STATE CONSENT TO FOREIGN MILITARY INTERVENTION DURING CIVIL WARS

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by

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Abstract

The dissertation examines the legality under international law of foreign military interventions in States embroiled in an internal conflict or civil war with the consent, or at the request, of their governments. It attempts to provide a comprehensive and fresh account of the subject by analysing, among others, a detailed account of post-Cold War State practice with around 40 incidents on a scale neglected in current scholarship. Consensual interventions in principle do not present an immediate challenge to the UN Charter-based prohibition of the use of force between States. However, their legality, first and foremost, depends on the validity of the consent given and the capacity of the government to consent to foreign military intervention. Other challenges to the legality of such interventions arise from the principles with which any use of force must be consistent, such as the political independence of States and the self-determination of peoples. There are also rules of international law that do not relate to a State's right to consent to a foreign intervention but can considerably constrain the scope of such interventions under certain circumstances, such as the rules on State complicity.

The dissertation argues that the relevant rules of international law and State practice indicate that valid consent by a legitimate government is not enough to justify a foreign military intervention. Affirming the purpose-based approach and addressing the recent criticism against it, the dissertation argues that the compatibility of the objectives of consensual interventions with principles such as non-intervention and self-determination is of important consequence. The study also notably assesses the consensual interventions aimed at countering terrorism with respect to the legal distinctness of the concept of terrorism from ordinary armed rebellions. Owing to its extensive account of State practice, the study is also able to address some peripheral aspects of the subject. These relate to the legal consequences of the invocation by a State using force against a non-State armed group of two distinct legal bases, namely, its right to self-defence and the consent of the State where the group is located; the procurement by a government of foreign military assistance in response to a foreign intervention on the side of the opposition, despite a UN arms embargo prohibiting assistance to both sides alike; the endorsement by the UN Security Council of a consensual intervention; and human rights and humanitarian law violations by the consenting State.

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Abbreviations

ARSIWA	Draft Articles on Responsibility of States for Internationally Wrongful Acts
ATT	Arms Trade Treaty
AU	African Union
CAR	Central African Republic
CIS	Commonwealth of Independent States
DRC	Democratic Republic of the Congo
GCC	Gulf Cooperation Council
ICG	International Crisis Group
ICRC	International Committee of the Red Cross
ICU	Islamic Courts Union
ICJ	International Court of Justice
IHL	International humanitarian law
IHRL	International human rights law
IIL	Institute of International Law (*Institut de Droit International*)
ILA	International Law Association
ILC	International Law Commission
LNA	Libyan National Army
NATO	North Atlantic Treaty Organisation
NIAC	Non-international armed conflict
NTC	National Transitional Council
OHCHR	Office of the United Nations High Commissioner for Human Rights
RAMSI	Regional Assistance Mission to Solomon Islands
RULAC	Rule of Law in Armed Conflicts
UNITA	National Union for the Total Independence of Angola
SADC	Southern African Development Community
SIPRI	Stockholm International Peace Research Institute
UCDP	Uppsala Conflict Data Program
UK	United Kingdom
UN	United Nations
US	United States of America
VCLT	Vienna Convention on the Law of Treaties

Chapter 1: Introduction

1. Problem

In the three decades since the end of the Cold War, there have been at least 40 occasions where States militarily intervened in the internal conflicts of other States at the request of their beleaguered governments.[1] This dissertation examines the legality of such consensual interventions under contemporary international law. Despite being of major concern and controversial in the doctrine, few modern studies have addressed the issue as comprehensively as is needed.[2] The ripeness of recent State practice and the ever-changing context of such interventions require a re-engagement with the issue and relevant practice 'with a view to bringing normative clarity to an area that is in urgent need thereof'.[3] This dissertation attempts to meet this need, among others, by extensively analysing post-Cold War State practice with more than 40 cases in their due context on a scale neglected in current scholarship.

Consensual military interventions in principle do not present an immediate challenge to the prohibition on the use of force between States, enshrined in the Charter of the United Nations (UN).[4] However, attempts to assess their legality face various doctrinal challenges that continue to be relevant and contentious today. These relate to the conditions required for the validity of the consent given and the legitimacy of the concerned government and its capacity to consent to foreign military intervention. These issues raise various precarious questions that can be exemplified as follows: Can consent given in secret be regarded as valid? How should ambiguous reactions or symbolic protests from a State against a foreign military intervention in its territory be interpreted? What forms of action amount to coercion that invalidates

[1] See Chapter 6.
[2] See Olivier Corten, Gregory Fox and Dino Kritsiotis, *Intervention by Invitation* (Max Planck Trialogues on the Law of Peace and War, CUP) (forthcoming); Volume 7 (2020) of the Journal on the Use of Force and International Law, dedicated to 'Military Assistance on Request'; Erika de Wet, *Military Assistance on Request and the Use of Force* (OUP 2020); Eliav Lieblich, *International Law and Civil Wars: Intervention and Consent* (Routledge 2013); Olivier Corten, *The Law Against War* (Translated by Christopher Sutcliffe, Hart Publishing 2010) Ch 5; IIL, 'Intervention by Invitation' (Rapporteur: Gerhard Hafner, Session of Naples, 2009); Georg Nolte, *Eingreifen auf Einladung* (With an English Summary, Springer 1999).
[3] ILA, 'Proposal & Mandate: Use of Force: Military Assistance on Request' (18 November 2018) <https://www.ila-hq.org/index.php/committees> (All online sources were accessed 13 November 2020).
[4] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16, Article 2(4).

consent? Does being elected in internationally observed elections suffice to normatively determine the elected entity as the government of the concerned State under international law? Can an internationally recognised but ineffective government consent to a foreign military intervention? Does representation of a government in an international organisation amount to recognition of that government by the organisation or its members? What consequences follow when the international community is divided on which government to recognise in a State where two governments contend for recognition? The dissertation attempts to answer these and similar questions against the backdrop of the relevant State practice.

In assessing the legality of such interventions, particular attention also needs to be paid to the exact content and the peremptory character of the prohibition of the use of force. These issues, for example, lead to the questioning of the legality of interventions that rely on consent expressed through a treaty whereby the consenting State agrees that an intervention can take place in its territory when the circumstances identified in the treaty materialise, regardless of its will at the time of the intervention. Most importantly, principles with which any use of force must be consistent, such as the political independence of States and the right to self-determination of peoples, put into question the legality of influencing a civil war with external force at the request of the beleaguered government.

As to State practice, the dissertation, based on more than 40 post-Cold War incidents of such interventions, shows that from the involved States' point of view, there barely is an instance where a consensual military intervention has taken place to suppress a popular opposition group at the request of the government. Intervening States usually put forward claims such as that they intervene to counter terrorism, address a threat to their national security (sometimes with the claim of self-defence) or to the region, counter a prior illegal intervention, assist the inviting State in the exercise of its collective self-defence, rescue nationals or foreigners, maintain law and order, bring stability, protect vital infrastructure, or prevent a humanitarian crisis or genocide, or that they are not taking a side in the internal conflict.

The controversy in literature on the interpretation of the relevant practice importantly boils down to whether the objectives relied on by the intervening States are of a political nature and thus do not imply acceptance as law (*opinio juris*) for the purpose of the identification of a rule

of customary international law.[5] The dissertation contends that these objectives are more likely to be also legally pertinent to the primary justification of consent. It shows that the relevant State conduct commonly indicates an avoidance to be seen as influencing by force widespread civil conflicts in favour of one party. This behaviour is in line with the UN Charter stipulating that the force cannot be used to the detriment of the political independence of States and the self-determination of peoples. It argues that being related to the rules of international law, the relevant State conduct cannot simply be dismissed as political without clear indications that it is merely political. Moreover, as also argued in the literature,[6] since practice essentially conforms with theory, one has to prove the emergence of a contradictory practice to argue that there is a definite right for third States to provide direct military support to a beleaguered government merely in order to suppress a popular armed rebellion.

The dissertation consequently argues that a legally sound consent is not enough to justify a military intervention. States are not allowed to intervene with direct military force in civil wars merely in order to pit beleaguered governments against popular opposition groups. The dissertation affirms the purpose-based approach in the scholarship that deems the compatibility of the objectives of consensual military interventions with principles such as non-intervention and self-determination instrumental for their legality.

What further strengthens the argument of the dissertation is the existence of clear *opinio juris* of some States. States at times turned down an invitation to intervene based on reasons such as that it would be an interference in the internal affairs of the State concerned. Sometimes third States criticised an intervention by invitation for similar reasons. Likewise, general statements of law by some States found consensual military interventions in civil wars legally problematic. The language used by States in these occasions at the least shows that a valid consent by a government does not necessarily make an intervention compatible with principles such as non-interference, political independence and self-determination. The particularities of each case need to be taken into account to see whether a consensual intervention complies with these principles and thus is lawful.

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[5] See Chapter 7, Sections 2 and 3.1.
[6] Olivier Corten, 'Is an Intervention at the Request of a Government Always Allowed? From a "Purpose-Based Approach" to the Respect of Self-Determination' (2019) 79 ZaöRV 677, 679; See Chapter 7, n 23 and the surrounding text.

The dissertation notably assesses the consensual interventions aimed at countering terrorism with respect to the legal distinctness of the concept of terrorism from ordinary armed rebellions. By virtue of its extensive account of State practice, the dissertation is also able to outline and attempt to answer a group of important legal questions peripheral to the subject. Even though there are numerous instances of consensual interventions that give rise to such questions, they are largely overlooked in the literature. They concern the legal consequences of the invocation by a State using force against a non-State armed group of two distinct legal bases, that is, its right to self-defence under Article 51 of the UN Charter and the consent of the State where the group is located; the procurement by a government of foreign military assistance in response to a foreign intervention on the side of the rebels, despite a UN arms embargo prohibiting military assistance to both sides alike; the endorsement by the UN Security Council of an intervention by invitation; and human rights and humanitarian law violations by the State requesting foreign assistance.

The dissertation also examines certain rules of international law that can considerably limit the scope of a particular consensual intervention regardless of its legality under the law on the use of force. The systematic analysis of these rules seems to be overlooked in the scholarship. Their analysis helps to determine which rule of international law in a given case is being violated, and thus under which rule the State's responsibility arises. They include the general principle of law that no State can transfer more rights than it has itself; rules on State complicity; the duty to ensure respect for international humanitarian law; the UN Security Council Resolutions addressing the conflict at hand; and treaties regulating arms transfers. The 2013 Arms Trade Treaty, for example, prohibits State parties from licensing an arms transfer to another State if there is an overriding risk that the transfer will undermine the peace and security in the receiving State.[7] The dissertation also examines the role of domestic law on the legality of consensual interventions, in which case the issue of the supremacy of international law arises.

In the literature, consensual interventions have been referred to with various terms. 'Intervention by invitation', for example, is a term commonly used to describe 'military intervention by foreign troops in an internal armed conflict at the invitation of the government

[7] The Arms Trade Treaty (adopted 2 April 2013, entered into force 24 December 2014) 3013 UNTS, Article 7(1)(a).

of the State concerned'.[8] More recently the term 'military assistance on request' has been also employed to describe such interventions.[9] However, in comparison to the words 'invitation' and 'request', 'consent' seems to represent a more neutral and inclusive meaning. It is true that in internal conflicts where the government issuing the consent is in need of assistance against the opposition, it would be apt to describe such consent as 'invitation' or 'request', as these words imply a more active role by the issuer of the consent. However, this should not be considered necessarily the case in every internal conflict. In some conflicts it could quite conceivably be that the intervening State asks the 'consent' of the government to intervene against a non-State armed group that constitutes a threat not only to the beleaguered government but also to the intervening State itself. It could also be that the States concerned come to an 'agreement' to fight against the common enemy. This work thus employs such and similar phrases interchangeably and cognisant of this explanation, without necessarily attributing too rigid meanings to them.

What mostly gives rise to contention in the literature is intervention in conflicts characterised as civil wars or non-international armed conflicts. However, especially when surveying the relevant State practice, the dissertation also engages with interventions in conflicts of a lesser scale, such as army mutinies, riots or violent protests. This helps to demonstrate any difference civil wars may manifest in the legality of consensual interventions. With respect to the type of intervention, what is mostly contested in the literature is direct military interventions, that is, interventions where the intervening State deploys its own armed forces to fight on the side of the government, rather than merely providing the government with arms, intelligence or logistics. The dissertation nevertheless addresses the latter type of interventions as appropriate.

2. Methodology

'International law is an argumentative practice. It is about persuading target audiences such as courts, colleagues, politicians, and readers of legal texts about the legal correctness … of the

[8] Georg Nolte, 'Intervention by Invitation' *Max Planck Encyclopedias of Public International Law* (January 2010) <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1702?prd=EPIL> para 1.
[9] On the reasoning in the recent scholarship in preferring this term, see Chapter 2, n 33 and the surrounding text.

position one defends.'[10] This dissertation, in pursuance of its general aim to state international law on the issue as it stands and to persuade target audiences about the correctness of its findings, conducts a doctrinal analysis. It is based on the formal legal sources of international law as contained in article 38(1) of the Statute of the International Court of Justice (ICJ). These consist of treaties, customary international law, general principles of law and judicial decisions and the teachings of the publicists as subsidiary means for the determination of the law.[11]

The absence of black letter rules addressing specifically consensual interventions that take place in the context of an internal conflict or civil war ushers in a potential indeterminacy on the content of the law on the subject. The dissertation addresses the difficulties the situations of civil war gives rise to in chapter 4 through potentially applicable normative frameworks of the principle of non-intervention and the right to self-determination. Because of their instrumentality to the legality of any consensual intervention, in chapters 2 and 3, the study, with reference to State practice, addresses the conditions required for the validity of consent and the identification of the legitimate government capable of consenting to foreign military intervention. With respect to the identification of the legitimate government, the study essentially attempts to decipher any formal characteristics that adhere to the practice of States in extending recognition to the governments of other States and the consequences of such recognition. In chapter 5 the study addresses the potential legal grounds other than those which relate to the prohibition of the use of force that can considerably constrain consensual interventions.

Having addressed the theoretical framework, the study lastly in chapters 6 and 7 analyses the real incidents where a State militarily intervened in the internal conflict of another State at the request of its beleaguered government. The interpretation of this State practice has proved controversial in the literature. In its attempt to dispel the controversy, the dissertation attempts to analyse a more detailed and extensive account of post-Cold War State practice than the accounts given in prior studies. The reason why it chooses this period of time is that it attempts to provide a fresh and contemporary account of the subject and that the post-Cold War practice

[10] Martti Koskenniemi, 'Methodology of International Law', *Max Planck Encyclopedia of Public International Law* (November 2007) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1440> para 1.
[11] Statute of the International Court of Justice annexed to Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16, Article 38(1).

could have the potential to reveal new insights into States' approach to the issue. The world politics in the Cold War era were mostly driven within the bounds of the ideologies of the time's confrontational bipolar world and post-colonial relationships. This landscape of the time that affected the decision making by States with respect to, among others, foreign interventions in internal conflicts have undergone considerable changes since then.

3. Structure

Chapter 1, after the introductory remarks, seeks to set out what the term 'civil war' denotes in the legal sphere. It asks the question of where the term fits into the binary framework of the 1949 Geneva Conventions dealing with a more technical term, 'non-international armed conflict', in two separate provisions. The study addresses the uncertainty around the terminology, among others, through the preparatory works of these provisions. It also relates the concept of civil war to the norms that are at stake in the case of foreign military interventions. Lastly it shows how difficult the characterisation of a conflict – whether it is an inter-State war, a civil war or merely a local unrest – may in practice become. The difficulty mainly lies in the fact that States are inclined to depict the conflicts in which they are involved not necessarily based on the factual circumstances but conscious of the legal advantages and disadvantages each of these categories entail. The last part of the chapter addresses the concept of 'intervention'. Most importantly, it maps out and critiques the propriety and viability of the recent *lex ferenda* efforts in the scholarship towards revealing an international legal regime governing the right to resort to force in internal conflicts. Such a regime could have answered the question of when a government can request foreign assistance during a civil war.

Chapter 2, in the absence of such a regime in *lex lata*, addresses State 'consent' to foreign interventions. It examines whether consent in general is a secondary rule precluding an international wrongfulness or an element already intrinsic to the prohibition on the use of force. It also discusses whether this debate has any practical implications. It additionally examines how to reconcile consenting to the use of force with the fact that the prohibition on the use of force is a peremptory norm from which no derogation is permitted. It also explores the legality of interventions relying on treaty-based *ex ante* consent. It reconciles the opposite views on this issue by arguing that such treaty provisions the objectives of which do not actually go

against the principles/purposes of the UN, with which the use of force must be consistent, should be considered lawful.

To produce its legal effects, consent must be expressed validly. Chapter 2, therefore, lastly examines the conditions required for the validity of consent. These include that the consent must be given freely, clearly established and granted by an organ of the State authorised to do so. It shows that, based on case law, which is limited and overlooked in the scholarship, a State could be coerced to give consent not necessarily through verbal or physical threats but in various far-reaching forms. It also addresses critical issues such as how to interpret ambiguous or contradictory reactions from the territorial State against the intervention, and the validity of secret consent, in which case the problem seems to be with evidentiary issues.

Chapter 3 examines another condition required for the validity of consent, namely, that consent must be granted by the legitimate government. To this end it examines the criteria that an entity has to fulfil to qualify for recognition by other States as government and gain the capacity to legally represent the State in international relations. First, it examines the traditional effective control doctrine, which helps to ascertain the legitimate government in a State based on the question of whether it exerts effective control over the national territory and people. The doctrine is quite nuanced and raises several difficult questions. Thus, in light of past and recent practice, the chapter deals with issues such as the irrelevancy of the constitutional law and the policy of not extending formal recognition – a policy only to be breached in exceptional cases; the presumption in favour of established governments in civil wars; the illegitimacy of effective governments owing their existence to foreign interventions – an illegitimacy to be averted with the UN Security Council's conferral of legitimacy; additional criteria such as the willingness by the purported government to observe international obligations – a criteria which could be one of the reasons behind the pledges by non-recognised entities, such as coup plotters or opposition groups, to observe international obligations; the case of failed States that plunge into anarchy in the absence of any effective and recognised government; the role of international recognition; the viability of the collectivisation of the recognition process in international law; and the relationship between representation in international organisations, such as the UN, and being recognised as a government.

The chapter lastly examines the democratic legitimacy doctrine, under which the legitimacy of a government is determined based on whether it ascended to power through democratic means.

Against the backdrop of post-Cold War legal developments and State practice, the doctrine has increasingly been finding support in the scholarship. The chapter highlights the decline, already noted in recent scholarship, in the strength of this doctrine with the more recent practice. This includes the recent recognition decisions in respect to the political crisis-hit States such as Egypt and Ukraine. The chapter warns about the threat to the legal credibility and potency of this doctrine that emanates from the calculations lacking formal characteristics of law in the recognition decisions. It lastly notes that in any event, the doctrine has limited utility, as it is known to come into play only when the results of an internationally validated election are not respected. However, not in every State or internal conflict, the power struggle hinges on such elections.

Chapter 4 examines the normative framework that addresses the legal difficulties the situations of civil war gives rise to in respect to consensual interventions. Even if consent in a particular case meets the conditions required for its validity and is given by a legitimate government, a potential limitation on the government's right to request military assistance is said to arise when the government is challenged by a civil war the outcome of which would be decisive for the political structure of the State. This limitation is based on the interrelated principles of non-intervention and self-determination. In respect to the non-intervention principle that safeguards the political independence of States, the chapter examines the UN General Assembly Resolutions that prohibit 'interference in civil strife'. It resorts to the preparatory works of these resolutions to clarify the meaning of the prohibition. It also examines the relevant cases of the International Court of Justice, a detailed analysis of which reveals important insights into the topic. Lastly, the chapter addresses the right to self-determination which, in the same way as the non-intervention principle, cautions against foreign interventions that aim to implicate the outcome of civil wars. It also examines the compatibility with the right to self-determination of intervention by invitation against secessionist movements.

Chapter 5 examines certain rules of international law that can considerably limit the scope of a particular intervention by invitation regardless of its legality under the law on the use of force. They include the general principle of law that no one can transfer more rights than he has himself; the rules on State complicity; the duty to ensure respect for international humanitarian law; treaties concerning arms transfers; the UN Security Council Resolutions imposing sanctions on parties to a civil war; and domestic laws.

Chapter 6, having thus far outlined the relevant normative framework, delivers a systematic and comprehensive account of State practice with around 40 cases. It also reviews general legal statements by some States directly pertaining to the intervention by invitation in civil wars. Among these, while the opinions of the United Kingdom (UK) and France at times have been referred to in the literature, those of Canada, the Democratic Republic of the Congo (DRC) and the United States (US) seem to have gone unnoticed.

Chapter 7 analyses the practice reported in chapter 6. It first reviews the literature assessing the relevant practice and examine the contrary views on the subject. It consequently argues that international law does not allow States to intervene with direct military force in civil wars merely to pit beleaguered governments against popular oppositions groups. It entrenches the purpose-based approach in the scholarship that deems the compatibility of the objective of an intervention by invitation with principles such as non-intervention and self-determination instrumental for its legality.

The chapter also sheds light on some surrounding issues, namely, the concept of terrorism as a legal concept distinct from ordinary armed rebellions and the impact of this difference on interventions by invitation; counter-intervention; invocation by the intervening State of both consent and its right to self-defence; assistance short of direct military intervention; requesting military assistance despite an arms embargo by the UN Security Council; the UN Security Council's endorsements of interventions by invitation; and the violations by the inviting State of human rights or humanitarian law.

The study finally in chapter 8 provides a summary of its findings.

4. Preliminary issues

4.1. The usage of the term 'civil war' in legal literature

Admittedly, for the view that a government can request foreign military assistance regardless of being involved in a civil war or not, the emergence of a civil war in a State does not change the legal *status quo* on consent to intervention. However, as will be explored, this issue is highly contentious. There is considerable support in the literature for the idea that military

interventions aimed at influencing civil wars, be it in favour of the government, are legally problematic.[12] As such, it becomes imperative to explore the meaning of 'civil war'. Yet, what further complicates this already contentious matter is the fact that 'civil war', not dealt with resolutely in any international instrument, is not technically a legal term. In fact, historically no established definition of civil war has existed.[13] As such, one must not expect from it to give 'rise to identifiable and consistent legal consequences'.[14]

The term often is used without precision and interchangeably with terms such as 'non-international armed conflict' (NIAC), 'internal armed conflict', 'internal war', 'intra-state war' or 'intra-state armed conflict'. The term NIAC was introduced into the legal terminology with the adoption of the Geneva Conventions (1949) on the laws of war.[15] Yet, the usage of the term 'civil war' persists in the doctrine of both *jus in bello* and *jus ad bellum*. Thus, the question arises as to what the term 'civil war' connotes in international law today. The more technical term NIAC, the contours of which have become more precise in literature today, is an appropriate starting point in answering this question.

4.1.1. NIACs in the sense of Common Article 3

Two main provisions in the Geneva Conventions (1949) and Protocols thereto deal with non-international armed conflicts, namely, article 3 common to all four Geneva Conventions (1949) and article 1 of Protocol II. The former provides that it applies to situations of an 'armed conflict not of an international character', without explaining when such a situation arises.[16] The latter helps at this point by excluding some situations from its field of application as not being *armed conflicts*. These are 'internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature'.[17] It is generally accepted that these

[12] See Chapters 4 and 7.
[13] See David Armitage, *Civil Wars: A History in Ideas* (Alfred A. Knopf 2017) 18 writing that 'history shows that civil war has had no stable identity or agreed definition'.
[14] Lassa Oppenheim, *International Law: A Treatise* (Hersch Lauterpacht (ed), Vol II, 7th edn, Longmans 1967) 162, fn 2.
[15] For more on this, see the next section.
[16] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31, Article 3.
[17] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609, Article 1(2).

situations are excluded from the definition of 'armed conflict' for the purpose of Common Article 3 as well.[18]

A widely cited definition of NIACs within the meaning of Common Article 3 made in the *Tadić* case by the Appeals Chamber helps to distinguish NIACs from internal disturbances and tensions. According to the Court, a NIAC exists when there is 'protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'.[19] As later suggested by the Trial Chamber, two main criteria to test the existence of an armed conflict emerge from this definition, namely, the intensity of the hostilities and the organisation of the parties to the conflict.[20]

In *Prosecutor v Haradinaj*, relying on how in previous cases these criteria had been interpreted, the Court set some factors indicating the existence of a NIAC. Accordingly, the number, duration and intensity of individual confrontations, the type of weapons used, the number of casualties involved, the extent of material destruction, and so forth, are useful in assessing the *intensity* criterion.[21] Regarding the *organisation* criterion, the government is presumed to be confronting the opposition with its armed forces rather than the police force. As for the opposition, or the non-governmental armed groups, factors such as 'the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory', and so forth, all would indicate the satisfaction of the *organisation* criterion.[22] However, none of these factors 'are, in themselves, essential to establish whether the "organization" criterion is fulfilled.'[23] Therefore, for the existence of a NIAC in the sense of Common Article 3, an armed group does not have to control a certain territory. This is one of the points where the field of application of Common Article 3 differs from that of article 1 of Protocol II, which will be examined next.

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[18] ICRC, 'How is the Term "Armed Conflict" Defined in International Humanitarian Law?' (Opinion Paper, March 2008) 3.
[19] *Prosecutor v Dusko Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY 94-1-A (2 October 1995) para 70.
[20] *Prosecutor v Dusko Tadić* (Opinion and Judgement) ICTY 94-1-T (7 May 1997) para 562.
[21] *Prosecutor v Ramush Haradinaj* (Judgement) ICTY 04-84-T (3 April 2008) para 49.
[22] ibid para 60.
[23] ibid.

4.1.2. NIACs in the sense of Protocol II

Protocol II applies to armed conflicts that take place in the territory of a State 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'.[24] As such, its scope of application differs from that of Common Article 3 in that it solely concerns conflicts taking place between governmental forces and non-governmental armed groups, but not conflicts occurring between non-governmental armed groups themselves. It also differs in the sense that it sets a higher threshold by requiring the non-governmental armed groups to be in control over a certain territory – a control sufficient to enable them to conduct intense military operations.

It should be stressed that Protocol II 'develops and supplements' Common Article 3 'without modifying its existing conditions of application'.[25] Its field of application, therefore, as explained by the International Committee of the Red Cross (ICRC), does not extend to the law of NIACs in general.[26] The general meaning of the term NIAC, thus, should be understood within the framework of Common Article 3, which does not condition territorial control by the opposition/non-governmental forces for its application.

4.1.3. Where does 'civil war' fit into the binary framework of Geneva Conventions (1949)?

The question arises as to where the ancient term 'civil war' fits into this modern binary framework of the Geneva Conventions. Does 'civil war', as in the case of Protocol II, refer to a conflict where the armed group confronting the government must be in control of a certain territory or, as in the case of Common Article 3, is territorial control by the non-State groups merely one of the indicative, but not definitive, factors? Is it possible for a civil war to be waged only between non-State armed groups or, as the only conflicts to which Protocol II apply, is it to be waged only between an incumbent government and non-State groups? Therefore, the fact

[24] Protocol II (n 17) Article 1(1).
[25] ibid.
[26] ICRC (n 18) 5.

that the term 'NIAC' is a more modern and technical term does not further clarify the definition of 'civil war', which is overwhelmingly used with reference to or interchangeably with it.

Indeed, in the doctrine, where the term 'civil war' is defined, discussed or used in passing, there is no unity on its parameters. When it is used with referral to the Geneva Conventions of 1949, it is equalised with all variations of NIACs under Common Article 3 and Protocol II. The Inter-American Commission on Human Rights, for example, refers to the 'application of Common Article 3' as that it 'does not require the existence of … a situation comparable to a civil war in which dissident armed groups exercise control over parts of national territory'.[27] A legal opinion by the UN Secretariat on the usage of the term 'civil war' points out the concept of NIAC under Protocol II as a 'more technical, legal, term' and states that '"civil war" is generally understood to connote a notion of two warring factions within a State – of which one is a sovereign Government – fighting for the control of the political system or secession, each having effective control over parts of the State territory'.[28]

The US Law of War Manual considers 'civil war' a 'classic example of non-international armed conflict', without specifying whether it refers to Common Article 3 or Protocol II.[29] The Institute of International Law resolution on intervention in civil wars, on the other hand, describes 'civil war' with the language and in the meaning of Common Article 3. For the purpose of the resolution, civil war is an '*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 … or b) two or more groups'.[30]

Academic commentaries also vary in their definition of civil war.[31] Oppenheim's International Law treatise, first published before the adoption of the Geneva Conventions of 1949, writes in

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[27] *Juan Carlos Abella v Argentina* (Judgement) Inter-American Commission on Human Rights, Case 11.137 (18 November 1997) para 152.
[28] UN Secretariat, 'Note to the Assistant Secretary-General for Political Affairs, Regarding the Usage of the Term "Civil War"' (2007) United Nations Juridical Yearbook 458, 458-460.
[29] US Department of Defence, *Law of War Manual* (June 2015, Updated December 2016) 1027-1028.
[30] IIL, 'The Principle of Non-Intervention in Civil Wars' (Session of Wiesbaden, 1975) Article 1 (emphasis added); On the other hand, the Institute's 2011 resolution on 'Military Assistance on Request', which recalls the 1975 resolution in the preamble, applies to cases of internal disturbances and tensions 'below the threshold of non-international armed conflict in the sense of Article 1 of Protocol II'. See IIL, 'Military Assistance on Request' (Session de Rhodes, 2011) Article 2.
[31] In addition to the scholarly works cited below, see Emer De Vattel, *The Law of Nations; Or Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (6th American edition, T. & J. W. Johnson 1844) 424; John Norton Moore, 'The Control of Foreign Intervention in Internal Conflict' (1969) 9

its 1967 version edited by Lauterpacht that '[i]n the proper sense of the term 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 portion of the population of a State rises in arms against the legitimate Government'.[32] Among the modern commentaries, Dinstein writes that intra-State armed conflicts – a term he uses interchangeably with 'NIAC' – 'are sometimes called, confusingly, "civil wars"'.[33] Lieblich as well finds the term civil war misleading in particular because it reminds the concept of belligerency. Because the term 'war' actually left its place to 'armed conflict' with the adoption of Geneva Conventions (1949), he prefers to use the term 'internal armed conflict'. For its definition he takes as a reference the above-mentioned *Tadić* case.[34] Likewise, De Wet uses 'civil war' interchangeably with 'NIAC', because the latter is preferred to the former since the adoption of Common Article 3. She points out that the drafters of Common Article 3 referred to 'civil war' with respect to the threshold required for the article's applicability. Based on the overlap between the two terms, eventually, she applies 'civil war' in her study synonymously with 'NIAC' under Protocol II.[35]

Klingler attempts to find a specifically formulated definition of civil war with respect to the question of the point at which a government cannot legally request assistance during the internal conflict. He speculates that considering that a government may appeal to foreign 'assistance when it has "effective control" over the entire territory, then it makes sense to include in any definition of "civil war" a requirement of a breakdown in such control by the government'.[36] Fox similarly argues that especially from the point of view that it is prohibited to assist both sides in a civil war, the 'focus on territorial control has lived on'. However, he questions the consistency of this old understanding, which is totally indifferent to the policies and practices of the parties to an internal conflict, with today's understandings based on the concept of democratic legitimacy. In any event, he reasons that an established definition of

VaJIntlL 205, 220 and fn 24; Pater Malanczuk, *Akehurst's Modern Introduction to International Law* (First published in 1970, 7th revised edn, Routledge 1997) 318.

[32] Oppenheim (n 14) 209.

[33] Yoram Dinstein, *War, Aggression and Self-Defence* (5th edn, CUP 2012) 5.

[34] Eliav Lieblich, *International Law and Civil Wars: Intervention and Consent* (Routledge 2013) 46-50.

[35] Erika de Wet, *Military Assistance on Request and the Use of Force* (OUP 2020) 17-9.

[36] Joseph Klingler, 'Counterintervention on Behalf of the Syrian Opposition? An Illustration of the Need for Greater Clarity in the Law' (2014) 55 HarvIntlLJ 483, 496-7.

civil war does not exist today, largely because it 'is not a critical term of art in international instruments'.[37]

Gray finds that with regard to the threshold of civil war, the meaning ascribed to the term 'civil war' contained in a 1984 UK Foreign Policy document on the legality of intervention in civil wars mirrors the provision set out in Protocol II. 'Are opposition forces in control of territory?' is one of the questions she asks with regard to the determination of the line between civil wars and merely local unrests – but a line that, as she states, 'has proved controversial'.[38]

As seen, the literature varies on what the term 'civil war' exactly refers to. Is it Common Article 3 or Protocol II that should be taken as a point of reference? Prominently, and based on these two venues, the controversy boils down to whether the armed groups must exercise territorial control for a civil war to exist. A solution to this quagmire could be found in the preparatory works of the Geneva Conventions. However, before turning to these preparatory works, it would be apt to address a less controversial disagreement on the meaning of civil war.

As mentioned above, with reference to Protocol II the UN Secretariat limited 'civil war' to conflicts in which one of the parties must be the incumbent government.[39] However, an internal conflict of the intensity of a NIAC waged only between non-State armed groups within the boundaries of a single State may certainly arise. The reason why this possibility was not included in Protocol II is, as the Commentary by the ICRC provides, that such a situation was considered by drafters as 'merely a theoretical textbook example'.[40] However, today, as the cases of 'failing States',[41] where the governmental structure is dissolved and in the absence of it armed groups vie for power, and more modern cases such as Syria, where non-State armed groups fight each other in addition to their fight against the government, demonstrate, despite being rare, such situations may arise. Therefore, in order not to disregard the existence of such situations, it does not seem reasonable to take Protocol II as a reference for the concept of civil

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[37] Gregory H Fox, 'Intervention by Invitation' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 827-8.
[38] Christine Gray, *International Law and the Use of Force* (4th edn, OUP 2018) 85, fn 44.
[39] UN Secretariat (n 28) 458-60.
[40] ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers 1987) para 4461.
[41] See Daniel Thürer, 'Failing States', *Max Planck Encyclopedia of Public International Law* (February 2009) <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1404>.

war when it comes to the identification of the parties to the conflict. Nonetheless, it should be noted that such conflicts waged only between non-State actors are not directly of concern to this study, as the study concerns interventions relying on governments' consent.

As to the preparatory works of the Geneva Conventions of 1949 in search of a solution to the said terminological confusion, one may refer to the Joint Committee's report presented to the Plenary Assembly. It states that it was clear that the term 'armed conflict not of an international character' contained in Common Article 3 referred to 'civil war, and not to a mere riot or disturbances caused by bandits'.[42] Therefore, even though the drafters left the question of 'at what point should the suppression of the rising be regarded as a civil war' [43] unanswered, they accommodated 'civil war' with Common Article 3.

In contrast to this intention of the drafters of Common Article 3, in the diplomatic conference convened for the preparation of Protocol II, even though some delegates referred to the draft Protocol II in general terms as it is dealing with 'civil wars',[44] some of them specifically referred to it as covering 'conventional',[45] 'highly organized'[46] or 'major'[47] civil wars, or not 'all the forms which civil war may take'.[48] One delegate stated that requiring territorial control 'would confine it to the relatively rare cases of characterized civil war'.[49] This indicates that Protocol II clearly was intended by some delegates not to cover every form of 'civil war'.

Therefore, in light of the preparatory works of Common Article 3 and Protocol II, and speaking with the leeway given by the lack of a generally agreed definition, taking the NIAC within the meaning of Common Article 3, that is in its general meaning compared to its restricted version under Protocol II, as a reference for the meaning of 'civil war' seems more rational. Accordingly, with respect to civil war's threshold, the territorial control by the armed groups should not be deemed a necessary component of the definition as in Protocol II, but only one

[42] Swiss Federal Political Department, *Final Record of the Diplomatic Conference of Geneva of 1949* (Volume II, Section B) 129.
[43] ibid.
[44] See Swiss Federal Political Department, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (Geneva, 1974-1977) Volume V, 121 and 142; Volume VII, 77, 136, 287 and 329; Volume XIV, 8, 31 and 44.
[45] ibid Volume VII, 300.
[46] ibid Volume XII, 398.
[47] ibid Volume VII, 219.
[48] ibid Volume VII, 76.
[49] ibid Volume VII, 235.

of the indicative factors as in Common Article 3. Such an understanding also provides unity among these two concepts ('civil war' and 'non-international armed conflict') and provides clarity in the legal terminology with regard to their threshold. Also, it makes sense semantically considering that the term 'armed conflict' in Geneva Conventions (1949) was used in lieu of 'war'.

However, on a final note, while it is helpful to attempt to clarify what the term 'civil war' connotes in legal parlance in general, the main theoretical concern on the subject of intervention by invitation in civil wars, as will be explored,[50] is that the intervention in a civil war could impact on the outcome of a conflict that is decisive for the future of the body politic of a State. What is at stake in such a situation is the political independence of the State and the right to self-determination of its people. These are notions that entitle a State and its people to freely choose their political institutions, including the government, without external intervention. The term 'civil war', thus, for the purpose of intervention by invitation, is supposed to have a meaning that indicates a level of conflict where the incumbent government finds itself on the hook in the sense that when it requests intervention its otherwise uncertain future rests on that foreign intervention. Therefore, in the legal analysis of the intervention, the weight also must be given to such a nuanced understanding.

In fact, for this reason, and as some commentators have indicated, the legality of an intervention by invitation does not merely depend on the level of the internal conflict. It is not the existence of a civil war that makes the invited interventions illegal, but the principles of international law that are involved. Thus, Nguyen finds the 'efforts to establish the threshold of a "civil war" obsolete'. To him, 'The question … is not "When is an intervention lawful?", but: "What makes an intervention lawful?"'[51] Likewise, Butchard reminds us that the prohibition on the use of force enshrined in article 2(4) of the UN Charter proscribes States from using force in a manner inconsistent with the purposes of the UN. What it in essence entails is that military assistance on request must be limited to military force that remains consistent with the purposes of the UN, including the right to self-determination. Thus, military assistance on request is not

[50] See Chapter 4.
[51] Quoc Tan Trung Nguyen, 'Rethinking the Legality of Intervention by Invitation: Toward Neutrality' (2019) 24 JC&SL 201, 235.

necessarily 'restricted to the arbitrary and often difficult to identify threshold of "civil war" or "non-international armed conflict"'.[52]

This understanding actually shows itself in State practice in the sense that the mere 'level' of conflict does not seem to play a role in States' justification of intervention by invitation. It rather is construed impliedly in the sense that in low-level internal conflicts, those short of an 'armed conflict', intervening States usually allude to purposes playing down the magnitude of the intervention. For example, they claim to intervene to maintain law and order, to restore the rule of law or to protect the vital infrastructure. They do not easily allude to such objectives in widespread armed conflicts, where particularly non-State armed groups are in territorial control.[53]

Therefore, the level of the internal conflict is not necessarily the criterion to assess the legality of an intervention by invitation. However, it could play a role in determining the legality of the intervention. As mentioned, when a conflict reaches the level of civil war, making the future of the beleaguered government uncertain, foreign intervention on its behalf could put in immediate danger the principles of international law such as political independence and self-determination. From this aspect, as to the threshold of civil war, the territorial acquisition by the rebels from the government could prove that the latter, without foreign assistance, would not have been able to sustain itself. In the abovementioned commentaries articulating on the meaning of civil war, indeed, many writings in the context of the alleged prohibition of intervention by invitation in civil wars affiliate civil war with a breakdown in territorial control.

4.1.4. Determining a conflict as a civil war in practice

Whatever the threshold for 'civil war' is, in practice, for States it is difficult to make a determination with regard to the level of an internal conflict in which they are involved. States generally are reluctant to acknowledge the fact that the threshold for civil war has been reached with the thought that such an acknowledgment would legitimise the opposition.[54] The existence

[52] Patrick M Butchard, 'Territorial Integrity, Political Independence, and Consent: The Limitations of Military Assistance on Request under the Prohibition of Force' (2020) 7 JUFIL 35, 66.
[53] See Chapter 7, n 42 and the surrounding text.
[54] Gray (n 38) 85; Armitage (n 13) 15 stating that '[e]stablished governments will always view civil wars as rebellions or illegal uprisings against legitimate authority'.

of a civil war may be denied even when the opposition gains territorial control. In the early days of the Syrian conflict, for example, the Syrian government disputed the claim by the UN Under-Secretary-General for Peacekeeping Operations that the conflict had reached a 'civil war', as the government was trying to retake 'some large chunks of territory' lost to the opposition. The government claimed that speaking of 'civil war' in Syria was against the reality; 'what is happening in Syria is a war against terrorist groups plotting against the future of the Syrian people'.[55] Apparently, in such situations the opposition may also deny the existence of a civil war for the same reason – not to legitimise the other party. Thus, Syrian opposition groups also rejected the above-mentioned statement by arguing that this assertion 'makes the killer and the victim equal and ignores all the massacres committed by the Assad regime'.[56]

States usually are inclined to deem the internal violence as a matter to be dealt with by domestic measures under the State's criminal law system. By refusing to recognise the situation as a civil war, they deny the applicability of international humanitarian law and their incompetence to restore and maintain public order. For these reasons, it has been claimed, for example, that despite the fact that the conflict in Northern Ireland in the 1970s was considered to have reached the level of an armed conflict falling under Common Article 3 by the legal advisors in the UK government, it was not pronounced in any official way.[57]

Technically, however, considering all the advantages and disadvantages under *jus in bello* and *jus ad bellum*, governments may find themselves in a dilemma to designate a conflict in which they are involved as a civil war or merely a local unrest. On the one hand, they may be inclined to claim that the conflict is a local unrest to easily justify third-State assistance if needed, as otherwise requesting assistance in civil wars proves problematic. Another reason for such a claim could be to avoid the application of international humanitarian law to the hostilities, thereby facing war crimes (for responsible State officials) before international tribunals.[58] On

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[55] Colum Lynch, 'The U.N. war over calling Syria a "civil war"' (*Foreign Policy*, 13 June 2012) <http://foreignpolicy.com/2012/06/13/the-u-n-war-over-calling-syria-a-civil-war/>.
[56] 'Assad regime and activists deny Syria has reached civil war' (*The Guardian*, 13 June 2012) <https://www.theguardian.com/world/middle-east-live/2012/jun/13/syria-civil-war-attack-helicopters-live>.
[57] Steven Haines, 'Northern Ireland 1968-1998' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP 2012) 130 based on unattributable information provided to the author from legal advisors to the UK government, and citing another source mentioning the same information.
[58] On war crimes, see Alexander Schwarz, 'War Crimes', *Max Planck Encyclopedia of Public International Law* (September 2014) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e431>.

the other hand, they may prefer to classify the conflict as a civil war to ensure that international humanitarian law applies to the hostilities, as, in the alternative, more stringent rules of international human rights law alone will apply to the suppression of the violence.[59]

Another contention that may in practice arise regarding the characterisation of a conflict is whether the conflict at hand is a 'civil' or an 'international' war. This contention arises mostly as a result of a dispute as to whether the civil war in question involves foreign intervention. If a foreign State intervenes on the side of the opposition group to a level as much as to exercise 'effective' or 'overall' control over it, the conflict becomes an international war between the intervening State and the State whose government is in conflict with the group in question.[60] The South Ossetian conflict is a telling example of such a dispute. Georgia claimed that its conflict with South Ossetian armed groups was not a NIAC but an international armed conflict because of Russian intervention. Dismissing Russia's claim that its troops were undertaking a peacekeeping mission, it claimed that Russia exercised effective control over those groups and occupied its territory, and thus it acted in self-defence against Russian invasion. Russia, on the other hand, denying effective control over those groups, argued that Georgia's conflict with those groups was a NIAC, and it also claimed to have acted in self-defence against Georgia because of attacks on its peacekeeping forces.[61]

In a similar dispute with regard to the characterisation of the conflict in Eastern Ukraine, the Ukrainian government in official statements consistently claimed that the ongoing conflict waged there was not a 'civil war' and dismissed press reports naming the conflict as such. It claimed that it was an aggression by Russia which sent its armed forces and military equipment in support of the armed groups fighting against the Ukrainian government in the region.[62]

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[59] On the relevant rules, see Stuart Casey-Maslen, 'Crowd Management, Crowd Control, and Riot Control' in Stuart Casey - Maslen (ed) *Weapons Under International Human Rights Law* (CUP 2014).

[60] On the level of involvement required to internationalise the conflict, see Dapo Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP 2012) 57-62.

[61] See Philip Leach, 'South Ossetia (2008)' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP 2012) 326-8.

[62] Embassy of Ukraine in Ireland, 'Ambassador of Ukraine to Ireland Sergii Reva: there is no civil war in Ukraine but aggression from Russia' (28 May 2014) <https://ireland.mfa.gov.ua/en/news/23662-posol-ukrajini-v-irlandiji-sergij-reva-v-ukrajini-maje-misce-ne-gromadyansyka-vijna-a-agresija-z-boku-rosiji>; Embassy of Ukraine to the UK, 'Letter to the editor of Ambassador of Ukraine to the UK Natalia Galibarenko regarding the report "The Global Liveability Report 2017" prepared by the Economist Intelligence Unit' (16 August 2017) <http://uk.old.mfa.gov.ua/en/press-center/publications/5709-letter-to-the-editor-of-ambassador-of-ukraine-to-the-uk-natalia-galibarenko-regarding-the-report-the-global-liveability-report-2017-prepared-by-the-economist-

Russia, on the other hand, repeatedly denied its involvement and only accepted the presence of its military specialists after the capture of two Russian military intelligence officers.[63]

A similar dispute arose in the conflict in Bosnia and Herzegovina. Bosnia and Herzegovina claimed that because it was involved in an armed conflict with armed groups fighting at the direction or behest of Yugoslavia, the conflict was an inter-State war with Yugoslavia and that it could obtain military equipment or request other kinds of assistance from third States under its right to collective self-defence. Yugoslavia, on the other hand, disputed any involvement and claimed that it purely was a civil war.[64]

The problem of the characterisation of a conflict sometimes arises because of a dispute as to the statehood of a party to the conflict. For example, in scholarship it was, on the one hand, claimed that since the conflict between the Democratic Republic of Vietnam (North Vietnam) and the Republic of Vietnam (South Vietnam) was an inter-State war – the two entities being separate and independent States under international law – the assistance by the US to South Vietnam was an exercise of South Vietnam's right to collective self-defence against North Vietnam aggression.[65] On the other hand, it was contended that, among other reasons, since the conflict was a civil war and a domestic issue of the complete sovereign State of Vietnam, the US intervention constituted an unlawful intervention in the civil war waging there.[66]

In sum, in practice States that have a stake in a conflict may come up with entirely different narratives on whether it is an inter-State war, a civil war, or merely a local unrest. They may easily adjust the facts or interpret them differently for favourable legal results. This problem in contemporary international law sometimes may be alleviated by the establishment of an independent and impartial commission of inquiry, or a fact-finding mission, tasked with

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intelligence-unit>; Embassy of Ukraine to the UK, 'Letter to the editor of Ambassador of Ukraine to the UK Natalia Galibarenko in relation to the article published in The Times on February 8, 2019' (08 February 2019) <http://uk.old.mfa.gov.ua/en/press-center/publications/6774-https%3A%2F%2Fuk.mfa.gov.ua%2Fua%2Fpress-center%2Fnews%2F70377-letter-to-the-editor-of-ambassador-of-ukraine-to-the-uk-natalia-galibarenko-in-relation-to-the-article-published-in-the-times-on-february-8-2019>.

[63] Shaun Walker, 'Putin admits Russian military presence in Ukraine for first time' (*The Guardian*, 17 December 2015) <https://www.theguardian.com/world/2015/dec/17/vladimir-putin-admits-russian-military-presence-ukraine>.

[64] See Christine Gray, 'Bosnia and Herzegovina: Civil War or Inter-state Conflict? Characterization and Consequences' (1997) 67 BYIL 155, 179-197.

[65] John Norton Moore, 'The Lawfulness of Military Assistance to the Republic of Viet-Nam' (1967) 61 AJIL 1.

[66] Quincy Wright, 'Legal Aspects of the Viet-Nam Situation' (1966) 60 AJIL 750.

addressing the disputes of a particular conflict,[67] or when the dispute concerning a conflict comes before an international tribunal. In other cases States will have a wide margin of discretion on the characterisation of an internal conflict, or events related to the conflict. Under such a scenario, what is permitted or forbidden for third States under international law in their relations with parties to an internal conflict will depend on a decentralised decision-making process. This could be considered as a further challenge to assessing the legality of foreign interventions in civil wars.

4.2. Prohibition of intervention

In analysing foreign 'intervention' in civil wars, the question of what is meant by 'intervention' obviously is pressing. One cannot comment on this question without referring to the general prohibition of 'intervention' or, for that matter, the principle of non-intervention. However, the prohibition is deemed one of the most ambiguous concepts regarding its content and scope in international law.[68] One may link this uncertainty surrounding the concept to the fact that despite the weight given to its prohibition, '[w]hat constitutes an "intervention" is nowhere set out clearly'.[69]

The way in which the scope and content of the prohibition are distilled partly explains the ambiguity surrounding it.[70] States' attempts to define the prohibition, through the UN General Assembly Resolutions, tend to cohere its contours with other existing principles of the international legal order such as the sovereign equality of States, with less importance given to State practice.[71] Such an approach leads the further elaboration of the principle to be made prominently through earlier 'authoritative' texts, rather than State practice from which a more

[67] On the difference such commissions can make, see Michael A Becker and Sarah M H Nouwen, 'International Commissions of Inquiry: What Difference Do They Make? Taking an Empirical Approach' (2019) 30 EJIL 819 showing, among others, that they may inspire further action, justify decision-making, promote international law or expose its limitations.
[68] See Niki Aloupi, 'The Right to Non-intervention and Non-interference' (2015) 4 CJICL 566, 566-7; Christina Nowak, 'The Changing Law of Non-Intervention In Civil Wars – Assessing the Production of Legality in State Practice After 2011' (2018) 5 JUFIL 40, 43-9; Percy H Winfield, 'The History of Intervention in International Law' (1922-23) 3 BYIL 130, 130; Ann Van Wynen Thomas and A. J. Thomas, *Non-Intervention: The Law and its Impact in the* Americas (Sothern Methodist University Press 1956) xi and 67.
[69] Maziar Jamnejad and Michael Wood, 'The Principle of Non-intervention' (2009) 22 LJIL 345, 347.
[70] Vaughan Lowe, 'The Principle of Non-Intervention: Use of Force' in Vaughan Lowe and Colin Warbrick (eds), *The United Nations and the Principles of International Law* (Routledge 1994) 72.
[71] ibid 73.

sophisticated framework could have been drawn.[72] This is one of the reasons this study gives great importance to contemporary State practice to specify the contours of the principle in relation to civil wars.[73]

Despite the challenge surrounding the precise contours of its meaning, a highly cited authoritative definition in general terms of the prohibition could be found in the *Nicaragua* case heard before the International Court of Justice. Accordingly, the principle of non-intervention entails that a State cannot be coerced by another State, directly or indirectly, to act contrary to its wishes on issues on which it has the right to decide freely under its right to sovereignty. Such issues include the State's political, economic, social and cultural system, and the policy it pursues in foreign relations.[74] This definition, thus, includes two notable elements, namely, that the State must be coerced, and this coercion must be on issues that fall within its *domaine réservé*.

This definition also shows that there is a close relationship between the concepts of 'intervention' and 'use of force'. Article 2(4) of the UN Charter prohibits States '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 manner inconsistent with the Purposes of the United Nations'.[75] As articulated in the *Nicaragua* case, the element of 'coercion', which must exist for an intervention to occur, 'is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State'.[76] Thus, the prohibitions on the use of force and intervention overlap, and a violation of the former *a fortiori* is a violation of the latter.

The important question for the purpose of this study is the legal effects arising from a scenario where a State consents to foreign intervention in its affairs. In principle, in such a scenario there would be no prohibited intervention to speak of, as the element of 'coercion', an integral

[72] ibid.
[73] See Chapters 6 and 7.
[74] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits [1986] ICJ Rep 14, para 205.
[75] UN Charter (n 4) Article 2(4).
[76] *Nicaragua* (n 74) para 205.

part of the prohibition, would be lacking. The same conclusion, however, cannot be reached that easily when it comes to the consent of a State embattled in a civil war. This is due to the other principles that concern intervention and the use of force, such as the political independence of States and the right to self-determination of peoples, which are particularly at stake in cases of civil war, as will be examined later in the study.[77]

4.2.1. Scholarly efforts to reveal an international legal regime governing resort to force in civil wars

The reason why the starting point of discussion in this study has been the prohibition on the use of force *between* States is that international law does not address the use of armed force between the government and armed groups *within* States. Had there been such an international regulation, it could have implications on foreign intervention in civil wars. Such a legal regime, for example, could under certain circumstances give the parties to an internal armed conflict the right to request foreign assistance in self-defence as the UN Charter gives to the victims of international wars.[78]

Article 2(4) of the UN Charter is clear in the sense that it governs only resort to force by States against each other; it prohibits 'Members' of the organisation from using force 'in their international relations'.[79] As such, using force by a State against a non-State armed group within its territory by no means falls under this prohibition. A legal regime that can regulate such force is to be found in domestic laws, where resorting to violence against the government mostly is prohibited under any circumstances.[80] International law neither condones nor condemns resort to force within a State, be it by the government or non-State armed groups.[81]

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[77] See Chapter 4.
[78] UN Charter (n 4) Article 51.
[79] ibid Article 2(4).
[80] Exceptionally some national constitutions allow the people to resist and overthrow the government under certain circumstances. For the relevant data and analysis, see Tom Ginsburg, Daniel Lansberg-Rodriguez and Mila Versteeg, 'When to Overthrow Your Government: The Right to Resist in the World's Constitutions' (2013) 60 UCLA Law Review 1884; For an analysis of the potential materialisation of such a constitutional right, see Benedict Abrahamson Chigara, 'Operation Restore Legacy Renders Southern African Development Community (SADC) Constitutionalism Suspect in the Coup d'Etat That Was Not a Coup' (2018) 20 Oregon Review of International Law 173, among others, arguing that the overthrow of the government in Zimbabwe in 2017 was the operationalisation of Zimbabwe's ancient and enduring constitutional convention, *resistance of oppression*.
[81] See Yoram Dinstein, *Non-International Armed Conflicts in International Law* (CUP 2014) 4-6; James R Crawford, *The Creation of States in International Law* (2nd edn, OUP 2007) 390-1; Annyssa Bellal and Louise Doswald-Beck, 'Evaluating the Use of Force During the Arab Spring' (2011) 14 YIntlHL 3, 11-14 examining

It, however, should be noted that the neutrality of international law against armed rebellions has been seriously tested in the context of terrorism. Many international instruments today criminalise, or urge States to combat, terrorism, sometimes with very wide definitions that could be regarded as covering many acts of rebellion.[82]

The fact that article 2(4) prohibits using force 'against the territorial integrity'[83] of States does not mean that it prohibits non-State actors from using force within States. As the ICJ put it, 'the scope of the principle of territorial integrity is confined to the *sphere of relations between States*'.[84] That is, non-State actors are not the addressees of this principle.

Likewise, the UN Security Council Resolutions calling parties to an internal conflict to observe a ceasefire or refrain from using force, which have become common with the end of the Cold War, cannot be interpreted in such a way that international law on the use of force is extended to civil wars.[85] In these Resolutions, the Security Council has been acting pursuant to its mandate under Chapter VII to restore international security and peace by using its discretion accordingly. The Council in these Resolutions does not necessarily refer to an international prohibition on the use of force when urging parties to avoid using force, and many activities

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whether there is a right to rebellion in international law and reaches the conclusion that 'international law neither allows nor prohibits rebellion'; Also see Olivier Corten, *The Law Against War* (Translated by Christopher Sutcliffe, Hart Publishing 2010) 126-129 arguing that even though the prohibition of the use of force does not extend to civil wars, seeing international law as 'legally neutral' in the face of civil wars is 'misleading' because contemporary international law is inclined to justify internal use of force by States against rebellions and to condemn the use of force by the rebels.

[82] See Tom Ruys, 'The Quest for an Internal *Jus ad Bellum*: International Law's Missing Link, Mere Distraction or Pandora's Box?' in Claus Kreβ and Robert Lawless (eds), *Necessity and Proportionality in International Peace and Security Law* (Lieber Series Vol 4, OUP 2020) 16-7 (forthcoming) <https://ssrn.com/abstract=3316054>

[83] UN Charter (n 4) Article 2(4).

[84] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403, para 80 (emphasis added).

[85] For such interpretations, see Kirsti Samuels, '*Jus Ad Bellum* and Civil Conflicts: A Case Study of the International Community's Approach to Violence in the Conflict in Sierra Leone' (2003) 8 JC&SL 315, 333-338 arguing that the UN Security Council practice leads to the emergence of new norms on *jus ad bellum* in civil wars, particularly on the prohibition of the overthrow of democratically elected governments by the rebels and use of force against the civilian population.; Also see Gregory H Fox, Kristen E 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' (2018) 67 AmULRev 649, 688-692 arguing that the UN Security Council resolutions lead to the emergence of new evidence of customary international law on *jus ad bellum* in civil wars. Accordingly, the government and non-State actors within a State can use force in self-defence against each other, the government or non-State actors can use force to further democracy or to end mass human rights violations, and the government can use force to defeat terrorist or terrorist-affiliated groups.; Also see sources cited in Corten (n 81) 131, fn 34.

that the Council condemns could be considered out of concerns based on human rights violations.[86]

The context of these resolutions matters for the inference of a rule of customary international law. A resolution adopted by an international organisation 'cannot independently constitute rules of customary international law'. Rather, for such a rule to be generated, the purported 'rule set forth in the resolution' must 'in fact correspond to a general practice that is accepted as law (accompanied by *opinio juris*)'.[87] Not all resolutions can serve the purpose of providing evidence of the existence and content of a rule of customary international law. Cases where particularly this purpose is served can be seen 'when a resolution purports to be declaratory of an existing rule of customary international law'.[88] As such, the conditions for the UN Security Council Resolutions dealing with civil wars to give birth to a certain rule of customary international law are highly stringent, and the context in which the particular Resolution is issued is of paramount importance. It is not likely for resolutions issued based on concerns other than a purported international legal regulation governing the resort to internal use of force to give rise or contribute to the emergence of such a rule.[89]

Having articulated the non-existence of a *jus ad bellum* regime for civil wars in international law, it should be noted that today there is an endeavour in the scholarship to bring such a regime into international law. This effort is understandable from a policy-oriented perspective. The original *jus ad bellum* regime, adopted in the aftermath of World War II as a reaction to inter-State wars, which aimed 'to save succeeding generations from the scourge of war',[90] fails to prevent the scourge of war from taking place out of intra-State wars.

Some proposals in this direction are grounded in international human rights law. Implementing a revisionist approach to just war theory – a theory according to which the act of killing should be subjected to the same ethics regardless of whether individuals, groups, peoples or States are

[86] See Corten (n 81) 131-5; Georg Nolte, *Eingreifen auf Einladung* (With an English Summary, Springer 1999) Ch 7; Crawford (n 81) 389-90.
[87] ILC, 'Draft conclusions on identification of customary international law, with commentaries' (2018) UN Doc A/73/10, Commentary to Conclusion 12, para 4.
[88] ibid para 5.
[89] But see Fox, Boon and Jenkins (n 85) 692-713 making an extensive argument to the contrary claiming that the Council's practice in respect to non-international armed conflicts has normative consequences.
[90] UN Charter (n 4) Preamble.

the victims of this act – Lieblich proposes an internal *jus ad bellum* regime applicable to both governments and opposition groups based on the right to life of everyone enshrined in international human rights law. Under this proposal, similar to the original *jus ad bellum* regime, recourse to the internal use of force by the opposition or government can only be permissible in self-defence, or the defence of others, against the grave threats to life or limb. This paradigm, however, is not free from issues to be surmounted. The main problem Lieblich himself designates is that international human rights law does not directly apply to non-State actors and ceases to apply exclusively once an armed conflict erupts.[91]

As Lieblich, Anderson also identifies an approach that rests on international human rights law. He suggests that the right to peace, a so-called third generation right the meaning of which is not well-defined in international law and which principally aims to prevent the eruption of war between States, should be the base for an internal *jus ad bellum* regime. Under this paradigm, if the application of the right to peace was extended to intra-State violence, it would prevent States and non-State actors alike from resorting to armed force.[92]

Another proposal for a new *jus ad bellum* regime governing NIACs hinges on a potential reform in *jus in bello*. In the current law, unlike international armed conflicts, the participants in hostilities in NIACs are not entitled to the prisoner-of-war status. That is, unless they prevail and oust the government, the fighters of a non-State armed group can be prosecuted under domestic laws even if their acts did not violate international humanitarian law. The fear of prosecution under domestic laws provides deterrence to non-State groups not to resort to force in the first place.[93] There are proposals in the literature to put the fighters of a non-State group on an equal footing with the armed forces of a State for the purpose of incentivising the former to respect international humanitarian law. However, this may remove the mentioned deterrence, as it could enable those fighters to evade domestic charges.[94] The argument,

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[91] Eliav Lieblich, 'Internal *Jus ad Bellum*' (2016) 67 HastingsLJ 687; Also see Jan Arno Hessbruegge, *Human Rights and Personal Self-Defense in International Law* (OUP 2017) Ch 7, similarly arguing in favour of the development of a right to resort to organised armed resistance against the State based on the personal right to self-defence.

[92] Kjell Anderson, 'The Universality of War: *Jus ad Bellum* and the Right to Peace in Non-International Armed Conflicts' in David Keane and Yvonne McDermott (eds), *The Challenge of Human Rights: Past, Present and Future* (Edwar Elgar Publishing 2012).

[93] Nils Melzer, 'Bolstering the Protection of Civilians in Armed Conflict' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (OUP 2012) 516-8.

[94] ibid 516-8; Claus Kreβ, 'Towards further developing the law of non-international armed conflict: a proposal for a *jus in bello interno* and a new *jus contra bellum internum*' (2014) 96 IRRC 30, 38-9.

therefore, is that to level the playing field, the *jus ad bellum*, which in its current form neither prohibits nor allows armed rebellion, must also be reformed to prohibit non-State actors from resorting to force against governments.[95]

Kreβ calls this proposed regime *jus contra bellum internum* and argues that this should be complemented with a *jus ad bellum internum*, which would give the right to self-defence to 'the civilian population under lethal attack'.[96] Bellal and Doswald-Beck, similarly, find unreasonable the lack of combatant immunity for fighters of a non-State group in cases where the violence is unlawfully initiated by the government. They argue that absent a right to self-defence for protesters 'against a government that uses excessive force', this would 'amount to an abuse of rights in that the State would benefit from a right on the basis of its own wrong'.[97] Badar and Sabuj, for similar reasons, find the existing international legal framework regarding rebellion deficient and problematic. They consider that the Islamic law of rebellion, where 'legitimacy of use of force by and against rebels … moved from "*jus ad bellum"* to "*jus in bello"*'[98] 'may be regarded as a positive contribution in the development of public international law in providing an effective framework in dealing with rebellion'.[99]

From quite a different perspective, in his suggestion for a possible *jus ad bellum* for NIACs Waters relies on a specific international legal regime contained in the Sochi Agreement of 1992. This agreement mandated the peacekeeping forces consisting of Russian, Georgian and Ossetian troops to oversee the ceasefire between South Ossetia and Georgia. He argues that with the abstraction of a general regime from this *lex specialis*, a *jus ad bellum* regime may be incorporated for internal armed conflicts. Accordingly, the international rules of *jus ad bellum* would apply on territorial lines that separate the 'protectable territory' held by the insurgents from the rest of the State as they apply on international frontiers. Therefore, the violation of these lines would allow responses such as those performed in self-defence, which normally are available only in international conflicts.[100]

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[95] Kreβ (n 94) 39-42; Melzer (n 93) 516-8.
[96] Kreβ (n 94) 39-42; For a critique of Claus Kreβ's proposal, see Ruys (n 82) 26-9.
[97] Bellal and Doswald-Beck (n 81) 20-3.
[98] Mohamed Elewa Badar and Mohammad Z Sabuj, 'The Islamic Law of Rebellion and Its Potential to Complement Public International Law on the Use of Force' (2019) 6 J Int'l & Comp L 365, 372.
[99] ibid 390.
[100] Timothy William Waters, 'Plucky Little Russia: Misreading the Georgian War through the Distorting Lens of Aggression' (2013) 49 StanJIntlL 176, 184-9 and 227-33.

The above account of proposals on a possible *jus ad bellum* governing civil wars naturally reflects *lex ferenda*, that is, how the law should be, rather than *lex lata*, the law currently in force.[101] The common goal of these proposals is to move the legal regulation of the initiation of civil wars from the scope of domestic law to international law. It is difficult to say, however, that, when contemplated together, these efforts make it easier to bring about such a legal regime in positive international law given that they all originate from different reasonings and principles. In this respect, efforts relying on human rights law could prove more influential in shaping law considering that human rights law is the primary area of international law that increasingly regulates relations between States and their subjects.

Nevertheless, highly plausible reasons remain that States will not consent to the emergence of an international regime that regulates resort to force within States. To start with, it is unlikely to expect them to forego their freedom to respond to resort to rebellions as they wish under their domestic laws. Moreover, it would be quite implausible to contemplate an internal *jus ad bellum* regime giving right to self-defence without a right to collective self-defence. States arguably would be opposing the emergence of a such a legal regime that would make possible the internationalisation of internal conflicts to their detriment.

It should also be noted that the policy and moral rationales, which mostly seem to be taken for granted in this quest for an internal *jus ad bellum*, do not necessarily prove to be compelling or reasonable. This is the case even for a proposal of a right to armed rebellion in situations where arguably the force becomes the only means for the oppressed people to resort to against a government committing mass atrocities.[102] Such a scenario is the focus of a historical debate that usually concentrates on the point whether the injustices and injuries that people suffer could be tolerated for the sake of public peace and order.[103] The situation of opposition fighters in places such as Libya, Syria, Iraq and Mali suggests that resort to force by the people, or other

[101] The third State criticism of excessive internal use of force by States, such as Libya (2011) and Syria (since 2012), against parts of their population do not amount to the emergence of a customary law of the prohibition of internal use of force. The emphasis in the wording of these criticism rather indicates a preference to limit the scope and modalities of the internal use of force based on international human rights, humanitarian, or criminal law. See Claus Kreβ, 'Major Post-Westphalian Shifts and Some Important Neo-Westphalian Hesitations in the State Practice on the International Law on the Use of Force' (2014) 1 JUFIL 11, 25.
[102] Mary Ellen O'Connell, *The Art of Law in the International Community* (CUP 2019) 237-253.
[103] ibid.

countries on behalf of the people, against atrocious entities 'is typically counter-productive' and thus could not be considered even as an 'available' option.[104]

Even if materialised, the application of an internal *jus ad bellum* would not be immune to difficulties in practice. To determine whether it is the government, or the non-State entity opposing it, that initiated the conflict would not be as easy as to determine the perpetrator in an international armed conflict, where the law aims to protect internationally recognised frontiers, the violation of which could easily be ascertained.[105] The question of which party initiated the conflict in a NIAC would face a challenge also in the sense that such conflicts do not 'come out of the blue, but mostly follow a cycle of gradually escalating violence'.[106]

Also, it should not be forgotten that while the mentioned proposals focus only on the right to self-defence of the parties to an internal armed conflict, the original *jus ad bellum* regime is a collective security system. It gives States the right to use force in self-defence 'until the [UN] Security Council has taken measures necessary to maintain international peace and security'.[107] One thus may contemplate a similar UN Security Council role for a potential internal *jus ad bellum*, where the Council is mandated to take measures to maintain 'internal' peace and security. Indeed, such a role seems, at least to some extent, to be grounded in international law with the concept of the 'responsibility to protect'. In the UN General Assembly Resolution of the 2005 World Summit Outcome, the UN member States agreed that they are prepared 'to take collective action … through the Security Council … should … national authorities are manifestly failing to protect their populations from' atrocity crimes.[108] One can complete the mentioned internal *jus ad bellum* proposals with this role of the Council. Accordingly, the victim of an internal armed conflict would be able to use force in self-defence until the Council takes action to maintain 'internal' peace and security.

In any event, the *lex lata* does not include an international legal regime governing resort to force within States. Such a regime could have determined, among others, whether a government subjected to an armed attack by an internal armed group can request foreign

[104] ibid.
[105] See also Ruys (n 82) 10-11.
[106] ibid 11.
[107] UN Charter (n 4) Article 51.
[108] 2005 World Summit Outcome, UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1, para 139.

assistance in self-defence. Until such a regime materialises, the existing normative frameworks of international law have to be resorted to for questions surrounding foreign assistance to a government involved in a civil war. To this end, the next chapter examines the issues surrounding State consent to foreign intervention.

Chapter 2: The legal construct of consent to intervention

1. Introduction: The right to consent to intervention

To speak of the legal issues arising from consent to foreign intervention in situations of civil war, first, the general legal regime of State consent to intervention must be examined. Although not explicitly recognised in any treaty, the legality of States' right to consent to foreign activities on its own territory is undisputed and can be deduced from their right to sovereignty. As the UN Security Council mentioned, 'to request assistance' from other States is 'the inherent and lawful right of every State, in the exercise of its sovereignty'.[1] Sovereign rights entitle States to their independence in international relations and autonomy in their internal affairs. States are the only entities to have plenary jurisdiction over their territory and the people therein.[2] It follows that as a consequence of this exclusive jurisdiction, they can dispose of their territories freely; that is, they can allow the entrance of foreign troops or the flow of weapons thereto, or the use of force by other States therein.

This right has been confirmed in its various forms in international legal instruments. The UN General Assembly, for example, implicitly recognised the legality of using force in the territory of a consenting State when it qualified 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 violation of the agreement.[3] States' right to receive foreign assistance certainly is not limited to military assistance. A right to receive economic and political assistance, for example, *a contrario* is inferred from the UN General Assembly Resolution 36/103 which reaffirms '[t]he duty of a State to refrain from any economic, political or military activity in the territory of another State without its consent'.[4]

[1] UNSC Res 387 (31 March 1976) UN Doc S/RES/387.
[2] Samantha Besson, 'Sovereignty', *Max Planck Encyclopedias of Public International Law* (April 2011) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1472> para 119.
[3] Definition of Aggression, UNGA Res 29/3314 (14 December 1974) Article 3(e).
[4] Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, UNGA Res 36/103 (9 December 1981) Article 2 II(o).

The right was confirmed also in the jurisprudence of the International Court of Justice. In *Nicaragua* the Court stated that in contrast to the assistance to opposition forces, assistance to governments is allowable at their request.[5] In *DRC v Uganda* it did not dispute the legality of Ugandan military intervention in the Democratic Republic of the Congo (DRC) during the period in which it found the Congolese consent to the intervention valid.[6] The issue also has been subjected to at least one domestic trial. The Latvian Constitutional Court held that in international law States can consent to the deployment of foreign armed forces to their territory.[7] A State's right to consent to intervention is not disputed in literature either.[8]

Nonetheless, some controversies arise due to the characteristics of the prohibition of the use of force. Is consent a secondary rule precluding wrongfulness under the rules of State responsibility or an element already intrinsic to the primary rule of the prohibition of the use of force? How can one reconcile the legality of consensual use of force with the fact that the prohibition of the use of force is a peremptory norm from which no derogation is permitted? Characteristics of the prohibition of the use of force, including its peremptory character, also give rise to the dispute about whether a State can prospectively consent to the use of force via a treaty under which, when the circumstances the treaty provides for materialise, the consented State or States can intervene regardless of the wishes of the consenting State at the time of the intervention. The following parts of the chapter, respectively, deal with these questions. The final part examines conditions required for consent to be deemed legally valid.

2. Is consent a secondary rule or intrinsic to the primary rule itself?

Article 20 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) of the International Law Commission (ILC), which concerns the secondary rules

[5] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits [1986] ICJ Rep 14, para 246; See also Chapter 4, Section 2.2.1.
[6] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment [2005] ICJ Rep 168, paras 42-54; See also Chapter 4, Section 2.2.2.
[7] *Kariņš and ors v Parliament of Latvia and Cabinet of Ministers of Latvia* (Constitutional Review) 29 November 2007, Case No 2007-10-0102, para 25.6.
[8] See, for example, Ian Brownlie, *International Law and the Use of Force by States* (OUP 1963) 317; Terry D Gill, 'Military Intervention with the Consent or at the Invitation of a Government' in Terry D Gill and Dieter Fleck, *The Handbook of the International Law of Military Operations* (2nd edn, OUP 2015); See also US Department of Defence, *Law of War Manual* (June 2015, Updated December 2016) 45.

of State responsibility,[9] characterises 'consent by a State to the commission of a given act by another State' as a circumstance 'preclud[ing] the wrongfulness of that act in relation to the former State'.[10] The article aims to bring the principle of *volenti non fit injuria* into play in international law.[11] It applies to many cases in practice, ranging from the consent by a State to the conduct of investigations or inquiries by other States in its territory, to the entry of foreign troops thereto for the purposes of suppressing internal disturbances, revolts or insurrections.[12] What article 20 purports to say is that when a wrongfulness takes place because of an act not in conformity with a primary obligation such as the prohibition of the use of force, that wrongfulness will be precluded, that is, the primary rule will be inoperative or displaced for that particular instance, because of the legal value the secondary rules of State responsibility attaches to the consent of the State.[13] Thus, Special Rapporteur Robert Ago speaks of the 'consent of the *injured* State',[14] assuming that *prima facie* there is a violation of the law. Against the contrary view that the consent cannot be perceived as an 'exception', that is, it cannot be invoked as a secondary rule, he defends his position by explaining that the 'exceptionality' here is due to the fact that the consent renders an obligation ineffective for that particular occasion – without such consent, the obligation would bind the State and make the act not in conformity with itself wrongful. In this sense, it is not different from other circumstances precluding wrongfulness contained in the ARSIWA such as self-defence, *force majeure* or necessity.[15]

Contrary to the view adopted in the 1979 Commentary and Robert Ago's report, Special Rapporteur James Crawford argued that the consent was different from other circumstances precluding wrongfulness in the sense that it is part of the definition of the pertinent primary obligation.[16] If there would be some cases where the consent is not envisaged in the primary

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[9] See ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' UN Doc A/56/10 (2001) 31.
[10] ibid Article 20.
[11] ILC, 'Report of the Commission to the General Assembly on the Work of its Thirty-First Session' UN Doc A/CN.4/SER.A/1979/Add.1 (1979) 109, para 1; ILC, 'Eighth Report on State Responsibility by Mr. Roberto Ago, Special Rapporteur' UN Doc A/CN.4/318 and Add.1 to 4 (1979) 30.
[12] ILC, 'Draft Articles' (n 9) 72-3; ILC 'Report' (1979) (n 11) 110-1.
[13] ILC 'Report' (1979) (n 11) 107, para 3 and 109-10, paras 2-3; ILC, 'Draft Articles' (n 9) 73, para 2.
[14] ILC, 'Eighth Report' (n 11) 31, para 58 (emphasis added).
[15] ibid 35, para 67.
[16] ILC, 'Second Report on State Responsibility, by Mr. James Crawford, Special Rapporteur' UN Doc A/CN.4/498 and Add.1–4 (1999) 61-2, para 238; Similar concerns have been voiced by governments and members of the ILC during the preparatory works of the draft articles. See ILC, 'Comments and observations of Governments on part one of the draft articles on State responsibility for internationally wrongful acts' Doc

obligation itself, then the article on consent at least would have a limited scope of application. However, there were no such cases at least insofar as the examples given in the 1979 Commentary, such as the prohibition of the exercise of foreign jurisdiction on the territory of other States, or the prohibition of intervention and use of force, were concerned.[17]

Another point that differentiates consent from other circumstances, the Rapporteur argued, is that while the latter are something to be invoked when the act, the wrongfulness of which will be precluded, already is present, consent is something that must be given in advance. While such validly given consent suggests that the act, at the time of occurrence, is perfectly lawful, in other circumstances, one can hardly say that it is 'perfectly lawful' given that there exists an act inconsistent with an obligation, from which the State's responsibility does not arise because of being excused on account of those circumstances, such as necessity or *force majeure*.[18] Thus, Crawford proposed that the article must be deleted altogether from ARSIWA because of being outside the scope of the chapter on the circumstances precluding wrongfulness, and because including it in that chapter is to confuse the content of primary rules with the application of secondary rules of responsibility.[19]

Eventually, however, Crawford's proposal was not accepted. It was claimed that deletion of the article could have been perceived as 'the abrogation of an important principle' and, even though some important concerns were raised about its wording, no State so far had objected to its inclusion.[20] ARSIWA could regulate the consent as a circumstance precluding the wrongfulness in the same way as the Vienna Convention on the Law of Treaties (VCLT) regulated the principle *rebus sic stantibus*.[21] Its deletion would make States seek an implied consent from other States in justification of their acts, and the absence of clearly stated limits in such a consent would make way for interpretation with regard to these limits. Thus, it must be retained to prevent possible abuse and provide better protection, particularly in respect to

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A/CN.4/362 (1983) 2, para 3 (Czechoslovakia); ILC, 'Comments and observations received by Governments' Doc A/CN.4/488 and Add. 1–3 (1998) 130, para 1 (UK); ILC, 'Summary records of the meetings of the thirty-first session' Doc A/CN.4/SER.A/1979 (1979) 33-48.

[17] ILC 'Second Report on State Responsibility' (n 16) 62, para 240.

[18] ibid 62, para 239.

[19] ibid 62, para 241; On this debate, also see James Crawford, *State Responsibility: The General Part* (CUP 2013) 288-9.

[20] ILC, 'Report of the International Law Commission on the Work of its Fifty-First Session' UN Doc A/54/10 (1999) 75, paras 298 and 305.

[21] ibid 75, para 301; Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Article 62.

weaker States.[22] Crawford also, on balance, was open to the idea that its deletion would give a false impression.[23]

The article, thus, was retained mostly based on practical reasons, principally not to leave such an important legal principle – *volenti non fit injuria* – unregulated, thus giving rise to its abuse. Its retention is 'best explained as a pragmatic widening of the boundary that insulates secondary from primary rules'.[24] Without this distinction of primary and secondary rules, which led to the emergence of the category of the circumstances precluding wrongfulness, the ILC's 'codification effort would have lost much of its interest'. However, 'reality often rebels against classifications which are too rigid and that simple schemes may not always take into account all of the complexities of a topic'.[25]

It seems that this is what happened in the case of consent to intervention or the use of force, that is, reality defied the classification of consent as a secondary rule of responsibility. The fact that the consent is a matter of the primary rule, rather than being a secondary rule or an exception, is widely reflected in literature (despite the contrary views)[26] and difficult to argue against. Succinctly, as the International Law Association's report purported, State consent is a legal basis different from exceptions of self-defence and the UN Security Council authorisation. When the force is used based on these exceptions, in principle it remains a breach of the prohibition enshrined in article 2(4) but is allowed under international law. However, when the force is used with State consent, a breach of article 2(4) is beside the point *ab initio*.[27]

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[22] ILC, 'Report' (1999) (n 20) 75, para 302.
[23] ibid 75, para 305; On this debate see also Affef Ben Mansour, 'Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Consent' in James Crawford et al. (eds), *The Law of International Responsibility* (OUP 2010) 439-41.
[24] Crawford (n 19) 289.
[25] Eric David, 'Primary and Secondary Rules' in James Crawford et al. (eds), *The Law of International Responsibility* (OUP 2010) 31-32 showing that the classification of other circumstances such as self-defence and counter-measures was also problematic.
[26] See Florian Kriener, 'Invitation – Excluding *Ab Initio* a Breach of Art. 2 (4) UNCh or a Preclusion of Wrongfulness?' (2019) 79 ZaöRV 643; Federica Paddeu, 'Military Assistance on Request and General Reasons Against Force: Consent as a Justification for the Use of Force' (2020) 7 JUFIL 227 arguing that seeing consent as intrinsic to the prohibition implies that there is no general reason against force in international law, while the maintenance of international peace, a paramount purpose of the UN with which any use of force must be compatible, constitutes such a reason. Her analysis addresses only 'physical violence'. It excludes 'from consideration situations … such as joint military trainings and the operation of military bases on foreign territory'.
[27] ILA, 'Final Report on Aggression and the Use of Force' (Sydney Conference, 2018) 18.

This is understood from the wording of the provision. When a State consents to the use of force in its own territory, the 'international relations' stipulated in article 2(4) are not affected, because sovereign States are already entitled to dispose of their territory – an entitlement that naturally extends to the right to allow the conduct of foreign military operations in their territory.[28] As mentioned above, consenting to the use of force, or requesting military assistance from other States, is a sovereign right of States.[29] Therefore, one can also consider that deeming consent a secondary rule, that is regarding consensual uses of force as *prima facie* unlawful, would be an affront to States' sovereignty. It was also argued based on the text of article 2(4) that since the use of force with consent does not go 'against the territorial integrity or political independence' of the consenting State, consensual use of force falls outside the legal regime of *jus ad bellum*.[30]

While commentators mostly discuss the role of 'consent' in consensual 'use of force' with reference to the wording of article 2(4), one cannot assess the consent's role without having regard to the principle of non-intervention. As explained in the previous chapter, the unlawful use of force, first and foremost, is a violation of the principle of non-intervention.[31] To speak of a prohibited intervention, a State must be coerced on an issue on which it has the exclusive right to decide freely as part of its sovereign rights. Since the element of coercion does not exist in the case of consensual intervention, the intervention in question falls outside the prohibition. Thus, even speaking of 'intervention' is wrong insofar as it indicates an imposition of the will of one State upon another.[32]

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[28] Oliver Dörr and Albrecht Randelzhofer, 'Article 2 (4)' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (Volume I, 3rd edn, OUP 2012) 214, para 33; Also see Laura Visser, 'May the Force Be with You: The Legal Classification of Intervention by Invitation' (2019) 66 NILR 21, 39-42 after comparing four different approaches to consent – namely, the approach seeing consent as a circumstance precluding the wrongfulness; an exception; an element intrinsic to the phrase 'the territorial integrity and political independence' in Article 2(4); or an element intrinsic to the phrase 'international relations' in Article 2(4) – preferring the latest.

[29] See n 1 and the surrounding text.

[30] Max Byrne, 'Consent and the Use of Force: an Examination of 'Intervention by Invitation' as a Basis for US Drone Strikes in Pakistan, Somalia and Yemen' (2016) 3 JUFIL 97, 99-100; Patrick M Butchard, 'Territorial Integrity, Political Independence, and Consent: the Limitations of Military Assistance on Request under the Prohibition of Force' (2020) 7 JUFIL 35, 40-43 and 66-70.

