

# Intervention by invitation - when can consent from a host state justify foreign military intervention?

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## ARTICLES

### INTERVENTION BY INVITATION – WHEN CAN CONSENT FROM A HOST STATE JUSTIFY FOREIGN MILITARY INTERVENTION?

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*In spite of the general prohibition of intervention in the affairs of other states, military interventions undertaken with the consent of a host state are considered to be permissible. This is confirmed both in state practice and in international legal doctrine. However, in order for such interventions to be permitted in particular situations, certain requirements have to be fulfilled. The consent must be given by a due authority, it must not be vitiated, it must precede the intervention, and it must be given expressly and clearly. This article explores the meaning of each of these requirements and examines their application in state practice. In addition, the possibility of intervening in civil wars is examined. It is submitted, in the conclusion of the article, that some aspects of the right to intervene upon invitation are undergoing certain changes, which results in the non-intervention principle becoming more flexible.*

*Keywords: intervention by invitation; non-intervention; use of force; jus ad bellum; consent.*

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## Introduction

Much has been written on self-defense and actions authorized by the U.N. Security Council as the only exceptions to the use of force provided for by the Charter of the United Nations. As much as the particular aspects of these two exceptions, primarily self-defense, are far from unambiguous, their legality is not disputed. The same cannot be said about a whole range of military interventions which regularly take place among states. Besides humanitarian interventions, which nowadays no doubt represent one of the most controversial issues, in recent years much attention has been drawn to another type of military intervention – interventions by invitation, or, as some authors prefer to call them, consensual interventions.<sup>1</sup>

Intervention by invitation, as defined by the International Law Institute, is direct military assistance by the sending of armed forces by one state to another state upon

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<sup>1</sup> Eliav Lieblich, *International Law and Civil Wars: Intervention and Consent* 1 (New York: Routledge, 2013). Hafner also criticizes the term “intervention by invitation” and proposes the term “military assistance on request.” See Gerhard Hafner (rapporteur), *Problèmes actuels du recours à la force en droit international. Sous-groupe : Intervention sur invitation* [Present Problems of the Use of Force in International Law. Sub-Group: Intervention by Invitation] in *Annuaire de l'Institut de droit international : Session de Naples (Italie), Vol. 73, 2009* [Yearbook of the Institute of International Law: Session of Napoli (Italy), Vol. 73, 2009] 299 (Paris: Éditions A. Pedone, 2009) (Nov. 2, 2019), also available at <http://www.idi-ii.org/app/uploads/2017/06/Hafner.pdf>. Some authors use the terms “consent” and “invitation to intervene” interchangeably, treating them as synonyms. 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*, 3(1) *Journal on the Use of Force and International Law* 97, 97 (2016). The author of the present paper will follow the same line of reasoning, using the terms “intervention by invitation,” “invited intervention,” “consent-based intervention” and “consensual intervention” interchangeably.



the latter's request.<sup>2</sup> The argument of "invitation" or "consent" has been invoked on number of occasions. In recent years it has, for instance, been invoked to justify French intervention in Mali, U.S. drone strikes in Pakistan, Afghanistan, Somalia and Yemen, Saudi Arabia's intervention in Yemen, Russia's intervention in Ukraine, interventions against Islamic State of Iraq and the Levant (ISIL) in Iraq, Libya and Syria, as well as numerous interventions among African states.<sup>3</sup> These examples, along with many others that took place in the second half of the 20<sup>th</sup> century, show that interventions by invitation appear relatively often and, therefore, deserve closer scrutiny.

It is a well-established rule of international law that intervention in the affairs of another state is prohibited. The Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty provides that "no state has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State."<sup>4</sup> An identical provision was stipulated in the Friendly Relations Declaration,<sup>5</sup> as well as in the Declaration on Inadmissibility of Intervention and Interference in the Internal Affairs of States.<sup>6</sup> Furthermore, the ICJ observed in the *Nicaragua* case that a prohibited intervention is one "bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely."<sup>7</sup> One such matter is "the choice of a political, economic, social and cultural system and the formulation of foreign policy."<sup>8</sup> The Court further noted that a wrongful intervention is one that "uses methods of coercion in regard to such choices, which must remain free ones."<sup>9</sup> Coercion is "particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State."<sup>10</sup>

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<sup>2</sup> Gerhard Hafner (rapporteur), *Present Problems of the Use of Force in International Law. Sub-Group C – Military Assistance on Request*, Institute of International Law, Session of Rhodes (Greece), 10<sup>th</sup> Commission, Plenary, 8 September 2011 (Nov. 2, 2019), available at [http://www.idi-iil.org/app/uploads/2017/06/2011\\_rhodes\\_10\\_C\\_en.pdf](http://www.idi-iil.org/app/uploads/2017/06/2011_rhodes_10_C_en.pdf).

<sup>3</sup> For instance, the Ugandan intervention in South Sudan in 2013, or the Economic Community of West African States (ECOWAS) intervention in Gambia in 2017.

<sup>4</sup> U.N. General Assembly, Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, 21 December 1965, A/RES/2131(XX).

<sup>5</sup> U.N. General Assembly, Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, 24 October 1970, A/RES/2625(XXV).

<sup>6</sup> U.N. General Assembly, Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, 9 December 1981, A/RES/36/103.

<sup>7</sup> *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* (1986) I.C.J. 14, para. 205.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*



In spite of the generally accepted prohibition of intervention, practically no one contests that interventions which are conducted upon invitation are permissible, provided that certain conditions are fulfilled. Therefore, the controversy over this type of intervention does not lie in the permissibility of the undertaking *per se*, but in the fulfillment of certain requirements necessary for its legality. These controversies mainly concern determining the due authority to request outside intervention. Is a government of a state the only entity authorized to invite a foreign intervention, or may opposition groups, under certain circumstances, also be empowered to do so? Is *any* government entitled to request outside military assistance? Must it have democratic legitimacy? Must it have a certain degree of control over a territory, and if so, what degree? What if both sides to the conflict control significant parts of a territory? Are invited interventions allowed in cases in which the hostilities within a country have evolved into a civil war? These and other questions will be addressed in the following chapters.

## **1. Consent as a Legal Basis for Intervention**

Since neither the U.N. Charter, nor any other international document, specifically regulates interventions by invitation, the starting point of our analysis will be Article 20 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (DARS), which speaks of consent. Article 20 reads:

Valid consent by a state to the commission of a given act by another state precludes the wrongfulness of that act in relation to the former state to the extent that the act remains within the limits of that consent.<sup>11</sup>


Consent is, therefore, specified as one of the circumstances precluding the wrongfulness of an act, which act would, in the absence of such consent, be illegal. Such preclusion is conditional upon two things: first, that the consent is “valid,” and second, that the act in question remains within the limits of that consent. We will consider both conditions later on. But before we move on to elaborating the prerequisites for valid consent, another issue must be addressed. It concerns the possibility of invoking consent in relation to military interventions, given the fact that consent cannot justify a breach of a peremptory norm of international law.

### **1.1. Consent and the Use of Force**

Consent, as well as other circumstances precluding wrongfulness as outlined in DARS, may be invoked only if actions undertaken under these circumstances are

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<sup>11</sup> United Nations, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001) (Nov. 2, 2019), available at [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf).



in conformity with the peremptory norms of international law.<sup>12</sup> This is required by Article 26 of DARS.<sup>13</sup> Since the prohibition of the use of force has commonly been accepted as a peremptory norm of international law (*jus cogens*),<sup>14</sup> the question of the permissibility of invoking consent in relation to the use of force, or more specifically to invited military interventions, has become an issue.

If a military intervention is a form of the use of force and the prohibition of force is a peremptory norm, consent could not then be a valid ground for precluding wrongfulness in a military intervention. Following this line of reasoning, consent could not serve as a legal basis for a military intervention.

