intervention by Invitation: The Expanding Role of the UN Security Council', Chapter 2 in this volume, section I.B, p. 109.

[17] See the critical points raised during the Trialogue workshop by Veronika Bílková, 'Reflections on the Purpose-Based Approach', *Heidelberg Journal of International Law* 79 (2019), 681–3.

[18] Christian Henderson, *The Use of Force and International Law* (Cambridge: CUP 2018), 366.

[19] Bílková, 'Reflections on the Purpose-Based Approach' (n. 17), 683.

[20] Corten, 'Intervention by Invitation', Chapter 2 in this volume, section I.B, p. 107.

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(2013), Iraq (2014), Syria (2015), and The Gambia (2017), Corten finds that practice supports the existence of limitations. Interventions have not been justified as outright interference in civil wars but rather on the basis of other objectives, such as the fight against terrorism; the essence of the IDI view – the protection of a population's right to self-determination – remains untouched. The objects and effects clearly show, Corten argues, that states aim to refrain from interfering with the right to self-determination.[21]

Fox raises two objections to this conclusion. First, he argues that analysis of a limited number of cases is not enough to support this claim and that an overall assessment of state practice shows rather that general limitations to the right to invite foreign intervention do not exist.[22] Second, he finds the assumption of a general limitation based on the right to self-determination normatively unconvincing, since, under this view, the right to self-determination is protected only in the abstract. In many cases, the people, Fox emphasises, 'have made an *actual* choice', because they had the right to participate in an election. In other words, if an elected government invites foreign military support, such support may be very much in line with the right to self-determination.[23] Here, it becomes clear that – as Kritsiotis puts it – 'the "self" can become a hotly contested idea'.[24]

Thus a second outcome of the Trialogue is that it adds substance and nuance to the debate on the principle of self-determination as a limit to consensual interventions, with no existing or emerging consensus between the authors. The authors are divided on the question of whether self-determination poses a limit to consensual military interventions under the lex lata. Their disagreement appears to be mitigated if we change the perspective and ask not whether self-determination poses a *theoretical* limit but whether it operates as a limit *in practice*. In fact, even if interventions were lawful only when their 'purpose', or 'object and effects', do not violate the right to self-determination, it seems that states will often find it easy to frame their intervention as pursuing a legitimate purpose. This exercise does not seem to be too demanding, because the relevant legal concepts – such as self-determination, counter-intervention, or terrorism – are sufficiently indeterminate. States will therefore usually be able to present a face-saving justification that asserts the legality of their actions. For that reason, Corten concludes his chapter with a critical diagnosis 'that the various

[21] *Ibid.*, section VI.A, p. 172.

[22] Fox, 'Invitations to Intervene after the Cold War', Chapter 3 in this volume, section VI.A, p. 257.

[23] *Ibid*, p. 258 (emphasis original).

[24] Kritsiotis, 'Intervention and the Problematisation of Consent', Chapter 1 in this volume, section VI, p. 99.

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alternative justifications (counter-intervention, counter-terrorism, self-determination, etc.) given by the intervening states largely deprive the doctrine of non-intervention of all normative constraining effect'.[25] In other words, even if we were to assume that the limitation exists as a matter of law, it seems it would not provide any tight restriction to states willing to act in practice.[26]

This discrepancy between words and deeds poses the much-debated, yet still pertinent, question about the relationship between facts and norms in international law. Should international lawyers act as advocates of legal normativity, as well as specific norms – that is, should they reconstruct norms and uphold them, even if primarily at a discursive level, and even if the practical implementation and effect remain precarious? Or should they aim for descriptive accuracy, taking a lack of sufficient implementation as evidence that no general limitation to the right to invite foreign intervention exists and that states' declarations of respect for self-determination are 'cheap talk'? The answer to such questions and the position a scholar adopts are essentially political in attitude, politics shaping expectations of what international law is meant to achieve.

In this Trialogue, three different paradigmatic approaches to international law have been employed:

- Corten's restrictive approach to the use of force, aiming to limit lawful uses of force;
- Fox's aim for comprehensiveness and analytic accuracy, which more strongly emphasises the practice of states rather than their opinio iuris; and
- Kritsiotis's approach, comprising conceptual and historical analysis, which does not aim to determine the exact state of the law at a specific moment in time, but rather is interested in broader trajectories and in understanding 'how and why these limitations on consent took root in the way that they did'.[27]

These different premises also find expression in different methodological approaches, particularly to the interpretation of state practice. The Trialogue illustrates the challenges, volatility, and politics involved in interpreting such practice. One significant challenge is the selection of cases, and the breadth and depth of case analysis; another is legal assessment, because the

[25] Corten, 'Intervention by Invitation', Chapter 2 in this volume, section VI.B, p. 178.