[31] See Chapter 1, Section 4.2.

[32] Ann Van Wynen Thomas and A. J. Thomas, *Non-Intervention: The Law and its Impact in the Americas* (Sothern Methodist University Press 1956) 91.

Indeed, the Institute of International Law, in line with this understanding, sees the term 'intervention by invitation' as a *contradiction in se*, arguing that supporting a government upon its request is not an 'intervention' in 'the usual sense of international law'. Based on this reasoning, in addition to the vagueness of the term 'intervention', its report, eventually, for the resolution it aims to adopt, replaces the term 'intervention by invitation' with the 'military assistance on request'.[33]

However, it should be noted that the term 'intervention by invitation' is already settled in literature, mostly denoting 'military intervention by foreign troops in an internal armed conflict at the invitation of the government of the State concerned' while, in a wider sense, also encompassing non-military interventions.[34] According to the reasoning that the term 'intervention by invitation' is a *contradiction in se,* one should also not use the other equally settled phrases such as 'consent to intervention' or 'consent to use of force'. However, there seems to be no harm in employing such terminology as long as it is appreciated that the word 'intervention' could also be used in the meaning as it is used in the expressions of 'lawful intervention' or 'lawful use of force'. Otherwise, these expressions should also be considered contradictory, and their usage should be abandoned.

Returning to the main discussion, one cannot but ask the question of whether this debate – whether consent is a secondary rule the invocation of which precludes wrongfulness, or intrinsic to the primary rule of non-intervention or non-use of force itself – has any practical utility. After all, under both understandings, consensual interventions in principle are deemed lawful. One practical difference that comes to mind is that if the issue was brought up before a tribunal, the tribunal would first determine whether the 'state has acted in contravention of an international obligation or not, using the primary rules of international law'. If the State appears

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[33] IIL, 'Intervention by Invitation' (Rapporteur: Gerhard Hafner, Session of Naples, 2009) 372-5, paras 21-7; IIL, 'Military Assistance on Request' (Resolution, Session of Rhodes, 2011); The term afterwards is employed by other commentators in the scholarship. For example, see Erika de Wet, *Military Assistance on Request and the Use of Force* (OUP 2020) 16 adopting the term with reference to the report's reasoning.; Also see Agata Kleczkowska, 'The Misconception About the Term "Intervention by Invitation"' (2019) 79 ZaöRV 647 criticising the usage of the term 'intervention by invitation' for being confusing and not being part of the language of the States, and arguing in favour of the usage of more descriptive terms.

[34] Georg Nolte, 'Intervention by Invitation' *Max Planck Encyclopedias of Public International Law* (January 2010) para 1 <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1702?prd=EPIL>; See also Visser (n 28) 26-7 and Laura Visser, 'What is in a Name? The Terminology of Intervention by Invitation' (2019) 79 ZaöRV 651 arguing that because the term 'intervention by invitation' connotes military force, 'use of force by invitation' would be a more fitting term.

to be in breach of the obligation, then, in the second phase, it would determine 'the immediate legal consequences that are to ensue from this breach, using the law of state responsibility'. One difference that articles 20-25 of ARSIWA, which include consent as a circumstance precluding wrongfulness, therefore, makes is that they 'pertain to a second stage of the judicial decision-making process'.[35] This procedural difference arguably cannot be deemed to have an important practical implication on the legal justification of consensual interventions.

Another potential practical relevance of the debate could be that if consent was deemed as an exception to the rule, it would be expected from a State accused of violating the prohibition of the use of force to bear the burden of proof with respect to consent before a tribunal.[36] However, 'international courts and tribunals are often reluctant to explicitly assign burdens of proof'.[37] Indeed, in the only case where the ICJ has to assign the existence of consent, namely, *DRC v Uganda*, the Court remained silent on the issue.[38]

Paddeu argues that a difference if the consent was deemed extrinsic to the principle and thus considered 'defence' to be invoked against a *prima facia* violation of article 2(4) would be that States would be more inclined 'to offer justifications for their behaviour so as to clarify that they are acting within the boundaries of the law'.[39] She counts this as an 'important practical consequence'[40] and argues that seeing consent as a 'defence (justification)' comports with practice as it is prevalent in practice that States invoke the territorial State's consent to justify their interventions, while they do not need to do so under the view seeing consent as intrinsic to the principle.[41] However, the debate still seems to resemble more an academic, and even semantic, problem rather than one with important consequences in practice. If consent is intrinsic to the principle and thus consensual interventions are *ab initio* legal, it does not necessarily mean that consent is not a 'justification' intrinsic to the principle itself, and there

[35] Ulf Linderfalk, 'State Responsibility and the Primary-Secondary Rules Terminology –The Role of Language for an Understanding of the International Legal System' (2009) 78 ActScandJurisGent 53, 68-72 arguing that some parts of the ARSIWA 'still pertain to the first stage of that process' and that, because of this and other reasons, primary-secondary rules terminology is of little importance and should not be used anymore.
[36] See Paddeu (n 26) 233-4.
[37] ibid 234.
[38] ibid.
[39] Paddeu (n 26) 269; Also see Kriener (n 26) 645 arguing that 'qualifying an invitation as a preclusion of wrongfulness is pivotal for the implementation of restrictions on an intervening state', as according to the ICJ, use of force is '*prima facia* illegal unless justified'. Without the obligation to justify, the State would disregard the legal limitations on intervention by invitation.
[40] Paddeu (n 26) 269.
[41] ibid 256-263.

is nothing more normal for States than to attempt to publicly justify an open act of force. Moreover, otherwise, as a legal matter, as argued below, it is accepted that States can keep consent secret and thus do not have to publicly justify consensual interventions.[42]

3. Consent and the peremptory character of the prohibition of the use of force

Being a legal system, international law is susceptible to the inclusion of some norms hierarchically higher than others. Peremptory norms of international law (*jus cogens*) which made an entrance into positive law first through the Vienna Convention of 1969, are such norms enjoying a superior or special status. They are norms 'from which no derogation is permitted'.[43] In case of a conflict between them and ordinary obligations of States, they prevail. To deal with such implications of *jus cogens*, the ILC added to Chapter V of ARSIWA, which regulates the circumstances precluding wrongfulness, a saving clause (article 26). The clause recognises the logical conclusion that nothing in that chapter can hinder the wrongfulness of any act inconsistent with an obligation arising under *jus cogens*.[44] The saving clause, at first sight, entails that the prohibition on the use of force being *jus cogens* a State, by consent, cannot dispense another State from complying therewith; that is, a State cannot consent to the use of force by other States in its territory. However, the Commentary to article 26 acknowledges 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.'[45]

Similarly, Special Rapporteur Dire Tladi in a recent ILC report on *jus cogens* recognises that although article 26 prevents reliance on one of the circumstances contained in chapter V of ARSIWA, 'to the extent that the scope of a norm of *jus cogens* itself incorporates a ground precluding wrongfulness, the existence of such a ground would be relevant in determining whether that *jus cogens* norm has been breached'.[46] For example, it seems that, in the face of the saving clause in article 26, a State using force in self-defence cannot rely on article 21

[42] Chapter 2, Section 5.2.2.
[43] VCLT (n 21) Article 53.
[44] ILC, 'Draft Articles' (n 9) Article 26.
[45] ibid Commentary to Article 26, para 6.
[46] ILC, 'Third Report on Peremptory Norms of General International Law (*Jus Cogens*) by Dire Tladi, Special Rapporteur' UN Doc A/CN.4/714 (12 February 2018) 31, para 81.

regulating 'self-defence' as a circumstance precluding the wrongfulness. However, use of force in self-defence cannot be deemed in violation of the peremptory prohibition of the use of force, as the right to self-defence clearly is relevant to the prohibition.[47] 'Similarly, in *some cases*, consent by a State to the presence of the military of another State on the former's territory may exclude wrongfulness of an apparent breach of a peremptory norm.'[48] The report thus concludes that admittedly some issues relate more to the scope of the *jus cogens* norm in question, rather than the circumstances precluding the wrongfulness found in the ARSIWA and, if deemed appropriate, an illustrative list of such situations could be drawn up.[49]

Thus, the understanding undertaken in the commentary to article 26 of ARSIWA and the report of Tladi is that the consensual use of force is not a derogation from the peremptory norm of the prohibition of the use of force because consent, as other justifications such as self-defence, is relevant to the peremptory norm itself.[50] As for peremptory norms other than the prohibition of the use of force, however, the question of in which one of them the consent will be relevant remains open to discussion. According to Abass, '[w]hereas such obligations as torture, slavery, and genocide cannot generally be precluded by consent, it is submitted that the prohibition of the use of force does not *invariably* fall into this category'.[51]

In any event, even if the peremptory character of the principle of non-use of force had not encompassed the principle's justificatory factors such as self-defence and consent, in literature, the main reason why 'consent' does not lead to any derogation from the peremptory prohibition seems to be different. As argued above, when consented the prohibition does not arise by

[47] ibid 31, para 81; In fact, to some, the right to self-defence itself is a *jus cogens* norm. See ILC, 'Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law' (2006) Vol. II, Yearbook of the International Law Commission 189; AndrÉ De Hoogh, '*Jus Cogens* and the Use of Armed Force' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 1172-3.
[48] ibid 31, para 81.
[49] Ibid.
[50] For the debate on the scope of the peremptory prohibition of the use of force, see Hoogh (n 47) 1165-75; Natalino Ronzitti, 'Use of Force, Jus Cogens and State Consent' in Antonio Cassese (ed), *The Current Legal Regulation of the Use of Force* (Martinus Nijhoff Publishers 1986) 150 stating that 'the peremptory rule banning the use of force does not exactly coincide with the corresponding rule contained in Art. 2(4) of the U.N. Charter'.
[51] Ademola Abass, 'Consent Precluding State Responsibility: A Critical Analysis' (2004) 53 ICLQ 211, 225 (emphasis in the original).

definition; the peremptory principle of non-use of force does not apply, or come to fora, in cases where a State allows another State to use force in its territory.[52]

4. Treaty-based prospective consent

Even though in principle no problem arises when using force based on *ad hoc* consent, the legality of the use of force based on consent given *ex ante* via treaty proves controversial. Through such a treaty, a State gives another State or a regional organisation the right to intervene in its internal affairs in future when the circumstances identified in the treaty materialise, with disregard to its will at the time of the intervention.

Some commentators claim that such prospective consent must be considered invalid, that is, a State party to a treaty authorising intervention in advance can withdraw therefrom, or revoke its consent given therein, at any time even in contravention of the withdrawal procedure identified in the treaty. According to this view, consensual interventions cannot take place without an *ad hoc* consent.[53] The reasons given for the invalidity of treaty-based prospective consent vary: the prohibition of the use of force being a *jus cogens*, it cannot be derogated by a treaty; such consent would be against the purposes of the UN Charter, including the maintenance of international peace and security, with which use of force must be consistent as per article 2(4); in the same manner, such consent would be against the principles of international law such as the sovereign equality and political independence of States, and the right to self-determination of peoples; and, finally, such consent given to a regional organisation would violate article 53 of the UN Charter, which prohibits 'enforcement actions' by regional organisations without UN Security Council authorisation.[54]

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[52] See ibid 224; Dörr and Randelzhofer (n 28) 231-2; Sondre Torp Helmersen, 'Prohibition of the Use of Force as *Jus Cogens*: Explaining Apparent Derogations' (2014) 61 NILR 167, 177-8; Alexander Orakhelashvili, 'Changing Jus Cogens through State Practice? The Case of the Prohibition of the Use of Force and its Exceptions' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 168.

[53] See Orakhelashvili (n 52) 167; Olivier Corten, *The Law Against War* (Translated by Christopher Sutcliffe, Hart Publishing 2010) 254-9; Brad R Roth, *Governmental Illegitimacy in International Law* (OUP 2000) 189-92; Brad R Roth, 'The Illegality of "Pro-Democratic" Invasion Pacts' in Gregory H Fox and Brad R Roth, *Democratic Governance and International Law* (CUP 2000) 329; IIL, 'Military Assistance on Request' (n 33) Articles 4(3) and 5; Yoram Dinstein, *Non-International Armed Conflicts in International Law* (CUP 2014) 81-2; Butchard (n 30) 54-5; Agata Kleczkowska, 'The Meaning of Treaty Authorisation and *Ad Hoc* Consent for the Legality of Military Assistance on Request' (2020) 7 JUFIL 270; De Wet (n 33) 167-80.

[54] See the sources in ibid.

On the other hand, according to a view – which Wippman calls the 'freedom-to-contract model'[55] – since States under their sovereign rights already are free to bind themselves with treaties that may establish limitations on their future actions, there is no harm for them to consent to intervention prospectively by treaty. Such consent actually is a manifestation of their sovereignty, and – just as the case in *ad hoc* consent – it rules out the applicability of the peremptory prohibition of the use of force. It thus also does not constitute 'enforcement action' under article 53 of the UN Charter by not being against article 2(4) in the first place.[56]

Indeed, the law on the use of force and the law of treaties are different fields of international law. If consent is given via a treaty, the determination of whether that State's consent exists at the time of the intervention can be made only under the law of treaties. If a State at the time of the intervention cannot withdraw from the treaty authorising the intervention based on the reason that it would contravene the withdrawal procedure established in the treaty, its consent to intervention would be legally deemed to exist.[57] Since its consent would exist at the time of the intervention, the prohibition on the use of force would not apply, and thus its peremptory character would not constitute a barrier.

In accordance with the general principle of law recognising that one who can do the greater certainly can do the lesser, it has been argued that if a State is able to surrender its sovereignty altogether by merging with another State, it certainly can relinquish only part of it by waiving the right to non-intervention owed to itself by other States.[58] Indeed, the fact that once the union of two States is materialised the consent of the ceding State cannot be revoked, that is, the separation cannot happen only at the request of the State that once agreed to cede, shows that

[55] David Wippman, 'Treaty-Based Intervention: Who Can Say No?' (1995) 62 UChiLRev 607, 616.
[56] See Oona A Hathaway and others, 'Consent-Based Humanitarian Intervention Giving Sovereign Responsibility Back to the Sovereign' (2013) 46 CornellIntlLJ 499, 558-62; Peter E Harrel, 'Modern-Day "Guarantee Clauses" and the Legal Authority of Multinational Organizations To Authorize the Use of Military Force' (2008) 33 YaleJIntlL 417, 429-32; John Mark Iyi, *Humanitarian Intervention and the AU-ECOWAS Intervention Treaties Under International Law* (Springer 2016) 251-292.
[57] For the rules on withdrawal from treaties, see VCLT, (n 21) Articles 44 and 54-56.
[58] Tom Farer, 'A Paradigm of Legitimate Intervention' in Lori Fishler Damrosch (ed) *Enforcing Restraint: Collective Intervention in Internal Conflicts* (1993 Council on Foreign Relations Press) 331-2; Thomas and Thomas (n 32) 92 and 95-6 defending the validity of such treaties with the same reasoning. However, the authors go on to say that if a State intervenes in another State in contravention of its present will, it constitutes an illegal intervention even if the target State withdrew its consent to intervention in violation of the treaty authorising the intervention.

in the exercise of its sovereignty a State can bind its future in regard to an issue concerning the core of its sovereignty and independence with its valid consent.[59]

It has been claimed that it was recognised by the ICJ in *DRC v Uganda* that consent to intervention in a non-international armed conflict 'can always be revoked', even if it contravenes the conditions contained in the treaty through which the consent is given.[60] However, this does not seem to be a correct reading of the case. The Court first clarified that the consent of the DRC was not based on the Protocol in question signed between the DRC and Uganda. The consent rather was given informally antedating that Protocol. Following up this clarification, the Court then stated that such informally given 'consent could thus be withdrawn at any time by the Government of the DRC, without further formalities being necessary'.[61] It was because of 'reasons given above' that the Court rejected the Ugandan argument that any withdrawal of consent must require a formal denunciation of the Protocol.[62] The Court, thus, by no means recognised that every type of consent, be it granted formally or informally, can be informally withdrawn at any time. What the Court simply opined is that informally given consent can be revoked informally. Thus, in fact, the Court implied that if the consent had been given by the Protocol as Uganda claimed, its revocation could have required a procedure pursuant to conditions contained in the Protocol.[63]

A well-known example of treaties authorising intervention in advance in the UN Charter era is the 'Treaty of Guarantee' signed by Cyprus on the one side and the guaranteeing States Greece, Turkey and the UK on the other.[64] The treaty aimed to maintain the established constitutional power-sharing arrangement concluded between Greek and Turkish communities in Cyprus and gave a right to the guarantor States to 'take action' in the event of a violation of the treaty to

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[59] But see Roth, 'The Illegality of "Pro-Democratic" Invasion Pacts' (n 53) 331 arguing that 'Sovereignty is not a continuum'. A sovereign State 'can either relinquish its political independence and forfeit its standing in the international system, or it can maintain its political independence, and with it its right in the future to resist any uses of force to which it does not contemporaneously consent'.
[60] Dinstein (n 53) 81-82; Similarly, see De Wet (n 33) 170, fn 116.
[61] *DRC v Uganda* (n 6) paras 46-8.
[62] ibid paras 50-1.
[63] See also Hathaway (n 56) 561, fn 352.
[64] Treaty of Guarantee (adopted 16 August 1960, entered into force 16 August 1960) 382 UNTS 3; Another well-known example to such treaties is the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal (adopted 7 November 1977, entered into force 1 October 1979) 1161 UNTS 177, Condition 1 giving the US the right to use force if necessary to reopen or restore the operations of the Panama Canal.; Also see Louis Henkin, 'The Invasion of Panama under International Law: A Gross Violation' (1991) 29 ColumJTransnatlL 293, 302-3 examining the 1989 US Intervention in Panama under this treaty.

re-establish the state of affairs protected by the treaty.[65] When a *coup d'état*, believed to have been instigated by Greece, took place in Cyprus in July 1974 with an ultimate aim of Enosis (union of Cyprus with Greece) in contravention of this treaty, Turkey invoked its right to take action under the treaty.[66] After Turkey's military intervention, the UN Security Council passed a resolution calling for a ceasefire between the fighting parties and demanding 'an immediate end to foreign military intervention … that is in contravention of' the principles of sovereignty, independence and territorial integrity, while expressing its concern in the Preamble 'about the necessity to restore the constitutional structure of the Republic of Cyprus, established and guaranteed by international agreements'.[67] The validity of the treaty was not assessed by States during the debate preceding the resolution, although some expressed their disapproval of military actions.[68]

The Council of Europe's Parliamentary Assembly appeared to recognise the validity of the treaty in the resolution in which it expressed its regret over 'the failure of the attempt to reach a diplomatic settlement which led the Turkish Government to exercise its right of intervention in accordance with' the treaty.[69] The Security Council reiterated its call for a ceasefire and demand for an end to intervention in the face of the ongoing conflict,[70] and on 16 August 1974 it recorded '[i]ts formal disapproval of the unilateral military actions undertaken against the Republic of Cyprus'.[71] A similar attitude was shown by the UN General Assembly.[72]

The UN Security Council had been seized of the issue also a decade ago when Turkey similarly invoked the treaty. Cyprus at the time argued before the Council that if the Treaty of Guarantee is interpreted as authorising the use of force, the relevant provision should be deemed void, as

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[65] ibid Article 4.
[66] For an in-depth discussion of the issue including Turkey's further actions, which led to the partition of the island and establishment of a Turkish Cypriot State, see David Wippman, 'International Law and Ethnic Conflict on Cyprus' (1996) 31 TexIntlLJ 141; Zaim M Necatigil, *The Cyprus Question and the Turkish Position in International Law* (2nd edn, 1993 OUP).
[67] UNSC Res 353 (20 July 1974) UN Doc S/RES/353.
[68] See Louise Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government' (1986) 56 BYIL 189, 248-9.
[69] Council of Europe, 'Resolution 573 (1974) on the Situation in Cyprus and in the Eastern Mediterranean Area' (Parliamentary Assembly, 29 July 1974) Article 3.
[70] UNSC Res 354 (23 July 1974) UN Doc S/RES/354; UNSC Res 355 (1 August 1974) UN Doc S/RES/355; UNSC Res 357 (14 August 1974) UN Doc S/RES/357; UNSC Res 358 (15 August 1974) UN Doc S/RES/358
[71] UNSC Res 360 (16 August 1974) UN Doc S/RES/360.
[72] UNGA Res 3212 (XXIX) (1 November 1974).

it contravenes a *jus cogens* norm.[73] The UK representative defended the validity of the treaty by arguing that its purposes do not contravene article 2(4) of the UN Charter and that 'a right of intervention' is provided for only when circumstances identified in the treaty materialise.[74] The Council abstained from making a judgment on the validity of the treaty, but took into consideration 'the positions taken by the parties in relation to the treaties signed at Nicosia on 16 August 1960'.[75] It later appealed to the government of Turkey to cease using force against Cyprus, and to the government of Cyprus to cease firing.[76] The Council at the time had taken this decision by considering a number of factors such as whether Turkey's actions aimed to re-establish the *status quo* identified by the Treaty of Guarantee and were purported to prevent further repressive measures undertaken against Turkish Cypriots, and Turkey had mostly complied with the decision.[77] During the debates concerning the resolution, while some States expressed support for Cyprus and denied Turkish intervention, the majority remained neutral and did not make a legal assessment.[78]

In sum, the UN Security Council and the General Assembly disapproved of military interventions undertaken by Turkey, but not necessarily because the Treaty of Guarantee it invoked was invalid, nor was there clear support among States for such a view. Therefore, in light of this case the legality of treaty-based authorisations of use of force at best remains controversial.

Today most known examples of treaties authorising intervention *ex ante* are to be found in the context of regional organisations. The 1999 Lomé Protocol adopted by the Economic Community of West African States (ECOWAS) mandates its Mediation and Security Council to take decisions with regard to peace and security in member States. The powers of the Council include to 'authorise all forms of intervention and decide particularly on the deployment of

[73] UNSC Verbatim Record (27 February 1964) UN Doc S/PV.1098, paras 94-8.
[74] ibid paras 66-8.
[75] UNSC Res 186 (4 March 1964) UN Doc S/RES/186; See also Egon Schwelb, 'Some Aspects of International *Jus Cogens* as Formulated by the International Law Commission' (1967) 61 AJIL 946, 952-3.
[76] UNSC Res 193 (9 August 1964) S/RES/193.
[77] See Thomas Ehrlich, 'Cyprus, the "Warlike Isle": Origins and Elements of the Current Crisis' (1966) 18 StanLRev 1021, 1077-8.
[78] See Agata Kleczkowska, 'The Meaning of Treaty Authorisation' (n 53) 6, 275.

political and military missions'.[79] It can authorise intervention, both in inter-State conflicts, and

> [i]n case of internal conflict: (a) that threatens to trigger a humanitarian disaster, or (b) that poses a serious threat to peace and security in the sub-region; In event of serious and massive violation of human rights and the rule of law. In the event of an overthrow or attempted overthrow of a democratically elected government; Any other situation as may be decided by the Mediation and Security Council.[80]

Likewise, the Constitutive Act of the African Union (AU) gives the AU the right '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'.[81] Accordingly, once the circumstances set out in these agreements have been met, these organisations can intervene regardless of the consent of the government of the State party at the time of the intervention. These organisations, moreover, do not condition their intervention upon a UN Security Council authorisation. While the mentioned ECOWAS Protocol only stipulates that it shall 'inform' the UN of its military actions,[82] the AU Peace and Security Protocol pledges that in the fulfilment of its mandate it shall 'cooperate and work closely' with the UN Security Council.[83]

Because no intervention that exclusively relies on these provisions has yet been carried out, no proper opportunity has arisen to test their validity in practice. However, the AU once attempted to militarily intervene during the conflict in Burundi in 2015 when its President attempted to seek a third term of office.[84] The AU Peace and Security Council authorised the deployment of military forces to the country and decided, 'in the event of non-acceptance of the deployment of' the force by Burundi, 'to recommend to the Assembly of the Union, in accordance with the powers which are conferred to Council … the implementation of article 4 (h) of the Constitutive

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[79] Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (10 December 1999) ECOWAS Doc A/P.1/12/99, Article 10(2)(c).
[80] ibid Article 25.
[81] Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) 2158 UNTS 3, Article 4(h).
[82] Protocol Relating to the Mechanism for Conflict Prevention (n 79) Article 52.
[83] Protocol Relating to the Establishment of the Peace and Security Council of the African Union (adopted 9 July 2002, entered into force 26 December 2003) Article 17(1).
[84] See De Wet (n 33) 173.

Act relating to intervention in a Member State in certain serious circumstances'.[85] It also requested 'the UN Security Council to adopt, under chapter VII of the UN Charter, a resolution in support of the present communiqué'.[86] Except for a few, no member State criticised planned intervention on legal grounds, although there were reservations by some States on other grounds.[87] Eventually, the intervention did not materialise, as the AU Peace and Security Council considered that the deployment of forces would be premature.[88]

While in this instance the AU Peace and Security Council requested UN Security Council authorisation under chapter VII of the UN Charter, it did not make its authorisation of military deployment conditional upon this, nor did it make its authorisation conditional upon a contemporaneous consent from the Burundian government. Therefore, this instance – though not unequivocally, as the intervention did not materialise – indicates the acceptability by a group of States of a military intervention based on an *ex ante* consent given via a treaty.[89]

The view claiming the invalidity of consent given in advance is so far-fetched that the relevant provision contained in the Constitutive Act of the AU ratified by 55 States[90] must be deemed invalid. It is not known that any individual State or the UN challenged these treaties in a significant way.[91] States adopt these treaties and, even though limited and inconclusive, State practice, as shown, militates in favour of the validity of treaty-based *ex ante* consent.[92] The question is how to reconcile this reality with the above-mentioned concerns, most importantly, the non-conformity of such treaties with the purposes of the UN Charter, which include the

[85] AU Peace and Security Council, 'Communiqué' (17 December 2015) PSC/PR/COMM.(DLXV) Articles 13(a)(i) and 13(c)(iv); also see De Wet (n 33) 173.
[86] ibid Article 15.
[87] See De Wet (n 33) 173.
[88] See ibid 173.
[89] But see De Wet (n 33) 179 arguing that 'While the post-Cold War practice in this regard is limited', the mentioned AU and ECOWAS clauses 'have in practice been interpreted and applied in line with this customary right of states to withdraw prior consent to forcible measures at any time'. She argues this way apparently against the backdrop of the fact that in the current African State and organisation practice no intervention took place based on these clauses.
[90] For the list of ratifying countries, see AU, 'List of Countries Which Have Signed, Ratified/Acceded to the Constitutive Act of the African Union' (15 June 2017) <https://au.int/sites/default/files/treaties/7758-sl-constitutive_act_of_the_african_union_2.pdf>.
[91] David Wippman, 'Pro-Democratic Intervention' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 814.
[92] On practice further see Harrel (n 56) 432-43 examining how relevant 'treaty provisions have been used to justify' interventions and showing that States 'routinely cite even weak treaty language as providing legal authority for their actions'.

maintenance of international peace and security, and respect for the political independence of States, the principle of sovereign equality and the self-determination of peoples.

In consideration of this, it would be apt to argue that the validity of a prospective consent should be assessed on a case-by-case basis; such consent should be deemed valid to the extent that it conforms to the purposes of the UN Charter. The mentioned AU treaty, for example, authorises the AU Assembly to intervene 'in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity'.[93] This provision mirrors the sovereign responsibility of States to protect their 'populations from genocide, war crimes, ethnic cleansing and crimes against humanity', endorsed in the UN General Assembly's 2005 World Summit Outcome resolution.[94] As such it could be interpreted as entrenching States' sovereignty – sovereign responsibility – rather than limiting it. The said ECOWAS Protocol could also be considered in the same vein, as the circumstances it formulates relate to the protection of populations from atrocities.[95]

However, there would be a problem with respect to the ECOWAS Protocol, as it also stipulates that 'all forms of intervention' can take place also in 'any other situation as may be decided by the Mediation and Security Council'. Such a blanket rule giving almost unlimited authority to the organisation could be regarded as encroaching on the sovereignty of the States parties, and thus unlawful. However, it should be noted that the interpretation of this provision, for example, based on its object and purpose, certainly matters as far as its legality is concerned.

Along the same line of argument, a treaty enforcing a consociational formula[96] could be considered conforming with the right to self-determination of the people and thus lawful. Such treaties formulate a power-sharing arrangement between two different communities, or for two different people for that matter, in a State, as in the above-mentioned Treaty of Guarantee regarding Cyprus. They are signed in the interests, and with the agreement, of the sub-

[93] Constitutive Act of the African Union (n 81) Article 4(h).
[94] 2005 World Summit Outcome, UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1, para 138.
[95] For a similar argument for AU and ECOWAS agreements, see Hathaway (n 56) 555-7 also accounting the advantages and drawbacks of concluding treaties authorising intervention in advance through regional organisations.; Also see Eliav Lieblich, *International Law and Civil Wars: Intervention and Consent* (Routledge 2013) 201 arguing that these two African agreements could be reconciled with the UN Charter 'if we adopt an approach according to which when a government fails to exercise effective protection, it suffers the sovereign power to withdraw previous consent given in the context of forward-looking intervention treaties'.
[96] On this see Roth, 'The Illegality of "Pro-Democratic" Invasion Pacts' (n 53) 341.

communities of the relevant State that the unitary will of the State will exist as long as the established power-sharing arrangement remains intact. When one sub-community overtakes the power in contravention of the arrangement, that community could be said to lack the authority to exercise sovereign rights on behalf of the State. Thus, when a foreign intervention to re-establish the state of affairs envisaged in such a treaty materialises, it could be said that it does not impact on the sovereign will.[97]

In conclusion, a treaty provision authorising the use of force in advance in the affairs of a State party does not always conflict with the purposes of the UN. To the extent that it does not conflict with these purposes, it should be considered lawful. What is prohibited in article 2(4) is the use of force 'inconsistent with the Purposes of the United Nations'.[98] When the circumstances specified in such a treaty materialise, the intervention in pursuance of the treaty can legally take place regardless of the wishes of the government at the time of the intervention, as long as the State's consent can be said to exist under the law of treaties. Such circumstances could relate to or could emerge during a civil war. In such scenarios, the usual legal problems that arise on the issue of intervention with *ad hoc* consent in civil wars, which actually arise because of the potential inconsistencies of such interventions with the purposes of the UN, such as the right to self-determination of peoples, as will be seen in chapter 4, will be evaded.

5. Validity and limits of the consent

The legality of a consensual intervention ultimately depends on the validity, and whether the intervening State observes the limits, of the consent given. Among the prerequisites for the validity of consent are that it must be freely given, clearly established and granted by an organ of the State authorised to do so.[99]

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[97] See ibid contemplating this example but arguing that such 'arrangements are often miserably unjust, if not at the outset, then down the road'.; Also see David Wippman, 'Pro-Democratic Intervention by Invitation' in Gregory H Fox and Brad R Roth, *Democratic Governance and International Law* (CUP 2000) 318 arguing that while the communities jointly could revoke consent given via such treaties regardless whether the treaty allows it or not, one sub-community cannot unilaterally revoke consent at the time of intervention.

[98] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16, Article 2(4).

[99] ILC, 'Draft Articles' (n 9) 73, paras 4-6.

5.1. Consent to be given freely

As noted in the Commentary to ARSIWA, '[c]onsent must be freely given' and the law of treaties provides relevant guidance to asses in a given case whether consent is expressed freely.[100] According to the Vienna Convention on the Law of Treaties, consent to a treaty may be vitiated in consequence of a fault, such as error, fraud, corruption or coercion of a representative of the State, or coercion of the State itself by the threat or use of force.[101] Therefore, depending on its specific circumstances, one of these faults could be invoked as a ground for the invalidity of a given consent.

Thus, in 2007, in a case before the Latvian Constitutional Court the coercion of the consenting State was invoked to proclaim the consent invalid. The issue that seized the Court was the consent given by the Latvian government to the Soviet Union on 17 June 1940 to the deployment of Soviet troops to the territory of Latvia. The Court dismissed the legal validity of this consent on the ground that it had been obtained as the result of a threat against Latvia. The Court decided that to determine the existence of threat the historical context must be taken into account. The Soviet Union had already used force against other Baltic countries shortly before its ultimatum to the Latvian government. Simultaneously with this ultimatum, it had stationed its troops in Lithuania without its President's consent and requested Latvia to go through a governmental change in contravention of the prohibition of intervention in the internal affairs of other States. The Court even took into consideration the events subsequent to the deployment and concluded that even if Latvia had rebuffed the Soviet request, it would not prevent the stationing of Soviet troops in its territory. It consequently held that Latvian consent was vitiated by threat and thus the Soviet deployment of troops constituted an act of aggression against Latvia.[102]

This case demonstrates that a State could be coerced to consent to a foreign military intervention in various forms that can hardly be conceptualised. Every case may have its own particular circumstances. In the mentioned case, for example, there was no verbal threat or force, but the historical events in the region, the accompanying interference in the internal

[100] ibid 73, para 6.
[101] VCLT (n 21) Articles 48-52.
[102] *Kariņš and ors v Parliament of Latvia and Cabinet of Ministers of Latvia* (n 7) para 25.6.

affairs of the host State, and the potential consequences of the refusal to give consent as a whole were enough to determine the existence of a threat that vitiates consent.

The importance of the factual circumstances and context surrounding the given consent was also at the front in the ICJ's 2019 Advisory Opinion on the Separation of the Chagos Archipelago from Mauritius in 1965. The Court '[h]aving reviewed the circumstances in which the Council of Ministers' of Mauritius, then a colony of the UK, 'agreed in principle to the detachment of the Chagos Archipelago' to the UK, considered that 'this detachment was not based on the free and genuine expression of the will of the people concerned'. The Court came to this conclusion after taking into account a report which, it quoted, suggested that the Constitution of Mauritius does 'not allow the representatives of the people to exercise real legislative or executive powers, and that authority is nearly all concentrated in the hands of' the UK government. The Court also was of the view that 'heightened scrutiny should be given to the issue of consent in a situation where a part of a non-self-governing territory is separated to create a new colony'.[103] Even though this was not a case concerning a scenario in which a fully independent State consents to the use of force by another State, since the act consented to – ceding territory – concerned the core of sovereignty, one may draw lessons by way of comparison. Accordingly, in a specific case, the relationship between the host and the intervening State, such as the domination of the first by the latter, can warrant a fault vitiating consent depending on the circumstances.

5.2. Consent to be clearly established and actually expressed

Another requirement for the validity of consent is that it must be 'clearly established' and 'actually expressed by the State rather than merely presumed on the basis that the State would have consented if it had been asked'.[104] The point that the consent must be 'actually expressed' has been emphasised in practice, for example, by Iraq when its Minister for Foreign Affairs reaffirmed that they had 'requested' military assistance from the US-led international coalition

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[103] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95, para 172; For a detailed analysis of the Court's decision on Mauritius's consent, see Mohor Fajdiga and others, 'Heightened Scrutiny of Colonial Consent According to the Chagos Advisory Opinion: Pandora's Box Reopened?' in T Burri and J Trinidad (eds), *The International Court of Justice and Decolonization: New Directions from the Chagos Advisory Opinion* (CUP 2020) (forthcoming).
[104] ILC, 'Draft Articles' (n 9) 73, para 6.

in the fight against ISIL with their 'express consent'.[105] However, the idea that the consent must not be 'presumed' does not mean that it cannot be implicit or tacit and, thus, also informal.[106] In *DRC v Uganda*, for example, the ICJ believed that 'the absence of any objection to the presence of Ugandan troops in the DRC' and the relevant practice showed that the DRC consented to the presence of these troops.[107] According to the Court, the withdrawal of such consent also requires no formality and can take place at any time.[108] This, however, does not mean that consent given by a treaty also can be revoked at any time, without requiring any formalities.[109]

However, in practice a State planning to intervene in another State with its consent may prefer to put forward a condition of formality out of extra-legal concerns. The UK Foreign Affairs Committee, for example, suggested to the UK House of Commons that British troops should not be dispatched to Libya until 'a formal request' is made.[110]

The Institute of International Law's resolution on 'military assistance on request' contains a provision entailing to notify the UN Secretary-General of 'any request that is followed by military assistance'.[111] It mirrors article 51 of the UN Charter, which requires member States to report to the UN Security Council when resorting to measures under their right to self-defence.[112] Nolte suggests that such a formality which helps to draw international attention to the intervention may seem counter-productive for States.[113] In any event, this provision can only be part of *lex ferenda* considering that, as illustrated above, there is no requirement of any formality in issuing consent in positive law. Even though in practice, as could be seen from the account of cases of interventions by invitation in chapter 6, it is prevalent among States to publicise their request in letters to the UN, it is not a consistent practice and there is no belief by States that they are legally obliged to do so, and thus no such requirement can be identified

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[105] UNSC, '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.
[106] ILC 'Report' (1979) (n 9) 112, para 14.
[107] *DRC v Uganda* (n 6) para 46.
[108] *DRC v Uganda* (n 6) paras 46-7 and 50-1.
[109] See n 60 above and the surrounding text.
[110] Foreign Affairs Committee, 'Libya: Examination of Intervention and Collapse and the UK's Future Policy Options' (Third Report of Session 2016-17, 6 September 2016) 38, para 127.
[111] IIL, 'Military Assistance on Request' (n 33) Article 4 (4).
[112] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16, Article 51.
[113] Georg Nolte, 'The Resolution of the *Institute de Droit International* on Military Assistance on Request' (2012) 45 RBDI 241, 255.

in customary international law.[114] A requirement of reporting to the UN is so estranged from the positive law in the sense that a valid consent can be given even in secret, out of public reach, as will be examined below in this chapter.

5.2.1. Contradictory and ambiguous reactions to intervention

As noted in the ICRC's 2016 Commentary to the Geneva Conventions, it will not be easy to discern the existence of consent when the foreign intervention elicits contradictory reactions or symbolic protests from the authorities of the territorial State that try to satisfy their constituency.[115] Such situations indeed led to controversies in practice.

The reaction of the Syrian government to the US-led coalition's airstrikes against ISIS in its territory is one example. Before the commencement of intervention, the Syrian government in a letter to the UN expressed its readiness to cooperate and coordinate with possible military operations against ISIS that must be conducted through itself.[116] Syria's foreign minister warned that any airstrike conducted against the ISIS in the territory of Syria without its permission will be considered aggression.[117] However, after the intervention had begun, Syria did not explicitly protest, and some authorities in Syria even expressed positive views about the airstrikes.[118] This attitude has been interpreted by some commentators as tacit or passive consent to the intervention by Syria.[119] The spokesperson of the German Chancellor impliedly put forward the tacit consent of Syria as a legal basis for intervention when he stated in a news

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[114] For an analysis of advantages and disadvantages of the potential requirement of reporting and suggestions how it should be done, and the assessment of current practice, see Larissa van den Herik, 'Replicating Article 51: A Reporting Requirement for Consent-Based Use of Force' (2019) 79 ZaöRV 707.

[115] Tristan Ferraro and Lindsey Cameron, 'Article 2: Application of the Convention' in Knut Dörmann et al (eds), *Commentary on the First Geneva Convention* (ICRC, CUP 2016) para 263.

[116] UNSC, 'Identical letters dated 26 August 2014 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' (28 August 2014) UN Doc A/68/983–S/2014/631, para 24.

[117] 'U.S. Airstrikes on Syrian ISIS Targets Need Permission: Syria' (*CBC*, 25 August 2014) <https://www.cbc.ca/news/world/u-s-airstrikes-on-syrian-isis-targets-need-permission-syria-1.2745775>.

[118] See Ryan Goodman, 'Taking the Weight off of International Law: Has Syria Consented to US Airstrikes?' (*Just Security*, 32 December 2014) <https://www.justsecurity.org/18665/weight-international-law-syria-consented-airstrikes/>.

[119] ibid; Raphael Van Steenberghe, 'From Passive Consent to Self-Defence after the Syrian Protest against the US-led Coalition' (*EJIL: Talk!*, 23 October 2015) <https://www.ejiltalk.org/13758-2/>; For a general evaluation of Syrian consent, also see Olivia Flasch, 'The legality of the air strikes against ISIL in Syria: new insights on the extraterritorial use of force against non-state actors' (2016) 3 JUFIL 37, 43-6.

conference that '[t]he Syrian government was advised beforehand and has made no protest'.[120] However, the US official position did not ground the legality of intervention on the Syrian consent,[121] and statements reported in media revealed that even though the US had warned Syria about the airstrikes beforehand, it did not seek Syrian consent.[122] In a November 2014 UN Security Council meeting, the Syrian representative, contradicting Syria's silence and positive views expressed by its officials, stated that 'air strikes cannot achieve their established goals if they are carried out in violation of the Charter of the United Nations and without cooperation and coordination with the Governments concerned'.[123] Syria eventually made it clear in its letters to the UN in September 2015 that it had made no request for these operations and viewed them as violations of its sovereignty.[124]

When contradictory and ambiguous statements exist, therefore, controversy will ensue. In such a situation, one can ascertain the non-existence of consent with certainty only when the territorial State clearly expresses its objection to the intervention by, for example, categorising it as illegal, as the Syrian government did in September 2015 in the above-given example. This tentative conclusion finds resonance in *DRC v Uganda*. As the Court quoted, President Kabila's statement of 28 July 1998 read that 'he has just terminated … the Rwandan military presence … This marks the end of the presence of all foreign military forces in the Congo.' However, the ICJ reached the conclusion that 'whatever interpretation may be given to the President Kabila's statement of 28 July 1998, any earlier consent by the DRC to the presence of Ugandan troops on its territory had at the latest been withdrawn by 8 August 1998', when the DRC accused 'Uganda of invading its territory'.[125]

5.2.2. Secret consent

[120] Stephen Brown, 'Berlin voices support for air strikes on Islamic State in Syria' (*Reuters*, 26 September 2014) <https://www.reuters.com/article/us-mideast-crisis-germany-idUSKCN0HL1BU20140926>.
[121] The White House, 'Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations' (December 2016) 16-7.
[122] See Flasch (n 119) 44.
[123] UNSC Verbatim Record (19 November 2014) UN Doc S/PV.7316, 33.
[124] UNSC, 'Identical Letters dated 16 September 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' (17 September 2015) UN Doc S/2015/718; UNSC, 'Identical Letters dated 17 September 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' (21 September 2015) UN Doc S/2015/719.
[125] *DRC v Uganda* (n 6) paras 49 and 53.

The requirement of consent to be clearly expressed is also closely related to consent given in secret, out of the reach of public scrutiny, for reasons such as national security or to avoid a public backlash. The US, for example, in 2014 in a first detailed public acknowledgment disclosed that its troops had been covertly operating in Somalia since 2007 and that it was kept secret out of concerns for the protection of its personnel and citizens.[126] Similarly, it only came to light based on leaked diplomatic cables that Yemeni President Salih had consented to American counterterrorism efforts in Yemen and even put forward conditions that the Yemeni government would claim responsibility for conducted operations to prevent a potential anti-American backlash in the public.[127] The next Yemeni President Hadi also kept the Yemeni consent secret, until he later publicly acknowledged for the first time during a press interview in September 2012 that he personally approved every drone strike by the US.[128]

International law contains no rule prohibiting secret consent. The rules of State responsibility, the law on the use of force, and customary international law contain no requirement to publicise consent.[129] As revealed in a 2016 government report the US also is of the opinion that State consent does not have to be procured publicly.[130] The legal validity of secret consent also holds true with the analogy to the law of treaties in the sense that secret treaties are not illegal under customary international law as long as their purpose is not to engage with an internationally wrongful act.[131] It also follows from this analogy that to the extent that an intervention in a civil war would be unlawful, for example, for being against the right to self-determination of people, consenting to such an intervention in secret likewise would be unlawful. In other words, and obviously, where an intervention would be wrongful if it was undertaken upon publicly

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[126] Philip Steward, 'Exclusive: U.S. discloses secret Somalia military presence, up to 120 troops' (*Reuters*, 3 July 2014) <https://www.reuters.com/article/us-usa-somalia/exclusive-u-s-discloses-secret-somalia-military-presence-up-to-120-troops-idUSKBN0F72A820140703?feedType=RSS&feedName=worldNews&rpc=69.>.

[127] Scott Shane, 'Yemen Sets Terms of a War on Al Qaeda' (*The New York Times*, 3 December 2010) <https://www.nytimes.com/2010/12/04/world/middleeast/04wikileaks-yemen.html>.

[128] Greg Miller, 'Yemeni President Acknowledges Approving U.S. Drone Strikes' (*The Washington Post*, 29 September 2012) <https://www.washingtonpost.com/world/national-security/yemeni-president-acknowledges-approving-us-drone-strikes/2012/09/29/09bec2ae-0a56-11e2-afff-d6c7f20a83bf_story.html?utm_term=.66c453dbcdc9>.

[129] See Max Brookman-Byrne, 'Intervention by (Secret) Invitation: Searching for a Requirement of Publicity in the International Law on the Use of Force with Consent' (2020) 7 JUFIL 74 additionally arguing that there are good policy reasons for the existence of such a requirement and articulating these reasons.

[130] The White House (n 121) 11.

[131] See Richard Caddell, 'Treaties, Secret', *Max Planck Encyclopedias of Public International Law* (June 2006) paras 2 and 7 <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1489>; However, see Mary Ellen O'Connell, *The Art of Law in the International Community* (CUP 2019) 217 arguing that the consent must be procured publicly, as secret treaties are denounced in international law.

given consent, such intervention would be wrongful also if it was conducted based on secret consent. Keeping the consent private in such a case moreover, in case of a dispute, could militate in favour of the claims of the unlawfulness of the intervention, as covertness of the consent could imply that the parties avoided public scrutiny because of the potential illegality of their action. Secret consent in that sense can put the parties in a disadvantaged position when they need to legally justify their actions.

Another problem that could arise from validly given secret consent would be about evidencing its existence when required. When the legality of the action is at stake, especially before an international tribunal, proving the existence of privately given consent would be burdensome if the process is not documented. If such consent at the same time is being denied publicly, the process of discerning the true will of the territorial State evidently would become more difficult. For example, despite repeatedly denying having given consent to the drone strikes conducted by the US's Central Intelligence Agency and objecting to them, leaked documents revealed that Pakistani officials had approved the operations during secret negotiations.[132] In such situations, the evidence related to the consent will play a more instrumental role when the need arises to justify the intervention.[133] As the International Law Association's report on the use of force puts it, the public contradiction of secret consent is 'a matter for evidentiary proceedings' and that the key issue in secret consent 'is likely to be whether the consent can be evidenced'.[134]

5.3. Consent to be granted by an organ entitled to do so

Another requirement for the validity of consent is that it must be granted by a State organ authorised to do so. This is an issue separate from whether the act of an organ can be attributable to the State for the purposes of State responsibility. Even though, pursuant to article

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[132] Greg Miller and Bob Woodward, 'Secret memos reveal explicit nature of U.S., Pakistan agreement on drones' (*The Washington Post*, 24 October 2013) <https://www.washingtonpost.com/world/national-security/top-pakistani-leaders-secretly-backed-cia-drone-campaign-secret-documents-show/2013/10/23/15e6b0d8-3beb-11e3-b6a9-da62c264f40e_story.html?utm_term=.eb9c4fec4d2c>; For older sources on denials and revelations of the secretly given consent, see Sean D Murphy, 'The International Legality of US Military Cross-Border Operations from Afghanistan into Pakistan' (2009) 85 International Law Studies 109, 118-9.

[133] See Murphy (n 132) 118 suggesting that if any internal documentation was available from Pakistan side clarifying such consent, it would put the US in a strong position to prove the legality of its actions in whatever venue needed.

[134] ILA, 'Final Report on Aggression and the Use of Force' (Sydney Conference, 2018) 19.

4 of ARSIWA, the act of any State organ, be it legislative, executive or judicial, or local in character, shall be regarded as the conduct of the State, it does not necessarily mean that in the particular circumstances the State organ was authorised to do so.

As far as consent to foreign military intervention is concerned, considering that it relates to the independence of a State as a whole, and as evidenced in State practice, only the highest governmental authorities in a State are entitled to express the will of the State, but not the local/regional authorities or any other particular official.[135] Indeed, as seen in chapter 6 examining post-Cold War State practice of intervention by invitation in internal conflicts, the consent has always been expressed by, or on behalf of, the head of State, such as the President or the Monarch, or the government in general. In UN letters and their annexes, for example, regardless of the State official signing the letter, the consent to, or request for, an intervention is expressed on behalf of, or on the instructions of, the 'government'.[136] No case, for example, seems to exist where a foreign minister or head of the army exclusively issues consent to foreign military intervention.

Such an issue arose in 1960 when Belgium for its military intervention in the Republic of the Congo invoked, among other grounds, the consent of the regional authorities. Its justification was proved unpersuasive and the intervention was condemned by many States.[137] Likewise, when the US dispatched troops to the Dominican Republic in 1965 based on, among others, the request of the law enforcement and military officials in the country, where the central government collapsed with the eruption of civil war, the general diplomatic reaction was negative.[138] Another similar issue arose in respect to the joint intervention undertaken by the US and Organisation of East Caribbean States in Grenada in 1983. The intervention allegedly was requested by the Governor-General, the representative of the Queen of the UK, the symbolic head of state of Grenada. The intervening States were not convinced that this consent

[135] See Nolte, 'Intervention by Invitation' (n 34) paras 12 and 23.
[136] For example, see UNGA and UNSC, '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' (16 October 2015) UN Doc A/70/429–S/2015/789; UNSC, 'Letter from the Permanent Representative of Iraq to the United Nations Addressed to the Secretary-General' (25 June 2014) UN Doc S/2014/440.
[137] See Corten (n 53) 263.
[138] See Doswald-Beck (n 68) 226-8.

constituted a legal basis nor did the international community in general consider the intervention legal.[139]

More recently the issue arose with regard to the Russian military intervention in Ukraine's Crimea region in early 2014. During a UN Security Council meeting Russia, for its intervention, among others, invoked the request made by the new Crimean Prime Minister Sergei Aksenov to the Russian President to ensure peace and tranquillity in the Autonomous Republic of Crimea.[140] In response, in addition to disputing the constitutional legality of the Prime Minister's appointment, Ukraine recalled that since 'Ukraine is a unified State, and Crimea, in line with its powers, is not a member of the Federation', the permission to dispatch Russian troops to the country can only be granted by the central government.[141] However, even though this statement may hold true in respect to its conclusion, it is not possible to agree with its potential implication that a member of a federal State can call in foreign troops. Such a decision concerns the independence and the territorial integrity of a State as a whole, and thus it must come from the federal/central government. An intervention against the wishes of the federal government representing the State in external relations would be a violation of article 2(4) of the UN Charter against the federal State in question.

The US also dismissed the invitation issued by the Crimean Prime Minister, arguing that '[t]he prohibition on the use of force would be rendered moot were subnational authorities able to unilaterally invite military intervention by a neighbouring State. Under the Ukrainian Constitution, only the Ukrainian Rada can approve the presence of foreign troops.'[142] In general, in the UN Security Council emergency meetings conveyed right after the intervention, many States described the military intervention as a violation of international law. Some States, without making an explicit judgment, called for the preservation of the territorial integrity and political independence of Ukraine and diplomatic solution to the crisis.[143] Outside the context of the UN Security Council, the intervention was condemned by many States and, in total, only a handful of States showed support for it.[144]

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[139] See ibid 234-9; Corten (n 53) 265-6.
[140] UNSC Verbatim Record (1 March 2014) UN Doc S/PV.7124, 2 and 5.
[141] UNSC Verbatim Record (3 March 2014) UN Doc S/PV.7125, 15.
[142] ibid 5.
[143] See ibid and UNSC Verbatim Record (1 March 2014) UN Doc S/PV.7124.
[144] See Tom Ruys and others, 'Digest of State Practice 1 January–30 June 2014' (2014) 1 JUFIL 323, 334-5.

In another recent example the view that the invitation must emanate from the central government was confirmed in an EU Foreign Affairs Council meeting. With regard to the demand of military material by the Kurdish regional authorities of Iraq in the fight against ISIL, the Council noted that this demand would be met by the individual States 'according to the capabilities and national laws of the Member States, and with the consent of the Iraqi national authorities'.[145]

In sum, as demonstrated, consent to foreign military intervention must be granted by the highest authorities of the State. It additionally must be noted that the validity of consent also depends on whether the consenting government in question is 'legitimate' or whether consent was expressed in line with the relevant rules of the State's 'internal law to which, in certain cases, international law refers'.[146] These issues – 'legitimacy' of a government and the compliance of consent with domestic law – are examined in the following chapters.[147]

5.4. Intervention within the limits of consent

According to article 20 of ARSIWA a State's consent precludes the wrongfulness of the consented act 'to the extent that the act remains within the limits of that consent'.[148] As a legal matter, an intervention undertaken upon consent, obviously, will be subject to the terms and conditions of the agreement through which the consent is given. In *DRC v Uganda,* for example, the ICJ noted that the consent given to Uganda was not 'open-ended'. Even if the consent had been extended beyond its assumed withdrawal date as Uganda claimed, 'the parameters of that consent, in terms of geographic location and objectives, would have remained thus restricted'.[149]

The requirement to comply with the limits of consent is also understood from the UN General Assembly Resolution on the Definition of Aggression which qualifies the use of armed forces

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[145] Council of the European Union, 'Council Conclusions on Iraq – Foreign Affairs Council Meeting' (Press Office, 15 August 2014) para 3.
[146] ILC, 'Draft Articles' (n 9) 73, para 5.
[147] See, respectively, Chapter 3 and Chapter 5, Section 7.
[148] ILC, 'Draft Articles' (n 9) Article 20.
[149] *DRC v Uganda* (n 6) para 52.

stationed in another State in agreement with the host 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' as an act of aggression.[150]

Thus Jordanian delegate reminded this provision of the Resolution on the Definition of Aggression during a UN Security Council meeting when discussing the legality of Russian intervention in Ukraine's Crimea region.[151] Recalling Jordan's statement, Ukraine claimed that the intervention constituted an act of aggression under this provision, as it contravened the agreements on the Black Sea Fleet which it had entered into with Russia, in respect to the number and location of Russian troops on the territory of Ukraine.[152] The UK similarly condemned the intervention for the reason that Russian troops were deployed outside the bases designated under the Partition Treaty on the Status and Conditions of the Black Sea Fleet of 1997.[153] Russia for its part defended the compatibility of its actions with the treaty in question.[154]

6. Conclusion

A State's right to consent to military intervention in its territory is well established in international law and is among States' sovereign prerogatives. However, the underlying function of consent is subject to a theoretical debate: whether it is an exception/secondary rule, the invocation of which precludes wrongfulness, or whether its justificatory role being intrinsic to the primary norm of the prohibition on the use of force itself, it rules out the application of the prohibition by definition, and thus when there is consent there is no wrongfulness to speak of in the first place. The debates during the preparations of the ILC's draft articles on State responsibility show that it was not really convincing to keep 'consent' among the circumstances precluding wrongfulness. Nonetheless, it was kept with the thought that its codification would provide legal certainty, which would help prevent abuse and provide better protection, particularly for weak States.

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[150] Definition of Aggression (n 3) Article 3(e).
[151] UN Doc S/PV.7125 (n 141) 9.
[152] ibid 20.
[153] Foreign and Commonwealth Office, 'Oral Statement to the Parliament – UK's Response to the Situation in Ukraine' (4 March 2014) <https://www.gov.uk/government/speeches/uks-response-to-the-situation-in-ukraine>
[154] UN Doc S/PV.7125 (n 141) 16.

The reality, however, seems to have overwhelmed this well-intentioned move in the sense that it remains widely accepted in the literature based on the wording of Article 2(4) of the UN Charter that consensual use of force falls outside the prohibition by definition. Indeed, given that consent to foreign intervention is a sovereign right of every State, deeming consent a secondary rule, that is, considering consensual uses of force *prima facie* unlawful, would be an affront to State sovereignty. In any event, however, the secondary/primary rule discrepancy does not seem to have an important practical utility on the legality of consensual interventions.

ARSIWA stipulates that the circumstances precluding wrongfulness cannot be invoked to preclude the wrongfulness of a *jus cogens* norm from which no derogation is permitted. Despite what this indicates at first sight, since the peremptory character of the prohibition on the use of force comprises its justificatory factors, or, more prominently, since the prohibition does not apply *ab initio* in the case of consensual use of force, the prohibition is not to be derogated from with consent.

On the ground of the *jus cogens* character of the prohibition on the use of force and the principles it aims to protect, it is widely claimed that a State cannot consent to the use of force in advance via a treaty. Such treaties provide that the prospectively given consent could be invoked when the circumstances stipulated in the treaty materialise regardless of the consenting State's will at the time of the intervention. The claims of the invalidity of such consent are in contrast to the fact that as long as the State legally cannot withdraw with immediate effect from such a treaty at the time of the intervention due to the withdrawal procedure contained therein, its consent is deemed to exist under the law of treaties. States adopt these treaties and the practice concerning their application, though limited and not definitive, militates in favour of their validity.

One way of reconciling the contrary views on this issue seems to be to consider lawful such treaty provisions so long as their objective actually does not go against the principles/purposes of the UN, with which any use of force must be consistent. The AU and ECOWAS agreements allowing such interventions, therefore, should be deemed lawful, as these treaties are the materialisation of the sovereign responsibility of States to protect their population from atrocity crimes. Likewise, a treaty guaranteeing, by third States and by force if necessary, a power-

sharing agreement between two different communities/peoples of a State would be compatible with the principle of self-determination of peoples, and thus lawful.

To produce its legal effects, consent must meet the conditions required for its validity. To begin with, it has to be given freely, that is, without coercion. As exemplified in a 2007 case before the Latvian Constitutional Court, and the 2019 Chagos Advisory Opinion by the ICJ by way of comparison, coercion of the host State vitiating its consent can take far-reaching forms depending on the unique circumstances of each case. The intervening State's interference in the internal affairs of the host State, its other actions in the region, its domination of the host State or potential consequences of the refusal to give consent, for example, could help determine the existence of coercion that vitiates consent.

Another condition for the validity of consent is that it has to be clearly established and actually expressed. This does not mean that the consent cannot be given informally or tacitly. However, determining the existence of consent could prove complicated when intervention elicits contradictory reactions or symbolic protests from the territorial State, as was the case with the Syrian government's reaction to the US-led coalition's airstrikes against ISIS for a period of time. In such a situation, one can with certainty ascertain the non-existence of consent only when the territorial State clearly expresses its objection to the intervention by, for example, categorising it as illegal. This tentative conclusion finds resonance in the ICJ's *DRC v Uganda* case.

International law allows consent to be granted also in secret/private, which was the case with the US interventions in Somalia, Yemen and Pakistan. However, this does not mean that a State can secretly consent to engage with an internationally wrongful act. To the extent that a particular intervention in a civil war on the side of the government would be unlawful, consenting to this intervention in private would share the same conclusion.

Keeping consent to an intervention secret would arguably militate against the legality of the intervention should the need arises to defend its legality. Another problem with secret consent would be to evidence its existence when required. Discerning the true will of the territorial State would be more difficult when the claims of giving consent in private have been denied publicly, as was the case with Pakistan's consent to US drone strikes in its territory. Documents evidencing such consent will play a more instrumental role when needed.

Another prerequisite for valid consent is that it has to be expressed by, or on behalf of, an organ of the State entitled to do so. Given the principles at stake and as could be inferred from State practice, it must be expressed by, or on behalf of, the highest authorities in a State, such as the President or Monarch, or the government in general, but not, for example, the foreign minister, the army chief or regional authorities. This is a matter different from whether the entity in question is the legitimate government that has the legal capacity to consent to intervention. This issue will be examined in the next chapter. This chapter also highlighted the importance of observing the terms and conditions of a given consent. Not observing the limits of the consent and relying on the consent of an unauthorised State organ were among the grounds on which some States criticised and deemed Russia's 2014 intervention in Crimea an act of aggression.

Chapter 3: Capacity to consent: Recognition of governments

1. Introduction: The act of recognition

Another condition, in addition to those examined in the previous chapter, required for the validity of a State's consent to foreign military intervention in its territory is that consent must be granted by a 'legitimate' government.[1] The question of what the normative criteria are to determine an entity in a State as the government hinges on the question of what prompt States to recognise entities in other States as government.

In general terms, by the act of recognition the recognising State indicates its willingness to enter into official relations with the government in question and manifests its opinion that having fulfilled the required criteria, the recognised government exists as such under international law.[2] Even though it may seem as an 'absurdity' for a sovereign State to allow an evaluation on its government's legitimacy by other States since this, on its own, may imply an encroachment on its very sovereignty, international law inevitably paves the way for this.[3] Without an external evaluation of the legitimacy of a government, international law cannot present an answer to the legality of foreign interventions in other States when the question depends upon whether the intervening State relied on the consent of the 'government' of the territorial State.

Yet, as Brownlie wrote in 1963, '[t]here is in international law no definition of "legitimate government"'.[4] The international legal system does not provide any codified guideline to States on how to determine the legitimate government in other States. However, States often are faced with this problem when an entity in another State comes to power as a result of a civil war or

[1] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' UN Doc A/56/10 (2001) 73, para 5.
[2] See Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (OUP 1998) 23-33.
[3] Brad R Roth, *Governmental Illegitimacy in International Law* (OUP 2000) 9 borrowing analogously the reasoning on this 'absurdity' from John Locke.
[4] Ian Brownlie, *International Law and the Use of Force by States* (OUP 1963) 323.

coup d'état, or in any other way contravening the usual transition of power pursuant to the constitutional law of the State, thus giving rise to doubts.

The absence of any objective legal criteria gives enough leeway to States to exercise their political discretion in determining the legitimacy of other governments. Indeed, even though the matter was in its work programme between 1949 and 1973, the International Law Commission (ILC) abstained and finally for the time being set aside the examination of the recognition of States and governments mainly for the reason that although the recognition had legal consequences, it brings up many political problems which the law does not address.[5] Similar reasoning has been reiterated later during the discussions in the ILC concerning a report on unilateral acts of States in 2003. With respect to whether the ILC should focus on the recognition of States and governments, Mr Sreenivasa Rao suggested that the act of recognition in this case was 'discretionary and not governed by legal criteria'.[6] However, as Mr Koskenniemi suggested, the topic of recognition was a 'reality that existed as a legal institution, having the corresponding formal characteristics'. With the analyses of practice corresponding to the recognition of States and perhaps also the governments, the Law Commission 'could set about drawing up guidelines or articles regulating the institution'.[7]

Without guidelines that inform the reasons behind, and the consequences of, the act of recognition/non-recognition, the act could remain an institution to be abused for various purposes when it comes to the international representation of a particular State. In the case of intervention in civil wars, an international legal system allowing a foreign State to intervene on the side of the party it recognised as the legitimate government just because of deeming that party's consent fit to the political or pragmatic purpose of the planned intervention would undermine the stability of international peace and security.

An issue that is the subject of immense discussion and which will not be addressed here in detail is the legal value of the act of recognition: whether it is 'declaratory' or 'constitutive' of the existence of the entity to which the recognition is granted. While the former view argues that the recognition of a government (or State) is merely declaratory of the fact that an entity

[5] See Stefan Talmon, *Recognition in International Law: A Bibliography* (Martinus Nijhoff 2000) 22-3.
[6] ILC, Yearbook of the International Law Commission (Volume I, 2003) 158.
[7] ibid 144, also see 151 (Mr. Melescanu) and 147 (Mr. Momtaz).

fulfilled the required criteria and thus exists as the legitimate government, the latter is of the opinion that a recognised government owes its legal existence to the unilateral act of recognition in question.[8] In any event, whether an entity exists as a government by virtue of the recognition or not, the obvious common ground is that to be able to enter into government-to-government relationships and duly enjoy the rights that arise thereunder, an entity claiming to be the government needs the recognition of other governments, at least those which it wishes to be in such a relationship. The question then arises as to what are the criteria, if any, it has to fulfil to qualify for recognition as a government and to legally represent the State in international relations.

To that end, the chapter next examines the effective control doctrine, under which, traditionally, the legitimacy of a government has been ascertained based on whether it exerts effective control over the national territory and people. The doctrine is more complicated than may seem at first glance. The relevant issues the study addresses in relation to this doctrine in light of the past and recent practice include the irrelevancy of the constitutional laws and the policy of non-recognition; the presumption in favour of established governments in civil wars; the illegitimacy of effective governments installed as a result of foreign interventions; additional criteria such as the willingness by the purported government to observe international obligations; the case of failed States that are plunged into anarchy in the absence of any effective government; the value of being internationally recognised; and the relationship between representation in an international organisation and being recognised as a government. Finally, the chapter examines the democratic legitimacy doctrine under which the legitimacy of a government depends on whether it ascended to power through democratic means. It increasingly has been finding support in the scholarship against the backdrop of post-Cold War developments and State practice.

2. The doctrine of effective control

As generally accepted and evidenced in State practice, the primary criterion in international law to identify the legitimate government of a State is whether the purported government exerts

[8] For a general overview of the debate, see Roth, *Governmental Illegitimacy* (n 3) 124-9 who ultimately argues that what matters is to gain widespread legal recognition. Only then the international law protects the interests of the putative government.

effective control over all, or nearly all, the national territory and people, and is able to continue to do so.[9]

The popularity of the effective control doctrine among States was evident in the debates at the UN General Assembly on the question of which authority in a State should represent the State in the UN in the event of a dispute, the discussion of which revolved mostly around the legal criteria for the recognition of governments.[10] As the UK representative explained, the effective control test was a 'universal, factual and objective test which implied no moral or political approval' and as such was 'the most convenient and logical test' for a 'government to be recognised' under international law.[11]

It can easily be observed from these debates that the participating States agreed on the necessity of recognising the effective authority in a State as the government. However, the two draft resolutions submitted by Cuba and the United Kingdom differed slightly with respect to control over the people. While the Preamble to the Cuban proposal conditioned that the government must have 'the general consent of the population',[12] the Preamble to the UK proposal found 'the obedience of the bulk of the population'[13] sufficient. A draft resolution submitted by the sub-committee, established to consider the matter in light of the discussions that took place, mirrored the Cuban proposal, namely, that the authority of the government must be 'generally accepted by the population'.[14] Both views (*obedience* and *consent/acceptance*) attracted considerable support and no consensus was reached in the end.[15] Because the adopted resolution refrained from including any reference to any criteria, the issue remained unsettled.[16]

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[9] Jochen A Frowein, 'Recognition', *Max Planck Encyclopedia of Public International Law* (Last Updated December 2010) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1086?prd=EPIL> para 15-16; Roth, *Governmental Illegitimacy* (n 3) 137 and 255-320; Hersch Lauterpacht, *Recognition in International Law* (First published 1947, CUP 2013) 98-102; On the analyses of pre-Charter international arbitral decisions confirming the validity of this doctrine, see Louise Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government' (1986) 56 BYIL 189, 192-4.

[10] See UN, 'Recognition by the United Nations of the Representation of a Member State' (1950) Yearbook of the United Nations, Part 1, 429-435.

[11] ibid 431.

[12] ibid 430.

[13] ibid.

[14] ibid 433.

[15] ibid 432 and 434.

[16] ibid; UNGA Res 396(V) (14 December 1950) UN Doc A/RES/396(V).

However, as rightly put by the States critical of the latter view, 'the agreement of the population', which cannot be proven without a preceding inquiry, is not an objective factor. If the conduct of such an inquiry was allowed, it would constitute an illegal interference in the domestic affairs of the State concerned.[17] Moreover, as the UK representative suggested, conditioning a criterion, such as the consent of people as opposed to an objective criterion, such as the obedience of people, could cause sharp differences of opinion among States.[18]

In any event, whether it is the consent or mere obedience by the population that is required, the effective control doctrine does not require the will of the people to be manifested through democratic means. Such an idea has gained traction after the end of the Cold War with the emergence of the democratic legitimacy doctrine, which is examined in the last section of this chapter.

2.1. Irrelevancy of the constitutional law and the policy of not according formal recognition

By its very nature, the effective control doctrine operates with disregard to constitutional/domestic law. The way in which the government comes to power, be it a brutal *coup d'état*, civil war or revolution, is not relevant. However, there has been a policy contradicting this paradigm in the early twentieth century. In 1907 Carlos Tobar, then Foreign Minister of Ecuador, concerned by the political instability the American republics faced, had articulated a policy of refusal to recognise governments that seized the power as a result of a revolution against the constitutional order.[19] This policy, known as the Tobar doctrine, was incorporated into the General Treaty of Peace and Amity of 1907 signed by the five Central American republics.[20] Even though not signing it, the US and Mexico informally agreed to act in accordance with the treaty.[21]

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[17] ibid 434.
[18] ibid 431.
[19] Charles L Stansifer, 'Application of the Tobar Doctrine to Central America' (1967) 23 The Americas 251; Charles L Cochran, 'The Development of an Inter-American Policy for the Recognition of De Facto Governments' (1968) 62 AJIL 460; Ann Van Wynen Thomas and A. J. Thomas, *Non-Intervention: The Law and its Impact in the Americas* (Sothern Methodist University Press 1956) 248.
[20] General Treaty of Peace and Amity (signed 20 December 1907), the text can be found in 'Supplement: Official Documents' (1908) 2 AJIL 219.
[21] Stansifer (n 19) 253 and 262.

The Additional Convention to the treaty stipulated not to recognise any government that may come to power in any of the signatory countries as a result of a *coup d'état* or revolution, 'so long as the freely elected representatives of the people thereof, have not constitutionally reorganised the country'.[22] This provision was reiterated in another General Treaty of Peace and Amity in 1923, this time strengthened with a provision stipulating not to recognise even the subsequently elected governments if their leadership included the people who led a *coup d'état* or revolution, or certain relatives of them.[23]

Yet, the State practice did not accord with the Tobar doctrine. It had already elicited little support from Latin American States which have been of the view that the act of recognition or non-recognition of governments in other States can be used as a pretext for interference in their internal affairs.[24] What gained traction was a 1930 policy articulated by the then Mexican Secretary of Foreign Affairs, Genaro Estrada. According to this policy, known as the Estrada doctrine, the Mexican government would no longer make judgment on the legitimacy or illegitimacy of other governments, that is, it would award neither recognition nor non-recognition to *de facto* governments that came to power through a *coup d'état* or revolution. Making such a judgment in public would be considered an encroachment on the sovereignty of the State in question. In the absence of recognition, Mexico would constrain itself to decide whether or not to continue diplomatic relations with the entity in question as it sees fit.[25]

As evidenced in subsequent practice and especially formal declarations by the UK and other Commonwealth States in the 1980s, the Estrada doctrine's policy of not according recognition to governments found widespread support among States.[26] Yet, the abandonment of recognition of governments did not mean that the institution of recognition had been totally abolished. Even though, in principle, governments may avoid using the term 'recognition' publicly, the continuation of the government-to-government dealings is a necessary part of international relations, and the recognition can be construed from such dealings. The existence

[22] Additional Convention to the General Treaty (signed 20 December 1907), the text can be found in 'Supplement: Official Documents' (1908) 2 AJIL 229, Article 1.
[23] General Treaty of Peace and Amity (signed 7 February 1923), the text can be found in 'Supplement: Official Documents' (1923) 17 AJIL 117, Article 2.
[24] Stansifer (n 19) 251, 266-272; Thomas and Thomas (n 19) 249.
[25] Philip C Jessup, 'The Estrada Doctrine' (1931) 25 AJIL 719, 719-720.
[26] See Talmon, *Recognition of Governments* (n 2) 3.

of diplomatic relations with an entity in fact could reflect the fact that that entity is recognised as a government.[27]

The UK's declaration of abandonment of recognition of governments is illustrative at this point. When the Foreign Secretary announced that the UK joined 'many other countries in not according recognition to Governments' he added that '[l]ike them, [the UK] shall continue to decide the nature of [its] dealings with regimes which come to power unconstitutionally in the light of [its] assessment of whether they are able themselves to exercise effective control'. Under this policy, governments of other States 'must necessarily consider what dealings, if any, they should have with the new regime, and whether and to what extent it qualifies to be treated as the government of the State concerned'.[28]

It has also become evident in the subsequent English case law that this change of policy only meant to replace the practice of express recognition with implied recognition. The most important factor the courts – which would normally take for granted the executive's formal position under the ancient principle of speaking with one voice in foreign affairs – resorted to in identifying the legitimate government in another State when the issue arose was the interaction of the UK government with the entities claiming to be the government. If the UK government's dealings with one of the entities could be interpreted as a government-to-government relationship, that entity was designated as the legitimate government for the purposes of the case at hand.[29] So, in essence, as held in *Ting Lei Miao v Chen Li Hung*, this UK policy change 'has not changed the underlying principles' on recognition of governments. 'The same criteria are to be adopted, namely, whether the new regime has effective control of the territory of the state and is likely to continue to do so'.[30]

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[27] Frowein (n 9) para 17; But see ILA, 'Recognition/Non-Recognition in International Law' (Third Report, Johannesburg Conference, 2016) 17-18 concluding based on a limited State practice evidenced in reports submitted to the Committee by its members that the establishment of diplomatic relations under the Vienna Convention on Diplomatic Relations does not necessarily come to mean extending governmental recognition to the entity with whom the relations are established.

[28] Quoted in Colin Warbrick, 'The New British Policy on Recognition of Governments' (1981) 30 ICLQ 568, 574-575; The same policy was followed by Australia in 1988. See Jonathan Brown, 'Australian Practice in International Law 1988 and 1989' (1989) 12 AustYBIL 319, 357.

[29] Leonor Vulpe Albari, 'The Estrada Doctrine and the English Courts: Determining the Legitimate Government of a State in the Absence of Explicit Recognition of Governments' (2016) 29 HagueYIL 171, 179 and 188-195

[30] *Ting Lei Miao v Chen Li Hung and Another* [1997] 2 HKC 779, 787. The court opined in this way with a critique of the judgement made in *Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA and others* [1993] QB 54, 68 in which three more factors in addition to the interactions of the UK government with the purported

It must be noted that States that persistently adhere to the policy of not according formal recognition to governments, occasionally, had to go against this policy. In the words of the Minister of Foreign Affairs of New Zealand, this practice is subject to exceptions. In a certificate to the court when explaining New Zealand's official position with regard to the purported government of Fiji, the Minister went on to say that the act of formal recognition was undesirable 'except in the most unusual cases'.[31] Likewise, when explaining to the court its recognition decision in respect to the dispute concerning the two contending governments of Venezuela, the UK government stated that '[t]he policy of non-recognition does not preclude HMG from recognising a foreign government … where it considers it appropriate to do so in the circumstances'.[32] The practice of States who follow the policy of non-recognition, indeed, shows that they seldom had to clarify their position with formal recognition when confronted with two different entities claiming to be the government in another State.[33] The British and Dutch authorities, for example, in May 2011 had explained their position with regard to the National Transitional Council (NTC), the opposition group in the civil war in Libya, as that they only recognise States, not governments.[34] However, in one of such 'unusual cases', dramatically, they, together with other 30 countries, ultimately could not help but formally extend recognition to the NTC only two months after this decision.[35]

The Estrada Doctrine, which entails disregard for constitutional law, today faces a major challenge. Since the end of the Cold-War, in some cases States granted recognition to governments elected in internationally monitored elections when they have been ousted or not allowed to hold the reins of power from the beginning unconstitutionally. On the formation of such practice, the contribution of regional organisations providing the condemnation of the unconstitutional change of democratic regimes in their regulations, in a way reinstating the

government were counted. For an exclusive analysis of these factors, see Colin Warbrick, 'Recognition of Governments' (1993) 56 ModLRev 92.

[31] *Attorney-General for Fiji v Robt Jones House Ltd* [1989] 2 NZLR 69, 71.

[32] *Deutsche Bank AG London Branch v Receivers Appointed by the Court Central Bank of Venezuela* [2020] EWHC 1721 (Comm), 31.

[33] See Talmon, *Recognition of Governments* (n 2) 7-9.

[34] UK Parliament, 'Daily Hansard - Written Ministerial Statements' (13 May 2011) <https://publications.parliament.uk/pa/cm201011/cmhansrd/cm110513/wmstext/110513m0001.htm>; 'Minister Rosenthal: Nederland erkent staten, geen regeringen' (*Europa Nu*, 5 May 2011) <https://www.europa-nu.nl/id/vip35od0t7zs/nieuws/minister_rosenthal_nederland_erkent?ctx=vgaxlcr1jzkk&start_tab0=320>.

[35] See below Section 2.2.3.

Tobar Doctrine, is undeniable. This development, with the relevant practice and regulations, will be examined in the last section concerning the doctrine of democratic legitimacy.

2.1.1. Recognition of Guaidó as Interim President of Venezuela

The doctrine of effective control faced a challenge in 2019 when the claims to the constitutionality of a purported interim President in Venezuela, who himself was not formally elected President and was not in effective control of the country, were formally upheld by some 50 States, as will be discussed. This, at the same time, was another 'unusual case' for those States that normally adhered to the policy of not according formal recognition.

On 1 January 2019 the Lima Group, a 14-member regional body, founded to address the situation in Venezuela and made up mostly of Latin American countries, declared that it did not recognise the legitimacy of the incumbent President Nicolas Maduro's new term of office, which was to commence on 10 January 2019.[36] The reason was that the electoral process of 20 May 2018 that resulted in his election lacked legitimacy.[37] The Group instead recognised the National Assembly, which it considered legitimately elected on 6 December 2015, 'as a democratically elected constitutional institution'.[38] Among the member States, Mexico declined to sign the declaration. In line with the above-mentioned Estrada doctrine, outlined by the then Mexican Foreign Minister, its foreign sub-secretary explained this decision as that the Mexican government 'will abstain from issuing any kind of pronouncement regarding the legitimacy of the Venezuelan government. Self-determination and non-intervention are constitutional principles that Mexico will follow.'[39]

The situation has become more dramatic on 23 January 2019 when the head of the National Assembly, Juan Guaidó, citing constitutional provisions,[40] declared himself the interim

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[36] Government of Canada, 'Lima group declaration' (1 January 2019) Article 1 <https://international.gc.ca/world-monde/international_relations-relations_internationales/latin_america-amerique_latine/2019-01-04-lima_group-groupe_lima.aspx?lang=eng>.
[37] ibid.
[38] ibid Article 2.
[39] Translated by Alonso Gurmendi, 'Estrada Redux: Mexico's stance on the Venezuela Crisis and Latin America's evolving understanding of non-intervention' (*OpinioJuris*, 8 January 2019) <http://opiniojuris.org/2019/01/08/estrada-redux-mexicos-stance-on-the-venezuela-crisis-and-latin-americas-evolving-understanding-of-non-intervention/>.
[40] See Juan Guaidó, 'Maduro is a usurper. It's time to restore democracy in Venezuela.' (*The Washington Post*, 15 January 2019) <https://www.washingtonpost.com/opinions/2019/01/15/maduro-is-usurper-its-time-restore-

President of Venezuela despite the fact that incumbent Maduro remained in control of key assets of the State, including the military and police.[41] Later the same day, the US government recognised Guaidó and expressed its support for his 'decision to assume that role pursuant to Article 233 of Venezuela's constitution and supported by the National Assembly, in restoring democracy to Venezuela'.[42] Ultimately, more than 50 States joined the US in recognition of Guaidó.[43] 19 European countries jointly 'acknowledge[d]' Guaidó as the interim President when their call to Maduro for democratic presidential elections expired. They confirmed that their acknowledgment was 'in accordance with the provisions of the Venezuelan Constitution'.[44] Similarly, 11 members of the Lima Group jointly reiterated that they recognise 'Juan Guaidó as the Interim President of the Bolivarian Republic of Venezuela as per its Constitution' and called 'for the immediate re-establishment of democracy in Venezuela'.[45]

Yet the claims of the illegitimacy of the elections based on which Maduro assumed office and the constitutionality of Guaidó's presidency were not undisputed.[46] By recognition, the recognising States in a sense took a side in a controversial domestic issue. The question of whether this interference in the internal affairs of Venezuela was admissible or inadmissible under international law was at issue in a report of the Research Services division of the German Parliament.[47] The division was commissioned by an opposition Member of Parliament in relation to the German government's recognition of Guaidó. Its mandate was to consider the

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democracy-venezuela/?noredirect=on&utm_term=.0439fcf1906a> citing 3 articles of the Venezuelan constitution in an op-ed before declaring himself as President.

[41] Patricia Laya, 'How Venezuela's Presidential Standoff Fizzled Out' (*The Washington Post*, 31 July 2020) <https://www.washingtonpost.com/business/energy/how-venezuelas-presidential-standoff-fizzled-out/2020/07/31/ed09f476-d35b-11ea-826b-cc394d824e35_story.html>.

[42] US Department of State, 'Recognition of Juan Guaido as Venezuela's Interim President' (23 January 2019) <https://www.state.gov/recognition-of-juan-guaido-as-venezuelas-interim-president/>.

[43] For a list of these States, see US Department of State's platform ShareAmerica, 'More than 50 Countries Support Venezuela's Juan Guaidó' (15 February 2019) <https://share.america.gov/support-for-venezuelas-juan-guaido-grows-infographic/>.

[44] UK Foreign and Commonwealth Office, 'Joint Declaration on Venezuela' (4 February 2019) <https://www.gov.uk/government/news/joint-declaration-on-venezuela>; Also see [2020] EWHC 1721 (Comm) (n 32) 13 noting that the UK government's position is based on the Venezuelan constitution and exceptionality of the circumstances in Venezuela.

[45] Government of Canada, 'Lima Group Declaration' (4 February 2019) Articles 1 and 5 <https://www.canada.ca/en/global-affairs/news/2019/02/lima-group-declaration-february-04-2019.html>.

[46] See Chiara Redaelli, 'Venezuela and the Role of Domestic Constitutional Order in International Law' (*OpinioJuris*, 23 April 2019) <http://opiniojuris.org/2019/04/23/venezuela-and-the-role-of-domestic-constitutional-order-in-international-law/>.

[47] Research Services of the German Bundestag, 'On the Recognition of Foreign Heads of State' WD 2 - 3000 - 014/19 (7 February 2019) 6 (Note that the paper that does not represent the views of the German Bundestag, see its page 2).

permissibility of recognition of a new foreign head of State whose tenure of office is unconstitutional or constitutionally disputed by other organs of that State's constitution.[48]

The resulting report recognised that in political practice on recognition 'a state's own national interests and considerations of expediency often play a decisive role'.[49] However, it found that a recognition decision could amount to inadmissible intervention in the internal affairs of the relevant State depending upon the investigation of facts on, for example, 'who is exercising effective control of the state, including the armed forces and security apparatus'.[50] The report acknowledging that such an investigation of facts cannot be established with the means at the division's disposal, also concluded that '[i]n the eyes of a government that is still in office, the recognition of a head of state *ad interim* will surely always be deemed unfriendly'.[51] In short, the assessment of the Research Services of the German Parliament may be interpreted as concluding that the German government's act of recognition is legally problematic, as Guaidó was not exercising effective control of the State at the time of recognition and the constitutionality of his claim to the presidency did not matter as far as international law is concerned.