However, this argument corresponds neither to scholarly writing,<sup>15</sup> nor to state practice,<sup>16</sup> which both show that interventions by invitation have generally been accepted as permissible. Even the ICJ has confirmed the right of states to seek outside military assistance.<sup>17</sup> On what grounds then could such interventions be justified?

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<sup>12</sup> A peremptory norm is defined in the Vienna Convention on the Law of Treaties (VCLT) as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention on the Law of Treaties (with Annex), concluded at Vienna on 23 May 1969 (Nov. 2, 2019), available at <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>. A definition of a peremptory norm from the VCLT has been used for the purposes of state responsibility in DARS.

<sup>13</sup> Article 26 of DARS provides that “nothing ... precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.” For the text of DARS see *supra* note 11.

<sup>14</sup> The International Law Commission pointed out that “the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*.” See Draft Articles on the Law of Treaties with Commentaries (1966), at 247 (Nov. 2, 2019), available at [https://legal.un.org/ilc/texts/instruments/english/commentaries/1\\_1\\_1966.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf). See also *Nicaragua* case, *supra* note 7, para. 190. Although there is a fairly unanimous understanding that prohibition of force represents a *jus cogens* norm, it remains much less clear whether the peremptory character refers to each and every form of the use of force or whether it is reserved for the most serious instances of the use of force, such as aggression. Scholarly opinion is not clear on this point. Natalino Ronzitti, *Use of Force, Jus Cogens and State Consent in The Current Legal Regulation of the Use of Force* 147, 159 (A. Cassese (ed.), Dordrecht; Boston; London: Martinus Nijhoff Publishers, 1986).

<sup>15</sup> Christine Gray, *International Law and the Use of Force* 85 (Oxford; New York: Oxford University Press, 2008); Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Oxford: Hart Publishing, 2010); Gregory H. Fox, *Intervention by Invitation in The Oxford Handbook of the Use of Force in International Law* 816 (M. Weller (ed.), Oxford; New York: Oxford University Press, 2015).

<sup>16</sup> See, for instance, Australian Prime Minister’s statement on the request by the Iraqi Government for help in fighting ISIL, PM Transcripts, 12 July 2015 (Nov. 2, 2019), available at <http://pmtranscripts.pmc.gov.au/prime-minister/abbott-tony?page=65>; Statement by the Canadian Minister of Foreign Affairs, Keeping tabs on Canada’s Parliament, 6 October 2014 (Nov. 2, 2019), available at <https://openparliament.ca/debates/2014/10/6/john-baird-5/>; Stephen W. Preston, *Speech on the Legal Framework for the United States’ Use of Military Force Since 9/11*, U.S. Department of Defense, 10 April 2015 (Nov. 2, 2019), available at <https://dod.defense.gov/News/Speeches/Speech-View/Article/606662/the-legal-/>.

<sup>17</sup> See *infra* note 64.



It can reasonably be presumed that anything that a state consents to cannot be considered as being against that state. Where there is consent, there is no coercion.<sup>18</sup> This reasoning encapsulates the well-known general principle of law, *volenti non fit injuria*.<sup>19</sup> It seems correct to understand consent as an inherent right of each state, an aspect of its sovereignty. This right seems to be unaffected by the prohibition of force contained in Article 2(4) of the U.N. Charter. Neither does Article 2(4) prohibit force undertaken with the host state's consent, nor can consensual intervention be regarded as an exception to the use of force. As James Crawford, while ILC Special Rapporteur, observed, consent acts as a constituent part of the primary rule and not as a secondary rule of state responsibility.<sup>20</sup> Crawford opined that "some peremptory norms contain an 'intrinsic' consent element."<sup>21</sup> Naturally, this applies solely when a state consents to the use of force on its own territory.<sup>22</sup> Conversely, a state cannot consent to the use of force against another state. This line of reasoning was present in the Report of the International Law Association's Committee on the Use of Force. The Report differentiated self-defense and the Security Council authorizations as the so-called "excused violations" of state sovereignty, from the use of force in a foreign state upon its consent, which involves no violation of state sovereignty *ab initio*.<sup>23</sup> Provided that consent is understood this way, the compatibility of consent-based interventions and Article 26 of DARS is not questionable.

### **1.2. An Ad Hoc Consent and a Treaty-Based Consent**

When speaking of consent as a basis for intervention, an *ad hoc* consent, given in particular circumstances, is what first comes to mind. Indeed, it is this kind of consent that most usually represents a ground for intervention. There is, however, a situation in which consent can be treaty-based, meaning that it is given in advance, when no

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<sup>18</sup> Antonio Tanca, *Foreign Armed Intervention in Internal Conflict* 19 (Dordrecht; Boston; London: Martinus Nijhoff Publishers, 1993).

<sup>19</sup> See Théodore Christakis & Karine Bannelier, *Volenti non fit injuria ? Les effets du consentement à l'intervention militaire [Volenti Non Fit Iniuria? The Effects of Consent to Military Intervention]*, 50(1) *Annuaire Français de Droit International* 102 (2004).

<sup>20</sup> See Corten 2010, at 252.

<sup>21</sup> *Id.*

<sup>22</sup> Consent precludes wrongfulness *vis-à-vis* a consenting state, but the question is whether the wrongfulness is at the same time precluded *vis-à-vis* third states. According to one conceptual basis, consent cannot preclude wrongfulness *vis-à-vis* the international community, while according to another, the absence of coercion against the consenting state takes the intervention outside the scope of the prohibition of the use of force. In the latter case, not only would the interests and rights of the consenting state be safeguarded, but likewise the interests and rights of the third states, that is, the international community as a whole. Tanca 1993, at 22.

<sup>23</sup> Committee on the Use of Force, International Law Association, Report on Aggression and the Use of Force, Washington Conference (2014), B.4 (Nov. 2, 2019), available at <https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1057&StorageFileGuid=1af35245-6705-48c1-be3d-4b099ea7ce60>.



situation requiring intervention yet exists. These treaties mostly include consent to the stationing of foreign troops in a state's territory, or various arrangements of military cooperation among states.<sup>24</sup> The scope of such consent depends on the conditions of a particular agreement.

Let us imagine a situation in which two states, A and B, conclude an agreement in which state A allows state B to station troops in state A's territory. This scenario is quite possible and not particularly problematic. What would, however, happen if state B used state A's territory in ways not provided for by the agreement? For example, where the presence of B's troops is prolonged contrary to the terms of the agreement, or where they use force in A's territory in a manner not envisaged by the agreement, or even where they use force against state A? Naturally, in such a situation the use of force against the host state would not be permitted. The General Assembly Definition of Aggression has described such a scenario as an instance of aggression. It confirmed that actions which are contrary to what is stipulated in the agreements amount to aggression.<sup>25</sup> Thus, treaty-based consent cannot be considered as a blank authorization for any future military intervention. On the contrary, its validity must be strictly observed in light of the conditions stipulated in the agreement.<sup>26</sup>

Some authors have reflected on a specific type of treaty-based consent, that given by the U.N. Charter to the Security Council by all U.N. member states.<sup>27</sup> Member states agreed to confer the primary responsibility for the maintenance of international peace and security to the Security Council<sup>28</sup> and to accept and carry out the decisions of the Council.<sup>29</sup> This, *inter alia*, requires the obligation to accept Council decisions even if they include a coercive action towards a state. Similar authorization is provided for in the Constitutive Act of the African Union.<sup>30</sup> Conferring such rights to organs of particular organizations can indeed be considered as giving

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<sup>24</sup> See David Wippman, *Treaty-Based Intervention: Who Can Say No?*, 62(2) *University of Chicago Law Review* 607 (1995).

<sup>25</sup> Article 3(e) provides that aggression is "the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement." U.N. General Assembly, *Definition of Aggression*, 14 December 1974, A/RES/29/3314.

<sup>26</sup> For a different opinion see Tom J. Farer, *A Paradigm of Legitimate Intervention in Enforcing Restraint: Collective Intervention in Internal Conflicts* 332 (L.F. Damrosch (ed.), New York: Council on Foreign Relations, 1993).

