

Military Interventions against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent

KARINE BANNELIER-CHRISTAKIS*

Abstract

The legal argument of intervention by invitation has been used by all 11 states intervening in Iraq (nine members of the US-led coalition, Russia, and Iran), by Egypt for its airstrikes against ISIL in Libya, and by Iran and Russia for their interventions in Syria. To the extent that these consensual military interventions targeted ISIL and other UN-designated terrorist groups, their legality has not been challenged by any state. Strong criticisms marked nonetheless military operations undertaken by invitation, but not targeting ‘terrorist groups’, such as the alleged Russian strikes against the ‘Syrian moderate opposition’. The arguments advanced by intervening states seem to confirm the purpose-based approach of intervention by invitation. They did not claim a ‘right to intervene in a civil war’, but relied on the existence of both a request by the government and a legitimate purpose: fighting ISIL and other terrorist groups. The different reactions also show unwillingness by the international community to recognize a general right of intervention in a civil war. Turning to the strikes of the US-led coalition in Syria, it is impossible to rely on the legal basis of ‘intervention by invitation’. The controversial theory of ‘passive consent’ could be used to some extent – but not after September 2015 when Syria denounced these strikes as a ‘flagrant violation’ of its sovereignty. The current efforts of the international community to find consensual solutions to the dramatic conflicts in Syria, Libya, and Iraq could offer new possibilities of consensual interventions against ISIL and other terrorist groups.

Key words

consent; intervention; self-determination; terrorism; use of force

I. INTRODUCTION

The recent history of military interventions is full of invocations of the argument of invitation or consent as a legal basis for external intervention. During recent years, invitation or consent of different kinds and forms have been invoked, validly or not, in order to justify the intervention of France in Mali, the US drone strikes in Pakistan and Afghanistan, Russia’s intervention in Ukraine, the Saudi’s coalition intervention in Yemen, and, of course, the strikes against the Islamic State of Iraq and the Levant (ISIL)¹ in Iraq, Syria, and Libya. Intervention on the basis of consent thus becomes a common legal argument to justify military intervention – almost as

* Associate Professor of International Law, Centre for International Security and European Studies (CESICE), University Grenoble-Alpes [karine.bannelier-christakis@univ-grenoble-alpes.fr].

¹ Also called ISIS (Islamic State of Iraq and Syria) or Daesh.

common as self-defence. The use of this argument raises important problems, and not only in relation to the legitimacy of the inviting government or the validity of consent.

This article will focus on the multiple external interventions in Iraq, Libya, and Syria. The objective will be twofold. On the one hand, I will assess if consent is a valid and sufficient legal basis for the multiple interventions undertaken by different countries on the territory of these states since August 2014. On the other hand, I will examine what is the influence of these cases in relation to the evolution of some legal principles such as *volenti non fit injuria* or the principle of non-intervention in civil war and internal strife. Before undertaking this research, it is necessary to note some methodological difficulties linked to the complexity of the conflicts (Section 1.1) and to recall the legal framework of intervention by invitation against which the present analysis will be conducted (Section 1.2).

1.1. Methodological difficulties linked to the complexity of the conflicts

The task of this article is far from easy for at least three reasons. Firstly, as more and more jihadi groups in different countries aligned themselves with, or pledged allegiance to ISIL,² the global fight against the terrorist group expanded, raising issues of consent in other cases of intervention, such as in Afghanistan.³ Without neglecting the phenomenon of intervention against ISIL-affiliated groups in other countries, this article will focus on the interventions in Iraq, Syria, and Libya where ISIL is particularly strong and was able to establish territorial control over portions of the territories of these three states.

Secondly, the situation in Iraq, Syria and Libya is evolving constantly and very rapidly. This article covers developments of the situation, as far as possible, up to 3 February 2016.

Thirdly, even by introducing such geographical and time limits to this research, the task remains highly complicated because of the extreme complexity of the conflicts and external interventions in Iraq, Syria and Libya. The Syrian civil war, for example, has raged for more than five years, killing 250,000 people and displacing from their homes 11 million others and is underpinned by a particularly complex pattern of alliances and enmities.⁴ What started as anti-government and pro-democracy protests in March 2011, quickly escalated into a full-scale civil war between forces loyal to President Bashar al-Assad and rebels opposed to his rule, who themselves are divided into various factions. It is against this chaotic background that ISIL was able to spread and conquer several Syrian cities. On an international

² 'From Syria to Bosnia: Isis and its affiliates around the world', *The Guardian*, 3 July 2015, available at www.theguardian.com/world/2015/jul/03/isis-and-affiliates-around-the-world.

³ In January 2016, the USA carried out at least a dozen operations including commando raids and airstrikes against militants in Afghanistan aligned with ISIL (several thousand are estimated to be present in this country). The intervention took place with the consent of the government and the President of Afghanistan, Ashraf Ghani, thanked the USA. See 'U.S. Broadens Fight Against ISIS With Attacks in Afghanistan', *The New York Times*, 31 January 2016, available at www.nytimes.com/2016/02/01/us/politics/us-broadens-fight-against-isis-with-attacks-in-afghanistan.html?_r=0.

⁴ See, for example, 'Who backs whom in the Syrian conflict', *The Guardian*, 2 December 2015, available at www.theguardian.com/world/ng-interactive/2015/oct/09/who-backs-whom-in-the-syrian-conflict.

scale, the conflict has often been described as a 'proxy war' between regional and other powers. Iran, Hezbollah, Shia armed groups from other countries (such as Afghanistan) and, since September 2015, Russia, backed the Syrian regime while fighting ISIL. Sunni Gulf states backed the rebels and have also joined the US-led coalition against ISIL. Turkey has sided with the Gulf states and joined the US-led coalition as well while, nonetheless, trying to prevent Syria's Kurds (an ally of Western states in the fight against ISIL) from advancing their self-determination claims. Western states have also constantly asked for the removal of Bashar al-Assad but, while undertaking massive intervention against ISIL, they often found themselves constrained by conflicting aims and allegiances, doubts about the 'moderate' character of some rebel groups, and fears of being dragged deeper into the Syrian quagmire. Against this background, it is impossible to undertake a single unified research of the problem of intervention by invitation. The extreme complexity of the conflicts requires a very cautious research approach in order to distinguish carefully different issues and directions and to isolate clinically each different claim of intervention by invitation. To this complexity of the conflicts, one should also add the complexity of the legal framework and the controversies surrounding intervention by invitation.

1.2. The legal framework: The purpose-based approach to intervention by invitation

The limited space of this article does not permit detailed reproduction of the complex theoretical issues and legal arguments concerning the problem of intervention by invitation. I will thus just very briefly present some basic elements of the legal debate.

International legal scholarship is profoundly divided on the legality of intervention by invitation in a case of a civil war. Based on a famous *dictum* by the International Court of Justice in 1986,⁵ some scholars consider that if valid consent is given by a representative and a still effective government, intervention by invitation is always legal and there is no prohibition of invited intervention in a civil war. The author of the present article has maintained since 2004 a different view. External intervention by invitation is normally unlawful when its objective is to settle an exclusively internal political strife in favour of the established government. Military assistance on request can nonetheless be perfectly legal when the *purpose* of the intervention is to realize other objectives, including the joint fight against terrorism.⁶

The starting point of this purpose-based approach is that the *dictum* of the International Court of Justice cannot be read as a general license to intervene on the basis of consent. The fact that such intervention by invitation is *allowable* does not mean that it is authorized in *all* circumstances. The main obstacle to the admissibility of

⁵ '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'. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, Merits, Judgment of 27 June 1986, [1986] ICJ Rep. 14, para. 246.

⁶ For a detailed analysis of legal arguments and state practice, see T. Christakis and K. Bannelier, 'Volenti non fit injuria? Les effets du consentement à l'intervention militaire', (2004) 50 *Annuaire Français de Droit International* 102; K. Bannelier and T. Christakis, 'Under the UN Security Council's Watchful Eyes: Military Intervention by Invitation in the Malian Conflict', (2013) 26 *Leiden Journal of International Law* 855.

intervention by invitation is the principle of self-determination understood as ‘the right of the people of a State to choose its own government without external intervention’.⁷ It is generally recognized that the principle of self-determination does not apply only in cases of decolonization or unlawful military occupation, but also gives the right to a people that already forms a state to maintain its political independence with regard to third states and to choose its own government with no outside interference or intervention. This dimension of the principle of self-determination was clearly expressed, for example, in Common Article 1 of the two UN Covenants of 1966 (‘All peoples have the right of self-determination. By virtue of that right they freely determine their political status’) or in UN General Assembly Resolution 2625 (XXV) which famously stated that ‘[b]y virtue of the principle of equal rights and self-determination of peoples enshrined in the Chapter of the UN, all peoples have the right to determine, *without external interference*, their political status’.⁸ Focusing on this interpretation of the principle of self-determination, also confirmed by other UN General Assembly resolutions,⁹ several scholars concluded that ‘an internal challenge to the authority of a government cannot be arbitrated by a foreign state’¹⁰ and that, in case of civil war, ‘the settled government’s position is legally neither better nor worse, *vis-à-vis* third States than the one of the insurgents’.¹¹ One of the most famous contributions in favour of the prohibition of intervention in civil wars was a book published in 1974 by now Judge of the International Court of Justice, M. Bennouna.¹² Just a year later, the *Institut de droit international* (hereinafter ‘the IDI’) sided with his view. The IDI adopted at its 1975 Wiesbaden session the resolution on the principle of non-intervention in civil wars which articulated a very broad and clear-cut prohibition of intervention in civil wars, including interventions on request of the government.¹³ Several other scholars, from Doswald-Beck¹⁴ to Gray,¹⁵ Corten,¹⁶ or to a lesser extent, Nolte¹⁷ also concluded in favour of the idea that the principle of self-determination creates serious legal impediments to the possibility

⁷ J. Crawford, *The Creation of States in International Law* (2006), 114.

⁸ Emphasis added. The preparatory works of this resolution showed that the specific issue of intervention by invitation of the government in a civil war was discussed during the debates and several states insisted that such an intervention would be unlawful. See Nations Unies, *Annuaire Juridique* (1968), 130–1; O. Corten, *The Law Against War* (2010), 290.

⁹ For example, *Respect for the principles of national sovereignty and non-interference in the internal affairs of States in their electoral processes*, UN Doc. A/RES/54/168, 25 February 2000, para. 1. See also *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, UN Doc. A/RES 2131(XX), 21 December 1965, para. 2: ‘no 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’.

¹⁰ J. Noel, *Le principe de non-intervention: Théorie et pratique dans les relations inter-américaines* (1981), 143.

¹¹ C. Chaumont, *Cours général de droit international public* (1970), 406.

¹² M. Bennouna, *Le consentement à l’ingérence dans les conflits internes* (1974).

¹³ IDI, *The Principle of Non-Intervention in Civil Wars*, Resolution, Session of Wiesbaden (1975). According to Art. 2: ‘Third States shall refrain from giving assistance to parties to a civil war which is being fought in the territory of another State’.

¹⁴ L. Doswald-Beck, ‘The Legal Validity of Military Intervention by Invitation of the Government’, (1985) 56 *British Yearbook of International Law* 189, at 251.

¹⁵ C. Gray, *International Law and the Use of Force* (2008), 81.

¹⁶ Corten, *supra* note 8, at 289 ff.