The US Vice-President in a UN Security Council meeting reminded of the unseating of representatives of Maduro's government in other international bodies, urged 'the United Nations to recognize interim President Juan Guaidó as the legitimate President of Venezuela and seat his representative in this body'.[52] The US, however, ultimately could not achieve this aim.

A point that must be noted before reaching a conclusion on the precedential value of this case is that the States recognising Guaidó on constitutional grounds have actually paid little heed to what the constitutional law entails in other cases such as the one of Ukraine. Russia justified its 2014 intervention in Ukraine, among others, based on an invitation from the President Yanukovych. Russia considered that he had been removed from office by Parliament illegally and thus was able to issue an invitation on behalf of the State still being the constitutionally

[48] ibid 4.
[49] ibid 7.
[50] ibid.
[51] ibid 7-8.
[52] UNSC Verbatim Record (10 April 2019) UN Doc S/PV.8506, 8.

legitimate President. Indeed, his removal by Parliament met none of the requirements for impeachment contained in the Constitution. Most dramatically, the parliamentary vote fell short of the required three-quarters majority.[53] His presidency, and thus his invitation, however, was deemed invalid by many States.[54] In response to the Russian claims of the legitimacy of Yanukovych, the UK, among others, stated that Yanukovych 'abandoned his office, his capital and his country' and the replacing government 'is legitimate and has been overwhelmingly endorsed by the Ukrainian Parliament'.[55] The US's response was also in similar words, namely, that Yanukovych had fled the country and was voted out by Parliament.[56] Thus, in essence the two States had alluded that Yanukovych was not the legitimate President as he was not in effective control having fled the country, and the Ukrainian Parliament had deserted him, even though, as mentioned above, the process of ousting Yanukovych, at least on the face of it, was unconstitutional.

In conclusion, the recognition of Guaidó by more than 50 States could be considered a challenge to the traditional effective control test. However, those States who accorded recognition to Guaidó were actually ready to accept the effectiveness test, or quite dubious constitutional claims, in other cases. Also, the rest of the international community did not join them in the case of Venezuela. Moreover, six months after the recognition, only few recognising States had followed up their recognition in practice by, for example, accrediting Guaidó's envoys as representatives of Venezuela. This could indicate that for the majority of these countries the recognition was merely intended to be a form of political support.[57] Therefore, the effectiveness test seems to remain resilient against the constitutionality test in contemporary times. The case of Venezuela also showed that testing the legitimacy of a government only through the constitution or domestic law of the State is susceptible to indeterminacy compared to the rather objective test of effectiveness.

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[53] Christian Marxsen, 'The Crimea Crisis: An International Law Perspective' (2014) 74 ZaöRV 367, 375.
[54] Tom Ruys and Luca Ferro, 'Weathering the Storm: Legality and Legal Implications of the Saudi-led Military Intervention in Yemen' (2016) 65 ICLQ 61, 83-4; Olivier Corten, 'The Russian Intervention in the Ukrainian Crisis: was *Jus Contra Bellum* 'Confirmed Rather than Weakened'?' (2015) 2 JUFIL 17, 34-5.
[55] UNSC Verbatim Record (3 March 2014) UN Doc S/PV.7125, 7.
[56] ibid 18.
[57] See Federica Paddeu and Alonso Gurmendi Dunkelberg, 'Recognition of Governments: Legitimacy and Control Six Months after Guaidó' (*OpinioJuris*, 18 July 2019) <https://opiniojuris.org/2019/07/18/recognition-of-governments-legitimacy-and-control-six-months-after-guaido/>.

2.2. Presumption in favour of established governments in civil wars

The effective control test to a large extent is not a matter of concern for established governments in favour of whom 'the *status quo* orientation of the international system dictates a presumption' when their effectiveness faces a breakdown during a civil war.[58] State practice shows that, in most of the cases, as long as a civil war is in progress and the opposition faction claiming to be the government is not asserting complete control over the State, the established government continues to be recognised.[59] In the words of Nolte, the beneficiary of this presumption is the beleaguered government who at least preserves the 'control of a sufficiently representative part of the State territory'.[60] Even though it may not be legally relevant, as a practical matter the maintenance of control over the capital by the established government is indicative of that sufficient representativeness.[61] Having control over the capital, for example, helps administer the major means of communication, which plays a vital role in maintaining the control over parts of the population.[62] The loss of the capital, on the other hand, typically results in the disintegration of the established government even if it can wrap itself up as an insurgency in remote areas of the country afterwards.[63]

In line with State practice favouring established governments during civil wars, it is considered that if the opposition faction is accorded governmental recognition while the effectiveness of the established government has not yet diminished, the government is entitled to claim that the recognition in question has constituted a prohibited intervention in the internal affairs of the State it represents.[64]

It should be noted that while a breakdown in the territorial control during a civil war does not straightaway result in the derecognition of the established government, as will be explored in

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[58] Roth, *Governmental Illegitimacy* (n 3) 151; Also see Lauterpacht, *Recognition in International Law* (n 9) 93-97.
[59] Doswald-Beck (n 9) 197-200; Georg Nolte, *Eingreifen auf Einladung* (With an English Summary, Springer 1999) 631.
[60] Georg Nolte, 'Intervention by Invitation', *Max Planck Encyclopedia of Public International Law* (Last updated January 2010) para 18 <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1702?prd=EPIL>.
[61] Roth, *Governmental Illegitimacy* (n 3) 183-4.
[62] ibid 184.
[63] ibid.
[64] Frowein (n 9) para 15; Lauterpacht, *Recognition in International Law* (n 9) 94; IIL, 'The Principle of Non-Intervention in Civil Wars' (Session of Wiesbaden, 1975) Article 2(f).

the next chapter, it is strongly argued in the scholarship that such a government may lose the right to request military assistance to solely suppress an internal insurgency. This is because such intervention may violate the political independence of the State and the right to self-determination of the people.

As to the loss of effective control by an established government in cases of *coups d'état*, as Wippman argues, State practice shows that the brief discontinuity in the power of the established government does not prevent it from representing the State in international relations, thereby issuing an invitation to intervene so long as the intervention in question is swift and quick.[65] This is evidenced in the international reactions to the 1964 UK intervention in Tanganyika to restore to power President Nyerere, who had lost control of the capital as a result of a military mutiny, and France's military interventions in its former colonies to restore to power the leaders ousted by *coups d'état*.[66]

Although the practice confirms the continued legitimacy of established governments, it is not immune to the controversial cases, as will be illustrated next.

2.2.1. Continued recognition of the Assad government in Syria

Among the most contentious cases is the situation of Bashar Al-Assad's Syrian government embattled in civil war since 2011. Many countries recognised the main opposition group, the National Coalition for Syrian Revolutionary and Opposition Forces (NCSROF), which replaced the Syrian National Council, as the 'legitimate representative' of the Syrian people even though Al-Assad's established government had not yet been defeated.[67] As Talmon explains in his thorough analysis of the legal implications emanating from this recognition, however, this was a political act not intended to establish a legal status as government for the opposition or de-recognise the established government headed by Al-Assad. Despite losing

[65] David Wippman, 'Pro-Democratic Intervention by Invitation' in Gregory H Fox and Brad R Roth, *Democratic Governance and International Law* (CUP 2000) 300; Also see IIL, 'Intervention by Invitation' (Rapporteur: Gerhard Hafner, Session of Naples, 2009) 397-8, para 78.
[66] Wippman (n 65) 300.
[67] Stefan Talmon, 'Recognition of Opposition Groups as the Legitimate Representative of a People' (2013) 12 Chinese JIL 219.

large swaths of territory the incumbent authority legally continued to represent Syria as its government.[68]

This was evident from the fact that the offices established by the NCSROF in recognising States did not enjoy diplomatic status, and dealings between the NCSROF and these States did not reach diplomatic or government-to-government level relations.[69] Exceptionally, Libya, headed by the National Transitional Council, expressly, in 2011[70] and Qatar, implicitly, by handing over the Syrian embassy in Doha to the ambassador appointed by the National Coalition, in 2013[71] recognised the opposition as the government of Syria. Even though the Assad government's seat was vacated in some international organisations such as the Arab League and the Organisation of Islamic Cooperation, it continued to be represented in the UN and other organisations.[72]

2.2.2. Continued recognition of President Hadi of Yemen and the derecognition of President Yanukovych of Ukraine

The difference in reactions by the international community to the cases of Yemen and Ukraine despite the striking similarities between the two raised the question of double standards.[73] In March 2015, right before fleeing to Saudi Arabia in the face of a major advancement by the Houthi armed rebellion, Yemeni President Hadi rescinded his resignation, which had been obtained under Houthi compulsion, and requested military assistance from a Saudi-led coalition.[74] In general, the international community approved the intervention undertaken upon

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[68] ibid.
[69] ibid 244.
[70] 'Libya NTC Says Recognises Syrian National Council' (*Khaleej Times*, 12 October 2011) <https://www.khaleejtimes.com/article/20111011/ARTICLE/310119980/1028>.
[71] Talmon, 'Recognition of Opposition Groups' (n 67) 244-5; 'Qatar Hands Syrian Embassy to Opposition National Coalition' (*Gulf Times*, 14 February 2013) <https://www.gulf-times.com/story/342144/Qatar-hands-Syrian-embassy-to-opposition-National->.
[72] Karine Bannelier-Christakis, 'Military Interventions against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent' (2016) 29 LJIL 743, 762; On the relationship between being represented in an international organisation and being recognised as government, see Section 2.7 below.
[73] See Zachary Vermeer, 'The Jus ad Bellum and the Airstrikes in Yemen: Double Standards for Decamping Presidents?' (*EJIL Talk!*, 30 April 2015) <https://www.ejiltalk.org/the-jus-ad-bellum-and-the-airstrikes-in-yemen-double-standards-for-decamping-presidents/>; Ruys and Ferro (n 54) 84-5; Isabella Wong, 'Authority to Consent to the Use of Force in Contemporary International Law: the Crimean and Yemeni Conflicts' (2019) 6 JUFIL 52, 79-80.
[74] For a detailed account of the events, see Wong (n 73) 73-77; Ruys and Ferro (n 54) 62-6 and 84.

the request of the President-in-exile.[75] The UN Security Council in a resolution, adopted nearly three weeks after the intervention commenced, reaffirmed 'its support for the legitimacy of' President Hadi.[76]

Russia's early 2014 militarily intervention in Ukraine's autonomous region Crimea, which ended up by the region declaring itself an independent State before integrating into Russia, took place in a similar context.[77] Russia principally justified its intervention based on a request by the elected President Yanukovych. He was in exile at the time having fled Ukraine for Russia upon the removal from office by a parliamentary vote following months of revolutionary violent protests. The vote was considered unconstitutional because, among others, of falling short of the required parliamentary majority.[78] The invitation letter of Yanukovych, presented by the Russian ambassador in a UN Security Council meeting, called on the President 'of Russia to use the armed forces of the Russian Federation to establish legitimacy, peace, law and order and stability in defence of the people of Ukraine'.[79] However, this letter from a president who is no longer recognised internationally was deemed invalid by many States.[80]

Therefore, in essence, driven from power unconstitutionally, the leaders of both countries had fled to a neighbouring State and requested military assistance therefrom. Yet, while the international community continued to recognise the Yemeni President and accepted his invitation, in the Ukrainian case it acted quite contrarily. The above-mentioned presumption in favour of established governments arguably could explain this different treatment of the two Presidents. Despite having had to flee his country, the Yemeni President had not lost all the control over Yemen. Even though the capital Sana'a, and along with it the central government machinery, were overtaken by the Houthis, some parts of the country, especially Southern and Eastern Yemen, were under the control of Hadi. In addition, sections of the army, some

[75] Ruys and Ferro (n 54) 66-70.
[76] UNSC Res 2216 (14 April 2015) UN Doc S/RES/2216, Preamble.
[77] For an account of the events and their legal analyses, see Wong (n 73) 67-70; Ruys and Ferro (n 54) 83-5, Marxsen (n 53) 367-72 and 374-9.
[78] Marxsen (n 53) 375.
[79] UN Doc S/PV.7125 (n 55) 3-4.
[80] See Ruys and Ferro (n 54) 83-4; Corten, 'The Russian Intervention' (n 54) 34-5.

governorates and tribes and the 'popular resistance committees' continued to support his presidency.[81]

By contrast, the situation of Yanukovych was not even similar to the above-mentioned cases where the brief loss of control as a result of a *coup d'état* was tolerated by the international community. Yanukovych's loss of control was not preliminary; losing all internal support, especially the support of police and military forces, he fled the country with no prospect of returning to power.[82] In an interview held less than two weeks after his ousting, even Russian President Putin admitted that 'he has no political future, and [he has] told him so'.[83] Indeed, rather than restoring his government to power, the Russian intervention prepared the ground for the secession of Crimea.[84] In sum, the government of Yanukovych could not have benefitted from the presumption in favour of established governments due to his permanent loss of control over Ukraine in contrast to the government of Hadi whose control over Yemen had not entirely diminished despite the ongoing conflict. Therefore, this may be the legal explanation behind the different reactions by the international community to the ostensibly similar cases of Yemen and Ukraine.[85]

2.2.3. Recognition of the NTC as the government of Libya

Probably the clearest breach of the presumption in favour of established governments in recent times occurred during the 2011 Libyan civil war. The hand of the opposition groups was strengthened when the North Atlantic Treaty Organisation (NATO) intervened upon the UN Security Council's authorisation 'to take all necessary measures … to protect civilians and civilian populated areas under threat of attack'.[86] Even though the incumbent Qaddafi government was still in place and was fighting to hold onto power during the ongoing conflict,

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[81] Ruys and Ferro (n 54) 84.
[82] Marxsen (n 53) 379.
[83] Official Internet Resources of the President of Russia, 'Vladimir Putin Answered Journalists' Questions on the Situation in Ukraine' (4 March 2014) <http://en.kremlin.ru/events/president/news/20366>.
[84] Marxsen (n 53) 379.
[85] Also see Ruys and Ferro (n 54) 85 giving some weight also to the fact that in any case Hadi was internationally recognised and arguing that this may considerably compensate the loss of control. On the role of international recognition, see Section 2.6 below.; Vermeer (n 73) putting forward some additional arguments.; Benjamin Nußberger, 'Military Strikes in Yemen in 2015: Intervention by Invitation and Self-Defence in the Course of Yemen's 'Model Transitional Process' (2017) 4 JUFIL 110, 150-1 refuting the double standard claims based on the difference between the phases of political transitional processes in which the two countries are involved and based on the aim of Russian intervention.
[86] UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973, para 4.

the Libya Contact Group in its fourth meeting, consisting of participants from 32 countries, on 15 July 2011 'agreed to deal with the National Transitional Council (NTC) as the legitimate governing authority in Libya' until an interim authority took over.[87] The wording of the declaration clearly was a step further away from the preceding recognition of the NTC as the 'legitimate representative' of the people of Libya by some States.[88] However, its wording may seem ambiguous for not using the words 'recognition' or 'government'. Apparently, for this reason, it was not deemed by every commentator a recognition.[89] Nonetheless, the dealings to be pursued with the NTC outlined in the declaration could be interpreted as an intention to establish a government-to-government relationship. The Group, for example, agreed to put the overseas assets of the Libyan State at the NTC's disposal and welcomed its 'commitment to honor any existing legal contracts signed under the Qaddafi regime'.[90]

The NTC enjoyed this governmental recognition in July 2011 despite the fact that it was able to declare full control over the country only in October 2011, coinciding with the termination of the UN authorisation and the end of the NATO operation.[91] The problem of the premature recognition of the NTC was reflected in the debate on the adoption of the UN General Assembly Resolution of 16 September 2011 accepting the credentials of the representatives sent by the NTC, passed by a 114-17-15 vote.[92] Some States that did not vote in favour voiced criticism that they did not consider the NTC the government of Libya because it had not yet been in full control of the country (Saint Vincent and the Grenadines, Kenya) or because it had come to power through foreign intervention (Venezuela, Cuba, Bolivia, Nicaragua).[93]

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[87] Turkish Ministry of Foreign Affairs, 'Fourth Meeting of the Libya Contact Group Chair's Statement' (15 July 2011) para 4 <http://www.mfa.gov.tr/fourth-meeting-of-the-libya-contact-group-chair_s-statement_-15-july-2011_-istanbul.en.mfa>.

[88] On the implications of this recognition, see Dapo Akande, 'Which Entity is the Government of Libya and Why does it Matter?' (*EJIL: Talk!*, 16 June 2011) <https://www.ejiltalk.org/which-entity-is-the-government-of-libya-and-why-does-it-matter/>.

[89] See Dapo Akande, 'Recognition of Libyan National Transitional Council as Government of Libya' (*EJIL: Talk!*, 23 July 2011) <https://www.ejiltalk.org/recognition-of-libyan-national-transitional-council-as-government-of-libya/> seeing this statement as a clear governmental recognition; Colin Warbrick, 'British Policy and the National Transitional Council of Libya' (2012) 61 ICLQ 247, 252-253, on the other hand, noting that the Group's decision did not constitute recognition by each participating State. The UK, for example, rather recognised the NTC on 28 July 2011 when it outlined the actions it will take in response to the Group's decision.

[90] Turkish Ministry of Foreign Affairs (n 87) paras 10-11.

[91] Katie A Johnston, 'Transformation of Conflict Status in Libya' (2012) 17 JC&SL 81, 107.

[92] UNGA Res 66/1 (16 September 2011) UN Doc A/RES/66/1.

[93] See UNGA Verbatim Record (16 September 2011) UN Doc A/66/PV.2, 7-16; With respect to the situation of governments installed by foreign intervention, see Section 2.3 below.

One cannot assume that this exceptional case of Libya could have precedential value against the presumption of the continued legitimacy of the established governments, or in favour of the premature recognition. Only 32 States recognised the opposition as government when clearly the incumbent was still fighting to hold onto power. Even when the UN General Assembly accepted the credentials of the representatives of the NTC after it had claimed victory, this was far from being unanimous. Moreover, as will be seen below, the acceptance of credentials of the representatives from a government in an international organisation not necessarily implies recognition as government.[94] During the debates on the mentioned UN General Assembly Resolution, statements by some States that voted in favour clearly showed that they did not recognise the NTC as a government.[95]

Furthermore, the context of the NATO intervention must also be taken into account. Most States supporting the intervention had already interpreted the UN Security Council authorisation as allowing the intervening States to change the existing regime in Libya to protect the civilians if necessary.[96] The recognition of the NTC conveniently underpins this interpretation. Nonetheless, it must be noted that the objective of regime change arguably exceeded the mandate given by the UN Security Council[97] and was not extensively accepted by the international community of States.[98]

A case such as that of the Libyan civil war, where an insurgent group enjoys recognition prematurely, is a clear example of potential abuse.[99] Such a premature recognition, after all, is supposed to render the foreign military support to the recognised entity lawful when requested. An intervention undertaken upon such a request can easily change the course of civil wars in the interests of the intervening foreign powers at the expense of the interests of the State where the intervention takes place, and its people, and international peace and security.

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[94] See Section 2.7 below.
[95] See n 194 and n 198 below, and the surrounding text.
[96] Olivier Corten and Vaios Koutroulis, 'The Illegality of Military Support to Rebels in the Libyan War: Aspects of *Jus Contra Bellum* and *Jus In Bello*' (2013) 18 JC&SL 59, 67-9.
[97] ibid 71-4.
[98] ibid 74-7.
[99] See Yoram Dinstein, *Non-International Armed Conflicts in International Law* (CUP 2014) 103. He also claims that such concern is alleviated in the case of Libya where 'an entire group of foreign States' ultimately came to the same conclusion.

2.3. Illegitimacy of governments installed by foreign powers

The effective control principle refers to a control that is independently acquired and maintained. As is widely acknowledged in scholarship, when a government's control depends upon an illegal foreign intervention, that government is rather entitled to non-recognition.[100] Such entities often are characterised as 'puppet governments' and acts emanating therefrom, including an invitation to intervene, are deemed void.[101] The non-recognition of such entities may be considered a natural consequence of the maxim *ex injuria jus non oritur*, according to which an unlawful act cannot give rise to a legal right or entitlement, such as the entitlement to recognition as a government.

The roots of the requirement of independency from a foreign power may be traced to the case of *Charles J Jansen v Mexico* of 1868, where the arbitral tribunal had to determine whether Archduke Maximilian's regime installed by the French intervention was the government of Mexico.[102] The tribunal held that the change of government in a State may occur either as a result of a secure and permanent conquest or a revolution carried out within the State. It went on to say that '[s]hould foreign intervention aid this change we can never regard the fact as accomplished or as resting upon the favour of the people unless the new government is strong enough to maintain itself after the foreign aid shall be withdrawn'.[103] In conclusion, the regime in question was not the government of Mexico because, among others, 'it rested alone on the assistance of foreign force'.[104]

The non-recognition of governments installed by foreign powers is well-established in State practice. This, especially, was the case during World War II when many States continued to recognise governments in exile as the representatives of the States occupied by Axis powers,

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[100] Frowein (n 9) para 15; Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (Volume I, 9th edn, Longman 1996) 151-2; The American Law Institute, *Restatement of the Law (Third) - The Foreign Relations Law of the United States* (1987) § 203 (2); For the Cold War era sources in scholarship advocating this position, see M J Peterson, *Recognition of Governments: Legal Doctrine and State Practice, 1815-1995* (Macmillan 1997) 77, fn 5.
[101] For more on 'puppet' entities, see James R Crawford, *The Creation of States in International Law* (2nd edn, OUP 2007) 80-81.
[102] *Charles J Jansen v Mexico* (1868) 29 RIAA 159.
[103] ibid 184.
[104] ibid 186.

rather than effective governments *in situ* established by means of occupation.[105] As to the post-UN Charter era, the Soviet intervention in Afghanistan and the Vietnam intervention in Cambodia may be considered some of the most dramatic cases.[106] The decade-long 1979 intervention by the Soviet Union in the civil war in Afghanistan in support of the Karmal government, which was considered to be imposed by the Soviet Union itself, was not generally accepted by the international community except for some States allied to, or seeking good relations with, the Soviet Union. The Karmal government had come to power only two days after the Soviets began dispatching troops in Afghanistan by toppling the short-lived presidency of Hafizullah Amin. In line with the Soviets' position, the government claimed to have repeated previous Taraki and Amin governments' request of assistance from the Soviet Union to fend off foreign armed intervention in Afghanistan.[107] Yet, despite these claims, in an emergency session the UN General Assembly deplored the intervention and called for the withdrawal of the Soviet troops.[108]

The other dramatic case was the Vietnamese intervention in Cambodia, which took place between 1978 and 1989. It replaced the Khmer Rouge regime, the Communist Party of Kampuchea, responsible for the killing of one to two million people, with another Communist regime of Heng Samrin. Instead of the newly established regime, the UN General Assembly recognised the opposing Coalition Government of Democratic Kampuchea, which had been formed in 1982 in exile, as the legitimate representative of Cambodia in the UN. This was despite the involvement of the former Khmer Rouge regime in this government. The reason behind this recognition was that the newly established regime was imposed on Cambodia as a result of the illegal use of force by Vietnam. The General Assembly also considered the government it recognised as exercising effective control over the country.[109]

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[105] See Stefan Talmon, 'Who is a Legitimate Government in Exile? Towards Normative Criteria for Governmental Legitimacy in International Law' in Guy S Goodwin-Gill and Stefan Talmon (eds), *The Reality of International Law: Essays in Honour of Ian Brownlie* (OUP 1999) 525-6.
[106] For State practice in general see Peterson (n 100) 77-80; Talmon, 'Who is a Legitimate Government in Exile? (n 105) 524-30.
[107] For an account of the events and legal claims, see Christopher J Le Mon, 'Unilateral Intervention by Invitation in Civil Wars: The Effective Control Test Tested' (2003) 35 NYUJIntlL&Pol 741, 778-82; Doswald-Beck (n 9) 230-34; Peterson (n 100) 79.
[108] UNGA Res ES-6/2 (14 January 1980) UN Doc A/RES/ES-6/2.
[109] For an account of the events, see Nhu Dung Hopt-Nguyen, 'Vietnam', *Max Planck Encyclopedia of Public International Law* (Last updated March 2009) para 48-50 <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1873>; Lucy Keller, 'Cambodia Conflicts (Kampuchea)', *Max Planck Encyclopedia of Public International Law* (Last Updated

Since the end of the Cold War, the practice involves cases where the UN Security Council conferred legitimacy on governments that owed their existence to foreign interventions. Rather than contradicting the requirement of independence, this practice can only be interpreted in a way confirming the fact that without the approval of the Council, whose decisions are agreed to be accepted by the UN member States,[110] such governments would lack legitimacy. In other words, these cases demonstrate that the external legitimacy conferred on a government by the UN Security Council can make up for that government's lack of independence from a foreign power. Additionally, these governments, after being endorsed by the Council, have been internationally recognised – an acquisition which also in and of itself can offset the lack of effective control, as will be seen below.[111]

The situation in Iraq is illustrative. After having invaded Iraq in 2003, the US and UK-led coalition formed the Coalition Provisional Authority (CPA) to administer the country.[112] The CPA, whose role was recognised by the UN Security Council as being the unified command for occupying powers,[113] handed over power in 2004 to the Interim Government of Iraq, which was established largely as a result of its efforts and relatively the limited role of the UN.[114] Despite owing its existence to foreign occupation, the Council endorsed the 'formation of the sovereign Interim Government of Iraq'.[115] It also reaffirmed its authorisation of the multinational force, which it noted was present in Iraq 'at the request of the incoming Interim Government of Iraq'.[116] In addition to the Council's recognition, the interim government enjoyed widespread recognition from individual States.[117]

December 2017) paras 5, 8 and 9 <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1263>.

[110] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16, Article 25.

[111] See Section 2.6 below.

[112] UNSC, 'Letter Dated 8 May 2003 from the Permanent Representatives the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the President of the Security Council' (8 May 2003) UN Doc S/2003/538.

[113] See UNSC Res 1483 (22 May 2003) UN Doc S/RES/1483, Preamble.

[114] Andrea Carcano, 'End of the Occupation in 2004? The Status of the Multinational Force in Iraq after the Transfer of Sovereignty to the Interim Iraqi Government' (2006) 11 JC&SL 41, 50.

[115] UNSC Res 1546 (8 June 2004) UN Doc S/RES/1546, Article 4(a).

[116] ibid Article 9; On political transition in Iraq, also see UNSC Res 1511 (16 October 2003) UN Doc S/RES/1511.

[117] Carcano (n 114) 48-9.

The legality of this resolution and the invitation from the Interim Government was subjected to high criticism in the literature. Wheatley considers that the resolution on the face of it violated the *jus cogens* right to self-determination of the Iraqi people by endorsing a power-sharing government that excluded the people's active participation. He acknowledges that this right could be overridden by the UN Security Council by virtue of article 103 of the UN Charter as long as the Council acts within the constitutional framework of the Charter. However, he argues that the Council failed to provide the rationale for endorsing the Interim Government in the relevant resolutions and debates. This contravened the fact that the decisions of the Council, being a political judgment, must not be patently unreasonable, and such failures could ultimately propel States to challenge its authority.[118] Carcano, on the other hand, despite the Council's binding resolution, considers that it is difficult to deem the Interim Government sovereign, the invitation it issued valid, and the invited Multinational Force a non-occupation force. The reason is that the Interim Government lacked 'both independence/internal legitimacy and effective control'.[119]

Nevertheless, apart from the scholarly criticism about the way in which the government had been formed, the reality remained that the Interim Government was accepted by the international community as the legitimate government of Iraq. In contrast, what was not the subject of controversy was the governmental illegitimacy of the CPA. It was established by the occupying coalition of States 'to exercise powers of government temporarily'.[120] As Lord Mance opined in a UK Supreme Court case, CPA did not equate 'with the state of Iraq for the purposes of consenting to the presence of foreign troops under international law. The CPA, although separate from the United Kingdom government, was the creature of the occupying forces.'[121]

A situation similar to that of Iraq took place in Afghanistan. After the 2001 US-led military intervention had overthrown the ruling Taliban regime in Afghanistan, the participants from various segments of the Afghan population came together under the UN Talks on Afghanistan,

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[118] Steven Wheatley, 'The Security Council, Democratic Legitimacy and Regime Change in Iraq' (2006) 17 EJIL 531.
[119] Carcano (n 114) 53 and 66.
[120] UNSC, 'Letter Dated 8 May 2003' (n 112) 1.
[121] *R (on the application of Smith) (FC) (Respondent) v Secretary of State for Defence (Appellant) and another* [2010] UKSC 29, para 186.

a UN-sponsored initiative. They agreed to establish an Interim Authority as the first step in a process of political transition that would last until elections were held.[122] The Interim Authority would assume power from Burhanuddin Rabbani,[123] who was considered to be heading the internationally recognised government of Afghanistan despite having been ousted by the Taliban in 1996.[124] It was agreed that the Interim Authority would 'be the repository of Afghan sovereignty' and occupy the seat of Afghanistan in international organisations.[125]

Despite the fact that the Interim Authority would not have come to power had it not been for the US-led intervention, the UN Security Council supported 'the efforts of the Afghan people to establish a new and transitional administration'[126] and endorsed the resulting Agreement Establishing the Interim Authority.[127] Thus, a legitimate government had been formed, as in the Iraqi case, with the blessing of the Council and the international community at large. Such a blessing could be considered to have offset the fact that the new government owed its existence to a foreign intervention.

Additionally, it should be noted that other factors played into the hands of the new Afghan government. The Taliban itself had not internationally been recognised before having been overthrown, and it was 'the efforts of the Afghan people', to the exclusion of the intervening States' involvement, that established the new administration. This and the fact that power was assumed from the previously recognised government could indicate that the Interim Authority was an independent entity. As such, even if it was not blessed with the endorsement by the Council, it could have been regarded as deserving governmental recognition. Another point that should be emphasised is that the US-led intervention that aimed at overthrowing the Taliban, thus opening the way for the formation of the Interim Authority, was not *per se* illegal. It was considered by some States and scholars as an exercise of the right to self-defence.[128] As

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[122] Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions (5 December 2001) UN Doc S/2001/1154, Chapter I; For a detailed account of this political transition, see Simon Chesterman, *You, The People: The United Nations, Transitional Administration, and State-Building* (OUP 2004) 88-92.
[123] Agreement on Provisional Arrangements (n 122) Preamble and Chapter I, Article 3.
[124] Rüdiger Wolfrum and Christiane E Philipp, 'The Status of the Taliban: Their Obligations and Rights under International Law' (2002) 6 MaxPlanckUNYB 559, 567-7.
[125] Agreement on Provisional Arrangements (n 122) Chapter I, Article 3.
[126] UNSC Res 1378 (14 November 2001) UN Doc S/RES/1378, Article 1.
[127] UNSC Res 1383 (6 December 2001) UN Doc S/RES/1383, Articles 1 and 3.
[128] See Christopher Greenwood, 'International Law and the 'War against Terrorism'' (2002) 78 International Affairs 301, 308 and 317.

such, the recognition of the Interim Authority was not necessarily the recognition of a situation created by an internationally wrongful act.

2.4. Unwillingness to observe international obligations as a reason for non-recognition

Alongside the effectiveness principle, at times States demanded willingness to abide by the international obligations as a prerequisite from the new entities seeking recognition.[129] This, indeed, could be one of the reasons behind the declarations by coup plotters or opposition groups in civil wars pledging to adhere to the international obligations should they come to power.[130] In the same vein, *de facto* regimes generally pledge to uphold international obligations in the territory under their control[131] – a pledge in which an expectation of recognition by the international community could be playing a role. The requirement of the willingness to abide by the international obligations was also evident in the above-mentioned Cuban proposal which conditioned for the representation of a government in the UN, among others, 'the ability and willingness to achieve the Purpose of the Charter, to observe its Principles' and to show 'respect for human rights'.[132]

A relatively modern case illustrating the importance of the willingness to abide by the international obligations was the situation of the Taliban in Afghanistan. The majority of the international community refused to recognise the Taliban for not committing to fulfil its obligations under international law despite the fact that *de facto* it had been in control of substantial parts of Afghanistan since 1996 until overthrown by the US-led coalition in 2001.[133]

2.5. The case of failed states

[129] For examples in practice where this condition was put forward by some States, see Jennings and Watts (n 100) 153-4, fn 13-5; For other additional criteria occasionally invoked in practice, see Peterson (n 100) 80-85.
[130] See, for example, the statement issued by the army group behind the 2016 failed coup attempt in Turkey, declaring that they took every action to fulfil the obligations that arise from the UN, NATO and all other international organisations. Hakime Torun, 'TRT Haber'de okunan metin: Türk Silahlı Kuvvetleri yönetime el koymuştur' (*Hürriyet*, 16 July 2016) <http://www.hurriyet.com.tr/trt-haberde-okunan-metin-turk-silahli-kuvvetleri-yonetime-el-koymustur-37309565>.
[131] For a list of provisions in the constitutions of some *de facto* regimes committing to respect international obligations, see Antal Berkes, 'The Formation of Customary International Law by *De Facto* Regimes' in Sufyan Droubi and Jean d'Aspremont (eds), *International Organizations, Non-State Actors and the Formation of Customary International Law* (Manchester University Press, 2020) fn 37.
[132] See n 12 and n 13, and the affiliated text.
[133] See Wolfrum and Philipp (n 124) 574-7.

There might be an exceptional case where a State plunges into anarchy with the total collapse of the law and order, thus lacking any effective government to represent it in international relations. Such a State, usually defined as a failed or failing State, 'ceases to exist as a participant in international affairs' even though some diplomatic relations could still exist with the outer world for practical reasons.[134] A civil war could very well be the reason behind the failure of a State's governing machinery. However, it does not mean that every State that plunges into a civil war is a failed state. As mentioned above, it is the general practice of States to deem the established governments in such States legitimate as long as their control over the State has not totally vanished and they continue to fight to hold onto power. What makes the failed State exceptional is the fact that, in the absence of a government, it cannot validly request foreign military assistance to bring order to the anarchical situation in which it finds itself.[135]

Nonetheless, losing the ability to exercise sovereign rights does not mean that these rights are forfeited. The absence of a government does not take away the legal identity of the State. The existence of an effective government could be considered the most important criterion for statehood upon which all other criteria depend.[136] However, this criterion applies less strictly when assessing the continuity of statehood, in favour of which there is a strong presumption in practice.[137]

The importance of this presumption is that the failed State will continue to preserve its legal status and concomitant rights to sovereignty and equality with other States. Therefore, contrary to some views held in the 1990s, it will continue to be protected by the norms of non-intervention and non-use of force as other States.[138] This theoretical conclusion indeed is confirmed in practice in the sense that no State has justified intervention in a State lacking a government by arguing that it does not benefit from the protection of article 2(4) of the UN

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[134] Daniel Thürer, 'Failing States', *Max Planck Encyclopedia of Public International Law* (Last Updated February 2009) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1404> paras 1 and 7.

[135] The lack of an effective government is at the core of the concept of 'failed State'. However, this term, not being a legal term of art, is also attributed different meanings by governments and commentators especially in the sense of how much ineffectiveness of its government renders a State failed. See Hannah Woolaver, 'State Failure, Sovereign Equality and Non-Intervention: Assessing Claimed Rights to Intervene in Failed States' (2014) 32 WisIntlLJ 595, 600-2.

[136] Crawford (n 101) 55-6.

[137] ibid 59 and 701.

[138] See Woolaver (n 135) 599-600.

Charter.[139] Rather, it was the UN Security Council, in such cases, that intervened in the internal affairs of the State and restored the collapsed State machinery. It did so when it considered the situation at stake a threat to peace under article 39 of the UN Charter.[140]

Somalia of the 1990s, where the State machinery collapsed amid inter-clan fighting in the absence of any entity that exercised effective control, is the quintessential case of a failed State.[141] The UN Secretary-General's letter regarding the situation, in line with which the UN Security Council acted,[142] sums up how to address the problem of failed States. The letter advised that the Council must determine the situation as a threat to peace and authorise the use of force under chapter VII of the UN Charter to secure an environment for humanitarian operations, because 'no government exists in Somalia that could request and allow such use of force'.[143]

2.6. The role of international recognition

The effective control doctrine and the principles emanating therefrom, set out so far, have been based on State practice. In other words, States have overwhelmingly been issuing recognition in line with the doctrine of effective control. That is, most often the international recognition of a government and the effective control doctrine go hand in hand. The pertinent question is whether international recognition plays a role on its own for the purpose of determining the lawful government of a State. Can an internationally recognised but ineffective government, or *vice versa*, legally speak on behalf of the State?

One view argues that if the government is not in *de facto* control of the State, it cannot speak for that State even if it is generally recognised.[144] General foreign recognition is neither an additional condition for the existence of a government, nor can it by itself create or, by its non-

[139] ibid 609.
[140] See Thürer (n 134) para 14; Also see Woolaver (n 135) 609-615 arguing that in some cases the intervention took place based on State consent and right to self-defence, as if there were governments in such cases that can consent to the intervention. On the meanings attributed to 'failed State', see n 135.
[141] See Woolaver (n 135) 595, 603 and 604; Also see n 159 on the recognition of no entity as a government in Somalia.
[142] See UNSC Res 794 (3 December 1992) UN Doc S/RES/794, preamble, and Articles 8 and 10.
[143] UNSC, 'Letter Dated 29 November from the Secretary-General Addressed to the President of the Security Council' (30 November 1992) UN Doc S/24868, 3.
[144] Quincy Wright, 'United States Intervention in the Lebanon' (1959) 53 AJIL 112, 120; Dinstein (n 99) 97.

existence obliterate, a government.[145] A new government denied general recognition and thus deprived of access to foreign assets and diplomatic ties 'is still the Government of the State' as long as it is effective and independent.[146]

The opposite view grounded on State practice is more prevalent among commentators. Doswald-Beck recognises that the above-mentioned view may have some merit under the early international arbitral decisions.[147] However, she denies its validity by citing the practice in relation to the above-mentioned presumption in favour established governments which, despite losing control over the State, continue to be recognised and act on behalf of the State until another identifiable entity secure control of the State.[148] Thus, for her the role the international recognition played in such situations shows that in practice it is of paramount importance in determining the lawful government.[149]

However, among commentators the importance of recognition is not limited to cases where the presumption in favour of established governments is upheld. For example, after examining the collective recognition controversies that took place at the UN, Roth suggests that for whatever reason given, be it with disregard to the traditional rules of recognition, there is a 'close relationship between collective recognition and the capacity to assert rights against, or consent to, foreign military intervention'.[150] The legitimacy of a *de facto* government, as such, is not a given in international law.[151] Likewise, based on a number of cases of interventions by invitation in civil wars, Le Mon views the international external legitimacy of the inviting government as critical; in fact, to him 'it is only when the inviting party is recognised as the legal government' that the intervention will be deemed legal.[152] The reverse also holds true in the sense that lacking external legitimacy will taint the legality of intervention.[153] Citing the cases of Iraq (2004) and Afghanistan (2001), where an international body (the UN Security Council) legitimised the government and presence of foreign troops, Nolte argues that

[145] Dinstein (n 99) 97.
[146] ibid referring to The American Law Institute (n 100) § 203.
[147] Doswald-Beck (n 9) 197.
[148] Doswald-Beck (n 9) 197-9.
[149] ibid 199.
[150] Roth, *Governmental Illegitimacy* (n 3) 284.
[151] ibid.
[152] Le Mon (n 107) 791.
[153] ibid.

international legitimation of a government can substitute its lack of effectiveness and non-independence.[154]

With regard to the issue, Talmon surveys State practice concerning the validity of treaties and unilateral acts performed by recognised governments in exile. He suggests that when it comes to a unilateral act of requesting military assistance to replace the government *in situ*, considering the possibility of abuse and as illustrated in practice, the request will be deemed valid only if it is made by an authority that gained widespread recognition; recognition by the intervening State or States will not suffice.[155] Hathaway and others, similarly, put forward the possibility of abuse and manipulation of flexible criteria for recognition as the reason behind their insistence on the requirement of the multilateral endorsement of the legitimacy of a government consenting to a foreign intervention.[156]

The importance of international recognition is also recognised in *Somalia v Woodhouse Drake*, where the court considered that 'in marginal cases, the extent of international recognition' is among the factors to be assessed in determining the lawful government.[157] Apparently, for the court, however, the international recognition does not compensate for a total lack of control over the State. Even assuming that the interim government of Somalia was internationally recognised as its counsel claimed, 'where, as here, the regime exercises virtually no administrative control at all in the territory of the state, international recognition of an unconstitutional regime should not suffice and would, indeed, have to be accounted for by policy considerations rather than legal characterisation'.[158]

Even though not dismissing the value of international recognition and deeming it and the effectiveness 'mutually reinforcing', Corten does not consider that the international recognition can compensate for the lack of effective control for the purpose of issuing an invitation for intervention.[159] In support of his view that internationally recognised but ineffective

[154] Nolte, 'Intervention by Invitation' (n 60) para 20.
[155] Talmon, *Recognition of Governments* (n 2) 148-9.
[156] Oona A Hathaway and others, 'Consent-Based Humanitarian Intervention: Giving Sovereign Responsibility Back to the Sovereign' (2013) 46 CornellIntlLJ 499, 549-50.
[157] *Somalia v Woodhouse Drake* (n 30) 68.
[158] ibid 67.
[159] Olivier Corten, *The Law Against War* (Translated by Christopher Sutcliffe, Hart Publishing 2010) 277-87.

governments cannot 'make a valid call for military intervention'[160] and the mere appeal from such a government is not 'enough to justify outside military intervention',[161] he refers to interventions that restored the democratically elected governments of Haiti and Sierra Leone to power in 1994 and 1998, respectively. He rightly argues that the forceful reinstitution of these effectively ousted but still internationally recognised governments took place on the grounds other than their consent.[162]

In Haiti the UN Security Council acted under its chapter VII powers when authorising the use of force, while taking note of the appeal made by the recognised President.[163] In Sierra Leone, Nigeria, heading the ECOMOG peacekeeping forces that forced the effective government to relinquish power, justified the intervention on the ground that it occurred as a result of self-defence measures undertaken as part of the peacekeeping operations. This was despite the fact that the recognised President had appealed for intervention.[164] Indeed, Sierra Leone's UN representative acknowledged in a press conference at the UN that his country, represented by the recognised President, had sought intervention but Sierra Leone was told in the UN Security Council 'in "rather cynical" terms that Sierra Leone had "to deal with the boys on the ground", meaning those who controlled the military force'.[165]

Another recent example where the ineffectiveness was a barrier to requesting military assistance includes the Government of National Accord (GNA) of Libya. For example, though the US justified its operations against ISIL in Libya based on the internationally recognised GNA's consent, including an attack on 19 February 2016,[166] in early February 2016 the US officials who spoke to the press on condition of anonymity said that the largest 'hurdle' that

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[160] ibid 284.
[161] ibid 287.
[162] ibid 285-7. He also cites the case of Somalia, where the UN Security Council authorised intervention in December 1992 in response to the deteriorating humanitarian situation in the country. He wrongly assumes that 'it seems that Somalia's official government – that no one contested was the only recognised government' requested assistance even though intervention was justified with the Council's authorisation. There was no recognised government at the time in Somalia. See Talmon, *Recognition of Governments* (n 2) 314 showing that the Interim Government of Somalia, established on 28 January 1991 after the collapse of the State, was not recognised by any State. Somalia was not even represented at the UN General Assembly between 1992 and 2000 due to the absence of any purporting claims to that seat. See Riikka Koskenmaki, 'Legal Implications Resulting from State Failure in Light of the Case of Somalia' (2004) 73 ActScandJurisGent 1, 13.
[163] See n 227 and the surrounding text.
[164] See n 228 and the surrounding text.
[165] UN, 'Press Conference by Permanent Representative of Sierra Leone' (18 February 1998) <https://www.un.org/press/en/1998/19980218.jonah.html>.
[166] See Chapter 6, nn 386-388.

'stand[s] in the way of increased American military involvement' was 'the formation of a unified Libyan government strong enough to call for and accommodate foreign military assistance'.[167] The UK Secretary of Defence, in answer to a parliamentary question, said that he authorised the use of a UK airbase by the US for the 19 February attack after being satisfied with the legality of the US operation.[168]

To give another example regarding the situation of the GNA of Libya, in early 2016 NATO and EU made a potential consensual intervention against ISIL in Libya conditioned on the formation of an operative national unity government.[169] Likewise, the UK House of Commons Foreign Affairs Committee in a September 2016 report suggested that 'British troops should not be deployed to Libya in a training role' at the request of the GNA 'until the GNA has established political control' and 'stabilised internal security'.[170]

Nonetheless, State practice includes examples where requests by ineffective but internationally recognised governments were fulfilled, such as the Ethiopian intervention in Somalia in 2006. The intervention, which was welcomed at large by the international community, took place based on the invitation from the Transitional Federal Government (TFG). The TFG was established in Kenya in October 2004 as a result of a regionally sponsored reconciliation process and was relocated to Somalia in June 2005. Even though the international community in the beginning was reluctant, soon after its establishment the TFG gradually gained widespread recognition. The justification put forward by Ethiopia was that it acted in self-defence against the Islamic Courts Union (ICU) with the consent of the TFG, despite the fact that at the time the TFG had no real control over the State.[171] Being newly established, the TFG did not benefit from the above-mentioned presumption in favour of established governments. Perhaps what substituted this lack of control by the TFG was that, as the Ethiopian Prime

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[167] Phil Stewart, Warren Strobel and Jonathan Landay, 'Despite Libya Urgency, Hurdles to Quick Action against Islamic State' (5 February 2016, *Reuters*) <https://uk.reuters.com/article/uk-usa-libya/despite-libya-urgency-hurdles-to-quick-action-against-islamic-state-idUKKCN0VE2ON>.
[168] UK Parliament, 'USA: RAF Lakenheath, Question for Ministry of Defence, UIN 27840, tabled on 22 February 2016' <https://questions-statements.parliament.uk/written-questions/detail/2016-02-22/27840#>
[169] Bannelier-Christakis (n 72) 758-9.
[170] UK House of Commons, 'Libya: Examination of Intervention and Collapse and the UK's Future Policy Options – Third Report of Session 2016–17' (14 September 2016) 37-8.
[171] For a detailed account of events see Eliav Lieblich, *International Law and Civil Wars: Intervention and Consent* (Routledge 2013) 165-9 giving this case as an example to the notion that a transitional government possessing international legitimacy in a failed State can consent to intervention.; For an account of events, also see Chapter 6, Section 2.19; On the legal dilemma in invoking both consent and self-defence, see Chapter 7, Section 3.4.

Minister argued in defence of the initial deployment of Ethiopian trainer troops to Somalia, it was 'an internationally recognized government … who have officially asked for support'.[172]

For the TFG, being internationally recognised was so crucial that the contestation of it could had have dramatic results. So, when in September 2008 the TFG requested the funds previously obtained from the management of the Mogadishu port be repatriated, the United Nations Development Programme in Somalia refused to do so on the basis 'that the TFG was not yet an internationally recognised Government'.[173]

One can also mention in support of the validity of a request of military assistance from an ineffective but recognised government the recent intervention in The Gambia in 2017. The incumbent and effective government, which refused to leave office, was removed from power by force at the request of the elected and internationally recognised President.[174]

To sum up, the importance of international recognition is undeniable. It is the internationally recognised government that represents the State at the international level even if the State is effectively being controlled by another entity. The above-mentioned view suggesting that the effectiveness exclusively determines the existence of a government, regardless of whether it gained recognition from any State, does not hold true and remains an isolated one. However, practice also shows that States do not regard the invitation for military intervention from an ineffective but recognised government a sufficient legal basis on every occasion. The practice also does not show a discernible pattern between the cases where the consent of such a government was acted upon and those that were not. This could be interpreted as that in some cases invited States may prefer not to rely on the consent of the such government for reasons, such as, as could be construed from some of the above-mentioned statements and practice, to be realistic about who is in charge on the ground, to be practical about how an ineffective government can accommodate the invited forces, not to unduly antagonise the effective authorities, or to be more prudent when it comes to the legal basis of the intervention by, for example, obtaining a UN Security Council authorisation. In any event, for whatever reason, it

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[172] Alemayehu G Mariam, 'The End of Pax Zenawi in Somalia' (*Ethiopian Review*, 6 October 2008) <https://www.ethiopianreview.com/index/4993>.
[173] UNSC, 'Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2182 (2014): Somalia' (19 October 2015) UN Doc S/2015/801, 164.
[174] See n 214 and n 215 below, and the surrounding text.

does not seem safe to conclude that being internationally recognised can entirely compensate for the lack of effective control when it comes to the capacity to consent to military intervention. It should not be forgotten, however, that practice shows that effective but non-recognised governments cannot object to a foreign intervention with which the recognised government agrees.

A significant role the international recognition plays with respect to the maintenance of international peace and security is that to collectively agree on who the government of a State is, that is, whose call must be heeded at the international stage, can alleviate the danger of escalation of an internal conflict into an international one between different political blocks of the international community. A situation where the international community is divided over who can speak for the State, as in the case of Venezuela where some 50 States recognised the national assembly's leader Guaidó in 2019 as the interim President in defiance of the almost absolutely effective and established government of President Maduro, can exemplify this danger.[175] Indeed, Guaidó considered consenting to a possible US military intervention[176] and officially asked from the US military for 'strategic and operational planning' through the Venezuelan ambassador to the US appointed by him.[177] The US Secretary of State had already stated that '[i]f that is what is required', the US will take military action in support of Guaidó.[178]

One cannot predict that a US military action would not elicit a counter-intervention on the side of the Maduro government at its request by its supporter States. In such a situation, two foreign powers would justify intervention based on the consent of the government they recognised. The justification thus would eventually hinge on the political act of recognition by the individual States. To prevent a possible abuse in such situations where the international community is divided on who to recognise as government, no government should be able to request military assistance. In particular, an intervention must not take place against the wishes

[175] See Section 2.1.1 above.
[176] Giulio Piovaccari, 'Venezuela's Guaido would Probably Accept U.S. Military Intervention if Proposed: Paper' (*Reuters*, 10 May 2019) <https://www.reuters.com/article/us-venezuela-politics-guaido-us/venezuelas-guaido-would-probably-accept-u-s-military-intervention-if-proposed-paper-idUSKCN1SG0GQ>.
[177] Julian Borger, 'Venezuela: opposition leader Guaidó asks US military for 'strategic planning' help' (*The Guardian*, 13 May 2019) <https://www.theguardian.com/world/2019/may/13/venezuela-news-latest-guaido-us-military-help-maduro>.
[178] US Department of State, 'Interview With Maria Bartiromo of Mornings With Maria on Fox Business Network' (1 May 2019) <https://www.state.gov/interview-with-maria-bartiromo-of-mornings-with-maria-on-fox-business-network-4/>.

of the government whose legitimacy is determined by the objective criteria of effectiveness. Otherwise, the legality of an intervention would merely hinge on the political act of recognition by the intervening States themselves, which would not be immune to considerations of subjective and arbitrary nature.

2.7. International recognition in the form of representation in the UN?

International law provides no mechanism to recognise governments collectively. As early as 1946, bearing in mind the disadvantages of the decentralised system of recognition, Lauterpacht argued that it would be a rational and desirable development if the recognition process was collectivised in the form of recognition by the UN.[179] Such a process, as argued by a 1950 UN legal memorandum on the representation in the UN, which also referred to this idea by Lauterpacht, does not exist in practice.[180] Also, according to the memorandum, the representation of a government in the UN cannot substitute for its recognition: 'The linkage of representation in an international organization and recognition of a government is a confusion of two institutions which have superficial similarities but are essentially different.'[181]

The position of the UN today holds the same today. It is stated on the UN's website in similar lines to the memorandum that

> [t]he recognition of a new State or Government is an act that only other States and Governments may grant or withhold ... The United Nations is neither a State nor a Government, and therefore does not possess any authority to recognize either a State or a Government. As an organization of independent States, it may admit a new State to its membership or accept the credentials of the representatives of a new Government.[182]

As regards criteria required to accept the credentials issued by a new government, the memorandum draws an analogy with article 4 of the Charter.[183] Article 4 provides that for a

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[179] Hersch Lauterpacht, 'Recognition of Governments: II' (1946) 46 ColumLRev 37, 60-3.
[180] UNSC, 'Letter Dated 8 March 1950 from the Secretary-General to the President of the Security Council Transmitting a Memorandum on the Legal Aspects of the Problem of Representation in the United Nations' (9 March 1950) UN Doc S/1466, 3.
[181] ibid 2.
[182] UN, 'About UN Membership' <https://www.un.org/en/sections/member-states/about-un-membership/index.html> accessed 27 September 2019.
[183] UNSC, 'Letter Dated 8 March 1950' (n 180) 6.

new State to be admitted to the membership of the Organisation it must be able and willing to carry out the obligations contained in the Charter.[184] Accordingly, the memorandum submits that a revolutionary government claiming to represent the State in the Organisation must demonstrate that it possesses the power to carry out these obligations on behalf of the State, and this is a question of whether it 'exercises effective authority within the territory of the State and is habitually obeyed by the bulk of the population'.[185]

As such, in situations of competing governments, the criteria for representation in the UN eventually mirrors the traditional criteria for recognition of governments. The validity of these criteria have been evidenced in the credential controversies that took place in the UN where the discussions in general evolved around the principles of the effective control doctrine.[186] However, it does not strictly apply to every international organisation as in some of them coming into power unconstitutionally or undemocratically may be contrary to the institutional rules.[187] The criteria for the acceptance of credentials are actually flexible even at the UN. Since the end of the Cold War in some cases, governments democratically elected but subsequently overthrown, or not allowed by the incumbent to hold the reins at all, represented the State at the organisation.[188]

In any event, the representation of a government in the UN for whatever reason does not necessarily mean the recognition of that government as the above-mentioned view of the UN underscored.[189] Even though it is the case that States at the UN mostly approve the credentials issued by a government that they recognise,[190] State practice shows that this is not the rule. In one of the most dramatic cases, the credentials of the Afghan government of 1980, which was mostly believed to had been installed by the Soviet Union, were accepted by the UN General Assembly.[191] This occurred despite the fact that the Soviet intervention at the invitation of that government had been rejected by the UN General Assembly months ago.[192] In the debate

[184] UN Charter (n 110) Article 4.
[185] UNSC, 'Letter Dated 8 March 1950' (n 180) 6.
[186] See Roth, *Governmental Illegitimacy* (n 3) 260.
[187] See n 237 and n 238, and the accompanying text.
[188] See Section 3 below on the democratic legitimacy doctrine.
[189] Also see Talmon, *Recognition of Governments* (n 2) 174; Agata Kleczkowska, '"Recognition" of Governments by International Organizations – The Example of the UN General Assembly and Asian States' (2017) 35 Chinese (Taiwan) YBInt'lL&Aff 136; *Somalia v Woodhouse Drake* (n 30) 67-8.
[190] Talmon, *Recognition of Governments* (n 2) 175.
[191] UNGA Res 35/4 (13 October 1980) UN Doc A/RES/35/4.
[192] UNGA Res ES-6/2 (14 January 1980) UN Doc A/RES/ES-6/2.

preceding the report of the Credentials Committee, some States made their intentions clear by making reservations that their approval of representatives from such an authority installed by a foreign power did not mean approval of the situation or recognition of the authority in question as government.[193]

As such, it is imperative to pay attention to the intention of the State approving the credentials issued by a new government. More recent debates taking place in the UN over the credential issues also prove this point. As the debate preceding the UN General Assembly Resolution accepting the credentials of the representatives appointed by the National Transitional Council (NTC) of Libya shows, some States voted in favour despite not recognising the NTC as the government of Libya.[194] Among these, Gabon stated that it 'officially recognised the NTC as the legitimate authority representing the national and international interests of Libya'.[195] Egypt noted that 90 States recognised the NTC 'as the only representative of the Libyan people'.[196] Iran suggested that it accepted the credentials of representatives from a freedom-seeking people and noted that 'the Libyan nation will able to realize its desire to establish a national Government of its choice'.[197] Chad noted that in 'Libya, where there is not even a minimum of Government, we had no choice but to put our trust in that entity to build the Libya of tomorrow. Chad therefore recognized the National Transitional Council as the only legitimate authority embodying the aspirations of the Libyan people.' After expressing its hopes for the future of Libya, Chad made it clear that '[t]hat is not to say that the NTC is the only inevitable governmental entity or that it is in fact the Libyan government'.[198]

Likewise, despite joining the consensus on the UN General Assembly Resolutions collectively approving the credentials of delegates appointed by governments to the UN, Iran regularly expresses reservations on the parts 'that could be construed as recognizing the Israeli regime'.[199] Indeed, many countries, even though not recognising Israel as a State, join the

[193] UNGA, 'First Report of the Credentials Committee' (23 September 1980) UN Doc A/35/484 (China, para 9; US, para 12; Singapore, para 13; Haiti, para 14).
[194] See the statements in UNGA Verbatim Record (16 September 2011) UN Doc A/66/PV.2.
[195] ibid 12.
[196] ibid 12.
[197] ibid 16.
[198] ibid 16.
[199] See, for example, UNGA Verbatim Record (17 December 2018) UN Doc A/73/PV.56, 10; UNGA Verbatim Record (11 December 2017) UN Doc A/72/PV.71, 2; UNGA Verbatim Record (12 December 2016) UN Doc A/71/PV.61, 2.

consensus in recognising the delegates appointed by its government. As such, it is obvious that their approval of delegates does not amount to recognition of the Israeli government.

Similarly, during the debates over the acceptance of credentials of representatives to the seventy-fourth session of the UN General Assembly, Peru, on behalf of quite a number of States, put on record that their acceptance of the credentials 'should not be interpreted as a tacit recognition … of the regime of Nicolás Maduro or of his designated representatives to the Assembly'.[200]

Therefore, approval of the credentials of the representatives of a government at the UN General Assembly does not necessarily amount to collective or individual (by each State voting in favour of the resolution) recognition of that government. The intention behind the approval of delegates is of paramount importance. In this respect, it must be noted that in situations where two competing governments issue credentials, to make a choice between the rival authorities claiming to represent the State can arguably be interpreted as legitimising one over another as the rightful government. After all, a State may have only one government capable of representing it in an international organisation.[201]

The absence of any mechanism for collective recognition of governments capable of representing the State in the eyes of international law could lead to dire consequences in cases where two entities contend for recognition in a State – especially where the international community is divided on whom to recognise. The recent case of Venezuela is quite illustrative of many such consequences.[202] It shows that there may be a case where a State is represented by different governments in different organisations.[203] While Maduro's government continued to represent Venezuela in other organisations, including the UN, in the Inter-American Development Bank and the affiliated Inter-American Investment Corporation,[204] and the

[200] UNGA Verbatim Record (18 December 2019) UN Doc A/74/PV.51, 1-2.
[201] Talmon, *Recognition of Governments* (n 2) 183; Hathaway and others (n 156) 550; Roth, *Governmental Illegitimacy* (n 3) 253 arguing that, in such situations, '[n]otwithstanding the disclaimers rendered by its participants, the credentials process serves necessarily as a process of collective recognition'.
[202] For an account of the events, see Section 2.1.1 above.
[203] For some other examples in history, see Talmon, *Recognition of Governments* (n 2) 181-3.
[204] Inter-American Development Bank, 'Governor and Executive Director for the Bolivarian Republic of Venezuela' (15 March 2019) Resolution AG-1/19 and CII/AG-1/19.

Organisation of American States,[205] it was Guaidó appointees who have been recognised as representatives of Venezuela. Such rivalry may even result in the non-representation of the State at all in an organisation of which it actually is a member.[206] Thus, no representative from Venezuela turned up for the G-24 meeting, members of which were already divided on whom to recognise.[207] Indecision with regard to the representation of a State within an international organisation may also prevent the organisation from taking action in regard to that State, as the International Monetary Fund and the World Bank could not get involved financially in a most needed time in the economic crisis-hit Venezuela for this reason.[208] A division of opinion among the member States with regard to recognition may even prevent the whole organisation from holding its one of planned meetings. In order to 'depoliticise' the meeting, China refused to invite any representative from Venezuela to attend the annual meeting of the Inter-American Development Bank, which was to be held in China. This led the 48-member body to cancel the gathering a week before it was held amid threats from the US to 'pull quorum' with its allies if Guaidó's representative is excluded.[209]

One way to prevent such consequences from arising in international relations is to bring a collective recognition mechanism to international law under the universal body of the UN to solve the situations of competing governments. Yet, since adhering to such a binding mechanism will mean for States to give up their privilege of having a wide political discretion

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[205] Organisation of American States, 'Resolution of the Situation in Venezuela' (22 April 2019) CP/RES. 1124 (2217/19).

[206] See Talmon, *Recognition of Governments* (n 2) 184 exemplifying this 'empty-chair policy' with Cambodia's vacant seat in the 1970 Non-Aligned Movement Summit.; A single claimant's seat also could be left vacant in an organisation. For the exclusion of South African representatives from the UN General Assembly due to rejection of their credentials, see Raymond Suttner, 'Has South Africa been Illegally Excluded from the United Nations General Assembly' (1984) 17 CILSA 279; For the non-representation of Somalia in the UNGA due to the absence of any government claiming the seat, see Koskenmaki (n 162) 13.

[207] IMF, 'G24 Press Conference' (12 April 2019) <https://www.imf.org/en/News/Articles/2019/04/12/tr041119-g24-press-conference-transcript>; For the list of participants, see Intergovernmental Group of Twenty-Four on International Monetary Affairs and Development, 'Communiqué' (Washington D.C., 11 April 2019).

[208] IMF, 'Transcript of International Monetary Fund Managing Director Christine Lagarde's Opening Press Conference, 2019 Spring Meetings' (11 April 2019) <https://www.imf.org/en/News/Articles/2019/04/11/tr041119-transcript-managing-director-christine-lagarde-press-conference-2019-spring-meetings> accessed 27 September 2019; Rodrigo Campos and David Lawder, 'Venezuela leadership issue still blocking IMF, World Bank aid' (*Reuters*, 11 April 2019) <https://www.reuters.com/article/us-imf-worldbank-venezuela/venezuela-leadership-issue-still-blocking-imf-world-bank-aid-idUSKCN1RN1TH>.

[209] Inter-American Development Bank, 'News Releases - IDB changes location of Annual Meeting' (22 March 2019) <https://www.iadb.org/en/news/idb-changes-location-annual-meeting>; Lesley Wroughton and Roberta Rampton, 'Exclusive: U.S. threatens to derail meeting of Latam lender if China bars Venezuela' (*Reuters*, 21 March 2019) <https://www.reuters.com/article/us-venezuela-politics-china-iadb-exclusi/exclusive-us-threatens-to-derail-meeting-of-latam-lender-if-china-bars-venezuela-idUSKCN1R22LS>.

on whom to recognise as government under the existent legal regime, States may not be willing to come aboard. Even if it existed, a problem in such a mechanism would be that a simple majority of the participating member States could hardly be counted as collective recognition. On the other hand, a more decent threshold, say, a two-thirds majority of all member States, may not be reached in every contested case, as none of the contenting governments may gain the favour of the required majority. In any case, as mentioned above, to prevent potential abuse and a further escalation of the conflict into an international dimension, when the international community is divided on who to recognise as government in a State, no entity must be able to request military assistance.[210]

3. The doctrine of democratic legitimacy

International law does not require 'the structure of a State to follow any particular pattern'.[211] To adopt a democratic or non-democratic system remains a sovereign prerogative. Therefore, it is not surprising that the determinative factor for the recognition of governments has traditionally been the ability of the putative government to exert effective control over the State machinery. Being factual and objective, such a factor avails third States from making a judgment on the constitutional disputes or the political system of a State, when it comes to its representation in the eyes of international law.

This traditional paradigm, however, faced a serious challenge with the end of the Cold War, after which the theory of an emerging right to democratic governance has gained traction in the scholarship.[212] This theory is accompanied by an emerging practice of not recognising governments that grabbed power unconstitutionally from the entities elected in internationally monitored free and fair elections. It was the post-Cold War developments that played a trigger role in the rise of this theory and practice.[213] Many States around the world, for example, have

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[210] See the last paragraph of the previous section.
[211] *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12, para 94.
[212] See, for example, Thomas Franck, 'The Emerging Right to Democratic Governance' (1992) 86 AJIL 46; James Crawford, 'Democracy and International Law' (1993) 64 BYIL 113; Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (CUP 2000); Jean d'Aspremont, 'Legitimacy of Governments in the Age of Democracy' (2006) 38 NYUJIntlL&Pol 877; For a collection of essays on this, see Richard Burchill (ed), *Democracy and International Law* (Routledge 2006).
[213] Gregory H Fox, 'Democracy, Right to, International Protection', *Max Planck Encyclopedia of Public International Law* (Last Updated March 2008) para 2 <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e773>.

been adopted democracy as their political system.[214] This was not a hollow victory for democracy. Since 1991 the UN alone has provided electoral assistance to more than 100 States upon their request to ensure the compatibility of the elections with international standards.[215] Another momentous development has been the adoption of various international agreements by inter-State forums aimed at promoting and consolidating democracy.[216]

Thomas Franck, among the most prominent commentators of this theory,[217] has articulated it against the backdrop of the negative international reactions to the attempted August coup against Gorbachev in the Soviet Union and the overthrow of the democratically elected President Aristide in Haiti in 1991. He normatively grounded this theory, which he also termed 'democratic entitlement', on the right to self-determination, freedom of expression and the emerging right to free and open elections which, among others, were conceived in the 1948 Universal Declaration of Human Rights[218] and the 1976 International Covenant on Civil and Political Rights.[219]

Proponents of this theory went as far as to assert a right to pro-democratic intervention on behalf of the ousted elected governments.[220] State practice so far has been to the extent that in some cases, democratically elected governments that have been unconstitutionally ousted, or have not been allowed to hold reins at all after winning the elections, not only have been internationally recognised, but also, at their request, have been restored to power with military intervention. The most known of these pro-democratic interventions that has been condoned by the international community took place in Haiti, Sierra Leone and The Gambia.[221]

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[214] ibid.
[215] UN, 'Elections' <https://dppa.un.org/en/elections>.
[216] For a compilation of these documents, see OHCHR, 'Compilation of Documents or Texts Adopted and Used by Various Intergovernmental, International, Regional and Subregional Organizations Aimed at Promoting and Consolidating Democracy' <https://www.ohchr.org/EN/Issues/RuleOfLaw/CompilationDemocracy/Pages/DemocracyCompil.aspx>.
[217] Franck (n 212).
[218] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III), Article 21.
[219] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 25.
[220] Fernando R Tesón, 'The Kantian Theory of International Law' (1992) 92 ColumLRev 53; W Michael Reisman, 'Sovereignty and Human Rights in Contemporary International Law' in Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (CUP 2000) 245; For a contrary view, see 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* (CUP 2000).
[221] For military and non-military interventions by regional organisations in Africa in Guinea-Bissau (1998), Cote d'Ivoire (1998), Lesotho (1998), São Tomé and Príncipe (2003) and Togo (2005) that could be considered as 'pro-democratic', see Jeremy I Levitt, 'Pro-Democratic Intervention in Africa' (2006) 24 WisIntlLJ 785.

The early case of Haiti[222] was mostly the inspiration behind the emerging right to democratic governance in literature.[223] The UN Security Council in 1994, acting under chapter VII of the UN Charter and taking note of Jean-Bertrand Aristide's letter requesting assistance from the international community, has authorised the reinstatement of the democratically elected President Aristide.[224] The UN Secretary-General's report taken into consideration by the Council and the debate on the resolution illustrate that the Council was reluctant to deem Aristide's request a sufficient legal basis on its own for the intervention.[225]

In the case of Sierra Leone, it was the ECOWAS forces that reinstated the democratically-elected President Ahmed Tejan Kabbah to power in 1998. The intervention was later welcomed by the UN Security Council.[226] The justification invoked by Nigeria heading the ECOMOG peacekeeping forces that forced the effective government to relinquish power was that the action was a result of self-defence measures undertaken as part of the peacekeeping operations.[227] Sierra Leone's representative in the UN, on the other hand, in press conferences at the UN stated that President Kabbah had appealed to ECOWAS for military assistance to restore civilian rule to power and defend Sierra Leone against foreign intervention under article 51 of the UN Charter.[228]

Perhaps the most unequivocal instance of an intervention at the request of an ineffective but elected leader took place in The Gambia in 2017. In this case the appeal by the elected President Adama Borrow to the international community 'to help ensure respect for the sovereign will of the people of The Gambia'[229] was the primary legal reason behind the unilateral ECOWAS

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[222] For an extensive account of the events, see Roth, *Governmental Illegitimacy* (n 3) 366-387.
[223] But see Richard Falk, 'The Haiti Intervention: A Dangerous World Order Precedent for the United Nations' (1995) 36 HarvIntlLJ 341, seeing this UN Security Council authorised intervention as a flawed and dangerous precedent.
[224] UNSC Res 940 (31 July 1994) UN Doc S/RES/940.
[225] See Wippman, 'Pro-Democratic Intervention by Invitation' (n 65) 302.
[226] UNSC, 'Statement by the President of the Security Council' (26 February 1998) UN Doc S/PRST/1998/5.
[227] See Karsten Nowrot and Emily W Schebacker, 'The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone' (1998) 14 AmUIntlLRev 321, 365.
[228] UN, 'Press Conference by Permanent Representative of Sierra Leone' (27 May 1997) <https://www.un.org/press/en/1997/19970527.sleone27.may.html>; UN, 'Press Conference by Permanent Representative of Sierra Leone' (18 February 1998) <https://www.un.org/press/en/1998/19980218.jonah.html>; See Nowrot and Schebacker (n 227) 349 and 386; Wippman, 'Pro-Democratic Intervention by Invitation' (n 65) 307-8.
[229] UNSC Verbatim Record (19 January 2017) UN Doc S/PV.7866, 2 (The statement by the Senegalese representative).

intervention.[230] It aimed to remove the incumbent Yahya Jammeh, who refused to leave office, from power.[231] Without the need for any armed confrontation, Jammeh agreed to leave office when the ECOWAS gave a pause to the operation for negotiations.[232]

Overall, one has to be cautious not to overestimate the legal value of these instances for the purpose of intervention by invitation. In Haiti and Sierra Leone, the extent of the legal role that the invitations of the elected governments played remains uncertain. At best, it is obvious that these interventions were not exclusively grounded on these invitations. In this respect, the 2017 Gambian intervention, which was primarily based on the elected President's consent, may constitute a turning point for the emergence of customary international law in that direction. It is also important to keep in mind that in respect to this practice, 'democracy' should not be construed broadly; what was upheld in these cases was the result of internationally monitored free and fair elections.[233]

It is also worth noting that in all these three cases, the relevant governments, in addition to be democratically elected, have been internationally recognised, particularly by the UN Security Council.[234] As articulated above in this chapter, being 'internationally recognised' for whatever reason has its own merits. Therefore, it also could be considered that it is the legitimacy granted by the international community and the UN Security Council that conferred upon those governments the right to speak on behalf of the State and thus to request foreign military assistance for their restoration to power.[235]

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[230] See Mohamed S Helal, 'The ECOWAS Intervention in The Gambia—2016' in Tom Ruys, Olivier Corten and Alexandra Hofer (eds) *The Use of Force in International Law: A Case-Based Approach* (OUP 2018).
[231] ibid.
[232] ibid 919. On the meaning of the UN Security Council resolution expressing 'support to the ECOWAS … to ensure, by political means first, the respect of the will of the people of The Gambia' in a resolution, see page 918.
[233] See the above-cited relevant sources; But on the difficulties surrounding the observation of the Gambian elections, which was surprisingly resulted in the defeat of Yahya Jammeh, who was supposed to be one of the African 'President[s]-for-life', see Helal (n 229) 912-3. The UN Security Council deemed this election as 'peaceful and transparent', see UNSC Res 2337 (19 January 2017) UN Doc S/RES/2337, preamble.
[234] See UNSC Res 841 (16 June 1993) UN Doc S/RES/841 (Haiti); UNSC Res 1132 (8 October 1997) UN Doc S/RES/1132, para 1 (Sierra Leone), demanding from 'the military junta' to 'make way for the restoration of the democratically-elected Government'.; UNSC Res 2337 (19 January 2017) UN Doc S/RES/2337 (The Gambia).
[235] See Wippman, 'Pro Democratic Intervention by Invitation' (n 65) 299-300 and 327 arguing that the recent practice in Haiti and Sierra Leone provides the most equivocal evidence in favour of a pro-democratic intervention by invitation especially when the legitimacy of the elected government is internationally acknowledged as in these cases.; But also see David Wippman, 'Pro-Democratic Intervention' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 805-8 considering, mainly based on the same cases, such invitations as 'legally problematic, but sometimes accepted or, in any event, tolerated'.

What further has strengthened the theory of democratic legitimacy in the post-Cold War era has been the fact that various international organisations adopted regulations taking a stance against the unconstitutional takeover of democratic governments in member States.[236] Most importantly, the Organization of American States (OAS)[237] and the African Union (AU)[238] have adopted anti-coup measures that have gone as far as banning from participating in the activities of the organisation of entities which have usurped power unconstitutionally, and suspension of the membership of States these entities purport to represent.

However, neither the AU nor the OAS has on the whole been consistent in their responses to unconstitutional takeovers of democratically elected governments. The AU has taken a strong stance against unconstitutional takeovers by, among others, suspending, imposing economic sanctions and de-recognising as and when required in Togo (2005), the Comoros (2007), Guinea (2009), Madagascar (2009), Côte d'Ivoire (2010), Egypt (2012), the Central African Republic (2013), Burkina Faso (2015) and The Gambia (2017).[239] However, among others cases, the accommodation of the military junta responsible for the March 2012 coup in Mali in the August 2012 transitional government, and the third-time re-election of the Burundian President in spite of a two-term constitutional limit were tolerated.[240] An overall evaluation of African practice shows that the collective will of the region is inclined to uphold democratic legitimacy particularly when coup plotters or those who unconstitutionally refuse to leave office 'are politically isolated in and outside the region'.[241] The OAS has not acted differently when it comes to being coherent in the application of democratic legitimacy. Its practice suggests that it has adopted a 'restrained interpretation' in applying its rules that safeguard democracy.[242]

Inconsistencies certainly were not limited to the practice of these organisations but seen at large in the practice of the community of States. Even though the political repudiations of

[236] For the related documents in this respect, generally, see OHCHR (n 216).
[237] See Inter-American Democratic Charter (11 September 2001) Articles 19 and 21.
[238] See African Charter on Democracy, Elections and Governance (adopted 30 January 2007, entered into force 15 February 2012) Article 25; Lomé Declaration of July 2000 on the Framework for an OAU Response to Unconstitutional Changes of Government (AHG/Decl.5 (XXXVI)).
[239] Erika de Wet, 'The Role of Democratic Legitimacy in the Recognition of Governments in Africa Since the End of the Cold War' (2019) 17 ICON 470, 472-4.
[240] ibid 474-7.
[241] ibid 478.
[242] See Antonio F Perez, 'Democracy Clauses in the Americas: The Challenge of Venezuela's Withdrawal from the OAS' (2017) 33 AmUIntlLRev 391, 432-5.

unconstitutional takeovers have become quite common in the post-Cold War era, they have not in every case transpired into the legal effect of non-recognition of the incoming governments.[243] This incoherent practice and some additional developments led the recent literature to note a retreat from the emerging norm of democratic legitimacy. These developments include an emerging multipolar world politics reminiscent of the Cold War era where undemocratic powers are rising, and the increasing emphasis on values in international relations such as transparency, stability, security and economic development in a way playing down the importance of democratic legitimacy.[244] One can also mention, as a potential factor undermining the potency of democratic legitimacy, the rising politics of populism, as this further implicates the already-existent definitional problems of democracy.[245]

Recent practice on the application of the idea of democratic legitimacy in some political crisis-hit States only seems to have underscored the mentioned retreat. When Mohamed Morsi, first elected President of Egypt, was ousted by the army in 2013 amid massive public protests demanding his resignation, many States were reluctant to condemn what happened and called for a new democratic transition rather than the reinstatement of the unlawfully ousted leader.[246] The AU, on the other hand, deeming the transition unconstitutional, suspended the membership of the country as per its rules.[247] However, it also recognised the situation as exceptional and urged the new authorities to hold, without delay, new free, fair and transparent elections.[248]

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[243] See Brad R Roth, 'Secessions, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine' (2010) 11 Melbourne Journal of International Law 393, 429-30 and fn 137; Sean Murphy, 'Democratic Legitimacy and the Recognition of States and Governments' (1999) 48 ICLQ 545, 575-9; Roth, *Governmental Illegitimacy* (n 3) 401-5.

[244] See, generally, Jean d'Aspremont, 'The Rise and Fall of Democracy Governance in International Law: A Reply to Susan Marks' (2011) 22 EJIL 549, 559; Susan Marks, 'What has Become of the Emerging Right to Democratic Governance?' (2011) 22 EJIL 507, 522-23; Wippman, 'Pro-Democratic Intervention' (n 235) 798-9; Also see Murphy (n 243) 580-1 arguing that although the democratic legitimacy doctrine is increasingly gaining traction in practice, democracy remains to be just one of the factors, and other values like economic development and regional stability may very well affect the decision making in extending recognition depending on the circumstances.; Russel A Miller, 'Self-Determination in International Law and the Demise of Democracy?' (2003) 41 ColumJTransnatlL 601, 648 arguing that unless reconceived in a way rightly to be associated with self-determination, democracy cannot 'answer the challenges posed by neo-nationalism in the Twenty-First Century'.; Georg Nolte, 'The Resolution of the *Institut de Droit International* on Military Assistance on Request' (2012) 45 RBDI 241, 256 arguing that the fact that the Institute's 2011 resolution does not address the character of the requesting government suggests a retreat from the doctrine of democracy legitimacy as a criterion for requesting military assistance.

[245] On the lack of clarity in the definition of democracy arising from the difference between its procedural and substantive understandings, see Fox, 'Democracy, Right to, International Protection' (n 213) paras 5 and 7-11.

[246] 'International Reactions to Morsi's Removal' (*Al Jazeera*, 4 July 2013) <https://www.aljazeera.com/news/middleeast/2013/07/201373223029610370.html>.

[247] AU Peace and Security Council, 'Communiqué' (5 July 2013) PSC/PR/COMM.(CCCLXXXIV) para 6.

[248] ibid paras 2 and 8.

After new elections had been held, the AU lifted the suspension of the country.[249] This decision, however, was made by noting that it did not constitute a precedent.[250] The reason was that, as the AU panel recommending this decision had noted, the lifting of the suspension would be in defiance of the Union's own rule prohibiting the perpetrators of unconstitutional change from participating in the elections held to restore the constitutional order, as the new President was the former general who headed the military coup.[251]

Another unconstitutional takeover of a democratically elected authority took place in 2014 in Ukraine. The pro-Russian President Yanukovych was ousted amid violent public protests against his presidency by parliament in an impeachment vote that actually fell short of the required three-quarters majority. The international community at large, however, welcomed the incoming government.[252]

The importance of Ukraine and Egypt is that ousted leaders in these countries were elected under internationally endorsed free and fair elections. Otherwise, the toleration of unconstitutional seizures of power already are not infrequent. In Zimbabwe in 2017[253] and Sudan in 2019,[254] for example, the controversially elected long-time Presidents have been forced to leave office by the army, but the international community at large neither demanded the reinstatement of the ousted leaders nor continued to recognise them as Presidents.[255]

The divide within the community of States on who to recognise as President in the poverty-ridden Venezuela seems to have touched another fault line in the democratic legitimacy doctrine. Some 50 States in January 2019 recognised Guaidó, who was neither elected as President nor in effective control of the State, as the interim President of Venezuela. This was in defiance of the incumbent Nicolás Maduro who, they disputed, had assumed office in the

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[249] AU Peace and Security Council, 'Communiqué' (17 June 2014) PSC/PR/COMM.2 (CDXLII) para 8.
[250] ibid.
[251] AU Peace and Security Council, 'Final Report of the African Union High-Level Panel for Egypt' 442nd Meeting (17 June 2014) PSC/AHG/4.(CDXVI) paras 75 and 83.
[252] For an account of the events, see Section 2.2.2.
[253] Tendai Marima, 'Zimbabwe: Army operation that led to Mugabe ouster ends' (*Al Jazeera*, 27 November 2017) <https://www.aljazeera.com/news/2017/11/27/zimbabwe-army-operation-that-led-to-mugabe-ouster-ends>.
[254] 'Sudan coup: Why Omar al-Bashir was overthrown' (*BBC*, 15 April 2019) <https://www.bbc.co.uk/news/world-africa-47852496>.
[255] AU, however, suspended Sudan's membership as per its rules until a new civilian-led government was established. See AU Peace and Security Council, 'Communiqué' (6 September 2019) PSC/PR/COMM.(DCCCLXXV) Article 4.

aftermath of an irregular election process. Based on a (controversial) reading of the Constitution, recognising States deemed the head of the National Assembly, Guaidó, who they hoped would restore democracy, deserving the seat of presidency.[256]

If one is to draw a lesson from the foregoing cases, even though these countries have been undergoing a political upheaval and this may have played a role in the recognition decisions, it seems that no compelling normative excuse has been offered for ignoring the internationally validated election results in Egypt and Ukraine. This is despite the fact that in modern practice of democratic legitimacy, the prevalent understanding of democracy is procedural, that is, the results of the free and fair elections are decisive for the legitimacy of the government, as could be seen from the examples where it applied given in this section.[257] In Venezuela, on the other hand, doubt over the legitimacy of the election results divided the international community and led some States to recognise Guaidó as interim President according to their interpretation of the Venezuelan Constitution. When one thinks in a broader picture involving these and similar cases, as long as reasons based on geopolitical or other calculations, to the exclusion of certain formal principles, will continue to dominate the discretion of States in recognition decisions, upholding the validated election results in one country but not in another will make the charges of double standards unavoidable. This, in turn, will weaken the credibility and potency of the of emerging norm of democratic legitimacy, and will prevent it from taking the form of normative standards.

It finally should be noted that the doctrine of democratic legitimacy has a limited utility, if one considers that it practically applies only when one side does not respect the internationally endorsed election results. However, the power struggle does not in every State hinge on such elections. Indeed, as can be seen in chapter 6 from the accounts of interventions by invitation in internal conflicts, widespread internal armed conflicts do not usually erupt following the holding of internationally observed elections, or in countries where such elections are held.