<sup>27</sup> Christian Henderson, *The Use of Force and International Law* 350 (Cambridge: Cambridge University Press, 2018).

<sup>28</sup> Art. 24(1) of the U.N. Charter.

<sup>29</sup> *Id.* Art. 25.

<sup>30</sup> Constitutive Act of the African Union, Art. 4(h) (Nov. 2, 2019), available at [https://au.int/sites/default/files/pages/34873-file-constitutiveact\\_en.pdf](https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf).





a blank authorization for the use of force in certain circumstances. Any state, except the permanent members of the U.N., due to their right of veto, may be a subject of the U.N.'s coercive action. Thus, this particular situation is an exceptional case, which confers a kind of a prior blank authorization for the use of force. Not a right conferred on a state, however, but on an international organization.

### **1.3. Validity of Consent**

Article 20 of DARS speaks of “valid” consent. The Commentary to DARS refers to the validity requirement in terms that the consent must be “freely given and clearly established.”<sup>31</sup> The Commentary further explains that it must be “actually expressed by the state rather than merely presumed on the basis that the state would have consented if it had been asked.”<sup>32</sup> Validity also requires the giving of consent by an agent or person who is authorized to do so on behalf of the State.<sup>33</sup> Finally, consent may be given either in advance or at the time the conduct is occurring, while cases of consent given after the conduct has occurred are a form of waiver or acquiescence.<sup>34,35</sup>

#### *1.3.1. Consent Must Precede the Intervention*

Consent to an intervention may be given by a state in advance or even at the time an event is occurring, while *ex post facto* consent is a form of waiver or acquiescence, leading to the loss of the right to invoke responsibility.<sup>36</sup> Attempts by some states to assert that retroactive consent might be appropriate in circumstances where an emergency situation required action in order to protect persons in another state from imminent and serious danger, have been inconclusive.

A discussion on the time frame for giving valid consent to intervention reflects a similar discussion on whether the Security Council can authorize military actions by U.N. member states *ex post facto*. Legal scholars, as in the case of consent, generally agree that such authorizations must be given beforehand.<sup>37</sup>

Examples of this were the Soviet interventions in Hungary and Afghanistan, the Vietnamese invasion of Kampuchea, and the Ugandan intervention in the Congo. The Soviet intervention in Hungary that took place in 1956 was justified by the request of J. Kadar, who came to power after the beginning of the intervention. The intervention

<sup>31</sup> DARS Commentaries, *supra* note 11, Commentary to Art. 20, para. 6.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* para. 4.

<sup>34</sup> *Id.*

<sup>35</sup> For a comparison of these conditions with the ones for a valid “request” in the IDI Resolution on Military Assistance on Request *see supra* note 2.

<sup>36</sup> DARS Commentaries, *supra* note 11, Commentary to Art. 20, para. 3.

<sup>37</sup> *See* Tarcisio Gazzini, *The Changing Rules on the Use of Force in International Law* 89 (Manchester: Manchester University Press, 2006); Corten 2010, at 348.



was perceived as illegal and was not approved by the United Nations.<sup>38</sup> When the Soviet Union invaded Afghanistan in 1979, it did so without the prior consent of Prime Minister Amin. Intervention resulted in the killing of Amin and the installing of the pro-Soviet Kamin. Kamin then issued the consent to intervention. However, such consent could not cancel the consequences of the unlawful act, even if it had been issued by a proper government of Afghanistan and not a puppet government.<sup>39</sup> Vietnam invaded Kampuchea in 1978 to remove Pol Pot and the Khmer Rouge. Intervention was justified by Vietnam on humanitarian grounds, however Vietnam invoked consent to justify its continued presence in Kampuchean territory. The argument was considered groundless, since the consent was given by a government that came into power by means of Vietnam's intervention, which was not regarded by the majority of states as a legally constituted government.<sup>40</sup> Uganda justified its military intervention in the Congo by referring to the *Lusaka Agreement* from 1999. Since its intervention had begun almost one year before the conclusion of the said Agreement, treaty-based consent could not be invoked as a valid justification for intervention.<sup>41</sup>

### 1.3.2. Express and Clear Consent

Validity of consent has also been considered by examining the requirement that consent must be clear and express. Although it has been accepted that this presupposes the exclusion of presumed consent, it is not clear exactly in what way consent must be expressed. When Special Rapporteur, Roberto Ago opined in his report to the ILC that consent, like all manifestations of the will of a state, can be *expressed* or *tacit*, as well as *explicit* or *implicit*, provided that it is clearly established.<sup>42</sup> He thus provided no conditions as far as the form of consent is concerned. Any form would be acceptable, then, if it derives from the circumstances of a particular case that consent indeed was given. Ago warns, on the other hand, that tacit consent should not be confused with presumed consent. The former is acceptable, the latter not. Presumed consent means that there is actually no consent at all, but it is presumed that the state in question would have consented had it been in a position to do so. Ago rejected the idea that such consent would be valid. He understandably found that, were such consent to be valid, cases of abuse would be all too common.<sup>43</sup>

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<sup>38</sup> Tanca 1993, at 43.

<sup>39</sup> Ronzitti 1986, at 161.

<sup>40</sup> *Id.* at 162.

<sup>41</sup> *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (2005) I.C.J. 168, para. 96.

<sup>42</sup> Roberto Ago, *Eighth Report on State Responsibility in Yearbook of the International Law Commission 1979. Vol. II (Part One)* 3, 35 (New York: United Nations, 1981) (Nov. 2, 2019), also available at [http://legal.un.org/ilc/publications/yearbooks/english/ilc\\_1979\\_v2\\_p1.pdf](http://legal.un.org/ilc/publications/yearbooks/english/ilc_1979_v2_p1.pdf).

<sup>43</sup> *Id.* at 36.



Although in theory the permissibility of tacit consent and the impermissibility of presumed consent are not disputed, in practice it is not always easy to differentiate between the two. Silence on the part of the host state has sometimes been interpreted as passive consent, as tolerance to a foreign military intervention, while in other situations it has been perceived as a lack of consent. The question then arises as to whether in such situations the principle of *qui tacet consentire videtur* can be applied. In certain areas of international law, this principle can no doubt be applied. It is, for instance, well-known that for customary law rule to be created, tacit consent or acquiescence will suffice, and no express consent to a particular conduct is required. In cases of the use of force, however, the situation is different. Doubts about interpreting silence as consent seem justified. Such interpretations might literally, as some authors suggest, “lead to chaos.”<sup>44</sup>

The form of consent was discussed by the ICJ in the *Armed Activities* case. The Court examined the consent given by the Congolese Government to the presence of Ugandan troops in its territory. The Court found that Uganda had been allowed by Congolese President Kabila to engage in military action in the DRC against anti-Ugandan rebels operating in the eastern part of the Congo. Before August 1998, the DRC did not object to this. In April 1998, the two states signed a Protocol in which they agreed that their armies would “co-operate in order to ensure security and peace along the common border.”<sup>45</sup> The DRC claimed before the Court that the said statement did not signify consent, that is, an invitation by either party to send its army into the other’s territory.<sup>46</sup> The Court found that the Protocol could not form a legal basis for consent. The consent, on the contrary, predated the Protocol, and that prior consent could at any time be withdrawn by the Congolese Government, without any further formalities being necessary.<sup>47</sup> In July 1998, Congolese President Kabila issued a statement in which he announced the end of the mandate of the Rwandan troops in Congolese territory.<sup>48</sup> Although he spoke of the Rwandan army, not the Ugandan army, in the last sentence he announced “the end of the presence of all foreign military forces in the Congo.”<sup>49</sup> The two states interpreted this announcement in different ways, Uganda claiming that any withdrawal of consent for the presence of Ugandan troops would have required a formal denunciation by the DRC of the Protocol of April 1998.<sup>50</sup> The Court found Kabila’s statement ambiguous. However, regardless of the interpretation of the statement, the

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<sup>44</sup> Karine Bannelier-Christakis, *Military Interventions Against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent*, 29(3) *Leiden Journal of International Law* 743, 768 (2016).

