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Intervention by Invitation

The Expanding Role of the UN Security Council

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I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

[7] See below, section III.

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

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

> [I]t is difficult to see what would remain of the principle of non-intervention in international law if intervention, *which is already allowable at the request of the government of a State*, were also to be allowed at the request of the opposition. This would permit any State *to intervene at any moment in the internal affairs of another State*, whether *at the request of the government* or at the request of its opposition.[10]

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

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

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

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

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

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

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

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

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

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

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

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

[15] *Ibid*. (emphasis added).

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

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

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

1. Third States shall refrain from giving assistance to *parties to a civil war* which is being fought in the territory of another State.
2. They shall in particular refrain from:
   a) sending armed forces or military volunteers, instructors or technicians to *any party to a civil war*, or allowing them to be sent or to set out;
   b) drawing up or training regular or irregular forces with a view to supporting *any party to a civil war*, or allowing them to be drawn up or trained;
   c) supplying weapons or other war material to *any party to a civil war*, or allowing them to be supplied . . . [18]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. *Aim and Methodology*

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

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

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

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

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

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

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

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

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

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

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

anyone who challenges the legality of the intervention has to establish that, in the circumstances, the intervention is incompatible with the right (of the people concerned) to self-determination. This burden of proof is difficult to bear, because states will systematically present their interventions as perfectly compatible with this right. Thus this official discourse tends, as we will see, to confirm that there are at least some theoretical legal limits to the possibilities of outside intervention in an internal conflict.

Second, it should be clarified that I will adopt a classical perspective in the chapter, tending to interpret existing positive law.[36] The limitations of such an approach are familiar enough and have been decried in studies that take a critical approach.[37] They relate essentially to the open interpretation of texts stating the relevant legal principles and of texts expressing the position of the states concerned. For some, rhetorical reference to the right to self-determination reveals a utopian view, disconnected from practice that reveals an unlimited right to intervene on the basis of an invitation given by a government; for others, to reduce law to a mere practice of intervention would simply be 'apologetic' of the power of the states – and, for this cohort, the necessity of respect for the universally recognised right to self-determination should therefore be emphasised. Faced with such indeterminate legal reasoning, another – more critical – approach might be envisaged, highlighting the tensions surrounding the classical legal debate. This is a perfectly legitimate and feasible avenue of investigation, and I have explored it elsewhere.[38] Yet the debate in positive law does indeed exist and, within it, the various legal arguments are marshalled, evaluated, and challenged, even if they are sometimes difficult to assess.[39] In this sense, even if it cannot be separated from it, law cannot be simply *reduced* to politics. There is a battlefield in the legal domain too (sometimes characterised as 'lawfare'), and interpretations arise from it that, at a given moment in time and in

[36] Olivier Corten, 'Breach and Evolution of the International Customary Law on the Use of Force', in Enzo Cannizaro and Paolo Palchetti (eds), *Customary International Law on the Use of Force: A Methodological Approach* (Leiden/Boston: Martinus Nijhoff 2005), 119–44.

[37] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: CUP 2nd edn 2006), 224 *et seq.*

[38] Olivier Corten, 'Droit d'intervention v. Souveraineté: antécédents et actualités d'une tension protéiforme', *Droits* 56 (2012), 33–48; Olivier Corten, 'Les visions des internationalistes du droit des peuples à disposer d'eux-mêmes: une approche critique', *Civitas Europa* 32 (2014), 96–111; Olivier Corten, 'La rébellion et le droit international. Le principe de neutralité en tension', *Recueil des Cours* 374 (2014), 53–312.

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

a precise context, tend to influence political debate.[40] From this perspective, far from an idealist, utopian, or naive conception, taking up a position in positive law may be a conscious strategic choice tending to restrict the possibilities that justify the use of force.

Based on the classical elements of custom recognised by the ICJ and the ILC, I have taken a positivist approach to appraising the practices of the UN Security Council.[41] As Vera Gowland-Debbas states:

> Generally speaking, the Council's resolutions are not legislative in the sense of applying outside the framework of particular cases of restoration of international peace and security. Moreover, they cannot – by analogy with General Assembly resolutions – be said to reflect either *opinio juris*, nor the generality of the requisite state practice.[42]

This perspective differs to a large extent from that espoused by Gregory Fox elsewhere in this volume:[43] the UN Security Council is not systematically considered a vehicle for expressing customary law when it makes a decision in a specific case. The organ has not been conceived of as a judge or a 'jury',[44] designed to deliver judicial review of the practices of states. It rarely makes any legal pronouncement; rather, it acts pragmatically, as a political body.[45] The relevant provisions of the UN Charter also support argument that the Council is not a legislative body. Despite acting on 'behalf' of its member states (Article 24) and being entitled to take mandatory decisions that those members must respect (Article 25), the Security Council is not supposed to elaborate general norms or rules beyond specific situations envisaged in Articles 33 and 39 of the Charter.[46] Article 39 even more specifically states that the Council's role is to 'decide what measures shall be taken … to maintain or restore international peace and security', and hence Security Council resolutions must be considered a lex specialis that, according to Article 103 of the Charter, shall prevail over any other

[40] Olivier Corten, *Le discours du droit international. Pour un positivisme critique* (Paris: Pedone 2009).