4. Conclusion

[256] For an account of the events, see Section 2.1.1 above.
[257] Also see Gregory H Fox, 'The Right to Political Participation in International Law' in Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (CUP 2000) 49.

This chapter addressed the question of how to identify the legitimate government that is legally capable of speaking and expressing consent to foreign intervention on behalf of the State. This is a matter that concerns the act of recognition by States of the governments of other States. While the recognition of governments inherently is a political act, and its discretionary nature was behind the ILC's reluctance to deal with it as a legal institution, it has important legal implications for the legality of consensual interventions. It is therefore important to dissect any formal and consistent features that adhere to this act.

Practice shows that traditionally the government of a State has been identified with its ability to exert effective control over the national territory and people, and to continue to do so. Under this doctrine, whether the government came to power through constitutional means has been irrelevant. States in line with this objective criterion have adopted a policy of not according formal recognition to new governments – a policy only to be breached in exceptional or unusual cases. The doctrine could be said to have endured the challenge of the recent case of Venezuela where some 50 States, based on, among others, their reading of the Venezuelan Constitution, formally recognised as interim President someone who had no control over the country. The rest of the international community did not join them in this recognition, and they were not consistent in upholding the constitutionality, and disregarding the effectiveness, in other cases.

Under the effective control doctrine, an established government is continued to be recognised until its effectiveness diminishes considerably. Losing control over part of the territory during an internal conflict does not affect its status as government. This presumption in favour of established governments helps explain in legal terms the continued recognition of Yemeni President Hadi in contrast to the de-recognition of Ukrainian President Yanukovych. Both presidents had fled their country, but the former still had some control over the State while the latter did not have any prospect of returning back to power. When closely examined, it is seen that the other recent challenging cases also, namely, the recognition of the opposition as the legitimate representatives of people in Syria and the recognition of the NTC as the government of Libya, by a considerable number of States during the continuing internal conflicts in these States do not constitute solemn precedents against the long-established presumption in favour of established governments.

The effective control doctrine refers to a control that is independently acquired and maintained. Governments installed as a result of foreign interventions are rather entitled to non-recognition,

as confirmed in practice. Recent practice also involves cases such as those of Iraq and Afghanistan, where the UN Security Council endorsed the formation of transitional governments which owed their existence to foreign interventions. Rather than contradicting the requirement of independence, this practice can only be interpreted in a way confirming the fact that without the approval of the Council such governments would lack legitimacy. That is, the external legitimacy conferred on a government by the Council, and international community, can make up for that government's lack of independence from foreign intervention.

Although effectiveness is the primary criterion for recognition, at times States have refused to recognise a new government due to its unwillingness to abide by international obligations. The non-recognition of the Taliban in Afghanistan was explained on this ground. The importance of willingness to abide by international obligations could be one of the reasons behind the declarations by coup plotters, or opposition groups in civil wars, pledging to adhere the international obligations if they come to power. Likewise, the commitment of *de facto* regimes to uphold international obligations could, among others, emanate from the expectation of recognition.

A failed State where law and order has collapsed in the absence of an effective government to represent it in international relations obviously cannot validly request foreign assistance to restore the anarchy in which it is involved. Nevertheless, the absence of a government does not in and of itself cause the loss of 'statehood' and, thus, the concomitant right to sovereignty. Being so, such a State will still be able to safeguard itself from arbitrary interventions. It is rather the UN Security Council that can authorise intervention in such States, as was the case with Somalia of the 1990s.

Since States overwhelmingly award recognition in line with the effective control doctrine, the international recognition of a government and its effectiveness accord with each other. The question is whether international recognition on its own plays a role in the legitimacy of a government. An isolated view that finds its base in early international arbitral decisions and suggests that the effectiveness exclusively and legally determines the existence of a government does not seem to hold true. In practice, it is the internationally recognised government that represents the State in international relations even if the State is effectively being controlled by another entity. International recognition, given for whatever reason, thus can compensate for the lack of effectiveness.

However, practice also shows that States do not regard the invitation for military intervention from an ineffective but recognised government a sufficient legal basis on every occasion, without a discernible pattern to differentiate such occasions. Therefore, it does not seem safe to conclude that being internationally recognised can entirely compensate for the lack of effectiveness when it comes to the authority to consent to military intervention. There could be various reasons for States not to deem consent from such governments sufficient, such as to be realistic about how an ineffective government can accommodate foreign forces or be more prudent when it comes to the legal basis of the intervention by seeking a UN Security Council authorisation. In any event, the importance of international recognition must not be underestimated. As practice shows, effective but non-recognised governments cannot object to a foreign intervention with which the recognised government agree.

Thus, if the international community could agree on whose call must be heeded in a conflict-hit State, the danger of escalation of that internal conflict into an international one between different political blocks of international community could be alleviated. A situation where the international community is divided over who can speak for the State, such as in the case of Venezuela where foreign military intervention by invitation indeed was contemplated, can exemplify this risk. To prevent possible abuse, in such situations no competing government should be able to request foreign military assistance. Particularly, no intervention should take place against the wishes of the effective government.

It would be desirable if the recognition of governments was collectivised, for example, in the form of recognition by the UN. However, such a process does not exist in practice. The representation in an international organisation does not necessarily amount to collective governmental recognition, or individual recognition by the State voting in favour of the approval of the delegates appointed by the government in question. The recent debates at the UN General Assembly over the approval of credentials of State representatives demonstrate that the intention behind the approval by individual States is of paramount importance.

The absence of any mechanism for collective recognition of governments could lead to dire consequences when the international community is split on whom to recognise. Venezuela, for example, was represented by different governments in different organisations. In some organisations it was not represented at all. Indecision with regard to its representation prevented

some organisations from taking decisions concerning the country and entirely prevented another organisation from holding one of its planned meetings. However, even if States had agreed on the establishment of such a mechanism, for example, under the universal body of the UN, a problem would be that when the required threshold for recognition has not been reached, the process would be deadlocked. In other words, such a mechanism would still not be a panacea for every case.

Post-Cold War developments, such as the spread of democracy as a political system around the world, the recognition by the international community of governments elected under internationally monitored free and fair elections despite their ineffectiveness, and their restoration to power by force, led the evolution of a theory of the right to democratic governance. This certainly placed the effective control doctrine under strain. However, incoherent practice and some additional developments, such as the rise of undemocratic powers and an increasing emphasis on relatively competing values such as stability, security and economic development, led the recent literature to note a retreat from the doctrine of democratic legitimacy. One may add to this list also the rise of so-called 'populism', as it further implicates the definitional problems of democracy.

Recent practice in respect to the political crisis-hit States of Egypt in 2013 and Ukraine in 2014, where the ousted governments were de-recognised despite having been elected under internationally endorsed elections, underscored this retreat. As long as the recognition decisions in respect to States that are undergoing political, social and economic challenges continued to be made based on calculations to the exclusion of certain formal characteristics, the credibility and potency of the emerging norm of democratic legitimacy will be further damaged. The doctrine will struggle to take a form based on discernible normative standards.

It finally should be noted that the democratic legitimacy doctrine has a limited utility. While it practically applies only when the results of internationally validated elections are not respected, not every power struggle in every State flares up due the non-acceptance of the results of such elections.

Chapter 4: Consenting to intervention during civil wars: Non-intervention and self-determination

1. Introduction

As demonstrated in previous chapters, a State militarily intervene in another State when the latter's legitimate government validly consents to it. However, this does not seem to be an unlimited right on the part of the government. A potential limitation is said to arise when the legitimacy of the government is challenged by a civil war. A consensual intervention that impacts on the outcome of a civil war would be inconsistent with the principle of non-intervention that safeguards States' political independence, and the principle of self-determination that makes the people the only arbiter of their political status. In the literature, many who caution against interventions in civil wars put forward these principles as theoretical grounds behind their views.[1] The chapter next examines these principles respectively, with regard to their relation to the legality of interventions by invitation in civil wars.

2. Principle of non-intervention

One reason why a government could be constrained when it comes to requesting foreign military assistance against an armed rebellion is that foreign assistance to any party during a civil war may implicate the State's 'political independence', which is shielded by the principle

[1] See Ian Brownlie, *International Law and the Use of Force by States* (OUP 1963) 323, fn 4 in 323 and 327; John Norton Moore, 'The Control of Foreign Intervention in Internal Conflict' (1969) 9 VaJIntlL 205, 247-51; David Wippman, 'Change and Continuity in Legal Justifications for Military Intervention in Internal Conflict' 27 ColumHumRtsLR 435, 444-6; Oscar Schachter, 'The Right of States to Use Armed Force' (1984) 82 MichLRev 1620, 1641-5; Louise Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government' (1986) 56 BYIL 189, 200-12; John A Perkins, 'The Right of Counterintervention' (1986) 17 GaJIntl&CompL 171, 184-195; Georg Nolte, *Eingreifen auf Einladung* (With an English Summary, Springer 1999) Chapters 6-8; IIL, 'Intervention by Invitation' (Rapporteur: Gerhard Hafner, Session of Naples, 2009) 408-9; Olivier Corten, *The Law Against War* (Translated by Christopher Sutcliffe, Hart Publishing 2010) 288-90; Georg Nolte, 'Intervention by Invitation' *Max Planck Encyclopedia of Public International Law* (January 2010) paras 19-22 <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1702?prd=EPIL>; Karine Bannelier and Theodore Christakis, 'Under the UN Security Council's Watchful Eyes: Military Intervention by Invitation in the Malian Conflict' (2013) 26 LJIL 855, 860-3.

of non-intervention.[2] Political independence gives a State autonomy 'with respect to its institutions, freedom of political decisions, policy making, and in matters pertaining to its domestic and foreign affairs'.[3] Thus, Schachter reasons that the provision of foreign assistance to any party in a civil war with 'force' would be 'depriv[ing] the people in some measure of their right to decide' themselves on their political authority. Such force would be against the 'political independence' of the State in terms of article 2(4) which prohibits States from using 'force against the territorial integrity or political independence of any state'.[4] Such a limitation, on the other hand, would not arise when the intervention does not implicate the choice to be made on the composition of a government but to help the government quash a coup attempt or to restore law and order.[5]

Butchard claims that the view, which in a combined way and in loose terms argues that theoretically the 'political independence' of a State would prevent a government from requesting assistance during a civil war, as it is actually up to the 'people' in line with their right to self-determination to decide on the State's political future, wrongly conflates the two different 'legal personalities of the state and peoples'.[6] It is only the right to self-determination of 'people' that legally prevents such an intervention. The 'political independence' of the State would rather be at stake when the intervention relies on the 'consent that comes from the *wrong authority*, or a party that is *not* the official representative of the state … especially given the fact that such "consent" itself would also be considered invalid'.[7]

However, the view Butchard criticises could still hold true in the sense that it shows the extent of the proximity between the right to political independence of a State and the right to self-determination of peoples. As the UN General Assembly's Friendly Relations Declaration

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[2] See Schachter (n 1) 1641 and 1645; Perkins (n 1) 189-90; Nolte, 'Intervention by Invitation' (n 1) paras 19-20; Louis Henkin, 'Use of Force: Law and US Policy' in Louis Henkin and others (eds) *Right V. Might: International Law and the Use of Force* (Council on Foreign Relations 1991) 47.

[3] Samuel K N Blay, 'Territorial Integrity and Political Independence' *Max Planck Encyclopedia of Public International Law* (March 2010) para 1 <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1116>.

[4] Schachter (n 1) 1641; Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16, Article 2(4).

[5] Schachter (n 1) 1645.

[6] Patrick M Butchard, 'Territorial Integrity, Political Independence, and Consent: The Limitations of Military Assistance on Request under the Prohibition of Force' (2020) 7 JUFIL 35, 50-2 citing for this view, among others, Erika de Wet, *Military Assistance on Request and the Use of Force* (OUP 2020) 7-8 and 80-1 and Corten (n 1) 259.

[7] ibid 52 (emphasis in the original).

provided, 'in their interpretation and application', these two principles, together with others mentioned in the Declaration, 'are interrelated' and that each of these principles 'should be construed in the context of the others'.[8] What actually is not to conflate when it comes to the political independence of a 'State' is the two different legal personalities of *State* and *government*. As Butchard also cites, in the 1949 UN General Assembly Resolution on the Draft Declaration on Rights and Duties of States, the 'right to independence' of a State was defined as a State's right 'to exercise freely … the choice of its own form of government'.[9] This description of political independence of a State clearly separates a *State* from its *government* when it comes to a choice to be made on the latter's form – a choice that arguably arises in a civil war situation challenging an incumbent government's standing.

This tentative result drawn from the underlying elements of the principle of the political independence of States seems to have been confirmed by the UN General Assembly Resolutions dealing with the prohibition of intervention, which will be examined next.

2.1. The UN General Assembly and intervention in civil wars

Although many UN General Assembly Resolutions articulate on the content of the principle of non-intervention, they do not add much to one another. Rather than specifying the principle further, they mostly seem to confirm the general articulations made before. This could indicate a restraint on the General Assembly to elucidate on controversial legal matters. However, such a restraint should be construed as similar to what any other large group attempting to agree on a detailed text would face, rather than being about the intellectual ability of its members.[10] Responding to the political pressures of the day, the General Assembly was unable to progress as much as to infer the law from basic principles or State practice that would enable it to eventually articulate on the exceptions and qualifications of the principle of non-intervention. What the General Assembly consequently achieved was 'doctrinal coherence and purity at the expense of accuracy and compliance'.[11]

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[8] Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970) Article 2.
[9] Draft Declaration on Rights and Duties of States, UNGA Res 375(IV) (6 December 1949).
[10] Vaughan Lowe 'The Principle of Non-intervention: Use of Force' in Vaughan Lowe and Colin Warbrick (eds), *The United Nations and the Principles of International Law* (Routledge 1994) 73.
[11] ibid 73.

One of the issues left ambiguous in the articulation of the principle apparently is the issue of foreign intervention in civil wars. Parts of these resolutions, which will be examined below, that refer to a prohibition of 'fomenting civil strife', 'interfere[nce] in civil strife' or 'participating in acts of civil strife' seem wide enough to suggest a prohibition of assistance by third States to either party to a civil strife. However, although the illegality of assistance to the opposition groups is clear from the texts of these resolutions, the question of assistance to governments involved in civil strife and the meaning of 'civil strife' remains tenuous. The preparatory works to these resolutions, therefore, should be resorted to for their interpretation. As will be seen below, they suggest that some delegates understood the prohibition as also encompassing intervention on the side of governments.

2.1.1. The 1949 Draft Declaration on Rights and Duties of States

One of the first tasks the UN General Assembly undertook after it set to work was to instruct the International Law Commission (ILC) to prepare the 1949 Draft Declaration on Rights and Duties of States.[12] The Draft Declaration in article 3 obliges States 'to refrain from intervention in the internal or external affairs of any other State'.[13] Annotations to one of the draft texts of the Declaration include among the statements by jurists and publicists relevant to this provision Francesco Cosentini's 1935 view, which explicitly rejects the right of governments to consent to intervention during civil wars: 'Intervention cannot be legalized by the existence of a treaty authorizing it in the case of civil war, or by the formal consent of the Government against which a revolution has been started'.[14]

In article 4 the Declaration obliges every State 'to refrain from fomenting civil strife in the territory of another State, and to prevent the organization within its territory of activities calculated to foment such civil strife'.[15] It is acknowledged in the proceedings of the Declaration that this provision was originally based on a principle found in a study titled 'The

[12] Draft Declaration on Rights and Duties of States (n 10).
[13] ibid Article 3.
[14] ILC, 'Preparatory Study Concerning a Draft Declaration on the Rights and Duties of States' (15 December 1948) UN Doc A/CN/.4/2, 65.
[15] Draft Declaration on Rights and Duties of States (n 10) Article 4; For other resolutions issued in the same period containing provisions against 'fomenting civil strife', see Essentials of Peace, UNGA Res 290(IV) (1 December 1949) Article 3; Peace Through Deeds, UNGA Res 380(V) (17 November 1950) Article 1.

International Law of the Future'[16] prepared with the involvement of a number of American and Canadian jurists and officials.[17] It is recognised in the commentary to this study that the foundations of this principle may be traced to domestic legislations that States have adopted during the nineteenth century to prevent their territories from being used for the organisation of armed expeditions to the territories of other States.[18] However, neither this commentary nor the proceedings of the Declaration reveal insights into whether States are allowed to take action in support of a government involved in a civil strife.[19] Moreover, the meaning of 'civil strife' remains ambiguous in the sense that in the proceedings the term is used interchangeably both with 'civil disturbances' and 'civil war',[20] while 'war' obviously seems to connote a more intense situation than 'disturbances'.

Thus, the only mention of a prohibition on assistance to governments during civil wars in the preparatory works of the Declaration is traced to the above-mentioned secondary source found in the annotations to one of the draft texts of the Declaration. Otherwise, such a prohibition may be inferred from the text of article 1 which recognises every State's 'right to independence and hence to exercise freely, without dictation by any other State, all its legal powers, including the choice of its own form of government'.[21] This article, which situates 'government' and 'State' as two different institutions, may be interpreted in a way prohibiting foreign assistance to either the government or opposition when a situation decisive on the future of the government or its form arises, such as a civil war, as it would be a 'dictation' on the State's 'choice of its own form of government'.

2.1.2. The 1965 Declaration on the Inadmissibility of Intervention

[16] Carnegie Endowment for International Peace, *The International Law of the Future: Postulates, Principles and Proposals* (1944) v-ix.
[17] ILC, 'Summary Records and Documents of the First Session including the report of the Commission to the General Assembly' 1949 Yearbook of the International Law Commission (New York, 1956) 118; The principle is cited in the ILC, 'Preparatory Study' (n 14) 124.
[18] Carnegie Endowment for International Peace (n 16) 52-5.
[19] See ILC, 'Summary Records' (n 17) 118-9 and 148; ILC, 'Preparatory Study' (n 14); UNGA, 270th Plenary Meeting, (6 December 1949) UN Doc A/PV.270.
[20] ILC, 'Summary Records' (n 17) 118-9; In the preparatory study, the provision was titled as 'Duty Not to Foment Civil Disturbances in Other States'. Greece's proposal used the phrase 'to foment civil war'. See ILC, 'Preparatory Study' (n 14) 59, 123 and 168.
[21] Draft Declaration on Rights and Duties of States (n 10) Article 1.

The preparatory works of the 1965 Declaration on the Inadmissibility of Intervention seem to be more promising with regard to the existence of such a prohibition. In the relevant parts, the Declaration states that:

> [N]o State shall organize, 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. … Every State has an inalienable right to choose its political, economic, social and cultural systems without interference in any form by another State.[22]

Thus, while it explicitly proscribes intervention on behalf of a non-State armed group 'towards the violent overthrow' of the government of another State, it remains unclear whether the assistance to the government during 'civil strife' would likewise be prohibited. It merely and additionally obliges other States not to 'interfere in civil strife in another State'. However, such a prohibition could be inferred when this obligation is read in conjunction with the second part of the article. Foreign assistance to a government involved in a civil strife, the outcome of which is decisive for the State's 'political, economic, social and cultural system', could be a 'form' of interference in the State's 'inalienable right to choose' such a system on its own.

Indeed, Doswald-Beck's review of statements by delegates during the preparation of the Declaration points in this direction. It shows that there was an idea, largely motivated by a desire to confine neo-colonial power domination and the Cold War rivalry, on the inadmissibility of intervention on either side in revolutions that can lead to certain changes in governments. This was despite the fact that it was debatable whether these delegates would accept such inadmissibility when it comes to their own governments.[23]

Importantly, some statements Doswald-Beck cites reveal an emphasis on the difference between governments supported by its people and those that are not. The Argentinian delegate, for example, stated that even though weak States have the right to conclude security and defence agreements with other States, such agreements should be entered into only 'when the

[22] Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, UNGA Res 20/2131 (21 December 1965) Articles 2 and 5.
[23] Doswald-Beck (n 1) 207-11.

government concerned was in full possession of its governmental prerogatives and was supported by the people and its representatives'.[24]

Some statements, on the other hand, emphasised governments' right to request foreign assistance in the face of an unlawful intervention on the side of the rebels.[25] These, *a contrario*, suggest that governments should not be assisted during a genuine civil war where rebels are not externally backed. To the statements Doswald-Beck cites, one may add the Soviet delegation's brief statement made in the closing meeting seemingly indicating a policy of non-intervention in States undergoing a revolution: 'We have invariably opposed and we continue to oppose the "export of revolution", as we oppose the export of counter-revolution'.[26]

2.1.3. The 1970 Declaration on Friendly Relations

The 1970 Declaration on Friendly Relations is a landmark document that has a continuing impact on the development of international law.[27] It reiterates word for word the above-quoted proclamation of the 1965 Resolution by additionally recognising that the foreign interference in civil strife may take the form of the use of force.[28]

Though Doswald-Beck does not delve into the preparatory works of this Declaration, they reveal important insights on the subject. Several delegates rightly pointed out that the vagueness of the language of the 1965 Declaration was being repeated in this Declaration. One term they particularly emphasised was 'civil strife'. The criticism was that the inclusion of this term in such a declaration was unacceptable for 'a statement of law' to be 'properly formulated'.[29] Reflecting the uncertainty surrounding the phrase 'civil strife', in some proposals the term 'civil war' was used in its stead. Thus, in a joint proposal submitted by Argentine, Chile, Guatemala, Mexico and Venezuela the use of force was prohibited in

[24] ibid 209.
[25] ibid 210-1.
[26] UNGA, '1408th Plenary Meeting' (21 December 1965) UN Doc A/PV.1408, 11.
[27] See Ian Sinclair, 'The Significance of the Friendly Relations Declaration' in Colin Warbrick and Vaughan Lowe (eds), *The United Nations and the Principles of International Law* (Routledge 1994) 1-32.
[28] Friendly Relations Declaration (n 8).
[29] UNGA, 'Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States' (26 September 1967) UN Doc A/6799, 149, para 330.

'intervening in a civil war',[30] and in another proposal submitted by the UK, in 'the encouragement of civil war'.[31]

One representative considered that the intention of the provision prohibiting interference in civil strife, which he found was reflected in a clearer manner in the United Kingdom's proposal, was that if control of a country was divided between warring factions and no outside interference had taken place, then any form of interference would be prohibited by international law. He also considered that this rule did not prejudice the right of a legally constituted and internationally recognised government to seek and receive from a friendly State assistance in preserving or restoring internal law and order. Another representative considered that the test of whether a government could legitimately be assisted by another State in the maintenance of order was whether that government enjoyed the confidence of the majority of its people. The hope was expressed that an unduly broad definition would not be given to 'civil strife', as doing so might prevent a State from obtaining outside assistance for the maintenance of its territorial integrity and political independence.[32]

The inappropriateness of supporting unpopular regimes was articulated by another representative in the neo-colonial context: '[M]utual defence treaties between colonial Powers and their former colonies had been used on occasion as pretexts both for interfering in the latter's internal affairs and for buttressing unpopular regimes in the new States'.[33]

The US representative's view regarding the provision prohibiting interference in civil strife was that it 'did not limit or otherwise affect the right of a state to provide assistance to a friendly Government whose administration of its own territory had been beset by civil disorder, violence and terrorism'.[34] The extent to which the words 'civil disorder, violence and terrorism' cover the situations of civil war seems to be unclear.

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[30] ibid 29, para 27.
[31] ibid 140, para 306.
[32] ibid 159-60, para 355.
[33] UNGA, 'Report of the Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation among States' (16 November 1964) UN Doc A/5746, 136-7.
[34] UNGA, 'Report of the Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation among States' (New York, 1970) UN Doc A/8018, 120, para 259.

The commentary to the UK's proposal indirectly confirms the prohibition of foreign military assistance to governments involved in civil wars if no external assistance is provided to the rebels. It provides:

> In the event that a State becomes a victim of unlawful intervention practised or supported by the Government of another State, it has the right to request aid and assistance from third States. Such aid and assistance may, if the unlawful intervention has taken the form of subversive activities leading to civil strife in which the dissident elements are receiving external support and encouragement, include armed assistance for the purpose of restoring normal conditions.[35]

In sum, as in the case of the 1965 Declaration, the 1970 Declaration was understood by some States as that while a government can be aided for the purpose of maintaining law and order, a government cannot request assistance during a civil war so long as the conflict is not instigated from outside. Reference to the inadmissibility of aid to unpopular regimes also implies the difficulty for governments beset by civil war to request assistance, as the existence of a civil war is a strong indication for the unpopularity of a government among the people it represents. The reference to unpopularity also indicates that a government can request foreign assistance as long as the conflict does not concern its unpopularity, but, for example, terrorism or some other criminal activities.

However, contrary to the 1965 and 1970 Resolutions, the 1981[36] and 1987[37] Resolutions on the principle of non-intervention neither refer to a prohibition of 'interference in civil strife', nor do they distinctly indicate a limit on governments' right to request assistance, while explicitly proscribing foreign support for various activities of non-State armed groups in other States. As such, one cannot take the tendencies reflected in the preparatory works of the 1965 and 1970 Resolutions, motivated by the concerns distinct to their time, as granted for the assessment of the law today. The evaluation of contemporary State practice, which will be

[35] UNGA, 'Report' UN Doc A/5746 (n 33) 111, para 205.
[36] Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, UNGA Res 36/103 (9 December 1981) Article 2.
[37] Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, UNGA Res 42/22 (18 November 1987) Articles 6 and 7.

made in chapters 6 and 7, therefore, is of paramount importance to understand how the norm of non-intervention is interpreted today.[38]

2.2. The International Court of Justice and intervention in civil wars

Among the cases in which the International Court of Justice (ICJ) was tasked to adjudicate on the prohibition on intervention and the use of force,[39] *Military and Paramilitary Activities in and Against Nicaragua*[40] (*Nicaragua*) and *Armed Activities on the Territory of the Congo*[41] (*DRC v Uganda*) notably engage with the prohibitions in the context of a civil war. While one cannot find a detailed assessment from the Court on the impact of civil wars on governments' right to request foreign assistance, a detailed analysis of the cases reveals important insights into its understanding of the issue.

2.2.1. The Nicaragua *case*

The *Nicaragua* case, brought by Nicaragua against the US before the ICJ in 1984, concerns the legality of the military and paramilitary activities of the US in and against the former. After challenging the jurisdiction of the Court, the US did not participate in the subsequent proceedings. Thus, the Court had to reach a judgment without hearing counter-arguments. The Court ultimately rejected the justification of the US made during the jurisdiction and admissibility proceedings. The US had claimed that its actions were in collective self-defence of El Salvador, Honduras and Costa Rica in response to Nicaragua's support to anti-government non-State armed groups in these countries and its direct use of force against the latter two countries. The Court found the US, among others, in breach of the customary international law principles of non-intervention and non-use of force.[42]

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[38] For an analysis of the relevant resolutions covered in this section, see also Doswald-Beck (n 1) 207-12; Nolte, *Eingreifen auf Einladung* (n 1) 632; Corten, *The Law Against War* (n 1) 290.
[39] For an overview of the ICJ case law on the use of force, see Christine Gray, 'The International Court of Justice and the Use of Force' in Christian J Tams and James Sloan (eds) *The Development of International Law by the International Court of Justice* (OUP 2013); Claus Kreß, 'The International Court of Justice and the 'Principle of Non-Use of Force'' in Marc Weller (ed) *The Oxford Handbook of the Use of Force in International Law* (OUP 2016).
[40] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits [1986] ICJ Rep 14.
[41] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment [2005] ICJ Rep 168.
[42] *Nicaragua* (n 40) paras 172-82.

Governments' right to request military assistance

Having concluded that the US's aid to the *contras*, the armed group opposing the government in Nicaragua, constituted an act of intervention, the ICJ queried whether it would be lawful if the aid had been requested by the *contras*. It stated in its much-cited *dictum* that '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'.[43]

On its own, this brief statement may not be qualified to address all the intricacies that may arise from governments' right to request assistance during civil wars.[44] Nonetheless, it was clear that in the eyes of the Court, a government in principle can request assistance regardless of being involved in a civil war. After all, the Court was comparing the assistance to the opposition with the assistance to the government in respect to the conflict in Nicaragua, which it characterised as 'an armed conflict which is "not of an international character"' in the sense of article 3 of the 1949 Geneva Conventions.[45]

While this is the most cited *dictum* of the Court on the subject of intervention by invitation, the Court also, during the proceedings concerning the admissibility of the case, noted that 'Nicaragua's Application does not put in issue the right of a third State to receive military or economic assistance from the United States (or from any other source)'.[46] The Court referred to this comment in the merits of the case as follows: '[T]his refers to the direct aid provided to the Government of El Salvador on its territory in order to help it combat the insurrection with which it is faced, not to any indirect aid which might be contributed to this combat by certain United States activities in and against Nicaragua'.[47] Therefore, the Court here again accepts that a country has the right to receive external aid, including military aid, in combating an insurrection in its territory.

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[43] ibid para 246.
[44] See Kreß (n 39) 577; Christine Gray, *International Law and the Use of Force* (4th edn, OUP 2018) 84.
[45] *Nicaragua* (n 40) para 219.
[46] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Jurisdiction of the Court and Admissibility of the Application) [1984] ICJ Rep 392, para 86.
[47] *Nicaragua* (n 40) para 51.

Nonetheless, one has to be cautious not to read too much into this brief comment in the sense that the insurrection in El Salvador was not purely local but had been externally instigated by Nicaragua at least 'up to the early months of 1981'.[48] As such, the US's right to assist El Salvador was in the context of deterring an unlawful prior intervention in the country, for which the Court said the assistance should not extend to a form of use of force in and against the perpetrator State.[49] It thus was an issue of counter-intervention, which will be examined separately below.

The Court's silence in the face of some legal provisions it cited in the case and that may have come to mean a prohibition on foreign aid to governments beset by civil war complicates the Court's stance. One of the provisions the Court cited as evidence to the principle of non-intervention in the inter-American context proscribes 'intervening in a civil war in another state or in its internal struggles'.[50] The provision seems broad enough to ban foreign assistance to governments during civil wars and thus to contradict the Court's above-mentioned comments.

When the Court's brief and generic statements relating to governments' right to request intervention are read together with the Court's reticence in the face of a relevant provision envisaging limitations to that right, the issue should not be deemed resolved with this case.

Aid to the rebels amounting to armed attack

Article 51 of the UN Charter recognises that States have the inherent right of individual and collective self-defence in the event of an armed attack.[51] Accordingly, governments can invariably request foreign military assistance during a civil war if the foreign assistance to the opposition reaches the level of an armed attack. Among the issues that proved controversial in

[48] ibid para 152.
[49] Also see Perkins (n 1) 195 cautioning that one should not read the court's words about El Salvador's right to request assistance 'as sanctioning aid to the government in circumstances where that support would transgress the people's right of self-determination or the political independence of the state'.
[50] *Nicaragua* (n 40) para 192; General Assembly of the Organization of American States, 'Strengthening of the Principles of Non-Intervention and the Self-Determination of Peoples and Measures to Guarantee Their Observance', AG/RES. 78 (II-0/72) (21 April 1972) Article 3.
[51] UN Charter (n 4) Article 51.

the proceedings of the case was whether and when aid to the rebels in another State amounts to an 'armed attack'.

During the jurisdictional proceedings, the US justified its support to the *contras* in Nicaragua as collective self-defence of El Salvador, Honduras and Costa Rica. The US claimed that Nicaragua assisted to the opposition forces in El Salvador, and, on a smaller scale, Honduras and Costa Rica with the supply of arms, training and other support, and that this aid amounted to an armed attack giving right to collective self-defence.[52]

However, while designating arming and training opposition forces in another country as 'use of force', the Court did not consider that such support may amount to an 'armed attack' giving right to self-defence. In respect to the concepts of the use of force and armed attack generally, the Court opined that 'it will be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms'.[53] The Court also confirmed that there was an agreement that an armed attack must not be understood only as an action taken by regular armed forces across international frontiers. Based on the description made in the Definition of Aggression Resolution,[54] an armed attack may also occur when a State sends 'armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces'.[55] The Court, however, did not believe that the concept of armed attack included 'the provision of weapons or logistical or other support' to such bands or rebels.[56]

The Court's decision of not finding foreign assistance to opposition groups in another country equivalent to an armed attack was one of the primary contentious issues among the judges on the bench and in the scholarship. In favour of the decision, in his separate opinion, president Singh stated that even if the flow of arms would be 'regular and substantial, as well as spread over a number of years', it still would not amount to armed attack.[57] Also in support of the

[52] *Nicaragua* (n 40) paras 126-30.
[53] ibid para 191.
[54] Definition of Aggression, UNGA Res 29/3314 (14 December 1974) Article 3(g).
[55] *Nicaragua* (n 40) para 195.
[56] ibid para 195.
[57] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Separate Opinion of President Nagendra Singh, page 144.

decision, Judge Ruda opined that 'juridically, the concept of "armed attack" does not include assistance to rebels'.[58]

The strongest criticism to the Court's decision came from Judge Schwebel. He argued that Nicaragua's involvement 'in materially supporting insurgency in El Salvador' was tantamount to armed attack, and not designating aid to irregulars as armed attack was incompatible with the realities of the recourse to the use of force in international relations and puts the security of States into risk.[59] Moreover, he argued that the right to self-defence can be resorted to not only in case of an armed attack but also of an illegal use of force. Thus, even assuming that arming the Salvadorian insurgents constituted only the use of force, the right to self-defence would be triggered.[60]

Schwebel also claimed that Nicaragua substantially was involved in sending armed bands to El Salvador. Its involvement in sending armed bands, among others, took 'the forms of providing arms, munitions, other supplies, training, command-and-control facilities, sanctuary and lesser forms of assistance to the Salvadoran insurgents'.[61] If this claim was right, Nicaragua could have been held responsible for an armed attack against El Salvador, as article 3(g) of the Definition of Aggression qualifies 'substantial involvement' in sending armed bands as an act of aggression.[62]

However, the Judge explicitly fails to explain how sending arms to an armed group located in another country can imply, as he argued, a substantial involvement in sending these armed groups to that country. Apparently, the position taken by the Court here is that they are two different categories, and the former will never be qualified as an armed attack. That is, the gravity of an act, based on which the Court separates those acts constituting the use of force from armed attack, does not play a role here; the act of sending arms is completely a different

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[58] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Separate Opinion of Judge Ruda, para 13.
[59] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Dissenting Opinion of Judge Schwebel, paras 154-5.
[60] ibid paras 172-3; See for an opinion in the scholarship in the same direction: Nicholas Rostow, 'Nicaragua and the Law of Self-Defense Revisited (1986) 11 YaleJIntlL' 437, 451-6; This is a minority view in literature, which also includes the US's official position that the 'right to self-defence potentially applies against any illegal use of force'. See The US Department of Defence, *Law of War Manual* (June 2015, Updated December 2016) 47-8.
[61] ibid paras 166 and 170.
[62] Definition of Aggression (n 54) Article 3(g).

category that does not relate to armed attack. In the words of Green, it 'is insufficiently qualitatively grave, by its very nature, to constitute an armed attack'.[63] Also, to claim that the assistance by a State to an armed group in another State falls under article 3(g) of the Definition of Aggression is inconsistent with both the preparatory works of the Definition of Aggression and State practice.[64]

Another criticism by Judge Schwebel was that 'the term "logistic support" is so open-ended, including, as it may, the transport, quartering and provisioning of armies' that it can be considered substantial involvement in sending armed groups.[65] Judge Jennings shared this criticism, arguing that when the provision of arms is coupled with the logistical or other support, it may be regarded as amounting to an armed attack. As he cited from the dictionary, logistical support may cover the 'art of moving, lodging, and supplying troops and equipment'. Thus, '[i]f there is added to all this "other support", it becomes difficult to understand what it is … that may not be done apparently without a lawful response in' self-defence.[66] Although the Court nowhere implies that its intent with the words 'logistical support' is the support given for the dispatch of armed bands to the victim State, considering that the law designates 'substantial involvement' in dispatching armed bands as armed attack, the phrase 'logistical support' must have been clarified in the case. The Court's exclusion of 'logistical or other support' from the meaning of 'substantial involvement' in sending armed bands makes it difficult to determine what is left in the residual meaning of this phrase.[67]

The discussion in the scholarship on the decision of the Court evolves around two main arguments. The core approaches in these arguments are similarly inherent in many debates on the *jus ad bellum*, namely, whether articles 2(4) and 51 are to be interpreted in a restrictive fashion or whether they can be broadly construed. According to the opponents of this restrictive interpretation by the Court, it would lead to an increase in subversive or terrorist activities around the world, as it limits the ability of the victim States to respond in an effective way. For

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[63] James A Green, *The International Court of Justice and Self-Defence in International Law* (Hart Publishing 2009) 37.
[64] Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (CUP 2010) 382-90 and 418; But for contrary views in respect to what practice indicates, see De Wet (n 6) 202-5.
[65] Schwebel (n 59) para 171.
[66] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Dissenting Opinion of Judge Sir Robert Jennings [1986] ICJ Rep 14, page 533.
[67] Ruys (n 64) 418.

the supporters of the decision, it prevents the unnecessary proliferation of instances where States can lawfully resort to the use of force.[68]

When one considers the Court's refusal to accept material aid to opposition groups as armed attack in the context of its above-mentioned *dictum* on governments' right to request military assistance, its decision seems to be fairly balanced. It guarantees States' right to receive necessary assistance from third States to quell an externally instigated insurgency within their territories. At the same time it prevents the collective response to these externally supported insurgencies from spreading over international frontiers by not allowing a response in self-defence against or in the territory of the supporting States. Third States' right to intervene in support of a government against an externally instigated rebellion, known in literature as the right to counter-intervention,[69] is examined below from the Court's perspective.

Right to counter-intervention

Recalling that the use of force in the exercise of the right to collective self-defence is possible only in response to an armed attack, the Court stated that under existing international law, States have no 'right of "collective" armed response to acts which do not constitute an "armed attack"'.[70] Thus, assuming that Nicaragua is responsible for the acts it is accused of, the victims of which are El Salvador, Honduras or Costa Rica, these acts could be responded to with 'proportionate counter-measures' only by the victim States themselves. Nicaragua's acts 'could not justify counter-measures taken by a third State, the United States, and particularly could not justify intervention involving the use of force'.[71]

The starting point of the Court's argument here is that the use of force not amounting to armed attack does not give rise to the right to use force in collective self-defence. However, such reasoning does not explain why third States cannot resort to collective 'proportionate counter-measures' short of the use of force in support of the victim State itself. Therefore, what mostly makes sense from the judgment is that the collective armed responses are not allowed.

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[68] For an overview of these discussions, see ibid 416-7.
[69] See Perkins (n 1).
[70] *Nicaragua* (n 40) para 211.
[71] ibid paras 248-9, 252 and 257.

Hargrove criticises the Court's view deeming collective counter-measures unlawful, among others, for the reason that 'states are sovereign legal persons, and can lawfully do in concert what they can lawfully do alone'. With this decision the Court generates new exceptions the content and limit of which are unknown.[72] Macdonald, on the other hand, while praising the decision for providing simplicity and clarity in the law, suggests that it 'gives rise to the risk of states being isolated and devoured by aggressors'.[73] Green points out an advantage in the Court's restrictive view. He argues that in theory it can limit large-scale conflicts, by not allowing third States to respond to minor wrongful uses of force that do not amount to armed attack.[74]

On the bench, the decision is heavily criticised by Judge Schwebel, who suggested that when a State is subjected to a foreign subversion not amounting to an armed attack but implicating its political independence, its allies would be 'essentially powerless to intervene effectively to preserve' their ally's political independence.[75] Thus, the Court 'appears to offer … a prescription for overthrow of weaker governments by predatory governments while denying potential victims what in some cases may be their only hope of survival'.[76]

From the judge's words of 'only hope of survival' one must assume that governments cannot ask for help in any way to put an end to externally instigated rebellions. However, the Court's decision should not be considered in isolation from its above-mentioned *dictum*, which rejects the rebel's right to request aid while confirming the validity of such a request if made by the government.[77] Thus, when these two approaches of the Court are read together, a State can always request military aid from a third State to survive an externally instigated insurgency. What it cannot request from third States is to take direct action against the State supporting the insurgency.

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[72] John L Hargrove, 'The Nicaragua Judgment and the Future of the Law of Force and Self-Defense' (1987) 81 AJIL 135, 141-2.
[73] Ronald St J Macdonald, 'The Nicaragua Case: New Answers to Old Questions?' (1986) 24 ACDI 127, 158.
[74] Green (n 63) 59.
[75] Schwebel (n 59) para 177.
[76] ibid para 177.
[77] *Nicaragua* (n 40) para 246; Also see Thomas M Franck, 'Some Observations on the ICJ's Procedural and Substantive Innovations' (1987) 81 AJIL 116, 120 pointing out the fact that while the court prohibits collective-countermeasures, it allows a State to request aid from friendly States during a civil strife.

In short, this decision by the Court puts a territorial limit on collective responses to illegal interventions falling short of an armed attack. A State can assist a friendly State to deal with the insurgency waging in its territory but cannot use force against the State externally supporting this insurgency. Targeting the territorial integrity of that State, as in the case of the US support to the *contras* in Nicaragua in response to Nicaragua's support for the insurgency in El Salvador, will be unlawful.[78]

In sum, with its advantages and disadvantages, the Court secures a balanced view. While it assures the protection of the territorial sovereignty and political independence of States subjected to unlawful interventions, it prevents internal tensions from spreading over international boundaries. As to the contemporary State practice, no intervention by invitation that has taken place in response to a prior foreign intervention on the side of the opposition seems to have extended beyond the territory of the State where the internal conflict was raging.[79]

2.2.2. The DRC v Uganda *case*

In June 1999 the Democratic Republic of the Congo (DRC) filed an application against the Republic of Uganda before the ICJ alleging, among others, that the latter's armed activities in its territory, which included assistance to irregular armed forces therein, amounted to aggression and violated the principles of non-use of force and non-intervention.[80] The events, which led the DRC (known as the Republic of Zaire until 1997) to file this application, started after President Kabila had assumed power in May 1997. Initially, his relations with the Ugandan government were good, and he had consented the Ugandan military to operate in the Congo where a civil war was raging. The consent to this intervention was born out of 'a common interest in controlling anti-government rebels who were active along the Congo-Uganda border, carrying out in particular cross-border attacks against Uganda'.[81] The good relations between the two governments afterwards culminated in a Protocol that aimed 'to put an end to the existence of the rebel groups operating on either side of the common border' and

[78] *Nicaragua* (n 40) para 248.
[79] See Chapter 7, Section 3.3.
[80] *DRC v Uganda* (n 41) para 24.
[81] ibid para 45.

provid co-operation between the two armies 'to ensure security and peace along the common border'.[82]

By mid-1998, however, President Kabila's relations with Uganda and Rwanda deteriorated, with the DRC claiming that Ugandan activities in its territory after August 1998 were not lawful. Uganda in response claimed that its presence in the DRC until 11 September 1998 was with the consent of the Congolese government and that the consent was renewed in July 1999, and between these dates its activities were based on self-defence.[83] The Court did not, both on legal and factual grounds, accept the Ugandan claim that it acted in self-defence.[84] Also, the Court found that the DRC's consent had been withdrawn at the latest before 8 August 1998, and that there was no valid consent after July 1999.[85] Uganda's actions after August 1998, therefore, violated the principle of the non-use of force.[86]

The fact that the Court did not dispute the legality of assistance given to the DRC by Uganda during the period in which the consent was valid may indicate the legality of assistance to a government beset by a civil war. However, one cannot read much into this indication. The purpose of the Ugandan intervention, as mentioned above, was to fight against rebels that were in particular carrying out cross-border attacks against Uganda and to provide security in the common border between the two States. It was not an intervention that aimed merely to put down an indigenous armed rebellion concerning only the internal affairs of the Congo.

What makes drawing from the case an indication of permissibility of consensual interventions in civil wars more doubtful is the fact that the DRC particularly claimed that Uganda's actions violated 'the principle of non-interference in matters within the domestic jurisdiction of States, which includes refraining from extending any assistance to the parties to a civil war operating on the territory of another State'.[87] The principle the DRC invoked clearly states that States are not allowed to extend assistance to a government beset by civil war. The Court, however, did not pay attention to the principle from this aspect. Perhaps it was understandable in the sense

[82] Quoted by the court in ibid para 46.
[83] ibid paras 43-44.
[84] ibid para 147.
[85] ibid paras 53 and 105.
[86] ibid paras 149 and 153.
[87] ibid para 24.

that what the DRC complained of was the foreign assistance given to irregular forces in its territory, not to its own government. Nonetheless, if the Court had intended to suggest a general permissibility of consensual interventions in civil wars, it expectedly would not do so without addressing this provision invoked during the merits of the case.

During the conflict the UN Security Council adopted a number of resolutions calling on an end to the violation of the territorial integrity and sovereignty of the DRC.[88] In one resolution it called upon foreign States the forces of which were present in the territory of the DRC 'to bring to an end the presence of these *uninvited* forces'.[89] Gray interprets this resolution as demonstrating that the position of the Security Council on the issue was that assistance to governments at their invitation is allowed while assistance to armed groups seeking to overthrow these governments is not.[90] Yet, the above-mentioned caution must be noted here as well. The Ugandan army's presence in the Congo was related to a fight against armed groups conducting cross-border attacks into Ugandan territory. Thus, attributing a position to the Council from this resolution, entailing a general admissibility of intervention by invitation against anti-government forces in civil wars, would be doubtful.

3. Right to self-determination

One of the purposes of the UN is '[t]o develop friendly relations among nations based on respect for the ... self-determination of peoples'.[91] Having such a status, the right to self-determination operates as a 'guiding principle' in relations between UN member States and performs an 'interpretative function' for rules applicable to these relations.[92] The Charter indeed refers to the purposes of the UN in various provisions setting forth the rights and duties of member States. Most importantly, it prohibits the use of force by States in international relations 'in any … manner inconsistent with the Purposes of the United Nations'.[93] Thus, if a

[88] For a list of these resolutions, see ibid para 150.
[89] UNSC Res 1234 (9 April 1999) UN Doc S/RES/1234, para 2 (emphasis added).
[90] Gray, *International Law and the Use of Force* (n 1) 80.
[91] The UN Charter (n 4) Article 1(2).
[92] Daniel Thürer and Thomas Burri, 'Self-Determination' *Max Planck Encyclopedia of Public International Law* (December 2008) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e873> para 28.
[93] The UN Charter (n 4) Article 2(4).

State uses force in the territory of another State with the latter's consent, the legality of that use of force could be tainted if it infringes the right to self-determination of the latter's people.

Even though the UN Charter does not elaborate on the content or scope of the right to self-determination, the right has been affirmed and formulated in many international and regional instruments, including the UN General Assembly resolutions. Among these resolutions, the Friendly Relations Declaration is known to be the most authoritative and comprehensive.[94] It provides that by virtue of the principle of self-determination, 'all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development'.[95] It further obliges every State to assist the UN in bringing 'a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned; and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle'.[96] In addition it recognises that every State has the duty to refrain from taking any forcible action depriving the mentioned peoples of their right to self-determination and that 'such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter'.[97]

In line with the Declaration's proclamations, people living under colonial regimes had been deemed to have the right to exercise their right to self-determination through national liberation movements, be it with armed means, against colonial administrations. Even though the permissible extent of the aid was controversial, these liberation movements had also been considered to be allowed to seek and request foreign aid. The controversy was over whether the aid could include armed support. Foreign intervention on behalf of the powers administering these territories, on the other hand, had been regarded as unlawful.[98]

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[94] Thürer and Burri (n 92) para 11.
[95] Friendly Relations Declaration (n 8) Principle 5.
[96] ibid.
[97] ibid.
[98] For an in depth examination of the principle of non-intervention in relation to colonial peoples' right to self-determination, see Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (CUP 1995); On a potential revival of such a framework in the non-colonial context in contemporary times due to the recognition of some groups as the legitimate representatives of peoples, see Dapo Akande, 'Self Determination and the Syrian Conflict – Recognition of Syrian Opposition as Sole Legitimate Representative of the Syrian People: What Does this Mean and What Implications Does it Have?' (*EJIL: Talk!*, 6 December 2012) <https://www.ejiltalk.org/self-determination-and-the-syrian-conflict-recognition-of-syrian-opposition-as-sole-legitimate-representative-of-the-syrian-people-what-does-this-mean-and-what-implications-does-it-have/>; For a critique of this view, see Stefan Talmon, 'Recognition of Opposition Groups as the Legitimate Representative of a People' (2013) 12 Chinese JIL 219, 237 and fn 88.

The fact that colonisation has fallen into disfavour, however, does not make the right to self-determination obsolete. After all, not only peoples subjected to alien subjugation, domination and exploitation are the addressees of this right. As the above quotation from the Friendly Relations Declaration recognises, 'all peoples' have the right to freely choose their political status without external interference.[99] As the Supreme Court of Canada, *a contrario*, recognises, the whole population of an existing State is eligible to hold the right to self-determination. In the words of the Court, 'the reference to "people" does not necessarily mean the entirety of a state's population. To restrict the definition of the term to the population of existing states would render the granting of a right to self-determination largely duplicative'.[100]

Therefore, even though a generally agreed definition of the term 'people' may not exist in international law,[101] a people constituting the whole population of an already independent State by all means is entitled to this right. The fact that the people have already achieved 'statehood' and are represented by a recognised and effective government does not prevent it from enjoying the right to self-determination. It is from this perspective that the legality of a third State's intervention aimed at propping up a government in a civil war among the people of another State proves controversial. In such a case, a foreign State implicates or perhaps determines the outcome of a civil war which is severe enough to challenge the authority of the government and to put the future of the government in doubt. Foreign intervention on such a matter prevents the people to freely choose their own political status 'without external interference' as per the principle of self-determination.[102] The principle of self-determination entails that a change in the body politic in a State cannot be built upon an external intervention.[103] The fact that the government was not coerced, that is, that the intervention was at its request, is not of value as the right to self-determination pertains to the people, not the government or State.[104]

At this juncture it is also important to point out that in respect to the principle of self-determination, the purpose of the external intervention is of consequence. The intervention may

[99] Friendly Relations Declaration (n 8) Principle 5.
[100] *Reference re Secession of Quebec* [1998] 2 SCR 217, para 124.
[101] Thürer and Burri (n 92) para 18.
[102] See n 95 and the surrounding text.
[103] ibid.
[104] On the self-determination and its impact on intervention by invitation, also see the sources cited in n 1.

not be aimed at implicating the people's right to determine their own future. The intervening State's objective, for example, could be countering terrorism or other criminal activity rather than to arbiter a conflict in favour of one side in an internal conflict.[105] In such a case, therefore, arguably it would not breach the right to self-determination.

As will be seen in chapters 6 and 7, State practice seems to be in line with such an understanding. Intervening States almost always put forward a purpose/objective for their intervention indicating that they do not wish to be regarded as intervening merely to prop up the government in an internal conflict. These purposes include intervening to prevent a humanitarian crisis, to fight terrorism, to counter a prior unlawful intervention on the side of the opposition, to maintain law and order, or to target an armed group not only constituting a threat to the government of the territorial State but also to the intervening State.

State practice also indicates that what States find problematic are direct military interventions, that is, interventions where the intervening State dispatches its own armed forces to fight on behalf of the government rather than merely providing it with arms, logistics or intelligence support.[106] From a theoretical point of view, however, there should be no difference between the two types of support with respect to their implications for the right to self-determination. What matters for the due exercise of the right to self-determination is the absence of external interference that could impact the outcome of the conflict. Any kind of support impacting an outcome that is to be freely determined by the people would theoretically violate the principle of self-determination. As argued in this study, one can make sense of such State practice only based on the difference the impact of direct military interventions, that is, of foreign troops on the ground, makes in the eyes of the people and in determining their future, compared to non-direct military interventions.[107]

3.1. Civil war as a way of exercising the right to self-determination

The principle of self-determination itself does not disclose the means through which the decision on the political status of the State is to be made by the people. Wippman finds the

[105] For a discussion on terrorism and self-determination, see Elizabeth Chadwick, 'Terrorism and Self-Determination' in Ben Saul (ed), *Research Handbook on International Law and Terrorism* (Edward Elgar 2014).
[106] See Chapter 7, Section 3.5.
[107] See ibid.

argument that civil war is one of the suitable venues through which the right to self-determination could be exercised problematic. The problem is that it prioritises an outcome based on the physical strength of the parties over an outcome based on the popular support they may hold, or over the type of political system they may be aiming to establish.[108] However, as he also accepts, 'other approaches may be even more problematic, requiring as they do subjective evaluations by potentially biased external actors of the human rights credentials or democratic prospects of contenders for power in another country'.[109]

Many authors, on the other hand, do not even contend the premise that the people of a State can choose their own form of government by civil war if necessary. Thus, Lauterpacht writes that granting advantages to the lawful government during an insurgency would amount 'to a denial of the right of the nation to decide for itself – by a physical contest, if necessary, between the rival forces – the nature and the form of its government'.[110] Bannelier and Christakis note that this right certainly 'should be exercised by ballot, not by bullet. But in case a civil war erupts, third states should not have a right to military intervention in order to decide the outcome of the conflict in favour of their political interests and preferences'.[111] Nguyen also notes that '[a]uthors have agreed that the right to self-determination could be marked by violence, coercion, civil war, or coups'.[112] Werner bases his entire study, in which he examines the effect of the principle of self-determination on the law pertaining to internal armed conflicts, on the premise that the right to self-determination could be exercised in the extraordinary situation of civil war, where the State authority is put into question due to a failure to exercise territorial control.[113]

Of course, one would be inclined to argue that peoples' right to choose their own government ought to be peaceful, preferably in accordance with democratic principles. After all, an outcome reached based on violence may reflect the will of the powerful rather than the true

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[108] David Wippman, 'Military Intervention, Regional Organisations, and Host-State Consent' (1996) 7 DukeJComp&IntlL 209, 220; Also see Eliav Lieblich, 'Consent, Forcible Intervention, and Internal Justification to Use Force' (2017) 111 Proceeding of the ASIL Annual Meeting 222, 223 writing that this argument is 'implausible, as it equates self-determination with the capacity to use effective violence'.
[109] Wippman, 'Military Intervention' (n 108) 220.
[110] Hersch Lauterpacht, *Recognition in International Law* (First published 1947, CUP 2013) 233.
[111] Bannelier and Christakis (n 1) 861, fn 25.
[112] Quoc Tan Trung Nguyen, 'Rethinking the Legality of Intervention by Invitation: Toward Neutrality' (2019) 24 JC&SL 201, 218.
[113] Wouter G Werner, 'Self-Determination and Civil War' (2001) 6 JC&SL 171, 180-1.

will of the people. Violence also opens the door to violations of international law, particularly of human rights and humanitarian law. However, bringing about changes to the body politic in a State by the internal forceful ousting of governments nevertheless is conceivable in positive international law. As the previous chapter on recognition of governments has shown, the doctrine of effective control is resilient in contemporary times. According to this doctrine, regardless of the means through which a government comes to power, it has the ability to speak on behalf of the State. The emerging doctrine of democratic legitimacy challenging this paradigm fails to be fully consistent in practice. Moreover, it exclusively applies when the results of internationally observed free and fair elections are disrespected. State practice, on the other hand, obviously does not entail a democratic form of government, however one defines it, for every State. After all, non-democratic political systems are an accepted reality in world politics. There is no doctrine of democratic legitimacy, therefore, that applies in every power struggle in every State. The right to self-determination entailing the people to choose their own government thus remains a principle that does not entail this choice to be made through internationally observed free and fair elections.

Indeed, the ILC's Draft Articles on Responsibility of States takes it for granted that under international law a government can be constituted through an insurrection. It provides that when an insurrectional movement replaces the established government as the new government in a State, its conduct committed during the struggle 'shall be considered an act of that State under international law'.[114] The possibility of the exercise of the right to self-determination through violence has also been accepted in international law in the context of decolonisation. As mentioned above, the armed struggles of liberation movements were justified under the right to self-determination.

It remains that under the conventional understanding a government can draw its legitimacy from the fact that it exerts effective control and enjoys the obedience of the people, if not their acquiescence. A civil war evidently is a show of disobedience by the people to the established order administered by the incumbent government. Especially when the opposition becomes as strong as to gain territorial control, the internal struggle in a State puts the immediate future of the government into question and becomes decisive in determining the political system of the

[114] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' UN Doc A/56/10 (2001), Article 10(1)

State. It follows that such a determination, as the principle of self-determination entails, must be made 'without external interference'. Civil war, thus, can effectively become an exigency through which the people themselves determine their political status.[115]

This conclusion should not mean that in the extraordinary situation of civil war, the right to self-determination comes into play because a State's sovereignty is put aside due to a breakdown in the effective control by the government.[116] Rather, in times of civil war, the principles of self-determination and State sovereignty operate together, as the two underpin the same principle, namely, the principle of non-intervention.[117] As shown in the previous chapter, an established government can still speak on behalf of the State when it loses control over parts of the territory during a civil war so long as its power has not altogether diminished.[118] What is argued in this chapter is that in such situations, an established government only cannot invite an external intervention that may impact the outcome of the civil war, due to the right to self-determination of peoples. Otherwise, even in a failed State where no recognised or established government exists the State's territorial integrity and political independence, essential components of State sovereignty, remain intact due to the principle of non-intervention, as mentioned in the previous chapter.[119]

3.2. Internal self-determination and foreign intervention against secessionist movements

As is widely acknowledged, the right to self-determination bestowed upon the people constituting the entire population of an already independent and sovereign State does not enable a breakaway from the parent State. Under this understanding, dubbed 'internal self-determination', the realisation of the right is to take place within the constitutional framework of the parent State rather than by forceful secession therefrom. It is in this way that the tension

[115] While this is why the right to self-determination is of particular importance when it comes to intervention in civil wars, self-determination is not the only purpose of the UN that could be at stake in consensual interventions. Theoretically, there could be variety of scenarios where a particular consensual use of force could be inconsistent with other purposes of the UN such as maintaining international peace and security or the peaceful settlement of disputes, and thus violates Article 2(4). See Butchard (n 6) 55-6.
[116] See generally Werner (n 113).
[117] ibid.
[118] See Chapter 3, Section 2.2.
[119] See Chapter 3, Section 2.5.

between the right to self-determination of a people and the inviolability of the territorial integrity of States can be assuaged.[120]

However, it has been argued that the incompatibility of the right to self-determination with secession is subject to an exceptional situation. Accordingly, under extreme circumstances, where a group of people in a State suffers gross violations of human rights, a right to secession could be granted as a last resort. This scenario, known as 'remedial secession', however, is subject to high controversy in respect to its place in positive international law.[121] In any event, it remains an exception and, in principle, the right to self-determination does not entitle a people to a right to secession.

The question that arises is how the incompatibility of the right to self-determination with secession affects the legality of foreign interventions at the invitation of governments confronted by secessionist movements. One view argues that since the principle of self-determination does not envisage a right to secession, a consensual intervention against a group aiming at the breakaway of the State is not necessarily unlawful, as it does not violate the right to self-determination of the people.[122] From this standpoint, secessionist civil wars are legally different from civil wars waged for power or some other political interest within the internal structure of the State. In other words, the purpose of the intervention, as also mentioned above, is crucial. When the intervention is aimed at preventing secession, it is compatible with self-determination and thus is not necessarily against international law.

A considerable number of commentators, however, hold opposing views. They argue that the principle prohibiting foreign States from aiding any side in a civil war also applies in secessionist conflicts. Higgins, for example, denies the existence of 'a legal distinction between civil war and secession'. She considers the decision to be made on 'the optimum political and

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[120] On 'internal self-determination', see Stefan Oeter, 'The Role of Recognition and Non-Recognition with Regard to Secession' in Christian Walter, Antje von Ungern-Sternberg, and Kavus Abushov (eds), *Self-Determination and Secession in International Law* (OUP 2014) 56-7 and sources cited therein.

[121] See Christian Tomuschat, 'Secession and Self-Determination' in Marcelo G Kohen (ed), *Secession: International Law Perspectives* (CUP 2006) 38-42.

[122] Georg Nolte, 'Secession and External Intervention' in Marcelo G Kohen (ed), *Secession: International Law Perspectives* (CUP 2006) 84; Antonello Tancredi, 'Secession and Use of Force' in Christian Walter, Antje von Ungern-Sternberg, and Kavus Abushov (eds), *Self-Determination and Secession in International Law* (OUP 2014) 77-80; Doswald-Beck (n 1) 202-3 acknowledging that such intervention 'would not necessarily offend against the principle of self-determination'.

economic unit' of another State as a matter 'to be resolved between' the people of that State. She also cautions that her argument is free from the debate on whether or not there is a right to secession in international law.[123] Moore, on the other hand, bases his argument of non-intervention on either side in a war of secession on '[t]he danger of competing interventions prolonging the struggle and the complexity of identifying the scope of peoples to whom self-determination is to be applied'.[124] Schachter considers that whether the nature of the civil war involves the overthrow of the government or secession is irrelevant. In any case, foreign intervention would 'be contrary to the right of the people to decide the issue by their own means'.[125] Akehurst's *Modern Introduction to International Law* argues that as in the case of other civil wars, the outbreak of a secessionist conflict 'renders uncertain the status of the territory concerned and therefore suspends the right of the established authorities to seek foreign help in order to maintain their control over that territory'.[126]

As such, the uncertain future of the political and territorial unity of a State undergoing a secessionist civil war and the unveiling of such uncertainty being appropriated to the free choice of the people by law seem to be the reason based on which these authors argue that a foreign intervention on either side of the conflict would be unlawful. This reasoning, however, does not seem to have taken into consideration whether it really is up to the people to determine freely, that is, forcefully if necessary, the breakaway of a State. As mentioned above, in the non-colonial context, the right to self-determination does not entitle the people to the right to forcefully secede from the parent State. A foreign intervention to put down a rebellion seeking secession being not against the right to self-determination of the people would not violate international law. One, however, can still argue that the extreme circumstances of gross human rights violations necessitating the above-mentioned putative right to remedial secession may prevent a third State from intervening on behalf of the government against such oppressed people.

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[123] Rosalyn Higgins, 'International Law and Civil Conflict' in Evan Luard (ed), *The International Regulation of Civil Wars* (New York University Press 1972) 174-5.
[124] Moore (n 1) 268-9.
[125] Schachter (n 1) 1642.
[126] Pater Malanczuk, *Akehurst's Modern Introduction to International Law* (First published in 1970, 7th revised edn, Routledge 1997) 324.

As to State practice, consensual interventions against secessionist movements are scant and have occurred on a small scale. They are also open to interpretation in the sense that the intervening States in such conflicts have justified their intervention by other various means such as countering a foreign intervention or maintaining internal security. Thus, it is difficult to call the practice conclusive. However, it militates in favour of the conclusion reached theoretically, that is, consensual interventions against secessionist movements do not necessarily violate the principle of self-determination.[127]

4. Conclusion

As previous chapters have demonstrated, a legitimate government in principle has the right to request military assistance from other States. This chapter has illustrated that when the government's legitimacy is challenged by a civil war, its sovereign right to request foreign assistance could be constrained due to the complementary and interconnected principles of non-intervention and self-determination. Therefore, valid consent by a legitimate government alone is not sufficient to judge a consensual intervention as lawful.

When a foreign State arbiters a civil war in another State by force, be it with the consent of the government, it is assumed to implicate the latter's political independence shielded by the principle of non-intervention. Such an understanding seems to be consistent with the preparatory works of the UN General Assembly Resolutions prohibiting 'interference in civil strife'. Some delegates during the debates preceding these resolutions suggested that a government, especially an unpopular one, cannot request assistance during a civil war provided that the conflict is not instigated from outside. Some of them particularly submitted that requesting foreign assistance would be permissible when its purpose is to maintain law and order. Nonetheless, it should be noted that the trend of proclaiming a prohibition on 'interference in civil strife' has not been followed up in the more recent resolutions on non-intervention of 1981 and 1987.

[127] See Tancredi (n 122) 81-9; Nolte 'Secession and External Intervention' (n 122) 86-7; But also see Corten (n 1) 308-9 drawing attention to the way these interventions were justified and arguing that the 'practice does not seem to point clearly in' the direction that third States can 'contribute to the fight against secessionists'.

As for the ICJ's engagement with the principle of non-intervention in the context of civil wars, in the *Nicaragua* case the Court accepted that a government can request military assistance during a non-international armed conflict. However, the briefness and incidental nature of its relevant statement renders it insufficient to address the complications that may arise. One likewise should not read much into the Court's acceptance of El Salvador's right to receive military assistance from the US to combat the insurrection it faced. The insurrection was not purely local, but, as the Court also confirmed, was externally supported by Nicaragua. What makes the Court's stance on the issue more complicated is the fact that it did not elaborate on one of the relevant principles it invoked. This principle required a prohibition on 'intervention in a civil war', which on the face of it contradicts the Court's view of the permissibility of assistance to governments in non-international armed conflicts. The Court's further engagement with the dispute showed that, while third States can counter-intervene in an internal conflict on the side of the government against an armed rebellion supported by another State, such right must be territorially limited. The counter-intervening State cannot use force in or against the State supporting the rebellion unless the support to the rebellion reaches the level of an armed attack.

The *DRC v Uganda* case also cannot be said to have settled the issue. It is true that the Court did not dispute the legality of Uganda's intervention in the DRC's civil war during the period in which it found that the consent of the DRC was valid. However, the purpose of the Ugandan intervention, as the Court had confirmed, was to prevent the rebel groups from violating Uganda's border, rather than merely to put down an armed rebellion concerning only the internal affairs of the Congo. Furthermore, though repeatedly mentioned in judgement, the Court did not elaborate on the DRC's invocation of a prohibition on 'extending any assistance to the parties to a civil war'.

Like the non-intervention principle, the right to self-determination of peoples calls into question governments' right to request foreign military assistance in situations of civil war. The materialisation of self-determination of peoples is one of the purposes of the UN and any use of force must be compatible with those purposes. As long as the purpose of a foreign intervention is merely to implicate the outcome of a civil war, where the people in a show of disobedience effectively challenge the established government, the intervention prevents the people from freely choosing their own political status. This goes against the principle of self-determination by virtue of which people are free to determine their political status without

external interference. While it may not be desirable, in international law a civil war is conceived to be a permissible means by which to exercise the right to self-determination. Civil war can effectively become an exigency for the people of a State to determine their own political status. As to secessionist civil wars, however, the principle of self-determination does not entail a right to secession, arguably except in certain extreme circumstances. Therefore, intervention by invitation against secessionist movements, despite the contrary views in the literature, would be compatible with the right to self-determination, and thus not necessarily unlawful. State practice, though not being conclusive, militates in favour of this conclusion, as demonstrated in the literature.

Chapter 5: Other legal grounds that can limit consensual interventions

1. Introduction

The previous chapter examined governments' right to request military assistance during civil wars under the principles that inherently concerned the prohibition of the use of force. However, even if lawful under the law concerning the use of force, a foreign intervention by invitation nevertheless has to comply with certain rules of international law. Though under-addressed, especially in a systematic manner, such rules may substantially limit the scope of a particular intervention by invitation. Their analysis also helps to determine which rule of international law is violated and, thus, under which rule a State's responsibility arises in a particular case.

One such rule is the general rule of State complicity set out in article 16 of the ILC's Draft Articles on State Responsibility. The article provides that a State incurs responsibility if it assists in the conduct of a wrongful act by another State provided that it had the knowledge of the circumstances of the act and the act would be wrongful if committed by itself.[1] A more specific and relevant rule is the duty to ensure respect for international humanitarian law. It entails not assisting a State violating humanitarian law. The relevancy and importance of these rules as far as the legality of foreign military assistance is concerned, indeed, has been confirmed by the US government: 'As a matter of international law, the United States looks to the law of State responsibility and U.S. partners' compliance with the law of armed conflict in assessing the lawfulness of U.S. military assistance to, and joint operations with, military partners'.[2]

Another legal venue that may limit the scope of foreign military assistance between States is the bundle of international treaties regulating arms transfers. While some of these treaties altogether ban the transfer of weapons to which they apply, some of them ban the transfer of the concerned weapons only under certain circumstances. Another such legal venue is the UN

[1] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries' UN Doc A/56/10 (2001) Article 16.
[2] The White House, 'Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations' (December 2016) 14.

Security Council resolutions. The Council, for example, may impose an arms embargo on a particular State embroiled in a civil war, preventing it from acquiring arms from other States. It is also worth addressing the question of whether the domestic law of the concerned States can constrain the consensual intervention, in which case the issue of the supremacy of international law arises.

The following sections will address these legal venues in order. However, it would be apt to start the chapter with the general principle of law that proscribes States from consenting to the conduct of an act that they themselves cannot undertake under international law.

2. No state can transfer more rights than it has itself

It is widely acknowledged that a State cannot consent to the conduct of an act by another State that would be unlawful under international law if it itself had conducted the act.[3] If this were allowed, a State by consent would be able to circumvent its international obligations.[4] The impermissibility of this is inherent in the general principle of law which provides that one cannot transfer more rights than he himself has (in Latin, *nemo plus iuris ad alium transferre potest ipse habet*), which in the context of international law translates into that 'a State's government may not grant more authority than it itself possesses under international law'.[5]

One can base this argument in respect to consensual interventions also on the legal rationale behind such interventions. For a State to allow another State to impact its internal affairs is an exercise of its sovereignty.[6] The right to sovereignty gives States independence in their internal affairs. A State's power to consent to intervention, therefore, is limited to the extent it exerts

[3] See Oona A Hathaway and others, 'Consent is not Enough: Why States Must Respect the Intensity Threshold in Transnational Conflict' (2016) 165 UPaLRev 1, 33-6; Terry D Gill, 'Military Intervention with the Consent or at the Invitation of a Government' in Terry D Gill and Dieter Fleck, *The Handbook of the International Law of Military Operations* (2nd edn, OUP 2015) 253; John Lawrance Hargove, 'Intervention by Invitation and the Politics of the New World Order' in Lori Fisler Damrosch and David J Scheffer (eds), *Law and Force in the New International Order* (First Published 1991 by Westview Press, Routledge 2018); David Wippman, 'Pro-Democratic Intervention by Invitation' in Gregory H Fox and Brad R Roth, *Democratic Governance and International Law* (CUP 2000) 296; IIL, 'Military Assistance on Request' (Resolution, Session of Rhodes, 2011) Article 4(2); Max Byrne, 'Consent and the Use of Force: An Examination of 'Intervention by Invitation' As a Basis for US Drone Strikes in Pakistan, Somalia and Yemen' (2016) 3 JUFIL 97, 122-3.

[4] See IIL, 'Military Assistance on Request' (n 3) Article 7 stating that 'Military assistance shall not be used by the requesting State to circumvent its international obligations'.

[5] Gill, 'Military Intervention' (n 3) 253.

[6] See Chapter 2, Section 1.

independence over its internal affairs. This independence of a State could be constrained by international obligations, in particular by those that arise under international human rights or humanitarian law towards its nationals. Consequently, a State's consent will have to be in line with these constraints. Likewise, since the sovereignty gives autonomy only in the internal affairs, a State cannot consent to an act to the detriment of the rights of third States.[7]

Having set forth the principle that the consent to intervention must be in line with the international obligations of the consenting State, the question arises as to what role the intervening State assumes in the face of a consent that breaches this principle. Can a State fulfilling the wishes of another State, or providing the assistance it requests, under the bilateral agreement entered into with that State, be held responsible if that State was circumventing its international obligations with this agreement? The Commentary to article 1 of the ILC's Draft Articles on State Responsibility provides that 'the basic principle of international law is that each State is responsible for its own conduct in respect of its own international obligations'.[8] Thus, it must be obvious that an intervening State cannot be held responsible for the wrongdoings of the consenting State.

A report on intervention by invitation by the Institute of International Law explains this principle as that the obligations of the State requesting assistance 'are not extended to the assisting State'; the latter will be 'hardly aware of all obligations imposed on' the former. A requirement of such an awareness, at least of those obligations that have a manifest character, would be *de lege ferenda,* even though it would be desirable from a policy-oriented perspective to prevent the requesting State from circumventing its international obligations.[9]

Therefore, in sum, it is conceivable to conclude that under international law, by relying on the consent of the host State, intervening States evade responsibility *for* the consented acts regardless of whether those acts would be unlawful if carried out by the host State.[10]

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[7] See *The Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v Albania),* Merits [1949] ICJ Rep 4, 22 setting forth the obligation upon States 'not to allow knowingly [their] territory to be used for acts contrary to the rights of other States'.
[8] ILC, 'Draft Articles' (n 1) Commentary to Article 1, para 6.
[9] IIL, 'Intervention by Invitation' (Rapporteur: Gerhard Hafner, Session of Naples, 2009) 413, para 121.
[10] Also see Anders Henriksen, '*Jus ad bellum* and American Targeted Use of Force to Fight Terrorism Around the World' (2014) 19 JC&SL 211, 220; Ashley S Deeks, 'Consent to the Use of Force and International Law Supremacy' (2013) 54 HarvIntlLJ 1, 26-7.

Nonetheless, one still finds legal venues under positive international law to hold the intervening State responsible *in connection* with the consented act, or the act for which the assistance is requested, as examined below.

3. General rule of State complicity

The general principle of State responsibility for complicity is set out in article 16 of the ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).[11] The article has been identified as part of customary international law by the International Court of Justice.[12] It provides:

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that State.[13]

An important aspect of this principle in the context of intervention by invitation is that, once the conditions it requires are met, the assisting State, in line with article 30 of ARSIWA, has to cease the act that facilitates the commission of the wrongful act by the assisted State.[14] It thus provides a potential legal venue capable of hindering the discharge of a particular foreign assistance to a government involved in a civil war.

3.1. Issues concerning the wrongfulness of the principal act

According to the above-quoted provision of ARSIWA regulating State complicity, for the assisting State's responsibility to arise, first of all the act for which the assistance is provided must be 'an internationally wrongful act'. It would be apt, therefore, to point out the rules of international law, the violation of which would be relevant in the context of civil war. These

[11] ILC, 'Draft Articles' (n 1) Article 16; For the elaboration of some other international law instruments regulating complicity, or providing alternative mechanisms, for specific violations of international law in the contexts of the use of force, international humanitarian law and international human rights law, see Helmut Philipp Aust, *Complicity and the Law of State Responsibility* (CUP 2011) 379-418.
[12] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43, para 420.
[13] ILC, 'Draft Articles' (n 1) Article 16.
[14] ibid Article 30 (a); For the consequences of complicity in general, see Aust (n 11) Chapter 6.

rules obviously have to relate to the assisted State's obligations against its subjects, as civil war by definition occurs among the people of a State within its boundaries. In this respect, the body of law that comes to mind first is international human rights law (IHRL) which concerns a State's obligations towards its citizens. Yet, in the context of civil war, international humanitarian law (IHL) would be of greater importance, as IHRL plays a complementary role to it once an armed conflict breaks out.[15] The assisting State, therefore, has to be circumspect not to be complicit in the commission of an internationally wrongful act within this framework.

Another requirement for the assisting State to incur responsibility, as set out in subparagraph (b) of the above-quoted provision, is that the wrongful act by the assisted State must be of such a nature that it would be unlawful if committed by the assisting State itself. That is, the obligation breached by the assisted State needs to be binding also upon the assisting State.[16]

As De Wet points out, this condition does not seem to constitute a major impediment in the context of assistance provided to a State involved in a civil war. Typical rules of IHL concerning non-international armed conflicts that the assisted State could potentially be accused of violating are enshrined in article 3 common to all Geneva Conventions of 1949, which enjoys almost universal ratification, as well as in customary international law.[17] The situation is not so different in respect to IHRL, as major human rights treaties are binding upon virtually all States.[18]

However, in contrast to IHL, IHRL is traditionally viewed to be territorial in its scope. Accordingly, a State's human rights obligations arise only against individuals within its

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[15] On the interplay between IHRL and IHL, see Cordula Droege, 'The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40 Israel Law Review 310,

[16] ILC, 'Draft Articles' (n 1) Commentary to Article 16, para 6,

[17] Erika de Wet, 'Complicity in Violations of Human Rights and Humanitarian Law by Incumbent Governments through Direct Military Assistance on Request' (2018) 67 ICLQ 287, 298,

[18] See, for example, the status of ratifications of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 at United Nations Treaty Collection Website <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en>; Not all human rights violations would give rise to the complicity of the assisting State, as the violated rule of IHRL may not be binding upon the assisting State due to the fact that it arises from a regional human rights treaty with which it is not bound. For such an example, see Miles Jackson, *Complicity in International Law* (OUP 2015) 162.

territory, as only they are directly subject to its jurisdiction.[19] Under this traditional approach, therefore, an assisting State would not be responsible for its assistance in the commission of an IHRL violation by the assisted State in the latter's territory, as the act would not be wrongful if committed by the assisting State itself due to the territorial limitation in the application of IHRL. However, the modern understanding of IHRL has transformed this strict view of territoriality. Today, human rights bodies, as well as domestic and international courts, although without a settled and precise approach, accept that States could be held responsible for IHRL violations against individuals under their power or effective control regardless of whether they are physically outside their territories.[20]

In any event, it seems that with respect to human rights violations, the assisting State's responsibility for complicity will arise to the extent that the violated rule of human rights law would apply extraterritorially in the given situation. Only in this way can one answer the question of whether the act would be wrongful if committed by the assisting State. In other words, even when all other conditions giving rise to complicity are met, the assisting State's complicity is not a *carte blanche* under article 16 of ARSIWA when it comes to violations of rules of human rights law by which both the assisting and assisted States are bound.[21] This bleak picture, however, could further be alleviated by the primary rules found in the field of IHRL, which provide bases alternative to the general legal regime of State complicity or creative ways to get around the jurisdictional problem in IHRL.[22]

3.2. 'Aid and assistance' and the shifting responsibility of the assisting state

[19] See OCHCR, 'International Legal Protection of Human Rights in Armed Conflict' (United Nations Publication 2011) 42.
[20] See ibid 42-5; Also see Oona A Hathaway and others, 'Human Rights Abroad: When Do Human Rights Treaty Obligations Apply Extraterritorially' (2011) 43 ArizStLJ 389.
[21] On the relationship between complicity and the jurisdictional limitation in the IHRL, also see Aust (n 11) 405-15 trying to answer the question of 'whether State complicity with the conduct of another State which is both committed outside of the territory of the complicit State and constitutes a breach of a relevant human rights obligation takes place within the 'jurisdiction' of the complicit State under the human rights treaty in question.'; Also see Marko Milanovic, *Extraterritorial Application of Human Rights Treaties* (OUP 2011) 125 briefly engaging with the issue in respect to a particular case. The author assumes that even if the violated human rights obligation was binding upon both the UK and the State it assisted in the commission of the violation, 'it would be far from clear that the UK was bound to respect or secure Mohamed's rights as he was not located in a territory under its jurisdiction'.
[22] See Aust (n 11) 415; Also see Harriet Moynihan, 'Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism' (Chatham House, Research Paper, November 2016) 27-8 for similar rules.

An important aspect of the general rule concerning State complicity that needs to be remarked is that the responsibility of the State providing aid and assistance should not be confused with the responsibility arising from the wrongful act committed by the assisted State. In the sense that the assisting State is facilitating the commission of the principal wrongful act, as the Commentary to ARSIWA puts it, its responsibility is 'derivative'.[23] In other words, it 'will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act'.[24] This conclusion implies that the remedial consequences arising from the derivative responsibility of the assisting State will be lower than those arising from the responsibility for the principal wrongful act.[25] This inference is strengthened by the Commentary's referral to the fact that 'the responsibility of the assisting State will not extend to compensating for the act itself'[26] or the assisting 'State should not necessarily be held to indemnify the victim for all consequences of the act, but only for those which … flow from its own conduct'.[27]

A more pressing issue concerning 'aid and assistance' is the fact that it is not qualified in article 16 of ARSIWA, which renders its scope an open question. What is understood from the Commentary is that the article's scope is not limited to any 'particular kind or level of assistance'.[28] The Commentary merely refers to the requirement that the provided aid or assistance must be 'clearly linked to the subsequent wrongful act'.[29] Such a 'link' is established when the aid or assistance 'facilitat[es]', or 'contribute[s] significantly' to, the commission of the wrongful act; the aid does not need to be 'essential to the performance' of the act.[30] This suggests that the assistance related to the principal act should not be indirect, remote or incidental.[31] On the other hand, the assistance does not have be on a level that it transcends into 'a necessary element in the wrongful act in the absence of which it could not have occurred'.[32]

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[23] ILC, 'Draft Articles' (n 1) Commentary to Chapter IV, para 7.
[24] ibid Commentary to Article 16, para 1.
[25] Moynihan (n 22) 7.
[26] ILC, 'Draft Articles' (n 1) Commentary to Article 16, para 1.
[27] ibid Commentary to Article 16, para 10.
[28] Aust (n 11) 195; Also see Jackson (n 18) 153-4.
[29] ILC, 'Draft Articles' (n 1) Commentary to Article 16, para 5.
[30] ibid Commentary to Article 16, para 5; Not every State could be on the same page with the ILC on this. A 2016 report by the US government, for example, by requiring a 'clear' and 'unequivocal' nexus between the assistance and the wrongful act, seems to intent to set out a higher threshold than the ILC, as argued in Kristina Daugirdas and Julian Davis Mortenson (eds), 'Contemporary Practice of the United States Relating to International Law' (2017) 111 AJIL 476, 533.
[31] Jackson (n 18) 158.
[32] ILC, 'Draft Articles' (n 1) Commentary to Article 16, para 10.

When assistance reaches such a level and thus becomes a 'necessary element' for the commission of the principal act, the assisting State incurs 'concurrent responsibility' with the assisted State, in which case article 47 of ARSIWA comes into play.[33] Depending on the level of assistance in such a case, the assisting State may even assume the independent responsibility for the wrongful act.[34] Thus, an assessment of complicity must be made on the basis of this spectrum subject to the particularities of each case.[35]

Accordingly, with respect to the responsibility for complicity that may arise in the context of intervention by invitation in a civil war, one has to keep in mind the kind or level of assistance provided to the requesting government in a given case. Such assistance may range from the mere provision of financial aid to the supply of arms or troops on the ground. A clear causal link and, thus, the 'significant contribution' could easily be discerned when, for example, the assisted State violates certain rules of IHL through the weapons or various military vehicles provided by the assisting State. The issues concerning the causality between the assistance and the principal act, however, may not be plain along these lines in every case.