<sup>45</sup> *Armed Activities* case, *supra* note 41, para. 46.


<sup>46</sup> *Id.*

<sup>47</sup> *Id.* para. 47.

<sup>48</sup> *Id.* para. 49.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* para. 50.



Court found that consent by the DRC to the presence of Ugandan troops in its territory had been withdrawn at the latest in August 1998, when at the Victoria Falls Summit the DRC accused Uganda and Rwanda of invading its territory.<sup>51</sup>

There have been divergent opinions among legal scholars on whether consent needs to be public. For example, O’Connell and Murphy have both examined the legality of U.S. drone strikes in Pakistan, and came to different conclusions regarding the existence and validity of consent by the Pakistani government. It is undisputed that there was no explicit and public consent. Murphy, however, alleges that the absence of public consent does not mean that there was no consent at all. He cites the Washington Post, which noted that although Pakistan “formally protests such actions as a violation of its sovereignty, the Pakistani government has generally looked the other way when the CIA conducted Predator missions or US troops respond to cross-border attacks by the Taliban.”<sup>52</sup> Murphy maintains that there may have been internal documents or communications from the Pakistani government that clarified such consent, and that the Pakistani government’s knowledge of Predator drones being based in Pakistan and its knowledge that such aircraft were being used for missile strikes, presented a strong picture of tacit consent, so long as such knowledge could be established.<sup>53</sup> O’Connell, on the other hand, notes that “without express, public consent of the kind the US received from Afghanistan and Iraq, Pakistan is in a position to claim the US is acting unlawfully, even bringing a future legal claim for compensation.”<sup>54</sup> O’Connell claims that this would be true even if there were some sort of secret consent that the U.S. would have difficulty proving in a court or other public forum.<sup>55</sup> The Pakistani government’s protests would, according to O’Connell, be a strong argument that it had withdrawn any implicit consent that might have been given.<sup>56</sup>

O’Connell has been criticized by some authors for advocating the “publicity” requirement, since “such a requirement is not present in any international legal documents, nor does it appear to be a requirement of customary international law.”<sup>57</sup>

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<sup>51</sup> *Armed Activities case*, *supra* note 41, para. 53.

<sup>52</sup> Sean D. Murphy, *The International Legality of US Military Cross-Border Operations from Afghanistan into Pakistan in The War in Afghanistan: A Legal Analysis* 109, 118 (M.N. Schmitt (ed.), Newport: Naval War College, 2009).

<sup>53</sup> *Id.* See also Olivia Flasch, *The Legality of the Air Strikes Against ISIL in Syria: New Insights on the Extraterritorial Use of Force Against Non-State Actors*, 37(3) *Journal on the Use of Force and International Law* 37, 42 (2016).

<sup>54</sup> Mary E. O’Connell, *Unlawful Killing with Combat Drones*, Notre Dame Law School Legal Studies Research Paper No. 09-43, at 18 (July 2010) (Nov. 2, 2019), available at <https://www.law.upenn.edu/institutes/cerl/conferences/targetedkilling/papers/OConnellDrones.pdf>.

<sup>55</sup> The case of the U.S. and Pakistan has been compared to that of the Congo and Uganda, in which Congo gave express consent, while the Court found that even indirect signals are sufficient for the withdrawal of consent. *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Byrne 2016, at 105.



Indeed, although public consent is rather common in state practice,<sup>58</sup> no rule of international law specifies publicity as a necessary requirement for valid consent. However, O'Connell merely pointed to the practical difficulty in ascertaining the existence of consent in situations where it has not been given publicly. By giving consent in a public form, confusion about whether the consent was tacit or presumed are avoided, and proving the existence of consent is considerably easier for the intervening state if consent is public. Advocating public consent does not mean that tacit consent, should it be established, would not be recognized as valid. However, if a host state is at all in a position to give public consent, such consent is preferable to tacit consent. The claim that the Pakistani government, although it formally protested, in fact approved of the U.S. intervention, may or may not be true. Such consent might indeed have existed, however it needs to be proven rather than presumed.

Going back to Ago's opinion, it can be concluded that consent may be given in different forms. Express consent, preferably a public one, seems to be more appropriate since it is much easier to establish. This does not mean, however, that tacit consent would under no circumstances be valid. It is necessary to determine all the relevant circumstances to see whether a host state agreed to an outside intervention or not. Naturally, the chance of abuses, divergent interpretations and misunderstandings are much more likely where consent is tacit.

### 1.3.3. *Consent Must Not Be Vitiating*

Consent to an intervention must be freely given in order to be valid. If consent is vitiated, it produces no legal effects. Consent may be vitiated by error, fraud, corruption or coercion. The ILC has confirmed this, pointing to the principles concerning the validity of consent to treaties.<sup>59</sup> In that respect, the Vienna Convention on the Law of Treaties provides that error, fraud and corruption of a representative of a state may invalidate a state's consent, while coercion upon a representative of a state or coercion on a state itself, committed by the threat or use of force, results in a treaty being without legal effect.<sup>60</sup>

The most frequently cited example is the military intervention in Czechoslovakia, where Warsaw Pact countries relied on an appeal by dissident local authorities, "plainly under very intense pressure from Moscow."<sup>61</sup> The lawfulness of the operation was criticized for this reason.<sup>62</sup>

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<sup>58</sup> For example, the request of the King of Bahrain, Hamad bin Isa Al Khalifa, to the GCC in 2011, Yemeni President Hadi's request to the GCC to intervene in 2015 and Iraq's invitation to the United States in 2014. Henderson 2018, at 372.

<sup>59</sup> Ago 1981, at 35–36; DARS Commentaries, *supra* note 11, at 73.

<sup>60</sup> Arts. 51 and 52 of the Vienna Convention on the Law of Treaties. For the text of the Convention *see supra*, note 12.

<sup>61</sup> Corten 2010, at 270.

<sup>62</sup> *Id.*



The requirement of unvitiated consent guarantees that the will of a state, as expressed through consent, is true, and that its expression reflects the state's genuine intention.

#### **1.4. A Due Authority**

One of the basic prerequisites for valid consent is that consent comes from an authorized entity. It is generally accepted that intervention by invitation is allowed on the side of the government, while it is prohibited on the side of the opposition. In a well-known statement in the *Nicaragua* case, the ICJ concluded:

...it is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition.<sup>63</sup>

In that particular case, the Court found that the U.S. aid to *contras* in recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding and directing military and paramilitary actions in and against Nicaragua, was a breach of the prohibition of the use of force.<sup>64</sup> The Court repeated the same line of reasoning from the *Nicaragua* case in the case of *Armed Activities*, asserting that intervention is "allowable at the request of the government."<sup>65</sup> On the other hand, the General Assembly Definition of Aggression has qualified aggression as the "sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to [the listed acts of aggression], or its substantial involvement therein," confirming the prohibition of providing help to non-state actors fighting against the government.<sup>66</sup> A similar provision can be found in another General Assembly resolution, namely the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty. This Declaration provides that

no state shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards a violent overthrow of the regime of another state, or interfere in civil strife in another state.<sup>67</sup>

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<sup>63</sup> *Nicaragua* case, *supra* note 7, para. 246.

<sup>64</sup> *Id.* para. 209.

<sup>65</sup> *Armed Activities* case, *supra* note 41, paras. 42–53.

<sup>66</sup> Art. 3(g) of the Definition of Aggression. For the text *see supra*, note 25.

<sup>67</sup> Para. 2 of the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty.