[26] See also de Wet, *Military Assistance on Request* (n. 13), 225.

[27] Kritsiotis, 'Intervention and the Problematisation of Consent', Chapter 1 in this volume, section I, p. 30.

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factual situations so often remain uncertain. Additionally, it is not often clear of which facts an actor was aware when they made an assessment regarding the legality of an intervention at a specific moment in time. Moreover, the line between legal and political positions is not clear-cut, and there is room for interpretation, so that scholarship is divided on whether declarations about the purposes of an intervention should be seen to have legal or merely political significance.[28] The exercise thus remains fuzzy and legal positions can easily be challenged from either direction.[29]

II. INSTITUTIONALISATION: THE ROLE OF THE UN SECURITY COUNCIL

A further finding of the Trialogue – one on which there is broad agreement between the authors – relates to the institutional environment in which consensual military interventions are regularly addressed. Here, the Trialogue has raised and substantiated a finding that marks an interesting difference between the legal debate on military assistance on request and other developments in the ius contra bellum: all three contributions highlight the significance of the UN Security Council in the practice of consensual military interventions. This aspect is at the centre of Corten's and Fox's chapters, which refer to 'a new collective model' (Fox) and to the 'expanding role of the Security Council' (Corten) in their titles. Kritsiotis also highlights the role of the Security Council in the operation of consent within the ius contra bellum.[30] Its relevance is surprising in view of the widely held belief that the Security Council is, in fact, not capable of adequately guaranteeing international peace and security. A crisis diagnosis seems to prevail within the general debate, pointing out that the Council is regularly blocked and incapable to act.

The contributions in this Trialogue show that, in recent decades, the Security Council has, in practice, taken a crucial role in cases of consensual military intervention. Many of these instances of state practice occurred in the last ten years – a time in which a renewed global polarisation has often been assumed. Corten and Fox particularly emphasise the role of the Security Council. In 36 of

[28] Arguing for a merely political dimension, see Erika de Wet, 'The (Im)permissibility of Military Assistance on Request during Civil War', *Journal on the Use of Force and International Law* 7 (2020), 26–34 (31).

[29] This Trialogue has considered, but does not investigate in depth, other potential limitations of the right to invite foreign interventions, such as limitations stemming from human rights that might be relevant when the foreign state may get involved in human rights abuses of the inviting state. See Peters, 'Introduction', in this volume, section II.B, pp. 16–17.

[30] Kritsiotis, 'Intervention and the Problematisation of Consent', Chapter 1 in this volume, section V.D, pp. 95–97.

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the 44 cases Fox analyses, the Security Council reacted to interventions; similarly, the Council played a central role in all of Corten's in-depth case studies. Its involvement was particularly crucial in situations of internal turmoil where several actors competed for effective control over a state's territory.[31] In such situations, it is inherently difficult to identify the entity that should be allowed to issue an invitation for a foreign state to intervene.

Fox and Corten agree that the doctrine on consensual military assistance has already been – or, at least, is about to be – multilateralised.[32] In other words, the doctrine may contain a unilateral core according to which every state is in principle allowed to invite another state's intervention, but the appreciation of the facts and the determination of the respective government is recommended to a multilateral process within the Security Council. Fox and Corten, however, take different turns in their arguments and arrive at different theoretical conclusions. Fox sees the old doctrines (what he calls the 'IDI view' and the '*Nicaragua* view') as outdated and too schematic. They were, he argues, justified during the Cold War when the Security Council was actually incapable of acting; today, there is no need for 'categorical' and 'prophylactic' prohibitions – such as the doctrine of negative equality – because the Security Council is able to take a more fine-tuned, nuanced, and therefore more fitting approach.[33]

Corten disagrees. In his reading, both the Security Council and state practice respect the right to self-determination of peoples as the central legal reasoning behind the negative equality doctrine. He therefore regards multilateralisation as a form of operationalising and rationalising limitations of the right to consensual military interventions.[34]

III. LEGISLATION? THE UN SECURITY COUNCIL'S CONTRIBUTION TO LAWMAKING

The institutionalisation of the practice of consensual military interventions raises a more general question concerning the status of Security Council practice according to the sources of international law. This question is particularly relevant to the development of the international law on consensual military interventions: should the new Council practice be seen as a self-enclosed lex specialis or as evidence of customary international law? Can we

[31] See, e.g., the cases of Albania and Mali, discussed by Kritsiotis, *ibid*, pp. 95–97.
[32] Fox, 'Invitations to Intervene after the Cold War', Chapter 3 in this volume, section VI.A, p. 250; Corten, 'Intervention by Invitation', Chapter 2 in this volume, section VI.A, p. 174.
[33] Fox, 'Invitations to Intervene after the Cold War', Chapter 3 in this volume, section VI.A, p. 251.
[34] Corten, 'Intervention by Invitation', Chapter 2 in this volume, section VI.A, p. 174.