A questionable case concentrating on the lower end of the spectrum drawn above may arise, for example, when the aid in question is not directly used in the commission of the wrongful act but smooths the way for it. An apt example could be that the presence of the requested foreign troops in certain parts of a conflict-ridden State gives its government the opportunity to divert its military sources in other parts of the country in reprisals against civilians in violation of IHL.[36] Similarly, the procurement of patrol cars to be used in law enforcement activities in the capital, for example, could enable the State to which the foreign assistance is provided to free its own patrol cars to be used in the conflict-ridden areas in the commission of the wrongful acts.[37] In such situations, it remains questionable whether the requisite link has been established, as the connection between the aid and the principal act is too remote to regard the aid as a significant contribution, or the link as clear.[38] To think otherwise, that is, to expect States not to provide assistance to other States for lawful purposes because the aid provided

[33] ibid Commentary to Article 16, para 10.
[34] See Aust (n 11) 213.
[35] Moynihan (n 22) 9; Aust (n 11) 216.
[36] De Wet (n 17) 300.
[37] Moynihan (n 22) 9.
[38] De Wet (n 17) 300; Moynihan (n 22) 9.

could remotely, indirectly or incidentally cause the commission of a wrongful act, would be impracticable. This would require the foreign assistance to be provided only to States which have an impeccable track record in regard to IHRL or IHL, as otherwise the danger of the commission of a wrongful act would always be foreseeable.[39]

As for the cases concentrating on the higher end of the spectrum, the assistance could be in a level constituting a 'necessary element' in the wrongful act entailing the concurrent, or even independent, responsibility of the assisting State. Hathaway and others, therefore, are correct when they, in a study in which they treat 'consent-based intervention' as the direct use of force in the consenting State, argues that article 16 of ARSIWA is not directly applicable to such direct military interventions. Article 16 merely concerns facilitating the commission of a wrongful act rather than the active/direct role taken by the intervening State.[40] Indeed, if the intervention is taking place in the form of the deployment of air or ground forces, the activities of which are solely controlled by the intervening State's military branches, the intervening State will assume the sole responsibility for the acts committed through this assistance. After all, '[t]he conduct of any State organ shall be considered an act of that State under international law'.[41] In such a case the consenting State rather could be the one assuming the derivative responsibility for facilitating the commission of the wrongful act by making its air space or territory available to the intervening State's army.

Finally, within the above-mentioned spectrum, as the Commentary to article 47 of ARSIWA provides, several States' concurrent responsibility could be invoked in relation to a single internationally wrongful act when they 'combine in carrying out together an internationally wrongful act in circumstances where they may be regarded as acting jointly in respect of the entire operation'.[42] Thus, when such a joint operation results in the commission of IHRL or IHL violations, it may give rise to the responsibility of each State. For this joint responsibility to arise, the contributing States' acts do not have to be of the same character; the mentioned

[39] See Moynihan (n 22) 10 mentioning that a State otherwise would not be able to help in capacity-building of the law enforcement of another State unless the latter's hands are clean on any ground. As she also notes, however, the requirement of intent which will be mentioned in the next section may play a role to hold the assisting State responsible in such a case if it provided the assistance knowing that the recipient State will divert its sources for the commission of the wrongful act.
[40] Hathaway and others, 'Consent is not Enough' (n 3) 37.
[41] ILC, Draft Articles' (n 1) Article 4.
[42] ibid Commentary to Article 47, para 2.

Commentary to article 47 does not provide for such a requirement. Therefore, as De Wet argues, a State sharing intelligence with a government using reprisals against civilians who are ethnically or politically affiliated with the members of the rebel movement, for example, will arguably incur concurrent responsibility as long as the provided intelligence was essential in identifying the targeted civilians.[43]

In sum, depending on the nature and level of the assistance provided, the intervening State's responsibility could shift through three categories. It may assume responsibility independently, jointly with the assisted State, or derivatively for its complicity in the commission of the wrongful act by the assisted State.

3.3. 'Knowledge'

As stipulated in article 16 of ARSIWA, a State will incur responsibility for complicity only if it provides assistance 'with knowledge of the circumstances of the internationally wrongful act' committed by the assisted State.[44] An issue of contention to which this requirement gives rise is the degree of awareness required from the assisting State. While it is clear that the actual knowledge will meet the requirement, it is also generally accepted that the 'virtual certainty' or 'wilful blindness', that is, deliberately avoiding to inquire into the circumstances in the face of credible evidence pertaining to the wrongfulness of the act, will also suffice to incur responsibility.[45] On the other hand, the assisting State is not under a duty to make inquiries, or to exercise due diligence, into the acts of the assisted State while such a requirement could be conditioned in the primary rule applying to the case at hand.[46] The international obligation to prevent genocide, for example, as the ICJ held, 'calls for an assessment *in concreto*' of due diligence; a State must employ all means reasonably available to it to prevent genocide.[47] Therefore, a State intervening in a civil war on behalf of a genocidal government will incur

[43] De Wet (n 17) 300; For another example of joint operation where arguably the assisting State's responsibility does not arise see Peter Vedel Kessing, 'Liability in Joint Military Operations—The *Green Desert* Case' 2020 JC&SL 343 assessing Denmark's responsibility under international law with regard to the ill-treatment by Iraq of the individuals detained by the Iraqi forces during a joint military operation with the Danish forces.
[44] ILC, 'Draft Articles' (n 1) Article 16(a).
[45] See Moynihan (n 22) 13-5; See also Jackson (n 18) 161-2.
[46] Moynihan (n 22) 15.
[47] *Genocide* (n 12) para 430.

responsibility if it fails to carry out this obligation, regardless of the fact that article 16 of ARSIWA requires a higher threshold with respect to the subjective element.

A more pressing issue concerning the element of knowledge is that the Commentary to ARSIWA seems to impose a higher threshold than 'knowledge'. It provides that the assistance must be given 'with a view to' facilitating the commission of the act and the assisting State will not be responsible unless its relevant organ 'intended' to facilitate it.[48] While such a discrepancy between the Commentary and the text could be considered unfortunate and undesirable, it is widely acknowledged in the literature that when the assisting State has actual knowledge of the circumstances, the intent to facilitate the commission of the act may be ascertained on its part.[49]

Such a threshold seems to make the applicability of the article particularly difficult, not least because it entails the attribution of the physiological element of 'intent' to a State which 'cannot have a certain will'.[50] Some commentators suggested that this hardship in establishing intent makes the article unworkable.[51] Indeed, it would not be difficult to comprehend if the accused State had denied that it intended its assistance to be used in the violation of an international obligation by which it is bound. It could, after all, be quite understandable for an assisting State to claim to have an innocent motive in providing assistance, as States always cooperate with one another for lawful purposes.

In the context of a civil war, the assisting State could simply be providing support to the requesting government in its 'general war effort' against the rebels without intending, for example, the facilitation of the commission of a specific war crime that took place during the course of the conflict.[52] Moynihan argues that if one considers that the actual 'knowledge' could be interpreted as 'intent' for the purposes of complicity, proving intent would be of less concern.[53] However, considering that 'intent and knowledge have a considerable overlap with

[48] ILC, 'Draft Articles' (n 1) Commentary to Article 16, para 5.
[49] See Moynihan (n 22) 21; Aust (n 11) 242; Jackson (n 18) 159-60.
[50] Aust (n 11) 241-4 accounting the practical problems in proving the existence of intent and knowledge in general and before the international courts and tribunals.
[51] ibid 236.
[52] Tom Ruys, 'Of Arms, Funding and "Non-lethal Assistance" – Issues Surrounding Third-State Intervention in the Syrian Civil War' (2014) 13 Chinese JIL 13, 24.
[53] Moynihan (n 22) 22.

standards concerning evidence and proof',[54] it obviously remains a high threshold, if not one impractical to overcome.

Furthermore, it would not be difficult for the assisting State to mitigate the risk of liability for complicity by seeking assurances from the assisted State that the latter will be more circumspect in observing, for example, IHL. Credible assurances given by the assisted State may prove that the assisting State had no actual or near-certain knowledge of the violations. However, if the credibility of such assurances is consistently undermined by the following acts of the assisted State, it could also give reason to hold the assisting State responsible for complicity for further assistance provided. In such a situation, it would be more feasible to ascertain the existence of actual or near-certain knowledge that there will be further violations.[55]

It must be noted that article 41 of ARSIWA concerning peremptory norms of international law seems to prescribe a standard of knowledge less stringent than that under article 16. It provides that '[n]o State shall recognize as lawful a situation created by a serious breach [of peremptory norms of international law], nor render aid or assistance in maintaining that situation'.[56] Before addressing the element of knowledge in this provision, a marked difference worth mentioning between article 41 and article 16 is that the former applies only after the peremptory norm in question is violated, as what it prohibits is rendering assistance in 'maintaining' the wrongful situation.

The difference with respect to the element of knowledge is that article 41 does not refer to a mental element as in the case of article 16. The Commentary to article 41, however, recalls the requirement of 'knowledge' contained in article 16 by pointing out that '[a]s to the elements of "aid or assistance", article 41 is to be read in connection with article 16'.[57] As to the reason why the requirement of knowledge is not required to be contained in Article 41, the Commentary provides that 'it is hardly conceivable that a State would not have notice of the

[54] Aust (n 11) 242-4.
[55] Oona A Hathaway and others, 'Yemen: Is the U.S. Breaking the Law?' (2019) 10 Harvard National Security Journal 1, 67 writing in the context of US assistance to the Saudi-led collation's intervention in Yemen.
[56] ILC, 'Draft Articles' (n 1) Article 41 (2).
[57] ibid Commentary to Article 41, para 11.

commission of a serious breach by another State'.[58] Such a presumption of knowledge by the assisting State when it comes to violations of peremptory norms seems to make the standard required under article 41(2) higher than that under article 16.[59] The importance of this inference in the context of intervention by invitation in civil wars is that the assisting State's responsibility must be more easily ascertained when it comes to the maintenance of violations of peremptory norms. The norms designated as peremptory in the Commentary such as the prohibition against genocide, racial discrimination, apartheid and torture, or the basic rules of IHL applicable in armed conflict,[60] could be of interest as they would be at stake in the context of a civil war.

4. Duty to ensure respect for international humanitarian law

Article 1 common to all four Geneva Conventions of 1949 requires State parties 'to ensure respect for the present Convention in all circumstances'.[61] The 2016 Commentary to the Conventions by the International Committee of the Red Cross (ICRC) interprets this provision as requiring States, even if they are not party to an armed conflict, to do everything reasonably in their power to ensure respect for IHL by the parties to the conflict.[62] In this respect, it entails both negative and positive obligations. Under their negative obligations States 'may neither encourage, nor aid or assist in violations of' IHL.[63] Contrary to the above-mentioned general complicity rule contained in article 16 of ARSIWA, to be responsible for aiding and assisting in violations of IHL, the existence of subjective element of 'intent' is not required.[64] Accordingly, '[f]inancial, material or other support in the knowledge' or, as the Commentary mentions in the context of arms transfers, 'expectation, based on facts or knowledge of past patterns' that the assistance will be used in the commission of violations of IHL will be sufficient for the assisting State to be obliged to cease the assistance.[65]

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[58] ibid Commentary to Article 41, para 11.
[59] See Moynihan (n 22) 22-3; Aust (n 11) 341-2.
[60] ILC, 'Draft Articles' (n 1) Commentary to Article 40, paras 4 and 5.
[61] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31, Article 1.
[62] ICRC, 'Commentary of 2016 - Article 1: Respect for the Convention' <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=72239588AFA66200C1257F7D00367DBD#88_B> para 153.
[63] ibid para 158.
[64] ibid paras 159-60.
[65] ibid paras 160 and 162.

As for the positive obligations, the precise content of which is subject to discussion,[66] States are required to 'take proactive steps' to end the ongoing violations. Also, States are obliged 'to prevent violations when there is a foreseeable risk that they will be committed and to prevent further violations in case they have already occurred'.[67] The positive component of the duty to ensure respect for IHL, thus, requires the exercise of due diligence. In this exercise, the specific circumstances of the case at hand and the influence a State exercises over a party to the conflict responsible for IHL violations will be decisive.[68] According to Rule 144 of the ICRC's study on customary IHL, States 'must exert their influence, to the degree possible, to stop violations of international humanitarian law'.[69] A State, for example, by financing, equipping, arming or training the armed forces of a government involved in a non-international armed conflict, places itself in a unique position. It acquires influence over the behaviour of the governmental forces, and thus assumes positive obligations to ensure respect for IHL by those forces, including the duty to exercise due diligence.[70]

The Commentary by the ICRC also provides possible measures to be undertaken by States with respect to their duty to ensure respect for IHL. It further indicates the potential of this duty to constrain the scope of a prospective or ongoing intervention by invitation in a civil war. Accordingly, States can undertake, among others, 'lawful countermeasures such as arms embargoes, trade and financial restrictions, flight bans and the reduction or suspension of aid and cooperation agreements'.[71] In the same vein, a State providing or planning to provide assistance to a State involved in a non-international armed conflict can condition, limit or refuse to exercise arms transfers.[72]

To mitigate its liability, a State may simply prefer to take assurances from the assisted State that IHL applicable to non-international armed conflicts will be observed. However, if those assurances are not credible, or the State giving assurances in any case is incapable of complying

[66] See ibid paras 169-73.
[67] ibid para 164.
[68] ibid para 165; On the principle of due diligence in international law in general and its changing role depending upon the primary role in question, see Neil McDonald, 'The Rule of Due Diligence in International Law' (2019) 68 ICLQ 1041.
[69] ICRC, 'Customary IHL – Rule 144' <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule144>.
[70] ICRC, 'Commentary of 2016' (n 62) para 167.
[71] ibid para 181.
[72] ibid.

with IHL, the assisting State will not have discharged its positive obligations. It thus may have to undertake additional measures.[73]

5. Arms transfer treaties

One way to support a government embroiled in a civil war is to provide it with arms that will bolster its army. The general legal framework on the procurement of arms by States has been outlined by the ICJ as that international law contains 'no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited'.[74] It is possible, therefore, that the traffic in arms between States could be limited 'by treaty or otherwise'. Indeed, international law contains various multilateral treaties, alongside soft law instruments, regulating arms transfers. Either in absolute terms or under certain circumstances, they ban the transfer of particular types of weapons to which they apply, such as nuclear explosive devices, chemical weapons, cluster munitions or anti-personnel bombs.[75] Some treaties subject the transfer of the weapons to which they apply to a risk assessment of whether they will be used in violations of IHL by the recipient State.[76]

Thus, treaties concerning arms transfers constitute another legal venue to be complied with by States assisting governments involved in internal conflicts. Chief among these treaties is the Arms Trade Treaty examined below.

5.1. The Arms Trade Treaty

Unlike the treaties addressing limited types of weapons, the Arms Trade Treaty (ATT) of 2013, ratified by 105 States and signed by 130 States,[77] concerns the transfer of a wide array of conventional arms. These range from battle tanks and combat aircraft to small arms and light

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[73] See Hathaway and others, 'Yemen' (n 55) 70 writing in the context of US support to Saudi-led coalition's direct military intervention in Yemen.
[74] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits [1986] ICJ Rep 14, para 269.
[75] For global and regional treaties and soft law instruments regulating arms transfers, see Anthony E Cassimatis, Catherine Drummond and Kate Greenwood, 'Arms, Traffic in', *Max Planck Encyclopedia of Public International Law* (August 2016) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e98>.
[76] For examples of such instruments with the relevant provisions quoted, see ICRC, 'Arms Transfer Decisions: Applying International Humanitarian Law Criteria – Practical Guide' (June 2007) 4.
[77] See United Nations Treaty Collection, 'Status of Treaties – Arms Trade Treaty' <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-8&chapter=26&clang=_en>.

weapons, and their ammunitions and parts and components.[78] Also, unlike other treaties on arms transfers, the ATT, mindful of the adverse consequences of armed conflicts,[79] aims to 'establish the highest possible common international standards for regulating or improving the regulations of the international trade in conventional arms'.[80]

The constraints on arms transfers are mainly regulated in articles 6 and 7. Article 6(1) and (2) reiterate State parties' existing relevant legal obligations arising under the UN Security Council resolutions and relevant international agreements applicable in a given case.[81] More importantly, article 6(3) prohibits a State party from authorising any transfer of conventional arms to which the treaty applies 'if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity' or war crimes.[82] With the requirement of 'knowledge', the article mirrors the above-mentioned text of article 16 of ARSIWA, which regulates the general rule of State complicity. Principles of harmonisation and systematic integration pertaining to the fragmentation of international law would require the knowledge element in the ATT to be interpreted in conformity with that in article 16 of ARSIWA.[83] In this respect, therefore, the ATT does not seem to introduce a new obligation on States parties.

However, article 7 of the ATT in effect brings about a lesser threshold with respect to the subjective element. Paragraph 1 of the article prescribes that if the export is not prohibited under article 6, the exporting State, before authorising the export, 'shall assess the potential that the conventional arms or items (a) would contribute to or undermine peace and security; (b) could be used to commit or facilitate a serious violation of international humanitarian law' or human rights law, or an act constituting terrorism or transnational organised crime under an international regulation binding the exporting State.[84] The article further obliges exporting States to consider whether certain measures could be undertaken to mitigate these identified

[78] The Arms Trade Treaty (adopted 2 April 2013, entered into force 24 December 2014) 3013 UNTS, Articles 2-4.
[79] ibid Preamble.
[80] ibid Article 1.
[81] ibid Article 6(1) and (2).
[82] ibid Article 6(3).
[83] Luca Ferro, 'Western Gunrunners, (Middle-)Eastern Casualties: Unlawfully Trading Arms with States Engulfed in Yemeni Civil War?' (2019) 24 JC&SL 503, 520; Also see Andrew Clapham and others, *The Arms Trade Treaty: A Commentary* (OUP 2016) 204-7 interpreting the knowledge element in the ATT in accordance with the existing rules of State complicity.
[84] ATT (n 78) Article 7(1).

risks.[85] Consequently, after the risk assessment and the consideration of mitigating circumstances, the exporting State will have to refuse to authorise the export in question if it 'determines that there is an overriding risk of any of the negative consequences in paragraph 1'.[86]

The term 'overriding risk' presents a degree of ambiguity and uncertainty in the sense that it is not a concept engrained in international law. While some States have interpreted it as a 'substantial' risk or risk 'more likely to materialise than not', it remains to be seen what meaning State practice will attribute to it.[87] In any event, the treaty apparently confers a broad authority and margin of discretion on States in conducting the risk assessment. It is the exporting State itself that determines the existence of an overriding risk entailing the non-authorisation of the export,[88] and the records of the authorisations reported to the Secretariat by the exporting State party for the implementation of the treaty 'may exclude the commercially sensitive or national security information'.[89]

Authorisations by the executive branches of Canada, the UK, Belgium and France of exports of arms to the Saudi-led coalition, potentially to be used in its military intervention in the Yemeni civil war, have been subjected to domestic judicial review. The judgements in these cases demonstrate how wide a margin of discretion States could have in authorising the export of arms. They conferred considerable respect for the decision-making process behind the authorisations. They moreover mostly did not go beyond scrutinising whether there had been a formal defect during that process by the executive, no matter how convincing the publicly available data was for reaching a conclusion that there was an overriding risk of the relevant negative consequences.[90]

5.1.1. Undermining peace and security

[85] ibid Article 7(2).
[86] ibid Article 7(3).
[87] Clapham and others (n 83) 275-6.
[88] ATT (n 78) Article 7 (3).
[89] ibid Articles 12 and 13.
[90] See Ferro (n 83) 509 and 522-32.

The ATT, as also quoted above, stipulates that the exporting State must conduct an assessment measuring the potential of whether the export of arms 'would contribute to or undermine peace and security'.[91] If this assessment results in an overriding risk of undermining, rather than contributing to, peace and security, the exporting State is not allowed to authorise the export in question.[92] It seems that by only referring to 'peace and security' in contrast to 'international peace and security' as in the UN Charter, the provision aims to be concerned with both domestic and international peace and security.[93] For the applicability of this provision, therefore, it suffices if the supply of arms to a State involved in a civil war undermines only the peace and security within that State.

Thus, as a commentary to the ATT states, the delivery of arms to a State that is likely to brazenly oppress its own people or a national minority would be an obvious example where peace and security is undermined.[94] According to the same commentary, arming a State to defend itself against an insurgency or terrorist threat, on the other hand, would be a contribution to peace and security.[95] Accordingly, just because a government is beset by an internal conflict does not necessarily mean that the procurement of arms by that government will undermine peace and security and thus breach the mentioned provision of the ATT; rather, particular acts of the government must warrant it. However, based on an analysis of costs and causes of recent civil wars, it is also claimed that the provision could be interpreted in a way that arms exports to any of the warring parties to a civil war would fuel the conflict, and thus undermine peace and security.[96]

This view could hold true in the sense that without the means to continue the fighting, the parties to a civil war and their international supporters could be obliged to iron out their differences through diplomatic means rather than by the use of arms. However, it would be too assertive to claim that in all civil wars strengthening the government's hand would further inflame the conflict. It theoretically could bring the conflict that threatens civilian life to an end faster than expected, provided that the rebels' munitions remain limited with no outside help.

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[91] ATT (n 78) Article 7(1)(a).
[92] ibid Article 7(3).
[93] Clapham and others (n 83) 254.
[94] ibid 255.
[95] ibid 254.
[96] Antonio Bultrini, 'Reappraising the Approach of International Law to Civil Wars: Aid to Legitimate Governments or Insurgents and Conflict Minimization' 56 (2018) ACDI 144, 160 and 189-206.

To that end, there must be a difference between governments whose actions aim to oppress and intimidate a part of the people and thus are directed to the disruption of peace and security inside the country and potentially in the region, and those solely aiming to provide security. In any case, the provision textually does not stipulate a general prohibition of the supply of arms to the parties to an internal conflict. It is therefore more reasonable to apply the provision based on a case-by-case evaluation.

However, as mentioned above, exporting States have a wide margin of discretion when it comes to the risk assessment in a given case. They have also the right to prevent the important information to be revealed for the sake of commercial sensitivity and national security. Such a power on the part of the exporting States potentially undermines the rule's potency and deterrence, as it gives the very State that exports the arms the opportunity to depict the delivery of arms conveniently as contributing to peace and security rather than undermining it.

Finally it must be noted that other regional regulations could also stipulate the assessment of the domestic situation in the State which the arms are exported to. The EU Council Common Position of 2008, for example, among others, prescribes the consideration of the '[i]nternal situation in the country of final destination' before authorising the export of arms in question.[97] According to this criterion, 'Member States shall deny an export licence for military technology or equipment which would provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination'.[98] This obviously should constitute a major hurdle to overcome for member States aiming to strengthen the forces of a government beset by civil war, as foreign involvements in internal conflicts always carry the potential of provoking new conflicts and prolonging the ongoing ones.

6. UN Security Council resolutions

Another legal venue that may constrain an intervention by invitation during a civil war could be a binding UN Security Council resolution addressing the conflict at hand. With article 25 of the UN Charter, the UN member States have undertaken 'to accept and carry out' the Council's

[97] EU Council Common Position 2008/944/CFSP [2008] L 335/99, Article 2(3).
[98] ibid.

decisions in accordance with the Charter.[99] Moreover, with article 103, member States have given superiority to their Charter obligations, and thus those arising from the Council's decisions, over any other international agreement.[100] Accordingly, whatever agreement the intervening State makes with the consenting State where the civil war is waging, the obligations arising from a UN Security Council resolution addressing the conflict in question will supersede it. The Institute of International Law's resolution on 'Military assistance on request' which provides that the provision of assistance is prohibited when it 'would be inconsistent with a Security Council resolution relating to the specific situation, adopted under Chapter VII of the Charter of the United Nations'[101] thus merely is a reiteration of this general principle.

Under chapter VII of the UN Charter, the UN Security Council is empowered to take measures to maintain or restore international peace and security. Under these powers, the Council, since the end of the Cold War, has increasingly been engaging in civil wars by, for example, reinforcing peace processes, authorising peacekeeping operations, or imposing financial sanctions or arms embargos.[102]

Arms embargos, for example, can considerably limit the effectiveness of foreign interventions in civil wars. They could be imposed against the whole country and thus could prevent the supply of arms to any party, including the government,[103] as well as only against the opposition groups.[104] The Council also, in support of peace processes, may oblige States to 'refrain from any action which might contribute to increasing tension',[105] or neighbouring States to refrain from deploying troops to the country where the conflict is waging.[106] Third States, thus, in such

[99] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16, Article 25.
[100] ibid Article 103; See Johann Ruben Leiæ and Andreas Paulus, 'Article 103' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (Volume II, 3rd edn, OUP 2012) 2123-2124.
[101] IIL, 'Military Assistance on Request' (n 3) Article 3(2).
[102] See James Cockayne, Christoph Mikulaschek and Chris Perry, 'The United Nations Security Council and Civil War: First Insights from a New Dataset' (International Peace Institute, September 2010) 30-1.
[103] See, for example, UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973, para 13.
[104] See, for example, UNSC Res 2216 (14 April 2015) UN Doc S/RES/2216, para 14.
[105] UNSC Res 733 (23 January 1992) UN Doc S/RES/733, para 6.
[106] UNSC Res 1725 (6 December 2006) UN Doc S/RES/1725, para 4; The Council, also, may impose sanctions on a specific State preventing it from transferring arms to any State. Thus, in such a scenario, the concerned State cannot supply arms to any government including those beset by a civil war. See UNSC Res 1747 (24 March 2007) UN Doc S/RES/1747, para 5, prohibiting Iran from supplying any arms, and other States from procuring arms from Iran.

scenarios in effect will be prohibited from supplying arms or sending troops, or providing any other prohibited assistance to the government subjected to the relevant sanctions.

However, the lack of political will may result in ineffective implementation of the Council's arms embargos.[107] The UN Security Council indeed rarely takes effective measures against violations of arms embargos, particularly when the interests of the permanent members of the Council are at stake.[108] Thus, it could be that the opposition in a civil war is being militarily aided in its fight against the government by another State in violation of an arms embargo, with the Council not being able to prevent it. The question is whether the law in such a situation entails the government to abide by the arms embargo and, thus, prevents it from obtaining military assistance to defend itself against an unlawful foreign intervention which could result in its ousting.

On this point, it has already been convincingly asserted in the literature, based on the textual interpretation of the UN Charter, preparatory works of the Charter and State practice, that the measures taken by the UN Security Council under chapter VII do not in themselves suspend the exercise of the right to self-defence of a State.[109] For such measures to prevent the victim State from invoking its right to self-defence, they must effectively prevent an armed attack from occurring. In other words, 'the Council's primacy is conditional upon its effectiveness'.[110] Thus, a government beset by a civil war is not obliged to conform to an arms embargo when the embargo is violated to its detriment with the foreign military assistance to the opposition reaching the level of an armed attack. Recent practice analysed in chapter 7 also confirms this position. It is also argued in that chapter that even if the foreign intervention does not amount

[107] For example, see UNSC, 'Letter dated 29 November 2019 from the Panel of Experts on Libya established pursuant to resolution 1973 (2011) addressed to the President of the Security Council' (9 December 2019) UN Doc S/2019/914 accounting the non-compliance of sanctions by various States in respect to the civil war in Libya.
[108] Judith Vorrath, 'Implementing and Enforcing UN Arms Embargoes: Lessons Learned from Various Conflict Contexts' (SWP Comment, No.23, May 2020) 3.
[109] Marco Roscini, 'On the Inherent Character of the Right of States to Self-Defence' (2015) 4 CJICL 634, 653-9; Terry D Gill, 'Legal and some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers Under Chapter VII of the Charter' (1995) 26 NYIL 33, 97-100.
[110] Gill, 'Legal' (n 109) 97 drawing this conclusion from, among others, the facts that the UN Charter mentions 'effective' collective measures and the preparatory works of the Charter shows that the understanding of States was that the Council would be able to take swift and effective measures in maintaining peace and security.; Also see Craig Scott and others, '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' (1994) 16 MichJIntlL 1, 63-7.

to an armed attack, the government should still be entitled to request assistance to deter the intervention, regardless of the embargo.[111]

Sanctions or arms embargos concerning internal conflicts could also be imposed by regional organisations.[112] Such embargos could produce the same effect with the UN Security Council resolutions with respect to the member States of the regional organisation. Their global effect, however, cannot be compared with the UN Security Council resolutions. They cannot prevent any State outside the organisation that wishes to support the government in question from doing so.

7. Domestic law

This chapter so far has examined the rules of international law that in the circumstances can constrain consensual interventions. To comprehend the whole legal picture, it would be appropriate also to comment on the ability of domestic law to constrain such interventions. It would be a tautology to state that a State has to comply with its own domestic law when requesting assistance from another State. Likewise, the assisting State is bound by its own domestic law when fulfilling that request. The relevant question is whether non-compliance with domestic law can affect the legality of the requested intervention under international law. According to the principle of supremacy in international law, rules deriving from international law, such as those deriving from the agreement between the consenting and the intervening State, must prevail over domestic law.[113] It follows that the intervening State can rely on the consent without having to conduct an inquiry into whether the consent comports to the consenting State's domestic law.[114]

Article 3 of ARSIWA also confirms the superiority of international law over domestic law. It provides that '[t]he characterization of an act of a State as internationally wrongful … is not affected by the characterization of the same act as lawful by internal law'.[115] The Commentary

[111] See Chapter 7, Section 3.6.
[112] For a list of current arms embargos by regional organisations, see SIPRI, 'Arms Embargoes' <https://www.sipri.org/databases/embargoes>.
[113] See Deeks (n 10) 3 and 6-8.
[114] See ibid.
[115] ILC, 'Draft Articles' (n 1) Article 3.

to article 20 of ARSIWA on consent, however, states that '[s]ometimes the validity of consent has been questioned because the consent was expressed in violation of relevant provisions of the State's internal law'.[116] The Institute of International Law's 2009 Report on intervention by invitation interprets this statement as enabling 'the conclusion that consent may only be given in accordance with obligations incumbent on the consenting State'.[117] However, it has to be noted that, as the Commentary to ARSIWA goes on to state, the validity of consent depends on the 'rules of internal law to which, in certain cases, international law refers'.[118] As such, when the two comments by the ILC are read in conjunction, it is understood that internal law can prevail over international law only to the extent that the latter defers to the former. The international agreement between the consenting and consented State, for example, may defer to certain rules of internal law on various aspects of the intervention, or may generally subject the international legality of the intervention to internal law.

Otherwise, such a referral is contained in article 46 of the Vienna Convention on the Law of Treaties (VCLT). It permits a State to invoke its internal law to invalidate its consent to be bound by a treaty if the consent was given in manifest violation of a fundamentally important rule of its internal law 'regarding competence to conclude treaties'.[119] Such an exception thus is accompanied by strict conditions and only relates to the procedural but not substantial rules of the domestic law. The VCLT, otherwise, as a general rule prohibits a State from invoking its internal law to justify its failure to perform its treaty obligations.[120]

The application of this conclusion to State consent to intervention, at first sight, could be seen as doubtful. The VCLT governs treaties, that is, international agreements concluded between States in written form,[121] while the consent to intervention could be expressed, as mentioned in chapter 2, both formally (in the form of a treaty)[122] and informally. However, the VCLT acknowledges that the fact that it does not apply 'to international agreements not in written

[116] ibid Commentary to Article 20, para 5.
[117] IIL, 'Intervention by Invitation' (n 9) 395, para 71.
[118] ILC, 'Draft Articles' (n 1) Commentary to Article 20, para 5.
[119] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Article 46.
[120] ibid Article 27.
[121] See ibid Articles 1 and 2(1)(a).
[122] For examples of such treaties and intricacies that arise therefrom, see Eliav Lieblich, 'Intervention and Consent: Consensual Forcible Intervention in Internal Armed Conflicts as International Agreements' (2011) 29 BostonUIntlLJ 337, 357-62.

form, shall not affect: (a) the legal force of such agreements; (b) the application to them of any of the rules set forth in the present Convention of which they would be subject under international law independently of the Convention'.[123] Therefore, the rules of the VCLT could nevertheless apply to the informal agreement between the intervening and consenting State so long as those rules are also part of the customary international law applying to all binding international agreements.[124] State consent to the commission of an act by another State, as examined in chapter 2, has the legal power to preclude the international wrongfulness of the act in question. It would be apt, therefore, to consider, in conjunction with other rules of customary international law, such as *pacta sunt servanda*, that State consent to intervention, given in whatever form, amounts to a legally binding international agreement to which the above-mentioned rules of the law of treaties, enshrined in the VCLT and customary international law, apply.[125]

The debate around domestic law with respect to intervention by invitation is not merely one with hypothetical consequences. Finland's domestic law, for example, has in almost absolute terms prevented the country from requesting from, or providing to, other States military assistance until a wide range of changes were introduced into the existing law in 2017.[126] To give an example of potential breach of domestic law, the US's actions against Al-Qaeda members in other States with their consent seem to have disregarded the host State's domestic laws protecting individuals from being rendered to another State, subjected to lethal force and detained in secret facilities.[127]

Based on, among others, such problems in practice producing undesirable consequences for the rule of law, Deeks proposes a change to the current positive international law – a change that could materialise through the modification of the VCLT or customary international law.[128] Accordingly, intervening States should be required to conduct an inquiry into the domestic law of the consenting State. If the latter's domestic law does not comport to the consent given or if

[123] The VCLT (n 119) Article 3.
[124] Lieblich (n 122) 362-4.
[125] See ibid.
[126] See Heini Tuura, 'Finland's Changing Stance on Armed Measures: How Does it Correspond to International Law?' (2018) 87 ActScandJurisGent 154; Also see Deeks (n 10) 23, fn 79, citing Mexico's and Philippines's Constitution restricting the government's power to request the deployment of foreign troops to the territory of the State.
[127] See Deeks (n 10) 27-30.
[128] ibid 57-8.

the latter consents to the conduct of an act that it itself cannot undertake under its domestic law, the former has to abstain from fulfilling the wishes of the latter such as putting down a rebellion.[129] However, as long as the incentives to preserve the supremacy of international law in international fora exist and by the time a proposal such as that of Deeks becomes part of positive law, non-compliance with domestic law in consenting to foreign intervention in principle remains to be only the problem of domestic law.

As for State practice, it shows that the criticism based on the internal law of the consenting State generally relates to the rules concerning competence to express consent under the constitution of the consenting State. This seems to be in line with the above-mentioned rule in the VCLT, although that rule actually gives the right to invoke the relevant domestic rule to the consenting State itself. One of the criticisms against Turkey's consent-based intervention in Libya, for example, was that the way in which the consent given by the Government of National Accord (GNA) was inconsistent with the Libyan Political Agreement signed by the key political players in the country and that led to the formation of the GNA. It was claimed, for example, that the consent of Libya was not endorsed by the House of Representatives, which actually at the time of the intervention was on the other side of the conflict.[130] Similarly, Ukraine and the US criticised the Russian intervention in Ukraine's Crimea region, among others, based on the fact that the Crimean authorities' consent to such an intervention was not acceptable under the Ukrainian Constitution.[131]

8. Conclusion

This chapter has demonstrated that some rules of international law can considerably limit the scope of a consensual intervention even when it is deemed lawful under *jus ad bellum*. One such rule is the general principle that a State cannot consent to the conduct of an act that it itself cannot undertake under international law. However, an intervening State relying on such consent cannot be held responsible *for* the consented act. International law rather contains legal venues where such a State could be held responsible *in connection* with the consented act or the act for which the assistance is requested.

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[129] ibid 33-60.
[130] See Chapter 6, Section 2.39.
[131] See Chapter 2, n 141 and n 142, and the surrounding text.

One of these legal venues is the general rule on State complicity set out in article 16 of ARSIWA. Accordingly, a State will be held responsible for assisting another State in the commission of an internationally wrongful act by the latter if it had the knowledge of the circumstances and the act would have been wrongful if committed by itself. Thus, for example, if a State's assistance facilitates the commission of a violation of IHL or IHRL by the assisted government during a civil war and the conditions in article 16 have been met, the assisting State will incur derivative responsibility and be obliged to cease the assistance. A complicated picture seems to emerge in holding the assisting State responsible when it comes to human rights violations by the assisted State. It appears to depend on whether the relevant rule of IHRL would extraterritorially apply in the given situation, as one can only in this way determine whether the act would have been wrongful if committed by the assisting State. However, the modern understanding of territoriality in IHRL and certain rules of IHRL that already address complicity help alleviate this bleak picture. It should be noted that depending on the nature of the assistance, the intervening State could also incur concurrent, and even independent, responsibility for the principal wrongful act. These kinds of responsibilities are more likely to arise in the case of direct military interventions.

The requirement of 'knowledge' makes the applicability of the general rule on complicity particularly difficult. The duty to ensure respect for IHL, on the other hand, stipulates less stringent requirements with respect to the mental element in holding the assisting State into account. For example, it requires the assisting State to exercise due diligence in preventing IHL violations by the assisted State.

Another legal venue that has the potential of limiting the scope of a military assistance on request is the arms transfer treaties that, either in absolute terms or under certain circumstances, ban the transfer of particular types of arms to which they apply. Chief among these treaties is the Arms Trade Treaty, which concerns a wide array of conventional arms. Like the duty to ensure respect for IHL, it brings a lesser threshold than the general principle of complicity. It obliges the exporting State to refuse to authorise the export of arms in a given case if it determines that there is an overriding risk that the export will undermine peace and security, lead to a violation of IHL or IHRL, or lead to the commission of an act of terrorism or transnational organised crime.

The condition that the export of arms must not be authorised if it will undermine peace and security particularly concerns the export of arms to a State involved in a civil war. External support to a government intimidating or oppressing part of its population with its actions during a civil war, for example, could undermine peace and security. Every case, however, has to be assessed according to its specific circumstances. In any event, as also exemplified in domestic case law, States seem to have a wide margin of discretionary power under the ATT in deciding whether the conditions to refuse the authorisation of the export in a given case are met. It also should be noted that this treaty is not the only regulation that brings about such a restraint. The EU Council Common Position of 2008 regulating exports of military technology and equipment contains a similar provision.

Another legal venue that may constrain a consensual intervention is the UN Security Council resolutions. The Council in a resolution, for example, can impose an arms embargo on a country embroiled in a civil war, and thus prevent any third State from providing the parties to the conflict with military material. A resolution's primacy over the agreement between the assisting and assisted State, however, depends on the effectiveness of the measures the Council undertakes. A State subjected to an unlawful foreign military intervention on the side of the rebels in violation of the Council's ineffective arms embargo, can request military material from other States to fend off such an intervention.

One more potential legal venue that can constrain a military assistance on request is the domestic law of the assisted or assisting State. However, due to the primacy of international law, the unlawfulness of a consensual intervention under domestic law would not affect the legality of the intervention under international law. Internal law would affect the intervention's legality only to the extent international law defers to it. The international agreement between the assisting and assisted State, for example, could defer to internal law. The VCLT defers to internal law in the sense that it permits a State to invoke its internal law to invalidate its consent if the consent was given in manifest violation of a fundamentally important rule of its internal law regarding competence to conclude treaties. Indeed, in some recent cases the validity of consent had been criticised by third States for not being given in accordance with the rules of domestic law on competence to express consent to foreign military intervention, even though it is actually a right to be invoked by the consenting State under the VCLT. Otherwise, non-compliance by the assisted or assisting State with the domestic law remains to be the problem of domestic law.

Chapter 6: Contemporary State practice

1. Introduction

As has been illustrated in previous chapters, in the exercise of their sovereignty States through their legitimate governments in principle can consent to foreign interventions with respect to matters within their jurisdiction. What proves elusive is whether a government can request external military assistance solely to suppress the opposition during a civil war. As the chapter 4 has shown, principles of non-intervention and self-determination seem to undermine the legality of such a right. To enlighten the matter further this chapter will examine relevant State practice.

As the ICJ concluded, parallel to the treaty law, the principles of non-use of force and non-intervention continue to exist as part of customary international law.[1] A rule of customary law can be said to exist only if there is 'a general practice that is accepted as law (*opinio juris*)'.[2] *Opinio juris* refers to the requirement that the practice 'must be undertaken with a sense of legal right or obligation'.[3] This requires a careful and contextual assessment of the practice in light of the relevant circumstances.[4] To this end, while examining the practice in this chapter, a special effort has been made to duly deliver the motivation behind the relevant State conduct.

The requirement that the practice must be general means that it must be sufficiently widespread, representative and consistent.[5] To this end, this chapter attempts to examine all possible relevant practice rather than relying only on the practice generated by influential States or the practice which has attracted widespread public attention. It gives an account of the practice since the end of the Cold War, starting from 1992. The reason the study chooses this period of time is that it attempts to provide a fresh and contemporary account of the subject and that the post-Cold War practice arguably has the potential to reveal new insights into

[1] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits [1986] ICJ Rep 14, paras 174-5.
[2] ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (2018) UN Doc A/73/10, Conclusions 2 and 8.
[3] ibid Conclusion 9.
[4] ibid Commentary to Conclusion 3, para 2.
[5] ibid Conclusion 8(1).

States' approach to the issue. The world politics that affected the decision-making by States with respect to foreign interventions in internal conflicts in the Cold War era, mostly driven within the bounds of the ideologies of the time's confrontational bipolar world and post-colonial relationships, have in the course of time undergone a considerable change.

Some cases that are mentioned in previous chapters are not separately recounted below. These include the interventions in support of the ineffective but democratically elected governments of Sierra Leone in 1998 and The Gambia in 2017.[6] Uganda's 1997 intervention in the DRC against the armed groups violating its territorial integrity, which was discussed in the context of *DRC v Uganda*, is also one of these.[7] They are combined to the analysis of the practice made in the next chapter.

The practice reported in this chapter does not necessarily relate to 'civil wars' or 'non-international armed conflicts'. The chapter also includes interventions in conflicts where the violence was limited in degree or scope, such as army mutinies, riots or other isolated and sporadic acts of violence. Examining a vast variety of types of internal conflicts helps to determine whether and how the justification for the intervention changes depending on the level of the conflict, and thus to ascertain the content of the law more adequately.

Section 2 gives a systematic account of the relevant instances of consensual interventions in historical order. Each subsection is dedicated to a specific intervention. The last paragraph of each subsection summarises the context in which the intervention took place in order to provide a holistic insight into the precedential value of the case at hand. Section 3 reviews the general statements by some States on the legality of interventions by invitation in civil wars. An analysis under customary international law of the State conduct reported in this chapter will be made in the next chapter.

2. State practice

[6] See Chapter 3, Section 3.
[7] See Chapter 4, Section 2.2.2.

2.1. Russian and CIS intervention in Tajikistan – 1992

Soon after declaring independence from the Soviet Union on 9 September 1991, Tajikistan delved into an intense economic and social crisis. Towards the end of 1992, the crisis developed into a complex civil war between the opposition Islamic-led coalition, which briefly seized power in May 1992, and the government made up of the old ruling elite of Soviet times. It was compounded by intra-regional and clan dynamics.[8] Russia, in a letter dated 28 October 1992 to the UN on the events in Tajikistan, expressing concerns over 'the fate of the Russian nationals and Russian-speaking population', confirmed that '[i]n these extremely complex circumstances', the Russian troops in the country 'continue to maintain their neutrality'. It noted that the instruction given to them was to protect their camps and residences, vitally important installations, and the personnel of some diplomatic missions.[9]

After an effective defeat by the government in December 1992, the opposition largely retreated to Afghanistan from where it continued its struggle.[10] This led to an agreement between Tajikistan and Russia on the protection of the Tajik-Afghan border by Russian troops.[11] In a letter to the UN in July 1993, Russia justified its actions in a particular instance as being in self-defence of the Russian border troops and Tajikistan against the attack 'by bandits launched from Afghan territory', which it regarded as an act of aggression. The letter also confirmed Russia's readiness to assist Tajikistan based on the latter's right to collective self-defence under article 51 of the UN Charter.[12] It has also been reported that the Russian Foreign Minister explained Russia's intention as aimed at preventing the conflict from turning into a fully-fledged civil war, protecting Tajik citizens, promoting democratic government and national reconciliation, and preventing extremism from taking root in the region.[13]

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[8] Christopher J Le Mon, 'Unilateral Intervention by Invitation in Civil Wars: The Effective Control Test Tested' (2003) 35 NYUJIntlL&Pol 741, 786-7; UN Peacekeeping, 'Tajikistan – UNMOT' <https://peacekeeping.un.org/sites/default/files/past/unmot/UnmotB.htm>.
[9] UNSC, 'Letter Dated 28 October 1992 From the Permanent Representative of the Russian Federation to the United Nations Addressed to the President of the Security Council' (20 October 1992) UN Doc S/24725, 2.
[10] UN Peacekeeping, 'Tajikistan – UNMOT' (n 8).
[11] ibid.
[12] UNSC, 'Letter Dated 15 July 1993 From the Permanent Representative of the Russian Federation to the United Nations Addressed to the Secretary General' (19 July 1993) UN Doc S/26110.
[13] See Le Mon (n 8) 789.

The efforts to stabilise the situation in the country further led Kazakhstan, Kyrgyzstan, Russia, Tajikistan and Uzbekistan, member States of the Commonwealth of Independent States (CIS), to establish the Collective Peace-Keeping Forces by 1 October 1993 as a regional arrangement in accordance with chapter VIII of the UN Charter.[14] The aim of these forces was presented as helping to 'stabilis[e] the situation' in Tajikistan.[15] Their mandate included maintaining the security in the Tajik-Afghan frontier and participating in the negotiation process between the parties to the conflict.[16] In particular, it is provided that these forces 'shall not interfere in [Tajikistan's] internal affairs and shall not participate in internal conflicts'.[17]

Soon after being established, the control of the Collective Peace-Keeping Forces, supposed to be under a joint command, was left to Russia.[18] It was reported that Russia actually took sides in the conflict, as at times it backed the government in capturing territories from the opposition.[19] During the course of the conflict Tajikistan portrayed the situation as an issue involving foreign elements – giving Tajikistan the right to self-defence under article 51 of the UN Charter – and terrorism.[20]

In December 1994 the UN Security Council in a resolution welcomed the ceasefire reached between the Tajik government and the opposition, '[r]ecall[ed]' the statement establishing the Collective Peace-Keeping Forces, and '[a]cknowledg[ed] positively the readiness of these Forces' to work together with UN observers to assist in maintaining the cease-fire.[21] The intervention, in general, has escaped criticism of illegality from the international community.[22] The conflict effectively ended in 1997 with the parties signing a national peace accord.[23]

In sum, the consent-based Russian/CIS intervention, which has been 'recalled' in a UN Security Council resolution, took place mainly in order to stabilise the situation in Tajikistan

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[14] UNSC, 'Letter Dated 20 October 1993 From the Permanent Representative of the Russian Federation to the United Nations Addressed to the Secretary General' (21 October 1993) UN Doc S/26610, 2-3.
[15] ibid 2.
[16] ibid 9.
[17] ibid 12.
[18] Le Mon (n 8) 788.
[19] See ibid 788 and 789.
[20] UNGA, 'Forty-Eight Session – 10th Plenary Meeting' (30 September 1993) UN Doc A/48/PV.10, 6; UNSC Verbatim Record (14 June 1996) UN Doc S/PV.3673, 3 and 6; UNSC Verbatim Record (13 December 1996) UN Doc S/PV.3724, 2-3.
[21] UNSC Res 968 (16 December 1994) UN Doc S/RES/968, Preamble.
[22] Le Mon (n 8) 790.
[23] UN Peacekeeping, 'Tajikistan – UNMOT' (n 8); Le Mon (n 8) 790.

and protect its border against terrorist attacks coming from Afghan territory in the exercise of Tajikistan's right to self-defence. Although the intervention took place with a special aim not to 'participate in internal conflicts', the foreign forces reportedly took the side of the government.

2.2. Croatian intervention in Bosnia and Herzegovina – 1995

After gaining independence from Yugoslavia in 1992, Bosnia and Herzegovina was beset by ethnic strife. Upon the escalation of its armed confrontation in the Bihac pocket with the Serb militias and forces loyal to a Muslim rebel leader, on 22 July 1995 the Bosnian government signed a declaration with the Croatian government, whereby the latter committed to military assistance to the former. With the help of the Croatian armed forces, the rebel groups were defeated in early August 1995.[24] According to the declaration, the 'military and other assistance' to Bosnia and Herzegovina were 'in the defence against aggression' by Serbia and Montenegro. The latter, with the full responsibility of its political and army leadership, was aiming to create a 'Great Serbia' by militarily supporting the extremists in the occupied territories in Bosnia and Herzegovina.[25]

The Croatian government had also warned the UN Security Council that the displacement of the population and the fall of Bihac were a serious threat to Croatia's security and stability against which it could be compelled to undertake necessary measures.[26] Later, in a UN Security Council meeting, the Croatian representative defended Croatia's actions in Bosnia and Herzegovina by stating that 'coming to the aid of a friendly Government is fully consistent with the Charter of the United Nations and is a hallmark of international relations and behaviour'.[27]

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[24] See UCDP, 'Government of Bosnia-Herzegovina - Autonomous Province of Western Bosnia' <https://ucdp.uu.se/statebased/846>; UNSC, 'Letter Dated 7 August 1995 from the Secretary-General Addressed to the President of the Security Council' (7 August 1995) UN Doc S/1995/666.
[25] Declaration on Implementation of the Washington Agreement, Joint Defence against Serb Aggression and Reaching a Political Solution Congruent with the Efforts of the International Community (Split, Croatia, 22 July 1995).
[26] UNSC, 'Letter Dated 7 August 1995' (n 24) 1.
[27] UNSC Verbatim Record (10 August 1995) UN Doc S/PV.3563, 3.

Bosnia and Herzegovina had previously requested the UN Security Council to exempt it from the arms embargo imposed in 1991 on former Yugoslav territories, of which it formed a part. Its intention was that if the embargo was lifted, it could have requested military assistance against Serbia and Montenegro's aggression that was taking place in the form of military and logistical assistance to the Bosnian Serbs. However, despite the UN General Assembly's repeated requests, the Council did not lift the embargo until October 1996. It failed to adopt a draft resolution in June 1993, exempting Bosnia and Herzegovina from the embargo to enable it to exercise its right to self-defence, when the nine members of the Council abstained.[28]

Bosnia and Herzegovina and some other States argued that the embargo could not prevent Bosnia and Herzegovina from requesting assistance in the exercise of its inherent right to self-defence under article 51 of the UN Charter. For those States, it was a matter of interpretation of the relevant UN Security Council resolution, and the embargo could not apply to Bosnia and Herzegovina when it needed to defend itself against an external aggression.[29] Furthermore, States that opposed the lifting of the embargo did not claim that Bosnia and Herzegovina's right to self-defence was superseded by the resolution imposing the embargo.[30] They proposed political and practical, but not legal, arguments in defence of their views during the debates in the UN Security Council and General Assembly.[31] Moreover, the US and European countries tolerated and condoned the flow of arms through Croatia to Bosnia and Herzegovina.[32]

In sum, Croatia's consensual intervention in Bosnia and Herzegovina was to deter a foreign aggression in the country, which took place in the form of military assistance to the secessionist rebels, and to address a threat to Croatia's security and stability. Bosnia and Herzegovina and some other States argued that, in the exercise of its inherent right to self-defence, Bosnia and Herzegovina can request military assistance against a foreign aggression despite the UN Security Council-imposed arms embargo.

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[28] See Marco Roscini, 'On the Inherent Character of the Right of States to Self-Defence' (2015) 4 CJICL 634, 656-7.
[29] See Christine Gray, 'Bosnia and Herzegovina: Civil War or Inter-state Conflict? Characterization and Consequences' (1997) 67 BYIL 155, 191.
[30] ibid 192.
[31] ibid 193.
[32] See ibid 197.

2.3. French intervention in the Comoros reversing a coup backed by foreign mercenaries – 1995

On 28 September 1995 Bob Denard, a French mercenary, together with some 20 other mercenaries from various nationalities, staged an attack in support of the few hundred renegade Comoran soldiers in the capital of the Comoros. The attack resulted in the overthrow of the incumbent government.[33] France sent troops at the request of Prime Minister Yachourtu, who had taken refuge in the French embassy when the coup was staged. On 5 October French troops took back control of the capital and the Prime Minister announced a new government of national unity.[34]

Combo, who came to power as a result of the coup, criticised the intervention as being reminiscent of former French colonialism and blamed France for not respecting the people's right to self-determination.[35] He also played down the fact that Denard was a mercenary by emphasising his Comoran citizenship.[36] Comoran politicians and community leaders, however, even though welcoming the coup and rejecting any justification for intervention in the internal affairs of the Comoros, demanded the expulsion of Denard from the country.[37] The Organisation of African Unity and a number of States, on the other hand, condemned the coup.[38] The government ousted by the coup appealed to the international community to withhold the recognition of the newly formed administration.[39]

The French Foreign Ministry stated that the intervention had been undertaken at the request of Prime Minister Yachourtu based on a 1978 defence agreement between France and the Comoros, whereby France committed to defending the country against external aggression.[40] The UN Commission on Human Rights regarded the attack by the mercenaries as seriously

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[33] UN Economic and Social Council, 'Report on the Question of the Use of Mercenaries as a Means of Violating human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination' (17 January 1996) UN Doc E/CN.4/1996/27, 18.
[34] ibid.
[35] John Chalmers, 'French Troops Land to Crush Comoros Coup' (Westlaw, *Reuters,* 4 October 1995).
[36] Mark Dodd, 'Rebels Control Comoro Islands After Coup; Army Captain Promises Interim President, Multi-Party Elections' (Westlaw, *Washington Post,* 1 October 1995).
[37] 'Demonstrators Support Coup as France Rules out Intervention' (Westlaw, *AFP,* 29 September 1995).
[38] ibid.
[39] Mark Dodd, 'Comoros Coup Chief Tells France to Keep Out' (Westlaw, *Reuters,* 2 October 1995).
[40] 'France Says It Has Sent Troops to the Comoros' (Westlaw, *Reuters*, 4 October 1995); 'Report on the Question of the Use of Mercenaries' (n 33) 18.

infringing on the right to self-determination of the people. The Commission stated that the French intervention had been conducted under a bilateral defence agreement 'in order to put an end to the foreign aggression and restore the rule of law' and called the intervention 'legitimate'.[41]

In sum, the consent-based French intervention which quickly repelled the coup in the Comoros was undertaken in response to a foreign intervention by the mercenaries and to restore the rule of law.

2.4. French interventions in the Central African Republic against army mutinies – 1996

In 1996 the Central African Republic (CAR) was unsettled by a crisis of a political and military nature, which resulted in several mutinies by renegade soldiers in the army throughout the year. The source of the crisis was the social and economic discontent among the public aggravated by the non-payment of salary arrears by the government.[42] In April a mutiny lasting three days ended after the government had started the payment of the late wages and agreed to the amnesty demands of the mutineers.[43] A spokesman for the mutineers said that they 'had no political connotation' and that they respected the democratic institutions of the republic.[44] During the uprising France ordered its troops, already stationed in the country based on a cooperation agreement, to protect the key installations and presidential palace.[45] The French Foreign Ministry called 'for a return to order and respect of the democratically elected institutions' of the CAR.[46] The President of the CAR commended France 'for the defence of the interests' of his country.[47]

In another mutiny in May, the renegade soldiers took control of part of the capital for four days following a struggle that lasted ten days with a moderate degree of support from the civilian

[41] 'Report on the Question of the Use of Mercenaries' (n 33) 18.
[42] UNSC, 'Report of the Secretary-General Pursuant to Resolution 1136 (1997) Concerning the Situation in the Central African Republic' (23 January 1998) UN Doc S/1998/61, 2.
[43] Raphael Kopessoua, 'Troops End Mutiny in Central African Republic' (Westlaw, *Reuters*, 21 April 1996); Raphael Kopessoua, 'France Backs Central African Leader Over Mutiny' (Westlaw, *Reuters*, 19 April 1996).
[44] 'Troops End Mutiny in Central African Republic' (n 43).
[45] ibid.
[46] 'France Backs Central African Leader Over Mutiny' (n 43).
[47] 'Troops End Mutiny in Central African Republic' (n 43).

population.[48] It ended with another amnesty for the uprising. French troops backed the President in an intervention originally initiated to rescue foreign residents.[49] The French Minister responsible for France's relations with its former African colonies stated that the intervention prevented a bloodbath, was supported by neighbouring countries, and sent out a political signal. He also told the French Parliament that the aim of France was not to keep continuing 'acting as the gendarme of Africa' but because the violence in the country could harm foreigners and spread to Europe, the intervention was necessary.[50] It was also reported that France had decided to intervene in retaliation against the killing of several French troops by the rebels, not in defence of the incumbent government.[51] The discord between the rebels and the government finally came to an end in 1997 with the parties signing the Bangui Agreements bringing about a comprehensive settlement. It included the establishment of an inter-African peacekeeping force mandated with the implementation of the agreements.[52]

In sum, regardless of how it played out on the ground, France's military involvement with respect to the mutinies in the CAR was not exclusively directed at supporting the government or acting 'as the gendarme of Africa'. It was, among others, to protect the key installations, rescue foreigners, address a threat to Europe, and in retaliation for the killing of French soldiers.

2.5. Senegal and Guinea's intervention in Guinea-Bissau against an army mutiny – 1998

After having been dismissed for not investigating the claims of the supply of arms by high-ranking army officers to the rebels in the Casamance region of Senegal, Guinea-Bissau's army chief of staff, Mané, led a mutiny in June 1998.[53] Dissatisfaction among the population with the government's policies provided broad support for the military junta, which gradually gained most of the control over the country. The perpetrators declared that they did not wish

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[48] Jeremy I Levitt, 'Pro-Democratic Intervention in Africa' (2006) 24 WisIntlLJ 785, 815; Joseph Benamsse, 'Renegade Soldiers Return to Barracks' (Westlaw, *Reuters*, 27 May 1996).
[49] Benamsse (n 48); Thalia Griffiths, 'U.S, France – A Tale of Two African Interventions' (Westlaw, *Reuters*, 29 May 1996).
[50] Griffiths (n 49).
[51] Levitt (n 48) 816.
[52] UN Peacekeeping, 'Central African Republic – MINURCA' <https://peacekeeping.un.org/mission/past/minurcaB.htm#Bangui>.
[53] Jean-Claude Marut, 'Guinea-Bissau and Casamance: Instability and Stabilization' (UNHCR, WRITENET Paper No. 15/2000, June 2001) 2; Amnesty International, 'Guinea-Bissau: Human Rights in War and Peace' (AFR 30/07/99, July 1999) 6-8; Levitt (n 48) 805.

to take power but to return it to the people.[54] Within a few days of the mutiny, neighbouring Senegal and Guinea sent troops at the request of President Vieira in order to put down the mutiny, evacuate foreign nationals, restore security and defend the democratically elected government, in line with the bilateral defence agreements.[55] The support by the Guinea-Bissau's military to the separatist rebels in the Casamance region of Senegal was considered the predominant reason behind Senegal's intervention against the military junta.[56] After the start of the conflict in Guinea-Bissau, the rebels in Casamance reportedly provided significant support to the junta, which it denied.[57] The Economic Community of West African States (ECOWAS) 'condemned the rebellion', expressed its support for the rapid intervention by Senegal and Guinea, and determined the ECOWAS's objective in Guinea-Bissau as being 'to restore peace and the authority of President Vieira's democratically elected Government throughout the country'. Measures to be undertaken to achieve this objective included '[t]he use of force'.[58]

In November 1998 parties to the conflict reached a ceasefire agreement. The agreement stipulated the withdrawal of all foreign troops, the deployment of an ECOWAS military observer interposition force, the immediate establishment of a national unity government and a commitment to hold elections before the end of March 1999.[59] The conflict in effect ended when the junta, after the deployment of the interposition force and the establishment of the national unity government, ousted President Vieira on 7 May 1999 following a dispute over the disarming of the presidential guard.[60]

In sum, the consent-based intervention by Senegal and Guinea in Guinea-Bissau aimed to put down an army mutiny, restore security, and defend the democratically elected government. It was also intended by Senegal to deter a threat to its own territorial integrity.

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[54] Marut (n 53) 2; Amnesty International (n 53) 8.
[55] Levitt (n 48) 805-6; Marut (n 53) 3; 'Senegal-Guinea Bissau Senegal Sends Troops to Bissau' (Westlaw, *Comtex News Network*, 15 June 1998).
[56] Marut (n 53) 3; Amnesty International (n 53) 9.
[57] Amnesty International (n 53) 9.
[58] UNSC, 'Letter Dated 6 July 1998 From the Permanent Representative of Nigeria to the United Nations Addressed to the President of the Security Council' (13 July 1998) UN Doc S/1998/638.
[59] UNSC, 'Letter Dated 3 November 1998 From the Permanent Representative of Nigeria to the United Nations Addressed to the President of the Security Council' (3 November 1998) UN Doc S/1998/1028, 2.
[60] Amnesty International (n 53) 10; Marut (n 53) 6.

2.6. Regional countries' intervention in the Democratic Republic of the Congo against Ugandan and Rwandan-backed rebels – 1998

Barely one year after the 1996-1997 conflict that brought President Kabila into power with Ugandan and Rwandan support, the Democratic Republic of the Congo (DRC) plunged into another armed conflict in August 1998. This conflict erupted with the direct military intervention of Uganda and Rwanda, former allies of Kabila, in support of the anti-Kabila rebel groups. The intervention prompted the DRC government to request assistance from Angola, Zimbabwe, Namibia and Chad.[61] In addition to political, ethnic and security factors, the involvement of so many States and non-State actors in the conflict was explained by the DRC's rich mineral resources.[62]

The primary legal justification offered by Uganda and Rwanda was that they acted in self-defence in response to cross-border attacks of non-State armed groups emanating from the DRC. Burundi, accused of intervening on a small scale, denied its involvement until May 2001 when it claimed to have conducted an operation in self-defence.[63] The DRC, on the other hand, claimed to have been the victim of an armed attack by these States.[64] Thus, the States that came to the DRC's support primarily justified their actions based on collective self-defence of the DRC.[65] In a letter to the UN Zimbabwe stated that a special committee established under the auspices of the Southern African Development Community (SADC) had determined that the conflict in the DRC was not an internal rebellion as claimed by Uganda and Rwanda but a foreign invasion.[66] The letter went on to claim that the intervention by Zimbabwe, Angola and Namibia took place as a result of the request by the internationally recognised government of the DRC from the member States of the SADC in line with article 51 of the UN Charter.[67] It also claimed that the intervention was in line with a 1997 resolution of the Organisation of

[61] James A Green, 'The Great African War and the Intervention by Uganda and Rwanda in the Democratic Republic of Congo – 1998-2003' in Tom Ruys, Olivier Corten and Alexandra Hofer (eds), *The Use of Force in International Law: A Case-Based Approach* (OUP 2018) 575-6; Eliav Lieblich, 'Intervention and Consent: Consensual Forcible Intervention in Internal Armed Conflicts as International Agreements' (2011) 29 BostonUIntlLJ 337, 350-3.
[62] Green (n 61) 576.
[63] ibid 580-3.
[64] ibid 577-8.
[65] ibid 579-80.
[66] UNSC, 'Letter Dated 23 September 1998 From the Permanent Representative of Zimbabwe to the United Nations Addressed to the President of the Security Council' (25 September 1998) UN Doc S/1998/891.
[67] ibid.

African Unity which condemns 'the change of legitimate Governments by military means' and with a 1995 SADC resolution by which the SADC member States 'agreed to take collective action in the case of attempted coups to remove Governments by military means'.[68]

The UN Security Council called upon the foreign States to bring to an end the presence of 'uninvited forces'.[69] Overall, the international community's reaction was one of acquiescence of the legality of the intervention relying on the invitation of the DRC government. In the course of time, however, many actors took a neutral stance accompanied by a call for a peaceul resolution of the conflict.[70]

The UN Security Council established the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) in November 1999 for, among others, the observation of the Lusaka Ceasefire Agreement reached between States involved in the conflict.[71] Its mandate, in a series of resolutions, was expanded to the supervision of the implementation of the ceasefire.[72] The conflict in the country to a large extent ended only in July 2003 with the establishment of a transitional government.[73]

In sum, the intervention on the side of the DRC government came in response to a prior intervention on the side of the rebels. It was justified as collective self-defence of the DRC under article 51 of the UN Charter and was regarded to be in line with regional instruments condemning the change of governments by military means and committing to a collective action against coups.

2.7. SADC intervention in Lesotho against an army mutiny – 1998

The results of Lesotho's May 1998 national assembly elections, which the opposition parties claimed to have been rigged, led to protests and violent tensions in Lesotho even though international observers found the polling free and fair. The discomfort among the population

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[68] ibid.
[69] UNSC Res 1234 (9 April 1999) UN Doc S/RES/1234, Article 2.
[70] Green (n 61) 583-6.
[71] UNSC Res 1279 (30 November 1999) UN Doc S/RES/1279, Article 5.
[72] See UN Peacekeeping, 'MONUC' <https://peacekeeping.un.org/mission/past/monuc/> where the related UN Documents could be found.
[73] Lieblich (n 61) 353; Green (n 61) 575.

resulted in a group of army officers aligned with the opposition sparking a mutiny against the government on 11 September. Order was restored by the end of October after the intervention by the military forces of the Southern African Development Community (SADC) on 22 September. These forces consisted of troops from South Africa, which completely landlocks Lesotho, and Botswana. The intervention was requested by Lesotho's government to restore law and order in accordance with the SADC agreements.[74]

A South African military spokeswoman, affirming that the intervention was at the request of the King of Lesotho and under the auspices of the SADC, stated that it aimed 'to restore stability'.[75] Likewise, Botswana's Foreign Minister informed the press that it intended 'to restore law and order'.[76] The South African cabinet in a public statement confirmed that the intervention had been undertaken as part of the fulfilment of South Africa's SADC obligations. It also stated that the intervention was 'premised on the unequivocal rejection of any acts of unlawful seizure of power against any democratic government'.[77]

In sum, the SADC's consent-based intervention in Lesotho, which swiftly quelled an army mutiny, aimed to restore law and order, to bring stability and to protect the democratic government.

2.8. Namibian intervention in Angola against UNITA – 1999

After gaining independence from the colonial power Portugal in 1975, Angola plunged into a multi-party civil war between the rival independence movements based on ideological and ethnic differences. The conflict intermittently continued until 2002. At the start of the conflict, foreign States intervened along the lines of both global Cold War rivalry and Southern African regional conflict.[78] Towards the end of 1998, heavy clashes between the opposition UNITA

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[74] US Department of State, 'Country Report on Human Rights Practices 1998 – Lesotho' (26 February 1999) <https://www.refworld.org/docid/3ae6aa620.html>; Freedom House, 'Freedom in the World 1999 – Lesotho' (1999) <https://www.refworld.org/docid/5278c71b14.html>; Levitt (n 48) 820-2.
[75] Keketso Lawrence, 'Safrican, Botswanan Troops Prop Up Lesotho Govt.' (Westlaw, *Reuters*, 22 September 1998).
[76] 'Botswana Defends Military Intervention in Lesotho' (Westlaw, *AFP*, 23 September 1998).
[77] 'S.African Cabinet Endorses Lesotho Intervention' (Westlaw, *AFP*, 23 September 1998).
[78] See UCDP, 'Government of Angola – UNITA' <https://ucdp.uu.se/statebased/714>; Ingo Winkelmann, 'Angola', *Max Planck Encyclopedia of Public International Law* (May 2019) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1935>.

(National Union for the Total Independence of Angola), which by the time had lost much of its foreign support, and the government erupted once more after the collapse of the 1994 ceasefire agreement.[79] The UN Security Council mandated peace missions and imposed sanctions on UNITA, which it also condemned.[80]

In December 1999 Angola and Namibia concluded a defence pact granting the Angolan government the right to use the Namibian territory to launch attacks against UNITA.[81] Namibia's direct military support to the Angolan government, which continued until the end of the conflict, came following cross-border raids by UNITA.[82] UNITA had previously threatened to respond to Namibia's rapprochement to the Angolan government.[83] Early on during the involvement of Namibia in the conflict, the Namibian army's chief of staff denied the presence of Namibian troops in the Angolan territory and stated that 'we are securing our border' against UNITA.[84] In October 2000 the Deputy Minister of Defence of Namibia stated in the National Assembly that Namibian troops were not deployed to Angola, 'nor has the Namibian government entered into the Angolan civil war in any form'. He cautioned that the 'follow-up operations that … resulted in cross-border' operations must not be confused with the involvement 'in the Angolan war'.[85]

The conflict ended in April 2002 with the parties signing a ceasefire agreement followed by UNITA's transformation into a political party.[86]

In sum, Namibia depicted whatever assistance it gave to Angola and military operations it conducted in the Angolan territory as being for the defence of its borders. It explicitly claimed that it was not in any form involved in the civil war.

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[79] UCDP, 'Government of Angola – UNITA' (n 78); Winkelmann (n 78) paras 15-6.
[80] See the resolutions mentioned in Winkelmann (n 78) paras 18-23 and 25.
[81] Vincent Williams, 'Namibia: Situation Report' (UNHCR, WRITENET Paper No. 09/2000, December 2000) 6; UCDP, 'Government of Angola – UNITA' (n 78).
[82] UCDP, 'Government of Angola – UNITA' (n 78).
[83] Frauke Jensen, 'Namibia Sucked Closer to Role in Angola' (Westlaw, *Reuters*, 21 December 1999).
[84] 'Namibian Troops Secure Angola Border against UNITA' (Westlaw, *Reuters*, 17 December 1999).
[85] 'Namibia: Ministry Releases Statistics on Army Actions against UNITA' (Westlaw, *BBC*, 24 October 2000).
[86] UCDP, 'Government of Angola – UNITA' (n 78).

2.9. Regional countries' interventions against the Islamic Movement of Uzbekistan – 1999

In the mid-1990s an organisation called Islamic Movement of Uzbekistan (IMU), mainly consisting of Uzbek militants in exile, was formed with the aim of overthrowing the Uzbek government. It operated in Uzbekistan, Tajikistan and Kyrgyzstan, although without having the power to pose a major threat to any of these States' governments.[87] Later on, the group also declared that Uzbekistan's government, headed by Islam Karimov, must be replaced by its version of the Islamic State in the Ferghana Valley comprising territories from the three countries, where they operate. In August 1999 the group led an incursion into Southern Kyrgyzstan from Tajikistan mainly demanding from the Kyrgyz government a free pass to Uzbek territory.[88] In October Uzbekistan launched an attack against the group in the territory of Kyrgyzstan and Tajikistan. The attack in Tajikistan was not authorised by the Tajik government.[89] The attack in Kyrgyzstan was synchronised with the operations of the Kyrgyz troops on the ground, even though in late August the authorisation for such attacks by the Kyrgyz government had been withdrawn due to the inadvertent bombing of Kyrgyz villages by the Uzbek air force.[90] However, before the October attack, on 24 September the Kyrgyz authorities revealed that Uzbekistan had offered help to wipe out 'the terrorist formations'.[91]

The threat posed by the IMU eventually led these countries to enter into security agreements.[92] In a treaty concluded in April 2000, for example, Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan agreed to take joint action 'against terrorism, political and religious extremism, and transnational organized crime'.[93] The treaty regulated the forms of cooperation, which included

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[87] See ICG, 'Central Asia: Islamist Mobilisation and Regional Security' (1 March 2001) <https://www.refworld.org/docid/3de221f64.html>.
[88] ibid 7.
[89] The Jamestown Foundation, 'Insurgency Update: Hostilities and Negotiations Proceeding in Parallel' (Vol 5, Issue 183, 5 October 1999) <https://jamestown.org/program/insurgency-update-hostilities-and-negotiations-proceeding-in-parallel/>.
[90] ibid; Also see ICG, 'Central Asia: Islamist Mobilisation and Regional Security' (n 87) 7 reporting that during the conflict, the Uzbek attacks provoked protests from both countries but especially from Tajikistan.
[91] The Jamestown Foundation, 'Growing International Ramifications of the Islamic Insurgency in Kyrgyzstan' (Vol 5, Issue 179, 29 September 1999) <https://jamestown.org/program/growing-international-ramifications-of-the-islamic-insurgency-in-kyrgyzstan/>.
[92] ICG, 'Central Asia: Islamist Mobilisation and Regional Security' (n 87) 8.
[93] Treaty on Joint Action in the Struggle Against Terrorism, Political and Religious Extremism, Transnational Organized Crime, and Other Threats of the Stability and Security of the Parties, Article 2(1) reproduced in Statutes and Decisions, 2004, Vol 40, No 6, 80.

the involvement of armed forces of State parties in joint operations in the territory of other State parties, and the procedure for requesting assistance and its fulfilment.[94]

In August 2000 the IMU started another incursion in the southern regions of Uzbekistan and Kyrgyzstan.[95] To combat this threat, these two countries and Tajikistan set up a united command centre in Tajikistan to conduct joint operations against the IMU.[96] Kyrgyzstan criticised Tajikistan for not allowing Kyrgyz and Uzbek troops to enter into Tajik territory to pursue fleeing IMU fighters.[97] The conflict largely ended by October 2000.[98]

The official narrative by Uzbekistan and Kyrgyzstan consistently linked the IMU to other extremist and fundamentalist groups in the region and to the Taliban in Afghanistan. The IMU is depicted as being assisted by these external actors and not having a genuine local cause and support. Rather, it was a criminal organisation and did not deserve to be called 'opposition'. This line of argument was supported by the regional and Western countries, including Russia and the US.[99] Such a stance is also understood from the Kyrgyz government's reports to the UN Counter-Terrorism Committee, which additionally clearly associate the IMU with terrorism and separatism.[100]

In sum, the consent-based foreign operations against the IMU in the region were conducted for the purpose of fighting an externally supported extremis, terrorist, criminal and separatist organisation which did not have a local cause and threatened the security of the intervening countries from outside their borders.

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[94] ibid Articles 7-12.
[95] ICG, 'Central Asia: Islamist Mobilisation and Regional Security' (n 87) 8; ICG, 'Central Asia briefing: Recent Violence in Central Asia, Causes and Consequences' (18 October 2000) 3-4 <https://www.refworld.org/docid/3ae6a6ee8.html>.
[96] ICG, 'Central Asia Briefing: Recent Violence in Central Asia, Causes and Consequences' (n 95) 4; Olga Dzyubenko, 'C.Asian States Plan to "Annihilate" Rebels' (Westlaw, *Reuters*, 15 August 2000).
[97] ibid 4.
[98] ibid 5.
[99] ICG, 'Central Asia: Islamist Mobilisation and Regional Security' (n 87) 9; ICG, 'Central Asia Briefing: Recent Violence in Central Asia, Causes and Consequences' (n 95) 6.
[100] See UNSC, 'Letter Dated 26 February 2002 from the Chairman of the Security Council Committee Established Pursuant to Resolution 1373 (2001) Concerning Counter-terrorism Addressed to the President of the Security Council' (4 March 2002) UN Doc S/2002/204, 3; UNSC, 'Letter Dated 28 July 2003 from the Chairman of the Security Council Committee Established Pursuant to Resolution 1373 (2001) Concerning Counter-terrorism Addressed to the President of the Security Council' (30 July 2003) UN Doc S/2003/776, 9.

2.10. The UK's intervention in Sierra Leone against the RUF – 2000

From 1991 to 2001 Sierra Leone was embroiled in civil wars between the Revolutionary United Front (RUF) rebels and the government, which at times was overthrown by military coups. The conflict mainly raged on against the backdrop of economic interests rooted in the trade of diamonds extracted from the country's mineral resources-rich soil.[101] Apart from economic interests, the mission of the RUF largely remained vague. The group in a manifesto in 1995 rationalised its armed struggle based on the poverty and human degradation caused by the autocratic military rule.[102] During the course of the conflict, a military coup against President Kabbah, who had assumed office by virtue of internationally observed free and fair elections, was reversed by ECOWAS's intervention in 1998. Until toppled, the military junta ruled the country in collaboration with the RUF.[103]

During the conflict the UN Security Council decided to restrict its arms embargo, which had been imposed on the whole country when the country was under the rule of the military junta, to non-governmental forces,[104] condemned rebels' actions[105] and authorised the deployment of peacekeeping forces to the country.[106] British intervention came in May 2000. The rationale for the intervention varied and evolved over time from the protection and evacuation of the nationals and supporting the UN peacekeeping forces to backing the democratically elected legitimate government against the rebels, restoring peace and rebuilding the country.[107] The UK Secretary of State for Defence acknowledged in parliament that the intervention was welcomed by the Sierra Leonean President Kabbah as well as the UN Secretary-General. He also disavowed the involvement in the civil war when he emphasised that 'there is no question

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[101] Kirsti Samuels, 'Jus Ad Bellum and Civil Conflicts: A Case Study of the International Community's Approach to Violence in the Conflict of Sierra Leone' (2008) 8 Journal and Conflict and Security Law 315, 323-5.
[102] Richard McHugh, 'Revolutionary United Front', *Encyclopaedia Britannica* <https://www.britannica.com/topic/Revolutionary-United-Front>.
[103] Samuels (n 101) 323-4; On the ECOWAS intervention, see Chapter 3, nn 227 and 228, and the surrounding text.
[104] UNSC Res 1171 (5 June 1998) UN Doc S/RES/1171, Article 2.
[105] See UNSC Res 1181 (13 July 1998) UN Doc S/RES/1181; UNSC Res 1313 (4 August 2000) UN Doc S/RES/1313.
[106] See UNSC Res 1181 (13 July 1998) UN Doc S/RES/1181; UNSC Res 1270 (22 October 1999) UN Doc S/RES/1270; UNSC Res 1289 (7 February 2000) UN Doc S/RES/1289; UNSC Res 1313 (4 August 2000) UN Doc S/RES/1313.
[107] See Samuels (n 101) 331; Christine Gray, *International Law and the Use of Force* (4th edn, OUP 2018) 94; UNSC Verbatim Record (11 May 2000) UN Doc S/PV.4139, 6-7.

of the UK taking over the UN mission or of being drawn into the civil war'.[108] On a previous occasion the UK Secretary of State for Foreign and Commonwealth Affairs had played down the scale of the rebellion when he stated in parliament that '[w]e must not allow a few thousand rebels to prevent the end to violence, and the peace in which to get on with their lives for which 3 million people in Sierra Leone desperately hunger'.[109]

The UN Secretary-General's reports praised the intervention mainly for bolstering the UN mission in the country.[110] The international community's reaction, in general, was one of acquiescence, even though some countries criticised it for not having been undertaken as part of the UN mission.[111] By January 2002 the conflict largely ended with the rebels this time abiding by the peace agreement they had entered into with the government.[112]

In sum, the UK's consensual intervention in Sierra Leone clearly backed the government against the rebels, which were sanctioned and condemned by the UN Security Council. However, the UK underplayed the scale of the rebellion and alluded to various reasons for its intervention, such as the rescue of its nationals, support for the UN mission, backing the democratically elected institutions and restoring peace in a country that desperately needed it for humanitarian reasons. In particular, it denied 'being drawn into the civil war'.

2.11. Interventions against the Lord's Resistance Army – 2002

The post-colonial history of Uganda was tainted by violence between various armed groups alongside ethnic and regional differences. The Lord's Resistance Army (LRA), one of the two groups that continued to be active in the 2000s, emerged in 1987 as a cult-like Christian group aiming to oust the Ugandan government. Its agenda was thought to be framed with political and economic grievances alongside ethno-regional dimensions. The group was infamous for

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[108] The Secretary of State for Defence, House of Commons Debate, Vol 350 (15 May 2000) <https://api.parliament.uk/historic-hansard/commons/2000/may/15/sierra-leone>.
[109] The Secretary of State for Foreign and Commonwealth Affairs, House of Commons, 8 May 2000 <https://publications.parliament.uk/pa/cm199900/cmhansrd/vo000508/debtext/00508-11.htm>.
[110] See, for example, UNSC, 'Fourth report of the Secretary-General on the United Nations Mission in Sierra Leone' (19 May 2000) UN Doc S/2000/455, 6, 9 and 15; UNSC, 'Fifth report of the Secretary-General on the United Nations Mission in Sierra Leone' (31 July 2000) UN Doc S/2000/751, 5.
[111] Samuels (n 101) 335.
[112] ibid 325.

its relentless and brutal attacks against the civilian population and the mass abduction of children brutalised and forced to commit atrocities.[113]

In 1994, in response to Ugandan support to a Sudanese rebel group, Sudan started providing the LRA with arms, military training and bases in Southern Sudan. In March 2002, however, after the relations between the two countries had started to improve, Sudan allowed Uganda to conduct military operations against the LRA in its southern territory. The scope of permission by Sudan was later extended geographically, and this led the LRA in 2005 to split into sub-groups with one of them crossing into Eastern DRC.[114] The joint statement by Uganda and Sudan, announcing the permission granted to Uganda in March 2002, emphasised fostering and maintaining peace and security across their common border and containing problems caused by the LRA across the border, such as insecurity, violence and the abduction of children. The statement also added that the ongoing cooperation between the two States 'further demonstrates their coordination and readiness to support the international community in its legitimate measures to combat terrorism as recently reflected in Security Council resolution 1373 (2001)'.[115] This was one of the resolutions adopted in the aftermath of 9/11 terrorist attacks in the US outlining measures to be taken in combating terrorism.[116] Days after this statement the Ugandan Parliament, together with some other groups, designated the LRA as a terrorist group.[117]

A peace process started between the LRA and Ugandan government in 2006 after the unsealing of warrants of arrest against the senior leaders of the LRA by the International Criminal Court in 2005.[118] The LRA was also condemned for its activities in early 2006 by the UN Security Council, which also expressed deep concern for the group's 'brutal insurgency'.[119] After the peace process collapsed in November 2008 with the LRA failing to sign the final agreement, on 14 December 2008 armed forces of Uganda, the DRC and Southern Sudan Autonomous

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[113] UCDP, 'Government of Uganda – LRA' <https://ucdp.uu.se/statebased/688>; US Congressional Research Service, 'The Lord's Resistance Army: The U.S. Response' (28 September 2015) 5-6.
[114] ibid.
[115] UNSC, 'Letter Dated 14 March 2002 from the Permanent Representative of Uganda to the United Nations Addressed to the President of the Security Council' (15 March 2002) UN Doc S/2002/269.
[116] UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373.
[117] 'Ugandan Parliament Adopts Anti-Terrorist Bill' (Westlaw, *Xinhua News Agency*, 20 March 2002).
[118] UCDP, 'Government of Uganda – LRA' (n 113).
[119] UNSC Res 1653 (27 January 2006) UN Doc S/RES/1653; UNSC Res 1663 (24 March 2006) UN Doc S/RES/1663.