¹⁷ G. Nolte, *Eingreifen auf Einladung* (1999), 638. See also G. Nolte, ‘Intervention by Invitation’, *Max Planck Encyclopedia of Public International Law*, para. 20.

of intervention by invitation. The Report of the Independent International Fact-Finding Mission on the Conflict in Georgia also endorsed in 2009 what it called the ‘negative equality’ principle.¹⁸ The 2011 IDI Rhodes resolution on military assistance on request also indicated that self-determination could be violated even in situations below the threshold of non-international armed conflict, rendering external assistance illegal.¹⁹

This does not mean, however, that intervention by invitation is unlawful in *all cases* of internal strife. If the *purpose* of the intervention on request of the government does not violate the principle of self-determination, then normally such intervention is legal. A purpose-based approach is thus necessary. State practice shows that the legality of intervention by invitation (even in cases of civil war) has never raised problems when the purpose of such consensual intervention was clearly limited to the realization of other objectives, such as, the fight against terrorism; the fight against rebels who use the territory of the neighbouring state as ‘safe haven’ to launch attacks against the intervening state; the protection of nationals abroad; the liberation of hostages; the protection of critical 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’. The legality of counter-intervention when the rebels receive substantial outside support is also generally recognized.²⁰

The applicability of these ‘exceptions’ raises delicate issues of course and requires difficult and subjective judgments regarding the existence of the ‘legitimate purpose’ invoked by the inviting and the intervening state. The purpose of ‘fighting terrorism’, which is at stake in relation to the interventions in Syria, Iraq, and Libya, automatically raises the problem of the definition of terrorism and the question of *who* can decide that a specific group is a *terrorist* group. It is well known that established governments often try to portray their opponents as ‘terrorists’ in order to de-legitimize them politically and be legally able to request external help against them. The Syrian government, for instance, in its letters to the UN Security Council, seems to consider that almost all groups opposing government forces should be considered as ‘terrorist groups’.²¹

This is a very important issue to analyze in relation to the Russian intervention in Syria (Section 4.1.3). For the time being, it suffices to make two brief observations. First, even if the difficulties in the implementation of the exceptions proposed by

¹⁸ According to which both the government and the rebels are equally unable to invite outside assistance. See G. Fox, ‘Intervention by Invitation’, in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (2015), 827.

¹⁹ Art. 3: ‘Military assistance is prohibited when it is exercised in violation of the Charter of the United Nations, of the principles of non-intervention, of equal rights and self-determination of peoples and generally accepted standards of human rights and *in particular when its object is to support an established government against its own population*’ (emphasis added).

²⁰ See Christakis and Bannelier, *supra* note 6, at 120–37; Corten, *supra* note 8, at 290 ff.

²¹ See, for example, UN Doc. S/2016/80, 28 January 2016, *Identical letters dated 26 January 2016 from the Chargé d'affaires a.i. of the Permanent Mission of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council*, condemning ‘the bloody crimes and massacres committed by armed terrorist groups, including Islamic State in Iraq and the Levant (ISIL), the Nusrah Front, the Army of Islam, the Islamic Front, the Army of Conquest, Ahrar al-Sham and the Free Army’.

the purpose-based approach must be clearly acknowledged, the solution to these difficulties cannot be to authorize intervention by invitation in *all* cases against *all* groups. Arguably, it is preferable to undertake the hard task of identifying, on a case-by-case basis, if a claim that a rebel group is 'terrorist' is acceptable for the international community, rather than opting for a solution that will give foreign powers a license to target, after invitation of a regime, all opposition groups. Secondly, the identification of the 'terrorist groups' to be targeted raises no problem at all when it is the result of collective determination by the UN Security Council or other consensual mechanisms. In the case of the French intervention in Mali in 2013, for instance, all three groups targeted by France were clearly depicted as 'terrorist' by the UN Security Council. In the case of Syria, Iraq and Libya too, the UN Security Council clearly labels as 'terrorists' the ISIL, the Al-Nusra Front, 'and all other individuals, groups, undertakings and entities associated with Al-Qaida', while also declaring its readiness to add other groups to the list. There is thus no doubt about the fact that some groups targeted in Syria, Iraq and Libya are clearly 'terrorist' groups.

This purpose-based approach has been challenged by some scholars²² who argued that the prohibition of intervention by invitation in internal strife is 'inconsistent with State practice'.²³ In a recent study, G. Fox focused mainly on the acceptance of the legality of French military intervention in support of the beleaguered Malian government in 2013. According to him, despite the existence of a civil war, 'no State raised the negative equality principle or spoke in opposition to the French intervention', and thus 'the Mali episode ... demonstrates that the international community has not in fact accepted' the negative equality principle.²⁴

This argument cannot be sustained. As shown elsewhere, Mali is clearly a precedent *in favour* of the prohibition of intervention by invitation in internal strife and the purpose-based approach.²⁵ This was consistent with the official position taken by France in 1990 *against* intervention in favour of established governments in civil strife and with other recent cases involving France such as in Ivory Coast

²² L.C. Green, 'Le statut des forces rebelles en droit international', (1962) 66 *Revue Générale de Droit International Public* 5, at 17; J.H. Leurdijk, 'Civil War and Intervention in International Law', (1977) 24 *Netherlands International Law Review* 143, at 159; A. Tanca, *Foreign Armed Intervention in Internal Conflict* (1993), 26; C. Le Mon, 'Unilateral Intervention by Invitation in Civil Wars: the Effective Control Test Tested', (2003) 35 *International Law and Politics* 741, at 742; A. Kassim Allo, 'Counter-Intervention, Invitation, Both or Neither? An Appraisal of the 2006 Ethiopian Military Intervention in Somalia', (2009) 3 *Mizan Law Review* 201, at 215; E. Lieblich, *International Law and Civil Wars. Intervention and Consent* (2013), 122–52; Y. Dinstein, *Non-International Armed Conflicts in International Law* (2014), 76 ff; Fox, *supra* note 18, at 835; L. Visser, 'Russia's Intervention in Syria', *EJIL: Talk!*, 25 November 2015, available at www.ejiltalk.org/russias-intervention-in-syria/.

²³ D. Akande and Z. Vermeer, 'The Airstrikes against Islamic State in Iraq and the Alleged Prohibition on Military Assistance to Governments in Civil Wars', *EJIL: Talk!*, 2 February 2015, available at www.ejiltalk.org/the-airstrikes-against-islamic-state-in-iraq-and-the-alleged-prohibition-on-military-assistance-to-governments-in-civil-wars/.

²⁴ Fox, *supra* note 18, at 828–9. See also Visser, *supra* note 22, who shares this view.

²⁵ Indeed, France explained that the purpose of the invitation was to 'support Malian units in combating th[e] terrorist elements' in Mali. France made a clear distinction between the three organizations listed as 'terrorists' by the UN Security Council (AQIM, MUJAO and Ansar Dine) on the one hand, and the National Movement for the Liberation of Azawad (MNLA), a group fighting for the rights of Mali's minority Tuareg community and initially seeking independence for 'Azawad' (the North of Mali). France declared from the outset that 'there will be no action against the Tuareg' and respected this line throughout the intervention, while the rebels of the MNLA welcomed the French intervention and helped France. Bannelier and Christakis, *supra* note 6, at 866–7.

in 2002 or in Central African Republic in 2012.²⁶ More generally, the argument of ‘invitation’ or ‘consent’ has been used dozens of times in state practice in order to provide legal justification to various external interventions. But in the overwhelming majority of cases, states which carry out such military interventions take all necessary precautions to convince others that their action should not be regarded as an intervention in a civil war. Intervening states try either to *minimize* the purpose of their action, claiming, for example, that their only purpose is to ‘protect their nationals’, to ‘maintain order’, to help calm down a simple ‘mutiny’ or to help the fight ‘against terrorists’, or, on the contrary, they try to *maximize* the causes of their intervention by claiming that there was ‘external aggression’ against the inviting state or a case of counter-intervention.²⁷ Whatever the reality on the ground and their sometimes hidden intentions, ‘States do not claim a right to help a government that makes an appeal for aid to put down a rebel movement in a civil war’, they ‘never ... assume a right to intervene in any purely internal conflict’.²⁸

The Saudi-led coalition’s intervention in Yemen, initiated on 26 March 2015, could be used to challenge the prohibition of intervention by invitation in internal strife. Despite its magnitude and despite the fact that it took place against the background of a civil war and without UN Security Council authorization, this intervention ‘met with approval, or at least acquiescence, from a considerable number of States, with only few critical voices’ (mainly Iran).²⁹ However, from an *opinio juris* point of view, it is interesting to note that in its letter of justification sent to the UN Security Council, the Saudi coalition does not claim a right to intervene in a civil war on the basis of consent, but tries to ‘maximize’ the situation by saying that the Houthi militias ‘are supported by regional forces’ and this is therefore a case of ‘aggression’.³⁰ This case, and some other problematic cases,³¹ show nonetheless that the debate over intervention in civil war in general is far from over.³²

1.3. Aims of this article

While not neglecting the complexity of the legal debate and of other precedents, this study will focus exclusively on the use of the argument of intervention by invitation in relation to the conflicts in Iraq, Libya and Syria. Section 2 will argue

²⁶ Ibid., at 863–4.

²⁷ Christakis and Bannelier, *supra* note 6, at 127 ff; Bannelier and Christakis, *supra* note 6, at 863. For an analysis of state practice, see also Doswald-Beck, *supra* note 14, at 189 ff; Nolte, *supra* note 17; Gray, *supra* note 15, at 81 ff; Corten, *supra* note 8, at 276 ff.

²⁸ Conclusions of Corten, *supra* note 8, at 290 and 306, after a detailed analysis of state practice.

²⁹ T. Ruys and L. Ferro, ‘Weathering the Storm: Legality and Legal Implications of the Saudi-led Military Intervention in Yemen’ (not yet published) *International and Comparative Law Quarterly*, available at papers.ssrn.com/sol3/papers.cfm?abstract_id=2685567, at 1.

³⁰ UN Doc. S/2015/217, 27 March 2015, *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*, at 5.

³¹ Such as the intervention by invitation in Bahrain of the Gulf Cooperation Council, led by 1,000 troops from Saudi Arabia and 500 troops from UAE, that helped the government of Bahrain to crush the popular uprising in March 2011. For an analysis of this case, see O. Corten, *La rebellion et le droit international: Le principe de neutralité en tension* (2015), at 161–4.

³² In his recent book, *supra* note 31, Corten highlighted the important tensions surrounding the legal regime of insurrection in international law. See also G. Vidigal, ‘EJIL: Live! Joseph Weiler and Anne Orford Discuss Intervention in Civil War’, *EJIL: Talk!*, available at www.ejiltalk.org/ejil-live-joseph-weiler-and-anne-orford-discuss-intervention-in-civil-war/.

that intervention by invitation has been recognized as the sole valid legal basis for all foreign interventions in Iraq and that all of them confirm the purpose-based approach of intervention. [Section 3](#) will show that, to the extent that the argument of intervention by invitation has been used for some foreign interventions in Libya, it was also compatible with the purpose-based approach. Far from declaring a right to intervene in the Libyan civil war, NATO, the EU, and 23 states informally involved with the fight against ISIL in Libya, posed as a condition for military assistance on request the formation of a national unity government and the end of the civil war. [Section 4](#) will argue that Russia and Iran based their interventions in Syria on the legal basis of consent and, despite the problems, these interventions do not challenge the purpose-based approach of intervention. It is nonetheless impossible, for the time being, to use the doctrine of ‘intervention by invitation’ as a legal basis for the strikes of the US-led coalition in Syria, even if we try to rely on a controversial ‘passive consent’ theory.

2. INTERVENTION IN IRAQ: A CONFIRMATION OF THE PURPOSE-BASED APPROACH

Intervention by invitation is clearly the undisputable legal basis used by different states and coalitions in order to undertake military action in Iraq ([Section 2.1](#)). The importance of this legal basis is also highlighted by the international reactions to the military activities undertaken in Iraq by Turkey without the consent of the Iraqi government ([Section 2.2](#)). Having established that consent is the legal basis for military intervention in Iraq, it remains to be examined if the case of Iraq confirms the ‘purpose-based approach’, or if it could be used, instead, as a precedent by the partisans of a general right to intervention by invitation in civil war ([Section 2.3](#)).

2.1. The clear and undisputable legal basis of consent

Since 2014, the internationally recognized government of Iraq has authorized several states to undertake military action against ISIL on its territory. All these external interventions do not raise any legal problems from a *jus contra bellum* point of view. Indeed, consent seems to be a sufficient legal basis to justify these interventions and no state raised any legal objection.