[41] Olivier Corten, 'La participation du Conseil de sécurité à l'élaboration, à la cristallisation ou à la consolidation de règles coutumières', *Revue belge de droit international* 39 (2004), 552–67.

[42] Vera Gowland-Debbas, 'The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance', *European Journal of International Law* 11 (2000), 361–83 (377). See also Michael Wood, 'Assessing Practice on the Use of Force', *Heidelberg Journal of International Law* 79 (2019), 655–8 (655–6).

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

[44] Cf. Tom Franck, *Recourse to Force: State Actions against Threats and Armed Attacks* (Cambridge: CUP 2002), 67.

[45] Jean Combacau, *Le pouvoir de sanction du Conseil de sécurité* (Paris: Pedone 1974).

[46] Catherine Denis, *Le pouvoir normatif du Conseil de sécurité. Portée et limites* (Brussels: Bruylant 2005).

legal obligation applicable in the case at hand.[47] This does not mean, of course, that Council practice cannot be used to identify a customary norm – although this would require not only the establishment of a constant practice but also the identification of an opinio iuris that can be deduced from both the resolutions adopted and the positions taken by the UN member states in relation to those resolutions.[48] More concretely, this means that the Security Council's approval or condemnation of a specific intervention does not, as such, reveal anything about the state of customary law.[49] All will depend on the reasons for its approval or condemnation: was it motivated by a 'legal duty',[50] a 'sense of legal right or obligation'?[51] Or rather by 'extralegal motives for action, such as comity, political expediency or convenience'?[52] It is only in the first hypothesis that a (new) norm of customary law can be identified.

The present chapter was devised along the following lines. Each section will follow the same line of reasoning:

- in each section A, it will set out the general relations between the main argument (i.e., counter-intervention, the fight against international terrorism, the repression of secession, and the protection of democracy) and self-determination in broad terms (section A);
- this exposition of the legal framework will make it easier to understand the argument as it has been concretely invoked in the case at hand (in section B), as well as to highlight the problems it has caused (in section C); and
- on this basis, in each section D, we will be able to envisage the decisive role of the Security Council in addressing (or circumventing) those problems.

All in all, the aim is not to demonstrate the illegality of a given intervention, but to establish to what extent each of the cases analysed reveals an opinio iuris confirming the importance of self-determination and the decisive role of the Security Council in appraising it in each particular situation.

47 ICJ, *Aerial Incident at Lockerbie* (Libya v. United Kingdom), preliminary objections, judgment of 27 February 1998, ICJ Reports 1992, 15, para. 39.

48 Gérard Cahin, *La coutume internationale et les organisations internationales. L'incidence de la dimension institutionnelle sur le processus coutumier* (Paris: Pedone 2001), 182–3.

49 Here, again, a significant difference can be identified with the approach followed by Fox, 'Invitations to Intervene after the Cold War', Chapter 3 in this volume.

50 ICJ, *North Sea Continental Shelf* (Federal Republic of Germany v. Netherlands), judgment of 20 February 1969, ICJ Reports 1969, 44, para. 77.

51 ILC, *Draft Conclusions* (n. 32), concl. 9.1.

52 ILC, *Draft Conclusions on Identification of Customary International Law with Commentaries*, UN Doc. A/73/10, 2018, para. 139.

Finally, it must be stressed that this chapter is limited to an interpretation of the rule prohibiting the use of force (ius contra bellum); it does not extend to other rules, such as the principle of non-intervention in general, or rules of international humanitarian law (IHL) (ius in bello). In this sense, it differs from the approach Dino Kritsiotis follows elsewhere in this volume.[53]

II. COUNTER-INTERVENTION: THE SAUDI-LED INTERVENTION IN YEMEN

A. *The Existing Legal Framework: Counter-Intervention and Self-Determination*

According to Article 5 of the IDI's Wiesbaden Resolution III (titled 'Foreign Intervention'):

> Whenever it appears that intervention has taken place during a civil war in violation of the preceding provisions, third States may give assistance to the other party only in compliance with the Charter and any other relevant rule of international law, subject to any such measures as are prescribed, authorized or recommended by the United Nations.[54]

The provision clearly exposes the logic of the mechanism behind counter-intervention. If one party – in particular, the irregular forces – has been supported by a foreign state, the government party may legitimately obtain backing to quell the rebellion and, by the same token, the initial outside intervention.[55] In such a situation, support for irregular forces has called into question the right of the people of the state concerned to determine its political regime without outside interference. By supporting the government so that it is able to restore its authority, a party cannot therefore be accused of infringing upon the people's right to self-determination; on the contrary, such support is designed instead to end the violation of this principle. The 'counter-intervention' may even take place in the name of *protecting* the people's right to self-determination.