Region started a joint military operation against the LRA camps in the DRC.[120] A joint statement by the respective nations' military intelligence chiefs stated that their armed forces 'launched an attack on the LRA terrorists' located in the DRC.[121]

The US, which supported this operation with equipment and logistical assistance, sent troops in the fight against the LRA in October 2011.[122] An Act enacted by the US Congress in May 2010, which acknowledged the fact that the US had designated the LRA as a terrorist group, outlined the US policy as, among others, to provide 'support for viable multilateral efforts to protect civilians from the Lord's Resistance Army, to apprehend or remove [its leader] Joseph Kony and his top commanders from the battlefield in the continued absence of a negotiated solution'.[123] The US President in a letter sent to the US Congress, reminding of the atrocities committed by the LRA, stated that in furtherance of the Congress's policy he authorised the deployment of US forces 'to central Africa to provide assistance to regional forces that are working toward the removal of Joseph Kony from the battlefield'. He noted that even though the 'forces are combat equipped … they will not themselves engage LRA forces unless necessary for self defense'.[124] The US assistance, which continued in subsequent years, was, among other reasons, largely premised on the elimination of the suffering inflicted upon the civilians by the LRA,[125] as is also evident from the Congress's above-mentioned policy.

The pressure over the LRA further increased in 2013 with the forces of Uganda, the DRC, South Sudan and the CAR fighting under the auspices of the African Union (AU) against the group.[126] AU Peace and Security Council authorised the establishment of this regional task force in November 2011 with the mandate, among others, to assist 'the countries affected by the atrocities of the LRA', to stabilise 'the affected areas, free of LRA atrocities' and to deliver humanitarian aid.[127] The Council also emphasised the international community's support

[120] UCDP, 'Government of Uganda – LRA' (n 113).
[121] Jack Kimball, 'Nations Launch Offensive against Uganda LRA Rebels' (*Reuters*, 14 December 2008) <https://www.reuters.com/article/us-uganda-rebels/nations-launch-offensive-against-uganda-lra-rebels-idUSTRE4BD1AJ20081214>.
[122] US Congressional Research Service (n 113) 9-11.
[123] Lord's Resistance Army Disarmament and Northern Uganda Recovery Act of 2009, Sec. 3.
[124] The White House, 'Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate Regarding the Lord's Resistance Army' (14 October 2011) <https://obamawhitehouse.archives.gov/the-press-office/2011/10/14/letter-president-speaker-house-representatives-and-president-pro-tempore>.
[125] US Congressional Research Service (n 113) 8-11.
[126] UCDP, 'Government of Uganda – LRA' (n 113).
[127] AU Peace and Security Council, 'Communiqué' PSC/PR/COMM.(CCXCIX) Article 5.

behind the decision and readiness by some international partners to assist the AU.[128] The Council also decided to declare the LRA a terrorist group.[129] Before this authorisation by the AU, the CAR representative in October 2010 in a UN Security Council meeting had appealed to 'friendly nations and the international community in order to bolster' the CAR's operational capacity against the LRA. The representative described the LRA as a 'terrorist group' that 'sows the seeds of desolation among the population by pillaging, raping, massacring and burning down villages as they move through an area, resulting in thousands of internally displaced persons and refugees'.[130] The UN Security Council welcomed, and reiterated its support for, the AU's efforts to facilitate regional action to address the threat posed by the LRA[131] and commended the initiative established to eliminate the LRA.[132] As a result of the fight against it, today the LRA's power is largely diminished, and attacks on civilians have substantially ended.[133]

In sum, many States in the region and the US, especially after the condemnation of the group by the UN Security Council, are involved in the fight against the LRA with the consent of States where it is located. The reasons behind the interventions included combating a group threatening the intervening States' security, the protection of common borders and ending the notorious atrocities committed by a terrorist group. The AU-backed intervention was endorsed by the UN Security Council.

2.12. French intervention in Côte d'Ivoire – 2002

The conflict in Côte d'Ivoire was sparked when the Ivory Coast Patriotic Movement, mainly consisting of mutinous soldiers from the north of the country, launched an attack on 19 September 2002. The group aimed to topple the government and improve the economic situation of the country's Muslim and immigrant population, thought to be alienated with the downturn in the economy in the late 1980s.[134] In 2013 the group with two other rebel

[128] See ibid Articles 1, 5 and 9.
[129] ibid Article 10.
[130] UNSC Verbatim Record (20 October 2010) UN Doc S/PV.6406, 4-5.
[131] UNSC Res 2053 (27 June 2012) UN Doc S/RES/2053, Preamble and Article 21.
[132] UNSC Res 2195 (19 December 2014) UN Doc S/RES/2195, Article 9.
[133] UCDP, 'Government of Uganda – LRA' (n 113).
[134] UCDP, 'Government of Ivory Coast – MPCI' <https://ucdp.uu.se/statebased/879>; UCDP, 'MPCI' <https://ucdp.uu.se/actor/556>.

movements merged into an umbrella group called the New Forces.[135] The hostilities largely ended in late 2004. However, they briefly resumed in 2010 when the incumbent President Gbagbo refused to leave office after having been defeated in elections deemed free and fair by international observers.[136]

Three days after the uprising of September 2002, France intervened by reinforcing its troops which were already present in the country based on a bilateral defence agreement signed in April 1961.[137] The intervention effectively halted the fighting, with the rebels holding on to the control of the northern part of the country.[138] The Gbagbo government had requested military assistance from France insisting that the rebels were being supported with arms by neighbouring countries, particularly Burkina Faso, Liberia and Sierra Leone. France, however, deeming the uprising an internal matter rather than a 'blatant external aggression', refused to back the government.[139] A report prepared by the French Parliament's Foreign Affairs Committee in January 2005 inquiring into the circumstances of the September 2002 intervention stated that 'French military reinforcements were deployed in order to ensure the safety of foreign nationals, under the principle of international customary law which allows a state to protect its own nationals abroad'.[140]

ECOWAS later entrusted the French forces with the monitoring of a ceasefire agreement reached between the parties to the internal conflict.[141] The UN Security Council later welcomed the deployment of ECOWAS and French forces and mandated their presence.[142] It continued to mandate the presence of French troops in conjunction with the UN missions.[143]

In sum, France refused to fulfil the request of military assistance from the Côte d'Ivoire government, which had complained that the rebels were getting support from outside. In

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[135] UCDP, 'MPCI' (n 134).
[136] UCDP, 'Government of Ivory Coast – MPCI' (n 134).
[137] Amnesty International, 'Côte d'Ivoire: Clashes Between Peacekeeping Forces and Civilians: Lessons for the Future' (19 September 2016) AFR 31/005/2006, 5-7.
[138] ibid 5.
[139] ibid 7.
[140] Quoted in ibid; For a statement by the French army chief-of-staff in the same vein, see 'French Troops Sent to Ivory Coast' (*The Irish Times*, 22 September 2002) <https://www.irishtimes.com/news/french-troops-sent-to-ivory-coast-1.437764>.
[141] ibid.
[142] UNSC Res 1464 (4 February 2003) UN Doc S/RES/1464.
[143] See, for example, UNSC Res 2284 (28 April 2016) UN Doc S/RES/2284 extending the UN mission's mandate for a final period until 30 June 2017.

support of its decision not to back the government with its troops which were already present in the country based on a bilateral agreement, France argued that the conflict actually was an internal matter rather than an external aggression. It claimed that its intervention, which in effect halted the conflict, was to ensure the safety of the foreign nationals in line with customary international law.

2.13. RAMSI intervention in Solomon Islands – 2003

Civil unrest along ethnic lines in Solomon Islands first broke out in December 1998 in the island of Guadalcanal, when Guale militants known as the Isatabu Freedom Movement started a campaign of intimidation and violence towards settlers from the island of Malatia.[144] During the course of the conflict Australia and New Zealand rejected several requests of assistance by the government.[145] Even though Australian authorities were willing to assist through advice and financial support, what they refrained from was the deployment of troops.[146] In January 2003 the Australian Foreign Affairs Minister explained why they would not extend their aid to the deployment of troops or 'direct intervention'. The problems he touched upon included how to justify such an intervention to Australian taxpayers, the duration of the operation to be undertaken and the exit strategy. What is interesting for legal purposes in his explanation was that 'Australia is not about to recolonise the South Pacific, nor should it. These are independent sovereign countries, with their own constitutions, legal systems and seats in the UN'. The reason why direct intervention really 'would not work' was that 'foreigners do not have answers for the deep-seated problems afflicting Solomon Islands'.[147]

However, in July 2003, six months after this position had been expressed, the Australian-led Regional Assistance Mission to Solomon Islands (RAMSI), formed from seven States in the region, arrived in Solomon Islands at the request of its government.[148] The treaty between Solomon Islands and intervening States mandating this mission outlined the purpose of the intervention as to provide 'security and safety to persons and property; maintain supplies and

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[144] RAMSI, 'The Tensions' <https://www.ramsi.org/the-tensions/>.
[145] Tarcisius Tara Kabutaulaka, 'Australian Foreign Policy and the RAMSI Intervention in Solomon Islands' (2005) 17 The Contemporary Conflict 283, 286-7; RAMSI, 'The Tensions' (n 144).
[146] ibid 287.
[147] Alexander Downer, 'Neighbours Cannot be Recolonised' (Westlaw, *The Australian*, 8 January 2003); Also partly quoted in ibid.
[148] See RAMSI, 'About RAMSI' <https://www.ramsi.org/about/>.

services essential to the life …; prevent and suppress violence, intimidation and crime; support and develop Solomon Islands institutions; and generally to assist in the maintenance of law and order'.[149]

The Australian government justified its actions also on the basis of preventing a 'failing State' from being exploited by terrorist groups, as could be seen from its public statements.[150] In an address to the UN General Assembly, the Australian Foreign Affairs Minister, after talking about confronting global challenges, among which he mostly stressed terrorism, went on to say that '[s]imilarly, we are developing regional approaches to confront the dangers of State failure'. As evidence of this, he pointed out the role played by RAMSI. He also stated that RAMSI's mandate was consistent with the UN Charter's 'original vision of strong regional efforts to maintain international peace and security'.[151] On another occasion he stated that Solomon Islands once was 'a failed state' and the situation there was that 'a terrorist was about to attack' and Solomon Islands 'couldn't do anything to stop it', so 'we would have to go and do it ourselves'.[152]

In a UN General Assembly meeting the representative of New Zealand, one of the countries participating in RAMSI, stated that '[t]he mission acted at all times in accordance with Solomon Islands law as it reinforced Solomon Islands sovereignty'.[153] The mission, which ended in June 2017,[154] was welcomed by the UN General Assembly on different occasions.[155]

In sum, Australia and New Zealand initially refused invitations from Solomon Islands to intervene with their troops. Australia stated that it was an internal matter of a sovereign and independent country on which foreigners had no say. However, Australia later led a regional coalition to intervene by invitation with a mandate to provide security and safety to the people

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[149] Agreement Between Solomon Islands, Australia, New Zealand, Fiji, Papua New Guinea, Samoa and Tonga Concerning the Operations and Status of the Police and Armed Forces and Other Personnel Deployed to Solomon Islands to Assist in the Restoration of Law and Order and Security (adopted 24 July 2003, entered into force 24 July 2003) 2258 UNTS 231, Article 2.
[150] See Kabutaulaka (n 145) 291 and 295; Hannah Woolaver, 'State Failure, Sovereign Equality and Non-Intervention: Assessing Claimed Rights to Intervene in Failed States' (2014) 32 Wisconsin International Law Journal 595, 612-3.
[151] UNGA Verbatim Record (24 September 2003) UN Doc A/58/PV.9, 32.
[152] Quoted in Woolaver (n 150) 612.
[153] UNGA Verbatim Record (18 October 2005) UN Doc A/C.3/58/SR.9, 3.
[154] RAMSI <https://www.ramsi.org/>.
[155] UNGA Res 59/20 (27 January 2005) UN Doc A/RES/59/20, Article 8; UNGA Res 61/48 (12 February 2007) UN Doc A/RES/61/48, Article 10.

and in general to restore law and order in a country where crime and violence prevailed. Australia also depicted the situation as an intervention in a failing State exploited by terrorists.

2.14. The US drone strikes in Pakistan – 2004

In 2002 Pakistan conducted military operations against foreign fighters hiding in its tribal areas near the Afghan border. These fighters later formed the Tehrik-i-Taliban Pakistan (TTP). In 2004 the operations were extended against fighters affiliated with al-Qaeda in the same region. The US's involvement started at this time through drone strikes against al-Qaeda members and continued in subsequent years widening against other groups, namely, the TTP, the Taliban and the Haqqani network.[156]

The relationship between the groups operating in the Pakistan territory presents a complex picture. Most of these groups are affiliated with each other, and not all the groups targeted by the US could be said to have fought against the Pakistan government.[157] In general, all these groups pursue the aim of establishing an alternative governmental structure pursuant to their ideology.[158] Al-Qaeda, the TTP, the Taliban and the Haqqani network, some of which after the intervention started, were sanctioned by the UN Security Council.[159] Except for the Taliban, the US recognised these groups as foreign terrorist organisations, while acknowledging the Taliban's affiliation with terrorist organisations.[160]

As to Pakistan's consent to drone strikes, it is shrouded in mystery. While at times denying them publicly, Pakistan seems to have privately or tacitly consented to the strikes. The problem with Pakistan's consent is compounded by conflicting attitudes of its government, the intelligence agency and the military. However, despite clearly on occasion suspending its

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[156] RULAC, 'Non-International Armed Conflicts in Pakistan' (Last Updated 12 September 2017) <http://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-pakistan>.
[157] See ibid; Noam Lubell, 'The War (?) against Al-Qaeda' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP 2012) 426-7 and 438; Max Brookman-Byrne, 'Drone Use 'Outside Areas of Active Hostilities': An Examination of the Legal Paradigms Governing US Covert Remote Strikes' 64 (2017) NILR 3, 14-9.
[158] See the descriptions of these groups and the groups they are affiliated with in US Department of State, 'Country Reports on Terrorism 2018' (October 2019).
[159] See UN Security Council Consolidated List <https://scsanctions.un.org/consolidated/>.
[160] See 'Country Reports on Terrorism 2018' (n 158); More on the Taliban's status for the US, see below nn 362 and 363.

consent, in general, Pakistan seems to have acquiesced to strikes through the conflict.[161] Perhaps understandably based on the nature of the received consent, the US does not seem to have specifically invoked Pakistan's consent for the drone strikes,[162] despite justifying its actions against the same or affiliated groups in other countries based on their consent alongside the right to self-defence.[163] Since the US sees itself 'at war with al Qaeda, the Taliban, and their associated forces' waged in self-defence in response to 9/11 attacks and as part of a counterterrorism strategy,[164] its drone strikes in Pakistan, which targeted the groups referred to, could also be considered part of this understanding.

Pakistan's fight against these groups, in general, was depicted as one of counterterrorism. The Pakistan military in a briefing gave an account of casualties resulting from the US drone strikes as that the rest being civilian casualties, the 'majority of those eliminated are terrorists, including foreign terrorist elements'.[165] In a UN General Assembly meeting, Pakistan's representative explained his government's struggle against al-Qaeda and the Taliban in contexts such as 'deterring terrorist acts' and 'fighting terrorism'. When he conveyed his government's objection to the US drone strikes, he stated that '[t]he war against terrorism must be waged within the framework of international law' and that those strikes were 'detrimental to his Government's efforts to eliminate extremism and terrorism'.[166]

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[161] For a detailed account of the ambiguity surrounding Pakistan's consent, see Zohra Ahmed, 'Strengthening Standards for Consent: The Case of U.S. Drone Strikes in Pakistan' 23 (2015) MichJIntlL 459, 491-513; Also see RULAC, 'Non-International Armed Conflicts in Pakistan' (n 156) and sources cited therein.; On the validity of secret consent see Chapter 2, Section 5.2.2.

[162] Ahmed (n 161) 491-2; But see Max Byrne, 'Consent and the Use of Force: An Examination of 'Intervention by Invitation' As a Basis for US Drone Strikes in Pakistan, Somalia and Yemen' (2016) 3 JUFIL 97, 103 treating the issue as if the US invoked Pakistan's consent, based on brief references by US officials to consent in general for extraterritorial uses of force or drone strikes.

[163] For the US's justifications of using force in Afghanistan, Somalia and Yemen, see The White House, 'Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations' (December 2016) 15-8.

[164] See The White House, 'Remarks by the President at the National Defense University' (23 May 2013) <https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>; Also see the Speech by the Legal Adviser to the US Department of State: US Department of State, 'The Obama Administration and International Law' (25 March 2010) <https://2009-2017.state.gov/s/l/releases/remarks/139119.htm>.

[165] 'Most of Those Killed in Drone Attacks were Terrorists: Military' (*Dawn*, 8 March 2011) <https://www.dawn.com/news/611717/most-of-those-killed-in-drone-attacks-were-terrorists-military>

[166] UNGA Verbatim Record (18 October 2013) UN Doc A/C.6/68/SR.2, 12.

In sum, to the extent that Pakistan consented to the US drone strikes, it was for the purpose of combating terrorism. The US's response to this consent, on the other hand, was part of its wider conflict with the targeted groups in self-defence and in combating terrorism.

2.15. Multinational intervention in Timor-Leste – 2006

The dismissal in March 2006 from Timor-Leste's armed forces of a group of soldiers, who had complained of discrimination for coming from Western districts, ushered in a political, humanitarian and security crisis in the country. After an attack by an armed group led by one of the renegade army officers in May 2006 against the country's armed forces, the government requested military intervention from Australia, New Zealand, Malaysia and Portugal.[167] As expressed in a letter to the UN, the appeal was in view of deteriorating 'internal security conditions', and in order to establish 'security and confidence among the populations so as to restore tranquillity throughout the national territory and promote a climate of dialogue among the various sectors of society'.[168] The Timorese Foreign Minister in a statement to the press stated that the assistance had been requested due 'the inability of our armed forces and police to control the situation'.[169] Also, apparently in an attempt to downplay the level of violence in the country, he denied that the country was on the brink of civil war and stated that the Australian and New Zealand personnel 'will disarm renegade troops and police rebelling against the state'.[170] At a later stage, when reiterating its appreciation for the foreign support, the government stated that the intervention was 'to quell the violence and to maintain law and order and to re-establish confidence among the people'.[171]

On the day following the appeal the UN Security Council 'acknowledge[d] the request … welcome[d] the positive responses … and fully supporte[d]' the deployment of forces 'in

[167] UNSC, 'Report of the Secretary-General on Timor-Leste Pursuant to Security Council Resolution 1690 (2006)' (8 August 2006) UN Doc S/2006/628, 1-3.
[168] UNSC, 'Letter Dated 24 May 2006 from the Secretary-General Addressed to the President of the Security Council' (24 May 2006) UN Doc S/2006/319.
[169] 'East Timor Asks for International Help to Help Quell Unrest' (Westlaw, *AFP*, 24 May 2006).
[170] John Kerin and Morgan Mellish, 'East Timor Asks for Help to Quell Strife' (Westlaw, *Australian Financial Review*, 25 May 2006).
[171] UNSC, 'Letter Dated 4 August 2006 from the Chargé d'affaires a.i. of the Permanent Mission of Timor-Leste to the United Nations Addressed to the President of the Security Council' (7 August 2006) UN Doc S/2006/620.

restoring and maintaining security'.[172] The letter sent to the UN by Australia in response to the request for assistance from Timor-Leste described the purpose of the deployment of troops as 'to re-establish and maintain public order'.[173] Similarly, the letter sent by New Zealand described it as 'to help re-establish security and confidence'.[174] Apparently reflecting this purpose, before the deployment of troops the New Zealand Prime Minister cautioned that '[i]t's very important not to walk into what is a factional dispute, in some respects, and be seen to be taking sides'.[175]

Portugal's letter to the UN expressed the desire of all intervening States as being that 'such multinational deployment would profit from an expeditious decision of the Security Council confirming its full international authority'.[176] The Malaysian Defence Minister described his country's role as 'assist[ing] in ensuring the stability of Timor Leste' while expressing his wish to establish whether or not the forces would operate under a UN mission, which was 'an issue of cost'. He also stated that the assistance given was for 'humanitarian reasons'.[177]

On 26 January 2007 the invited States, the Timorese government and the UN mission to the country established a Trilateral Coordination Forum to enhance security activities, and this arrangement was welcomed by the UN Security Council.[178]

In sum, the consensual multinational intervention in Timor-Leste took place with the blessing of the UN Security Council. Its purpose was to provide law and order in a country where the internal disturbances caused by the former army members did not reach the level of civil war as per the government. New Zealand made it clear that they did not aim to take a side in a factional dispute.

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[172] UNSC, 'Statement by the President of the Security Council' (25 May 2006) UN Doc S/PRST/2006/25; In the same vein, see UNSC Res 1690 (20 June 2006) UN Doc S/RES/1690, Article 2; UNSC Res 1704 (25 August 2006) UN Doc S/RES/1704, Preamble.
[173] UNSC, 'Letter Dated 24 May 2006 from the Permanent Representative of New Zealand to the United Nations Addressed to the President of the Security Council' (24 May 2006) UN Doc S/2006/320.
[174] UNSC, 'Letter Dated 25 May 2006 from the Permanent Representative of Australia to the United Nations Addressed to the President of the Security Council' (25 May 2006) UN Doc S/2006/325.
[175] Mike Houlahan and Derek Cheng, 'Timorese Ask NZ to Help Quell Rebellion' (*NZ Herald*, 25 May 2006) <https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10383437>.
[176] UNSC, 'Letter Dated 25 May 2006 from the Permanent Representative of Portugal to the United Nations Addressed to the President of the Security Council' (25 May 2006) UN Doc S/2006/326, 2.
[177] Patrick Walters, 'Three More Countries to Join Peacekeeping Force - EAST TIMOR' (Westlaw, *The Australian*, 26 May 2006).
[178] See UNSC Res 1745 (22 February 2007) UN Doc S/RES/1745, Preamble and Article 5.

2.16. French intervention in Chad – 2006

After gaining independence from France in 1960, Chad was embroiled in violent conflicts of a criminal and inter-ethnic nature. Intense conflicts between rebels and the government recurred towards the end of 2006. Chad, which already had been accusing the Sudanese government of supporting the rebels, on 28 November 2006 declared that it was in 'a state of war' with Sudan.[179] It was reported that through intelligence and the air force, France first supported the government in April against a rebel attack on the capital.[180] A report by the UN Secretary-General stated with respect to events of late 2006 that the presence of over 1000 French troops with significant air assets in Chad, which appeared to have a significant stabilising effect, 'refrained from intervening in the recent hostilities between rebel groups and the Government'.[181] The French government, on the other hand, stated that they were providing logistical support to the government but not taking sides in the fighting and, according to the French Defence Ministry, their mission was to protect French nationals in Chad.[182]

Whatever role the French troops played in the conflict, in November 2006 the French Prime Minister justified their presence as countering a possible foreign intervention. He described the role of the French troops as 'a dissuasion policy with regard to all those who are tempted to any interference with Chad's unity and integrity'. He stated that they were showing the same reaction 'with regards to the aggression perpetrated in the Central African Republic's territory'. Similarly, the Chadian President claimed that '[t]here has never been question to date on any demand from Chad for a French army intervention in what we today term as the destabilization of Chad by Sudan through mercenaries'.[183] The UN Security Council, in support of a statement by the president of the AU Commission, in December 2006 condemned all attempts at destabilisation by armed groups in Chad in violation of the principles of 'respect for the territorial integrity and unity of Member States'.[184]

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[179] UNSC, 'Report of the Secretary-General on Chad and the Central African Republic Pursuant to Paragraphs 9 (d) and 13 of Security Council Resolution 1706 (2006)' (22 December 2006) UN Doc S/2006/1019, 2-3.
[180] Freedom House, 'Freedom in the World 2009 – Chad' (16 July 2009) <https://www.refworld.org/docid/4a6452c6c.html>.
[181] UN Doc S/2006/1019 (n 179) 3.
[182] Marc Lacey, 'Rebels are Repelled in Capital of Chad' (*The New York Times*, 13 April 2006) <https://www.nytimes.com/2006/04/13/world/africa/rebels-are-repelled-in-capital-of-chad.html>.
[183] 'French Premier Justifies Presence of Troops in Chad, CAR' (Westlaw, *BBC*, 30 November 2006).
[184] UNSC, 'Statement by the President of the Security Council' (15 December 2006) UN Doc S/PRST/2006/53.

In sum, in respect to its role in the internal conflict in Chad in 2006, France initially denied taking sides even though accepting that it provided logistical support to the government. It also claimed protecting its nationals. Later its Prime Minister described France's role as countering a foreign intervention on the side of the rebels, whose activities were later condemned by the UN Security Council.

2.17. New Zealand and Australian intervention in Tonga in response to riots – 2006

In November 2006 Tonga was unsettled by riots following pro-democracy activists' protests rooted in long-lasting demands for political reform.[185] The riots prompted a military intervention by New Zealand and Australia. The Australian Department of Defence in a media release confirmed that '[t]he Tongan Government requested Australia to provide police and military personnel to assist with law and order' and that they commenced their mission on 18 November 'as part of the New Zealand led combined military force to support the Tongan Security Forces in stabilising the situation'.[186]

The New Zealand Prime Minister rejected the criticism that troops were helping to bolster the government against the opposition. She stated on radio that 'New Zealand isn't taking sides in any internal dispute in Tonga but when there's a complete breakdown of law and order ... it's not even possible to have political dialogue about the way forward … the first thing you have to do is support some process of law and order'. Apparently, in an attempt to prove that they were not taking sides, confirming that the troops provided security at the country's main airport, she stated that 'I'd be very surprised if the Tongan opposition wanted the airport permanently closed down'.[187]

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[185] Freedom House, 'Freedom in the World 2007 – Tonga' (16 April 2007) <https://www.refworld.org/docid/473c560052.html>.

[186] 'ADF Support to Tonga – Update' (*Scoop*, 20 November 2006) <https://www.scoop.co.nz/stories/WO0611/S00326/adf-support-to-tonga-update.htm>; For more official statements from New Zealand and Australia, see Nautilus Institute, 'Coalition Forces – New Zealand' <https://nautilus.org/publications/books/australian-forces-abroad/tonga/coalition-forces-new-zealand/>; Nautilus Institute, 'ADF Deployment to Tonga, 2006' <https://nautilus.org/publications/books/australian-forces-abroad/tonga/adf-deployment-to-tonga-2006/>.

[187] Pesi Fonua, 'International Flights Return to Tonga as Foreign Troops Accused of Propping Up System' (Westlaw, *The Associated Press*, 20 November 2006).

The Australian troops returned home on 30 November with the Defence Minister announcing that '[t]he situation in Tonga has now stabilized and the Tongan Security Forces can control security without Australian military support'.[188] The New Zealand troops returned on 2 December.[189]

In sum, the New Zealand and Australian consensual intervention, which lasted less than a month, aimed to bring law and order to Tonga beset by riots. New Zealand explicitly claimed that it was not taking sides in an internal dispute.

2.18. French intervention in the Central African Republic – 2006

The CAR historically has been shattered by ethnic tensions, political instability and armed conflict. The situation has been aggravated by regional instability and internal conflicts in neighbouring countries, particularly Chad and Sudan. The aftermath of the 2005 elections brought about new tensions. Supporters of the former President and groups which formerly were associated with, but now turned against, the new President resorted to armed rebellion in the north of the country.[190] The head of State of the CAR described the situation in the northern part of the country as being 'virtually living under occupation, posing a grave threat to the integrity of the national territory'.[191] The government accused Sudan of supporting the rebellion[192] and appealed to the international community to 'provide additional resource to help' the CAR's army. The army was newly reorganised with French support and backed by the Multinational Force of the Central African Economic and Monetary Community (FOMUC), a regional mission that was commended[193] and encouraged[194] by the UN Security Council.[195] The UN Security Council requested reinforcement of cooperation with the regional countries with a view to addressing 'trans-border insecurity in the subregion and bringing to

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[188] 'Australian Troops Return from 'Stable' Tonga, Australia's Defense Minister Says' (Westlaw, *The Associated Press*, 30 November 2006).
[189] See Nautilus Institute, 'Coalition Forces – New Zealand' (n 186).
[190] UN Doc S/2006/1019 (n 179) 4-5.
[191] UNSC, 'Interim report of the Secretary-General on the Situation in the Central African Republic Subsequent to the Press Statement of 7 July 2006 by the President of the Council' (19 October 2006) UN Doc S/2006/828, 3.
[192] ibid 5.
[193] UNSC, 'Statement by the President of the Security Council' (22 July 2005) UN Doc S/PRST/2005/35, 1.
[194] UNSC, 'Statement by the President of the Security Council' (22 November 2006) UN Doc S/PRST/2006/47, 2.
[195] UN Doc S/2006/828 (n 191) 6.

an end the violations by armed groups of the territorial integrity of the Central African Republic'.[196]

Backed by FOMUC and French armed forces, the CAR started regaining control of the rebel-held northern areas, with the first city falling on 27 November 2006.[197] The CAR armed forces remained highly dependent on FOMUC and French forces to provide security throughout the country.[198]

The French Prime Minister justified France's actions in a fashion similar to the above-mentioned 2006 French intervention in Chad. He stated that France acted in Chad in the same way as it 'reacted in Birao with regards to the aggression perpetrated in the Central African Republic's territory'. He determined France's objective as providing 'stability in the sub-region'.[199] However, the French army's narrative of the events downgraded the involvement of France, which had committed itself to providing intelligence and logistics to the government. The spokesman for the army stated that French troops, which were helping in the air transportation of the CAR troops to Birao, 'were attacked and retaliated. So French troops shot in self defence at rebels who are attacking them'. Rebels declared that French troops were occupying the airport but they did not see the need to attack the French forces because these forces were not interfering in their 'domestic problem'.[200]

In sum, the conflict in the CAR, where Sudan was accused of assisting the rebels, attracted foreign intervention on the side of the government both from France and FOMUC. The UN Security Council called for the reinforcement of cooperation in the region, including against the armed groups in the CAR. While the French Prime Minister justified the intervention on the basis of helping the CAR in the face of foreign aggression, the French army tried to downplay the French involvement by stating that French troops provided intelligence and logistics and responded in self-defence when attacked by the rebels.

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[196] UN Doc S/PRST/2006/47 (n 194) 2.
[197] UNSC, 'Report of the Secretary-General on the Situation in the Central African Republic and the Activities of the United Nations Peacebuilding Support Office in the Central African Republic' (28 December 2006) UN Doc S/2006/1034, 2.
[198] UN Doc S/2006/1019 (n 179) 5.
[199] 'French Premier Justifies Presence of Troops in Chad, CAR' (n 183).
[200] 'French Army Clash with CAR Rebels' (*BBC*, 29 November 2006) <http://news.bbc.co.uk/1/hi/world/africa/6191754.stm>.

2.19. Ethiopian intervention in Somalia against the ICU – 2006

With the collapse of the central government in 1991, Somalia plunged into an internal conflict. It was not until 2004 that a regional peace initiative led to the establishment of a Transitional Federal Government (TFG).[201] Alongside the Transitional Federal Parliament, they were identified by the UN Security Council in July 2006 'as the internationally recognized authorities to restore peace, stability and governance to Somalia'.[202] However, it was the Islamic Courts Union (ICU), known as the militant Islamic fundamentalists, neutralising or subduing the other groups, that became the most powerful force in Somalia in late 2006 with enormous economic, military and political dominance over substantial parts of the country.[203] Nonetheless, starting from 24 December 2006, the government with the support of Ethiopian military forces was able to dislodge the ICU from the territories it controlled, including the capital, by early January 2007. With the defeat of the ICU, however, came banditry, violence and the resurgence of inter- and intra-clan fighting.[204]

Both sides to the conflict, which seemed to have been waged for economic resources and political power rather than ideology as noted in a report by the UN Secretary-General,[205] accused each other of obtaining support from foreign elements.[206] The UN Monitoring Group on Somalia found that, in breach of the UN Security Council's arms embargo, many States continuously provided different types of support to either the government or the ICU in the build-up to Ethiopia's December 2006 intervention.[207] This included Ethiopia's support to the government by arms and troops.[208]

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[201] UNSC, 'Report of the Secretary-General on the Situation in Somalia Pursuant to Paragraphs 3 and 9 of Security Council Resolution 1744 (2007)' (20 April 2007) UN Doc S/2007/204, 4-5.
[202] UNSC, 'Statement by the President of the Security Council' (13 July 2006) UN Doc S/PRST/2006/31, 1.
[203] UNSC, 'Letter Dated 21 November 2006 From the Chairman of the Security Council Committee Established Pursuant to Resolution 751 (1992) Concerning Somalia Addressed to the President of the Security Council' (22 November 2006) UN Doc S/2006/913, 39.
[204] UNSC, 'Report of the Secretary-General on the Situation in Somalia' (28 February 2007) UN Doc S/2007/115, 1-3; UN Doc S/2007/204 (n 201) 5.
[205] UN Doc S/2007/204 (n 201) 7.
[206] UN Doc S/2007/115 (n 204) 2.
[207] UN Doc S/2006/913 (n 203) 9-10.
[208] ibid 17-18.

Ethiopia justified its direct military intervention based on the invitation from the Somali government and, primarily, the right to self-defence against the ICU.[209] In an apparent response to the ICU's call for fighting the Ethiopian troops with an appeal to foreign fighters, the Ethiopian Prime Minister, admitting that his country had combat troops in Somalia, said in an official statement 'that his Government had taken self-defensive measures and started counter-attacking the aggressive extremist forces of the Islamic Courts and foreign terrorist groups', as reported in a UN Secretary-General report.[210] In an interview with the press the Ethiopian Prime Minister also stated that they 'did not invade Somalia'. Rather, they 'were invited by the duly constituted' and 'internationally recognised government of Somalia to assist them in averting the threat of terrorism'.[211] On another occasion the Prime Minister in a televised broadcast stated that Ethiopian troops 'were forced to enter into war to protect the sovereignty of the nation' and that '[w]e are not trying to set up a government for Somalia, nor do we have an intention to meddle in Somalia's internal affairs'.[212]

In a reply dated 15 June 2007 to the UN Monitoring Group's letter concerning the allegations of breaches of the arms embargo, the Ethiopian government claimed that its actions being in self-defence, there was no connection between its involvement in Somalia and the arms embargo. It mentioned the attacks by groups supported by States 'from both inside and outside the region' against the Somalian government and Ethiopia. Citing the Somalian government's invitation to Ethiopia, the reply letter also stated:

> It is therefore clear that the joint action taken by the defense forces of the two Governments is a legitimate exercise of the inherent right of self-defense consistent with the United

[209] For a legal appraisal of this intervention, see Zeray W Yihdego, 'Ethiopia's Military Action against the Union of Islamic Courts and Others in Somalia: Some Legal Implications' (2007) 56 ICLQ 666; Ahmed Ali M Khayre, 'Self-Defence, Intervention by Invitation, or Proxy War? The Legality of the 2006 Ethiopian Invasion of Somalia' (2014) 22 AfrJIntl&CompL 208.

[210] UN Doc S/2007/115 (n 204) 2; Reported also in UNSC Verbatim Record (26 December 2006) UN Doc S/PV.5614, 3; Also see 'Ethiopia Admits Somalia Offensive' (*BBC*, 24 December 2006) <http://news.bbc.co.uk/1/hi/world/africa/6207427.stm> accrediting the same words to the Ethiopian Information Minister.

[211] 'Interview: Meles Zenawi' (*Al Jazeera,* 26 Mar 2007) <https://www.aljazeera.com/news/africa/2007/03/200852518551561790 7.html>

[212] Jeffrey Gettleman, 'Ethiopia Hits Somalia Targets, Declaring War' (*The New York Times*, 25 December 2006) <https://www.nytimes.com/2006/12/25/world/africa/25somalia.html>.

> Nations Charter. It is also clear that this legitimate measure cannot be confused with obligations under the arms embargo or questioned in light of the same.[213]

The public, in general, resented the continued presence of Ethiopian troops. This resentment created a volatile situation.[214] Although there were ambivalent responses, the international community at large seemed to have tacitly approved of the intervention.[215]

In sum, Ethiopia intervened in the conflict in Somalia in self-defence against the ICU and for the purpose of combating terrorism at the invitation of the internationally recognised government. It further claimed that being a legitimate exercise of the right to self-defence, its intervention did not breach the UN Security Council arms embargo on the country.

2.20. The US interventions in Somalia against al-Shabaab, al-Qaeda and ISIL – 2007

Soon after the above-mentioned December 2006 Ethiopian intervention in Somalia, the US in January 2007 started military operations in the country against al-Qaeda and its affiliates such as al-Shabaab.[216] In response to a letter by the UN Monitoring Group on Somalia requesting information about its January and June 2007 strikes, the US government stated that it conducted the 'strikes in self-defence against Al-Qaida terrorist targets in Somalia in response to ongoing threats to the United States posed by Al-Qaida and its affiliates'. With respect to the compatibility of its actions with the UN Security Council-imposed arms embargo on Somalia, the government stated that it did 'not believe that these operations against known terrorists targets constituted "delivery" of a weapon within the plain meaning of' the relevant provision. The government's response did not mention the consent of the Somali government.[217] Not invoking Somalia's consent could be explained by the fact that the US for the first time since 1991 explicitly recognised its government only in January 2013.[218]

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[213] UNSC, 'Letter Dated 17 July 2007 From the Chairman of the Security Council Committee Established Pursuant to Resolution 751 (1992) Concerning Somalia Addressed to the President of the Security Council' (18 July 2007) UN Doc S/2007/436, 44.
[214] UN Doc S/2007/115 (n 204) 3.
[215] See Yihdego (n 209) 672-3.
[216] See The Bureau of Investigative Journalism, 'Somalia: Reported US Covert Actions 2001-2016' <https://www.thebureauinvestigates.com/drone-war/data/somalia-reported-us-covert-actions-2001-2017>.
[217] UN Doc S/2007/436 (n 213) 17 and 46.
[218] See CarrieLyn D Guymon (ed), United States Department of State, *Digest of United States Practice in International Law* (2013) 251-2.

Not surprisingly, therefore, the post-2013 US official position on the matter includes Somalia's consent. A 2016 report by the US government on the use of US military force states that

> [a]s a matter of international law, US counterterrorism operations in Somalia, including airstrikes, have been conducted with the consent of the Government of Somalia in support of Somalia's operations in the context of the armed conflict against al-Shabaab and in furtherance of US national self-defence.[219]

The report also confirmed that the US, apart from operations against al-Qaeda and a group associated with it, al-Shabaab, provided support 'to regional counterterrorism forces, including Somali and African Union Mission in Somalia (AMISOM) forces'.[220] Later, in an update to this report, the US government relying on the same justification confirmed that it also conducted operations in 'countering the terrorist threat posed by' the Islamic State of Iraq and Syria (ISIS).[221] Al-Shabaab, al-Qaeda and ISIL were all groups sanctioned and deemed to be terrorist threats by the UN Security Council as mentioned in other sections examining interventions against these groups.

Even though the US officially only in 2013 recognised a government in Somalia, the Somali authorities since the onset welcomed the US operations. The Somali President, for example, in January 2007 stated that '[t]he US has a right to bombard terrorist suspects who attacked its embassies in Kenya and Tanzania', referring to the US's 1998 claim of self-defence in response to these attacks.[222]

In sum, until it officially recognised the Somalian government in 2013, the US justified its actions in Somalia as self-defence against terrorist groups. Later, it additionally invoked Somalian consent, while Somali authorities had consented from the beginning.

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[219] The White House, 'Report' (n 163) 17.
[220] ibid.
[221] The White House, 'Unclassified - Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations' (2017-2018) 2 and 6 <https://www.state.gov/wp-content/uploads/2019/10/Report-to-Congress-on-legal-and-policy-frameworks-guiding-use-of-military-force-.pdf>.
[222] See Byrne (n 162) 116-7 quoting this and other statements from the Somali authorities.

2.21. The AU intervention in the Comoros – 2008

Since gaining independence from France in 1975, the Indian Ocean archipelago Comoros has been subjected to several successful and attempted coups, one of which, as also mentioned above,[223] was thwarted by France in 1995. A political crisis in the country again sparked during the June 2007 general elections when the government, backed by the AU, citing irregularities in the process, postponed the elections in the semi-autonomous island of Anjouan. The defiant leader of the island, Mohamed Bacar, proceeded to hold the elections and afterwards claimed victory. On 25 March 2008 the government, with the support of a coalition of armed forces authorised by the AU, commenced a military intervention and quickly took back control of the island.[224] The government accused Bacar of secessionist aims, even though he claimed fighting only for more autonomy rather than full independence.[225] A few days before the operation started the government spokesman had suggested that the Comoros 'should bury all its separatist ideas and allow Comorians to go into a stable and peaceful future'.[226]

In the AU Ministerial Meeting on the Comoros held on 20 February 2008, the participating States 'expressed their readiness to positively respond to the request for assistance made by the President of the Union of the Comoros, in order to restore the Union's authority in Anjouan'.[227] The Meeting was held as a follow-up to an AU Assembly decision where the organisation requested member States to provide support 'to put an end to the crisis born out of the persistent refusal by the illegal authorities of Anjouan to comply with the relevant texts governing the functioning of the Union of the Comoros'.[228] The Meeting furthermore mentioned that it had been briefed on the human rights violations and the repression against those favouring normalcy 'by the illegal authorities of the Island'[229] and 'expressed its determination to see to it that the unity and territorial integrity of the Comoros is safeguarded and that the Union's authority and legality are quickly restored in Anjouan'.[230] The Council of the League of Arab

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[223] See Section 2.3 above.
[224] 'Comoros: On the Edge of a "Military Solution"' (*IRIN*, 22 February 2008) <https://www.refworld.org/docid/47cbc62020.html>; 'Comoros: Union Government Takes Control of Rebel Island' (*IRIN*, 25 March 2008) <https://www.refworld.org/docid/47ea1fd21e.html>.
[225] Ahmed Ali Amir Moroni, 'African Union Troops Quell Comoros Rebellion' (*The Guardian*, 26 March 2008) <https://www.theguardian.com/world/2008/mar/26/1>.
[226] 'Comoros: On the Edge of a "Military Solution"' (n 224).
[227] AU, 'Ministerial Meeting on the Comoros – Communiqué' (Addis Ababa, 20 February 2008) Article 1.
[228] Quoted in ibid Article 2.
[229] ibid Article 6.
[230] ibid Article 10.

States affirmed its 'consummate wish for the national unity, territorial integrity and regional sovereignty of the Union of Comoros'[231] and extended its gratitude for the 'contribution to ending the rebellion and re-establishing legitimate authority on the island of Anjouan'.[232] The US also commended the AU's efforts in restoring 'constitutional rule on the island of Anjouan' in support of 'democratically elected Comoran President'.[233]

Later in a UN General Assembly speech the Comoros President referred to the intervention as one that 'put an end to a rebellion that had shaken the island of Anjouan and re-established constitutional legality'. He also confirmed keeping his promise to hold free and fair elections in the island, which led to the establishment of the local government.[234]

In sum, the AU's speedy intervention aimed to restore the Comoros government's constitutional authority over the island of Anjouan and safeguard the 'unity and territorial integrity' of the Comoros. The government blamed the authorities controlling the island for aiming at secession.

2.22. French intervention in Chad – 2008

When in 2008 the conflict in the country again escalated,[235] the Chadian representative, in a letter to the UN, stating that his 'country is currently facing an attempt to overthrow its legal Government by force' in a 'flagrant violation of international law', appealed 'to all States to provide all aid and assistance needed to help it end this aggression'.[236] The UN Security Council, in support of an AU decision, condemned rebel attacks and called 'upon Members States to provide support, in conformity with the United Nations Charter, as requested by the Government of Chad'.[237] Acting upon this call, the French President expressed his country's readiness to initiate a military operation against the rebels if necessary, while the rebels had

[231] UNSC, 'Letter Dated 23 April 2008 From the Permanent Observer of the League of Arab States to the United Nations Addressed to the President of the Security Council' (30 April 2008) UN Doc S/2008/296, 32, Article 1
[232] ibid Article 3.
[233] US Department of State, 'Commending African Union Operation to Restore Constitutional Rule on Comoran Island of Anjouan' (27 March 2008) <https://2001-2009.state.gov/r/pa/prs/ps/2008/mar/102736.htm>.
[234] UNGA, Verbatim Record (25 September 2008) UN Doc A/63/PV.9, 14.
[235] For the previous conflict and French intervention in 2006, see Section 2.16 above.
[236] UNSC, 'Letter Dated 3 February 2008 From the Permanent Representative of Chad to the United Nations Addressed to the President of the Security Council' (4 February 2008) UN Doc S/2008/69.
[237] UNSC, 'Statement by the President of the Security Council' (4 February 2008) UN Doc S/PRST/2008/3.

already accused France of directly intervening with helicopters and tanks on the side of the government.[238] However, about the early February 2008 French involvement, French authorities insisted that they did not take part in the fighting between the government and rebels even though acknowledging that they provided the government with logistical and intelligence support and helped it receive munition from other States. The French military also stated that they had opened fire against rebels during the conflict only in self-defence.[239]

A few weeks later in the announcement of the mentioned possible military operation against the rebels, the French President defended the presence of French troops in Chad stating that they did not take part in the fighting as opposed to 'what might have occurred in the past'. He also used this as evidence that France's 'relations with Africa have changed'. Around the same time, in a speech in the South African Parliament, he announced a 'major turning point'. Accordingly, in the twenty-first century it is unthinkable for the French army to 'be drawn into domestic conflicts'.[240]

In sum, France first showed its inclination to support the Chadian government against an armed rebellion after the UN Security Council's call to this effect. Later, however, it boasted for not taking sides in the domestic conflict contrary to what might have happened in the past, showing this to be a turning point. Moreover, regarding an earlier incident, it denied having taken part in the conflict even though admitting the provision of intelligence and logistical support to the government. It justified opening fire against the rebels as self-defence of its troops.

2.23. The US intervention in Yemen against AQAP and ISIL – 2009

In January 2009 al-Qaeda offshoots in Yemen and Saudi Arabia merged into al-Qaeda in the Arabian Peninsula (AQAP). The group assumed Yemen as a base, promising to overthrow the 'apostate' governments, drive out the Western influence in the region and establish an Islamic

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[238] Mark Tran, 'France Threatens Military Action Against Chad Rebels' (*The Guardian*, 5 February 2008) <https://www.theguardian.com/world/2008/feb/05/france.sudan>.
[239] Jamey Keaten, 'Official: French Helped Chad's Army' (Westlaw, *The Associated Press*, 14 February 2008).
[240] 'Africa Focus: Sarkozy Promises Major Shift in France's Africa Policy' (Westlaw, *Xinhua News Agency*, 28 February 2008).

State.[241] The group was sanctioned by the UN Security Council in January 2010.[242] The US started its military campaign against the group first in December 2009, seven years after its one-off drone strikes against al-Qaeda members in the country as part of its targeted killing programme. The consent of the Yemen government was ascertained mostly based on leaked private communications.[243] In September 2012 President Hadi, who took office in February, publicly acknowledged his direct role in consenting to the US drone strikes.[244]

The US initially depicted its military campaign as constituting part of its own counter-terrorism effort in deterring threats against the US. When reiterating this point, the spokesman for the US National Security Council stated that the US did 'not and will not get involved in a broader counterinsurgency effort' against AQAP in Yemen.[245] However, the broadening US operations in the country seemed to show direct support to the Yemeni government in its fight against the AQAP insurgency.[246] In any event, as the US Central Command spokesman confirmed in December 2017, the US 'enabled regional counterterrorism partners to regain territory from these terrorists – forcing them to spend more time on survival'.[247]

The 2016 White House report on the US's use of military force justified the US's 'counterterrorism operations against AQAP in Yemen' based on 'the consent of the Government of Yemen in the context of the armed conflict against AQAP and in furtherance of US national self-defense'.[248] In October 2017 the US extended its operations against ISIL

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[241] 'Profile: Al-Qaeda in the Arabian Peninsula' (*Al Jazeera*, 9 May 2012) <https://www.aljazeera.com/news/middleeast/2012/05/2012597359456359.html>.
[242] UN Security Council Consolidated List <https://scsanctions.un.org/consolidated/>.
[243] The Bureau of Investigative Journalism, 'Yemen: Reported US Covert Actions 2001-2011' <https://www.thebureauinvestigates.com/drone-war/data/yemen-reported-us-covert-actions-2001-2011>; On the validity of secret consent, see Chapter 2, Section 5.2.2.
[244] Greg Miller, 'Yemeni President Acknowledges Approving U.S. Drone Strikes' (*The Washington Post*, 29 September 2012) <https://www.washingtonpost.com/world/national-security/yemeni-president-acknowledges-approving-us-drone-strikes/2012/09/29/09bec2ae-0a56-11e2-afff-d6c7f20a83bf_story.html>.
[245] Greg Miller, 'U.S. Drone Targets in Yemen Raise Questions' (*The Washington Post*, 2 June 2012) <https://www.washingtonpost.com/world/national-security/us-drone-targets-in-yemen-raise-questions/2012/06/02/gJQAP0jz9U_story.html>; Also see RULAC, 'United States of America' (Last Updated 22 January 2020) <http://www.rulac.org/browse/countries/united-states-of-america>.
[246] See RULAC, 'United States of America' (n 245) and sources cited therein.; See Gray (n 107) 88 and sources cited there.
[247] US Central Command, 'Update on Recent Counterterrorism Strikes in Yemen' Update on recent counterterrorism strikes in Yemen' (Release No: 17-446, 20 December 2017) <https://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1401383/update-on-recent-counterterrorism-strikes-in-yemen/>.
[248] The White House, 'Report' (n 163) 18.

based on the same justification it put forward in its fight against AQAP.[249] ISIL was one of the groups initially affiliated to al-Qaeda and condemned and sanctioned by the UN Security Council, as will be mentioned in other sections of this chapter.

In sum, the US operations in Yemen were to counter UN Security Council-sanctioned terrorist groups with Yemen's consent and in furtherance of the US's self-defence.

2.24. Rwandan intervention in the Democratic Republic of the Congo against the FDLR – 2009

In October 2008 Rwanda and the DRC entered into negotiations seeking a solution to their long-standing conflict waged through the support they provided to the armed groups fighting against each other's interests in the region. One of the compromises they reached was the planning of a joint military operation between 20 January 2009 and 25 February 2009 against the DRC-based Rwandan Hutu rebel group, the Democratic Forces for the Liberation of Rwanda, known as the FDLR. It once was supported by the Congolese government to fight against Rwanda. Among its ranks, the group included members who had participated in the 1994 Rwandan genocide against the Tutsis.[250] In March 2008 the UN Security Council had deplored the human rights and international humanitarian law violations by the FDLR and stressed that a previously adopted arms embargo against the armed groups in the DRC also applied to the FDLR.[251] The joint operation by Rwanda and the DRC resulted in limited success in terms of the FDLR's disarmament, and after the end of the operation the group was able to re-occupy some of the positions it had lost.[252] A second operation conducted in the same year by the Congolese army with the backing of the UN-mandated mission MONUC also could not neutralise the FDLR.[253]

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[249] The White House, 'Unclassified – Report' (n 221) 2 and 6.
[250] ICG, 'Congo: A Comprehensive Strategy to Disarm the FDLR' (Africa Report No 151, 9 July 2009) 1-5; Also see UNSC, 'Letter Dated 23 November 2009 From the Chairman of the Security Council Committee Established Pursuant to Resolution 1533 (2004) Concerning the Democratic Republic of the Congo Addressed to the President of the Security Council' (23 November 2009) UN Doc S/2009/603.
[251] UNSC Res 1804 (13 March 2008) UN Doc S/Res/1804, Preamble and Article 7.
[252] ICG, 'Congo' (n 250) 2; UN Doc S/2009/603 (n 250) para 13.
[253] UN Doc S/2009/603 (n 250) 8-9.

According to the original plan for the operation, the Rwandan forces would provide logistical, operational and intelligence support to the Congolese army.[254] However, once the operation started, reports indicated a direct role played by the Rwandan troops.[255] The Rwandan government, amid political concerns about the size, strength and time limit of its presence in the country, denied an estimation by the MONUC of the number of its troops being around 5000.[256] The DRC also downgraded the role played by the Rwandan troops in its statements. At the beginning of the operation, a Congolese government spokesman stated that the Rwandan troops were on 'an observation mission' to monitor the disarming of the rebel group and that they 'will not part engage in fighting'.[257]

The purpose of the intervention was explained by the Rwandan President as being to destabilise the FDLR, arrest the perpetrators of genocide and reintegrate the other fighters into Rwandan society.[258] The Rwandan Information Minister, on the other hand, described its purpose as 'to bring peace and stability to the region'.[259] The Rwandan government in its communications to the UN characterised the FDLR, among others, as a threat to its 'security and sovereignty',[260] an internationally recognised 'terrorist group' constituting a 'threat to Rwanda',[261] the perpetrators of the 1994 Rwandan genocide and 'a main cause of regional insecurity'.[262] On one occasion it blamed the group and its affiliations for undermining the 'stability in the region', for 'systematically exterminating Congolese Tutsis, as … in Rwanda in 1994' and for continuing 'cross-border infiltrations into Rwanda'. On the same occasion the government also explained its intention to participate in a joint Rwandan/Congolese 'military operations plan to disarm the genocidal forces' in the FDLR and its affiliations.[263]

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[254] ICG, 'Congo' (n 250) 5.
[255] See ibid 5-9.
[256] ibid 6.
[257] Todd Pitman, 'Congo Says Rwandan Forces Will Observe, Not Fight' (Westlaw, *Associated Press*, 21 January 2009); In the same vein, see 'DRCongo says Rwandan Troops in East as Observers' (Westlaw, *BBC*, 21 January 2009).
[258] ICG, 'Congo' (n 250) 5.
[259] 'Rwanda Says Its Soldiers in Congo Led by Kinshasa' (Westlaw, *Reuters*, 20 January 2009).
[260] UNSC, 'Letter Dated 14 March 2008 From the Permanent Representative of Rwanda to the United Nations Addressed to the President of the Security Council' (17 March 2008) UN Doc S/2008/180, 1.
[261] UNSC, 'Letter Dated 16 May 2008 From the Chairman of the Security Council Committee Established Pursuant to Resolution 1373 (2001) Concerning Counter-terrorism Addressed to the President of the Security Council' (23 May 2008) UN Doc S/2008/336, 3.
[262] UNSC Verbatim Record (29 October 2008) UN Doc S/PV.6005 (Resumption 1), 33 and 34.
[263] UNSC Verbatim Record (22 December 2008) UN Doc S/PV.6055, 12-4.

The Congolese government spokesman, on the occasion where he confirmed that they 'officially invited the Rwandan army to take part in the operation', explained the purpose of the intervention as 'to repatriate, voluntarily or by force, combatants of the FDLR or Interahamwe or [ensure they] have refugee status in line with Congolese or international law, which precludes them bearing arms'.[264]

In sum, Rwanda's intervention against the FDLR in the DRC was aimed at eliminating a threat from a terrorist group to Rwanda itself. Rwanda also claimed to bring to justice the perpetrators of the 1994 Rwandan genocide and provide stability in the region.

2.25. The GCC intervention in Bahrain – 2011

In February 2011, against the backdrop of the so-called Arab Spring, Bahrain was embroiled in widespread protests by the majority Shia population demanding democratic reforms from the Sunni monarchy. Following the blockade of the business and financial district in the capital by the demonstrators, the Bahraini King requested assistance from other Sunni monarchies of the Gulf Cooperation Council (GCC) with a view to maintaining public order and keeping the peace in the country. Upon this request, the Peninsula Shield Force, the military component of the GCC, originally established to protect the member States from external threats, commenced its operation on 14 March with the participation of the Saudi, Emirati and later Qatari contingents. Some officials presented the role the troops played, in line with their mandate, as the protection of the vital infrastructure and financial and banking institutions. However, reports indicated a direct role by the troops in quelling the revolt. The troops started withdrawing in June.[265]

In a statement dated 23 March the GCC explained 'the legitimacy of the presence of the Peninsula Shield Force' in Bahrain 'by the joint agreement on defence and cooperation, as well as by the request of the Kingdom of Bahrain'. The purpose of the intervention was presented in another statement as being 'to support and promote stability' and 'contribute to the

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[264] 'Hundreds of Rwandan Troops to Help Disarm Hutu Rebels' (Westlaw, *AllAfrica*, 21 January 2009).

[265] For an account of the case and its legal appraisal, see Agatha Verdebout, 'The Intervention of the Gulf Cooperation Council in Bahrain – 2011' in Tom Ruys, Olivier Corten and Alexandra Hofer (eds), *The Use of Force in International Law: A Case-Based Approach* (OUP 2018); In the same vein, also see Jean-Yves de Cara, 'The Arab Uprisings under the Light of Intervention' (2012) 55 GYIL 11, 15-28.

maintenance of order and security'. The GCC also alluded to the Iranian interference in the affairs of Bahrain as the source of 'division among its citizens' and a danger to 'the safety and stability of Bahrain' and the GCC. For Bahrain, the intervention had foiled Iran's 'external plot' to undermine the country. For the Bahraini government, a possible Iranian armed intervention was one of the principal reasons for requesting assistance.[266]

While the Arab League endorsed the GCC's position, some States called for caution.[267] The Iranian government, on the other hand, in a letter to the UN, rejecting the accusations against it, stated that the intervention 'has only taken place to strengthen the Government's hands in repressing the popular legitimate demands' and that this is not 'the right answer, especially in a situation where people have risen up to demand their basic rights', as 'suppression may exacerbate the situation and bring the society to the boiling point'. The letter also stated that the Iranian 'Government condemns the resort to violence against peaceful civilians and asks for the withdrawal of foreign forces from Bahrain'.[268]

In sum, the GCC member States' consensual intervention in Bahrain, embroiled in anti-government protests, took place in order to protect vital infrastructure, bring stability, maintain law and order and counter the Iranian interference. Reports suggested that the troops assumed a direct role in quelling the revolt.

2.26. Kenyan intervention in Somalia against al-Shabaab – 2011

On 15 October 2011 the Kenyan government launched a military operation into Somali territory against al-Qaeda-affiliated insurgent group al-Shabaab.[269] The intervention followed a series of kidnappings of foreigners in Kenya, which Kenya attributed to al-Shabaab.[270] In a letter to the UN, Kenya declared that it took targeted measures 'with the concurrence of the Transitional Federal Government of Somalia … to protect and preserve the integrity of Kenya

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[266] See ibid 797-8 and sources with quotes cited there, most of which are translated from Arabic.
[267] See ibid 798-9.
[268] UNGA and UNSC, 'Identical Letters dated 15 April 2011 From the Chargé d'affaires a.i. of the Permanent Mission of the Islamic Republic of Iran to the United Nations Addressed to the Secretary-General, the President of the General Assembly and the President of the Security Council' (19 April 2011) UN Doc A/65/822–S/2011/253.
[269] For a short profile of the group, see 'Who are Somalia's al-Shabab?' (*BBC*, 22 December 2017) <https://www.bbc.co.uk/news/world-africa-15336689>.
[270] UNSC, 'Report of the Secretary-General on Somalia' (9 December 2011) UN Doc S/2011/759, para 4.

and the efficacy of the national economy and to secure peace and security in the face of the Al-Shabaab terrorist militia attacks emanating from Somalia'.[271] In a joint Communiqué annexed to this letter wherein they outlined their security cooperation against the group, Kenya and Somalia agreed 'that Al-Shabaab constitutes a common enemy to both countries'. They committed to continuing to work 'together to stabilize Somalia and to stamp out the threats of … terrorism, piracy, abductions, extortion, ransom demands and other international crimes' emanating from al-Shabaab.[272] An additional joint Communiqué clarified that the Kenyan operation was based on the right of self-defence under article 51 of the UN Charter.[273] The narrative on confronting the common threat of al-Shabaab was preserved in other joint statements.[274] The intervention was applauded by the regional organisations AU and the Intergovernmental Authority on Development (IGAD).[275]

Prior to the intervention the UN Security Council had condemned and sanctioned al-Shabaab, and considered it a terrorist threat for both Somalia and the international community.[276] On 22 February 2012, with the UN Security Council welcoming such an intention,[277] Kenyan forces were integrated into the UN-authorised AU mission AMISOM.[278] However, it is revealed in the report of the UN Secretary-General that Kenyan forces 'continued to also operate bilaterally in Somalia, outside of AMISOM command'.[279] Despite losing control over most of the towns and cities, Al-Shabaab continued to dominate many rural areas.[280]

[271] UNSC, 'Letter Dated 17 October 2011 From the Permanent Representative of Kenya to the United Nations Addressed to the President of the Security Council' (18 October 2011) UN Doc S/2011/646, 1.
[272] ibid 2 and 3.
[273] Referred in UN Doc S/2011/759 (n 270) para 5.
[274] See 'Joint Communique Issued at Nairobi Following a Meeting by the Heads of State of Kenya, Uganda and the TFG of Somalia' (16 November 2011) <https://reliefweb.int/report/somalia/joint-communique-issued-nairobi-following-meeting-heads-state-kenya-uganda-and-tfg>; Also see statements referred to in UN Doc S/2011/759 (n 270) para 5.
[275] UN Doc S/2011/759 (n 270) para 5.
[276] See UNSC Res 1910 (28 January 2010) UN Doc S/RES/1910, Preamble and Article 1; UNSC Res 2010 (30 September 2011) UN Doc S/RES/2010, Preamble.
[277] UNSC Res 2036 (22 February 2012) UN Doc S/RES/2036, Preamble and Article 10.
[278] AMISOM, 'Kenya – KDF' <https://amisom-au.org/wp-content/cache/page_enhanced/amisom-au.org/kenya-kdf/_index.html_gzip>.
[279] UNSC, 'Report of the Secretary-General on children and armed conflict in Somalia' (22 December 2016) UN Doc S/2016/1098, para 10.
[280] 'Who are Somalia's al-Shabab?' (n 269).

In sum, Kenya intervened in Somalia based on both Somali consent and the right to self-defence against a terrorist group that was involved in various international crimes and condemned by the UN Security Council.

2.27. Ethiopian intervention in Somalia against al-Shabaab – 2011

Ethiopia intervened in Somalia in November 2011 against al-Shabaab, a group splintered from Ethiopia's former enemy ICU against which it had intervened in December 2006.[281] Ethiopia seemed not to have put forward a specific legal justification, although it could be said that the intervention was undertaken based on Somalia's consent.[282] This is evident from the Communiqué issued by the regional group Intergovernmental Authority on Development (IGAD) on 25 November 2011 with the participation of both Somalia and Ethiopia. It called 'upon the Ethiopian Government to support the Kenyan-TFG and AMISOM operation' against al-Shabaab in Somalia.[283] Also, the Somali defence minister welcomed the contribution by Ethiopia and any other country in the 'fight against the Shabaab militants, as long as they do not violate [their] sovereignty'.[284]

Prior to the intervention, the UN Security Council had condemned and sanctioned al-Shabaab, and considered it a terrorist threat both for Somalia and the international community.[285] In January 2014 Ethiopian troops were formally integrated into AMISOM.[286] However, Ethiopian forces reportedly continued to conduct standalone operations.[287]

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[281] Jean-Christophe Martin, 'The Ethiopian Military Intervention in Somalia – 2011' in Tom Ruys, Olivier Corten and Alexandra Hofer (eds), *The Use of Force in International Law: A Case-Based Approach* (OUP 2018) 803; For the intervention against the ICU, see Section 2.19 above.
[282] See ibid 808.
[283] IGAD, 'Communique of the 19th Extra-Ordinary Session of the IGAD Assembly of Heads of State and Government on The Situation in Somalia and a Briefing on the Outstanding Issues of the Sudan Comprehensive Peace Agreement' (Addis Ababa, 25 November 2011) Article 6.
[284] 'Noose Tightens on Somali Rebels as Defense Minister Welcomes Foreign Troops' (Westlaw, *Al Arabiya*, 21 November 2011).
[285] See n 276 above.
[286] AMISOM, 'Press Release – Ethiopian Forces Formally Integrated Into AMISOM' (22 January 2014) <https://amisom-au.org/wp-content/cache/page_enhanced/amisom-au.org/2014/01/ethiopian-forces-formally-integrated-into-amisom/_index.html_gzip>.
[287] See RULAC, 'Ethiopia' (Last Updated 12 September 2017) <http://www.rulac.org/browse/countries/ethiopia#collapse1accord> and sources cited there.

In sum, Ethiopia's 2011 intervention in Somalia took place with the consent of Somalia in the context of fighting a group sanctioned and recognised as terrorist by the UN Security Council and in support of a UN-mandated mission. Ethiopia itself, however, seemed not to have put forward a specific legal justification for its intervention.

2.28. Multinational intervention in the Central African Republic against the Séléka Coalition – 2012

In December 2012 a number of rebel groups from the historically marginalised north-east region of the CAR established a coalition named Séléka. It was a heterogeneous alliance comprised of groups that had long been dissatisfied with the government, now demanding the President's removal from office. They accused the government of not honouring its promises, some of which were based on the 2007 peace agreement. Before the establishment of the coalition, some of the groups had long been enemies along ethnic lines.[288]

Capturing a number of towns, the coalition started advancing towards the capital on 10 December. In response, on 17 December Chad sent troops to halt their advance.[289] The UN Security Council soon afterwards condemned the group's offensive and its human rights abuses that threatened the stability in the CAR in violation of the peace process.[290] In early January 2013 the MICOPAX, a regional peace force present in the CAR since 2008, which was initially established to supervise a ceasefire agreement therein,[291] was reinforced by troops from Cameroon, the Congo, Gabon and Chad with a mandate to aggressively defend their positions.[292] South Africa also sent troops and France increased the number of its forces present in the country.[293]

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[288] ICG, 'Central African Republic: Priorities of the Transition' (11 June 2013) 6-7.
[289] See the briefing by the Special Representative of the UN Secretary-General in UNSC Verbatim Record (11 January 2013) UN Doc S/PV.6899, 2-3.
[290] UNSC, 'Security Council Press Statement on Central African Republic' (19 December 2012) UN Doc SC/10867-AFR/2492 <https://www.un.org/press/en/2012/sc10867.doc.htm>; UNSC, 'Security Council Press Statement on Central African Republic' (20 March 2013) UN Doc SC/10948-AFR/2582 <https://www.un.org/press/en/2013/sc10948.doc.htm>.
[291] See UNSC, 'Report of the Secretary-General on the Situation in the Central African Republic and the Activities of the United Nations Peacebuilding Support Office in That Country' (26 November 2008) UN Doc S/2008/733, para 6.
[292] UN Doc S/PV.6899 (n 289) 3-4.
[293] ibid 3.

Regarding the initial deployment of troops from Chad, the spokesman for the Chadian Defence Minister said that the troops 'are tasked with reinforcing the Central African Republic forces in the counterattack to retake the cities that have fallen into the hands of rebels'.[294] The Defence Minister of Gabon, one of the countries that deployed troops as part of the MICOPAX, on the other hand, made it clear that 'the mandate of the Gabonese troops is to provide a buffer and not to fight the rebels'.[295]

As far as South Africa was concerned, it deployed its troops as part of a renewed military cooperation agreement.[296] The troops' mandate mentioned assisting the CAR government forces only with 'capacity building' and 'planning and implementation of the disarmament, demobilization and re-integration processes'.[297] The spokesperson for the South African armed forces said that the dispatch of troops was 'coincidental to the context' and that the purpose was to train the CAR's defence forces rather than to engage with rebel fighters.[298]

French troops in the country also were not meant to be directly involved in the conflict, as they had been instructed to protect French nationals and diplomatic premises in the capital.[299] The French President in response to the CAR's request for assistance 'to push back the rebels ... to allow for dialogue' stated that '[i]f we are present, it is not to protect a regime, it is to protect our nationals and our interests, and in no way to intervene in the internal affairs of a country' and that '[t]hose days are gone'.[300] A French intervention was later authorised by the UN Security Council in December 2013 to support the African-led International Support Mission in the CAR.[301]

Despite the foreign intervention, in late March 2013 the Séléka entered the capital and took control of the government. The unconstitutional seizure of power by the Séléka was condemned

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[294] '2,000 Troops from Chad to Fight CAR Rebels' (Westlaw, *The Associated Press*, 19 December 2012).
[295] The Jamestown Foundation, 'African Troops Pour into Central African Republic to Halt Rebel Advance' (10 January 2013) <https://www.refworld.org/docid/50f698ded.html>.
[296] 'Central African Republic: South Africa bolsters its troops in Bangui' (*IRIN*, 8 January 2013) <https://www.refworld.org/docid/50f010c02.html>.
[297] The Jamestown Foundation, 'African Troops' (n 295).
[298] 'Central African Republic: South Africa bolsters its troops in Bangui' (n 296).
[299] Jamestown Foundation, 'African Troops' (n 295).
[300] 'Central African Republic in Plea for Help Against Rebels' (*France 24*, 28 December 2012) <https://www.france24.com/en/20121228-central-african-republic-appeals-help-rebel-advance>.
[301] UNSC Res 2127 (5 December 2013) UN Doc S/RES/2127, Article 49.

by the international community, including the UN Security Council.[302] With regional initiatives a National Transition Council was established on 13 April 2013.[303] Armed groups, however, continued to fight one another.[304]

In sum, among the numerous countries that intervened in the conflict, only Chad publicly admitted assisting the CAR government in order to push back the rebels. The UN Security Council condemned the rebels' activities soon after the Chadian intervention. MICOPAX was mandated to defend its position. This point was emphasised by Gabon, one of the States that participated in the mission, which declared that the aim of the Gabonese troops was 'to provide a buffer and not to fight the rebels'. South Africa claimed that the dispatch of its troops was 'coincidental to the context'; it did not intend to confront the rebels and had other purposes. France aimed to protect nationals and diplomatic premises and explicitly rejected the CAR government's request of assistance to push back the rebels. It considered that it would be an intervention in the internal affairs of the country.

2.29. French intervention in Mali – 2013

During 2012 the Malian government gradually lost control of the north of the country to a range of armed groups including al-Qaeda in the Islamic Maghreb (AQIM), Movement for Oneness and Jihad in West Africa (MUJAO) and Ansar al-Dine. All these groups had links with al-Qaeda and were aiming to bring about their version of Islamic rule. Another major group operating in the area was the National Movement for the Liberation of Azawad (MNLA) pursuing a separatist agenda for the ethnic Tuareg group in Northern Mali. When the advancement of the al-Qaeda-linked armed groups threatened the capital, the Malian President requested assistance from France, which in turn launched Operation Sahel on 11 January 2013.[305]

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[302] UNSC, 'Security Council Press Statement on Central African Republic' (25 March 2013) UN Doc SC/10960-AFR/2586 <https://www.un.org/press/en/2013/sc10960.doc.htm>.
[303] UNSC, 'Report of the Secretary-General on the Situation in the Central African Republic' (3 May 2013) UN Doc S/2013/261, 2-3.
[304] See UNSC, 'Central African Republic: Report of the Secretary-General' (15 October 2019) UN Doc S/2019/822.
[305] For an account of the case and its legal appraisal, see Karine Bannelier and Theodore Christakis, 'The Intervention of France and African Countries in Mali' in Tom Ruys, Olivier Corten and Alexandra Hofer (eds), *The Use of Force in International Law: A Case-Based Approach* (OUP 2018); Dan E Stigall, 'The French Military Intervention in Mali, Counter-Terrorism, and the Law of Armed Conflict' (2015) 223 MilLRev 1; For the profile

Just one day before the intervention started, the UN Security Council had reiterated its call 'to provide assistance to the Malian Defence and Security Forces in order to reduce the threat posed by terrorist organizations and associated groups'.[306] It had already sanctioned AQIM and MUJAO, while Ansar al-Dine was sanctioned two months after the intervention.[307]

The French government in a letter to the UN justified the intervention based on a request from the Malian interim President. It declared that it supported the Malian forces in combating a terrorist threat that put the territorial integrity of the State and the security of its population in danger.[308] France initially also alluded to the collective self-defence of Mali. This, however, could be seen as a futile attempt, as no third State involvement in the conflict was indicated.[309] France also acknowledged in its public statements that the intervention was in line with UN Security Council resolutions.[310] The objectives of Operation Sahel were laid down by the French army as being to help Mali stop the spread of terrorist groups and recover its territorial integrity and sovereignty, and to assist the UN-authorised mission AFISMA and the European Union Training Mission in Mali.[311] Reflecting the emphasis on combating terrorism, France clearly distinguished the MNLA from the 'terrorists' and declared that 'there will be no action against the Tuareg'.[312] The Tuareg rebels, on the other hand, voiced support for the intervention, promised to contribute to the 'operations against terrorism', and backed down from their demand for independence in favour of autonomy.[313]

Soon after the French intervention, Chad also sent troops in support of the Malian government. In the UN Security Council meeting, the Chadian delegate explained the situation in Mali as

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of the armed groups, see May Ying Welsh, 'Making Sense of Mali's Armed Groups' (*Al Jazeera*, 17 January 2013) <https://www.aljazeera.com/indepth/features/2013/01/20131139522812326.html>.

[306] UNSC, 'Security Council Press Statement on Mali' (10 January 2013) UN Doc SC/10878-AFR/2502 <https://www.un.org/press/en/2013/sc10878.doc.htm>.

[307] UN Security Council Consolidated List <https://scsanctions.un.org/consolidated/>.

[308] UNSC, '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' (14 January 2013) UN Doc S/2013/17.

[309] See Bannelier and Christakis (n 305) 815-6 and 819.

[310] See ibid 815-6 and 824.

[311] See French Ministry of the Armed Forces, 'Présentation de l'opération' (Update: 25/10/2013) (In French) <https://www.defense.gouv.fr/english/operations/missions-achevees/operation-serval-2013-2014/dossier/presentation-de-l-operation>.

[312] Quoted in Bannelier and Christakis (n 305) 824.

[313] ibid 817.

one where 'terrorists wanted to catch the international community unawares, in order to control all of Mali and turn it into truly reliable staging grounds for their operations in the subregion and throughout the world'. He praised the French intervention for being in line with UN Security Council Resolution 2085, wherein the Council authorised the deployment of an African-led International Support Mission in Mali (AFISMA) and urged member States to support AFSIMA and cooperate in its deployment.[314] The delegate went on to state that it was in that context that his country sent troops to Mali in response to the request 'by Mali's Head of State'.[315] The Chadian troops eventually joined AFSIMA in March 2013.[316]

The intervention received widespread support from the international community with regard to its legality.[317] In the UN Security Council meeting delegates praised the intervention in general and emphasised the point that it was aimed at 'terrorist', 'extremist' and 'criminal' groups.[318] Some delegates, on the other hand, explicitly called for the distinction between the rebels and terrorists. Thus, the delegate speaking on behalf of ECOWAS cautioned that '[a]ll mingling between Tuareg and narco-terrorists must be avoided'.[319] The delegate from the European Union said that the EU 'encourages an inclusive national dialogue open to the populations of the north and all groups that have rejected terrorism and recognized the territorial integrity of the country'.[320] Mr Feltman, UN Under-Secretary-General for Political Affairs, urged that 'the ongoing military operations should provide the necessary political space for negotiations between the Government and groups that have renounced violence and distanced themselves from terrorist networks'.[321]

In April 2013 the UN Security Council in a resolution 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'.[322] In the same resolution the Council transferred the authority to use force from AFSIMA to the UN mission MINUSMA.[323] It

[314] UNSC Res 2085 (20 December 2012) UN Doc S/RES/2085, Articles 9, 14 and 15.
[315] UNSC Verbatim Record (22 January 2013) UN Doc S/PV.6905, 12.
[316] Bannelier and Christakis (n 305) 817.
[317] ibid 815.
[318] UN Doc S/PV.6905 (n 315).
[319] ibid 10.
[320] ibid 18.
[321] ibid 5.
[322] UNSC Res 2100 (25 April 2013) UN Doc S/RES/2100, Preamble.
[323] ibid Article 7.

additionally authorised French troops to intervene in support of MINUSMA when it is 'under imminent and serious threat upon request of Secretary-General'.[324] As this was a limited authorisation for French troops with regard to its scope, other French operations in the country were regarded to be continued under the legal basis of Malian consent.[325]

In sum, France, and later Chad, intervened in Mali with its consent to combat terrorist groups sanctioned by the UN Security Council in line with the Council's resolutions calling for support to the Malian government. The UN Security Council welcomed the swift response by France. France and third States cautioned for the dissociation of targeted terrorist groups from the armed groups associated with the Tuareg ethnic community.

2.29.1. Operation Barkhane – 2014, and G5 Sahel Joint Force – 2017

Considering the cross-border dimension of the terrorist threat in the Sahel region that required a regional approach, on 1 August 2014 France launched the Operation Barkhane that replaced the Operation Sahel.[326] The 'primary objective' of the operation was 'to support the Group of Five for the Sahel (G5 Sahel) partner countries in taking over the fight against armed terrorist groups across the Sahel-Saharan strip'.[327] G5 Sahel, consisting of Burkina Faso, Chad, Mali, Mauritania and Niger, established a G5 Sahel joint force in July 2017 aimed 'at coordinating, on the borders, the fight against terrorists'.[328] The UN Security Council welcomed the deployment of this force, 'with a view to restoring peace and security in the Sahel region'.[329] It also welcomed the French forces' efforts to support 'cross-border joint military counter-terrorist operations' by G5 Sahel.[330]

2.29.2. The US involvement in the region – 2013

[324] ibid Article 18.
[325] Bannelier and Christakis (n 305) 826.
[326] French Ministry of the Armed Forces, 'Press Pack – Operation Barkhane' (February 2020) 3.
[327] ibid 4.
[328] ibid.
[329] UNSC Res 2359 (21 June 2017) UN Doc S/RES/2359, Article 1.
[330] ibid Preamble; For more recent counter-terrorism developments in the region and contributions from other States to the Operation Barkhane and G5 Sahel joint force, see Patrick M Butchard (ed), 'Digest of State Practice 1 July – 31 December 2019' (2020) 7 JUFIL 156, 169-70 and 174-8.

In February 2013 the US President announced that the US sent troops to Niger 'with the consent of the Government of Niger' to 'provide support for intelligence collection and … also facilitate intelligence sharing with French forces conducting operations in Mali, and with other partners in the region'.[331] In November 2017 Niger, in a memorandum of understanding with the US, permitted the US to fly armed drones out of the Nigerien capital.[332] A US Defence Department spokesperson said that the two countries 'stand firm in working together to prevent terrorist organizations from using the region as a safe haven'. The spokesperson did not comment on 'specific military authorities or permissions' for 'operational security reasons'.[333] A December 2019 letter to the US Congress from the US President describes the task of the US military personnel present in Lake Chad Basin and Sahel Region, including Niger, Cameroon, Chad and Nigeria, as 'to conduct airborne intelligence, surveillance, and reconnaissance operations and to provide support to African and European partners conducting counterterrorism operations in the region, including by advising, assisting, and accompanying these partner forces'.[334] The White House previously revealed that the US troops, which are present in Niger with its consent 'to train, advise, and assist Nigerien partner forces', used military force in their self-defence in response to ISIS attacks in October and December 2017.[335]

In sum, although it is not clear whether the US troops were directly involved in the fight against non-State groups in the region, the US troops' involvement was aimed at countering terrorism. On two occasions the US troops present in Niger with its consent used force in self-defence when attacked by ISIL.

2.30. Ugandan intervention in South Sudan – 2013

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[331] The White House, 'Letter from the President – Concerning Niger' (22 February 2013) <https://obamawhitehouse.archives.gov/the-press-office/2013/02/22/letter-president-concerning-niger>.
[332] Helene Cooper and Eric Schmitt, 'Niger Approves Armed U.S. Drone Flights, Expanding Pentagon's Role in Africa' (*The New York Times*, 30 November 2017) <https://www.nytimes.com/2017/11/30/us/politics/pentagon-niger-drones.html?mtrref=www.google.com&gwh=DA7EC8ABA2846818517452E7D98972A5&gwt=pay>.
[333] ibid.
[334] The White House, 'Text of a Letter from the President to the Speaker of the House of Representatives and the President Pro tempore of the Senate' (11 December 2019) <https://www.whitehouse.gov/briefings-statements/text-letter-president-speaker-house-representatives-president-pro-tempore-senate-8/>.
[335] The White House, 'Unclassified – Report' (n 221) 7.

On 15 December 2013 South Sudan descended into an internal conflict along ethnic lines after President Salva Kiir, a member of the country's largest ethnic group Dinka, had accused the former Vice-President Riek Machar, a member of the Nuer ethnic group, of plotting a *coup d'état*. Machar denied the charges and went into hiding to lead the rebel forces, which were able to seize control of some cities.[336] The Ugandan government sent troops into the country days after the conflict had erupted. However, it initially denied its involvement in the conflict, insisting that its troops were in the country only to evacuate its citizens and secure the airport and presential palace. On 15 January 2014 its President stated that they were helping the South Sudanese government at its request in the fight against the rebels.[337]

On 14 January 2014 the Ugandan Minister of Defence had confirmed in a motion moved in Parliament that the 'democratically elected' President of South Sudan, whose government faced 'an attempted coup', had requested assistance on 16 December 2013 'in stabilising the situation'. He summarised the purpose of the intervention detailed in the motion as '1. To save Ugandans and assist to prevent genocide. 2. Avert negative developments in national and regional security. 3. Protect constitutionalism. 4. Respond to dangers to a fraternal neighbour'.[338]

The US[339] and several countries in the region such as Ethiopia, Sudan and Kenya[340] expressed their concern over the intervention and called for the withdrawal of Ugandan troops based on reasons such as that it could lead to a regional conflict with the involvement of other interested parties or it would hamper the peace negotiations. Eritrea, on the other hand, in a letter to the UN, denying the claim that it supported the rebel leader Machar, called 'on all pretentious

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[336] 'South Sudan opposition head Riek Machar denies coup bid' (*BBC*, 18 December 2013) <https://www.bbc.co.uk/news/world-africa-25427619>; 'Yoweri Museveni: Uganda troops fighting South Sudan rebels' (*BBC*, 16 January 2014) <https://www.bbc.co.uk/news/world-africa-25759650>.

[337] Elias Biryabarema, 'Uganda leader says helping South Sudan fight rebels' (*Reuters*, 15 January 2014) <https://uk.reuters.com/article/uk-southsudan-unrest/uganda-leader-says-helping-south-sudan-fight-rebels-idUKBREA0E18E20140115>.

[338] Parliament of the Republic of Uganda, 'Hansards 2014 January' (14 January 2014) accessible at <https://www.parliament.go.ug/documents/132/hansards-2014-january>.