The general rule on the permissibility of military intervention on the side of a government and its non-permissibility on the side of the opposition, may at first glance seem straightforward. In practice, however, there are many questions concerning the particular features of a government entitled to invite an intervention that need to be answered. For instance, who exactly is entitled to act on behalf of a government? What kind of government does it have to be in terms of democratic legitimacy? What kind of control over territory must it have in order to be considered legitimate?

#### *1.4.1. An Entity Entitled to Act on Behalf of a Government*

When speaking of who is entitled to invite outside intervention on behalf of a government, it is accepted that only the highest authorities of the state are able to issue such consent validly.<sup>68</sup> On the contrary, local authorities, dissident authorities and diplomatic authorities are not entitled to do so,<sup>69</sup> nor are the military and intelligent services.<sup>70</sup> This rule is not applicable in all situations involving a state's consent, but rather those involving military action. As stated in the Commentary of DARS, the question of who has the authority to consent to a departure from a particular rule may depend on the rule.<sup>71</sup> The Commentary further asserts that

different officials or agencies may have authority in different contexts, in accordance with the arrangements made by each State and general principles of actual and ostensible authority.<sup>72</sup>

In order to properly identify the “highest state authorities,” the best option is most likely to refer to a state's constitution. From the perspective of international law, it is not material which entities are empowered by a state's internal act to represent such state at the highest level, as long as a state has such entities. It can generally be maintained that a president and a prime minister fall into this category. In practice, it will usually be one of these two to call for outside military assistance. A foreign minister could also be considered as one of the highest state authorities. These three officials have been specified by the Vienna Convention on the Law of Treaties as persons


<sup>68</sup> Corten 2010, at 259.

<sup>69</sup> *Id.* at 263–266.

<sup>70</sup> Committee on the Use of Force, International Law Association, Final Report on Aggression and the Use of Force, Sydney Conference (2018), at 19 (Nov. 2, 2019), available at [https://www.ila-hq.org/images/ILA/DraftReports/DraftReport\\_UseOfForce.pdf](https://www.ila-hq.org/images/ILA/DraftReports/DraftReport_UseOfForce.pdf).

<sup>71</sup> “It is one thing to consent to a search of embassy premises, another to the establishment of a military base on the territory of a State.” DARS Commentaries, *supra* note 11, Commentary to Art. 20, para. 6. James Crawford, *Second Report on State Responsibility in Yearbook of the International Law Commission 1999. Vol. II (Part One)* 3 (New York: United Nations, 2003), para. 237 (Nov. 2, 2019), also available at [https://legal.un.org/ilc/documentation/english/a\\_cn4\\_498.pdf](https://legal.un.org/ilc/documentation/english/a_cn4_498.pdf).

<sup>72</sup> DARS Commentaries, *supra* note 11, Commentary to Art. 20, para. 6.



representing a state by virtue of their function, and without having to produce full powers, for the purpose of performing all acts relating to the conclusion of a treaty.<sup>73</sup> However, the Vienna Convention need not necessarily be determinative of the issue at hand, given the above assertion that persons empowered in the domain of the law of the treaties need not be identical to persons empowered in respect of inviting foreign interventions. That said, it appears that the president, the prime minister and the foreign minister, in the practice of states, are indeed those who give consent to interventions. For example, President Kabila granted consent for the presence of Ugandan troops in the territory of the DRC, the Iraqi foreign minister requested intervention against ISIL,<sup>74</sup> while the interim president of the transitional government of Mali, Traoré, requested French intervention.<sup>75</sup> Where invitations have been made by persons other than these three, they have been found to be unauthorized. Such was the case with an invitation for foreign military assistance by the Governor-General of Grenada. According to some sources, the Governor-General was a post without executive powers.<sup>76</sup> According to others, the Governor-General was, under the Grenadian Constitution, the executive authority of Grenada, representing Her Majesty's Government.<sup>77</sup> He was also the sole constitutional authority remaining in the country, and the only one who could issue a formal invitation for outside military help in restoring order in Grenada.<sup>78</sup> Even if the latter is true, and the Governor-General did have executive powers, it appears that those powers were not considered to be equivalent to those of a prime minister, and were not sufficient as far as giving consent is concerned. For this reason, the Governor-General was not perceived by the international community as a legitimate authority to invite an intervention, so the intervention was generally characterized as unlawful.

#### 1.4.2. Legitimacy of Government

Traditionally, in assessing criteria for international recognition, state practice and international legal doctrine have given primacy to the actual control that a government has over its people, and the territory of the state. In the pre-Charter era, democratic legitimacy played very little or no part at all. In the matter of recognition,<sup>79</sup>

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<sup>73</sup> Art. 7(2)(a) of the Vienna Convention on the Law of Treaties. See *supra*, note 60.

<sup>74</sup> Byrne 2016, at 117.

<sup>75</sup> Susanna D. Wing, *French Intervention in Mali: Strategic Alliances, Long-Term Regional Presence?*, 27(1) *Small Wars & Insurgencies* 59 (2016).

<sup>76</sup> Gray 2008, at 91.

<sup>77</sup> Nabil Hajjami, *The Intervention of the United States and other States of Eastern Caribbean in Grenada – 1983 in The Use of Force in International Law: A Case-Based Approach* 385, 393 (T. Ruys et al. (eds.), Oxford; New York: Oxford University Press, 2018).

<sup>78</sup> *Id.*

<sup>79</sup> On recognition see Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (Oxford; New York: Oxford University Press, 2001).





it was thus not material whether a government came to power by virtue of free and fair democratic elections, or in an unconstitutional way, such as by military coup. Recognition depended on the establishment of effective control over the entire, or a significant part of, a territory.<sup>80</sup> Legitimacy, as seen in terms of *de facto* control, was at that time confirmed in several arbitral decisions, most notably the *Tinoco* arbitration, where the tribunal concluded that the non-recognition of the *Tinoco* regime by Great Britain did not rebut the *de facto* existence of that regime.<sup>81</sup> It was not required, however, that effective control be absolute. On the contrary, a minimum effective control was required, which meant that a government had not lost control of a sufficiently representative part of the state's territory.<sup>82</sup> On the other hand, phony governments, puppet regimes and governments in exile were excluded.<sup>83</sup> The existence of effective control was not important *per se*, but as a means of proving that a government was accepted by the general population (at least presumably accepted) and that it had the power to represent that state in international relations.<sup>84</sup>

The system described above was characteristic of the period prior to the Cold War. The end of the Cold War was marked by a new tendency towards human rights observation and the development of "qualitative criteria on the questions of governance."<sup>85</sup> Democratic governance emerged as a new value.<sup>86</sup> As a consequence, effective control was not an exclusive parameter in assessing the legitimacy of a government any more. What is more, it was considered that

the legitimacy of origin of a government can sometimes offset its lack of effectiveness.<sup>87</sup>

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<sup>80</sup> David Wippman, *Military Intervention, Regional Organizations, and Host-State Consent*, 7(1) *Duke Journal of Comparative & International Law* 209, 220 (1996).

<sup>81</sup> The *Tinoco* Claims Arbitration (*Great Britain v. Costa Rica*) (1923) 1 R.I.A.A. 369, 375.

<sup>82</sup> Georg Nolte, *Intervention by Invitation*, Max Planck Encyclopedia of Public International Law (January 2010), para. 18 (Nov. 2, 2019), available at <http://opil.ouplaw.com/view/10.1093/law/epil/9780199231690/law-9780199231690-e1702?prd=EPIL>.

<sup>83</sup> *Id.* For a different opinion see Julie D. Gagnon, *ECOWAS's Right to Intervene in Côte D'Ivoire to Install Alassane Ouattara as President-Elect*, 3(1) *Notre Dame Journal of International & Comparative Law* 51, 67 (2013).

<sup>84</sup> Erica de Wet, *The Modern Practice of Intervention by Invitation in Africa and its Implications for the Prohibition of the Use of Force*, 26(4) *European Journal of International Law* 979-984 (2016).

<sup>85</sup> Fox 2015, at 817.