Throughout 2014 (a year during which ISIL captured some important areas in Iraq, including Mosul), the Iraqi government issued several requests for ‘the assistance of the international community’ to help ‘defeat ISIL and protect our territory and people’ from the growing threat posed by this terrorist organization.³³ Responding to this call, a US-led coalition started airstrikes against ISIL in Iraq on 8 August 2014. President Obama insisted on the fact that this action was taken ‘at the request

³³ UN Doc. S/2014/440, 25 June 2014, *Letter dated 25 June 2014 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General*.

of the Iraqi government' and in order to 'help forces in Iraq' to combat a terrorist organization using barbaric methods.³⁴

Since that date and up to 3 February 2016, the US-led coalition has conducted a total of 6,763 airstrikes against ISIL in Iraq.³⁵ According to the official US webpage on Operation *Inherent Resolve*, the following nine states have participated: the US, Australia, Belgium, Canada, Denmark, France, Jordan, The Netherlands, and the United Kingdom.³⁶ While some other countries have provided logistical support or have joined the coalition effort to build partner capacity in Iraq, these countries have not yet undertaken military action in Iraq under the US-led (and Iraq authorized) coalition.³⁷

Iraq has clearly affirmed several times that the airstrikes by this US-led coalition were taking place on the basis of its 'express consent'. In a letter sent to the President of the UN Security Council in September 2014, for instance, Iraq emphasized that:

in accordance with international law and the relevant bilateral and multilateral agreements, and with due regard for complete national sovereignty and the Constitution, we have requested the United States of America to lead international efforts to strike ISIL sites and military strongholds, with our express consent.³⁸

No state has ever challenged the validity of this request or the legal basis of intervention by invitation. On the contrary, this request has been used in order to provide legal justification not only for the intervention in Iraq, but also for the intervention against 'the serious threat of continuing attacks from ISIL coming out of safe havens in Syria'.³⁹

Parallel to the strikes of the US-led coalition in Iraq, the Iraqi government has also authorized some other states to intervene on its territory and, once again, despite political objections, the legal basis of intervention by invitation has not been challenged by any state.

While the Iranian intervention in Iraq led to political reactions from some countries fearful of the regional aspirations of Iran, no state raised any objections about the *legality* of Iranian intervention, justified both by Iraq and Iran on the basis of valid consent *and* the fight against terrorism (the two countries even signed a military pact to combat ISIL on 31 December 2014).⁴⁰

³⁴ Statement by the President, The White House, 7 August 2014, available at www.whitehouse.gov/the-press-office/2014/08/07/statement-president.

³⁵ See Operation Inherent Resolve: Targeted Operations Against ISIL Terrorists, US Department of Defense, available at www.defense.gov/News/Special-Reports/0814_Inherent-Resolve.

³⁶ Ibid.

³⁷ For the case of Turkey, see Subsection 2.2, *infra*.

³⁸ UN Doc. S/2014/691, 22 September 2014, *Letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to President of the UNSC*, at 2.

³⁹ UN Doc. S/2014/695, 23 September 2014, *Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General*.

⁴⁰ 'Iran in new deal to boost Iraq army', *Mail Online*, 31 December 2014, available at www.dailymail.co.uk/wires/afp/article-2892238/Iran-new-deal-boost-Iraq-army.html. See also the interview of the Iranian President in *Le Monde*, 30 December 2016, confirming that Iranian troops assist Iraq on the basis of its consent.

In a similar way, despite the fact that the US expressed its hostility to any Russian intervention in Iraq,⁴¹ it did not challenge Russia's right to do so after Iraq authorized Russia to intervene against ISIL on its territory on 23 October 2015.⁴²

Finally, it is interesting to mention that, while the UN Security Council held several meetings concerning the situation in Iraq and even adopted a resolution concerning this country specifically on 29 July 2015, at no time did the UN Security Council authorize the use of force in Iraq under Chapter VII of the UN Charter. The UN Security Council 'urge[d] the international community, in accordance with international law to further strengthen and expand support for the Government of Iraq as it fights ISIL and associated armed groups'.⁴³ This, combined with the fact that no state ever criticized the consensual military operations against ISIL on the territory of Iraq, seems to indicate that we are probably in front of a case similar to the 'Mali precedent' when the French intervention by invitation took place without a UN Security Council authorization, but with its blessing and relief.⁴⁴

2.2. Consequences of the absence of consent: The case of Turkish incursions

The importance of consent as a legal basis for military intervention in Iraq is also highlighted by the international reactions to a case of military intervention where this consent was absent: the unauthorized incursion and activities of Turkish forces into Iraqi territory.

Although Turkey provides facilities for the US led-intervention against ISIL in Iraq, it has not participated in any airstrikes in Iraq. Moreover, a coalition spokesman recently said that the deployment of Turkish military forces in Iraq was not a part of the US-led coalition.⁴⁵

Iraq protested several times about what it perceived as violations of its sovereignty by Turkish armed forces.⁴⁶ But it was mainly the decision of Turkey to deploy, on 3 December 2015, what Iraq called 'hundreds of soldiers and a number of tanks and armoured vehicles'⁴⁷ near the city of Mosul, some 110 kilometres into Iraqi territory,

⁴¹ Reportedly the US has told Iraq's leaders that 'they must choose between ongoing American support in the battle against militants of ISIS and asking the Russians to intervene instead'. See 'US to Iraq: If Russia helps you fight ISIS we can't', *CBS News*, 21 October 2015, available at www.cbsnews.com/news/us-iraq-chose-between-american-and-russian-airstrikes-in-isis-fight/.

⁴² More precisely, Iraq authorized Russia to 'target Islamic State group convoys coming from Syria'. See 'Iraq authorizes Russia to strike Islamic State inside country', *Middle East Eye*, 24 October 2015, available at www.middleeasteye.net/news/iraq-authorises-russia-strike-islamic-state-inside-country-1869786714.

⁴³ UN Doc. S/PRST/2014/20, 19 September 2014, *Statement by the President of the Security Council*. See also UN Doc. S/RES/2233, 29 July 2015. For the effects of UN Doc. S/RES/2249 of 20 November 2015, see *infra* note 152.

⁴⁴ For an analysis of the 'Mali precedent', see K. Bannelier and T. Christakis, *supra* note 6, at 867–8, where it is argued that the UN Security Council welcomed the swift action by the French forces, but did not rush to replace the unilateral legal basis of the intervention (request of the Malian authorities) by a clear, multilateral use of force mandate.

⁴⁵ 'Turkey Not Part of US-Led Coalition in Iraq - Coalition Spokesman', *Sputnik International*, 2 February 2016, available at sputniknews.com/middleeast/20160202/1034091107/turkey-us-led-coalition-iraq.html#ixzz3zUitAmx1.

⁴⁶ UN Doc. S/2015/723, 25 September 2015, *Note verbale dated 16 September 2015 from the Permanent Mission of Iraq to the United Nations addressed to the Secretary-General*, protesting against various 'violations of Iraqi airspace committed by Turkish aircraft since the start of the current year' and 'condemn[ing] the infiltration of Iraqi territory by a number of Turkish military units'.

⁴⁷ UN Doc. S/2015/963, 14 December 2015, *Letter dated 11 December 2015 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council*.

that led to a very strong reaction by the Iraqi government. In a letter to the UN Security Council, Iraq emphasized that:

Those actions were taken without prior coordination or consultation with the federal Government of Iraq and are therefore in *flagrant violation of the provisions and principles of the Charter of the United Nations*. They also *violate the territorial integrity and sovereignty of the Iraqi State* Those military movements are *an act of aggression* under the Charter and the relevant provisions of international law.⁴⁸

In the same letter, Iraq mentioned its previous letters to the UN Security Council and official legal positions about the necessity of consent for any intervention on its territory and stressed that it ‘rejects, strenuously opposes and condemns in the strongest possible terms any military movements aimed at countering terrorism that take place without prior consultation with the federal Government of Iraq and without its approval’.⁴⁹ In a similar way, the Iraqi Minister for Foreign Affairs protested strongly against these Turkish incursions during a meeting of the UN Security Council, emphasizing that ‘Iraq rejects any military movements of a counter-terrorist nature without the knowledge and prior approval of the Iraqi federal authorities’.⁵⁰

Responding to these accusations, Turkey tried to downsize the importance of the event describing the deployment of these troops as a ‘routine rotation’ in a training program for Iraqi forces and aimed to protect Turkish trainers working with anti-ISIL groups.⁵¹ Turkey mentioned a ‘miscommunication with the Government of Iraq’ over these deployments and ‘reiterate[d] its support for Iraq’s sovereignty and territorial integrity’.⁵² The representative of Turkey in the UN Security Council argued that ‘[b]ecause we are extremely sensitive in matters concerning our own sovereignty and territorial integrity, we treat others the way we want to be treated’.⁵³

Therefore, it is interesting, from a legal point of view, to note that instead of advancing another legal basis to justify the incursion of its troops on Iraqi territory, Turkey spoke about a ‘miscommunication’ concerning a ‘routine operation’ within the framework of the ‘military assistance’ that Turkey ‘has extended to Iraq since the beginning of the Daesh occupation of Mosul’, upon the request of the Iraqi Government.⁵⁴

While the UN Security Council took no action after this meeting, several elements indicate that Turkey’s incursion in Iraq without the consent of its government met with strong reactions. During the meeting of the UN Security Council, the Under-Secretary-General for Political Affairs, J. Feltman, ‘urge[d] all Member States involved in the fight against ISIL in Iraq to do so in a manner that is consistent with the Charter of the United Nations and that respects the sovereignty and territorial integrity

⁴⁸ Ibid., (emphasis added).

⁴⁹ Ibid.

⁵⁰ UN Doc. S/PV.7589, 18 December 2015, *The situation concerning Iraq*, at 3.

⁵¹ ‘Obama to Erdogan: Withdraw Turkish troops from Iraq’, *Press TV*, 19 December 2015, available at [217.218.67.231/Detail/2015/12/19/442304/US-Turkey-Obama-Erdogan-Turkish-troops-Iraq](https://www.presstv.com/detail/2015/12/19/442304/US-Turkey-Obama-Erdogan-Turkish-troops-Iraq).

⁵² See the Official Communiqué of the Turkish MFA, available at www.mfa.gov.tr/no_-313_-19-december-2015_press-release-regarding-the-bashiga_zelikan-training-camp.en.mfa.

⁵³ *Supra* note 50, at 4.

⁵⁴ Ibid.

of Iraq'.⁵⁵ Moreover, on 24 December 2015, the League of Arab States adopted a resolution expressing its 'condemnation of the Turkish Government for its forces' incursion into Iraqi territory', which was called 'a violation of Iraqi sovereignty and a threat to Arab security'. The League demanded 'that the Turkish Government immediately and unconditionally withdraws its forces from Iraqi territory'.⁵⁶

Other states also expressed disapproval of the Turkish actions on various levels. Russia, for example, talked about an 'unlawful incursion'⁵⁷ while the US noted that 'the recent deployment of Turkish forces into northern Iraq had occurred without the prior consent of the Iraqi government', that 'any foreign forces can only be present in Iraq with the coordination and permission of the Iraqi government', and expressed their 'commitment to Iraqi sovereignty and territorial integrity, and called upon Turkey to do the same by withdrawing any military forces from Iraqi territory that have not been authorized by the Iraqi government'.⁵⁸ All these reactions⁵⁹ seem to indicate that the argument of 'counter-terrorism' has not been accepted as providing an autonomous legal basis for military action in Iraq. The consent of the government of Iraq is considered as essential for the legality of such counter-terrorism operations.

2.3. Intervention against terrorism or intervention in a civil war?

While not disputing the legality of intervention on the basis of consent, Akande and Vermeer argued that the airstrikes against ISIL in Iraq put in doubt the validity of the old rule of prohibition of military assistance to governments in civil wars.⁶⁰ The two scholars agreed that the purpose-based approach of intervention could also explain the situation, but what is decisive for them is that some states, in their legal justifications for the airstrikes in Iraq, seemed to take the position that intervention on the basis of consent of the legitimate government is always valid, including in classic situations of civil war. They quote, for example, the summary of the legal position of the United Kingdom, published on 25 September 2014, according to which:

International law is clear that the use of force in international relations is prohibited, subject to limited exceptions. However, international law is equally clear that this prohibition does not apply to the use of military force by one State on the territory of

⁵⁵ *Ibid.*, at 2.

⁵⁶ Resolution No. 7987 adopted at the Ministerial Meeting of the Council of the League of Arab States, held on 24 December 2015, 'Unified Arab position on the violation by Turkish forces of the sovereignty of Iraq', annexed in UN Doc. S/2016/16, *Letter dated 7 January 2016 from the Permanent Representative of Egypt to the United Nations addressed to the President of the Security Council*.