[339] US Department of State, 'Press Statement - U.S. Concern About Violations of Cessation of Hostilities in South Sudan' (8 February 2014) <https://2009-2017.state.gov/r/pa/prs/ps/2014/02/221487.htm> which called for the withdrawal of the 'troops invited by either side'.

[340] See 'Khartoum worried by Uganda military foray in South Sudan' (*Daily Nation*, 21 January 2014) <https://www.nation.co.ke/news/africa/Khartoum-worried-by-Uganda-military/-/1066/2154974/-/ofw7w4z/-/index.html>; 'Uganda ready to withdraw its troops from South Sudan' (*Sudan Tribune*, 17 March 2014) <http://www.sudantribune.com/spip.php?article50317>.

"benefactors"' who profit from the 'plight of the people of South Sudan to take their hands off and allow the people of South Sudan to resolve their own problems'.[341]

In October 2015 Uganda authorities, asserting that the deployment of troops 'helped to stop what was likely to be the worst genocide in the region', announced the beginning of their withdrawal. The decision was in compliance with the peace agreement concluded between the parties to the internal conflict.[342] The conflict, however, continued until 22 February 2020 when President Kiir announced 'the end of the war' with the establishment of a transitional coalition.[343]

In sum, Uganda's consensual intervention in South Sudan's civil war aimed to save its nationals, prevent genocide, protect the democratically elected and constitutional authorities that faced an attempted coup, and address the negative security implications for Uganda and the region. Several States criticised the intervention for opening the door to the regionalisation of the conflict and hampering the peace efforts. Eritrea, on the other hand, criticised all intervening countries for preventing the people of South Sudan from resolving their own problems.

2.31. Interventions by the US-led coalition, Iran and Russia in Iraq against ISIL – 2014

Generally considered to have been formed as an opposition against the Iraqi government installed after the 2003 US-led intervention in Iraq, the Islamic State of Iraq and the Levant (ISIL) came to the world stage with broad ambitions from 2013 onwards. With the geopolitical situation in the region turning in its favour, in 2014 it was able to exert control over vast territory in Iraq and Syria, where it proclaimed its version of the Islamic State.[344] Known by

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[341] UNSC, 'Letter Dated 11 March 2014 from the Chargé d'affaires a.i. of the Permanent Mission of Eritrea to the United Nations Addressed to the President of the Security Council' (11 March 2014) UN Doc S/2014/171.
[342] Elias Biryabarema, 'Uganda Says to Start Troop Exit from South Sudan' (*Reuters*, 12 October 2015) <https://www.reuters.com/article/uk-southsudan-unrest-idUKKCN0S615S20151012>.
[343] Colin Dwyer, 'South Sudan Forges Unity Government, Renewing Fragile Hope For Peace' (*npr*, 22 February 2020) <https://www.npr.org/2020/02/22/808471587/south-sudan-forges-unity-government-renewing-fragile-hope-for-peace?t=1585824798331>.
[344] For the background and a legal appraisal of the case, see Olivier Corten, 'The Military Operations against the 'Islamic State' (ISIL or Da'esh) – 2014' in Tom Ruys, Olivier Corten and Alexandra Hofer (eds), *The Use of Force in International Law: A Case-Based Approach* (OUP 2018); Also see Karine Bannelier-Christakis, 'Military Interventions against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent' (2016) 29 LJIL 743.

different names since its establishment, it was sanctioned by the UN Security Council on 18 October 2004, when it was known as 'Al-Qaida in Iraq'.[345]

On 25 June 2014, in a letter to the UN, noting ISIL's territorial advancement and atrocities it had committed, the Iraqi government renewed its request from the UN member States for military assistance 'with a view to denying terrorists staging areas and safe havens'.[346] On 8 August 2014 the US government announced that it had started targeted airstrike operations against ISIL in Iraq 'to protect American personnel in Iraq by stopping the current advance on Erbil by the terrorist group [ISIL] and to help forces in Iraq as they fight to break the siege of Mount Sinjar and protect the civilians trapped there … in coordination with the Iraqi government'.[347]

On 22 September 2014 the Iraqi government, in a letter to the UN, expressing its gratitude for the US military assistance provided upon its specific requests, confirmed that it also requested the US 'to lead international efforts to strike ISIL sites and military strongholds'. The letter mentioned the necessity to combat ISIL's 'evil terrorism' and the fact that ISIL 'established a safe haven outside Iraq's borders that is a direct threat to' Iraq's security.[348] States responding to Iraq's request generally referred to the fact that the intervention was lawful because it was based on Iraq's consent and that the target of the intervention was ISIL and terrorism.[349] In parallel to the US-led coalition, Iraq also requested assistance from Iran and Russia.[350]

No third State is known to have questioned the legality of these interventions against ISIL.[351] The UN Security Council, among its many statements taking a clear stance against ISIL, in a

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[345] UN Security Council Consolidated List <https://scsanctions.un.org/consolidated/>.
[346] UNSC, 'Letter from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General' (25 June 2014) UN Doc S/2014/440.
[347] The White House, 'Letter from the President -- War Powers Resolution Regarding Iraq' (8 August 2014) <https://obamawhitehouse.archives.gov/the-press-office/2014/08/08/letter-president-war-powers-resolution-regarding-iraq>.
[348] UNSC, 'Letter 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.
[349] For a detailed analysis of these statements, see Raphael Van Steenberghe, 'The Alleged Prohibition on Intervening in Civil Wars Is Still Alive after the Airstrikes against Islamic State in Iraq: A Response to Dapo Akande and Zachary Vermeer' (*EJIL: Talk!*, 12 February 2015) <https://www.ejiltalk.org/the-alleged-prohibition-on-intervening-in-civil-wars-is-still-alive-after-the-airstrikes-against-islamic-state-in-iraq-a-response-to-dapo-akande-and-zachary-vermeer/>.
[350] See Bannelier-Christakis (n 344) 751-2.
[351] Bannelier-Christakis (n 344) 751; Corten, 'The Military Operations' (n 344) 879.

July 2014 resolution before the interventions against ISIL started, emphasised the need to cooperate to support 'Iraq and to prevent terrorist groups … in particular ISIL, from using the territories of Iraq and neighbouring States … to destabilize Iraq and the region'.[352] Despite losing its territorial control in Iraq in 2017, ISIL was able to continue to stage attacks from different parts of the country.[353]

In sum, the aim of the consensual interventions by US-led coalition, Iran and Russia in Iraq against ISIL was to combat a terrorist group sanctioned by the UN Security Council that threatened Iraq both internally and externally. The UN Security Council had already urged for international cooperation against ISIL before the interventions started.

2.31.1. The US's previous consent-based presence in Iraq

The US had already preserved a military presence in Iraq in support of the subsequent governments since its 2003 military intervention ousted Iraq's Saddam government.[354] In 2008, for example, the US agreed to support, for a period of three years before withdrawing, the Iraqi government 'in its efforts to maintain security and stability in Iraq, including cooperation in the conduct of operations against al-Qaeda and other terrorist groups, outlaw groups, and remnants of the former regime'.[355]

2.32. The US (and NATO) interventions in Afghanistan – 2015

Invoking its right to self-defence, the US launched Operation Enduring Freedom against the Taliban government of Afghanistan on 7 October 2001. It accused Taliban of harbouring al-Qaeda, the perpetrator of the 11 September 2001 attacks on US soil. After the US intervention had removed Taliban from office, a Transitional Authority was established in June 2002 under

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[352] UNSC Res 2169 (30 July 2014) UN Doc S/RES/2169, Preamble.
[353] UNSC, 'Tenth Report of the Secretary-General on the Threat Posed by ISIL (Da'esh) to International Peace and Security and the Range of United Nations Efforts in Support of Member States in Countering the Threat' (4 February 2020) UN Doc S/2020/95, para 4.
[354] Miriam Berger, 'Invaders, allies, occupiers, guests: A brief history of U.S. military involvement in Iraq' (*Washington Post*, 11 January 2020) <https://www.washingtonpost.com/world/2020/01/11/invaders-allies-occupiers-guests-brief-history-us-military-involvement-iraq/>.
[355] Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq (signed 17 November 2008, entered into force 1 January 2009) Article 4(1) and Article 30.

the auspices of the UN. Its establishment was welcomed by the UN Security Council. It was replaced by a new Afghan government following the national elections held in October 2004. The new government gained immediate widespread recognition. In the meantime, in December 2001 the UN Security Council authorised the International Security Assistance Force (ISAR), the leadership of which was assumed by NATO in August 2003, to use force for the maintenance of security in Afghanistan. While the US took part in the mission, some of its troops continued to operate in a standalone manner under Operation Enduring Freedom. The UN Security Council referred to this operation with approval in its resolutions.[356]

The US signed a status of forces agreement with Afghanistan in 2002. It outlined the legal regime governing the presence of its troops. However, to the annoyance of Afghan authorities, the US continued to rely on the right to self-defence rather than Afghanistan's consent up to the end of 2014, when the two countries signed a security agreement establishing the basis of US presence in the country on Afghanistan's invitation.[357] The purpose of the agreement, which entered into force on 1 January 2015, was 'to strengthen security and stability in Afghanistan, counter terrorism, contribute to regional and international peace and stability, and enhance the ability of Afghanistan to deter internal and external threats against its sovereignty, security, territorial integrity, national unity, and its constitutional order'.[358] It particularly acknowledged 'that U.S. military operations to defeat al-Qaida and its affiliates may be appropriate in the common fight against terrorism'.[359]

The December 2016 White House report on the US's use of military force states that 'in the ongoing armed conflict' in Afghanistan, 'US persons and interests continue to be actively targeted by terrorist and insurgent groups'. It sets out the purpose of the US's presence as, among others, 'training, advising, and assisting Afghan forces' and conducting 'counterterrorism operations against' al-Qaeda and ISIL. Noting that the US 'initiated

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[356] For a background to the US operation and its legal appraisal, see Michael Byers, 'The Intervention in Afghanistan' in Tom Ruys, Olivier Corten and Alexandra Hofer (eds), *The Use of Force in International Law: A Case-Based Approach* (OUP 2018).
[357] Peter M Olson, 'Introductory Note to Security and Defense Cooperation Agreement Between the United States of America and the Islamic Republic of Afghanistan & Agreement Between the North Atlantic Treaty Organization and the Islamic Republic of Afghanistan on the Status of NATO Forces and Personnel Conducting Mutually Agreed NATO-led Activities In Afghanistan' (2015) 54 ILM 272, 272.
[358] Security and Defense Cooperation Agreement Between the United States of America and the Islamic Republic of Afghanistan (signed 30 September 2014, entered into force 1 January 2015) 54 ILM 290 (2015), Article 2(1).
[359] ibid Article 2(4).

counterterrorism combat operations in Afghanistan in U.S. national self-defense', it states that 'U.S. military operations and support for Afghan military forces … are now undertaken consistent … with the consent of the Government of Afghanistan'.[360]

A 2019 letter from the US President to the US Congress, in addition to the already above-mentioned purposes, states that the US military operates in Afghanistan with the aim of 'stopping the reemergence of safe havens that enable terrorists to threaten the United States; supporting the Afghan government and the Afghan military as they confront the Taliban in the field; and creating conditions for a political process to achieve lasting peace'. It further notes that '[a]lthough reconciliation efforts are ongoing … the United States remains in an armed conflict, including in Afghanistan and against the Taliban'.[361] Considering that Taliban is intentionally not listed in the US Department of State's special Foreign Terrorist Organisations list, reportedly not to alienate it ultimately to be able to engage it in a political process,[362] the US support to the Afghan government could be considered not only for the purpose of countering terrorism but also for suppressing an ordinary insurgency. The situation, however, remains complicated, as some US officials occasionally refer to Taliban as terrorists and it is listed by the US Treasury Department as a 'specially designated global terrorist' entity since 2002.[363]

NATO also entered into a status of forces agreement with Afghanistan coinciding with the US's agreement, ending its UN-authorised mission. As per the agreement, however, NATO committed to a non-combat role in countering the threat of terrorism.[364] In December 2014, in a resolution the UN Security Council condemned, among others, 'the ongoing violent and terrorist activities by the Taliban' and al-Qaeda. It also '*not[ed]* the signing of the' US-Afghan Bilateral Security Agreement, while '*welcoming* the signing of the' NATO-Afghan Status of

[360] The White House, 'Report' (n 163) 15.
[361] The White House, 'Text of a Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate' (11 June 2019) <https://www.whitehouse.gov/briefings-statements/text-letter-president-speaker-house-representatives-president-pro-tempore-senate-6/>.
[362] Conor Finnegan, 'Taliban Peace Talks Reignite Debate Over Whether US is Negotiating with 'Terrorists'' (*ABC News*, 16 March 2019) <https://abcnews.go.com/Politics/taliban-peace-talks-reignite-debate-us-negotiating-terrorists/story?id=61723458>.
[363] ibid.
[364] See Agreement Between the North Atlantic Treaty Organization and the Islamic Republic of Afghanistan on the Status of NATO Forces and Personnel Conducting Mutually Agreed NATO-led Activities in Afghanistan (signed 30 September 2014, entered into force 1 January 2015) 54 ILM 275 (2015), Preamble and Article 2.

Forces Agreement.[365] Taliban and al-Qaeda were also sanctioned by the UN Security Council.[366]

In sum, the US intervention in Afghanistan based on a bilateral agreement, the signing of which was noted by the UN Security Council, aimed to counter terrorist groups and Taliban, all condemned and sanctioned by the UN Security Council. The US, though not listing it in its special Foreign Terrorist Organisations list, affiliated Taliban with terrorism and had initially used force against it in self-defence. The presence of US troops in Afghanistan also, among others, aimed to contribute to regional stability, national unity and constitutional order. NATO's intervention based on a bilateral agreement, the signing of which was welcomed by the UN Security Council, aimed to counter terrorism while committing to only a non-combat role.

2.33. Multinational intervention in Nigeria and neighbouring countries against Boko Haram – 2015

The group, commonly known as Boko Haram, founded in 2002 in Nigeria, started an armed campaign in 2009 with the aim of overthrowing the Nigerian government and establishing its version of the Islamic State. Over time, it managed to hold onto territory and extended its military campaign to neighbouring States. Later, it also pledged allegiance to ISIS, turning its back on al-Qaeda.[367] The increasing level of violence by the group in the region, repeatedly condemned by the UN Security Council, led to further calls for collective action against it.[368]

On 29 January 2015 the AU Peace and Security Council reaffirmed 'that the activities of the Boko Haram terrorist group constitute a serious threat, not only to Nigeria and the region, but also to the entire continent'. It, accordingly, underlined the need to support the Lake Chad Basin Commission (LCBC) member States consisting of Cameroon, Chad, Niger and Nigeria, 'and Benin, in keeping with the principles of African solidarity and indivisibility of peace and

[365] UNSC Res 2189 (12 December 2014) UN Doc S/RES/2189, Preamble (emphasis in the original).
[366] UN Security Council Consolidated List <https://scsanctions.un.org/consolidated/>.
[367] 'Who are Nigeria's Boko Haram Islamist group?' (*BBC*, 24 November 2016) <https://www.bbc.co.uk/news/world-africa-13809501>.
[368] Tom Ruys, Nele Verlinden and Luca Ferro (eds), 'Digest of State Practice 1 January–30 June 2015' (2015) 2 JUFIL 257, 269-70.

security on the continent, as enshrined in the relevant AU instruments'.[369] The Council also, 'as requested by' those States, decided to authorise the deployment of the Multinational Joint Task Force (MNJTF) with a mandate to 'create a safe and secure environment in the areas affected by the activities of Boko Haram and other terrorist groups' and to facilitate the stabilisation programmes and humanitarian operations in the affected areas.[370] LCBC member States and Benin's efforts to confront Boko Haram collectively go back to 7 October 2014, when in a Communiqué they denounced the 'horrible atrocities committed by the terrorist group Boko Haram against the populations and the security forces in Nigeria and other neighbouring countries' and decided to set up an MNJTF.[371]

By the time the MNJTF was fully operational, Nigeria and neighbouring countries, sometimes assisted by France and the US, starting from January 2015, undertook collective action against Boko Haram outside the MNJTF framework.[372] The mentioned AU Peace and Security Council decision, for example, paid tribute to the deployment of troops by Chad in Northern Cameroon 'in the fight against the Boko Haram terrorist group, as a further demonstration of Chad's commitment and exemplary contribution to the promotion of peace and security on the African continent, as illustrated earlier by Chad's huge sacrifices towards the liberation of Northern Mali from terrorist and criminal groups'.[373]

The UN Security Council repeatedly commended the efforts for the establishment of the MNJTF and collective actions undertaken outside the MNJTF against Boko Haram.[374] The group was sanctioned by the UN Security Council on 22 May 2014.[375] In a 2017 resolution the UN Security Council condemned 'terrorist attacks' by Boko Haram, welcomed multilateral and bilateral support given in the fight against the group and called for such efforts to

[369] AU Peace and Security Council, 'Communiqué' (29 January 2015) PSC/AHG/COMM.2(CDLXXXIV), Article 6.
[370] ibid Article 11.
[371] Quoted in Tom Ruys and Nele Verlinden (eds) 'Digest of State Practice 1 July–31 December 2014' (2015) 2 JUFIL 119, 131.
[372] See 'Digest of State Practice 1 January–30 June 2015' (n 368) 270-1.
[373] AU Peace and Security Council, 'Communiqué' (29 January 2015) (n 369) Article 9.
[374] See documents cited in 'Digest of State Practice 1 January–30 June 2015' (n 368) 269, fn 106.
[375] UN Security Council Consolidated List <https://scsanctions.un.org/consolidated/>.

continue.[376] In November 2019 the AU Peace and Security Council renewed the MNJTF's mandate for another year, effective from 31 January 2020.[377]

In sum, the intervention by the MNJTF and the parallel interventions based on bilateral agreements were aimed at countering the terrorist group Boko Haram and provide security in the region. The UN Security Council condemned and sanctioned the group before the interventions took place and later commended the actions taken against it with a call for them to continue. The MNJTF also aimed to contribute to the stabilisation programmes and humanitarian operations in the areas affected by the group.

2.34. Egyptian and the US interventions in Libya against ISIL – 2015

With the overthrow of the government in 2011, Libya plunged into a political crisis accompanied by armed hostilities between several armed groups. In early 2015 the country remained split between the internationally recognised Tobruk-based government and the opposing Tripoli-based government. The beheading of Egyptian nationals by ISIL, whose origins are mentioned above, in Libya led Egypt to conduct a military operation against the group in February 2015.[378] The Egyptian Foreign Ministry in a 16 February statement justified the action based on Egypt's 'inherent right to legitimate self-defence and to the protection of its citizens abroad against any threat, per' the UN Charter.[379] In a UN Security Council meeting on 18 February the Libyan delegate stated that 'the Libyan Government has called on brotherly Egypt to support the Libyan army in confronting terrorism'.[380] The Egyptian delegate, in turn, confirmed having responded Libya's request adding that they 'will not hesitate to confront the terrorist threat that challenges our region with its ugliest face'.[381] An official from the Qatari Foreign Ministry expressed reservations about the intervention based on the concern, among others, that it would 'give an advantage to one side in Libya's conflict'. This drew

[376] UNSC Res 2349 (31 March 2017) UN Doc S/RES/2349.
[377] AU Peace and Security Council, 'Communiqué' (28 November 2019) PSC/PR/COMM. (DCCCXCVIII), Article 12.
[378] See 'Digest of State Practice 1 January–30 June 2015' (n 368) 263-4.
[379] Quoted in ibid 264.
[380] UNSC Verbatim Record (18 February 2015) UN Doc S/PV.7387, 5.
[381] ibid 7.

condemnation from Egypt, which also accused Qatar of supporting terrorism by putting forward Qatar's reservation about the intervention as proof.[382]

The first US military operation against ISIL in Libya took place in November 2015. Although no specific legal justification is known to have been provided for this operation,[383] the US Department of Defence stated that the target was 'a longtime al-Qaida operative' alongside being a senior ISIL leader. The statement went on to acknowledge that '[w]hile this was not the first U.S. strike against terrorists in Libya, this is the first U.S. strike against an ISIL leader in Libya, and it demonstrates that the United States will go after ISIL leaders wherever they operate'.[384] The operation, therefore, seems to have been part of the US's global counterterrorism campaign.

On 23 December 2015 the UN Security Council, welcoming an agreement between the parties to the internal conflict with regard to the formation of a Government of National Accord (GNA), endorsed an international decision to support the GNA 'as the sole legitimate government of Libya'. Moreover, the Council urged member States 'to actively support the new government in defeating ISIL', al-Qaeda and groups associated with them, 'upon its request'.[385] The US continued to carry out military operations against ISIL following this resolution. A February 2016 attack was justified by the US Department of State as that it was consistent with 'international law, and Libyan government officials were advised of the attack ahead of time'.[386] The December 2016 White House report on the use of US military force justified these operations based on 'the consent of the GNA in the context of the ongoing armed conflict against ISIL and in furtherance of U.S. national self-defense'.[387] The December 2019 letter from the US President to the Congress, on the other hand, seemed to refer only to the

[382] See 'Digest of State Practice 1 January–30 June 2015' (n 368) 264.
[383] See Bannelier-Christakis (n 344) 758.
[384] Department of Defence, 'U.S. Airstrike Targets Senior ISIL Leader in Libya' (14 November 2015) <https://www.defense.gov/Explore/News/Article/Article/628955/us-airstrike-kills-senior-isil-leader-in-libya/source/GovDelivery/>.
[385] UNSC Res 2259 (23 December 2015) UN Doc S/RES/2259, Articles 1, 3 and 12.
[386] See Tom Ruys, Luca Ferro and Nele Verlinden (eds), 'Digest of State Practice 1 January–30 June 2016' (2016) 3 JUFIL 290, 301-2.
[387] The White House, 'Report' (n 163) 17.

consent of the GNA. The letter, with respect to the latest 'airstrikes against ISIS terrorists in Libya', stated that they 'were conducted in coordination with the Libyan' GNA.[388]

However there have been some hesitancy by some international actors including the US, NATO, EU and the UK to intervene in Libya at the request of the GNA due to the GNA's failure to establish full political control over the country.[389]

In sum, Egypt justified its February 2015 intervention against ISIL in Libya both based on the right to self-defence and Libya's consent to counter terrorism. Qatar criticised the intervention for the possibility that it could give advantage to one side in the country's internal conflict separate from the fight against ISIL. Although the US did not seem to provide a specific legal justification for its November 2015 intervention against the group, it seemed to be part of its global counter-terrorism effort. The UN Security Council, after recognising the newly formed GNA as the sole legitimate government in the country in December 2015, urged States to support Libyan efforts against ISIL, al-Qaeda and groups affiliated with them. This was followed by the US intervention against ISIL both based on the GNA's consent and 'in furtherance' of US's self-defence.

2.35. Saudi-led intervention in Yemen – 2015

Popular protests that started in January 2011 in Yemen against the backdrop of the so-called Arab Spring eventually resulted in the roll-out of a transition process in 2014, which, among others, envisioned a six-region federation for the country. Dissatisfied with this concept and as part of its anti-corruption and anti-old regime stance, the religious and political movement Houthis, in a 'coalition of convenience' with the forces loyal to the former President Saleh, started an armed campaign against the government. By September 2014 the movement had established control over vast territory, including the capital. In March 2015 President Hadi, having escaped from the capture by Houthis and rescinded his resignation, requested military

[388] The White House, 'Text of a Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate' (11 December 2019) <https://www.whitehouse.gov/briefings-statements/text-letter-president-speaker-house-representatives-president-pro-tempore-senate-8/>.
[389] See Chapter 3, nn 167-170 and the surrounding text. On the capacity of recognised but ineffective governments to request military assistance see Chapter 3, Section 2.6.

assistance from the GCC countries, Saudi Arabia, the United Arab Emirates, Bahrain, Qatar and Kuwait, before fleeing to Saudi Arabia.[390]

In his invitation letter Hadi called on the GCC countries 'in accordance with the right of self-defence' under article 51 of the UN Charter 'and with the Charter of the League of Arab States and the Treaty on Joint Defence, to provide … support … including military intervention, to protect Yemen … from the ongoing Houthi aggression … and help Yemen to confront Al-Qaida and' ISIL. While the letter seemed to have failed to elaborate on how Yemen could invoke the right to self-defence against Houthis, an internal actor, it mentioned that Houthis are 'being supported by regional Powers that are seeking to impose their control over the country' and 'extend their influence in the region'. Therefore, the threat not only was 'to the security of Yemen, but also to the entire region and to international peace and security'. The letter also accused 'the Houthi coup orchestrators' of aiming to dismember Yemen and undermine its security and stability.[391]

The GCC member States' letter in reply reiterated the points made in Hadi's invitation letter. In addition it accused Houthis of threatening Saudi Arabian territory. The letter also pointed out President Hadi's appeal 'for help in confronting terrorist organizations', apparently referring to al-Qaeda and ISIL named in the invitation letter. The letter consequently stated that the GCC countries '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'.[392] The unnamed foreign power accused of intervening in Yemen was known to be Iran. Indeed, on one occasion the Saudi Ministry of Defense determined '[t]he coalition's military aim [as]

[390] For a background and legal appraisal of the case, see in 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* (OUP 2018); In the same vein, see Benjamin Nußberger, 'Military Strikes in Yemen in 2015: Intervention by Invitation and Self-Defence in the Course of Yemen's 'Model Transitional Process' (2017) 4 JUFIL 110.

[391] UNSC, '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' (27 March 2015) UN Doc S/2015/217.

[392] ibid; For more similar statements by Yemen and the GCC countries, see 'Digest of State Practice 1 January–30 June 2015' (n 368) 272-4.

to stop Iran's military support for the militias'.[393] During later stages of the conflict, Yemen and Saudi Arabia also associated Houthis with terrorism.[394]

Iran consistently rejected the accusations of providing arms, training or financial support to Houthis.[395] However, the UN Panel of Experts on Yemen identified in its January 2018 report that Iranian origin military material had been brought into Yemen in breach of the UN Security Council resolution of April 2015.[396] The resolution had imposed an arms embargo against the then Houthi-Salah's alliance.[397]

The Saudi-led coalition benefited from the military support of several other countries, which included the deployment of troops.[398] The US, without 'taking direct military action in Yemen', provided the coalition with support such as logistics and intelligence. It justified its assistance 'in the context of the Coalition's military operations being undertaken in response to … Yemen's request for assistance … to protect the sovereignty, peace, and security of Yemen'.[399] In light of increasing concerns over the civilian causalities, caused by the Saudi-led coalition, the US started reviewing and scaling down the assistance it provided.[400] The White House Press Secretary stated that the US considered refocusing its 'efforts to support the Saudis when it comes to enhancing their border security and their territorial integrity'.[401]

The US also conducted missile strikes against Houthis on 12 October 2016. In a letter to the UN the US stated that the strikes were 'in response to anti-ship cruise missile launches

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[393] The Embassy of the Kingdom of Saudi Arabia, 'Saudi Ministry of Defense Daily Briefing: Operation Decisive Storm' (15 April 2015) <https://www.saudiembassy.net/press-release/saudi-ministry-defense-daily-briefing-operation-decisive-storm-4>.
[394] See, for example, UNSC, 'Letter Dated 20 January 2020 from the Permanent Representative of Yemen to the United Nations Addressed to the Secretary-General and the President of the Security Council' (20 January 2020) UN Doc S/2020/51; UNSC, 'Letter Dated 13 June 2019 from the Permanent Representative of Saudi Arabia to the United Nations Addressed to the President of the Security Council' (13 June 2019) UN Doc S/2019/489.
[395] See 'Digest of State Practice 1 January–30 June 2015' (n 368) 274; Tom Ruys and others (eds), 'Digest of State Practice 1 July–31 December 2016' (2017) 4 JUFIL 161, 188-9; Tom Ruys and others (eds), 'Digest of State Practice 1 July–31 December 2017' (2018) 5 JUFIL 145, 171; Tom Ruys, Carl Vander Maelen and Sebastiaan Van Severen (eds), 'Digest of State Practice 1 January–30 June 2018' (2018) 5 JUFIL 324, 380-3.
[396] UNSC, 'Letter Dated 26 January 2018 from the Panel of Experts on Yemen Mandated by Security Council Resolution 2342 (2017) Addressed to the President of the Security Council' (26 January 2018) UN Doc S/2018/68, 2.
[397] UNSC Res 2216 (14 April 2015) UN Doc S/RES/2216, Article 14.
[398] See 'Digest of State Practice 1 January–30 June 2015' (n 368) 275.
[399] The White House, 'Report' (n 163) 18; Also see The White House, 'Unclassified – Report' (n 221) 6.
[400] See Kristina Daugirdas and Julian Davis Mortenson (eds), 'Contemporary Practice of the United States Relating to International Law' (2017) 111 AJIL 476, 527-31.
[401] Quoted in ibid 530.

perpetrated by Houthi insurgents that threatened' US warships in the international waters. The letter also stated that

> [t]hese actions were taken with the consent of the Government of Yemen. Although the United States therefore does not believe notification pursuant to Article 51 of the Charter of the United Nations is necessary in these circumstances, the United States nevertheless wishes to inform the Council that these actions were taken consistent with international law.[402]

Thus, apparently, the US did not invoke the right of self-defence by deeming the consent of Yemen sufficient to be consistent with international law.

In a February 2015 resolution the UN deplored actions taken by the Houthis undermining the political transition process and jeopardising 'the security, stability, sovereignty and unity of Yemen'. It called 'on all member States to refrain from external interference which seeks to foment conflict and instability and instead to support the political transition'.[403] In a presidential statement issued days before the intervention, the Council reiterated these points in addition to expressing support for 'the legitimacy of the President of Yemen, Abdo Rabbo Mansour Hadi'.[404] Weeks after the intervention started, the UN Security Council adopted another resolution along similar lines. It additionally *'[n]ote[d]*' the invitation letter from Yemeni President and reply letter from the intervening States. It also demanded that Houthis 'refrain from any provocation or threats to neighbouring States' and imposed an arms embargo on the Houthi-Saleh coalition.[405] As to the reaction by the international community, there was considerable support for the intervention.[406] Iraq for its part considered that 'bringing external forces' was not right, as its position was to 'resort to … non-interference in Yemen's internal affairs'.[407]

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[402] UNSC, 'Letter Dated 15 October 2016 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council' (17 October 2016) UN Doc S/2016/869; But for the US government's initial references to self-defence, see Daugirdas and Davis Mortenson (n 400) 524-6.
[403] UNSC Res 2201 (15 February 2015) UN Doc S/RES/2201, Preamble, and Articles 1 and 9.
[404] UNSC, 'Statement by the President of the Security Council' (22 March 2015) UN Doc S/PRST/2015/8.
[405] UNSC Res 2216 (n 397) Preamble, and Articles 1 and 14.
[406] See 'Digest of State Practice 1 January–30 June 2015' (n 368) 276-7.
[407] ibid 277 quoting Iraqi foreign minister's comments.

By 2020 the Yemeni conflict, in which by now the UAE was also backing the forces affiliated with the Southern Transition Council against the government, came to a point where the external and internal actors could not be clearly separated from one another.[408]

In sum, the Saudi-led coalition's consensual intervention in Yemen took place in response to alleged Iranian support to Houthis and to address a threat to Saudi Arabia itself and the region. It separately aimed to counter the terrorist groups ISIL and al-Qaeda, although the Houthis were later also associated with terrorism by Saudi Arabia and Yemen. The US supported the coalition with assistance short of direct military action. When it directly responded to anti-ship cruise missiles by Houthis, it cited Yemeni consent and did not consider it necessary to issue a notification pursuant to article 51 of the UN Charter. Before the intervention, the UN had deplored Houthis' actions and accepted the Yemeni President's legitimacy. It later noted the invitation and reply letters concerning the intervention and imposed an arms embargo on the rebels.

2.36. Russian, Iranian and Iraqi interventions in Syria – 2015

What started as popular protests against the government in March in 2011 in Syria evolved into an armed conflict by February 2012 with the number of non-State actors ever increasing since then. Both the government and anti-government groups drew external support from States and non-State actors since the early stages of the crisis. The involvement of external non-State actors accentuated the fight along sectarian lines. The flow of foreign fighters to the country mostly benefited the extremist actors, such as ISIL and Jabhat Al-Nusra which were designated as terrorist groups by the UN Security Council. ISIL, which emerged in the country in April 2013, was exercising control over vast territory in Iraq and Syria in June 2014, when it proclaimed its version of the Islamic State.[409] In November 2015 the UN Security Council called upon member States 'to take all necessary measures, in compliance with international law … on the territory under the control of ISIL … in Syria and Iraq, to redouble and coordinate

[408] See UNSC, 'Letter Dated 27 January 2020 from the Panel of Experts on Yemen Addressed to the President of the Security Council' (27 January 2020) UN Doc S/2020/70, 6-8.
[409] See UNGA, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (5 February 2015) UN Doc A/HRC/28/69, 3-7 and 18-9.

their efforts to prevent and suppress terrorist acts committed specifically by ISIL as well as' other designated terrorist groups.[410]

President Assad of Syria revealed in an interview in March 2015 that Russia had supplied weapons to the Syrian government since the beginning of the conflict both under the deals entered into during the crisis and those sealed before it started. He also acknowledged that the deals 'went through some changes to take into account the type of fighting the Syrian army carries out against the terrorists'. In response to this interview, a Russian government spokesman said that they 'always highlighted that there have been and are no embargoes on military cooperation. There are no legal limitations' on Russia.[411] Indeed, the US also seemed to have accepted the legality of the arms sales, while criticising them on other grounds. Thus, in May 2012 the US Ambassador to the UN accepted that '[i]t is not technically obviously a violation of international law since there's not an arms embargo'. She continued to say that '[i]t's reprehensible that arms would continue to flow to a regime that is using such horrific and disproportionate force against its own people'.[412] Several other countries called for a halt to the flow of arms to both sides for reasons such as that it was hindering a political solution to the crisis and leading to human rights or humanitarian law violations.[413]

Russia's response to the criticism of supply of arms to the Syrian government in general revolved around the arguments that they did not violate any international rule with these arms contracts; they did not take sides in the internal conflict or provide arms that would give the government an advantage against the opposition; and the arms they provided were for defensive purposes in the face of external threats.[414] Also, the Russian Foreign Minister

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[410] UNSC Res 2249 (20 November 2015) UN Doc S/RES/2249, Article 5.
[411] Gabriela Baczynska and Darya Korsunskaya, 'Syria Gets Russian Arms Under Deals Signed Since Conflict Began: Assad' (*Reuters*, 30 March 2015) <https://www.reuters.com/article/us-syria-crisis-russia-arms/syria-gets-russian-arms-under-deals-signed-since-conflict-began-assad-idUSKBN0MQ0RK20150330>.
[412] Louis Charbonneau, 'U.S. Condemns Reported Russian Arms Shipment to Syria' (*Reuters*, 31 May 2012) <https://www.reuters.com/article/uk-syria-arms-russia/u-s-condemns-reported-russian-arms-shipment-to-syria-idUKBRE84U0X020120531>.
[413] See the quotations in Antonio Bultrini, 'Reapprasing the Approach of International Law to Civil Wars: Aid to Legitimate Governments or Insurgents and Conflict Minimization' (2018) 56 ACDI 144, 163-4 fns 71-2.
[414] See Gleb Bryanski, 'Russia Not Supplying Arms for Syria Civil War – Putin' (*Reuters*, 1 June 2012) <https://uk.reuters.com/article/syria-crisis-russia-germany-putin/russia-not-supplying-arms-for-syria-civil-war-putin-idINDEE8500EA20120601>; Isabel Coles, 'Russia Defends Weapons Sales to Syria, Says U.S. Arming Rebels' (*Reuters*, 13 June 2012) <https://uk.reuters.com/article/uk-russia-syria/russia-defends-weapons-sales-to-syria-says-u-s-arming-rebels-idUKBRE85C0OF20120613>; Shaimaa Fayed, 'Russia Supplying Arms to Syria Under Old Contracts: Lavrov' (*Reuters*, 5 November 2012) <https://www.reuters.com/article/us-syria-crisis-russia-arms/russia-supplying-arms-to-syria-under-old-contracts-lavrov-idUSBRE8A40DS20121105>; 'Syria

accused other countries of providing 'weapons to the Syrian opposition that can be used in fighting against the Damascus government'.[415]

Russia's support for the government extended into a direct military intervention on 30 September 2015 as announced in a letter Russia sent to the UN. The letter stated that the military assistance in the form of air and missile strikes came in response to a request from Syria 'in combating the terrorist group [ISIL] and other terrorist groups operating in Syria'. It cautioned against the extension of the crisis caused by the terrorist groups beyond Syria and noted, by making an apparent distinction between terrorist and non-terrorist groups, that Russia considered creating conditions for negotiations between the Syrian government 'and the patriotic opposition'.[416] Syria's letter to the UN, announcing the request extended to Russia, also emphasised that it was for counter-terrorism efforts. The letter also asserted that the military assistance Syria received was 'consistent with international counter-terrorism instruments and Security Council resolutions … which reaffirm the unity, sovereignty and territorial integrity of' Syria.[417]

Syria's letter also complained that Syria's calls to the international community for cooperation and coordination 'have fallen on deaf ears. Instead, some States have perverted the substance of Article 51 of the Charter of the United Nations in order to violate the sovereignty of Syria'.[418] It refers to the US-led coalition's intervention in Syria against ISIL, which started in September 2014 without seeking the consent of the Syrian government. Members of the coalition in general justified the intervention based on the right to individual or collective self-defence. Syria's ambiguous reaction to this intervention until September 2015 led to the debate about whether Syria had passively consented to the intervention until that date.[419]

Crisis: Russia 'Sends Sophisticated Weapons' (*BBC*, 17 March 2013) <https://www.bbc.co.uk/news/world-middle-east-22565405>; President of Russia, 'News Conference Following the Russia-EU Summit' (4 June 2013) <http://en.kremlin.ru/events/president/transcripts/18253>.

[415] Coles (n 414).

[416] UNSC, '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' (15 October 2015) UN Doc S/2015/792.

[417] UNGA and UNSC, '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' (16 October 2015) UN Doc A/70/429–S/2015/789.

[418] ibid.

[419] See Bannelier-Christakis (n 344) 766-73.

Iran, on the other hand, despite the reports to the contrary, denied ever having been involved in the Syrian conflict either 'by providing arms or financially or by sending troops' as expressed by the Iranian Ministry of Foreign Affairs in 2014.[420] However, during later stages of the conflict Iran accepted the presence of its 'military advisers' in the country at the invitation of the government.[421] The reported Iranian assistance, including the supply of arms, to Syria came in the face of the fact that the UN Security Council in a 2007 resolution, which mainly concerned Iran's nuclear programme, decided 'that Iran shall not supply, sell or transfer … any arms or related materiel'.[422] Surprisingly, there has been little criticism of Iranian involvement based on this resolution.[423]

Since 2017 Iraq also launched several air strikes against ISIL with the approval of the Syrian government.[424] On one occasion the Iraqi army stated that the air strikes against ISIL took place 'because of the dangers posed by said gangs to Iraqi territories'.[425]

While commending the intervention against ISIL, some third States criticised Russia for also targeting the Syrian opposition groups. Thus, in a joint statement France, Germany, Qatar, Saudi Arabia, Turkey, the UK and the US called Russia 'to immediately cease its attacks on the Syrian opposition and civilians and to focus its efforts on fighting ISIL'.[426] Similar

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[420] See Tom Ruys and Nele Verlinden (eds), 'Digest of State Practice 1 January-30 June 2014' (2014) 1 JUFIL 323, 351.

[421] See 'Iran Says to Maintain Military Presence in Syria Despite U.S. Pressure' (*Reuters*, 28 August 2018) <https://www.reuters.com/article/us-mideast-crisis-syria-iran/iran-says-to-maintain-military-presence-in-syria-despite-u-s-pressure-idUSKCN1LD1JQ>; 'Four Iran Army Special Forces Troops Killed in Syria: Agency' (*Reuters*, 11 April 2016) <https://www.reuters.com/article/us-mideast-crisis-syria-iran/four-iran-army-special-forces-troops-killed-in-syria-agency-idUSKCN0X81IR>.

[422] UNSC Res 1747 (24 March 2007) UN Doc S/RES/1747, Article 5; On the follow-up on this blanket arms embargo, which was effectively amended in October 2015, see SIPRI, 'UN Arms Embargo on Iran' <https://www.sipri.org/databases/embargoes/un_arms_embargoes/iran>.

[423] See Bultrini (n 412) 165-6 and fn 77.

[424] 'Iraq Bombs Meeting of Islamic State Leaders in Syria – Military' (*Reuters*, 23 June 2018) <https://uk.reuters.com/article/uk-mideast-crisis-syria-iraq/iraq-bombs-meeting-of-islamic-state-leaders-in-syria-military-idUKKBN1JJ0F9>.

[425] Karzan Sulaivany, 'Iraq Announces Killing of 36 IS Members in Syria Airstrikes' (*Kurdistan24*, 22 April 2018) <https://www.kurdistan24.net/en/news/2e49d0cf-6a48-4517-a583-eed1d1d64c10>.

[426] UK Foreign and Commonwealth Office, 'Press release: Joint Declaration on Recent Military Actions of the Russian Federation in Syria' (2 October 2015) <https://www.gov.uk/government/news/joint-declaration-on-recent-military-actions-of-the-russian-federation-in-syria>.

statements came from the EU Council,[427] NATO[428] and several Western countries individually.[429]

Perhaps the strongest and most critical stance against the foreign intervention against the 'Syrian moderate opposition' came from the UN General Assembly in its resolutions concerning the situation of human rights in Syria.[430] The resolution adopted on 23 December 2015 with 104 States voting in favour and 13 against, for example, in paragraph 14 '*Strongly condemn[ed]* the intervention in the Syrian Arab Republic of all foreign terrorist fighters and those foreign organizations and foreign forces fighting on behalf of the Syrian regime'.[431] The paragraph also counted the names of the particularly relevant organisations and forces.[432] The resolution, in paragraph 15, '*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 (Daesh) and other terrorist groups, such as Al-Nusrah Front, and contribute to a further deterioration of the humanitarian situation'.[433]

During the debates on the adoption of this resolution, the Iranian representative found the fact that paragraph 14 enumerated the names of the parts of the armed forces of Iran 'particularly abhorrent'. She stated that these forces were 'deployed in Syria on an exclusively advisory basis at the formal invitation of the Government to support its legitimate fight against the terrorist onslaught in Syria'. She also contended that the paragraph 'denies the right of Member States to establish peace and order on their territory, including by requesting assistance'.[434]

Russia, for its part, maintained that it only targeted terrorist groups, while the international community could not come to an agreement on the exact number and identity of those groups.

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[427] Council of the European Union, 'Council Conclusions on Syria' (12 October 2015) para 10 <https://www.consilium.europa.eu/en/press/press-releases/2015/10/12/fac-conclusions-syria/>.
[428] NATO, 'Statement by the North Atlantic Council on Incursions Into Turkey's Airspace by Russian Aircraft' (5 October 2015) <https://www.nato.int/cps/en/natohq/news_123392.htm>.
[429] For these statements, see Tom Ruys, Luca Ferro and Nele Verlinden (eds) 'Digest of State Practice 1 July–31 December 2015' (2015) 3 JUFIL 126, 154 and fn 226.
[430] See UNGA Res 70/234 (9 March 2016) UN Doc A/RES/70/234; UNGA Res 71/203 (1 February 2017) UN Doc A/RES/71/203; UNGA Res 72/191 (23 January 2018) UN Doc A/RES/72/191; UNGA Res 73/182 (24 January 2019) UN Doc A/RES/73/182; UNGA Res 74/169 (23 January 2020) UN Doc A/RES/74/169
[431] UNGA Res 70/234 (n 430) Paragraph 14.
[432] ibid.
[433] ibid Paragraph 15.
[434] UNGA Verbatim Record (23 December 2015) UN Doc A/70/PV.82, 7.

Further exhibiting its point, Russia expressed its readiness to cooperate with the Syrian opposition and claimed to have worked with it in combating terrorism.[435]

In sum, Russia initially sold arms to the Syrian government. It defended selling arms based on, among others, the arguments that international law does not prohibit the trade of arms between States, that it does not take sides in the conflict or provide arms to be used against the opposition and that it provides defensive weapons to be used against external aggression. The purpose of its 2015 direct military intervention was to combat terrorism. Many States cautioned against an intervention aimed at the opposition rather than terrorists. While Russia argued that they made a distinction between terrorists and the opposition, the international community could not reach consensus on which groups were terrorists and which were not. Although Iran was blamed for militarily supporting the Syrian government including through the provision of arms, at a later stage it only accepted the presence of its 'military advisers', which were in country at the invitation of the Syrian government in order to fight terrorism. Iraq also intervened based on the Syrian consent against ISIL, which it considered to have constituted a threat against the security of Iraq. In early stage of the Russian intervention, the UN Security Council called for action against ISIL and other terrorist groups, on which it had imposed sanctions.

2.37. SADC intervention in Lesotho – 2017

The SADC again deployed troops to Lesotho at its request[436] in 2017 when the assassination of a military commander in the country led to a breakdown of the rule of law. The purpose of the deployment was to collaborate with the democratically elected government in creating a secure and stable environment necessary for the implementation of the political and judicial reforms.[437]

2.38. French intervention in Chad against the Union of Resistance Forces – 2019

[435] See Bannelier-Christakis (n 344) 764-6.
[436] For the 1998 intervention, see Section 2.7 above.
[437] See Erika de Wet, *Military Assistance on Request and the Use of Force* (OUP 2020) 85.

France again provided military assistance to the Chadian government[438] in February 2019 with air strikes when the Chadian rebel group Union of Resistance Forces, founded in 2009 with the alliance of eight rebel groups, crossed into to the Chadian territory from Libya. The French Ministry of Armed Forces stated that the action was taken separately from the Operation Barkhane, a counter-terrorism mission in the region. The French Minister of the Armed Forces responded to accusations of violations of international law as that 'as far as law is concerned, this intervention was made in response to a formal request for help from a sovereign country'.[439] The French Ministry of Armed Forces stated that the intervention was 'to counter the incursion of an armed column into Chadian territory' and that the raid by the rebels was 'likely to destabilise the country'. The rebels' spokesperson, on the other hand, considered the intervention a 'dangerous turn' by France in Chad's 'internal affairs'.[440]

In sum, French assistance to the Chadian government came to counter an incursion from Libya by a Chadian armed group into the Chadian territory.

2.39. Turkish intervention in Libya against the LNA – 2020

With the overthrow of the Gaddafi government as a result of popular protests that evolved into an armed uprising in 2011, Libya was embroiled in a political conflict accompanied by armed violence over governmental power.[441] On 17 December 2015 key political players, with the participation of armed groups and representatives from throughout the country, signed the Libyan Political Agreement providing the formation of a Government of National Accord (GNA).[442] The UN Security Council welcomed the signing of the agreement forming the GNA 'supported by the other institutions of state including the House of Representatives', endorsed the GNA 'as the sole legitimate government of Libya' and '*call[ed] upon* Member States to cease support to and official contact with parallel institutions that claim to be the legitimate authority but are outside of the Agreement'. It moreover '*urge[d]* Member States to swiftly

[438] For previous interventions, see Sections 2.16 and 2.22 above.
[439] 'Chad President Deby Says Rebel Convoy 'Destroyed' By 3 Days of French Airstrikes' (*The Defense Post*, 7 February 2019) <https://thedefensepost.com/2019/02/07/france-airstrikes-chad-mirage-2000-rebel-convoy/>.; On Operation Barkhane, see Section 2.29.1 above.
[440] Fergus Kelly, 'French Mirage 2000 Jets again Strike Vehicles in Northern Chad' (*The Defense Post*, 6 February 2019) <https://www.thedefensepost.com/2019/02/06/france-airstrikes-chad-20-vehicles-libya/>.
[441] UCDP, 'Libya: Government' <https://ucdp.uu.se/conflict/11346>.
[442] Libyan Political Agreement (signed 17 December 2015) <https://unsmil.unmissions.org/sites/default/files/Libyan%20Political%20Agreement%20-%20ENG%20.pdf>.

assist the [GNA] in responding to threats to Libyan security and to actively support the new government in defeating ISIL' and all other entities associated with al-Qaeda, 'upon its request'.[443]

The signing of the Libyan Political Agreement, however, did not end the conflict in the country. Despite initially endorsing the Agreement in principle on 25 January 2016, the House of Representatives later failed to ratify the ministerial list for the GNA and instead opted to form its own rival government.[444] It was elected in June 2014 and stipulated to be the legislative authority of the State in the Agreement.[445] The rivalry between the House of Representatives and the GNA, both of which were engaging in the fight against other groups such as ISIL during 2016, led to armed clashes in 2017, with the GNA being unable to assert real control outside the capital Tripoli.[446] The hostilities between the two were again triggered in April 2019 when the Libyan National Army (LNA), the House of Representatives' major militia,[447] launched an offensive to capture the capital from the GNA.[448]

Against the backdrop of this development, on 27 November 2019 the GNA and Turkish government signed a memorandum of understanding on security cooperation. Among others it laid out the legal framework for the 'provision of training, consultancy, experience transfer, planning and material support by Turkey'.[449]

On 2 January 2020 the Turkish Parliament approved a Bill that allowed the deployment of Turkish troops to Libya and outlined the deliberations in light of which the decision had been taken. According to the Bill, the GNA is internationally recognised and the only and legitimate government of Libya in accordance with UN Security Council Resolution 2259 (2015). The Resolution calls on member States to cease support to the parallel institutions outside the framework of the UN-facilitated Libyan Political Agreement, while urging them to support the

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[443] UNSC Res 2259 (23 December 2015) UN Doc S/RES/2259, Articles 1, 3, 5 and 12.
[444] UCDP, 'Libya: Government' (n 441).
[445] Libyan Political Agreement (n 442) Article 12.
[446] UCDP, 'Libya: Government' (n 441).
[447] On the relationship between the two, see UCDP, 'Forces of House of Representatives' <https://ucdp.uu.se/actor/5802>.
[448] UNSC, 'United Nations Support Mission in Libya – Report of the Secretary-General' (15 January 2020) UN Doc S/2020/41, para 2.
[449] Memorandum of Understanding Between the Government of the Republic of Turkey and the Government of National Accord-State of Libya on Security and Military Cooperation (signed 27 November 2019), Article 4 <https://www.resmigazete.gov.tr/eskiler/2019/12/20191226-3.pdf>.

GNA and other institutions referred to in the Agreement. Despite the efforts of political conciliation, the LNA, which bears an illegitimate characteristic for being outside the Libyan Political Agreement, continues its attacks with the support of foreign powers. The attacks by the LNA worsen the humanitarian situation while the hostilities benefit the terror groups ISIL and al-Qaeda. The LNA constitutes a threat to the region and Turkish companies and citizens, and other Turkish interests in Libya. The GNA requested military assistance in the fight against threats to the region, threats to the unity and stability of Libya, terrorist groups, illegal armed groups, illegal migration and human trafficking. Turkish troops will be deployed in response to the GNA's request based on these considerations and within the framework of international law. The aim of the deployment is to eliminate the threat against Turkish interests emanating from illegitimate armed groups and terrorist organisations, to provide security in the face of risks such as mass migration, and to deliver humanitarian aid, among others.[450]

On 6 January 2020 the Turkish President announced the beginning of the deployment of troops. He said that Turkey was not sending its own combat forces and that 'different teams' were undertaking coordination tasks and were providing training to the Libyan forces. The purpose of the intervention is 'not to fight' but 'support the legitimate government and avoid a humanitarian tragedy'.[451] Turkey, however, did not rule out more direct involvement in the conflict. The President had earlier said that they 'will evaluate all kinds of military support including ground, marine and air options if necessary'. He also accused foreign countries of 'supporting an illegal warlord, who is the pawn of certain nations, instead of the UN-recognised government'.[452] He accused Russia of sending mercenaries to Libya without the approval of the GNA and said that Turkey would not remain silent over this, while also accusing Sudan of sending troops to the country. He said the difference was that '[t]hey are all helping a war baron, whereas we are accepting an invitation from the legitimate government'.[453]

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[450] The Grand National Assembly of Turkey (02 January 2020) Bill No: 1238, Produced in Resmî Gazete (3 January 2020) Issue: 30997 (In Turkish) <https://www.resmigazete.gov.tr/eskiler/2020/01/20200103-15.pdf>.

[451] 'Turkey Begins Deploying Troops to Libya, Says Erdogan' (*DW*, 5 January 2020) <https://p.dw.com/p/3Vk7K>.

[452] 'Erdogan: Turkey will Increase Military Support to GNA if Needed' (*Al Jazeera*, 22 December 2019) <https://www.aljazeera.com/news/2019/12/haftar-forces-seize-ship-libya-coast-turkish-crew-191222105449299.html>.

[453] 'Turkey to Send Troops To Libya Amid Warnings From Russia' (*RFE/RL*, 27 December 2019) <https://www.rferl.org/a/erdogan-turkish-troops-libya-russia-opposition/30346782.html>.

There has been considerable criticism from some States (Egypt;[454] Saudi Arabia;[455] Greece, Cyprus and Israel in a joint statement;[456] Cyprus, Egypt, France, Greece and the United Arab Emirates in a joint statement;[457] the League of Arab States in general, without naming Turkey;[458] and France, Germany, Italy and the UK in a joint statement in general, without naming Turkey[459]) against the Turkish intervention. The criticism mainly revolved around the arguments that the intervention violated the arms embargo imposed by the UN Security Council;[460] was not consistent with the Libyan Political Agreement, for example, it was not endorsed by the House of Representatives;[461] constituted an unlawful interference in Libya's internal affairs; implicated or violated Libya's sovereignty and independence; and escalated the crisis.

To reflect the context of the criticism, it is apt to note that among the countries that criticised the Turkish intervention, Greece, Cyprus, Israel and Egypt had already been critical of Turkey for signing with Libya a memorandum of understanding on maritime boundaries, which was in contradiction of their interests in the Mediterranean Sea.[462] Also, some of the criticising States were publicly known for militarily, financially or politically backing the LNA against the GNA.[463]

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[454] UNGA, 'Note Verbale Dated 23 December 2019 from the Permanent Mission of Egypt to the United Nations Addressed to the Secretary-General' (24 December 2019) UN Doc A/74/628.

[455] 'No Deal: Libya's Parliament Votes Against Turkish Involvement' (*Al Jazeera*, 4 January 2020) <https://www.aljazeera.com/news/2020/01/deal-libya-parliament-votes-turkish-involvement-200104145706382.html>.

[456] 'Mitsotakis, Anastasiades and Netanyahu: The Turkish Decision to Deploy Troops in Libya Presents a Dangerous Threat to Regional Stability' (*ANA-MPA*, 3 January 2020) <https://www.amna.gr/en/article/419459/Mitsotakis--Anastasiades-and-Netanyahu-The-Turkish-decision-to-deploy-troops-in-Libya-presents-a-dangerous-threat-to-regional-stability>.

[457] Greek Ministry of Foreign Affairs, 'Joint Declaration adopted by the Ministers of Foreign Affairs of Cyprus, Egypt, France, Greece and the United Arab Emirates' (11 May 2020) paras 6 and 7 <https://www.mfa.gr/en/current-affairs/statements-speeches/joint-declaration-adopted-by-the-ministers-of-foreign-affairs-of-cyprus-egypt-france-greece-and-the-united-arab-emirates-11052020.html>.

[458] UNGA and UNSC, 'Identical Letters Dated 13 January 2020 from the Permanent Representative of Iraq to the United Nations Addressed to the Secretary-General and the President of the Security Council' (17 January 2020) UN Doc A/74/650–S/2020/84, Articles 4 and 5.

[459] French Ministry for Europe and Foreign Affairs, 'Joint Statement by the High Representative of the European Union for Common Foreign and Security Policy and the Ministers of Foreign Affairs of France, Germany, Italy and the United Kingdom' (7 January 2020) <https://www.diplomatie.gouv.fr/en/country-files/libya/news/2020/article/libya-joint-statement-by-the-high-representative-of-the-european-union-for>.

[460] See UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970, Article 9 imposing arms embargo on Libya.

[461] This point is made in Egypt's criticism. See n 454.

[462] See, for example, 'Turkish Navy Orders Israeli Ship out of Cyprus's Waters' (*Al Jazeera*, 15 December 2019) <https://www.aljazeera.com/news/2019/12/turkish-navy-deports-israeli-ship-cyprus-territorial-waters-191215062253581.html>.

[463] See Ramy Allahoum, 'Libya's War: Who is Supporting Whom' (*Al Jazeera*, 9 January 2020) <https://www.aljazeera.com/news/2020/01/libya-war-supporting-200104110325735.html>.

In response to the criticism of the League of Arab States which, among others, pointed out the breach of the UN arms embargo by Turkey, the Turkish Foreign Ministry, in a statement stated that 'the letter and spirit of the UN Security Council Resolution 2259, primarily, intend to support and strengthen the' GNA. 'On the other hand, contrary to the Libyan Political Agreement and UNSC Resolution 2259, it is obvious that the Arab League has remained silent and failed to decisively support international legitimacy against the months-long, foreign supported military offensive' by the LNA.[464] Thus, despite not directly answering the criticism of the fact that its intervention was in breach of the UN arms embargo, Turkey seemed to have read relevant UN Security Council resolutions calling for foreign support to the GNA allowing it to provide military support to the GNA despite the embargo. This seems to be the case also based on the above-mentioned Bill authorising the deployment of Turkish troops.

The GNA, for its part, confirmed its commitment to the UN Security Council resolutions, including the arms embargo. However, it complained about foreign support to 'the aggression' by the Haftar-led LNA in violation of the embargo and reiterated its right as the recognised and legitimate government 'to defend the sovereignty and territory of Libya and protect the country's citizens by entering … into openly declared alliances, in accordance with international law and through legitimate and transparent channels'.[465] Its delegation in a UN Security Council meeting stated that 'many States have violated' the embargo 'and supplied the aggressor forces attacking the city of Tripoli with sophisticated weapons … even some States do not possess … The actions that the [GNA] is taking to confront this aggression are an obligation in line with the natural right of every Government to defend its people.'[466] Thus, for Libya the UN arms embargo did not mean that it must refrain from procuring foreign military assistance when Libya was subjected to a foreign intervention in violation of the embargo and international norms; in such a situation, it can defend itself with the help of other States in the exercise of its right to sovereignty.

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[464] Turkish Ministry of Foreign Affairs, 'Statement of the Spokesperson of the Ministry of Foreign Affairs, Mr. Hami Aksoy, in Response to a Question Regarding the Extraordinary Session of the League of Arab States on Libya at the Level of Permanent Representatives' (31 December 2019) <http://www.mfa.gov.tr/sc_-83_-arap-ligi-konseyi-nin-libya-konulu-toplantisi-hk-sc.en.mfa>; Similarly see, UNSC, 'Letter dated 23 March 2020 from the Permanent Representative of Turkey to the United Nations addressed to the President of the Security Council' (24 March 2020) UN Doc S/2020/227.

[465] UNSC, 'Letter dated 1 April 2020 from the Permanent Representative of Libya to the United Nations addressed to the President of the Security Council' (2 April 2020) UN Doc S/2020/269.

[466] UNSC Verbatim Record (18 November 2019) UN Doc S/PV.8667, 14.

The external interference in the country was so pervasive that the UN envoy to Libya in May 2019 described the situation as 'a textbook example of foreign interference today in local conflicts' with the between 'six and 10 countries are permanently interfering in Libya's problem' by funnelling arms, cash and military advice to the country.[467] The UN Panel of Experts on Libya, in addition to other violations of the UN sanctions measures for Libya, found that the majority of arms transfers to the opposition came from Jordan and the United Arab Emirates.[468] Its report states that it was '[i]n response to' these 'illicit transfers' that the 'GNA approached Turkey' and received military material from it in violation of the arms embargo.[469] The Panel also found that there had been Chadian and Sudanese armed groups in the country in support of both sides alike.[470]

Seeking a political solution to the crisis, in the Berlin Conference on Libya held on 19 January 2020, 12 countries interested in the conflict, including Turkey, and the international organisations UN, AU, EU and the League of Arab States, admitting that 'the external interferences … continue to be a threat to international peace and security', 'commit[ted] to refraining from interference in the armed conflict or in the internal affairs of Libya'. The participants, welcoming the ceasefire between the parties to the conflict in Libya, also committed to respect and implement the arms embargo established by the UN Security Council.[471] However, the conflict in the country continued to wage with external interference on both sides.

In sum, Turkey's intervention in support of the Libyan GNA came in response to a prior foreign intervention on the side of the LNA, to address the threats to the region and Turkish interests in Libya, to prevent a humanitarian crisis, to maintain the unity and stability of Libya, to fight terrorist and illegal armed groups, and to prevent illegal migration and human trafficking.

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[467] 'UN Envoy: 'Libya a Textbook Example of Foreign Intervention'' (*Al Jazeera*, 23 May 2019) <https://www.aljazeera.com/news/2019/05/envoy-libya-textbook-foreign-intervention-190523164926246.html>.
[468] UNSC, 'Letter Dated 29 November 2019 from the Panel of Experts on Libya Established Pursuant to Resolution 1973 (2011) addressed to the President of the Security Council' (9 December 2019) UN Doc S/2019/914, para 61.
[469] ibid para 62.
[470] ibid 2.
[471] Annex to UNSC, 'Letter Dated 22 January 2020 from the Permanent Representative of Germany to the United Nations Addressed to the President of the Security Council' (22 January 2020) UN Doc S/2020/63, Conclusions 4, 6, 9 and 18.

Turkey claimed that its intervention was in line with the UN Security Council resolutions, which recognised the GNA as the legitimate government and urged for assistance to it to respond to threats to Libyan security, while also imposing an arms embargo on the country. Some States criticised the intervention for violating the embargo, being in contravention of the Libyan Political Agreement signed by the parties to the internal conflict and being an unlawful intervention in Libya's internal affairs that implicated the country's sovereignty and independence. The GNA claimed that it could request military assistance despite the embargo to defend Libya in the exercise of its right to sovereignty and independence when it is subjected to a foreign intervention in violation of the embargo. States interested in the conflict, including Turkey, later committed to refraining from interfering on either side. The conflict, however, continued to wage with external interference on both sides.

3. Legal statements by Canada, the UK, France, the DRC and the US

In addition to the State conduct concerning the individual cases reported above, States' stance on the matter could be ascertained from the general declarations directly addressing the legality of consensual interventions in civil wars, which few States made on occasion. For example, the Legal Bureau at Canada's Department of External Affairs in a memorandum of 1 December 1983 wrote that

> when two rival factions are competing over control, neither of which has established effective control over the territory or over a substantial part of it … acceptance of a request to intervene by one of the factions might well constitute an intervention in the domestic affairs of the state, and in some cases be inconsistent with the principle of self-determination. Thus, the legality of intervention in this situation is, to say the least, doubtful.[472]

Similarly, a UK Foreign Policy Document of 1986, highly cited in the literature, states that

> any 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

[472] L H Legault, 'Canadian Practice in International Law During 1983: At the Department of External Affairs' (1984) 22 ACDI 321, 334.

> 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.[473]

France's position on the issue was outlined by its President in a meeting with the African Heads of State and Government in 1990. Although the statement does not specifically refer to a prohibition, the way in which the argument is constructed, and the concepts referred to, demonstrate legal relevance. It described France's role in relation to African States as being that France would assist whenever their independence is externally threatened but not to intervene in their internal conflicts. France would intervene with the agreement of their leaders to protect France's nationals, but not to arbiter internal conflicts.[474]

The DRC's position on the issue was repeatedly revealed both in written and oral proceedings in *DRC v Uganda* of 2005 by its government. It claimed that Uganda's military and paramilitary activities against the DRC violated certain principles of conventional and customary law which included 'the principle of non-interference in matters within the domestic jurisdiction of States, which includes refraining from extending any assistance to the parties to a civil war operating on the territory of another State'.[475]

Thus, with respect to the nature of the prohibited aid, the statements by the UK and the DRC are surprisingly general (respectively, 'any form of interference or assistance' and 'any assistance'). They thus imply a prohibition not only on direct military interventions but also the provision of arms, intelligence, logistics or financial aid that may impact the outcome of a civil war in favour of one side. Another noteworthy point is seen in the statements by Canada and the UK. The prohibition of intervention in internal conflicts these statements refer to particularly hinges on a breakdown in the territorial control in the State beset by the conflict. Otherwise, all of these four statements favour a rule of international law that in principle prohibits foreign military assistance to parties to a civil war. This position finds resonance in statements made by the delegates from various States during the preparatory works of the UN General Assembly resolutions on non-intervention, mentioned in chapter 4.

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[473] Geoffrey Marston (ed), 'United Kingdom Materials in International Law 1986' (1986) 57 BYIL 487, 616.
[474] Karine Bannelier and Theodore Christakis, 'Under the UN Security Council's Watchful Eyes: Military Intervention by Invitation in the Malian Conflict' (2013) 26 LJIL 855, 863-4 quoting the statement in French.
[475] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment [2005] ICJ Rep 168, paras 24 and 25.

Nonetheless, the opposite position is also taken among States. Thus, the US Law of War Manual of 2016, in relation to non-international armed conflicts, without any further elaboration, states that '[i]nternational law does not prohibit States from assisting other States in their armed conflicts against non-State armed groups'.[476] However, the US position, as understood from another US government document, also accepts the challenge the non-international armed conflicts bring about for consensual interventions. Thus, a 2016 White House report on the US's use of force policy states:

> The concept of consent can pose challenges in certain countries where governments are rapidly changing, have lost control of significant parts of their territory, or have shown no desire to address the threat. Thus, it sometimes can be a complex matter to identify the appropriate person or entity from whom consent should be sought and the form such consent should take. The US Government carefully considers these issues when examining the question of consent.[477]

The report in general seems to admit that the legality of consensual interventions in civil wars, or in the words of the report, consensual interventions in States 'where governments are rapidly changing, have lost control of significant parts of their territory', proves problematic. However, the problem essentially seems to relate the uncertainty surrounding the identification of the right authority to consent rather than whether a general avoidance to influence civil wars are required or not due, for example, to the principles of political independence of States and self-determination of peoples. The report in any event seems to be complementing the general position expressed in the Law of War Manual by articulating the possible legal challenges facing consensual interventions in non-international armed conflicts.

4. Conclusion

In an extensive account of the post-Cold War State practice with around 40 cases, this chapter showed that direct military intervention in internal conflicts with the consent of the government of the concerned State is a prevalent practice in modern times.

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[476] US Department of Defence, *Law of War Manual* (June 2015, Updated December 2016) 1068.
[477] The White House, 'Report' (n 163) 11.

The chapter also showed that this practice seems to have been characterised with subtlety. Hardly any of the cases have been presented by States as simple as assisting a beleaguered government at its request to crush a popular opposition. Intervening States usually put forward claims such as intervening to counter terrorism, to address a threat to their national security or the region, to maintain law and order, to prevent a humanitarian crisis, to protect vital infrastructure or to rescue foreign nationals. Occasionally, intervening States explicitly claimed not taking sides in the internal conflict or denied charges of being drawn into the conflict. At times States refused an invitation to intervene because, among others, it would be an interference in the internal affairs of the inviting State. Though rare, there has also been criticism from third States that the intervention in question has prevented the people to determine their own future or interfered in the inviting State's internal affairs and implicated its independence.

The chapter also reviewed general legal statements by some States that overwhelmingly find consensual military interventions in civil wars problematic.

The next chapter analyses under customary international law the State practice reported in this chapter.

Chapter 7: Analysis of State practice

1. Introduction

As the previous chapter demonstrated, when a consensual military intervention in an internal conflict takes place, the involved States usually associate consent with certain objectives such as countering terrorism, addressing a security threat going beyond the territorial State, countering a prior intervention, maintaining law and order or preventing a humanitarian crisis. Occasionally, intervening States claimed not having taken sides in the internal conflict. At times States refused an invitation to intervene, and some interventions drew criticism from third States. General legal statements by some States found consensual military interventions in civil wars problematic. The evaluation of this nuanced State conduct, especially the ascertainment of *opinio juris* therefrom, requires a thorough analysis.

Section 2 of this chapter examines how the literature assessed the relevant State practice. Section 3 assesses the practice and examines various subsidiary issues arising therefrom. These include the concept of terrorism being a legal concept distinct from ordinary armed rebellions and its relevance to interventions by invitation; counter-intervention; the invocation by the intervening State of both consent and its right to individual self-defence; foreign assistance short of direct military intervention such as the supply of arms; the impact of the UN Security Council's arms embargoes on intervention by invitation; the UN Security Council's endorsement of an intervention by invitation; and the impact of the violations of human rights or humanitarian law by the inviting State.

2. Analysis of State practice in literature

In the scholarship, in the course of time since the adoption of the UN Charter, there has been wide support or sympathy based on State practice, though with certain variations, for the understanding that military interventions aimed at influencing the outcome of a purely internal conflict or civil war, be it in favour of the recognised incumbent government, are problematic.[1]

[1] Ann Van Wynen Thomas and A J Thomas, *Non-Intervention: The Law and Its Impact in the Americas* (Sothern Methodist University Press 1956) 215-40; Ian Brownlie, *International law and the Use of Force by States* (OUP

The debate among these authors usually revolves around the legality of direct military interventions. They do not in practice see an impediment to the provision of assistance short of direct military intervention, such as arms, advice or logistics, to governments even in times of civil war.[2]

To exemplify this position from a prominent study that examined the issue against the backdrop of an extensive account of Cold-War era practice, Doswald-Beck finds that there is 'substantial evidence to support a theory that the intervention to prop up a beleaguered government is illegal'. The evidence she mentions consists, among others, of the consistent practice indicating the need for the intervening States to argue the existence of significant outside support for the rebels in order for the intervening States not to be seen involving in a purely internal strife. The evidence also includes a number of statements made by States in relation to individual cases emphasising the independence of States, self-determination of peoples and non-intervention in the internal affairs of States.[3]

In a more recent study, Nolte approaches the issue in a more subtle way. He finds that the practice indicates that intervening States relied on the consent of governments not only in cases where there was outside support for the insurgents but also in 'purely internal conflicts', which could range from low-intensity conflicts to full-scale civil wars.[4] To be more precise, practice

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1963) finding practice diverse and contradictory.; Rosalyn Higgins, 'International Law and Civil Conflict' in Evan Luard (ed), *The International Regulation of Civil Wars* (New York University Press 1972) 169-184 seeing the law as playing a small role in regulating the issue and reaching an elaborate conclusion based on practice.; Oscar Schachter, 'The Right of States to Use Armed Force' (1984) 82 MichLRev 1620, 1641; Louise Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government' (1986) 56 BYIL 189; Antonio Tanca, *Foreign Armed Intervention in Internal Conflict* (Martinus Nijhoff Publishers 1993); Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (Volume 1, 9th edn, Longman 1996) 437-8; Pater Malanczuk, *Akehurst's Modern Introduction to International Law* (First published in 1970, 7th revised edn, Routledge 1997) 325-6; Georg Nolte, *Eingreifen auf Einladung* (With an English Summary, Springer 1999); Georg Nolte, 'Intervention by Invitation', *Max Planck Encyclopedia of Public International Law* (Last updated January 2010) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1702?prd=EPIL>;
Olivier Corten, *The Law Against War* (Translated by Christopher Sutcliffe, Hart Publishing 2010) Ch 5; Karine Bannelier and Theodore Christakis, 'Under the UN Security Council's Watchful Eyes: Military Intervention by Invitation in the Malian Conflict' (2013) 26 LJIL 855, 864, fn 46 citing their 2004 study in French; Tom Ruys and Luca Ferro, 'Weathering the Storm: Legality and Legal Implications of the Saudi-led Military Intervention in Yemen' (2016) 65 ICLQ 61, 88-9; Karine Bannelier-Christakis, 'Military Interventions against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent' (2016) 29 LJIL 743; Christine Gray, *International Law and the Use of Force* (4th edn, OUP 2018) 84-119 accounting and acknowledging the controversy surrounding practice.; Quoc Tan Trung Nguyen, 'Rethinking the Legality of Intervention by Invitation: Toward Neutrality' (2019) 24 JC&SL 201.

[2] See, for example, Doswald-Beck (n 1) 251; Corten, *The Law Against War* (n 1) 296.

[3] Doswald-Beck (n 1) 213 and 251.

[4] Nolte, 'Intervention by Invitation' (n 1) para 11; Also see Nolte, *Eingreifen auf Einladung* (n 1).

demonstrates that States at the invitation of a government may intervene to protect the property of foreigners, vital installations or transport routes; fight secessionist groups; or reverse military coups against democratically elected governments. However, it is less clear 'whether foreign troops may be invited to directly influence a classical and full-scale civil war'. Interventions by invitation 'seem to be permissible as long as the extent of the foreign military support does not exceed the dimension of an auxiliary enterprise'.[5] Nolte also notes that in practice interventions 'against popular uprisings or conflicts about who controls the central government have provoked resistance'.[6] Interventions by invitation, thus, though in principle permissible, are 'subject to more nuanced rules'.[7]

In a similar vein, Corten finds that the purpose of the intervention is of consequence and that the consent 'even by an uncontested government' does not justify 'to settle the internal conflict in favour of the authorities'.[8] The will of States in practice rather is limited to other goals such as maintaining law and order (often accompanied by an effort to downplay the level of the conflict in question); peacekeeping; responding to outside interference; or defending the security of the intervening State or protecting its nationals.[9] This purpose-based approach particularly finds resonance in the works of Bannelier-Christakis and Christakis, who importantly add to the mentioned objectives the fight against terrorism.[10]

Another group of authors, on the other hand, read State practice altogether differently. They reach the conclusion that as long as the requirements for the validity of consent are met, whatever the scale of the internal conflict in which it is involved, international law does not prohibit any kind of foreign military assistance to a rightful government.[11] They thus either do

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[5] ibid para 20.
[6] ibid para 12.
[7] ibid para 27.
[8] Corten, *The Law Against War* (n 1) 309.
[9] See ibid 291-310.
[10] See Bannelier-Christakis (n 1) 745-7 and fn 6 for the sources showing the origin of the view.; Bannelier and Christakis (n 1) 864-7, fn 46 citing their 2004 study in French for the origin of their view.
[11] Christopher J Le Mon, 'Unilateral Intervention by Invitation in Civil Wars: The Effective Control Test Tested' (2003) 35 NYUJIntlL&Pol 741; Yoram Dinstein, *Non-International Armed Conflicts in International Law* (CUP 2014) 78-9; Gregory H Fox, 'Intervention by Invitation' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 828-9; 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) <https://www.ejiltalk.org/the-airstrikes-against-islamic-state-in-iraq-and-the-alleged-prohibition-on-military-assistance-to-governments-in-civil-wars/>; Pietro Pustorino, 'The Principle of Non-Intervention in Recent Non-International Armed Conflicts' 53 (2018) QuestIntlL 17, 20-1; ILA, 'Final Report on

not view that general State practice indicates an avoidance from influencing the outcome of internal conflicts or that this avoidance is relevant for legal purposes. After all, State practice undertaken with extra-legal motives, 'such as comity, political expediency or convenience' cannot lead to the identification of a rule of customary law.[12]

Akande and Vermeer point out that statements by the States using of force against ISIL in Iraq generally recognise the legality of consensual interventions and lack reference to a presumed prohibition on military intervention in civil wars. They argue that this practice contradicts the claim that such a prohibition exists in contemporary international law. The claimed 'exceptions' to such a general prohibition, such as countering terrorism, States allude to in their statements, rather 'refer more to the *motivations or reasons* for which states provide military assistance to other states, as opposed to the *legal justification* for intervention'. Being policy reasons, they do not equate to *opinio juris* to constitute a rule of customary law.[13]

Similarly, against the backdrop of a broad account of post-Cold War practice, De Wet argues that States neither explicitly refer in their relevant statements to the right to self-determination or any prohibition on intervention in civil wars, nor do third States criticise such interventions based on the right to self-determination which, being *erga omnes*, affects all States' legal interests. Considering that even inaction by States with regard to instances affecting their legal interests can amount to *opinio juris*, the silence of these States in the face of such prevalent and publicised practice of intervention by invitation in civil wars indicates that no such prohibition on intervention in civil wars exists in general international law. As to the 'purposive rhetoric' by States that put the interventions by invitation into the context of counter-terrorism or counter-intervention, it 'is merely of political relevance'. In light of the fact that *opinio juris* could be implied or inferred from the context, De Wet claims that statements by States, where this rhetoric is used, actually tend to recognise in broad terms the governments' right to request military assistance. Moreover, she claims that this submission is strengthened by the fact that States hardly express criticism for interventions by invitation in civil wars that do not involve counter-terrorism or counter-intervention, indicating the legality of interventions even in such

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Aggression and the Use of Force' (Sydney Conference, 2018) 19; Erika de Wet, *Military Assistance on Request and the Use of Force* (OUP 2020).

[12] ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (2018) UN Doc A/73/10, Commentary to Conclusion 9, para 3.

[13] Akande and Vermeer (n 11) (emphasis in the original).

conflicts. As a 'prominent example' of such conflicts, she mentions the 2013 Ugandan intervention in South Sudan.[14]

However, it has to be noted that although the Ugandan intervention did not involve counter-terrorism or counter-intervention, Uganda had claimed to intervene to prevent genocide, protect its nationals, protect the democratically elected and constitutional authorities that faced an attempted coup, and address threats to its national and regional security. It thus did not merely concern taking sides in an internal conflict. Also, the intervention was criticised by Eritrea for preventing the South Sudanese people from resolving their own problems.[15]

Corten also documents some criticism of, or the difficulties surrounding, the purpose-based approach. Accordingly, it would be difficult to ascertain the 'legitimate objectives' justifying an intervention. It is even more challenging to prove the 'genuine purpose' of an intervention, and it would give a biased impression to bind the legality of the intervention only to the purpose of the intervening State, in which case the State's word would be enough to legalise the intervention.[16] Against the backdrop of such criticism, Corten presents a modification to the purpose-based approach pertaining to its terminology. This departs from the premise that conditioning the legality of an intervention to the sole (speculative) 'purpose', or (subjective) 'intention' for that matter, of the intervening State would not be appropriate as a legal construct. It must be the intervening State's 'object' and the intervention's concrete 'effects' that must be compatible with the fundamental principles of international law, particularly the right to self-determination of peoples. However, he also accepts that this terminological twist does not answer all the problems, particularly those with respect to the way in which the authenticity of these objects and effects can be proven.[17]

Below is an analysis of the relevant State practice, an extensive account of which is given in the previous chapter. The analysis entrenches the purpose-based approach and addresses the arguments against it.

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[14] De Wet, *Military Assistance on Request* (n 11) 116-20.
[15] See Chapter 6, Section 2.30.
[16] Olivier Corten, 'Is an Intervention at the Request of a Government Always Allowed? From a "Purpose-Based Approach" to the Respect of Self-Determination' (2019) 79 ZaöRV 677, 677-8; Also see Veronika Bílková, 'Reflections on the Purpose-Based Approach' (2019) 79 ZaöRV 681.
[17] Olivier Corten, 'Is an Intervention at the Request of a Government Always Allowed? (n 16) 679.

3. Analysis of State practice

3.1. General

An account of the relevant State conduct given in the previous chapter showed that intervention by invitation in internal conflicts is a prevalent practice. It is worth noting with respect to this practice that every instance of intervention has its own distinct characteristics. Almost none of the instances is presented by States as an intervention to suppress a popular armed opposition in support of the government during a civil war. States rather pursue a subtle approach to the matter. Intervening States do not rely exclusively on the consent of the territorial State. They rather consistently utilise and associate consent, sometimes in line with the content of the consent given, with an objective or an accumulation of objectives. These include countering terrorism; addressing a threat to their national security, sometimes with the claim of exercising their right to self-defence against the armed group they are targeting; addressing a threat to the region; responding to an unlawful prior intervention on the side of the rebels, sometimes with the claim of exercising the right to collective self-defence of the inviting State; rescuing nationals or foreigners; maintaining law and order; bringing about stability; protecting vital infrastructure; or preventing a humanitarian crisis or genocide. The previous chapter also showed that in some cases, intervening States explicitly claimed not taking sides in the internal conflict. Sometimes States altogether rejected an invitation to intervene. There have also been cases where third States criticised a specific intervention by invitation. This State practice will further be detailed below in this section.

It is fairly understandable for controversies to arise in the literature in respect to the identification of a rule of customary law from the reading of the relevant practice, such as those illustrated in the foregoing section on whether the objectives State put forward for consensual interventions are out of political or legal concerns. After all, although it has almost become a habit for States in the post-UN Charter era to publicly justify their military interventions in

legal terms,[18] it remains rare to see in-depth and clear accounts of those justifications, for example, in the form of legal memoranda.

Official or public statements by the intervening States justifying the intervention on the ground of the consent of the territorial State, widely referred to in the previous chapter, are usually mired with deliberations on the objectives of the intervention. Admittedly, not every statement, or every part of a statement, on a consensual intervention could be said to be laying out the legal justifications for the intervention. However, it is also a very common legal practice for States when laying out a legal justification for an act to also set out supportive arguments, or the alternatives, to the primary justification. It is to convince the relevant audience (a court, tribunal, organisation or other States) of the legality of their actions to the extent possible. As will be explained below, it would not be implausible to suggest that States also intend to enhance the legality of a consensual intervention when they associate the primary justification of consent with the objectives of the intervention.

The use of force in the territory of another State, be it with its consent, is a delicate matter in the sense that it has implications for the political independence of States and the self-determination of peoples. These are principles shielded by the prohibition on the use of force itself, as provided for in article 2(4) of the UN Charter. The article prohibits States from using force against the 'political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'.[19] One of these purposes is the materialisation of the right to self-determination of peoples.[20] Chapter 4 has shown based on these principles that valid consent by a legitimate government alone is not enough to make consensual interventions lawful. To be lawful, these interventions also must be compatible with these principles. It could be for this reason that intervening States are not willing to rely solely on consent to justify an intervention. The intricacy that comes with the concepts of political independence and self-determination could be behind the idiosyncrasies of each case.

[18] See Dino Kritsiotis, 'Theorizing International Law on Force and Intervention' in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (OUP 2016) 655-9.
[19] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16, Article 2(4).
[20] ibid Article 1(2).