<sup>86</sup> See, e.g., *Democratic Governance and International Law* (G.H. Fox & B.R. Roth (eds.), Cambridge: Cambridge University Press, 2000); Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86(1) *American Journal of International Law* 46 (1992); Sean D. Murphy, *Democratic Legitimacy and the Recognition of States and Governments*, 48(3) *International & Comparative Law Quarterly* 545 (1999).

<sup>87</sup> Jean d'Aspremont, *Legitimacy of Governments in the Age of Democracy*, 38(4) *New York University Journal of International Law and Politics* 877, 908 (2006).



In the 1990's, the Security Council demonstrated an unwillingness to recognize as legitimate those regimes which came to power in an unconstitutional way, and was more inclined to afford that status to those with democratic credentials. In the case of Haiti in 1991, the democratically elected President Aristide was overthrown in the *coup d'état* only eight months after the elections took place. He was sent into exile, from where he requested outside military assistance to regain power. Although he no longer had effective control over his country, the Security Council continued to recognize him as the legitimate representative of Haiti<sup>88</sup> and acting under Chapter VII of the U.N. Charter authorized "Member States to form a multinational force ... and ... to use all necessary means to facilitate the departure from Haiti of the military leadership ... (and) the prompt return of the legitimately elected President..."<sup>89</sup> A similar situation occurred in Sierra Leone in 1997, where the democratically elected President Kabbah was overthrown in a military coup not even a year after he came to power. While in exile, Kabbah requested Nigeria, who was chairing ECOWAS at the time, to intervene and "to put an end to [Sierra Leoneans'] nightmare," as well as "to enable them to recover their fundamental human rights."<sup>90</sup> ECOWAS conducted a successful intervention and Kabbah was reinstalled as President. The Security Council, for its part, firstly adopted a resolution on the imposition of sanctions on the junta members,<sup>91</sup> and after the conducted intervention commended ECOWAS for its engagement in Sierra Leone.<sup>92</sup> It is often maintained that the Security Council in that way provided an *ex post facto* authorization to the use of force.<sup>93</sup> Another instance of ECOWAS intervention was the case of Côte d'Ivoire in 2010, in which President Gbagbo refused to leave his post after losing the elections to the newly elected Ouattara. Although ECOWAS was asked to intervene by Ouattara, the Security Council passed a resolution in which it authorized a peacekeeping mission stationed in Côte d'Ivoire to "use all necessary means" to carry out its mandate to protect civilians.<sup>94</sup> The most recent ECOWAS invited intervention occurred in 2017 in The Gambia, when the former President Jammeh refused to transfer power to the President-elect, Adama Barrow. The Security Council adopted a resolution in which it expressed "support to ECOWAS in its commitment to ensure, by political means first, the respect of the will

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<sup>88</sup> U.N. Security Council, Resolution 841 (1993), 16 June 1993, S/RES/841 (1993).

<sup>89</sup> U.N. Security Council, Resolution 940 (1994), 31 July 1994, S/RES/940 (1994).

<sup>90</sup> Lee F. Berger, *State Practice Evidence of the Humanitarian Intervention Doctrine: The ECOWAS Intervention in Sierra Leone*, 11(3) *Indiana International & Comparative Law Review* 605, 622 (2011).

<sup>91</sup> U.N. Security Council, Resolution 1132 (1997), 8 October 1997, S/RES/1132 (1997).

<sup>92</sup> The Situation in Sierra Leone (S/PRST/1998/5), ReliefWeb, 26 February 1998 (Nov. 2, 2019), available at <https://reliefweb.int/report/sierra-leone/situation-sierra-leone-sprst19985>.

<sup>93</sup> U.N. Security Council, Resolution 1132 (1997), *supra* note 91.

<sup>94</sup> U.N. Security Council, Resolution 1975 (2011), 30 March 2011, S/RES/1975 (2011).



of the people of The Gambia.<sup>95</sup> In spite of the Security Council's instruction to use political means first, the same day the resolution was adopted, ECOWAS troops, under the lead of Senegal, undertook a military intervention in The Gambia.<sup>96</sup>

In the above examples, the request for military intervention came from authorities which did not have effective control in the respective states. However, they received international support, including military assistance, for they were perceived as having democratic legitimacy, and thus represented entities authorized to request outside intervention. Their status of authorized entities was confirmed by Security Council resolutions.

The situation was somewhat different in the case of the ousted Ukrainian President Yanukovich, who requested Russian military intervention in 2014. It was clear that Yanukovich did not have effective control, but it was arguable that he enjoyed popular support. The Security Council members disagreed on interpreting his status. The UK ambassador claimed that Yanukovich was "a former leader who abandoned his office, his capital and his country" and that the new government was "overwhelmingly endorsed by the Ukrainian Parliament."<sup>97</sup> The Russian ambassador, on the other hand, claimed that Yanukovich was "scared to leave Kyiv," implying that he still represented a legitimate President of Ukraine.<sup>98</sup>

The legitimacy of a government, and consequently the appropriateness of an invitation to intervene, was also assessed in the case of Syria. When Bashar al-Assad invited Russian intervention in 2015, some voiced an argument that he was no longer empowered to do so, as he had lost popular support, and thus legitimacy.<sup>99</sup> On the other hand, the Syrian Opposition Coalition gained recognition as "the legitimate representative of the people" by a large number of states, including three Security Council permanent members – the U.S., the UK and France.<sup>100</sup> However, such recognition was, according to some scholars, a political act and as such different from

<sup>95</sup> U.N. Security Council, Resolution 2337 (2017), 19 January 2017, S/RES/2337 (2017).

<sup>96</sup> See Claus Kreß & Benjamin Nußberger, *Pro-Democratic Intervention in Current International Law: The Case of The Gambia in January 2017*, 4(2) *Journal on the Use of Force and International Law* 239 (2017).

<sup>97</sup> S/PV.7125, Security Council 7125<sup>th</sup> meeting, 3 March 2014.

<sup>98</sup> *Id.*

<sup>99</sup> Marc Weller in an interview to the Huffington Post. See Nick Robins-Early, *Russia Says its Airstrikes in Syria Are Perfectly Legal. Are They?: An Expert on International Law Explains Why Russia's Argument Doesn't Hold Up*, Huffington Post, 3 January 2017 (Nov. 2, 2019), available at [https://www.huffpost.com/entry/russia-airstrikes-syria-international-law\\_n\\_560d6448e4b0dd85030b0c08?guccounter=1&guce\\_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LmNvbS8&guce\\_referrer\\_sig=AQAAAKbc3\\_V00ZaE5RJjqtIeIbnVQ2jzrbFF\\_zhaRi\\_TZpqNK6H2s9w\\_3g\\_J\\_4xBEYtZj8t2Xo9FHNvq-n6q6ARDbb1RAoGv8AYbL\\_GqL\\_7QTgBnYvqXk-IZb8XBPQoANYb1QGyJWxe5-VcuDGZUjMyBsB0gJknC6AMh6hnHoljKqE\\_](https://www.huffpost.com/entry/russia-airstrikes-syria-international-law_n_560d6448e4b0dd85030b0c08?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LmNvbS8&guce_referrer_sig=AQAAAKbc3_V00ZaE5RJjqtIeIbnVQ2jzrbFF_zhaRi_TZpqNK6H2s9w_3g_J_4xBEYtZj8t2Xo9FHNvq-n6q6ARDbb1RAoGv8AYbL_GqL_7QTgBnYvqXk-IZb8XBPQoANYb1QGyJWxe5-VcuDGZUjMyBsB0gJknC6AMh6hnHoljKqE_).