In this context, it should be noted that the initial support for the rebel forces may take on a variety of more or less intense forms. The most serious of these may be characterised as an armed attack – that is, when a foreign state 'sends' irregular forces into the territory of another state or has 'substantial involvement'

[53] Kritsiotis, 'Intervention and the Problematisation of Consent', Chapter 1 in this volume.
[54] IDI, 'The Principle of Non-Intervention in Civil Wars' (n. 18).
[55] Christakis and Bannelier, '*Volenti non fit injuria*?' (n. 1), 132–3.

in such an action, to refer to the criteria used by states when defining aggression.[56] The state attacked by a foreign state's irregular forces may then call for help from other states to exercise its right of collective self-defence. In this exceptional situation, Article 51 of the UN Charter provides that such third states then have grounds to act not only in the territory of the state where the civil war is being waged but also in the territory of the state to which an armed attack can be imputed because of the military actions by rebel forces.

A more limited form of intervention may arise when a foreign state tolerates its territory being used by armed bands to attack the authorities of a state, or provides financial support for such irregular forces, or even supplies them with weapons. If we confine ourselves to the ICJ precedents,[57] we are then dealing with a violation of the prohibition of the threat or use of force, according to Article 2(4) of the Charter, but not an 'armed attack' within the meaning of Article 51. The consequence is that the state targeted by armed bands does not have a right of self-defence, but it can nonetheless call on other states to intervene against such bands in its own territory (i.e., not in the territory of the infringing state).[58]

A third hypothesis exists when rebels are themselves foreign, or have found support among foreign private persons or entities, but are not assisted or tolerated by any state. In this particular instance, not only is there no 'armed attack' within the meaning of Article 51, but neither is there any 'use of force' within the meaning of Article 2(4). All the same, it is very difficult to consider liability for the rebel movement as the will of all or part of the population of the state concerned. The population might even consider its right to determine its political future without outside interference to be infringed upon by the actions of foreign private actors. It is logical, then, to accept that the government might validly request military aid from another state to put down such incursions by irregular forces. That request would not be in violation of the right to self-determination of the people concerned but rather an attempt to uphold it. As in the second hypothesis, military intervention must obviously remain confined within the territorial boundaries of the concerned state.

The counter-intervention mechanism may be illustrated by substantial practice. Beyond the first hypothesis, which is aimed less at intervention by invitation in the technical sense than at collective self-defence (the case of the

[56] Art. 3.g) ('Definition of Aggression'), annexed to UN GA Res. 3314 (XXIX), 14 December 1974.
[57] ICJ, *Nicaragua* (n. 10), para. 247; ICJ, *Armed Activities on the Territory of the Congo* (DR Congo v. Uganda), merits, judgment of 19 December 2005, ICJ Reports 2005, 53, paras 146–7.
[58] Christakis and Bannelier, '*Volenti non fit injuria*?' (n. 1).

Democratic Republic of the Congo comes to mind, which was supported by Angola, Zimbabwe, and Chad in reaction to the armed attack on it by Rwanda and Uganda in 1998[59]), it might be worth mentioning the examples of the intervention by the United Kingdom and the United States in Lebanon and Jordan in 1958,[60] by France in Chad in the 1970s,[61] or by the forces of the Commonwealth of Independent States in Tajikistan in the 1990s.[62] In this respect (as the last of these examples illustrates), it was not necessary to claim that irregular forces had been sent in, or even helped, by a foreign state to justify the intervention by invitation. Even if it cannot always be readily distinguished from the second hypothesis, the third hypothesis does seem to have been reflected in practice for some time now.

Some legal commentators think that if the state has received a valid invitation from the government of another state, it is allowed to intervene in an internal conflict with no legal limit deriving from an additional condition. To my mind, the practice just mentioned hardly squares with this traditionalist position; rather, it reduces the state to the will of its current government alone, potentially justifying massive outside interference in a conflict or an essentially internal crisis. By reading the discourse from the states in question, what is significant is that they do not assume such a hard-nosed, or even cynical, view of international relations; on the contrary, they insistently present their action as a 'counter-intervention' by linking the rebel forces to foreign states or elements. And this observation holds both for the government that intervenes in the conflict and the government calling for aid. The same pattern prevails in recent practice, as the Yemen case study will now demonstrate more clearly, illustrating both the difficulties that may surround the argument of counter-intervention and the role that the Security Council may play in this context.

B. *Invocation of Counter-Intervention in the Yemeni Context*

The events of what has been called the Arab Spring in 2011 did not concern only Tunisia, Egypt, Libya, Syria, and Bahrain; in Yemen, violent demonstrations broke out in the capital, Sana'a, protestors demanding the departure of Ali Abdallah Saleh, president of the reunited state (and, before that, of North

[59] See, e.g., John F. Clark (ed.), *The African Stakes in the Congo War* (New York: Palgrave Macmillan 2002).

[60] Georg Nolte, *Eingreifen auf Einladung* (Berlin, Heidelberg: Springer 1999), 630.

[61] Christiane Alibert, 'L'affaire du Tchad', *Revue générale de droit international public* 90 (1986), 374–98.

[62] Report of the Secretary-General on the Situation in Tajikistan, UN Doc. S/26311, 16 August 1993, para. 4. See Corten, *The Law against War* (n. 29), 307.