⁵⁷ 'Russia calls Turkish troop deployment in Iraq unlawful incursion', *Reuters*, 12 December 2015, available at www.reuters.com/article/us-mideast-crisis-iraq-russia-idUSKBN0TV0jH20151212.

⁵⁸ 'Readout of Vice President Biden's Call With Iraq's Prime Minister Haider Al-Abadi', The White House, 16 December 2015, available at www.whitehouse.gov/the-press-office/2015/12/16/readout-vice-president-bidens-call-iraqs-prime-minister-haider-al-abadi. See also 'Obama urges Turkey's Erdogan to withdraw troops from Iraq: White House', *Reuters*, 18 December 2015, available at ca.reuters.com/article/topNews/idCAKBN0U12JK20151218.

⁵⁹ Despite all these reactions, Turkey has not yet withdrawn its troops at the time of completion of this article. This led Iraq to file new protests and to threaten Turkey with military action in self-defence. See 'Iraq says Turkey not honoring pledge to remove troops', *Aljazeera*, 31 December 2015, available at www.aljazeera.com/news/2015/12/iraq-turkey-honouring-pledge-remove-troops-151231052525306.html.

⁶⁰ Akande and Vermeer, *supra* note 23.

another if the territorial State so requests or consents. It is clear in this case that Iraq has consented to the use of military force to defend itself against ISIL in Iraq.⁶¹

According to the two scholars, 'it is notable that this summary contained no reference to any prohibition on military assistance to a government in a civil war'.⁶² This leads them to the conclusion that the specific legal justifications advanced by the United Kingdom and other states in relation to the strikes in Iraq 'focused in broad and unqualified terms on the legality of the use of force with the consent of the territorial State's government' and thus challenge the alleged prohibition on military assistance to governments in civil wars.

This conclusion is nonetheless based on an over-formalistic and incomplete reading of the declarations made by intervening governments in Iraq. Indeed, a careful reading of all relevant documents (letters to the UN Security Council and other official declarations) clearly shows that the decisive element for all states is that the intervention in Iraq is legal not only because there is valid consent by the legitimate government, but also because the purpose of the intervention is to fight ISIL and terrorism.⁶³

The letters of invitation that Iraq sent to intervening states and the UN Security Council clearly focused on the common purpose of fighting terrorism. In a letter of 25 June 2014, for example, the ambassador of Iraq emphasized that there were four reasons that *cumulatively* justified external intervention: first, the new government of Iraq was the legitimate government which was designated after election under the assistance of the UN; second, ISIL was an entity included in the list of terrorist organizations; third, Iraq was a victim of terrorist attacks by ISIL and faced a serious threat from international terrorist organizations; and fourth, Iraq requested the assistance of the international community.⁶⁴ At no time did Iraq request foreign states to intervene in a civil war. Its invitation was to help the government forces fight ISIL.

It is precisely in response to this request that the US and other states agreed to intervene, emphasizing that what justifies the intervention is not just consent, but also the objective of the airstrikes, which is to fight a terrorist group, ISIL. This is also very clear in all relevant discussions in the UN Security Council: no state ever considered that it intervened 'in a civil war' in Iraq. On the contrary, they all took the position that what justified intervention was the fight against terrorism and a valid consent. Indeed, the 'fight against terrorism' and the need to conduct counter-terrorism operations is also the main argument used by these states in order to justify their intervention in Syria, combined with the argument of 'invitation' (for Russia and Iran) or with arguments of individual or collective 'self-defence', and sometimes

⁶¹ Ibid.

⁶² Ibid.

⁶³ These documents have been analyzed in detail by R. 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, available at 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/.

⁶⁴ UN Doc. S/2014/440, *supra* note 33.

with the ‘unwilling or unable theory’ for the states of the US-led coalition.⁶⁵ It is thus simply impossible to eliminate the ‘fight against terrorism’ from the legal equation of the interventions in Iraq, Libya, and Syria.

As a conclusion, it seems that the ‘Iraqi precedent’, far from challenging the purpose-based approach of intervention by invitation, looks like the ‘Mali precedent’. Similarly to the case of Mali, what also legitimizes military intervention in Iraq is not only the validity of the invitation issued by the internationally recognized government, but also the fact that its objective is to fight groups which are clearly and beyond doubt ‘terrorist groups’ according to international law.

3. LIBYA: INTERVENTION BY INVITATION AS A POLITICAL TOOL?

The growing threat from ISIL’s presence in Libya raises the issue of the legal basis for past and potential future military interventions in this country. In February 2015, Egypt used the theory of consensual military intervention as the legal basis for its strikes against ISIL in Libya (Section 3.1). In November 2015, the US carried out an airstrike in Libya against a senior leader of ISIL, but without providing any legal basis for it (Section 3.2). The increasing presence of ISIL in Libya and the fear that the terrorist organization might take control of Libya’s important oil infrastructure and use Libya as a basis to spread its influence to other North African and Sub-Saharan countries have caused growing concerns to the international community in the past few months and have led to several calls (including by the Libyan internationally recognized government) to expand military intervention against ISIL from Iraq and Syria to Libya. It is nonetheless interesting to note that the international community requires, as a condition for military intervention, the formation of a unified Libyan government. Thus, far from using the pretext of ‘consent’ in order to intervene in the Libyan civil war, the international community uses the pledge of ‘intervention by invitation’ as a kind of diplomatic tool in order to *put an end* to the civil war in Libya and to obtain the formation of a national unity government (Section 3.3).

3.1. Consent as the legal basis for the Egyptian strikes against the ISIL

On 16 February 2015, six Egyptian F16 fighter jets, in coordination with the Libyan air force,⁶⁶ launched airstrikes against ISIL in Libya, after the beheading by ISIL of 21 Coptic Christians from Egypt. The strikes killed 81 ISIL fighters. The declarations of both states made it clear that the legal basis of the airstrikes was valid consent by Libya combined with the fact that the objective was the common fight against terrorism.

During an urgent meeting of the UN Security Council, Libya declared that ‘[t]he Libyan Government has called on brotherly Egypt to support the Libyan army in confronting terrorism’.⁶⁷ In a similar way Egypt declared that:

⁶⁵ See Section 4, *infra*.

⁶⁶ See ‘Airstrikes hit 3 coastal Libyan cities: Egypt and Libya coordinated attacks, says Libyan Air Force commander’, *Daily News Egypt*, 16 February 2015, available at www.dailynewsegypt.com/2015/02/16/airstrikes-hit-3-coastal-libyan-cities/.

⁶⁷ UN Doc. S/PV.7387, 18 February 2015, *The Situation in Libya*, at 5.

States wishing to assist the legitimate Libyan Government *in confronting terrorism* and imposing security should be allowed to do so in the light of the severe difficulties the legitimate Government faces in that regard, with the condition that such assistance be provided in coordination with the Libyan Government and with its *approval*. Egypt has decided to respond to the requests and needs of the government of Libya and has provided military assistance.⁶⁸

Three observations can be made in relation to this event. First, it must be emphasized that since 2014, Libya has been torn apart by a civil war between several rival factions: the ‘Tobruk government’, constituted by the Council of Deputies elected in 2014 and internationally recognized as the government of Libya, which controls most of the territory; the ‘new General National Congress’, backed by the Muslim Brotherhood and the Islamist coalition ‘Libya Dawn’, which seized control of the capital Tripoli and controls a big portion of North-West Libya; and various jihadists and tribal elements, controlling smaller parts of the country. Despite the existence of the civil war in Libya, Egypt considered that the airstrikes were perfectly legal because the invitation emanated from the internationally recognized Libyan government *and its* objective was just to target a terrorist organization. This confirms the purpose-based approach of intervention by invitation.

Second, while the UN Security Council took no action after this February 2015 meeting, no member criticized in anyway the airstrikes or the legal argument of consensual military intervention against terrorist groups. The Arab League expressed its ‘complete understanding’ over the Egyptian action,⁶⁹ while the US declared that it ‘certainly respects the right of countries to make their own decisions about their own self-defence’.⁷⁰ During the debates within the Arab League, one state, Qatar, expressed reservations over the attack, saying that it could ‘give an advantage to one side in Libya’s conflict’. This led to a swift condemnation from Egypt, which accused Qatar of supporting terrorism, and to a diplomatic incident between the two countries after Qatar’s decision to recall its ambassador from Egypt in protest at this Egyptian accusation.⁷¹ This incident should nonetheless be explained by the fact that Egypt and Qatar back different sides in the ongoing Libyan civil war rather than as a challenge, by Qatar, of the legality of military intervention by invitation against terrorists.

Finally, it is interesting to note that, while Egypt considered that ‘intervention by invitation’ provided a clear and sufficient legal basis for these airstrikes, it also called for a UN Security Council Chapter VII resolution in order to create an international coalition to intervene in Libya ‘following the agreement of the Libyan people and government and that they call us to act’.⁷² Nonetheless, Western powers have been

⁶⁸ Ibid. at 7 (emphasis added).

⁶⁹ ‘Arab League “understands” Egypt airstrikes in Libya’, *Turkish Weekly*, 19 February 2015, available at www.turkishweekly.net/2015/02/19/news/arab-league-understands-egypt-airstrikes-in-libya/.

⁷⁰ ‘U.S. “Respects Egypt’s Right To Self-Defense” After Libya Airstrikes’, *Egyptian Streets*, 18 February 2015, available at egyptianstreets.com/2015/02/18/u-s-respects-egypts-right-to-self-defence-after-libya-airstrikes/.

⁷¹ ‘Egypt, Qatar trade barbs in dispute over Libya strikes’, *Reuters*, 19 February 2015, available at www.reuters.com/article/us-mideast-crisis-egypt-qatar-idUSKBNNoLNo7520150219.

⁷² ‘Egypt’s Sissi calls for Libya coalition under U.N. mandate’, *Reuters*, 17 February 2015, available at www.reuters.com/article/us-mideast-crisis-libya-egypt-idUSKBNNoLLoGA20150217.

reluctant to follow this path, considering that a prerequisite for such a military intervention is the establishment of a national unity government in Libya.⁷³

3.2. No legal justification advanced by the US

On 13 November 2015, a US airstrike on a compound in the city of Derna killed ISIL's senior leader in Libya, an Iraqi known as Abu Nabil. The US did not provide any legal justification for this. The US Department of Defense only mentioned that this 'demonstrates [that] we will go after ISIL leaders wherever they operate'.⁷⁴

More recently, it has been reported that the US was extremely worried about the ISIL's growing presence in Libya and that it was seriously considering opening a military front against ISIL in Libya, preparing for possible airstrikes, and/or commando raids.⁷⁵ Once again, nonetheless, nothing has been said about the potential legal basis for such future intervention.⁷⁶

3.3. The political use of intervention on request

ISIL was able to grow rapidly in Libya and to seize control of Sirte and several cities and districts, especially in the Cyrenaica region. It is in this context that several voices called for the US and its allies to expand military action against ISIL in Libya, while the officially recognized government of Libya launched several calls to 'fellow Arab States' to carry out air strikes against ISIL.⁷⁷

However, the international community has so far resisted the idea of military intervention without a previous political solution to the Libyan civil war. The possibility of military intervention and help on request is used as a major political tool in order to accelerate the political transition in Libya and to obtain the formation of a national unity government capable of issuing such a request.

This was, for example, the position of the UN Security Council in its Resolution 2259 of 23 December 2015 on Libya which 'welcome[d] the signature on 17th December 2015 of the Libyan Political Agreement of Skhirat, Morocco to form a Government of National Accord' and 'the formation of the Presidency Council', and 'calle[d] upon Member States to respond urgently to requests from it for assistance'.⁷⁸ The UN Security Council 'endorse[d] the Rome Communiqué of 13 December 2015 to support the Government of National Accord as the sole legitimate government of Libya'⁷⁹ and then emphasized, in relation to the fight against ISIL, that it:

Urges Member States to swiftly assist the Government of National Accord in responding to threats to Libyan security and to actively support the new government in defeating ISIL,

⁷³ 'West Rebuffs Egypt Proposals for Military Intervention in Libya', *The Wall Street Journal*, 19 February 2015.

⁷⁴ 'Statement from Pentagon Press Secretary Peter Cook on U.S. strike in Libya', US Department of Defense, 14 February 2015, available at www.defense.gov/News/News-Releases/News-Release-View/Article/628954/statement-from-pentagon-press-secretary-peter-cook-on-us-strike-in-libya.