<sup>100</sup> "Friends of Syria" Recognise Opposition: Over 100 Nations Meeting in Morocco Officially Recognise Opposition Coalition as "Legitimate Representative" of Syria, Al Jazeera, 12 December 2012 (Nov. 2, 2019), available at <https://www.aljazeera.com/news/middleeast/2012/12/201212124541767116.html>.



recognition in a legal sense.<sup>101</sup> If this view is accepted, it could then be maintained that such political recognition does not challenge the legitimacy of the Assad government, which remains the representative of Syria, despite its possible loss of legitimacy.<sup>102</sup> In addition, Assad seemed to have retained effective control over large parts of the country, including the capital, while none of the opposition groups exercised effective control to a similar degree.<sup>103</sup>

At the time of writing of this paper (June 2019), the issue of concurring authorities exists in the conflict in Venezuela. The self-proclaimed interim President Guaidó is challenging the current President Maduro, who had been re-elected in presidential elections held in 2018. The United States have renounced the legitimacy of Maduro, recognizing Guaidó as an interim President. Russia and China oppose such recognition, condemning the United States for interfering in the internal affairs of Venezuela. There has not been any foreign military intervention in the Venezuelan crisis yet, however American President Trump has clearly stated that a military intervention has not been ruled out.<sup>104</sup>

As seen from the examples above, state practice is still inconclusive with respect to criteria for determining the due authority to invite outside intervention. A traditional effective control standard is still being applied, however it is not an exclusive criterion. Democratic legitimacy has started to play an important role in assessing which side to the conflict is entitled to request military assistance. Such legitimacy is, however, sometimes difficult to establish.

## 2. Interventions by Invitation in Civil Wars

Invitations to intervention may occur in various situations. Often in the case of domestic unrest. Sometimes it will be a conflict with terrorist groups operating in a state's territory. In certain situations, an invitation will take place in a civil war. Will an intervention then be permissible, provided it is undertaken on behalf of a government?

When a conflict within a country reaches the threshold of civil war, the qualities of a government competent to make a valid intervention come into question. If a government has lost control over a certain part of a territory, and becomes one

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<sup>101</sup> Stefan Talmon, *Recognition of Opposition Groups as the Legitimate Representative of a People*, 12(2) Chinese Journal of International Law 219 (2013); Laura Visser, *Russia's Intervention in Syria*, EJIL: Talk!, 25 November 2015 (Nov. 2, 2019), available at <https://www.ejiltalk.org/russias-intervention-in-syria/>.

<sup>102</sup> Bannelier-Christakis 2016, at 763.

<sup>103</sup> Visser, *supra* note 101.

<sup>104</sup> Suzanne Lynch, *Trump Won't Rule out Military Intervention in Venezuela: US President Praises Brazilian Leader's Response to the Venezuelan Crisis*, The Irish Times, 19 March 2019 (Nov. 2, 2019), available at <https://www.irishtimes.com/news/world/us/trump-won-t-rule-out-military-intervention-in-venezuela-1.3831933>.



of two or more factions fighting for power within a country, then its legitimacy to invite an intervention becomes questionable. It is quite a common situation that multiple parties in an internal conflict claim to have legitimacy in representing the state. One party to a conflict may be democratically elected, while another may claim to enjoy the support of the majority of the population. In such cases of concurrent governments, the question of determining the due authority arises. We have dealt with the question of legitimacy earlier on. But apart from determining the due authority, another question remains – whether intervening in a civil war, as a matter of principle, has a legal basis in international law.

According to the so-called “negative equality” principle, a new doctrine proposed in the Report of the Independent International Fact-Finding Mission on the Conflict in Georgia, a foreign military intervention in the case of a civil war is impermissible, either on the side of an “old” government or on the side of the rebels.<sup>105</sup> The underlying purpose of this doctrine is to prevent outside interference in determining the future of a country in a civil war, safeguarding thus both the non-intervention principle, as well as the principle of self-determination.<sup>106</sup> The idea is that

where a society is fully divided about its political future, meaning that the government cannot plausibly claim to represent the entire population, external assistance on the government’s behalf would interfere with the people’s right to determine their own future.<sup>107</sup>

While the rationale behind the negative equality principle is understandable, it raises some questions, such as the appropriateness of not reacting to internal conflicts where civilians might be, and in practice are, subject to suffering and violations of human rights. It is this aspect of internal conflicts that has caused a shift in the perception of these conflicts as purely domestic issues. The trend of internationalizing internal conflicts thus started with the 1949 Geneva Conventions and the 1977 Additional Protocol I, and continued with the Security Council recognizing internal conflicts as threats to international peace and security.<sup>108</sup> Additionally, attempts to legally justify humanitarian interventions, including by endorsing the Responsibility to Protect doctrine, aim at changing the paradigm according to which internal

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<sup>105</sup> Report of the Independent International Fact-Finding Mission on the Conflict in Georgia, Vol. II (September 2009), at 227 (Nov. 2, 2019), available at [http://www.mpil.de/files/pdf4/IIFFMCG\\_Volume\\_II1.pdf](http://www.mpil.de/files/pdf4/IIFFMCG_Volume_II1.pdf).

<sup>106</sup> *Id.*

<sup>107</sup> Fox 2015, at 827.

<sup>108</sup> See some of the recent Security Council resolutions: S/RES/2441 (2018) on the situation in Libya; S/RES/2443 (2018) on Bosnia and Herzegovina; S/RES/2444 (2018) on the situation in Somalia; S/RES/2454 (2019) on the situation in the Central African Republic; S/RES/2463 (2019) on the situation in the DR Congo.



conflicts are excluded from outside military interference. Naturally, interventions by invitation cover a wide spectrum of situations, and are mostly not motivated by humanitarian reasons. However, an absolute prohibition of interventions in internal conflicts would inevitably have consequences on the humanitarian aspects of those conflicts as well.

Nonetheless, the negative equality principle should not be taken as an absolute principle, for it “has not yet attracted a consensus among legal scholars and indeed remains controversial.”<sup>109</sup> State practice shows that interventions in conflicts that might qualify as internal do occur, although it must be stressed that sometimes it is difficult to determine whether the conflict has reached the threshold of a civil war. This question arose in case of the French military intervention in Mali in 2013, which was conducted upon the request by the government of Mali. The aim of the operation was to suppress terrorists operating in Mali. French intervention was perceived as a response to a valid request by the government of Mali. Its legality was not questioned. On the contrary, many states, regional organizations and the United Nations supported the intervention.<sup>110</sup> In its Resolution 2100, the Security Council expressly 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.”<sup>111</sup> It seems, though, as if the aspect of terrorism in case of Mali excluded the possibility of the conflict being an internal one. However, it must be borne in mind that terrorism is a method, and may be employed by different actors, including rebels that participate in an internal conflict. The fact is that prior to the French intervention, a significant part of the country was controlled by rebels.<sup>112</sup> Newspapers reported that Mali’s government had lost control over the northern half of the country, which is the size of France.<sup>113</sup> To illustrate the gravity of the situation in Mali at the time, the words of the Malian representative during his address to the Security Council may be recalled. He said that a state of emergency was imposed throughout the country, as well as an appeal for general mobilization.<sup>114</sup> He also

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<sup>109</sup> Fox 2015, at 828. See also Dapo Akande & 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 (Nov. 2, 2019), available at <https://www.ejiltalk.org/the-airstrikes-against-islamic-state-in-iraq-and-the-alleged-prohibition-on-military-assistance-to-governments-in-civil-wars/>.

<sup>110</sup> Karine Bannelier & Théodore Christakis, *Under the UN Security Council's Watchful Eyes: Military Intervention by Invitation in the Malian Conflict*, 26(4) Leiden Journal of International Law 855, 857 (2013).

<sup>111</sup> U.N. Security Council, Resolution 2100 (2013), 25 April 2013, S/RES/2100 (2013).

<sup>112</sup> Mali Crisis: Key Players, BBC News, 12 March 2013 (Nov. 2, 2019), available at <https://www.bbc.com/news/world-africa-17582909>.

<sup>113</sup> Rebels Capture Mali Government Troops: Twelve Government Soldiers Captured Raising Fears of Rebel Advance Towards Government-Held Territory in the South, Al Jazeera, 8 January 2013 (Nov. 2, 2019), available at <https://www.aljazeera.com/news/africa/2013/01/2013181147990618.html>.

