

# 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’.<sup>1</sup> In 2014, Russia intervened in Crimea (Ukraine) at the request of a pro-Russian Ukrainian president, which resulted in the annexation of the peninsula.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> Meanwhile, the Russian interveners in Syria were explicitly pointing to the Syrian government’s request for military assistance in combating

<sup>1</sup> 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).

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

<sup>3</sup> 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).

<sup>4</sup> 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):

the terrorist organisation 'Islamic State' (IS).<sup>5</sup> The Saudi-led military intervention in Yemen (2015) was at the invitation of Yemeni President Abdrabbuh Mansur Hadi.<sup>6</sup> 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.<sup>7</sup>

Such interventions 'by invitation', 'on request', or 'with consent' have long attracted scholarly interest.<sup>8</sup> 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).

- <sup>5</sup> 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.'

- <sup>6</sup> 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.

- <sup>7</sup> The ECOWAS initiative was commended by UN SC Res. 2337 of 19 January 2017.

- <sup>8</sup> Since the contemporary classic study, Georg Nolte, *Eingreifen auf Einladung* (Heidelberg: Springer 1999), three more recent monographs have addressed the topic: Eliav Liebllich, *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

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 Neuchâtel, published as IDI, ‘Droits et devoirs des Puissances étrangères, au cas de mouvement insurrectionnel, 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](http://www.ila-hq.org/index.php/committees).

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.<sup>9</sup> 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’.<sup>10</sup> The ICJ also stated that such consent is limited in time, ‘geographic location and objectives’.<sup>11</sup> When the parameters of the consent are

<sup>9</sup> *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.

<sup>10</sup> 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.

<sup>11</sup> *Ibid.*, para. 52 (emphasis added). See also *ibid.*, para. 105.

overstepped, an (armed) intervention becomes illegal.<sup>12</sup> 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.<sup>13</sup> This question has, until recently, lingered in the background unresolved.<sup>14</sup>

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’.<sup>15</sup> That view considers an absence of consent as being, in effect, ‘intrinsic’ in the prohibitions of the use of force and of intervention.<sup>16</sup>

<sup>12</sup> 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’).

<sup>13</sup> For the doctrinal issues, see the references cited at nn. 14–19.

<sup>14</sup> 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.

<sup>15</sup> 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](http://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).

<sup>16</sup> 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

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).<sup>17</sup> 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.<sup>18</sup>

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),<sup>19</sup> 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.

<sup>17</sup> 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 Liebllich, ‘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.

<sup>18</sup> 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).

<sup>19</sup> 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.

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.<sup>20</sup>

## 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.<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup>

Several authors have considered either the effectiveness or the legitimacy of a government as self-sufficient conditions for the power to invite.<sup>24</sup> 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

<sup>20</sup> Kritsiotis, 'Intervention and the Problematisation of Consent', Chapter 1 in this volume.

<sup>21</sup> 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.

<sup>22</sup> Henderson, *Use of Force* (n. 8), 357.

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

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

(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).<sup>25</sup>

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.<sup>26</sup> 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).<sup>27</sup>

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

<sup>25</sup> 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'.

<sup>26</sup> 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/](http://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](http://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/>.

<sup>27</sup> Cf. Henderson, *Use of Force* (n. 8), 358–9.



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',<sup>28</sup> or might, under certain conditions, even mean that government 'forfeit[s] its right to ask for foreign intervention'.<sup>29</sup> Relevant breaches are notably those in the realm of *ius cogens*: atrocity crimes (genocide<sup>30</sup> and crimes against humanity) and violations of other peremptory norms (such as apartheid).<sup>31</sup> It is less likely, but not out of the question, that 'ordinary' violations of the population's human rights<sup>32</sup> 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.<sup>33</sup> Arguably, the principle is also addressed at the government itself and taints its power to invite military assistance in such a situation.<sup>34</sup> Such incapacitation of the government to consent can be

<sup>28</sup> 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).

<sup>29</sup> Redaelli, *Intervention in Civil Wars* (n. 8), 160.

<sup>30</sup> De Wet, *Military Assistance on Request* (n. 8), 135, fn. 60.

<sup>31</sup> Nolte, 'Intervention by Invitation' (n. 16), para. 22.

<sup>32</sup> For human rights as parameters of legitimacy and thus of the power to invite, see notably Oona A. Hathaway, Rebecca Crotoof, 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.

<sup>33</sup> See below, section II.B.2, pp. 12–14, on the doctrine of 'negative equality'.

<sup>34</sup> Nolte, 'Intervention by Invitation' (n. 16), para. 22.

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.<sup>35</sup>

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.<sup>36</sup> 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.<sup>37</sup> Invalidity (alternatively, ‘voidness’ or ‘nullity’) means that the act is deprived of any legal effect.<sup>38</sup> 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

<sup>35</sup> 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.

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

<sup>37</sup> 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.’

<sup>38</sup> Michael Reisman and Dirk Pulkowski, ‘Nullity’, in Anne Peters and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of International Law* (Oxford: OUP 2006), para. 1.

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.<sup>39</sup>

### 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.<sup>40</sup> 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'.<sup>41</sup>

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

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

<sup>40</sup> Reisman and Pulkowski, 'Nullity' (n. 38), para. 35.

<sup>41</sup> *Ibid.*, para. 38.

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.'<sup>42</sup> 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.<sup>43</sup>

## 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',<sup>44</sup> or 'strict abstentionism',<sup>45</sup> was born: that no foreign interference should be allowed when an internal conflict surpasses the threshold of 'civil war'.<sup>46</sup> 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.<sup>47</sup> 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

<sup>42</sup> Dinstein, *War, Aggression and Self-Defence* (n. 8), 128.