⁷⁵ 'Obama Is Pressed to Open Military Front Against ISIS in Libya', *The New York Times*, 4 February 2016.

⁷⁶ The US chairman of the Joint Chiefs of Staff just said that President Obama 'has made clear that we have the authority to use military force', in: 'U.S. and Allies Weigh Military Action Against ISIS', *The New York Times*, 22 January 2016.

⁷⁷ 'Libya urges Arab allies to launch air strikes against Isis', *The Guardian*, 21 August 2015.

⁷⁸ UN Doc. S/RES/2259, 23 December 2015, paras. 1, 2.

⁷⁹ *Ibid.*, para. 3 (emphasis added).

groups that have pledged allegiance to ISIL, Ansar Al Sharia, and all other individuals, groups, undertakings and entities associated with Al-Qaida operating in Libya, *upon its request*.⁸⁰

A very similar position was taken in early February 2016 by NATO and 23 states participating in an international meeting in Rome about Libya and the fight against ISIL. Despite the delays in the implementation of the Libyan Political Agreement and the urgent calls for military action against ISIL in Libya, NATO declared that it will not intervene in Libya without the formation of a national unity government and a request by this government to NATO to intervene.⁸¹ This was also the position of several European countries. The EU foreign policy chief, F. Mogherini, was reported as 'ruling out that the EU might launch military operations without agreement from the national unity government' and said that such an intervention could only take place 'in the ways that the Libyan government wants once it is operative'.⁸² Even the US, which seemed to be the most pressed to intervene against ISIL in Libya, considered in early February 2016 that 'enormous hurdles stand in the way of increased American military involvement' and 'the largest is the formation of a unified Libyan government strong enough to call for and accommodate foreign military assistance'.⁸³

It is of course too early to anticipate what will happen with the fight against ISIL in Libya, especially if the terrorist threat grows stronger and/or the political process stalls. It is interesting, nonetheless, to highlight that, far from using 'consent' of the internationally recognized government of Libya as a pretext to help this government win the civil war, states use the promise of military invitation against ISIL to obtain the creation of a national unity government willing and capable of issuing an invitation for external intervention. There is thus nothing, in the case-study of Libya, calling into question the prohibition of intervention by invitation in civil wars and the purpose-based approach.

4. INTERVENTION IN SYRIA: THE DIRE STRAITS OF CONSENT

There are, as of January 2016, 12 states openly recognizing that they take military action of different kinds (mainly airstrikes, but also, in some cases, ground operations) in Syria. In the following subsections, I will try to identify if and to what extent consent could be used as a legal basis for all these military interventions. This is clearly the legal argument used by Russia and Iran in order to justify their important military operations in Syria. The theory of consent is nonetheless extremely difficult, if not impossible, to use regarding the operations of the US-led coalition, even

⁸⁰ Ibid., para. 12 (emphasis added).

⁸¹ See the declarations of NATO Secretary General, Jens Stoltenberg, quoted in 'L'OTAN n'interviendra pas sans accord politique national en Libye', *Le Monde*, 2 February 2016.

⁸² 'Libya needs gov't before anti-ISIL intervention, Mogherini', *AnsaMed*, 5 February 2016, available at www.ansamed.info/ansamed/en/news/sections/politics/2016/02/05/libya-needs-govt-before-anti-isis-intervention-mogherini_09e433c8-c993-4fb6-bb91-2f2678700379.html.

⁸³ 'Despite Libya urgency, hurdles to quick action against Islamic State', *Reuters*, 6 February 2016, available at in.reuters.com/article/usa-libya-idINKCNoVE2PN.

if we try to stretch it to its outer limits, using the controversial argument of ‘passive consent’.

4.1. Express consent as the legal basis for intervention by Russia and Iran

It has often be reported that, parallel to the US-led coalition against ISIL in Syria, another coalition has been formed between Iraq, Russia, Iran, and Syria, not to mention some important non-state actors, such as the Lebanese Hezbollah which has now been helping the regime of Bashar Al-Assad for years.⁸⁴ Both Russia and Iran used consent as the legal basis for their intervention in Syria.

4.1.1. Russia and Iran relied on the theory of intervention by invitation

Iran was the first state to intervene in response to a request for help by the Syrian government. For a long time, this country officially denied the presence of its combat troops in Syria, maintaining that it provides just ‘military advice’ to Assad’s forces in their fight against terrorist groups. However, several reports have mentioned that Iran sent an important expeditionary mission involving Islamic Revolutionary Guards Corps and several high ranked officials to Syria. According to some experts, Iran may have sent as many as 3,000 troops to Syria.⁸⁵ Taking into consideration this secretive attitude by Iran, it is obvious why this state sent no letter of justification for this military intervention to the UN Security Council. Progressively, nonetheless, and due also to the increasing number of losses among the Iranian soldiers in Syria,⁸⁶ Iran started to acknowledge its role, using as a legal justification the call for help launched by the Syrian government. Iranian President, H. Rohani, acknowledged the existence of a ‘coalition between Iran, Iraq, Syria and Russia’, and explained that Iranian ‘military advisers’ are present in Syria and Iraq on the invitation of the governments of these two states.⁸⁷

Russia, on the contrary, made no secret of its military intervention against ISIL in Syria from the outset and used very clearly the argument of invitation by the Syrian ‘legitimate government’ as a legal justification. The Russian military intervention in Syria started on 30 September 2015 with massive airstrikes while Russian support troops were deployed in some areas like the Russian naval base of Tartus or the Latakia airport. In a letter sent to the UN Security Council on 15 October 2016, Russia explained that:

in response to a request from the President of the Syrian Arab Republic, Bashar al-Assad, to provide military assistance in combating the terrorist group Islamic State in Iraq and the Levant (ISIL) and other terrorist groups operating in Syria, the Russian Federation

⁸⁴ See, for example, ‘Iraq, Russia, Iran and Syria coordinate against ISIL’, *Al Jazeera*, 27 September 2015, available at www.aljazeera.com/news/2015/09/iraq-russia-iran-syria-coordinate-isil-150927125919507.html. We could add other non-state actors and ‘foreign fighters’, such as Shiite militia from Afghanistan and Iraq who have reportedly helped the Syrian government forces.

⁸⁵ See ‘Iranian casualties rise in Syria as Tehran ramps up role’, *The Jerusalem Post*, 23 December 2015.

⁸⁶ See ‘Iranian media is revealing that scores of the country’s fighters are dying in Syria’, *The Washington Post*, 27 November 2015.

⁸⁷ See his interview, in *Le Monde*, 30 January 2016.

began launching air and missile strikes against the assets of terrorist formations in the territory of the Syrian Arab Republic on 30 September 2015.⁸⁸

Syria welcomed the strikes, presenting the Russian intervention as perfectly legal and called for other countries to ‘honour international law’ by siding with Russia and Syria, and acting in cooperation with the government forces.⁸⁹ Since then, the Syrian government of Bashar al-Assad never ceased to express its approval and support for the Russian military intervention.

If it is thus undisputable that Russia acted under the regime of ‘military intervention by invitation’, two major legal issues arise and need to be discussed.

4.1.2. *The validity of the invitation*

The first legal issue concerns the *validity* of the invitation, and more precisely, the legitimacy and ‘representativeness’ of the author of the invitation, the government of Bashar al-Assad. Some scholars took the position that the regime of Bashar al-Assad has lost its legitimacy and popular acquiescence, and thus also its standing to consent to external intervention. According to M. Weller, for example:

A very large number of States have determined that the Assad government can no longer fully claim to represent the people of Syria. Instead, the opposition is the true representative of Syria. ... Having been disowned by such a large segment of its population, and over such a long period, [the Assad government] can no longer lawfully invite foreign military force to intervene and fight on its behalf.⁹⁰

This argument, nonetheless, is not really convincing. Without entering into an examination of the democratic legitimacy of Bashar al-Assad (his government was re-elected in June 2014, although many dismissed this election that took place in the midst of a terrible civil war as a farce), one could notice that there are several elements indicating that the international community still considers the government of Bashar al-Assad as representing Syria.

It is true that several states deny the legitimacy of the Syrian Government and some among them recognized the ‘Syrian National Coalition’ (or the ‘Syrian Opposition Coalition’) as the ‘legitimate representative of the Syrian people’.⁹¹ But, as Talmon showed, an illegitimate regime may still be a government in the eyes of international law.⁹² In a specific case-study of Syria, Talmon also explained the

⁸⁸ UN Doc. S/2015/792, 15 October 2015, *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*.

⁸⁹ See ‘Syria’s ambassador to Russia urges all countries to join Syria and Russia against terrorism’, SANA, 1 October 2015, available at sana.sy/en/?p=56454.

⁹⁰ ‘Russia Says Its Airstrikes In Syria Are Perfectly Legal. Are They?’, *The World Post*, 1 October 2015, available at www.huffingtonpost.com/entry/russia-airstrikes-syria-international-law_us_560d6448e4b0dd85030b0c08.

⁹¹ See Wikipedia, en.wikipedia.org/wiki/International_recognition_of_the_Syrian_National_Council.

⁹² S. Talmon, ‘The Difference between Rhetoric and Reality: Why an Illegitimate Regime May Still be a Government in the Eyes of International Law’, *EJIL: Talk!*, 3 March 2011, available at www.ejiltalk.org/the-difference-between-rhetoric-and-reality-why-an-illegitimate-regime-may-still-be-a-government-in-the-eyes-of-international-law/#more-3101. See also D. Akande, ‘Which Entity is the Government of Libya and Why does it Matter?’, *EJIL: Talk!*, 16 June 2011, available at www.ejiltalk.org/which-entity-is-the-government-of-libya-and-why-does-it-matter/.

difference between the ‘legal’ and ‘political’ act of recognition and concluded that the recognition of the ‘Syrian Opposition Coalition’ as ‘the legitimate representative of the Syrian people’ was ‘a purely political act’.⁹³ We could thus consider that this expression of political support for the ‘Syrian National Coalition’ by some states did not challenge the view of the international community that the government of Bashar al-Assad, regardless of its loss of legitimacy, was still representing Syria. Moreover, the lack of unity and cohesion of the opposition forces and the fluctuant character of the ‘Syrian National Coalition’ created a lot of reservations for many states, including those hostile to the regime of Bashar al-Assad, and can also explain why the overwhelming majority of states preferred to maintain the view that the regime in Damascus is still the Syrian government in the eyes of international law. As for effectiveness, the Bashar al-Assad government was able to exercise effective control over some important parts of Syria, including the capital, while ‘none of the other opposition groups including ISIL can be considered as a challenging authority as they are not exercising sufficient effective control over Syria’.⁹⁴ The ‘Mali precedent’ showed that the lack of effectiveness of the Malian authorities over more than half of the country, or indeed the political challenges facing these authorities, never questioned the validity of the invitation extended to France in January 2013 to intervene against terrorists threatening to capture the capital Bamako.⁹⁵

Turning to the practice of international organizations, we can notice that some organizations, such as the Arab League in November 2011,⁹⁶ or the Organization of Islamic Cooperation in August 2012,⁹⁷ suspended the Syria’s membership over its failure to end government crackdown on protests. However, Syria is still present in other organizations and their delegates, accredited by the Damascus government, still represent this country. The most notable example is the UN where the Permanent Mission of the Syrian Arab Republic is particularly active, sending dozens of letters to the Secretary-General and the President of the UN Security Council in order to defend the regime’s positions. The government in Damascus was also considered as capable to legally bind Syria by ratifying certain international treaties, most notably by acceding to the Chemical Weapons Convention on 14 October 2013, after the events (use of chemical weapons) in August 2013 and the adoption of the UN Security Council Resolution 2118 on 27 September 2013.⁹⁸

Last but not least, no state challenged, to my knowledge, the *validity* of the invitation to intervene. While several Western and Arab states criticized Russia for also attacking the ‘moderate Syrian opposition’, no state called into question

⁹³ S. Talmon, ‘Recognition of Opposition Groups as the Legitimate Representative of a People’, (2013) 12 *Chinese Journal of International Law* 219.

⁹⁴ Visser, *supra* note 22.

⁹⁵ Bannelier and Christakis, *supra* note 6, at 865.

⁹⁶ ‘Syria suspended from Arab League’, *The Guardian*, 12 November 2011.