Based on these principles, chapter 4 reached the conclusion that external States are not allowed to intervene by force merely to impact the outcome of a civil war. The relevant State conduct reported in the previous chapter and which will be analysed in detail below in essence indicates that States avoid to be seen as intervening merely to support an incumbent government against a genuine popular uprising and thus influence the outcome of such a conflict. As will be demonstrated below in this section, there barely is an intervention constituting a precedent for a right to suppress popular opposition groups in other States with the consent of their government.[21] Being relevant to the rules of international law, that is, being in line with the theoretical framework based on the principles of political independence of States and the right to self-determination of peoples, the relevant State conduct cannot be simply dismissed as merely political without clear indications that it is purely political. When an intervening State makes deliberations on the purpose of the intervention indicating its avoidance of intervening merely to influence the outcome of an internal matter, it is more likely that these deliberations are also arguments supportive of the legality, and not only the political convenience, of the intervention.

The intricacy that comes with the concepts such as political independence and self-determination could be the reason why States are not generally able to proclaim, or commit to, a clear rule of international law on intervention in civil wars. The few that did so overwhelmingly favoured a prohibition on intervention in civil wars in principle or with respect to certain circumstances.[22]

Moreover, as said, the practice of avoiding from taking sides in an internal conflict or supporting a government by force against a popular opposition group is in line, as demonstrated in chapter 4, with the UN Charter stipulating that the force cannot be used against the political independence of States and the self-determination of peoples. Therefore, to pronounce the law as stating that valid consent by a government is enough to justify foreign military intervention in a civil war, there has to be State practice contradictory to the mentioned theoretical conclusion. The role of practice in the case of intervention by invitation in internal conflicts should not be based on the assumption that there is no any theoretical barrier for invited States to intervene in civil wars. The law can change through customary international law. However,

[21] For questionable cases, see last paragraphs of this section.
[22] See below nn 24 and 25, and the surrounding text.

as will be seen below, there hardly is an instance of consensual military intervention where the intervening State did not advance the relevant objectives or did not claim that it is not interfering in the internal conflict. Therefore, State practice simply confirms the theoretical conclusion. In the words of Corten:

> [C]onsidering that all States have recognised self-determination as an *erga omnes* principle … the role of practice must be correctly understood. It is for those who consider that self-determination does *not* limit the possibility to intervene in an internal conflict (a limit that can be deduced from the texts just cited) to show that a customary norm has emerged in support of their thesis. And this task will be difficult to accomplish, as States systematically deny interfering in an internal conflict when they are invited by a government of another State.[23]

Moreover, the relevant State conduct also includes clear *opinio juris* on the part of some States that demonstrate the unlawfulness of influencing civil wars by force at the request of the government. Thus, general statements addressing directly the legality of consensual interventions in civil wars by Canada, the UK, France and the DRC found such interventions unlawful or at the least legally problematic.[24] Likewise, some statements made by the delegates during the preparatory works of the certain UN General Assembly resolutions found such interventions or interventions in support of unpopular governments unlawful.[25]

Additionally, in some cases examined in the previous chapter, States, for example, have turned down another State's request for military assistance with reasonings reminiscent of legal concepts such as non-interference and self-determination. Thus, Australia rejected the invitation to intervene from the government of Solomon Islands because the problem was an internal matter in which it had no say.[26] France likewise turned down an invitation from Côte d'Ivoire for the reason that it was an internal matter rather than an external aggression that

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[23] Corten, 'Is an Intervention at the Request of a Government Always Allowed?' (n 16) 679 (emphasis in the original).
[24] See Chapter 6, Section 3.
[25] See Chapter 4, Sections 2.1.2 and 2.1.3.
[26] See Chapter 6, n 147 and the surrounding text.

would warrant its intervention.[27] France also rejected a request from the CAR 'to push back the rebels' because France would not interfere in the internal affairs of the country.[28]

Such language was also seen in third States' criticism of some interventions. Eritrea, for example, criticised all interventions in South Sudan, and thus the Ugandan intervention on the side of the government, for preventing the people of the country from settling their problems themselves.[29] Similarly, some States criticised the Turkish military support to the Libyan government claiming that it constituted interference in the internal affairs of the country and implicated its sovereignty and independence.[30]

The language used in the mentioned general statements and statements made in relation to an instance of intervention by invitation at the least shows that a valid consent by a legitimate government does not necessarily make an intervention compatible with principles such as non-interference, political independence and self-determination. The particularities of each case need to be taken into account to see whether a consensual intervention complies with these principles and thus is lawful.

As to the other practice showing that foreign States avoid to be seen as influencing civil wars, in some cases, despite having been invited by the government and regardless of whether their actions in fact strengthened the hand of the government, the intervening States claimed that the aim of the intervention was not to interfere in the internal conflict or denied that they were taking sides in, or being drawn into, the conflict. This was the case in many French interventions, the 1992 intervention by Russia and the Commonwealth of Independent States in Tajikistan, the 1999 intervention by Namibia in Angola, the 2000 intervention by the UK in Sierra Leone, the 2006 intervention by New Zealand (as part of a coalition) in Timor-Leste, and the 2006 intervention by New Zealand in Tonga.[31]

Otherwise, the motive of not interfering to influence the outcome of an internal conflict is inferred from the objectives presented by the intervening States. The most capitalised objective,

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[27] See Chapter 6, n 139 and the surrounding text.
[28] See Chapter 6, n 300 and the surrounding text.
[29] See Chapter 6, n 341 and the surrounding text.
[30] See Chapter 6, nn 454-461 and the surrounding text.
[31] See the relevant sections in Chapter 6.

especially in recent times, seems to be combating a terrorist group – an issue separately examined below with reference to the difference between the concepts of terrorism and armed rebellion in international law.[32] In some cases the intervention came in response to a prior foreign intervention on the side of the rebels, sometimes with the invocation of the right to collective self-defence of the inviting State. The implications arising from such interventions also are examined separately below.[33]

Sometimes, regardless of whether their actions in fact strengthened the hand of the government against the opposition, one of the reasons the intervening States claimed intervening for in a particular instance was to prevent a humanitarian crisis, as was the case with the intervention by Turkey in Libya in 2020, by RAMSI in Solomon Islands in 2003, and by the UK in Sierra Leone in 2000. Similarly, one of the objectives Uganda put forward for its 2013 intervention in South Sudan was the prevention of a genocide.[34] These interventions could also be conceptualised in international law in the context of States' sovereign responsibility to protect their populations from 'atrocity crimes'. By requesting assistance for the prevention of a humanitarian crisis resulting in the commission of such crimes, a State could be considered as fulfilling its sovereignty, or even meeting a sovereign obligation if it is unable to provide the required protection alone.[35]

In some cases, one of the objectives the intervening States put forward was the rescue of nationals or foreigners. This was the case with the 2013 Ugandan intervention in South Sudan; the French interventions in the CAR in 2012 and 1996, and in Côte d'Ivoire in 2002; and the 2000 UK intervention in Sierra Leone.[36] States sometimes claimed that their troops, which were already present in the territorial State with its consent, did not involve in the conflict but responded in self-defence when attacked. This was the case with French interventions in Chad in 2008 and the CAR in 2006.[37]

[32] See Section 3.2 below.
[33] See Section 3.3 below.
[34] See the relevant sections in Chapter 6.
[35] See Oona A Hathaway and others, 'Consent-Based Humanitarian Intervention: Giving Sovereign Responsibility Back to the Sovereign' (2013) 46 CornellIntlLJ 499, 538-41.
[36] See the relevant sections in Chapter 6.
[37] See ibid.

Foreign intervention sometimes occurred not only to deter a threat to the government requesting the assistance, but also to the intervening State itself, or its borders or interests, or the region. This was the case with the 2020 Turkish intervention in Libya; the G5 Sahel Joint Force's 2017 and France's 2014 interventions in the Sahel region; the 2017 Iraqi intervention in Syria; the 2015 Saudi-led intervention in Yemen; the 2009 Rwandan intervention in the DRC; interventions starting from 2002 against the Lord's Resistance Army; the 1999 Namibian intervention in Angola; regional countries' interventions starting from 1999 against the Islamic Movement of Uzbekistan; and the 1995 Croatian intervention in Bosnia and Herzegovina.[38] This was also the case in some interventions against army mutinies, namely, the 1996 French intervention in the CAR, and Senegal and Guinea's 1998 intervention in Guinea-Bissau.[39] Uganda's intervention in the DRC, which the ICJ in *DRC v Uganda* found to be based on the latter's request in the period preceding August 1998 and thus legal, was also of this nature.[40] Sometimes intervening States, in addition to the consent of the territorial State, invoked the right to self-defence as a legal basis against the armed groups they were targeting. This, with the implications it raises, is examined separately below.[41]

When justifying an intervention by invitation, States never seem to take into account whether the conflict has reached the level of a civil war/non-international armed conflict or remained an internal disturbance, or whether the rebels are exerting control over the territory. This may indicate that the legality of consensual interventions is not about the level or the severity of the internal conflict, but the relevant principles of international law. Nonetheless, the level of the conflict seems to play a role in the sense that in conflicts such as army mutinies, riots or violent protests that did not reach the level of a civil war, backing the government was of less concern; such conflicts were a convenient ground for the intervening States not to make the intervention about taking sides in an internal conflict. In such low-level conflicts, the intervening States, sometimes in line with the content of the invitation, apart from utilising the above-mentioned objectives when available, usually put forward some vague or broad objectives such as maintaining law and order, restoring the rule of law, providing security and stability, or protecting vital infrastructure. This was the case in the 2011 GCC intervention in Bahrain; New Zealand and Australia's 2006 intervention in Tango; the 2006 multinational intervention in

[38] See ibid.
[39] See ibid.
[40] Chapter 4, Section 2.2.2.
[41] See Section 3.4 below.

Timor-Leste; the 1998 and 2017 SADC interventions in Lesotho; and the 1995 French intervention in the Comoros.[42]

In the case of Sierra Leone of 1998 and The Gambia of 2017, mentioned in chapter 3, foreign interventions were aimed at restoring a democratically elected and internationally recognised government to office when it had been toppled by a military coup or not allowed to hold the reins at all following the elections.[43] They also did not take place in the context of a widespread civil war. They rather targeted only a clique holding the power against the people's wishes verified in internationally monitored elections. Such factors in a given case can arguably militate against the claims of violations of certain principles of international law, such as self-determination.

The difficulty for foreign States to justify getting involved in widespread civil conflicts could also be inferred from the tendency of States in some cases to try to downplay the scale of the conflict or imply a lack of public support for the rebels. Such claims, for example, were made by the UK government in respect to the 2000 UK intervention in Sierra Leone[44] and by the government of Timor-Leste in respect to the 2006 multinational intervention in Timor-Leste.[45]

Nevertheless, though rare, there have been cases where the intervention seemed to take place only to back a government during a civil war. Thus, Chad in its 2012 intervention against the Séléka rebels in the CAR claimed helping the government in retaking the cities captured by the rebels. This was in contrast to other States intervening in the conflict that had come up with other rationales for their actions. Chad's intervention came two days before the rebels were condemned by the UN Security Council for threatening the stability of the country in violation of the peace process.[46]

In 2008 the AU intervened in the Comoros to reinstate the government's authority over an island controlled by the authorities blamed for secessionist aims by the government. The intervention was aimed at restoring the constitutionality and safeguarding the 'unity and

[42] See the relevant sections in Chapter 6.
[43] See Chapter 3, Section 3.
[44] See Chapter 6, n 109 and the surrounding text.
[45] See Chapter 6, n 170 and the surrounding text.
[46] See Chapter 6, Section 2.28.

territorial integrity' of the country. There was no widespread conflict in the country, and control over the island was soon restored.[47] Similar small-scale interventions against secessionist groups, which resembled police action, took place in the past in the Union Island of St Vincent and Grenadines in 1979 and the Vanuatu island of Santo in 1980.[48] The practice of intervention by invitation in secessionist conflicts in general does not seem to lead to a conclusive result because of such interventions being scant, occurring on a small scale and involving various other justifications. Nonetheless, the practice arguably militates in favour of the permissibility of intervention in such conflicts.[49] Also, though not mentioned here separately, in respect to some of the interventions examined in the previous chapter, States emphasised the need to preserve the 'unity' or 'territorial integrity' of the consenting State.

The 2019 French intervention in Chad may also appear as an intervention merely intended to side with the government in an internal conflict. If so, it would be in contrast to the long-standing French policy of avoiding to be seen as arbitering internal conflicts in favour of governments – a policy evident from the accounts of French interventions given in the previous chapter. However, it would be difficult to argue that this intervention was against this policy. The French military operation in this one-off instance came in order to halt an incursion from the Libyan territory by a Chadian armed group into Chad and not in the context of an ongoing conflict in the country.[50]

The US's consensual interventions in Afghanistan and Iraq also seem to have been conducted for the purpose of, among others, countering an insurgency. The US described its 2015 intervention in Afghanistan not only as one of counter-terrorism but also of countering an 'insurgency'. The intervention, among others, targeted Taliban, which was not listed in the US Department of State's special foreign terrorist organisations list. However, at other levels it was considered a terrorist group by the US. The UN Security Council condemned Taliban's terrorist activities and imposed sanctions on the group. Taliban was also the target of the initial

[47] See Chapter 6, Section 2.21.
[48] See Georg Nolte, 'Secession and External Intervention' in Marcelo G Kohen (ed), *Secession: International Law Perspectives* (CUP 2006) 86-7.
[49] See ibid 86-70; Antonello Tancredi, 'Secession and Use of Force' in Christian Walter, Antje von Ungern-Sternberg, and Kavus Abushov (eds), *Self-Determination and Secession in International Law* (OUP 2014) 81-9; On consensual interventions against secessionist movements, see Chapter 4, Section 3.2.
[50] See Chapter 6, Section 2.38.

2001 US intervention in Afghanistan, which was conducted in self-defence.[51] Similarly, the US intervention in Iraq at the request of the Iraqi government preceding the US's 2014 intervention against ISIL in Iraq targeted, in addition to terrorist groups, 'remnants of the former regime'. The former regime refers to the Iraqi government that had been toppled by the initial 2003 US intervention in Iraq.[52]

These US interventions in Afghanistan and Iraq therefore were fulfilling the objectives of the US's initial interventions in these countries. Taliban also at some levels of the US government was treated as a terrorist group. The UN Security Council deemed its activities as terrorism and condemned it. Therefore, in sum, while these US interventions could be seen as aimed at supporting governments at their request against popular insurgencies, their context is not as simple as it appears. Also, the US's official position, even though accepting the legal challenges brought about by non-international armed conflicts, is that it is not unlawful to assist 'other States in their armed conflicts against non-State armed groups', as mentioned in the previous chapter.[53]

Therefore, considering that the mentioned questionable cases are rare and not all of these cases are clear-cut examples of interference in civil war, it would be difficult to argue that they may implicate the common patterns of the practice set out so far. Therefore, it remains that the objectives of interventions by invitation are instrumental for the legality of these interventions. Intervening States' objectives should not contradict the relevant principles of international law and pitting a beleaguered government with direct military force against a popular insurgency could be considered as contradicting these principles.

Nevertheless, the criticism remains that, however one defines it, be it 'purpose' or 'object',[54] purposes/objectives presented for consensual interventions are not difficult for States to bring forth. Every State can effortlessly put forward a line of reasoning implying that its consensual intervention does not implicate the principles of international law, such as the political independence of States and the right to self-determination of peoples. The factuality or viability of the relevant statements or claims will have profound implications for the compatibility of

[51] See Chapter 6, Section 2.32.
[52] See Chapter 6, nn 354 and 355, and the surrounding text.
[53] See Chapter 6, nn 476 and 477, and the surrounding text.
[54] See nn 16 and 17, and the surrounding text.

the consensual intervention in question with these principles. Affordability States enjoy under the purpose-based approach in presenting their consensual interventions as compatible with the law potentially undermines the potency of this approach as a legal remedy. This is arguably a problem which should be further discussed in the literature.

3.2. Counter-terrorism as a distinct legal concept

The most capitalised objective in consensual interventions in internal conflicts, especially in recent times, seems to be combating a terrorist group, or a group that is accused of extremism or international crimes. This was the case with interventions against ISIL, al-Qaeda and groups associated with them in Syria, Libya, Iraq, Afghanistan, Yemen, Mali, Somalia and Pakistan; against Boko Haram and the Lord's Resistance Army in some African countries; against al-Shabaab in Somalia; against the Islamic Movement of Uzbekistan in some Central Asian countries; and against certain groups in Solomon Islands and Tajikistan.[55]

Especially in the context of counter-terrorism a group of scholars, as mentioned above, argued that relevant statements by States justifying consensual interventions indicate a general conviction of the legality of consensual interventions. The objectives that the intervening States allude to in these statements are of a political rather than a legal nature. Accordingly, this practice should lead to the conclusion that interventions by invitation in civil wars are actually lawful even if they solely aim to interfere in an internal conflict.[56]

However, a review of the relevant justificatory statements detailed in the previous chapter will show that the primary justification, that is the consent of the territorial State, was particularly utilised to fight terrorism or, for that matter, a terrorist group.[57] Considering that, as will be shown below, the concept of counter-terrorism already is one with distinct legal connotations, this relevant practice must only lead to the simple conclusion that intervention by invitation to counter a terrorist group is believed to be legal by States. In other words, terrorism, being a

[55] See the relevant sections in Chapter 6.
[56] See nn 13 and 14, and the surrounding text.
[57] Also, in respect to statements concerning the intervention against ISIL in Iraq, see Raphael Van Steenberghe, 'The Alleged Prohibition on Intervening in Civil Wars Is Still Alive after the Airstrikes against Islamic State in Iraq: A Response to Dapo Akande and Zachary Vermeer' (*EJIL: Talk!*, 12 February 2015) <https://www.ejiltalk.org/the-alleged-prohibition-on-intervening-in-civil-wars-is-still-alive-after-the-airstrikes-against-islamic-state-in-iraq-a-response-to-dapo-akande-and-zachary-vermeer/>.

different legal concept than ordinary rebellions or insurgencies in the eyes of States, when a State claims to intervene by invitation to counter terrorism, one cannot infer from this conduct a general right to intervention by invitation in civil wars.

International law does not regulate a government's right to fight against, or a non-State actor's right to resort to, rebellions or insurgencies, which are issues internal to States themselves and only regulated by their domestic laws.[58] In contrast, the issue of terrorism has always been subject to international legal instruments. Indeed, there is a body of international law consisting of various treaties and agreements, both at the universal and regional level, that obliges States to fight terrorism.[59] Therefore, while international law is neutral towards the struggle of ordinary opposition groups in civil wars, it clearly is prejudiced against terrorism and terrorist groups.[60]

This partiality of international law towards terrorism could be said to have been reflected in the UN General Assembly's 2005 World Summit Outcome resolution, which provides that '[w]e urge the international community … to assist States in building national and regional capacity to combat terrorism'.[61] Likewise, the solidarity clause of the Treaty on the Functioning of the European Union provides that '[s]hould a Member State be the object of a terrorist attack or the victim of a natural or man-made disaster, the other Member States shall assist it at the request of its political authorities'.[62] No international law instrument, on the other hand, is known to have urged States to assist other States in their fight against armed rebellions.

Against the backdrop of how the concept of terrorism is positioned in international law, it should be conceivable to consider that States clearly do not to regard fighting terrorism in another State as implicating that State's political independence, an interference in its internal affairs or an encroachment on its people's right to determine their own political system. Indeed,

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[58] See Chapter 1, Section 4.2.1.
[59] See Christian Walter, 'Terrorism', *Max Planck Encyclopedia of Public International Law* (Last updated April 2011) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e999?prd=EPIL> paras 16-74.
[60] On this point, also see Chapter 1, n 82 and the surrounding text referring to Tom Ruys, 'The Quest for an Internal *Jus ad Bellum*: International Law's Missing Link, Mere Distraction or Pandora's Box?' in Claus Kreβ and Robert Lawless (eds), *Necessity and Proportionality in International Peace and Security Law* (Lieber Series Vol 4, OUP 2020) 16-7 (forthcoming) <https://ssrn.com/abstract=3316054>.
[61] 2005 World Summit Outcome, UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1, para 88.
[62] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47, Article 222(2). In Article 222(1), it also regulates similarly the European Union's role itself in such situations.

during the decolonisation era, the designation of a group as terrorist was inherently related to the issue of the right to self-determination of the people. This was evident in the famous aphorism of the time that 'one man's freedom fighter is another man's terrorist'.[63] Indeed, 'wars of national liberation' continue to be one of the obstacles to a universal agreement on the definition of terrorism.[64]

Being designated as a terrorist group seems to be taking away any legitimacy an opposition group may hold in respect to its ability to represent the people and being part of the future of the State. While governments, for example, at times enter into peace negotiations with opposition groups and eventually compromise on power and accept these groups as being part of the body politic, they hardly do it with a group they call terrorists.[65]

The multi-faceted internal conflicts where both terrorist and non-terrorist groups are involved further proves that States draw a distinction between the two. In such conflicts, the intervening States intentionally aimed only at terrorist groups and claimed not being involved in the fight between the government and the opposition. This was the case with the 2013 French intervention in Mali and the 2015 Russian intervention in Syria. Third States also cautioned targeting the opposition in these instances and actually criticised Russia, including through a UN General Assembly resolution, for doing so.[66] Going further, Qatar criticised the Egyptian intervention against ISIL for the reason that it could give advantage to one side in the country's internal conflict separate from the one against the terrorist groups.[67]

The legal relevance of counter-terrorism in respect to interventions by invitation is also the position adhered to by the UN Special Rapporteur Koufa. In her report for the UN Commission on Human Rights, she states that among the underlying reasons behind States' preference to mischaracterise non-international armed conflicts in which they are involved as one of counter-terrorism is 'the duty of neutrality of third party States arising from the prohibition on

[63] Quoted in Walter (n 59) paras 2 and 17.
[64] See ibid para 84.
[65] It is in this respect intriguing that the US did not include Taliban, its opponent in Afghanistan, in its special Foreign Terrorist Organisations list in order to be able to start a political reconciliation with it. See Chapter 6, n 362 and the surrounding text.
[66] See Chapter 6, Sections 2.29 and 2.36.
[67] See Chapter 6, n 382 and the surrounding text.

intervention in the internal affairs of another State … Referring to the situation as "terrorism" can free up weapons to fight the "war" on terrorism'.[68]

Considering that counter-terrorism is an argument that can be used by States to advance the legal justification for consensual interventions, the absence of a universal definition of terrorism in international law opens the door for States to take advantage of the leeway it gives. In the case of Syria, for example, while the international community and Russia agreed on only targeting terrorist groups, they could not agree on which groups to identify as terrorists.[69] Such a problem arguably makes the efforts for a universal definition of terrorism more urgent.[70] The same goes for a need in international law for a centralised mechanism authorised to exclusively designate terrorist groups. Although the UN Security Council sometimes identifies certain groups with terrorism as could be seen from the previous chapter and maintains a sanctions list particularly concerning terrorist groups ISIL, Al-Qaida and associated groups,[71] this by no means prevents States from designating other groups as terrorists and taking measures against them accordingly.

3.3. Counter-intervention and collective self-defence

In some cases examined in Chapter 6 foreign military support to the government was claimed to have come in response to foreign assistance given to the opposition. Interventions of this kind are commonly known as 'counter-intervention'.[72] This was the case with the 2020 Turkish intervention in Libya; the 2015 Saudi-led intervention in Yemen; the 2011 GCC intervention in Bahrain; the 2006 French interventions in the CAR and Chad; interventions by the regional countries starting from 1999 against the Islamic Movement of Uzbekistan; and the 1995 French intervention in the Comoros.[73]

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[68] UN Economic and Social Council, Terrorism and Human rights: Final Report of the Special Rapporteur, Kalliopi K. Koufa (25 June 2004) UN Doc E/CN.4/Sub.2/2004/40, para 36, fn 73.
[69] See Chapter 6, Section 2.36.
[70] For such efforts, see Walter (n 59) paras 1-15.
[71] See UNSC Res 2253 (17 December 2015) UN Doc S/RES/2253.
[72] For an overview of the concept, see John A Perkins, 'The Right of Counterintervention' (1986) 17 GaJIntl&CompL 171; Joseph Klingler, 'Counterintervention on Behalf of the Syrian Opposition? An Illustration of the Need for Greater Clarity in the Law' (2014) 55 HarvIntlLJ 483.
[73] See the relevant sections in Chapter 6.

On the other hand, in some cases, the intervention on the side of the opposition was considered by the government and the States intervening on its side to have amounted to 'armed attack' triggering the right to collective self-defence of the territorial State under Article 51 of the UN Charter.[74] This was the case with the intervention by the regional countries in the DRC in 1998 against the Ugandan and Rwandan-backed rebels and the 1995 Croatian intervention in Bosnia and Herzegovina against the Bosnian rebels backed by Serbia and Montenegro. Likewise, in Tajikistan's 1992 conflict, the fact that the Tajik rebels also attacked from Afghan territory led to the claim that Tajikistan, with the support of Russia and CIS, was acting in self-defence.[75]

While the right to collective self-defence and its contours are relatively well-addressed and established in the doctrine,[76] the cases of 'counter-interventions' could give rise to various theoretical questions that State practice can hardly answer. For example, should such interventions be subjected to the principle of proportionality? One can argue in favour of such a suggestion by analogy to the legal venues that require a test of proportionality, such as the right to collective self-defence or the right to counter-measures, 'given that counter-interventions are also a form of self-help'.[77] Another basis in favour of such a suggestion would be that if the aim with counter-intervention is to uphold the right to self-determination of the people by confronting the unwarranted foreign intervention on the side of the rebels, then the counter-intervention should also not interfere with the process of self-determination by being disproportionate, that is, giving the upper hand to the government.[78] Nonetheless, it would still be difficult to determine what level of assistance to the government would be proportionate. This is not least because in most cases the exact nature, scale or level of assistance to the opposition, which is more susceptible to being kept secret given its unlawfulness, would be difficult to publicly ascertain.

What one may infer with some certainty from the practice of counter-intervention is the territorial limitedness of the military assistance given to the government. In the mentioned counter-intervention cases, the military assistance that the governments of the alleged victim

[74] UN Charter (n 19) Article 51.
[75] See the relevant sections in Chapter 6.
[76] See, for example, Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (CUP 2010).
[77] Ruys and Ferro (n 1) 93.
[78] ibid 93-4.

States received was territorially limited. States intervening on the side of the government did not use force against, and thus did not take the war into the territory of, the State intervening on the side of the rebels. This conforms to the ICJ's decision in the *Nicaragua* case where the Court declared unlawful collective armed responses against States providing assistance to the opposition on a scale not amounting to an armed attack. The Court's ruling thus limits any assistance to be provided to the government of the victim State to the victim State's territory.[79]

3.4. Invoking both 'consent' and 'self-defence' against non-state armed groups

At times, especially in the context of counter-terrorism, intervening States, in addition to the consent of the territorial State, invoked the right to individual self-defence against the non-State armed groups they were targeting in the territory of the consenting State. This was the case with most of the US's counter-terrorism interventions, though sometimes with ambiguous phrases, such as 'in furtherance' of US national self-defence; the 2006 Ethiopian intervention against the Islamic Courts Union in Somalia; the 2011 Kenyan intervention against al-Shabaab in Somalia; and the 2015 Egyptian intervention against ISIL in Libya.[80]

Without prejudice to the wider controversy on whether States have the right to self-defence under Article 51 of the UN Charter against armed attacks by non-State actors, one has to consider what to make of a State's invocation of the mentioned two distinct principles to justify a military intervention. First of all, even assuming that States have the right to self-defence against non-State actors, it is argued that due to the principle of necessity, if the consent of the State where the non-State actor is located will suffice to take the necessary action, that consent must be sought before invoking the right to self-defence.[81] The letter that the US sent to the UN in 2016 after it had used force in response to Houthis' anti-ship cruise missile launches seems to exemplify this situation. The letter stated that the Yemeni government had consented to the use of force and the US 'therefore does not believe notification pursuant to Article 51 of the Charter of the United Nations is necessary'.[82]

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[79] See Chapter 4, Section 2.2.1.
[80] See the relevant sections in Chapter 6.
[81] See Dapo Akande and Thomas Liefländer, 'Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defense' (2013) 107 AJIL 563, 566; Also see Terry D Gill, 'Military Intervention with the Consent or at the Invitation of a Government' in Terry D Gill and Dieter Fleck, *The Handbook of the International Law of Military Operations* (2nd edn, OUP 2015) 255.
[82] See Chapter 6, n 402 and the surrounding text.

On the other hand, it is a known practice that States sometimes invoke multiple justifications for their actions in the hope that these justifications will complement or reinforce each other or, based on a pragmatic understanding, especially in adversarial forums such as judicial disputes, that these justifications will constitute independent grounds that can substitute one another if needed. One can perceive the invocation of the two distinct principles of self-defence and consent based on this setting. Accordingly, and given the prominence of State sovereignty under international law, 'consent' of the territorial State must be deemed the primary justification. Only through this understanding the foreign State can be said to be respectful of the sovereignty of the State where the non-State actor is located.[83] As said, this should not render the additional justification of self-defence redundant. This justification can be considered as complementary to the justification of consent in the sense that the intervening State has to respect the limits of the consent given, while also preserving the right to go beyond these limits if they prevent it from taking the necessary action to deter the armed attack under its inherent right to self-defence. In other words, only when the limits of the consent prevent it from taking the necessary action, its right to self-defence should supersede the will of the territorial State.

3.5. Assistance short of direct military intervention

What causes international concern in consensual interventions in civil wars seems to be the provision of direct military assistance, that is, the deployment of armed forces by the intervening State to the consenting State in the fight against the opposition. States do not quibble about the right of a State to provide other types of assistance, such as arms, intelligence or logistics to other States even if they are involved in a civil war. This could simply be demonstrated with respect to conflict-hit countries where no direct military intervention took place. For example, while the governments of Myanmar, Senegal, Philippines and India are

[83] See Irene Couzigou, 'Respect for State Sovereignty: Primacy of Intervention by Invitation over the Right to Self-Defence' (2019) 79 ZaöRV 695, 698 arguing, in the context of the US led coalition's intervention in self-defence against ISIL in the territory of Syria without Syria's consent, that priority should have been given to 'consent' because of the importance of State sovereignty.

involved in non-international armed conflicts along political, ethnic or religious lines,[84] their right to receive arms went unabated.[85]

With respect to cases examined in this study, when the issue arose with Russia's arms transfers to the beleaguered Syrian government, preceding its 2015 direct intervention, Russia asserted that it did not violate international law, as there was no international limitation on it such as an arms embargo. Although there was criticism on other grounds, no challenge seems to have been made against Russia's right to sell weapons to the Syrian government, and the latter's sovereign right to receive them. The US ambassador to the UN, for example, while finding Russia's support to a regime using unwarranted force against its own people reprehensible, accepted that it technically did not violate international law since there was no arms embargo.[86]

The French interventions in Chad in 2006 and 2008 also comport with such an understanding. In these cases, although there were other conflicting narratives by France or other sources, French authorities claimed that they had provided intelligence or logistical support to the government but had not taken sides in the internal conflict, as if the provision of such assistance was acceptable.[87] Likewise, despite the existence of other narratives, the French army, which was already present in the CAR with its consent, downgraded its involvement in the 2006 intervention in the retaking of the town Birao from the rebels. The army's spokesperson claimed that French troops were providing logistical support to the government.[88]

Therefore, it seems that the practice does not indicate a prohibition for States to receive arms or other kinds of assistance short of direct military assistance from other States during civil wars.[89] Nonetheless, it should be pointed out that certain rules of international law, such as the rules on State complicity, can constrain the provision of assistance between States in certain circumstances, as examined in chapter 5. Indeed, in practice, based on such rules there have

[84] See RULAC <http://www.rulac.org/browse/map>.
[85] For information on the transfer of arms to these States, see SIPRI, 'SIPRI Arms Transfers Database' <https://www.sipri.org/databases/armstransfers>.
[86] See Chapter 6, nn 411-413 and the surrounding text.
[87] See Chapter 6, Sections 2.16 and 2.22.
[88] See Chapter 6, Section 2.18.
[89] Also see n 2 and the surrounding text for this view in literature.

been criticism, or suspension, of the provision of military material to States involved in non-international armed conflicts.[90]

Also, as examined in chapter 4, the right to self-determination entails the people of a State to determine their own future without external interference. It thus in theory prohibits any assistance to a government during a civil war that may change the course of the conflict in favour of the government. One has to ask why the supply of arms that can affect the outcome of the conflict would not be prohibited as in the case of direct military force. One can speculate that the reason such assistance does not give rise to controversy in practice could be that the supply of arms is not as effective or decisive as direct military intervention on the outcome of an internal conflict. A State providing arms to another State involved in a civil war can always claim that the arms in question was not intended to be used in the civil war but was part of the regular relationship between the two States. Russia, for example, had claimed in respect to its provision of arms to the Syrian government that it did not take sides in the conflict, that the arms it provided were not meant to give an advantage against the opposition, or that the arms were for defensive purposes.[91] There may be various explanations for such an attitude. One would be that Russia did not want to be seen as impacting on the outcome of an internal struggle and thus violating the right to self-determination of the people. It could, however, also be that Russia did not wish to be associated with a government that had fallen into disgrace as a result of grave violations of international law, and thus did not wish to be implicated in violations of certain rules of international law, such as the rules on State complicity or the duty to ensure respect for international humanitarian law, examined in chapter 5. Therefore, it remains doubtful whether this instance can indicate a prohibition for States to influence the outcome of civil wars in other States by the supply of arms.

3.6. The impact of the UN arms embargoes on military assistance on request

The practice examined in the previous chapter also gives some insight into the issue of foreign intervention in States subjected to a UN Security Council-imposed arms embargo. In the cases of the 1995 Croatian intervention in Bosnia and Herzegovina, the 2011 Ethiopian intervention

[90] See nn 118-119 below.
[91] See Chapter 6, n 414 and the surrounding text.

in Somalia and the 2020 Turkish intervention in Libya, the foreign assistance to the government came despite the existence of such an embargo on the whole country, preventing the delivery of the relevant assistance to the government and opposition alike.[92]

Bosnia and Herzegovina and some other States interpreted the resolution imposing the embargo as not preventing Bosnia and Herzegovina from requesting assistance in the exercise of its inherent right to self-defence.[93] Ethiopia likewise justified the conformity of its consensual intervention with the arms embargo as that the intervention being conducted in self-defence of Somalia, as well as its own, the embargo did not apply to its actions.[94] Libya similarly defended seeking support from Turkey and other States by stating that while it was mindful of its obligations under the embargo, it still had the right to defend its sovereignty and territory, when it was subjected to a foreign intervention on the side of the opposition in violation of the embargo and conventional norms of international law.[95]

As examined in chapter 5, due to the superiority of the obligations arising from the UN Security Council's decisions, a State cannot transfer arms to a beleaguered government subjected to the Council's arms embargo based on a bilateral agreement it entered into with the government. However, as also argued in literature, the primacy of the relevant measures the Council undertakes under Chapter VII of the UN Charter depends upon the effectiveness of these measures. They do not in themselves suspend the exercise of the right to self-defence, and this conclusion is confirmed in practice.[96] The mentioned State practice concerning the Croatian, Ethiopian and Turkish interventions reinforces this view.

The fact that Libya did not seem to particularly invoke 'self-defence' under article 51 of the UN Charter, but claimed to 'defend' itself against the foreign intervention in support of the Haftar-led LNA's 'aggression' should not change the conclusion. It is about whether the arms embargo is *effectively* implemented or not.[97] It is not expected for a beleaguered government to stay put when the State it represents is subjected to an unlawful foreign military intervention

[92] See the relevant sections in Chapter 6.
[93] See Chapter 6, Section 2.2.
[94] See Chapter 6, Section 2.27.
[95] See Chapter 6, Section 2.39.
[96] See Chapter 5, Section 6.
[97] See Chapter 5, n 110 and the surrounding text.

in violation of the embargo. Being put at a disadvantage with the unfair implementation of the law could go against the general principles of law concerning equality and fairness. In sum, the ineffective implementation of a UN-imposed arms embargo on a State to the detriment of the government cannot prevent the government from requesting military assistance in response to an unlawful external intervention on the side of the opposition.

Sometimes, however, an apparent breach by a State of a UN Security Council-imposed arms embargo could be about the interpretation of the Council's relevant decision. Thus, Turkey implicitly claimed that it had not violated the Council's decisions by supporting the GNA, because the relevant resolution of the Council actually intended to urge foreign States to provide support to the GNA for Libya's security and its intervention was in line with this resolution.[98] Likewise, with regard to its 2007 operations against the terrorist targets in Somalia, which was subjected to a Council-imposed arms embargo, the US claimed that it had not breached the embargo, as its operations did not constitute '"delivery" of a weapon within the plain meaning of' the relevant provision.[99]

3.7. The UN Security Council's role in enhancing the legality of consensual interventions

The post-Cold War practice examined in the previous chapter also showed that the UN Security Council has increasingly involved itself in interventions by invitation in internal conflicts in various ways. Relevant interventions include those that took place in the conflicts in Sierra Leone (1998); Timor-Leste (2006); the Central African Republic (2006); Chad (2008); Mali (2013); Sahel region (2014); Iraq (2014); Nigeria and neighbouring countries (2015); Libya (2015); and Syria (2015).[100] In these conflicts the Council, without authorising the intervention under its Chapter VII powers, requested, urged or called for foreign support to the beleaguered government, urged the continuation of a requested intervention, and/or welcomed or supported an intervention by invitation after it had taken place. The Council's condonation or endorsement of the intervention in these cases came either in general in support of the government, or particularly in the context of taking action against certain terrorist groups such

[98] See Chapter 6, n 464 and the surrounding text.
[99] See Chapter 6, n 217 and the surrounding text.
[100] See Chapter 6.

as ISIL, al-Qaeda and Boko Haram. It came in various formats such as resolutions, presidential statements and press statements. The Council also sometimes merely noted or recalled the existence of a request for intervention as in the cases of Tajikistan (1992),[101] Afghanistan (2015)[102] and Yemen (2015).[103] It would be debatable whether this could be interpreted as an explicit endorsement of the concerned intervention.

The question arises as to what role the endorsement by the Council of a military intervention plays in international law when the intervention should already in principle be considered lawful due to the consent of the territorial State. It should be remembered that in discharging its duties under its responsibility to maintain international peace and security, the Council 'shall act in accordance with the Purposes and Principles of the United Nations'.[104] One of the 'purposes' of the UN is the materialisation of self-determination[105] and one of its 'principles' is that States should not use force against the political independence of any State.[106] As argued in chapter 4, although in principle lawful, consensual military interventions remain legally challenging in the sense that legality of these interventions, particularly those that take place during civil wars, depends, in addition to the conditions surrounding the consent of the territorial State, on the intervention's compatibility with the principles of the political independence of States and the right to self-determination of peoples as per Article 2(4).[107]

Therefore, it could be argued that when the Council endorses a consensual military intervention 'in accordance with the Purposes and Principles of the United Nations', it makes it more difficult to argue against the compatibility of the intervention with the principles of political independence and self-determination. In a sense, it could be said that when endorsing such an intervention the Council, as a political authority, helps clear the air of doubts on the compatibility of the intervention with the principles of international law that are at stake. In other words, it makes it more difficult to argue against the legality of the intervention. After

[101] See Chapter 6, n 21 and the surrounding text.
[102] The Council, while *noting* the US's agreement with Afghanistan, *welcomed* NATO's agreement with Afghanistan. The latter had committed to a non-combat role. See Chapter 6, n 365 and the surrounding text.
[103] See Chapter 6, n 405 and the surrounding text.
[104] The UN Charter (n 19) Article 24(2).
[105] ibid Article 1(2).
[106] ibid Article 2(4).
[107] ibid; See Chapter 4.

all, arguing against the legality of a Council-endorsed consensual intervention would mean also arguing against the legality of the Council's relevant decision.

In the current decentralised international legal system, the arguments of individual States on the legality of a certain military operation usually lack thorough reasonings and explanations and are contested. This fact and the controversial dimension of interventions by invitation make the endorsements by the Council more significant. Also, the fact that in practice intervening States are anxious to be seen interfering in an internal conflict[108] makes having the Council's backing in a particular case more meaningful.

Relating to the question addressed here, it has recently been argued that when the UN Security Council endorses, supports or condones a military operation, legally dubious under general standards, it 'confers authority on the operation'. It makes an otherwise legally-suspect operation 'easier to justify and harder to challenge in law'.[109] The cases of Mali and Yemen, where the Council identified, or recognised the legitimacy of, the rightful leader in a country embroiled in an internal conflict and, thus, indicated who is able to legally consent to an intervention, are shown as examples.[110] Such role of the Council is called 'informal regulation' and is claimed to be reflecting another form, or feature, of *jus ad bellum*, which 'is more procedural and particularistic', that goes beyond its general standards.[111] Attributing this kind of legal effect to such decisions of the Council has been criticised not least because it seems to be altering the black letter content of *jus ad bellum* while lacking the basic characteristics of law such as coherency and predictability. Nonetheless, still the Council's meaningful impact when acting in this manner in legitimising, if not legalising, an intervention in general is recognised.[112]

This study showed that the Council's endorsement of a consensual intervention is pervasive in practice and not limited to the cases where the Council helped identifying the rightful authority to speak on behalf of the State and thus helped clarifying the legality of an otherwise legally

[108] See nn 24-31 and 44-45, and the surrounding text.
[109] Monica Hakimi, 'The *Jus Ad Bellum*'s Regulatory Form' (2018) 112 AJIL 151, 155.
[110] See ibid 169-175.
[111] ibid 155.
[112] For a review of the debate, see Ashley S Deeks, 'Introduction to the Symposium on Monica Hakimi "The Jus Ad Bellum's Regulatory Form"' (2018) 112 AJIL Unbound 94.

dubious intervention. As mentioned above, the Council at times directly endorsed a consensual intervention in various ways. Also as mentioned, such interventions are generally legally dubious in the sense that as per Article 2(4) of the UN Charter, they have to be compatible with certain principles of international law, such as the political independence of States and the right to self-determination of peoples, which are particularly at stake in situations of civil war.[113] One can therefore could consider that the above-mentioned recent debate in the literature on the legal effect of the Council's endorsements of legally dubious interventions could similarly apply to the cases of endorsements mentioned at the outset of this section.

In addition to the above-motioned methods of endorsing or condoning a consensual intervention, the Council had other ways by which to favour governments in internal conflicts. In many cases, the Council condemned or sanctioned various groups fighting the government. These especially were the groups it labelled as terrorist, or whose activities it characterised as terrorism, or whose activities it found were in grave violation of international humanitarian law.[114] If such approach by the Council has any meaning in the context of intervention by invitation, it should make it harder to challenge in law an intervention by invitation against such groups. A group sanctioned or condemned by the Council could lose whatever credibility it has in the eyes of the international community. This credibility, for example, could relate to the group's having a say in the future of the State as being part of the people and having the potential to be part of the governmental structure in future. No State, for example, would consider assisting a government in its fight against a terrorist group condemned by the Council as implicating the right of the people of that State to determine their own political structure themselves without external interference under the right to self-determination.[115]

3.8. The impact of human rights and humanitarian law violations by the consenting State on the legality of the intervention

Almost any State beset by civil war faces allegations of violations of human rights or humanitarian law. Military assistance to such States is equally pervasive in practice. De Wet's

[113] See Chapter 4.
[114] See generally Chapter 6.
[115] On the relationship between terrorism and self-determination, see, for example, Elizabeth Chadwick, 'Terrorism and Self-Determination' in Ben Saul (ed), *Research Handbook on International Law and Terrorism* (Edward Elgar 2014).

survey of non-international armed conflicts in Afghanistan, Iraq, Somalia, Mali, South Sudan, Syria and Libya reveals that the governments of these States, which had received direct military assistance from other States, had been found to be in widespread violation of human rights and humanitarian law in the reports of the UN and human rights organisations.[116] This is not an occurrence only concerning direct military assistance, but also assistance such as the supply of arms. The UN Fact Finding Mission on Myanmar, for example, found that State-owned and private companies from at least seven States had since 2016 provided arms and related material to the Myanmar army, which used the material in the commission of gross violations of human rights and humanitarian law during the non-international armed conflicts in which it was involved.[117]

States that provided assistance to the governments committing human rights or humanitarian law violations had occasionally been criticised and called on to halt their support by other States. Reasons for criticism included that they were aiding and abetting, or being complicit in, or there were concerns that their assistance could result in, violations of human rights and humanitarian law.[118] Some assisting States, indeed, based on such concerns at times suspended the support they were providing.[119]

However, despite the criticism or suspension of the assistance based on such concerns, States do not seem to question the sovereign right of the requesting governments implicated in violations of international law to request assistance from other States.[120] The criticism, or suspension of, foreign assistance based on the mentioned reasons such as aiding and abetting, or being complicit in, violations of human rights and humanitarian law could rather be

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[116] Erika de Wet, 'Complicity in Violations of Human Rights and Humanitarian Law by Incumbent Governments Through Direct Military Assistance on Request' (2018) 67 ICLQ 287, 292-5.
[117] UN Human Rights Council, 'The Economic Interests of the Myanmar Military' UN Doc A/HRC/42/CRP.3, 5 and 106-9.
[118] For example, in respect to the criticism of Russia's assistance to the Syrian government in the latter's violations of humanitarian law, see De Wet, 'Complicity' (n 116) 295, fn 44 and 296, fn 53; Also see Antonio Bultrini, 'Reapprasing the Approach of International Law to Civil Wars: Aid to Legitimate Governments or Insurgents and Conflict Minimization' (2018) 56 ACDI 144, 156 and 164.
[119] See Bultrini (n 118) 158 on the suspension by the US (partly) and Norway of support to the participants of the Saudi-led coalition intervening in the Yemeni conflict.
[120] See De Wet (n 116) 296; Indeed, the US Representative at the UN found Russian arms transfers to the Syrian 'regime that is using such horrific and disproportionate force against its own people' 'reprehensible' but 'technically' lawful 'since there's not an arms embargo'. See Chapter 6, n 412; On this matter, also see Claus Kreβ, 'Major Post-Westphalian Shifts and Some Important Neo-Westphalian Hesitations in the State Practice on the International Law on the Use of Force' (2014) 1 JUFIL 11, 26-30.

explained based on the legal grounds concerning the derivative responsibility that the assisting States could incur in assisting such governments. These grounds, which are explored in chapter 5, include rules on State complicity, the duty to ensure respect for IHL in armed conflicts and relevant provisions of the 2013 Arms Trade Treaty.

Sometimes it could remain ambiguous whether the suspension of support in a given case is based on policy or legal reasons. For example, the US at a certain time 'had scaled back its support of the Saudi-led coalition [intervening in Yemen] due to increasing concerns about civilian casualties'.[121] However, the US government did not 'appear to have addressed any of [the above-mentioned] particular theories *vis-à-vis* its role in Yemen',[122] thus leaving its reasoning speculative.

More recently, in literature the right of a government implicated in the commission of human rights or humanitarian law violations to consent to an intervention has been correlated with its responsibility to protect the population from atrocity crimes. The UN General Assembly's 2005 World Summit Outcome Resolution provides that every 'State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means.'[123] Accordingly, sovereignty not only gives States certain rights but also impose on them certain responsibilities. This understanding leads to the suggestion that a State that fails to perform its sovereign responsibility by committing atrocity crimes against its population loses the right to exercise the privileges that come with sovereignty, such as the right to request foreign military assistance.[124] However, it remains to be seen whether this understanding will settle in practice.[125]

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[121] Kristina Daugirdas and Julian Davis Mortenson (eds), 'Contemporary Practice of the United States Relating to International Law' (2017) 111 AJIL 476, 527.
[122] ibid 532. The author subsequently quotes a general statement from the US government articulating its view on the general rule of State complicity and suggests that this could provide some insight into the US government's reasoning.
[123] 2005 World Summit Outcome (n 61) para 138.
[124] See Eliav Lieblich, *International Law and Civil Wars: Intervention and Consent* (Routledge 2013) Ch 8; Cóman Kenny and Seán Butler, 'The Legality of 'Intervention by Invitation' in Situations of R2P Violations' (2018) 51 NYUJIntlL&Pol 135.
[125] Lieblich (n 124) 187-8 gives the examples of the Syrian and Libyan governments, the 'legitimacy' of which was challenged by other States because of the atrocities they committed.

4. Conclusion

The detailed analysis of practice in this chapter has shown that States pursue a more subtle approach to consensual interventions than may seem at first sight. Though consent in principle suffices to justify the intervention, involved States do not seem to rely on it in an exclusive manner. They rather consistently utilise and associate consent with an objective or an accumulation of objectives such as countering terrorism, addressing a security threat going beyond the territorial State, countering a prior intervention, maintaining law and order or preventing a humanitarian crisis.

The interpretation of this practice has been subject to contention in literature. Some commentators argued that such objectives are of an extra-legal, such as political, nature, and thus cannot imply *opinio juris*. States themselves do not clearly demarcate their legal arguments from extra-legal arguments. Their statements that invoke the consent of the territorial State are usually mired with the intervention's objectives. It is more likely that these objectives not only are of a political nature, but also supportive of the primary legal justification of consent. The relevant State practice commonly points out that States avoid to be seen suppressing with their armed forces popular armed opposition groups in other States and thus influencing the outcome of civil wars merely because of having been invited by the government. There has been almost no instance that constituted a precedent for the existence of such a right for States. This practice is in line with the UN Charter stipulating that States should not use force against the political independence of States and the right to self-determination of peoples. As argued in chapter 4, these principles indicate that foreign States should not militarily intervene in support of the governments to influence the outcome of civil wars. Therefore, being relevant to the rules of international law, the relevant State conduct cannot be dismissed as being merely political.

Moreover, since the relevant practice essentially conforms with theory, there has to be a contradictory practice to argue that there is a right to support beleaguered governments to suppress popular opposition groups. In sum, the rules of international law and State practice indicate that States are not allowed to intervene in civil wars even with the valid consent of the government merely to influence the outcome of the conflict. In other words, intervening States' objectives should not contradict the principles of international law that are at stake, and assisting a beleaguered government simply to prop it up against a popular insurgency does run

against them. The study, therefore, entrenches the purpose-based approach in the scholarship that deems the objective of an intervention by invitation instrumental for its legality.

What further strengthens the conclusion reached in this chapter is that the legal statements by Canada, the UK, France and the DRC, mentioned in the previous chapter, and some statements made by the delegates during the drafting of certain UN General Assembly resolutions on non-intervention, mentioned in chapter 4, similarly find consensual interventions in civil wars legally problematic. Also, though rare, at times States have rejected another State's request for military assistance with reasonings reminiscent of the principles of non-interference and self-determination, such as that the problem was an internal matter in which they had no say, or that it would be an interference in the internal affairs of the requesting State. Sometimes third States have criticised an actualised intervention by invitation for similar reasons. The language used by States in these occasions and the above-mentioned statements at the least indicates that valid consent of a government does not necessarily make an intervention compatible with principles such as non-interference, political independence and self-determination. The particularities of each case need to be taken into account to determine whether a consensual intervention complies with these principles and thus is lawful.

The purpose of not intervening to influence the internal conflict in practice is inferred, for example, from the cases where the intervening States clearly expressed that they were not taking sides or interfering in the conflict. It could also be drawn from the objectives put forward for the interventions. Thus, regardless of whether their actions actually strengthened the government's hand against the opposition, the intervening States sometimes alluded to preventing a humanitarian crisis or even genocide; claimed rescuing nationals or foreigners; or claimed that their troops, which were already present in the territorial State with its consent, responded in self-defence when attacked.

The most capitalised objective, especially in recent times, seems to be combating a terrorist group. The argument that the objectives States allude to are of political nature were especially made in the context of counterterrorism, and it was claimed that this practice actually leads to the conclusion that consensual interventions in civil wars in fact are legal. However, terrorism itself being a legal concept different from ordinary rebellions in the eyes of States, one cannot infer from the practice where the objective of counter-terrorism is particularly utilised a general right to intervention by invitation in civil wars. While international law is neutral over armed

rebellions, it clearly is partial towards terrorism, as there is a body of international law, both at the universal and regional levels, that oblige States to fight terrorism. In line with this understanding, some international legal instruments provide terrorism particularly as a reason to assist other States at their request.

While States already see in opposition groups a potential to be part of the future of the State considering, for example, that they accept to enter into peace negotiations with them that eventually result in compromise in political power, they hardly see such a potential in a group they call terrorists. The multi-faceted internal conflicts where both terrorist and non-terrorist groups are involved further prove the distinction between the two. In such conflicts, intervening States intentionally aimed only at terrorist groups and claimed not being involved in the fight between the opposition and government. Third States also cautioned and criticised the targeting of the opposition in these cases.

The distinction made between the two groups in the practice of intervention by invitation highlights the need for a universal definition of terrorism and a centralised mechanism to exclusively designate terrorist groups in international law.

In some cases, the intervention came in response to a prior foreign intervention on the side of the rebels. Sometimes the intervening States even invoked the right to collective self-defence of the assisted State when the intervention on the side of the rebels was deemed to have reached the level of an armed attack. The practice shows that, in line with the ICJ's decision in *Nicaragua,* in cases where the intervention came to counter a prior foreign intervention on the side of the rebels not amounting to an armed attack, the military assistance delivered to the government should remain territorially limited. States should not use force against, or take the war into the territory of, the State intervening on the side of the rebels.

Intervening States sometimes claimed that they needed to address a security issue that is posing a threat not only to the government they are assisting, but also themselves. Sometimes they even invoked the right to self-defence against the armed group they targeted, alongside the consent of the territorial State. In such cases, given the prominence of State sovereignty under international law, the consent of the territorial State must be deemed the primary justification. The justification of self-defence, on the other hand, should be considered complementary. That is, the intervening State must respect the limits of the consent given, while also preserving the

right to go beyond these limits if they hinder it from taking the necessary action to deter the armed attack under its inherent right to self-defence.

When justifying the intervention, States never seem to take into account whether the conflict reached the level of a civil war or remained an internal disturbance. This may indicate that it is not about the level of the conflict, but the relevant principles of international law. However, the level of the conflict seems to play a role in the eyes of the States in the sense that low-level conflicts are a convenient ground for the intervening States not to make the intervention about taking sides in an internal conflict. In such conflicts, they usually put forward claims such as maintaining law and order and restoring the rule of law. Similarly, some foreign interventions were aimed at restoring a democratically elected and internationally recognised government to office after it was toppled by a military coup or was not allowed to come to office from the beginning by the incumbent authorities. The difficulty to justify getting involved in widespread civil conflicts could also be inferred from the tendency of States in some cases to downplay the scale of the conflict or imply a lack of public support for the rebels.

The analysis of practice in this chapter also helped to address some questions peripheral to the subject. The practice indicates, for example, that the provision of assistance such as arms, intelligence or logistics to other States even if they are involved in civil war do not give rise to controversy as much as direct military interventions. This could indicate that in practice there is no prohibition on the provision of arms to governments regardless of the impact of this kind of assistance on the outcome of the internal conflict they are involved in. This conclusion would seem to contradict a theoretical understanding that just as direct military assistance, such assistance could also run against the right to self-determination of the people by influencing the outcome of the conflict with external interference. One can speculate that the reason such assistance does not give rise to controversy in practice could be that the supply of arms is not as effective or decisive as direct military intervention on the outcome of an internal conflict. A State providing arms to another State involved in a civil war can always claim that the arms in question was not intended to be used in the civil war but was part of the regular relationship between the two States. Russia, for example, had particularly defended its transfer of arms to Syria in this way. However, there could be other reasons behind Russia's such attitude, such as not to be seen complicit in the violations of international law by the Syrian government. Therefore, it remains doubtful whether this instance could indicate a prohibition on the provision to other governments of arms to be used in civil war.

The practice also gave some insight into the issue of intervening in States subjected to a UN Security Council-imposed arms embargo that prevents both the government and opposition alike from receiving arms from other States. The practice indicated that an ineffectively implemented arms embargo cannot prevent the government from requesting foreign assistance against external interventions on the side of the opposition. Also, an apparent breach of a Council-imposed embargo could sometimes be about the interpretation of the relevant decisions of the Council.

The practice and relevant analysis also showed that the UN Security Council, which has to act in accordance with the purposes and principles of the UN when taking decisions regarding the maintenance of international peace and security, can enhance the legality of an intervention by invitation. The Council nearly a dozen of times urged for foreign support to a beleaguered government, urged the continuation of a requested intervention, and/or welcomed an intervention by invitation after it had taken place. It could be argued that when the Council endorses a consensual military intervention in such a way, it makes it more difficult to argue against the compatibility of the intervention with the norms of international law that are at stake.

The Council had another way by which to take the side of the government in internal conflicts. In many cases it condemned, sanctioned or associated with terrorism various groups fighting the government. In such cases as well, it should be more difficult to challenge in law the intervention by invitation in question. No State, for example, would consider assisting a government in its fight against a terrorist group condemned by the Council as implicating the right to self-determination of the people.

Lastly, the practice showed that human rights or humanitarian law violations by the inviting government do not impact its sovereign right to request foreign assistance. Third States' criticism, or the assisting States' suspension, of assistance to such governments in practice were rather based on rules on State complicity or the duty to ensure respect for international humanitarian law. It remains to be seen whether the view which suggests that a State committing atrocity crimes against its population in violation of its sovereign responsibility to protect its population from such crimes loses its sovereign right to consent to foreign intervention will settle in practice.

Chapter 8: Conclusion

The purpose of this study has been to examine the legality of foreign military interventions at the request of the governments of States involved in an internal conflict or civil war. Below is a summary of the findings of the study as a whole.

Chapter 1 juxtaposed the recent *lex ferenda* proposals in literature on an internal *jus ad bellum* regime, drawn either with reference to existing areas of international law or out of pure policy considerations. If positive law had contained such a legal regime, one could have been able to answer the question of when and whether a government can request foreign assistance in self-defence against armed opposition groups. However, there are reasonable barriers to such a regime emerging in positive law any time soon, not to mention the serious concerns over whether it really is desirable from policy and moral aspects. Such a legal regime, moreover, would face various practical difficulties when put into force. In any event, until such a legal regime materialises, one has to consider the issue under the existing normative frameworks.

Chapter 2 examined how the well-established right of States to request foreign assistance, including military assistance, in the exercise of their sovereignty is constructed in international law. It first addressed the ILC's inclusion of 'consent' among the secondary rules of State responsibility, under which the invocation of consent precludes wrongfulness. The intention behind this inclusion mostly was to provide legal certainty to the concept of consent in order to prevent its abuse in international relations. However, in view of the wording of Article 2(4) of the UN Charter, the scholarship still overwhelmingly deems that consent is intrinsic to the primary rule and thus consensual use of force falls outside the peremptory prohibition on the use of force by definition. Indeed, given that consent to foreign intervention is a sovereign right of every State, deeming consent a secondary rule, that is, considering consensual uses of force *prima facie* unlawful, would be an affront to State sovereignty. This theoretical discussion, nonetheless, seems to play no crucial practical role with respect to the legality of consensual interventions. In respect to the peremptory character of the prohibition of the use of force, mainly because when there is consent the prohibition does not apply *ab initio*, a consensual use of force cannot be considered a derogation from the peremptory prohibition of the use of force.

On the ground of the peremptory character of the prohibition of the use of force and the principles it aims to protect, it is widely claimed in literature that a State cannot consent to the use of force in advance via a treaty from which it cannot withdraw at the time of the intervention. However, States adopt these treaties and the practice concerning their application, though limited and not definitive, militates in favour of their validity. It is suggested in this study that one way by which to reconcile the conflicting views on this issue seems to consider such treaty provisions lawful when their objectives actually do not go against the purposes of the UN, with which the prohibition of the use of force must be consistent. Under such an understanding, the AU and ECOWAS agreements allowing such interventions should be considered valid, as they are the materialisation of the sovereign responsibility of States to protect their population from atrocity crimes. Likewise, a treaty guaranteeing by third States a power-sharing agreement between the two different communities in a State would be compatible with the self-determination of peoples, and thus lawful.

To produce its legal effects, consent must meet the conditions required for its validity. To begin with, it has to be given freely, that is, without coercion. As exemplified in a 2007 case before the Latvian Constitutional Court, and the 2019 Chagos Advisory Opinion by the ICJ by way of comparison, coercion of the host State vitiating its consent can take far-reaching forms depending on the unique circumstances of each case. The intervening State's interference in the internal affairs of the host State, its other actions in the region, its domination of the host State or potential consequences of the refusal to give consent, for example, could help determine the existence of coercion.

Consent also has to be clearly established and actually expressed. This does not mean that the consent cannot be given informally or tacitly. The issue becomes complicated, however, when intervention elicits contradictory reactions or symbolic protests from the territorial State, as was the case with Syria's reaction to the US-led coalition's intervention against ISIS. In such a case one can with certainty ascertain the non-existence of consent only when the territorial State clearly expresses its objection to the intervention by, for example, categorising it as illegal. This tentative conclusion finds resonance in the ICJ's *DRC v Uganda* case.

International law allows consent to be given also in secret, which was the case with the US interventions in Somalia, Yemen and Pakistan. This however could cause evidentiary

problems. Documents evidencing such consent could play a more instrumental role when the claims of giving such consent have been denied publicly.

Another prerequisite for the validity of consent, given the principles of international law at stake and as could be inferred from State practice, is that it has to be expressed by, or on behalf of, the highest authorities in a State, such as the head of State, or the government in general, but not, for example, the foreign minister, the army chief or regional authorities. Lastly, it should be highlighted that the intervening States must observe the terms and conditions of the consent given. Not observing the limits of the consent given and relying on the consent of a State organ not entitled to do so, for example, were among the grounds on which some States dismissed Russia's intervention in Crimea.

Chapter 3 addressed the question of how to identify the legitimate government that is legally capable of speaking and expressing consent to foreign intervention on behalf of the State. This is a matter that concerns the act of recognition by States of the governments of other States. While the recognition of governments inherently is a political act, and its discretionary nature was behind the ILC's reluctance to deal with it as a legal institution, it has important implications for the legality of consensual interventions. It is therefore important to dissect any formal and consistent features that adhere to this act.

Practice shows that traditionally, the government of a State has been identified with its ability to exert effective control over the national territory and people, and to continue to do so. Under this doctrine, whether the government came to power through constitutional means has been irrelevant. States in line with this objective criterion have adopted a policy of not according formal recognition to new governments – a policy only to be breached in exceptional or unusual cases. The doctrine could be said to have endured the challenge of the recent case of Venezuela, where some 50 States grounded their recognition of an ineffective President mainly on the Venezuelan Constitution. The rest of the international community did not join them in this recognition, and they were not consistent in upholding the constitutionality, and disregarding the effectiveness, in other cases.

Under the effective control doctrine, an established government is continued to be recognised until its effectiveness diminishes considerably. Losing control over part of the territory during an internal conflict does not affect its status as government. This presumption in practice in

favour of established governments has survived the recent challenging cases of Yemen, Ukraine, Syria and Libya.

The effective control doctrine refers to a control that is independently acquired and maintained. Governments installed as a result of foreign intervention are rather entitled to non-recognition. Recent practice involves cases, such as of Iraq and Afghanistan, where the UN Security Council endorsed the formation of interim governments which owed their existence to foreign interventions. Rather than contradicting the requirement of independency, this practice can only be interpreted as that the external legitimacy conferred on a government by the Council, and international community, can make up for that government's lack of independence from foreign intervention.

Although effectiveness is the prominent criterion for recognition, at times States have refused to recognise a new government due to its unwillingness to abide by international obligations. The non-recognition of the Taliban in Afghanistan was explained on this ground. The importance for recognition of willingness to abide by international obligations could be one of the reasons why non-State entities seeking recognition commit to uphold international obligations.

A failed State where law and order has totally collapsed in the absence of any government to represent it in international relations obviously cannot validly request foreign assistance to restore the anarchy in which it is involved. Nevertheless, the absence of a government does not in and of itself cause the loss of 'statehood' and thus the concomitant right to sovereignty. Therefore, such a State will still be able to safeguard itself from arbitrary interventions. It is rather the UN Security Council that can authorise intervention in such States, as was the case with Somalia of the 1990s.

Since States overwhelmingly award recognition in line with the effective control doctrine, the international recognition of a government and its effectiveness accord with each other. The question is whether international recognition on its own plays a role in the legitimacy of a government. An isolated view that finds its base in early international arbitral decisions and suggests that the effectiveness exclusively and legally determines the existence of a government does not seem to hold true. In practice, it is the internationally recognised government that represents the State in international relations even if the State is effectively

being controlled by another entity. International recognition, given for whatever reason, thus can compensate for the lack of effectiveness.

However, practice also shows that States do not regard the invitation for military intervention from an ineffective but recognised government a sufficient legal basis on every occasion, without a discernible pattern to differentiate such occasions. Therefore, it does not seem safe to conclude that being internationally recognised can entirely compensate for the lack of effectiveness when it comes to the authority to consent to military intervention. There could be various reasons for States not to deem consent from such governments sufficient, such as to be realistic about how an ineffective government can accommodate foreign forces or be more prudent when it comes to the legal basis of the intervention by seeking a UN Security Council authorisation. In any event, the importance of international recognition must not be underestimated. As practice shows, effective but non-recognised governments cannot object to a foreign intervention with which the recognised government agree.

Thus, if the international community can agree on whose call must be heeded in a conflict-hit State, the danger of escalation of that internal conflict into an international one between different political blocks of the international community could be alleviated. A situation where the international community is divided over who can speak for the State, such as in the case of Venezuela where foreign military intervention by invitation indeed was contemplated, can exemplify this risk. To prevent possible abuse, in such situations no competing government should be able to request foreign military assistance. Particularly, no intervention should take place against the wishes of the effective government.

It would be desirable if the institution of recognition of governments was collectivised, for example, in the form of recognition by the UN. However, such a process does not exist in practice. The representation in an international organisation does not necessarily amount to collective governmental recognition, or individual recognition by the State voting in favour of the approval of the delegates appointed by the government in question. The recent debates at the UN General Assembly over the approval of credentials of State representatives demonstrate that the intention behind the approval by individual States is of paramount importance.

The absence of any mechanism for collective recognition of governments could lead to dire consequences when the international community is split on whom to recognise. Challenges

Venezuela faced in respect to its representation in some international organisations exemplify these consequences. However, even if States had agreed on the establishment of such a mechanism, for example, under the universal body of the UN, a problem would be that when the required threshold for recognition has not been reached, the process would be deadlocked. That is, such a mechanism would still not be a panacea for every case.

Chapter 3 also showed that the certain post-Cold War pro-democracy developments and practice have led to the emergence of a doctrine of democratic legitimacy, whereby the legitimacy of a government is mainly ascertained based on whether it has come to power through internationally observed free and fair elections. This certainly placed the effective control doctrine under strain. However, incoherent practice and some additional developments, such as the rise of undemocratic powers and an increasing emphasis on relatively competing values such as stability, security and economic development, led the recent literature to note a retreat from this doctrine. One may add to this list also the rise of so-called 'populism', as it further implicates the definitional problems of democracy.

Recent practice in the political crisis-hit States of Egypt and Ukraine, where the ousted governments were de-recognised despite having been elected in internationally endorsed elections, underscored this retreat. As long as recognition decisions in respect to States that are undergoing political, social and economic challenges continue to be made based on calculations to the exclusion of certain formal characteristics, the credibility and potency of the emerging norm of democratic legitimacy will be further damaged.

It finally should be noted that the democratic legitimacy doctrine has a limited utility. While it practically applies only when the results of internationally validated elections are not respected, not every power struggle in every State flares up due to the non-acceptance of the results of such elections.

Having established in the previous chapters the conditions required for the validity of consent and legitimacy of governments, chapter 4 showed that even if there exists a valid consent by a legitimate government, when the government's legitimacy is challenged by a civil war, its right to request foreign assistance could be constrained due to the complementary and interconnected principles of non-intervention and self-determination. When a foreign State arbiters a civil war in another State by force, it is assumed to implicate the latter's political independence shielded

by the principle of non-intervention. Such an understanding was confirmed by some delegates during the debates concerning the adoption of some UN General Assembly resolutions on non-intervention. They understood the prohibition as being that a government, especially an unpopular one, cannot request foreign assistance during a civil war that is not instigated from outside. Some of them particularly suggested that a State can request foreign assistance towards maintaining law and order.

As for the ICJ case law on non-intervention, the Court in *Nicaragua* accepted that a government can request foreign military assistance during a non-international armed conflict. However, the briefness and incidental nature of its relevant statement renders it insufficient to address the complications that may arise. One likewise should not read much into the Court's acceptance of El Salvador's right to receive military assistance from the US to combat the insurrection it faced. The insurrection was not purely local but, as the Court also confirmed, was externally supported by Nicaragua. What makes the Court's stance on the issue more complicated is that it did not elaborate on a principle it invoked that entailed a prohibition on 'intervention in a civil war', which on the face of it contradicts the Court's mentioned view.

The Court's further engagement with the dispute showed that, while third States can counter-intervene in an internal conflict on the side of the government against an armed rebellion supported by another State, such right must be territorially limited. The counter-intervening State cannot use force in or against the State supporting the rebellion unless the support to the rebellion reaches the level of an armed attack.

DRC v Uganda also cannot be said to have settled the issue. It is true that the Court did not dispute the legality of Uganda's intervention in the DRC's civil war during the period in which it found that the consent of the DRC was valid. However, the purpose of the Ugandan intervention was to prevent the rebel groups from violating Uganda's border, rather than merely to put down a rebellion concerning only the internal affairs of the Congo. Furthermore, though repeatedly mentioned in judgement, the Court did not elaborate on the DRC's invocation of a prohibition on 'extending any assistance to the parties to a civil war'.

Like the non-intervention principle, the right to self-determination of peoples, with which any use of force must be consistent, puts governments' right to request foreign military assistance into doubt in situations of civil war. As long as the purpose of a foreign intervention is merely

to implicate the outcome of a civil war, where the people in a show of disobedience effectively challenge the established government, the intervention prevents the people from freely choosing their own political status under the right to self-determination. While it may not be desirable, in international law civil wars are perceived to be permissible means by which to exercise the right to self-determination. However, since self-determination does not entail a right to secession, arguably except in certain extreme circumstances, intervention by invitation against secessionist movements would be compatible with self-determination. State practice militates in favour of this conclusion, as demonstrated in the literature.

Thus far the study focused on the compatibility with *jus ad bellum* of consensual interventions in civil wars. In chapter 5 it showed that some rules of international law can considerably limit the scope of a military intervention by invitation even if it can be deemed lawful under *jus ad bellum*. One such rule is the general principle that a State cannot consent to the conduct of an act that it itself cannot undertake under international law. However, a State relying on another State's consent given in violation of this principle cannot be held responsible *for* the consented act. International law rather contains legal venues where assisting State could be held responsible *in connection* with the consented act or the act for which the assistance is requested.

One of these legal venues is the rule on State complicity set out in article 16 of the ILC's Draft Articles on State Responsibility. Accordingly, a State can be held responsible for assisting another State in the commission of an internationally wrongful act by the latter if it had knowledge of the circumstances and the act would be wrongful if committed by itself. When it comes to IHRL violations by the assisted State, it appears that for the complicity to arise, the relevant rule of IHRL should be extraterritorially applying in the given situation, as one can only in this way determine whether the act would be wrongful if committed by the assisting State. However, the modern understanding of territoriality in IHRL and certain rules of IHRL that already address complicity help alleviate this bleak picture. It should be noted that depending on the nature of the assistance, the intervening State could also incur concurrent, and even independent, responsibility for the principal wrongful act. These kinds of responsibilities are more likely to arise in direct military interventions.

The requirement of 'knowledge' makes the applicability of the general rule on complicity particularly difficult. The duty to ensure respect for IHL, on the other hand, stipulates less stringent requirements with respect to the mental element in holding the assisting State into

account. For example, it requires the assisting State to exercise due diligence in preventing IHL violations by the assisted State.

Another legal venue with the potential to limit the scope of a military assistance on request is the arms transfer treaties or regulations that, either in absolute terms or under certain circumstances, ban the transfer of the types of arms to which they apply. The Arms Trade Treaty of 2013, for example, obliges the exporting State to refuse to authorise the export of arms in a given case if it determines that there is an overriding risk that the export in question will undermine peace and security. The EU Council Common Position of 2008 regulating exports of military technology and equipment contains a similar provision. External support to a government intimidating or oppressing part of its population with its actions during a civil war, for example, could undermine peace and security. In any event, however, as also exemplified in domestic case law, States have a wide margin of discretionary power under the Arms Trade Treaty in deciding whether the conditions to refuse the authorisation of the export in a given case are met.

Another legal venue that can constrain an intervention by invitation is the UN Security Council resolutions. The Council in a resolution, for example, can impose an arms embargo on a country embroiled in a civil war, and thus prevent any third State from providing the parties to the conflict with military material. A resolution's primacy over the agreement between the assisting and assisted State, however, depends on the effectiveness of the measures it imposes. A State subjected to an unlawful foreign military intervention on the side of the rebels in violation of the Council's ineffective arms embargo, can request military material from other States to fend off such an intervention.

One more potential legal venue that can constrain an intervention by invitation is the domestic law of the assisted or assisting State. However, the internal law would affect the intervention's legality under international law only to the extent international law defers to it. The international agreement between the assisting and assisted State, for example, could defer to internal law. The VCLT defers to internal law in the sense that it permits a State to invoke its internal law to invalidate its consent if the consent was given in manifest violation of a fundamentally important rule of its internal law regarding competence to conclude treaties. Indeed, in some recent cases the validity of consent had been criticised for not being given in accordance with the rules of domestic law on competence to express consent to foreign military

intervention, even though it is actually a right to be invoked by the consenting State under the VCLT. Otherwise, non-compliance by the assisted or assisting State with the domestic law remains to be the problem of domestic law.

Having addressed the subject under the relevant rules of international law, the study in chapter 6 gave an account of post-Cold War State practice with around 40 instances of consensual interventions in internal conflicts. This practice, analysed in chapter 7, in general showed that States adopt a subtle approach to the issue. Almost none of the cases has been presented by States as simple as assisting a beleaguered government at its request to suppress a popular opposition. They rather consistently utilise and associate consent with an objective or an accumulation of objectives such as countering terrorism, addressing a security threat going beyond the territorial State, countering a prior intervention on the side of the rebels, maintaining law and order or preventing a humanitarian crisis.

The interpretation of this practice has been subject to contention in literature. Some commentators argued that such objectives are of an extra-legal, such as political, nature, and thus cannot imply *opinio juris*. States themselves do not clearly demarcate their legal arguments from extra-legal arguments. Their statements that invoke the consent of the territorial State are usually mired with the intervention's objectives. It is more likely that these objectives not only are of a political nature, but also supportive of the primary legal justification of consent. The relevant State practice commonly points out that States avoid to be seen suppressing with their armed forces popular armed opposition groups in other States merely because of having been invited by their government. There has been almost no instance that constituted a precedent for the existence of such a right for States. This practice is in line with the UN Charter stipulating that States should not use force against the political independence of States and the right to self-determination of peoples. As argued in chapter 4, these principles indicate that foreign States should not militarily intervene on the side of the governments to influence the outcome of civil wars. Therefore, being relevant to the rules of international law, the relevant State conduct cannot be dismissed as being merely political.

Moreover, since the relevant practice essentially conforms with theory, there has to be a contradictory practice to argue that there is a right to support beleaguered governments to suppress popular opposition groups. In sum, the rules of international law and State practice indicate that States are not allowed to intervene in civil wars even with the valid consent of the

government merely to influence the outcome of the conflict. In other words, intervening States' objectives should not contradict the principles of international law that are at stake, and assisting a beleaguered government simply to prop it up against a popular insurgency does run against them. The study, therefore, entrenches the purpose-based approach that deems the objective of a consensual intervention instrumental for its legality.

What further strengthens the conclusion reached in this chapter is that the legal statements by Canada, the UK, France and the DRC, mentioned in the previous chapter, and some statements made by the delegates during the drafting of certain UN General Assembly resolutions on non-intervention, mentioned in chapter 4, similarly find consensual interventions in civil wars legally problematic. Also, though rare, at times States have rejected another State's request for military assistance with reasonings reminiscent of the principles of non-interference and self-determination, such as that the problem was an internal matter in which they had no say, or that it would be an interference in the internal affairs of the requesting State. Sometimes third States have criticised an actualised intervention by invitation for similar reasons. The language used by States in these occasions and the above-mentioned statements at the least indicates that valid consent by a government does not necessarily make an intervention compatible with principles such as non-interference, political independence and self-determination. The particularities of each case need to be taken into account to determine whether a consensual intervention complies with these principles and thus is lawful.

The purpose of not intervening to influence the internal conflict in practice is inferred, for example, from the cases where the intervening States clearly expressed that they were not taking sides or interfering in the conflict. It could also be drawn from the objectives put forward for the interventions. Thus, regardless of whether their actions actually strengthened the government's hand against the opposition, the intervening States sometimes alluded to preventing a humanitarian crisis or even genocide; claimed rescuing nationals or foreigners; or claimed that their troops, which were already present in the territorial State with its consent, responded in self-defence when attacked.

The most capitalised objective, especially in recent times, seems to be combating a terrorist group. The argument that the objectives States allude to are of political nature were especially made in the context of counterterrorism, and it was claimed that this practice actually leads to the conclusion that consensual interventions in civil wars in fact are legal. However, terrorism

itself being a legal concept different from ordinary rebellions in the eyes of States, one cannot infer from the practice where the objective of counter-terrorism is particularly utilised a general right to intervention by invitation in civil wars. While international law is neutral over armed rebellions, it clearly is partial towards terrorism, as there is a body of international law, both at the universal and regional levels, that oblige States to fight terrorism. In line with this understanding, some international legal instruments provide terrorism particularly as a reason to assist other States at their request.

While States already see in opposition groups a potential to be part of the future of the State considering, for example, that they at times accept to enter into peace negotiations with them that eventually result in compromise in political power, they hardly see such a potential in a group they call terrorists. The multi-faceted internal conflicts where both terrorist and non-terrorist groups are involved further prove the distinction between the two. In such conflicts, intervening States intentionally aimed only at terrorist groups and claimed not being involved in the fight between the opposition and government. Third States also cautioned and criticised the targeting of the opposition in these cases.

The distinction made between the two groups in the practice of intervention by invitation highlights the need for a universal definition of terrorism and a centralised mechanism to exclusively designate terrorist groups in international law.

In some cases, the intervention came in response to a prior foreign intervention on the side of the rebels. Sometimes the intervening States even invoked the right to collective self-defence of the assisted State when the intervention on the side of the rebels was deemed to have reached the level of an armed attack. The practice shows that, in line with the ICJ's decision in *Nicaragua*, in cases where the intervention came to counter a prior foreign intervention on the side of the rebels not amounting to an armed attack, the military assistance delivered to the government should remain territorially limited. States should not use force against, or take the war into the territory of, the State intervening on the side of the rebels.

Intervening States sometimes claimed that they needed to address a security issue that is posing a threat not only to the government they are assisting, but also themselves. Sometimes they even invoked the right to self-defence against the armed group they targeted, alongside the consent of the territorial State. In such cases, given the prominence of State sovereignty under

international law, the consent of the territorial State must be deemed the primary justification. The justification of self-defence, on the other hand, should be considered complementary. That is, the intervening State must respect the limits of the consent given, while also preserving the right to go beyond these limits if they hinder it from taking the necessary action to deter the armed attack under its inherent right to self-defence.

When justifying the intervention, States never seem to take into account whether the conflict reached the level of a civil war or remained an internal disturbance. This may indicate that it is not about the level of the conflict, but the relevant principles of international law. However, the level of the conflict seems to play a role in the eyes of the States in the sense that low-level conflicts are a convenient ground for the intervening States not to make the intervention about taking sides in an internal conflict. In such conflicts, they usually put forward claims such as maintaining law and order and restoring the rule of law. Similarly, some foreign interventions were aimed at restoring a democratically elected and internationally recognised government to office after it was toppled by a military coup or was not allowed to come to office from the beginning by the incumbent authorities. The difficulty to justify getting involved in widespread civil conflicts could also be inferred from the tendency of States in some cases to downplay the scale of the conflict or imply a lack of public support for the rebels.

The analysis of practice in this chapter also helped to address some questions peripheral to the subject. The practice indicates, for example, that the provision of assistance such as arms, intelligence or logistics to other States even if they are involved in civil war do not give rise to controversy as much as direct military interventions. This could indicate that in practice there is no prohibition on the provision of arms to governments regardless of the impact of this kind of assistance on the outcome of the internal conflict they are involved in. This conclusion would seem to contradict a theoretical understanding that just as direct military assistance, such assistance could also run against the right to self-determination of the people by influencing the outcome of the conflict with external interference. One can speculate that the reason such assistance does not give rise to controversy in practice could be that the supply of arms is not as effective or decisive as direct military intervention on the outcome of an internal conflict. A State providing arms to another State involved in a civil war can always claim that the arms in question was not intended to be used in the civil war but was part of the regular relationship between the two States. Russia, for example, had particularly defended its transfer of arms to Syria in this way. However, there could be other reasons behind Russia's such attitude, such

as not to be seen complicit in the violations of international law by the Syrian government. Therefore, it remains doubtful whether this instance could indicate a prohibition on the provision to other governments of arms to be used in civil war.

The practice also gave some insight into the issue of intervening in States subjected to a UN Security Council-imposed arms embargo that prevents both the government and opposition alike from receiving arms from other States. The practice indicated that an ineffectively implemented arms embargo cannot prevent the government in and of itself from requesting foreign assistance against external interventions on the side of the opposition. Also, an apparent breach of a Council-imposed embargo could sometimes be about the interpretation of the relevant decisions of the Council.

The practice and relevant analysis also showed that the UN Security Council, which has to act in accordance with the purposes and principles of the UN when taking decisions regarding the maintenance of international peace and security, can enhance the legality of an intervention by invitation. The Council nearly a dozen of times urged for foreign support to a beleaguered government; urged the continuation of a requested intervention; and/or welcomed an intervention by invitation after it had taken place. It could be argued that when the Council endorses a consensual military intervention in such a way, it makes it more difficult to argue against the compatibility of the intervention with the norms of international law that are at stake.

The Council also in many cases condemned, sanctioned or associated with terrorism various groups fighting the government. In such cases as well, it should be more difficult to challenge in law the intervention by invitation in question. No State, for example, would consider assisting a government in its fight against a terrorist group condemned by the Council as implicating the right to self-determination of the people.

Lastly, the practice showed that human rights or humanitarian law violations by the inviting government do not impact its sovereign right to request foreign assistance. Third States' criticism, or the assisting States' suspension, of assistance to such governments in practice were rather based on rules on State complicity or the duty to ensure respect for international humanitarian law. It remains to be seen whether the view which suggests that a State committing atrocity crimes against its population in violation of its sovereign responsibility to

protect its population from such crimes loses its sovereign right to consent to foreign intervention will settle in practice.

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