Yemen) since 1990.[63] Through mediation led by the Gulf Cooperation Council (GCC), the parties accepted a transition plan and Vice-President Abdo Rabbo Mansour Hadi was designated interim president on 4 June 2011. His appointment was confirmed by elections held the following year (he was the sole candidate and won 99.8 per cent of the vote), and he is officially still in office at the time of writing. Hadi's rule, however, was contested from the outset – especially by the 'Houthis', a rebel force in the northwest of the country, who contend that the Zaidite tribes have been marginalised by the central authorities since reunification.[64] In point of fact, these forces have exerted their control over the mountainous regions close to Saudi Arabia since 2004; after engaging in the Arab Spring in 2011 to overthrow President Saleh, they became his allies, with the common objective of bringing down his successor. In September 2014, making the most of a lack of resistance to certain factions of the army that had remained loyal to former President Saleh, the Houthi forces gained ground and occupied the capital, Sana'a. President Hadi and those close to him were arrested, forced to resign, and imprisoned.[65] However, the president managed to escape and take refuge in the coastal city of Aden. From there, on 24 March 2015, he called on Saudi Arabia and other members of the GCC for help. He then fled to Riyadh, and Saudi Arabia launched Operation 'Decisive Storm' on 26 March 2015.[66] This massive military operation – subsequently renamed 'Renewal of Hope', then 'Golden Arrow' – was directed against the Houthi rebels and continues at the time of writing.[67]

From the outset, the 'counter-intervention' argument has been reflected in the leading protagonists' discourse justifying the action. The letter from President Hadi inviting the GCC states to intervene is indicative:

> Dear brothers, I write this letter to you with great sadness and sorrow in my heart owing to the serious and extremely dangerous decline in security in the Republic of Yemen, a decline caused by the *ongoing acts of aggression and*

[63] Philippe Fabri, 'La licéité de l'intervention de la coalition internationale menée par l'Arabie saoudite au Yémen au regard des principes de l'interdiction du recours à la force et de non-intervention dans les guerres civiles', *Revue belge de droit international* 51 (2016), 69–102 (72–3).

[64] Tom Ruys and Luca Ferro, 'Weathering the Storm: Legality and Legal Implications of the Saudi-Led Military Intervention in Yemen', *International and Comparative Law Quarterly* 65 (2016), 61–98 (63–4).

[65] *Keesing's Record of World Events* 61 (2015), 53822.

[66] *Ibid.*, 53944–5.

[67] Anon., 'Chronology: Yemen', *The Middle East Journal* 69 (2015), 622–4; Luca Ferro and Tom Ruys, 'The Saudi-Led Military Intervention in Yemen's Civil War – 2015', in Tom Ruys, Olivier Corten and Alexandra Hofer (eds), *The Use of Force in International Law: A Case-Based Approach* (Oxford: OUP 2018), 899–911 (899–901).

> *the incessant attacks against the country's sovereignty that are being committed by the Houthi coup orchestrators . . .*
>
> [. . .]
>
> *. . . I urge you, in accordance with the right of self-defence set forth in Article 51 of the Charter of the United Nations, and with the Charter of the League of Arab States and the Treaty on Joint Defence, to provide immediate support in every form and take the necessary measures, including military intervention, to protect Yemen and its people from the ongoing Houthi aggression.*[68]

A similar logic is reflected in the statement issued by the Kingdom of Saudi Arabia, the United Arab Emirates, the Kingdom of Bahrain, the State of Qatar, and the State of Kuwait, which they sent to the UN Security Council shortly after receiving the letter from President Hadi:

> . . . We note the contents of President Hadi's letter, which asks for immediate support in every form and for the necessary action to be taken in order to protect Yemen and its people from *the aggression of the Houthi militias. The latter are supported by regional forces, which are seeking to extend their hegemony over Yemen and use the country as a base from which to influence the region . . .*
>
> [. . .]
>
> . . . Our countries have therefore decided to respond to President Hadi's appeal to protect Yemen and its great people *from the aggression of the Houthi militias, which have always been a tool of outside forces that have constantly sought to undermine the safety and stability of Yemen.*[69]

These declarations were not without their ambiguities. Although somewhat allusively so, counter-intervention does appear in the denunciation of support from abroad for the Houthi forces. Iran – the state accused of supporting the Houthis – is not actually named, and the nature and extent of the support it has supposedly provided to these irregular forces is not specified.[70] President Hadi's reference to Article 51 of the UN Charter seems to refer to the first of the hypotheses evoked above – that of collective self-defence – even if it is broadly interpreted. In this sense, the League of Arab States has:

> . . . fully welcome[d] and support[ed] the military operations in defence of legitimate authority in Yemen undertaken, at the invitation of the President of the Republic of Yemen, by the coalition composed of the States members of

[68] Abdo Rabbo Mansour Hadi, UN Doc. S/2015/2017, 27 March 2015, 4–5 (emphasis added). See also UN Doc. S/PV.7426, 14 April 2015, 9.

[69] *Ibid.*, 5 (emphasis added).

[70] Ferro and Ruys, 'The Saudi-Led Military Intervention' (n. 67), 905.