⁹⁷ ‘Symbolic decision: OIC poised to suspend Syria’, *Tribune*, 16 August 2012, available at tribune.com.pk/story/422772/symbolic-decision-oic-poised-to-suspend-syria/.

⁹⁸ ‘Syria’s Accession to the Chemical Weapons Convention Enters into Force’, Organisation for the Prohibition of Chemical Weapons, 14 October 2013, available at www.opcw.org/news/article/syrias-accession-to-the-chemical-weapons-convention-enters-into-force/.

the legality of the Russian airstrikes against ISIL on the basis of intervention by invitation.

4.1.3. *Russian intervention: A challenge to the purpose-based approach?*

The second important legal issue concerns the *purpose* of the Russian intervention and the question of the legality of intervention by invitation of a government in a civil war. In the case of the Russian intervention in Syria, as in the case of the US-led intervention in Iraq, some scholars took the position that this is a precedent in favour of the idea that there is no prohibition of intervention by invitation in a civil war.⁹⁹

However, both the criticisms addressed to Russia for the modalities of its intervention and Russia's responses to these criticisms seem to lead to a different conclusion. They seem to indicate that this is a case confirming the 'Mali precedent' and the idea that the legality of intervention does not result from a presumed *carte blanche* to intervene in a civil war, but is directly linked to its specific purposes and especially the 'exception' of the fight against terrorism.

Let us focus first on the reactions to Russian airstrikes in Syria. Several Western and Arab states, and some international organizations heavily criticized Russia for its military intervention in Syria. But in no case did an international actor criticize Russia for bombing ISIL or other terrorist groups in Syria. The criticism only concerned Russian airstrikes not directed against terrorist organizations, but against 'moderate rebels'.

The Council of the European Union stated, for example, on 12 October 2015:

The recent Russian military attacks *that go beyond Dae'sh and other UN-designated terrorist groups*, as well as on the moderate opposition, are of deep concern, and must cease immediately ... This military escalation risks prolonging the conflict, undermining a political process, aggravating the humanitarian situation and increasing radicalization.¹⁰⁰

At the UN level, some Arab and Western states were successful in adopting, on 2 November 2015, a non-binding resolution of the UN General Assembly's Third Committee which:

[s]trongly condemns all attacks against the Syrian moderate opposition and calls 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.¹⁰¹

⁹⁹ Visser, *supra* note 22.

¹⁰⁰ 'Council conclusions on Syria', Council of the European Union, 12 October 2015, available at www.consilium.europa.eu/en/press/press-releases/2015/10/12-fac-conclusions-syria/ (emphasis added).

¹⁰¹ Situation of human rights in the Syrian Arab Republic, UN Doc. A/C.3/70/L.47, 2 November 2015, UN Third Committee, para. 15. Adopted by 115 votes in favour, 15 against, 51 abstentions. This resolution also '*strongly condemns* 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, particularly the Al-Quds Brigades, the Islamic Revolutionary Guard Corps and militia groups, such as Hezbollah, Asa'ib Ahl al-Haq, and Liwa' Abu al-Fadl al-Abbas, and expresses deep concern that their involvement further exacerbates the deteriorating situation in the Syrian Arab Republic ...' (para. 14).

More recently, the British Foreign Secretary, Phillip Hammond, strongly criticized Russia for exceeding its proclaimed mission in Syria: ‘The Russians say they want to destroy Daesh but they are not bombing Daesh: they are bombing the moderate opposition’, said Hammond, adding that ‘less than 30 per cent of Russian strikes are against Daesh targets’ and that this ‘undermines international efforts to end the Syrian civil war by bombing opponents of Islamic State in an attempt to bolster Bashar al-Assad’.¹⁰²

These statements did not seem to challenge the *legality*, as such, of the Russian strikes against the moderate opposition.¹⁰³ However, the language used clearly demonstrates that the international community is not ready to give a *carte blanche* to foreign states to intervene in civil wars under the cover of invitation by the government. While nobody challenged the legality of Russian airstrikes against ISIL and other terrorist groups, the perceived effort of Russia to ‘take sides’ with the Syrian government against the rebels met strong reactions and condemnations. This seems to confirm, rather than to challenge, the purpose-based approach of the legality of military intervention by invitation.

The analysis of the Russian reactions to these criticisms also seems to confirm this approach. Despite pretty clear indications that Russia was indeed helping substantially the Syrian government forces in their fight not only against terrorist groups, but also against Syrian rebels, Russia has maintained until now that it only intervenes against terrorists. Russian President Vladimir Putin insisted on several occasions that ‘[t]he country’s only goal is to combat the international terrorists of ISIL’ and other terrorist groups, such as the al-Nusra Front.¹⁰⁴ Russia’s Foreign Minister, Sergey Lavrov, argued that the objective of Russia’s intervention is exactly the same as that of the US-led intervention in Syria – to fight terrorism.¹⁰⁵

From an *opinio juris* point of view, this is very important. In international law practice, there is sometimes a distortion between what states *say* and what they really *do*.¹⁰⁶ The declarations of Russia in relation to the objectives of its intervention in Syria seem to confirm the idea that, whatever the reality on the ground and the hidden intentions and actions are, states do not wish to assume a right to intervene

¹⁰² ‘Putin is fanning Syrian civil war, Britain’s Hammond says’, *Reuters*, 1 February 2016, available at www.reuters.com/article/us-mideast-crisis-britain-idUSKCN0VA3RQ.

¹⁰³ The moderate opposition did so, nonetheless, arguing in a letter addressed through the United Kingdom to the UN Security Council that ‘Russia’s intervention in Syria violates international law’ and that ‘ISIS will not be defeated as long as Syrians are being bombed into oblivion’. See UN Doc. S/So15/941, 11 December 2015, *Letter dated 8 December 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council*.

¹⁰⁴ ‘Syria crisis: Vladimir Putin insists Russia is only bombing Isis’, *Independent*, 12 October 2015.

¹⁰⁵ See ‘Russia rejects criticism of air strikes in Syria’, *Aljazeera*, 1 October 2015, available at www.aljazeera.com/news/2015/10/russia-rejects-criticism-air-strikes-syria-151001173827826.html; ‘Western criticism of Russian operations in Syria is groundless – Moscow’, *Russia Today*, 2 February 2016, available at www.rt.com/news/331028-uk-hammond-syria-lavrov/.

¹⁰⁶ For example, the fact that several states practice torture, while they clearly maintain the legal position that torture is prohibited, does not put in any way in danger the prohibition of torture in general international law. As the International Court of Justice famously said in the *Nicaragua* Judgment of 27 June 1986: ‘If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State’s conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule’ (para. 186).

in a purely internal conflict. From the beginning of the justifications provided for the operations (the Russian letter to the UN Security Council) until today (early February 2016), Russia has never claimed a *general right* to intervene in the civil war in Syria to 'save' the Syrian regime which called for help. Instead it provides the legal justification of intervening for a *specific purpose*—to help the Syrian government fight terrorist groups.¹⁰⁷

This immediately raises an important problem, as mentioned in the introduction, concerning the definition of terrorism and the organ capable of deciding which are the 'terrorist groups' in Syria. The invocation of a 'legitimate purpose' to justify intervention by invitation could become an empty shell or a mere game of semantics if it is used just as a cover to interfere in a civil war. The efforts of Russia to convince that the purpose of its invitation is just to 'fight terrorism' could indeed become meaningless if Russia shares the very broad approach of the Syrian government which seems to consider that almost all groups opposing government forces should be considered as 'terrorist groups'.¹⁰⁸ An examination of Russia's arguments does not seem to confirm, nonetheless, that this is the case.

Russia, of course, expressed doubts about the exact number and identity of the 'terrorist' groups in Syria. Russia mentioned several times that 'world powers must identify which of the dozens of rebel groups fighting in Syria are "terrorists" before resuming talks on establishing a limited cease-fire and moving toward a solution to the conflict'.¹⁰⁹ But these doubts regarding the exact number and identity of terrorist groups in Syria are shared, to some extent, by the international community. The UN Security Council clearly stated in several occasions that ISIL, the Al-Nusrah Front, 'and all other individuals, groups, undertakings and entities associated with Al-Qaida' are clearly terrorist organizations.¹¹⁰ The UN Security Council has also clearly and constantly affirmed that other groups could be added to the list 'as may further be agreed by the International Syria Support Group (ISSG) and endorsed by the UN Security Council, pursuant to the Statement of the International Syria Support Group (ISSG) of 14 November 2015'.¹¹¹ The embarrassment of the international community concerning the exact identification of terrorists in Syria is also evident in the decision of the participants in the Vienna talks on Syria to ask Jordan to coordinate efforts to compile a common list of terrorist groups in Syria.¹¹²

Despite these uncertainties, Russia stated that 'Russia's targets were those considered terrorists by the United Nations and by the Russian legal system, including

¹⁰⁷ Corten noted that, to the extent that the Syrian rebels received substantial aid from several foreign states, Russia could have also relied on another acceptable specific purpose for this invited intervention: counter-intervention. But, as Van Steenberghe observed, this argument was not used officially in the Russian letter to the UN Security Council to justify the intervention. See their comments in Visser, *supra* note 22.

¹⁰⁸ *Supra* note 21.

¹⁰⁹ 'Syrian "Terrorists" Must Be Identified Before Talks, Russia Says', *Bloomberg*, 4 November 2015, available at www.bloomberg.com/news/articles/2015-11-04/syrian-terrorists-must-be-identified-before-talks-russia-says.

¹¹⁰ See, for instance, UN Doc. S/RES 2249, 20 November 2015, para. 5; UN Doc. S/RES 2254, 18 December 2015, para. 8; UN Doc. S/RES 2258, 22 December 2015, preamble.

¹¹¹ *Ibid.*

¹¹² 'Russia says Jordan to coordinate Syria list of terrorist groups', *Reuters*, 15 November 2015, available at af.reuters.com/article/worldNews/idAFKCN0T40GM20151115; 'Selection of Jordan to compile list of Syria terror groups a sign of int'l trust', *The Jordan Times*, 16 November 2015.

Islamic State and the al Qaeda-linked Nusra Front' and that the Free Syrian Army rebels are not considered by Russia as a terrorist group.¹¹³ It has maintained that Russia's and USA's 'terrorist' lists 'largely coincide'.¹¹⁴ Russia also expressed several times its 'readiness to cooperate with the so-called moderate Syrian opposition'¹¹⁵ and claimed having 'worked together with the Free Syrian Army' and the Syrian Kurds in the fight against terrorism.¹¹⁶ Whatever the veracity of these statements is, it seems that Russia does not officially consider all the Syrian rebels as 'terrorists' and does not claim a right to target them either on the basis of the theory of intervention by invitation.

As a conclusion, whatever the reality is on the ground, the legal arguments used in relation to the Russian intervention in Syria give no support to the idea of absence of prohibition of consensual intervention in a civil war and seem to confirm, on the contrary, the purpose-based approach of intervention by invitation.

4.2. The US-led intervention and the murky waters of passive consent

The strikes of the US-led coalition against ISIL in Syria started on 22 September 2014, a few days after the speech of the US President Barack Obama, indicating the intent of the US to 'degrade, and ultimately destroy, ISIL through a comprehensive and sustained counterterrorism strategy' and to 'hunt down terrorists who threaten [the US], wherever they are'.¹¹⁷ According to the official US webpage of Operation *Inherent Resolve*, the following ten states have participated in US-led airstrikes in Syria until early February 2016: the US, Australia, Bahrain, Canada, France, Jordan, Saudi Arabia, Turkey, UAE, and the United Kingdom.¹¹⁸

Contrary to the Russian and Iranian intervention, it is impossible to use the theory of military intervention by invitation for the US-led intervention. In order to use consent as a potential legal basis for this intervention, one could thus only rely on a theory of 'passive consent' which is nonetheless not only controversial in international law, but also extremely difficult, if not impossible, to use in the case of Syria once we examine all the relevant facts.

4.2.1. The impossibility to use the theory of military intervention by invitation

Three simple facts clearly establish that it is impossible to argue that the USA-led coalition intervened in Syria on the basis of an invitation by the Syrian government.

¹¹³ 'Russia says U.S.-backed Free Syrian Army not a terrorist group', *Reuters*, 1 October 2015, available at www.reuters.com/article/us-mideast-crisis-lavrov-fsa-idUSKCN0RV51620151001.