<sup>114</sup> U.N. Security Council, 6905<sup>th</sup> meeting, S/PV.6905, 22 January 2013.



expressed gratitude to France for promptly providing assistance to Mali, thus “making it possible to save Mali as a state.”<sup>115</sup> Yet, in spite of the fact that Mali was evidently controlled by different groups and the outcome of internal fighting was insecure, the international community did not hesitate to take the government’s side. The case of Mali is not alone in this. In some other conflicts, such as those in Syria, the DRC, and Yemen, there have been foreign interventions upon the government’s request, although it appears that the conflicts in these states had, at least at certain moments, reached the threshold of a civil war.

The case of Mali sheds light on another issue, the so-called “purpose-based approach” in assessing the permissibility of intervening in civil wars. According to the principle, if the purpose of consensual intervention is, for instance, “a fight against terrorism; a fight against rebels who use the territory of the neighboring state as ‘safe-haven’ to launch attacks against the intervening state; the protection of nationals abroad; the liberation of hostages; the protection of crucial infrastructure; the joint fight against drug smugglers and other criminals, and more generally, support to the government to maintain law and order and the deployment of peacekeeping operations,” then intervention in a civil war is legal.<sup>116</sup>

The purpose-based approach is problematic for at least two reasons. The first difficulty relates to determining whether a particular purpose of intervention falls within acceptable purposes as stated. For instance, if the purpose for intervention is to fight terrorism, the question is who should determine, and how, whether an act is indeed a terrorist one.<sup>117</sup> In certain cases, the practice of states and/or international organizations will provide an answer to this question. For instance, in the case of Mali or Iraq, the U.N. Security Council characterized certain opposition groups as terrorists.<sup>118</sup> In other cases, such characterization can be subject to different interpretations, given the fact that there is no universally accepted definition of terrorism, while governments consenting to an intervention are inclined to characterize all opposition forces as terrorists.<sup>119</sup>

Another problem with the purpose-based approach is establishing whether the proclaimed purpose of intervention represents anything more than a motive for the intervening state, which in itself is not sufficient to legitimize an intervention. Each time a state undertakes a military intervention in another state, it stipulates one or more of its motives for such intervention. However, such motives or reasons should

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<sup>115</sup> U.N. Security Council, 6905<sup>th</sup> meeting, S/PV.6905, 22 January 2013.

<sup>116</sup> Bannelier-Christakis 2016, at 747.

<sup>117</sup> *Id.*

<sup>118</sup> See U.N. Security Council, Resolution 2100 (2013), *supra* note 111; U.N. Security Council, Resolution 2169 (2014), 30 July 2014, S/RES/2169 (2014).

<sup>119</sup> Bannelier-Christakis 2016, at 747.



be differentiated from legal justifications for intervention.<sup>120</sup> Motives can, naturally, correspond to legal justifications, but this is not necessarily so.

When discussing the permissibility of intervention in internal conflicts, another question arises – whether such an intervention on the side of a government can be justified as a response to a prior outside intervention on the side of the opposition. Such a situation clearly has to be differentiated from collective self-defense, as the latter includes the existence of an unlawful armed attack in terms of Article 51 of the U.N. Charter, while the former necessarily does not. In this scenario, the conflict ceases to be exclusively of an internal nature, as the involvement of international players internationalizes it.<sup>121</sup> For instance, when Saudi Arabia intervened in Yemen in 2015, it justified its intervention by referring to the prior intervention by Iran on the side of the Yemeni rebels, the Houthi. In situations like these, it is often the case that the intervening states' involvement in the internal conflict is less motivated by helping one side to the conflict, and more by protecting its own interests, often with respect to the other intervening state.<sup>122</sup> Apart from the fact that counter-interventions are prone to abuse (but so are other modalities of the use of force), it is not clear – either from state practice or from international jurisprudence – what degree of prior outside intervention gives rise to counter-intervention, nor whether a minimum degree of proportionality must exist between two foreign interventions.<sup>123</sup>

Another debatable feature of counter-intervention is how it relates to the self-determination principle. If the rationale of the negative equality principle, according to which intervention in a civil war is prohibited, is not to hamper the exercise of the right to self-determination, the same logic should apply to assessing the permissibility of counter-intervention. However, some argue that, to the contrary, “counter-intervention should be about undoing the impact of the original intervention on the side of the rebel groups” and that “it should be about evening the odds, not tilting the balance in favor of the *de jure* authorities.”<sup>124</sup> It is questionable whether this holds true, as foreign interventions complicate and may even further fuel an internal conflict. Counter-intervention is, thus, undeniably permitted if it constitutes collective self-defense against the prior intervention, which has reached the threshold of an armed attack. However, in such case, the legal basis for the use of force is self-defense, and the argument of counter-intervention becomes redundant.

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<sup>120</sup> Akande & Vermeer, *supra* note 109.

<sup>121</sup> See Fox 2015, at 820.

<sup>122</sup> See Glen Carey & Sarah Algethami, *How the Saudis Turned the Yemen War into a Humanitarian Crisis*, The Washington Post, 14 December 2018 (Nov. 2, 2019), available at [https://www.washingtonpost.com/business/how-the-saudis-turned-the-yemen-war-into-a-humanitarian-crisis/2018/12/14/9a8b6fce-ffb6-11e8-a17e-162b712e8fc2\\_story.html?noredirect=on&utm\\_term=.5e7d01a61238](https://www.washingtonpost.com/business/how-the-saudis-turned-the-yemen-war-into-a-humanitarian-crisis/2018/12/14/9a8b6fce-ffb6-11e8-a17e-162b712e8fc2_story.html?noredirect=on&utm_term=.5e7d01a61238).

<sup>123</sup> Tom Ruys & Luca Ferro, *Weathering the Storm: Legality and Legal Implications of the Saudi-Led Military Intervention in Yemen*, 65(1) *International & Comparative Law Quarterly* 61, 93 (2016).

<sup>124</sup> *Id.* at 94.





## Conclusion

In international legal doctrine, as well as in state practice, interventions by invitation are perceived as permissible. It is commonly accepted that these interventions, although they include the use of force, fall outside of the ambit of Article 2(4) of the U.N. Charter, which prohibits the use of force. According to the principle *volenti non fit injuria*, a state's political independence and territorial integrity are not violated by an action to which that state consents.

In spite of their general permissibility, the majority of interventions by invitation that occur in practice are of dubious legality. This is due to the fact that the validity of consent has been challenged in these particular circumstances. It has either been maintained that consent has been given by an authority not empowered to give it; or that consent was presumed rather than actually given; or that some other requirement for valid consent was lacking.

In addition, the possibility of intervening in civil wars remains a highly disputed issue. The traditional standard from the *Nicaragua* case, according to which an intervention is allowed on the side of a government, while it is prohibited on the side of the opposition, seems to apply only if a conflict has not reached a threshold of a civil war. If, however, it has evolved into civil war, the negative equality principle should apply, and third states should abstain from interfering, thus allowing the realization of the principle of self-determination. This traditional understanding seems, however, to be under scrutiny nowadays. Interventions by invitation do take place even in conflicts which are believed to have reached the threshold of a civil war. What is surprising, though, is that their legality has not been challenged by the international community. Moreover, governments seem to have lost the prerogative of inviting an intervention unless they possess certain qualities. Recent practice shows that third states were inclined to support opposition groups rather than governments in particular conflicts, especially if those governments were said to be hostile to their own population. These developments may lead to the erosion of the *Nicaragua* principle on the prohibition of intervention on the side of the opposition, on one hand, and also to the changing of the traditional paradigm of non-intervention in internal conflicts on the other. Such a scenario would further complicate the situation, as it would significantly broaden the spectrum of situations in which third states may intervene in internal conflicts. It is questionable what would remain of the non-intervention principle should such a scenario materialize.

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