> the Gulf Cooperation Council and a number of Arab States. Such action is grounded in the Arab Treaty of Joint Defence and Article 51 of the Charter of the United Nations.[71]

On 21 May 2015, the Permanent Representative of Saudi Arabia to the United Nations again asserted that the purpose of the operation was 'to rescue Yemen and protect its people and legitimacy, in accordance with the principle of self-defence'.[72]

At the same time, Article 51 of the Charter was not cited in the letter the intervening powers initially sent to the Security Council – unusually so for a state invoking self-defence within the meaning of that provision.[73] Perhaps the defence in question here might be considered in a broader sense. The reference to the second hypothesis – that of support contrary to Article 2(4) of the Charter – does not entitle the intervening states to riposte beyond the territory of Yemen, which the intervening states did not, for that matter, seek.[74] It is noteworthy that Saudi Arabia also claims to be protecting itself against attacks by the Houthi forces. From this perspective, there is no need to invoke the argument of counter-intervention: in accepting that its border can be crossed to prevent irregular forces based in its own territory from committing acts of force in the territory of another state, Yemen would merely be abiding by its international obligations, pursuant to existing international judicial precedent.[75] Saudi Arabia would not, then, be intervening in an internal conflict but instead exercising its own rights against irregular armed bands. Mention of the presence of terrorist groups in Yemeni territory in connection with peace and stability in the region is an argument along the same lines: this is supposedly no longer a matter of support for a government against rebel groups in receipt of prior support from abroad but an operation designed to help that state to prevent irregular forces from attacking neighbouring states.

The fact the counter-intervention argument was nonetheless subsequently maintained as one of the essential elements in the discourse with

[71] UN Doc. S/2015/232, 15 April 2015, 14. See also Final Communique of the 26th Arab Summit, 29 March 2015.

[72] UN Doc. S/2015/359, 21 May 2015.

[73] Fabri, 'La licéité de l'intervention' (n. 63), 98.

[74] See Ferro and Ruys, 'The Saudi-Led Military Intervention' (n. 67), 906–7.

[75] Christakis and Bannelier, '*Volenti non fit injuria*?' (n. 1), 126–7. See also François Dubuisson, 'Vers un renforcement des obligations de diligence en matière de lutte contre le terrorisme?', in Karine Bannelier, Olivier Corten, Théodore Christakis and Barbara Delcourt (eds), *Le droit international face au terrorisme* (Paris: Pedone 2002), 141–58.

which coalition led by Saudi Arabia justified its actions. The Permanent Representative of Yemen to the United Nations requested help to 'find a solution to the Yemeni crisis that would end the coup d'état against the authority and legitimate institutions in Yemen, as well as the aggressive interference by Iran in the affairs of Yemen and of the wider region', then denounced an 'ongoing war of annihilation, which was launched by Iran for the sake of its expansionist policies'.[76] '[T]hose gangs', he claimed, would have never been able to continue rejecting those proposals if they had not been receiving financial, logistical and military support from Iran. Thanks to that support and smuggled Iranian weapons, the militias are now turning into a serious threat to Yemenis and neighbouring countries, in particular the Kingdom of Saudi Arabia.'[77] It was, he alleged, 'an international terrorist plot masterminded by Iran – a rogue State that sponsors international terrorism and continues to spend billions of dollars to support terrorist organizations in the region, including the Houthis in Yemen.'[78]

In more measured tones, admittedly, other states also pointed the finger at the Republic of Iran. The United Kingdom stated that 'Iran failed to take the necessary measures to prevent the direct or indirect supply, sale or transfer of short-range ballistic missiles, missile propellant and unmanned aerial vehicles to what was then the Houthi-Saleh alliance'.[79] Likewise, the United States spoke out against 'Iran's efforts to destabilise the region and spread its malign influence', asserting that 'Iranian weapons are getting into the hands of Yemeni militias, and these militias are using them to target the capitals of Yemen's neighbours,'[80] before repeating that the 'Houthi aggression, with the support of Iran, threatens stability in the region'.[81]

If we were to limit our analysis to these declarations, we would clearly be dealing with the second hypothesis – that of Iranian involvement – which would not necessarily amount to an armed attack within the meaning of Article 51 of the Charter. In any case, it would incontrovertibly justify the intervention on Yemeni territory by Saudi Arabia and its allies on the basis of the invitation from the president of Yemen.

[76] UN Doc. S/PV.7871, 26 January 2017, 8. See also UN Doc. S/PV.7954, 30 May 2017, 11; UN Doc. S/PV.7999, 12 July 2017, 12.
[77] UN Doc. S/PV.8017, 18 August 2017, 11.
[78] UN Doc. S/PV.8191, 27 February 2018, 20.
[79] UN Doc. S/PV.8190, 26 February 2018, 2.
[80] *Ibid.*, 4.
[81] UN Doc. S/PV.8191, 27 February 2018, 10.

C. *Problems Raised by the Invocation of Counter-Intervention in the Yemeni Context*

The example of Yemen is evidence, though, of all the problems to which the counter-intervention argument gives rise. Three points ought to be made in this respect – not to demonstrate the illegality of the intervention, but to amplify some legal problems that the Security Council has avoided, as we will observe below.