¹¹⁴ 'Russia, U.S. 'terrorist' lists 'largely coincide', *Al Arabia*, 13 November 2015, available at english.alarabiya.net/en/News/middle-east/2015/11/13/Putin-says-Russia-has-struck-Syria-targets-identified-by-Free-Syrian-Army.html.

¹¹⁵ 'Ambassador: Moscow cooperating with some Syrian opposition on all 'fronts'', *Russia Beyond the Headlines*, 8 February 2016, available at rbth.com/news/2016/02/08/ambassador-moscow-cooperating-with-some-syrian-opposition-on-all-fronts_565865.

¹¹⁶ 'Putin says Russia has struck targets identified by Free Syrian Army', *Reuters*, 13 November 2015, available at www.reuters.com/article/us-mideast-crisis-russia-putin-idUSKCN0T211D20151113.

¹¹⁷ 'Statement by the President on ISIL', The White House, 10 September 2014, available at www.whitehouse.gov/the-press-office/2014/09/10/statement-president-isil-1.

¹¹⁸ These states have conducted until 3 February 2016 a total of 3,350 airstrikes in Syria. See *supra* note 35.

Firstly, it is clear that Syria never requested such an intervention which is in sharp contrast with the invitations extended to both Iran and Russia. In a letter sent to the UN Security Council on 17 September 2015, Syria emphasized that it ‘has not made any request to that effect’.¹¹⁹

Secondly, consent has clearly never been asked from Syria by the states participating in the US-led coalition. All of them are hostile to the official government of Bashar al-Assad, considering it illegitimate and asking for its departure. The US State Department clearly indicated that the US-led coalition was ‘not looking for the approval of the Syrian regime’,¹²⁰ and constantly ruled out any cooperation with Syrian government forces.¹²¹

Thirdly, on the legal field, the issue of invitation or consent was never mentioned in the legal justifications provided by the intervening states. The US letter of September 2014 and all the other letters of intervening states sent to the UN Security Council only advance, as a legal basis, ‘self-defence’, either individual and/or collective, combined with the fight against terrorism and, sometimes, the ‘unable or unwilling theory’. Far from ‘consenting’, Syria is presented in some of these letters as ‘neither capable . . . nor willing to prevent these threats emanating from its territory’.¹²²

It is thus clear that in the case of the US-led coalition’s military activities in Syria, nobody issued an invitation and nobody requested or accepted one. Could we consider, nonetheless, that the identity of the common enemy and some mutual interests could at least leave open the possibility of some kind of concealed cooperation or, at least, passive consent and acquiescence by the Syrian government to the strikes against ISIL? Before looking at the facts, let us examine if international law could accept a ‘passive consent’ theory of intervention.

4.2.2. Does international law accept the theory of ‘passive consent’?

It is well known that ‘one of the bedrocks of international law is the “action–reaction paradigm”. The conduct of a State towards another State and the reaction of the latter are essential to the definition of their relations’.¹²³ Silence, inaction, tolerance, absence of protest, passivity, and acquiescence can play a very important role in international law and the maxim *qui tacit consentire videtur si loqui debuisset ac potuisset* is of fundamental importance. Could this maxim be combined with

¹¹⁹ UN Doc. S/2015/719, 21 September 2015, *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*.

¹²⁰ ‘White House won’t commit to asking Congress for Syria strike’, *The Hill*, 25 August 2014, available at thehill.com/policy/defense/215905-white-house-wont-commit-to-asking-congress-for-syria-strike.

¹²¹ ‘U.S. rules out coordinating with Assad on airstrikes against Islamists in Syria’, *Washington Post*, 26 August 2014, available at www.washingtonpost.com/world/national-security/us-rules-out-coordinating-with-assad-on-airstrikes-against-islamists-in-syria/2014/08/26/cda02e0e-2d2e-11e4-9b98-848790384093_story.html.

¹²² See, for example, UN Doc. S/2014/695, 23 September 2014, *Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General*, or UN Doc. S/2015/563, 24 July 2015, *Letter dated 24 July 2015 from the Chargé d’affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council*. See O. Corten, ‘The “Unwilling or Unable” Test: Has it Been and Could it be Accepted?’, this Symposium, doi:10.1017/S0922156516000315.

¹²³ N.S. Marques Antunes, ‘Acquiescence’, *Max Planck Encyclopedia of Public International Law*.

the maxim *volenti non fit injuria* and lead to the conclusion that passive consent is possible?

Whatever the answer in other fields of international law is, considering the specific and so important issue of military intervention, the risks of abuse are evident: the blind application of the principle *qui tacit consentire* could indeed lead to chaos. States could undertake military interventions on foreign territory invoking implied consent, or hoping for a retrospective one. Weak states would often have to endure such military interventions on their territory, not daring to criticize the actions of powerful states or ‘allies’ with whom they find themselves in a situation of dependence (concerning for example, security arrangements or expectations of financial aid). An eventual ulterior protest could come ‘too late’. It could thus be wiser for international law to avoid the risks of abuse by requesting not only prior consent (this is admitted by all), but also written or clearly expressed consent for military intervention.

During the debates for the adoption of the UN General Assembly Resolution 3314 on the definition of aggression, two states proposed to introduce to the list of acts that ‘qualify as an act of aggression’, any armed action conducted without the written or express consent of the state concerned.¹²⁴ This proposal was not accepted and Resolution 3314 does not set any conditions as to the form of the agreement. According to this resolution, nonetheless, an act of aggression may consist of 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.¹²⁵

Without requiring an ‘express’ agreement of the receiving state, this paragraph seems to leave little room for military activities or even presence of foreign troops in the territory of the receiving state on the basis of its ‘presumed’ continuing consent.

Similarly, during its work on codification of consent as a ‘circumstance precluding wrongfulness’, the International Law Commission seemed hostile to the idea of presumed consent. While Article 20 of the ARSIWA adopted in 2001 requires only ‘valid consent by a State’, without setting any formal conditions, the commentary emphasizes that ‘[c]onsent must be freely given and clearly established. 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*’.¹²⁶

While the IDI was well aware of this hostility of the Commission to presumed consent, the 2011 IDI resolution on military assistance on request set no formal conditions, only mentioning that ‘[t]he request shall be valid, specific and in conformity

¹²⁴ Corten, *supra* note 8, at 272–3.

¹²⁵ Definition of Aggression, UN Doc. A/RES/3314(XXIX), 14 December 1974, para. 3(e).

¹²⁶ *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001 YILC, Vol. II (Part I), UN Doc. A/56/10, at 73, para. 6. This is consistent with the previous position of the Commission according to which consent, in order to produce any legal effects, must be ‘valid in international law, clearly established, really expressed [which precludes merely presumed consent], internationally attributable to the State and anterior to the commission of the act to which it refers’ (Report of the International Law Commission on the Work of its Thirty-First Session, 1979 YILC, Vol. II(2), UN Doc. A/34/10, at 112, para. 11.

with the international obligations of the requesting State'.¹²⁷ This is probably related to the absence of formalism in international law: what is of paramount importance is the will of states, not specific forms. Oliver Corten, who clearly rejected the idea of 'implied authorizations to use force' by the UN Security Council,¹²⁸ accepts the theory of 'presumed consent' in relation to military intervention. He bases this acceptance on the position of the International Court of Justice in the 2005 *Armed Activities on the Territory of the Congo (DRC v. Uganda)* Judgment where the Court found that the DRC had consented to Uganda's military intervention through tolerance or absence of protest.¹²⁹ For Corten, '[i]t is very clear, in view of [the reasoning of the Court], that consent may be given in a completely informal manner; a simple tolerance may suffice to demonstrate its existence in the particular circumstances of the case'.¹³⁰

Beyond the *Armed Activities* case, one could probably mention the case of the US drone strikes in Pakistan. The government of Pakistan never 'invited' the US or expressed publicly formal consent for the drone strikes against Al-Qaeda and Taliban leaders and fighters on its territory since 2004. On the contrary, it took the public position that it was opposed to these drone strikes.¹³¹ Several organs within Pakistan, such as members of parliament or the Pakistani high court, strongly criticized the strikes, but it was only in August 2014 that the government officially filed a protest to the US considering the strikes as a 'violation of Pakistan's sovereignty and territorial integrity' and calling for 'an immediate end to US drone strikes'.¹³² This led Michael Lewis to conclude that 'up until now the US was apparently operating under continued passive consent based upon the behaviour of the military and ISIL which were either cooperating or at least not interfering with the strikes', but the protest of June 2013 should be considered as an 'official withdrawal of consent for the drone strikes' by Pakistan.¹³³ A few months later, several sources revealed the existence of secret memos showing that Pakistan endorsed US drone strikes for several years.¹³⁴

¹²⁷ *Supra* note 19, Art. 4(2).

¹²⁸ *Supra* note 8, at 348 ff.

¹²⁹ *Ibid.*, at 272–3. The Court talked about the 'absence of any objection to the presence of Ugandan troops in the DRC' by the DRC government and concluded that '[t]he source of an authorization or consent to the crossing of the border by these troops antedated' a written Protocol concluded in April 1998 (paras. 46–7 of the Judgment).

¹³⁰ *Ibid.*

¹³¹ T. Nasser, 'Do Drone Strikes Violate International Law? Questioning The Legality of U.S. Drone Strikes and Analyzing The United States' Response to International Reproach Based on The Realism Theory of International Relations', (2015) 24 *Southern California Interdisciplinary Law Journal* 289, at 311.

¹³² 'Pakistan summons US ambassador to protest against latest drone killings', *The Guardian*, 8 June 2013, available at www.theguardian.com/world/2013/jun/08/pakistan-us-drone-killings.

¹³³ M. Lewis, 'Pakistan's official withdrawal of consent for drone strikes', 10 June 2013, available at opiniojuris.org/2013/06/10/guest-post-pakistans-official-withdrawal-of-consent-for-drone-strikes/. Other American scholars nonetheless took the position that consent was not necessary and that the argument of self-defence was sufficient to provide a legal justification for the drone strikes. See, for example, J. Paust, 'Self-Defense Targeting of Non-State Actors and Permissibility of U.S. Use of Drones In Pakistan', (2010) 19 *Journal of Transnational Law and Policy* 237.

¹³⁴ 'Secret memos show Pakistan endorsed US drone strikes', *BBC*, 24 October 2013, available at www.bbc.com/news/world-asia-24649840. See also Z. Ahmed, 'Strengthening standards for consent: The Case of U.S. Drone Strikes in Pakistan', (2015) 23 *Michigan State International Law Review* 460, at 513. See also S.A. Shah, *International Law and Drone Strikes in Pakistan* (2014).

The ‘Pakistani precedent’ therefore seems to confirm that, for several political reasons, governments might choose not to render public the existence of consent for a military intervention. Let us now turn to the situation in Syria to check whether the situation there compares with the ‘Pakistani precedent’.

4.2.3. ‘Passive consent’ during the first year of the US-led intervention?

Any comparison between Syria and Pakistan immediately runs against a major obstacle: in the case of Pakistan, the US never challenged the legitimacy of the Pakistani government. In the case of Syria, on the contrary, the governments of all states participating in the US-led coalition strongly challenge the legitimacy of the Syrian government, constantly asking President Bashar al-Assad to step down in order to open the way to a political transition, and are refusing any substantial cooperation with the Syrian regime while Bashar al-Assad is still in power. This creates a constant animosity between the two sides which could hardly let any space for a theory of even ‘passive’ consent.

When US President Barack Obama announced his intention to bomb ISIL targets in Syria on 10 September 2014, Syria strongly reacted. The Syrian Minister of National Reconciliation declared that ‘any action of any kind without the consent of the Syrian government would be an attack on Syria’.¹³⁵ Similarly, Russia and Iran declared that ‘strikes by the US armed forces against ISIL positions in Syria without the consent of the legitimate government’ will be, ‘in the absence of a UN security council decision, ... an act of aggression, a gross violation of international law’.¹³⁶

However, on 24 September 2014, just one day after the first strikes in Syria, the same Syrian minister declared that the airstrikes launched by the international coalitions against ISIL in Syria were ‘going in the right direction’ and that the Syrian government was kept informed by the US.¹³⁷

The passivity of the Syrian government in the following months (until September 2015) could indicate that, while following closely the situation and fearing an eventual use of the airstrikes against the regime, it was not opposed to the strikes of the US-led-coalition against ISIL which was a relief for the government forces. In a letter sent to the UN Security Council in June 2015, for instance, Syria emphasized that ‘it is prepared to cooperate bilaterally and at the regional and international levels to combat terrorism’ and that:

it supports any genuine international effort aimed at countering the scourge of terrorism in all its forms and manifestations, provided that, in doing so, every effort is made

¹³⁵ ‘Isis airstrikes: Obama’s plan condemned by Syria, Russia and Iran’, *The Guardian*, 12 September 2014, available at www.theguardian.com/world/2014/sep/11/assad-moscow-tehran-condemn-obama-isis-air-strike-plan.