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draw from it any conclusions regarding the state of the law, or are we confronted with a collection of case-specific decisions that cannot be generalised? Fox argues that, because the member states of the United Nations have empowered the Security Council to act on their behalf and because the Council in fact dominates the scene, this body's practice should count as important evidence of customary international law in evaluating the lawfulness of consensual interventions.[35]

Generally speaking, under certain circumstances, the practice of international organisations can provide evidence of customary international law. The International Law Commission (ILC) has cautiously formulated the following, indicating that, in 'certain cases, the practice of international organizations … contributes to the formation, or expression, of rules of customary international law'.[36] General criteria for assessing and weighing the organisation's practice are whether the practice is carried out on behalf of, and whether the practice is endorsed by, the member states of the organisations. Furthermore, the ILC recommends taking into account 'the nature of the organization; the nature of the organ whose conduct is under consideration; whether the conduct is ultra vires … ; and whether the conduct is consonant with that of the member States of the organization'.[37]

The qualification of the Security Council under these criteria is controversial. On the one hand, Article 24 of the UN Charter makes it clear that the Security Council acts on behalf of the UN member states; on the other hand, the Security Council's mandate is not that of a judicial organ.[38] It is not called on to legally settle conflicts, but rather tends to – as Corten points out – act 'pragmatically, as a political body'.[39] Fox's concern is that, should a reading be too strict, customary international law would essentially become irrelevant.[40] Because of the active role of the Security Council, states would not see any need to actively engage in specific conflicts and hence in most cases – in view of the multilateralisation of the doctrine of consensual military interventions – there would simply not be enough state practice to establish any legal rules.

35 Gregory H. Fox, Kristen E. Boon and Isaac Jenkins, 'Contributions of United Nations Security Council Resolutions to the Law of Non-International Armed Conflict: New Evidence of Customary International Law', *American University Law Review* 67 (2018), 649–731.
36 International Law Commission, 'Text of the Draft Conclusions on Identification of Customary International Law and Commentaries Thereto', in *Yearbook of the International Law Commission*, vol. II (pt 2) (2018), 91–113 (96, concl. 4.2).
37 *Ibid.*, 97 (Commentary to concl. 4, para. 7).
38 See Christine D. Gray, *International Law and the Use of Force* (Oxford: OUP 4th edn 2018), 21.
39 Corten, 'Intervention by Invitation', Chapter 2 in this volume, section I.B, p. 111.
40 Fox, 'Invitations to Intervene after the Cold War', Chapter 3 in this volume, section VII, p. 268.

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Even though Fox takes a critical stance towards Corten's view,[41] their eventual positions do not seem to be too far from one another. Corten does not generally oppose the relevance of Security Council practice in establishing rules of customary international law; rather, he opts for a close reading of each case and for an assessment of the reasons that explain Security Council approval or condemnation. Legal relevance can arise only where legal reasons and a sense of legal commitment exists. Where the Security Council acts out of political reasons, its actions cannot be referred to as evidence of customary international law.[42] In any case, the result is that a close reading of each case remains mandatory.

IV. POLITICISATION: INCREASING THE COMPLEXITIES

These developments have created a multilateralised framework for the unilateral concept of consensual military intervention. On the plus side of these developments, consensual interventions that were formerly disputed legally – for example because it was unclear which entity was to be regarded as the government – are now subject to an essentially undisputed (legal) qualification. Once the Security Council has given its blessing to a government and its call for assistance, the legality is unchallenged in state practice (at least from an ius contra bellum perspective). As Benjamin Nußberger describes it, when the Security Council becomes active, conflicts are taken out of the grey zone and an intervention receives a 'green light'.[43]

This does not come without challenges and problems. One obvious limitation of the institutional setting is that it will not be possible for the Security Council to position itself in opposition to an intervention by a permanent member. For example, the Security Council was not able to take a position on the invitation extended by Ukraine's former President Victor Yanukovych to the Russian Federation,[44] which, among other things, raised questions of whether Yanukovych was still in a position to invite foreign intervention in view of his loss of territorial control. For these cases, unilateral and interest-guided interpretations and applications of the law will prevail – a setting that dominated throughout the Cold War era.[45] Whether or not there is, in fact,

[41] *Ibid*., section VI.B, p. 266.