First is the question of proof.[82] Iran has consistently and vehemently denied providing military support for Houthi rebels, denouncing 'unfounded allegations',[83] which it claims were 'fabricated to distract attention from the misguided and failed policies that have led to the current political and humanitarian crisis in Yemen':[84]

> The conflict in Yemen is entirely local, not regional . . . As there could never be a military solution for the conflict in that country, the immediate cessation of the bombing campaign and a genuine push for a political solution is the only responsible approach to the crisis. A Yemenite-led dialogue and conciliation process among all Yemeni political and social groups is the only way to resolve the Yemeni predicament.[85]

Teheran views the conflict as essentially internal and denounced the intervention of the coalition led by Saudi Arabia as contrary to 'international law . . . in particular the obligation to refrain from the threat or use of force',[86] and an 'aggression against Yemen'.[87] Without showing themselves to be so critical, other states have expressed a nuanced position, calling for moderation and underscoring the need to abide by the principle of non-intervention in the affairs of Yemen.[88] In any event, no proof had been provided of active military support from Iran to the Houthi rebels at the time when the Gulf states launched their intervention. Indeed, the intervening states had not yet even named Iran. Instead, they advanced a somewhat ambiguous line of argument, both regarding acts of outside interference that supposedly justified their operation and connecting the counter-intervention

[82] Fabri, 'La licéité de l'intervention' (n. 63), 91; Ruys and Ferro, 'Weathering the Storm' (n. 64), 75–7.
[83] UN Doc. S/2015/207, 24 March 2015.
[84] UN Doc. S/2015/249, 13 April 2015.
[85] *Ibid.*
[86] UN Doc. S/2015/263, 17 April 2015.
[87] UN Doc. S/PV.7527, 30 September 2015, 7.
[88] See, e.g., Uruguay (UN Doc. S/PV.7954, 30 May 2017, 10; UN Doc. S/PV.7999, 12 July 2017, 8) and Bolivia (*ibid.*, 9; UN Doc. S/PV.8017, 18 August 2017, 9).

argument with others – especially those involving the fight against terrorist groups, or in defence of Saudi Arabia's sovereignty.

Second, and in this context, some commentators have questioned the proportionality of the Gulf states' military operation.[89] To remain within the bounds of international law, an action in self-defence must always comply with the customary criteria of necessity and proportionality.[90] Some authors contend that the same condition should also limit an action conducted as a counter-intervention. Should an intervention to put an end to limited outside support of a rebellion be massive, that scale would cast doubt on official justification. In reality, the intervening states might support a government not only against outside interference but also against rebel forces as such. The right of peoples to self-determination may, in other terms, justify a counter-intervention intended to restore equilibrium – that is, to nullify the effects of outside interference. But it cannot legitimise measures that go beyond that and interfere directly in the internal conflict. Now, in the present case, the scale of the military intervention by Saudi Arabia and its allies (mass bombings, presence of troops on the ground, naval blockade, etc.) is hardly comparable to the aid the Iranian state is alleged to have provided to the Houthi rebels. Luca Ferro and Tom Ruys infer from these factors that:

> Accordingly, the Yemeni people were arguably not allowed to *freely decide their* [*political*] *future* through a 'physical contest if necessary', inasmuch as the intervention did not aim exclusively at cancelling out alleged interference by Iran, but rather sought to defeat the Houthi rebel movement and restore Hadi to power.[91]

This criticism leads us to a third factor casting doubt on the relevance of the counter-intervention argument: the lack of effective control of the authority who formulated the consent.[92] At the time Abdo Rabbo Mansour Hadi issued his invitation, he had lost all control over the capital, Sana'a, and had fled to Aden, from where he eventually departed for Riyadh. Traditionally, it seems that a degree of effective control is required if a party is to be able to validly consent to a foreign military intervention;

[89] Ferro and Ruys, 'The Saudi-Led Military Intervention' (n. 67), 910.

[90] Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge: CUP 2004).

[91] Ferro and Ruys, 'The Saudi-Led Military Intervention' (n. 67), 910 (footnote omitted) (emphasis added).

[92] Fabri, 'La licéité de l'intervention' (n. 63), 87–9 ('effectivité', in the French); Ruys and Ferro, 'Weathering the Storm' (n. 64), 84–6.

several other actions support this conclusion. In the 1990s, the UN Security Council successively authorised military operations in Somalia (1992), Haiti (1994), and Albania (1996), where consent to the intervening states had been given by official leaders who, at the time, did not possess effective authority.[93] It can therefore be argued that this consent was not thought sufficient as such, since a Security Council resolution seemed to be additionally required. This condition of effective control can be understood thus: if a government no longer has any authority over its territory, it is difficult for it to claim to represent the will of the entire population, in accordance with the people's right to self-determination.[94]