¹³⁶ *Ibid.*

¹³⁷ ‘Damas se félicite des raids contre l’EI en Syrie’, *Le Figaro*, 24 September 2014. The Syrian rebels also welcomed the USA-led intervention. On 23 September 2014, the President of the Syrian Coalition said: ‘Tonight, the international community has joined our fight against ISIS in Syria. We have called for airstrikes such as those that commenced tonight’, National Coalition for Syrian Revolution and Opposition Forces, Press Release, 23 September 2014, available at en.etilaf.org/press/airstrikes-against-isis-positions-inside-syria.html.

to safeguard civilian lives, respect national sovereignty and adhere to international instruments.¹³⁸

This passivity of the Syrian government is to be compared with its strong reaction concerning other cases of military interventions on its territory. In December 2014, for example, Syria claimed that 'Israel committed yet another criminal aggression against [Syria's] territory and sovereignty' by bombing two civilian areas in Syria.¹³⁹ In February 2015, Syria also condemned as 'flagrant aggression' the intervention of the Turkish army on Syrian territory aimed to 'relocate the tomb of Sulayman Shah' without the consent of the Syrian government.¹⁴⁰

It would probably be an exaggeration to conclude, on the basis of these elements, that there was clear 'passive consent' during this first year of the US-led airstrikes, providing a sufficient legal basis for the operations, but the absence of protest by Syria could lead towards this idea. This situation changed dramatically in September 2015.

4.2.4. *The end of passive consent since September 2015?*

Already fragile in the previous period, the theory of passive consent seems to be in big trouble since the 17 September 2015 when Syria sent a letter to the UN Security Council concerning the 'military measures against the Syrian Arab Republic' carried out by some states and the legal justifications advanced for them. Syria explains that these states

invoke a distorted reading of the intention of Article 51 of the Charter of the United Nations ... Syria has not made any request to that effect. ... If any State invokes the excuse of counter-terrorism in order to be present on Syrian territory without the consent of the Syrian Government, whether on the country's land or in its airspace or territorial waters, its actions shall be considered a violation of Syrian sovereignty. Combating terrorism on Syrian territory requires close cooperation and coordination with the Syrian Government in accordance with the counter-terrorism resolutions of the Security Council.¹⁴¹

Similarly, a few days later, Syria said, during a debate in the UN Security Council, that:

The actions of the United Kingdom and France in Syrian air space are contrary to the Charter of the United Nations and international law, as well as a flagrant violation of Syria's national sovereignty. Those who genuinely wish to combat terrorism must coordinate their efforts with the Syrian Government ...¹⁴²

¹³⁸ UN Doc. S/2015/371, 1 June 2015, *Identical letters dated 25 May 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council.*

¹³⁹ UN Doc. S/2014/874, 8 December 2014, *Identical letters dated 8 December 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.*

¹⁴⁰ UN Doc. S/2015/132, 25 February 2015, *Identical letters dated 23 February 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.*

¹⁴¹ UN Doc. S/2015/719, 21 September 2015, *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.*

¹⁴² UN Doc. S/PV.7527, 30 September 2015, *Maintenance of International Peace and Security*, at 30.

These strong protests by Syria only focused at that time on the actions and legal arguments used by three states just joining the coalition, namely the United Kingdom, Australia, and France – not the other members of the US-led coalition. In subsequent letters, nonetheless, it became clear that Syria was strongly opposed to the airstrikes and legal arguments used by all members of the US-led coalition.¹⁴³ Indeed, since September 2015, a period coinciding with the beginning of the Russian airstrikes requested by the Syrian government, Syria sent to the UN Security Council several other letters strongly and continuously protesting against the airstrikes. In November 2015, for instance, Syria protested that '[a]ircraft of the so-called international coalition led by the United States of America continue to violate the sovereignty of Syria under the pretext that they are targeting the Islamic State in Iraq and the Levant (ISIL) terrorist organization'.¹⁴⁴ A month later, Syria qualified a specific airstrike against a Syrian Arab Army camp as a 'blatant aggression by coalition forces'.¹⁴⁵ In January 2016, it filled a new protest making a contrast between the US-led interventions and the Russian interventions: 'At a time when the coalition's futility and hypocrisy have become clear to see, the Syrian Arab Army and the Russian air force are waging relentless war on the terrorists'.¹⁴⁶

Although these protests leave no room for the theory of 'passive consent',¹⁴⁷ three observations can be made. First, while Syria strongly opposes in these letters the distortion of the self-defence provisions of the Charter and the 'unwilling or unable' theory advanced by some of the intervening states, at no point does it challenge the legality of a military intervention on the basis of consent. On the contrary, in all these letters Syria clearly insists on the need for consent from the Syrian Government and consultation/cooperation with the Syrian authorities for any anti-terrorism military action undertaken on its territory. This means that if, for example, some of the intervening states decide in the future to consult secretly with the Syrian government the passive consent theory could be revived.¹⁴⁸

Second, while Syria protests in these letters against what it calls 'a flagrant violation of its national sovereignty' by the US-led coalition, it does not call for an end to the airstrikes against ISIL. Despite these protests, Syria thus does not seem hostile to

¹⁴³ See, for example, UN Doc. S/2015/727, 22 September 2015, *Identical letters dated 21 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*, using a similar language and including this time also the US and Canada.

¹⁴⁴ UN Doc. S/2015/851, 16 November 2015, *Identical letters dated 9 November 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*.

¹⁴⁵ UN Doc. S/2015/933, 8 December 2015, *Identical letters dated 7 December 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*.

¹⁴⁶ UN Doc. S/2016/46, 22 January 2016, *Identical letters dated 18 January 2016 from the Chargé d'affaires of the Permanent Mission of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council*.

¹⁴⁷ See also R. Van Steenberghe, 'From Passive Consent to Self-Defence after the Syrian Protest against the US-led Coalition', *EJIL: Talk!*, 23 October 2015, available at www.ejiltalk.org/13758-2/.

¹⁴⁸ Syria also insists that 'the only productive way to combat terrorism remains the establishment of an effective international coalition within the framework of international law and with the participation of concerned States, particularly Syria, which is the main party confronting terrorism in the region'. UN Doc. S/2015/727, 22 September 2015, *Identical letters dated 21 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*.

the airstrikes against ISIL, while desperately wishing to move these airstrikes under a new legal regime of consent and coordination with the Syrian government. A kind of 'conditional invitation' is thus in place.

Would the states participating in the US-led coalition be able to accept this invitation? After the 13 November 2015 Paris terrorist attacks, some states, especially France, gave the impression that they were adopting a more flexible approach by considering cooperating with the Syrian governmental army.¹⁴⁹ The US, the Arab partners of the coalition, and the majority of other states remain nonetheless hostile to any cooperation with President Bashar al-Assad. As of early February 2016, the UN leads international efforts for an agreement between the Syrian rebels and government for a process of political transition combined with a ceasefire. The UN Security Council expressed in Resolution 2254 of 18 December 2015 its strong support:

for a Syrian-led political process that is facilitated by the United Nations and, within a target of six months, establishes credible, inclusive and non-sectarian governance and sets a schedule and process for drafting a new constitution, and ... for free and fair elections, pursuant to the new constitution, to be held within 18 months ...¹⁵⁰

The UN Security Council also noted that the proposed ceasefire 'will not apply to offensive or defensive actions' against ISIL, the Al-Nusrah Front, 'and all other individuals, groups, undertakings, and entities associated with Al Qaeda or ISIL, and other terrorist groups ...'¹⁵¹

It is therefore not excluded that, if the process of political transition succeeds (despite the current difficulties) and if a new government is formed under this process, the USA-led coalition's airstrikes against ISIL could come under the umbrella of the theory of intervention by invitation. But for the time being, this is clearly not the case.

5. CONCLUSIONS

Five main conclusions can be drawn from the previous analysis. First, the theory of intervention by invitation has been broadly used by different states in order to justify their military operations in Iraq, Syria, and Libya. All 11 intervening states in Iraq (nine members of the US-led coalition, as well as Russia and Iran) act under the legal umbrella of consent of the Iraqi government. In Libya, Egypt undertook airstrikes against ISIL with the approval of the internationally recognized 'Tobruk

¹⁴⁹ 'Syrie: Fabius envisage d'associer l'armée de Bachar al-Assad aux interventions au sol', *Les Echos*, 27 November 2015.

¹⁵⁰ UN Doc. S/RES/2254, 18 December 2015, para. 4.

¹⁵¹ *Ibid.*, para. 8.

government'. And in Syria, both Iran and Russia relied exclusively on the legal basis of intervention by invitation.

Second, to the extent that these military interventions were consensual and targeted ISIL and other UN-designated terrorist groups, their legality has not been challenged by any state. On the contrary, strong criticisms have marked military operations carried out by invitation, but not targeting 'terrorist groups', such as the alleged Russian strikes against the 'Syrian moderate opposition'. 'Counter-terrorism' operations *without* consent of the concerned governments also created strong reactions as shown by the case of Turkish incursions in Iraq.

Third, in all the cases where intervention by invitation has been used as a legal justification, the arguments advanced by intervening states and the reactions of the international community seem to confirm the purpose-based approach of consensual intervention. Intervening states did not claim a 'right to intervene in a civil war', but argued that what justifies their intervention is the existence of both a request by the government *and* a legitimate purpose: fighting ISIL and other terrorist groups. The different reactions show an unwillingness of the international community to recognize a general right to intervention in a civil war. The whole debate then turns around the adequacy of the legitimate purpose invoked by intervening states with their real intentions and their actions on the battlefield.

Fourth, it is impossible to use the theory of intervention by invitation in relation to the strikes of the US-led coalition in Syria. Syria never requested such an intervention and the ten participating states never asked for Bashar al-Assad's consent. The controversial theory of 'passive consent' and the 'Pakistani precedent' could be used to some extent, but not after September 2015 when Syria filed protests to the UN Security Council denouncing these strikes as a 'flagrant violation' of its sovereignty.

Finally, the efforts of the international community to find consensual solutions to the dramatic conflicts in Syria, Libya, and Iraq could offer new possibilities of consensual interventions against terrorist groups. In Iraq, the international community is working towards reconciliation between Sunnis and Shiites (and Kurds) in order to defeat ISIL. In Libya, the international community and the UN Security Council used the possibility of intervention by invitation as a tool in order to end the civil war and achieve the formation of a government of national unity. In Syria, the UN Security Council called for a ceasefire and a political transition agreement between the Syrian rebels and government so that all moderate Syrian actors and intervening states could act together in order to eradicate ISIL and other terrorist groups.

If these dreamed political solutions succeeded in the future, a consensus between world powers would probably be reached, allowing the UN Security Council to give a use of force mandate to intervening states to fight terrorism. At present, however, not only are we still far from such political solutions, but it is also fairly clear that such a use of force mandate under Chapter VII does not exist yet.¹⁵² Intervention by

¹⁵² UN Doc. S/RES/2249 of 20 November 2015, para. 5, 'Calls upon Member States (...) to take all necessary measures, in compliance with international law, (...) on the territory under the control of ISIL (...), in

invitation could therefore remain an essential legal argument used by several states in order to justify their military operations in Iraq, Syria, and Libya.

Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress terrorist acts (...). But, this resolution was not adopted under Chapter VII and 'does not actually authorize any actions against IS, nor does it provide a legal basis for the use of force against IS either in Syria or in Iraq'. D. Akande and M. Milanović, 'The Constructive Ambiguity of the Security Council's ISIS Resolution', *EJIL: Talk!*, 21 November 2015, available at www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/#comments.