<sup>43</sup> 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/2015/02/17/clauss-krebs-force-isil-syria/](http://www.justsecurity.org/2015/02/17/clauss-krebs-force-isil-syria/).

<sup>44</sup> 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.

<sup>45</sup> Coined by Lieblich, *International Law and Civil Wars* (n. 8), 130–40.

<sup>46</sup> 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.)

<sup>47</sup> IFFMCG, *Report* (n. 44), 277.

giving assistance to parties in a civil war which is being fought in the territory of another State' (Art. 2(1)).<sup>48</sup> 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'.<sup>49</sup>

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

<sup>48</sup> 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.

<sup>49</sup> 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.

<sup>50</sup> Fox, 'Invitations to Intervene after the Cold War', Chapter 3 in this volume.

<sup>51</sup> 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.

<sup>52</sup> 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.

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.<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup>

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.<sup>56</sup> The three contributions to this dialogue confirm that there is no broad and categorical legal prohibition on intervention in a NIAC.<sup>57</sup>

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).

<sup>53</sup> Henderson, *Use of Force* (n. 8), 364; Redaelli, *Intervention in Civil Wars* (n. 8), 96.

<sup>54</sup> Henderson, *Use of Force* (n. 8), 364.

<sup>55</sup> 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.

<sup>56</sup> 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.

<sup>57</sup> Christian Marxsen, ‘Conclusion: Half-Hearted Multilateralisation of a Unilateral Doctrine’, in this volume.

### 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.<sup>58</sup>

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.”<sup>59</sup>

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.<sup>60</sup> 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.<sup>61</sup> 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

<sup>58</sup> 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).

<sup>59</sup> *Ibid.*, Art. 3(1) (emphasis added).

<sup>60</sup> 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.

<sup>61</sup> ICJ, *DR Congo v. Uganda* (n. 10), para. 52.

correctly reflects the law as it stands;<sup>62</sup> and second, serious legal policy arguments speak against it.<sup>63</sup>

The risk that this doctrine is abused seems very high.<sup>64</sup> There is a danger that the admission of military interventions with noble purposes will erode the prohibitions on intervention and use of force.<sup>65</sup> 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.<sup>66</sup>

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

<sup>62</sup> Gray, *International Law and the Use of Force* (n. 8), 118–19.

<sup>63</sup> 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.

<sup>64</sup> Fox, 'Intervention by Invitation' (n. 17), 839; Redaelli, *Intervention in Civil Wars* (n. 8), 103.

<sup>65</sup> De Wet, *Military Assistance on Request* (n. 8), 120–1.

<sup>66</sup> 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.

<sup>67</sup> 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.



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.<sup>68</sup>

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,<sup>69</sup> 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.<sup>70</sup>

However – and importantly – the law laid out here is ‘inconclusive in light of the diversity of state practice’.<sup>71</sup> 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.<sup>72</sup> 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 dialogue authors examine this problem in more detail.

<sup>68</sup> Redaelli, *Intervention in Civil Wars* (n. 8), 179.

<sup>69</sup> Resolution adopted by the General Assembly, World Summit Outcome Document, UN Doc. A/RES/60/1 of 24 October 2005, para. 139.

<sup>70</sup> Hathaway et al., ‘Consent Is Not Enough’ (n. 32), 38; Lieblich, ‘The International Wrongfulness’ (n. 28), 668.

<sup>71</sup> Gray, *International Law and the Use of Force* (n. 8), 100, 104, and 107 (quote at 100).

<sup>72</sup> *Ibid.*, 107.

### 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 misrepresented 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.<sup>73</sup>

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.<sup>74</sup> History offers strong policy argument for upholding the prohibition on arming the

<sup>73</sup> 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.

<sup>74</sup> 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/](http://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).

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.<sup>75</sup>

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.<sup>76</sup> 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<sup>77</sup> and as invitations (by Iraq<sup>78</sup> and by Syria<sup>79</sup>). 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.<sup>80</sup>

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.<sup>81</sup>

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

<sup>76</sup> 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).

<sup>77</sup> 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).

<sup>78</sup> See n. 4.

<sup>79</sup> See n. 5.

<sup>80</sup> Gill, ‘Military Intervention at the Invitation of a Government’ (n. 17), 231; Kreß, ‘The Fine Line’ (n. 43).

<sup>81</sup> 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.

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.<sup>82</sup> 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’.<sup>83</sup>

### III. THE TRIALOGUE METHOD

The present volume continues the work of the three earlier volumes of the *Max Planck Dialogues*.<sup>84</sup> 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’.<sup>85</sup>

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.

<sup>82</sup> 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.

<sup>83</sup> Marxsen, ‘Conclusion’, in this volume.

<sup>84</sup> See ‘Preface’, in this volume.

<sup>85</sup> 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 Dialogues on the Law of Peace and War (Anne Peters and Christian Marxsen, series eds), vol. 1 (Cambridge: CUP 2019), XI–XXV.

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 triological 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

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

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 dialogue, 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.

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.<sup>86</sup> 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

<sup>86</sup> Cf. Art. 31(1) lit. c) VCLT.



continuing to rely on outdated doctrines.<sup>87</sup> 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’.<sup>88</sup> 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’.<sup>89</sup> We hope that the following three chapters, each manifesting a different scholarly approach, will be a welcome antidote.

<sup>87</sup> 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).

<sup>88</sup> 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/](http://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.

<sup>89</sup> Hersch Lauterpacht, ‘The Problem of the Revision of the Law of War’, *British Yearbook of International Law* 29 (1952), 360–82 (382).