However, this condition of effective control must be relativised in several respects. First, in the three examples just mentioned, the authorities no longer exercised control over virtually any part of their national territory. In other instances, such as those of Syria and Jordan in 1958, the Democratic Republic of the Congo in 1964 and in 1998, or of Chad in the 1970s, the governments in place retained some limited degree of effective control, which explains why no one questioned, in principle, their capacity to formulate consent.[95] In the case of Yemen, it is difficult to ascertain precisely how much of the national territory the forces of President Hadi still controlled at the time the invitation was issued. It would seem excessive, at any rate, to claim that *all* effective control had disappeared. Besides, under certain circumstances, a total absence of effective power is not an impediment to the valid formulation of consent: for example, when a state is entirely occupied because of an armed attack by another state (Kuwait in the months after its invasion by Iraq in 1990 comes to mind), a government in exile may validly launch an appeal for help in the context of collective self-defence. The lack of effective control in the Yemeni case is not the result of a lack of internal representation but solely of outside interference contrary to the UN Charter. The same reasoning can certainly be transposed to a lower threshold of intervention: when a foreign state unlawfully supports rebels in what was initially an internal conflict and, because of that support, the government loses all or part of its effective control, it would be paradoxical to argue that this government would no longer be in a position to invite third states to intervene on its behalf. Thus, in the case of Yemen, it could be considered that the loss of effective control by President Hadi's regime is only the consequence of the support granted to the Houthis by Iran, in violation of the prohibition of the use of force. Here, again, the logic of

[93] Corten, *The Law against War* (n. 29), 285–91.
[94] Lieblich, *International Law and Civil Wars* (n. 11), 163.
[95] Corten, *The Law against War* (n. 29), 308–9.

a 'counter-intervention' must be fully respected. However, the difficulty with this argument is that it relies only on a contestable factual basis: it is difficult to assert that, without such backing, the president would have maintained effective control over the whole of his territory. There are therefore a multitude of factors that seem to have influenced the outcome of what was, at least initially, a civil war. In this context, it is doubtful that the invitation is a valid one.

Criticism of the GCC's military intervention has nonetheless remained rare and muted.[96] Debates in the United Nations have, above all, concerned violations of IHL observed on the ground by various non-government organisations.[97] The conflict in Yemen has proved especially deadly for civilians, who are subjected not only to a blockade with disastrous effects on their health but also to largely indiscriminate bombings, which have hit schools or hospitals on several occasions.[98] In principle, however, the legality of the intervention with respect to ius contra bellum seems to have gone largely unchallenged[99] – a circumstance that, as we shall now observe, can be explained by the position taken by the Security Council in the context of this conflict.

D. *The Decisive Role of the UN Security Council in the Yemeni Context*

Traditionally, the use of force within a state is neither allowed nor prohibited by international law. Article 2(4) of the UN Charter prohibits it only in 'international relations', leaving municipal law to govern internal violence.[100] In terms of ius contra bellum (and not of ius in bello or of human rights, which are obviously applicable to all situations of internal crisis or conflict), a regime of 'legal neutrality' has been evoked in which nothing prohibits part of the population from rebelling nor government

[96] Ferro and Ruys, 'The Saudi-Led Military Intervention' (n. 67), 902–3.

[97] See, e.g., United Kingdom, UN Doc. S/PV.7954, 30 May 2017, 7.

[98] See, e.g., Mark Tran, 'Four Patients among Dead after Explosion at Hospital in Yemen', *The Guardian*, 10 January 2016; Bethan McKernan, 'Saudi-Led Coalition Air Strikes "Hit Yemen School"', *The Independent*, 22 January 2017; Saeed Al-Batati and Rick Gladstone, 'Saudi Bombing Is Said to Kill Yemeni Civilians Seeking Relief from the Heat', *The New York Times*, 2 April 2018.

[99] Ruys and Ferro, 'Weathering the Storm' (n. 64), 68–70; Fabri, 'La licéité de l'intervention' (n. 63), 94.

[100] Klaus Kreß, 'Major Post-Westphalian Shifts and Some Important Neo-Westphalian Hesitations in the State Practice on the International Law on the Use of Force', *Journal on the Use of Force and International Law* 1 (2014), 11–54 (14). See ICJ, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain), judgment of 16 March 2001, ICJ Reports 2001, 69, para. 96.

forces from attempting to put down such a rebellion.[101] However, this classical regime is without prejudice in the Security Council's adoption of the resolutions with which it tries to frame, stifle or prohibit violence within a state, or takes sides – in the name of maintaining international peace and security – with one of the factions that are engaged in the use of force.[102] For many years, the UN Security Council has thus adopted resolutions that, depending on the specificities of the situation, introduce obligations and rules for the parties to an internal conflict.

In the case of Yemen, the Security Council took a position long before the intervention by Saudi Arabia and its allies was triggered. In February 2014, when the Houthi rebellion was developing, it adopted a resolution based on Chapter VII of the Charter in which it:

> *Reaffirm*[ed] the need for the full and timely implementation of the political transition following the comprehensive National Dialogue Conference, in line with the GCC Initiative and Implementation Mechanism, and in accordance with resolution 2014 (2011) and 2051 (2012), and with regard to the expectations of the Yemeni people . . .

It then:

> *Emphasize*[d] that the transition agreed upon by the parties to the GCC Initiative and Implementation Mechanism Agreement has not yet been fully achieved and calls upon all Yemenis to fully respect the implementation of the political transition and adhere to the values of the Implementation Mechanism Agreement . . . [103]

In the same resolution, the Security Council decided on sanctions against 'individuals or entities . . . as engaging in or providing support for acts that threaten the peace, security or stability of Yemen'.[104] At this stage, it is clear that, for the Security Council, the only legitimate holder of authority in Yemen is the one arising from the peaceful transition mechanism supervised by the GCC. *A contrario*, the acts of violence committed by the rebel forces are prohibited in the name of maintaining international peace and security.