[42] Corten, 'Intervention by Invitation', Chapter 2 in this volume, section I.B, p. 112.

[43] Benjamin Nußberger, 'Military Strikes in Yemen in 2015: Intervention by Invitation and Self-Defence in the Course of Yemen's "Model Transitional Process"', *Journal on the Use of Force and International Law* 4 (2017), 110–60 (159).

[44] UN Doc. S/2014/146, 3 March 2014, 2.

[45] Corten, 'Intervention by Invitation', Chapter 2 in this volume, section VI.A, p. 174.

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a 'new cold war' emerging between the poles of the United States, on the one hand, and China, on the other, it remains an unanswered question whether such polarisation will have effects on the Security Council's ability to fulfil this new role in the future. It seems both possible that further polarisations might spill over from the major conflicts (especially Russia's aggression against Ukraine) into other cases and that the Security Council will prove able to maintain its capability to act – at least as long as the direct interests of its five permanent members are not affected.

But challenges also exist beyond a potential paralysis of the Security Council. In view of the context and the case-specific approach it takes, and in view of the mixture of political and legal considerations that enter into the equation of whether and how it will respond to an individual conflict, we can observe increased complexity that creates challenges. There is, as Kritsiotis puts it, an 'abiding worth of consent in the dynamics of the laws of the ius ad bellum', but there is also an apparent 'fragility' of consent: '[I]ts presence cannot be assumed or extended. Its function cannot be generalised but is instead wrapped in the politics and normativity of the particular.'[46] In other words, the practice of consensual intervention now depends on a more complex process of which politicisation is an inherent part – and the predictability of the law is negatively affected.

V. MULTILATERALISATION AND ITS LIMITS

An overall view on the current institutionalisation reveals its significant limitations. In fact, the Security Council's role may be described as half-hearted multilateralisation. Instead of creating mandates for interventions under Chapter VII of the UN Charter, the Council's current practice is to give its blessing to unilateral interventions. This strategy is well known from other fields and doctrinal debates on the ius contra bellum, such as those over the right to self-defence against non-state actors.[47] There, the Security Council has repeatedly acted in a way that has been interpreted as expressing approval for self-defence measures. In the aftermath of the 9/11 terrorist attacks of 2001, it reaffirmed – in the preambles to Resolutions 1368 and 1373 – the inherent right to self-defence, which the United States and its coalition partners interpreted as endorsement of their military intervention

46 Kritsiotis, 'Intervention and the Problematisation of Consent', Chapter 1 in this volume, section IV.A, p. 64.

47 Mary-Ellen O'Connell, Christian Tams and Dire Tladi, *Self-Defence against Non-State Actors* – Max Planck Trialogues on the Law of Peace and War (Anne Peters and Christian Marxsen, series eds), vol. 1 (Cambridge: CUP 2019).

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in Afghanistan.[48] With regard to the rise of the so-called Islamic State in the territories of Syria and Iraq, in 2015 the Security Council called upon member states 'to take all necessary measures, in compliance with international law, . . . to prevent and suppress terrorist acts committed specifically by ISIL also known as Da'esh . . . and to eradicate the safe haven they have established over significant parts of Iraq and Syria'.[49] Here, again, members of a coalition of Western states intervened in Syria without the Syrian government's consent and they interpreted the Security Council's resolution as an endorsement of these measures positioned as self-defence.

Thus the Security Council appears to only weakly provide a normative framework for specific conflicts; it favours instead the less ambitious approach of supporting – in language that is sometimes clear, sometimes ambiguous – certain unilateral acts. In this way, the Security Council fails to establish a framework for such interventions. It does not set out strategic and operational goals and limitations, but leaves this to the intervening states. This blurring of measures taken within the United Nations' collective security framework and unilateral measures is unsatisfactory. It precludes legal certainty, and it allows states to provide multiple justifications for their interventions that partly overlap and partly contradict each other.

The law on consensual military interventions remains a contested field. It is our hope that this book's partly complementary and party contrasting accounts of the law have at least illuminated its current trajectories.

[48] UN SC Res. 1368 of 12 September 2001, cons. 3; UN SC Res. 1373 of 28 September 2001, cons. 4.

[49] Resolution 2249 of 20 November 2015, UN Doc. S/RES/2249, para. 5.

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