[101] Roger Pinto, 'Les règles du droit international concernant la guerre civile', *Recueil des Cours* 114 (1965), 455–553 (466); Yoram Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge: CUP 2014), 5.

[102] Corten, 'La rébellion et le droit international' (n. 38), 138–42.

[103] UN SC Res. 2140 of 26 February 2014, paras 1 and 10.

[104] *Ibid.*, para. 17.

It should come as no surprise, then, that – one year later – the Security Council reacted in the following terms to the Houthis' taking the capital by violence:

> *Deploring* the unilateral actions taken by the Houthis to dissolve parliament and take over Yemen's government institutions . . .
> [. . .]
> 1. *Strongly deplores* actions taken by the Houthis . . .
> [. . .]
> 8. *Demands* that all parties in Yemen cease all armed hostilities against the people and the legitimate authorities of Yemen and relinquish the arms seized from Yemen's military and security institutions . . . [105]

At this stage, President Hadi and his government were explicitly designated the official authorities of Yemen, even though they had lost much of their effective control over the territory. Support for these authorities and the correlative condemnation of irregular forces were justified by the need to maintain stability in the region, as indicated by the comments of the Permanent Representative of France to the United Nations in the debate that preceded the Council's adoption of the Resolution:

> Lastly, the resolution sends a firm message in favour of the unity, integrity and stability of Yemen. The political vacuum in the country promotes the manifestation of violent discord that threatens its integrity. This is true not only politically, with the divisions that I have just mentioned, and at the regional level with the *disturbing ascendency of secessionist tendencies, but also in terms of security, with the strengthening of the threat posed by Al-Qaida in the Arabian Peninsula*. France is particularly concerned about this aspect in the light of the violent attacks sponsored by that terrorist organization in early January.[106]

France, like other members of the Security Council,[107] echoes another paragraph of the Resolution in which the Security Council '[c]ondemns the growing number of attacks carried out or sponsored by Al-Qaida in the Arabian Peninsula,' and '[e]xpresses concern at the ability of Al-Qaida in the Arabian Peninsula to benefit from the deterioration of the political and security situation in Yemen'.[108]

The logic behind the Security Council's position can be summarised as follows: maintaining Yemen's stability is essential to avoid the secessionist trends that might otherwise create an area favourable to terrorist activities. Support for government-elected authorities further to a peace process supervised by

[105] UN SC Res. 2201 of 15 February 2015, cons. 4, paras 1 and 8 (adopted unanimously).
[106] UN Doc. S/PV.7382, 15 February 2015, 4 (emphasis added).
[107] See, e.g., Malaysia (*ibid.*, 5) and Angola (*ibid.*, 7).
[108] UN SC Res. 2201 of 15 February 2015, cons. 13–14.

a regional security organisation can therefore be explained by specific considerations relating to international peacekeeping motives. Yet the Council never mentions outside support for the Houthi rebel forces nor, a fortiori, Iran – or any state that might be accused of interfering in the internal conflict.[109]

The same logic is reflected in the Declaration of the President of the UN Security Council of 22 March 2015:

> The Security Council supports the legitimacy of the President of Yemen, Abdo Rabbo Mansour Hadi, and calls upon all parties and Member States to refrain from taking any actions that undermine the unity, sovereignty, independence and territorial integrity of Yemen, and the legitimacy of the President of Yemen.[110]

Firm backing for President Hadi can also be found in the first resolution the Security Council adopted on the issue – Resolution 2216, adopted on 14 April 2015 – triggered by Operation Decisive Storm:

> *Noting* the . . . letter from the President of Yemen . . .
> [. . .]
> *Condemning* the growing number of and scale of the attacks by Al-Qaida in the Arabian Peninsula (AQAP),
> *Expressing* concern at the ability of AQAP to benefit from the deterioration of the political and security situation in Yemen, . . .
> [. . .]
> *Reaffirming its support for the legitimacy of the President of Yemen, Abdo Rabbo Mansour Hadi* . . .
> [. . .]
>
> 1. *Demands* that all Yemeni parties, in particular the Houthis, fully implement resolution 2201 (2015), refrain from further unilateral actions that could undermine the political transition in Yemen, and further demands that the Houthis immediately and unconditionally:
>
>   (a) end the use of violence;
>   (b) withdraw their forces from all areas they have seized, including the capital Sana'a; . . . [111]

Once again, support from the President of the UN Security Council and the GCC is warranted to maintain peace and fight international terrorism.

[109] See also UN SC Res. 2204 of 24 February 2015; Fox, 'Invitations to Intervene after the Cold War', Chapter 3 in this volume.
[110] UN SC Pres. Statement on the Middle East, S/PRST/2015/8, 22 March 2015, 1.
[111] UN SC Res. 2216 of 14 April 2015, cons. 2, 5, 6, 8 and para. 1 (emphasis added).

It is also worth noting that the Security Council makes no mention of outside support for irregular forces in the texts it adopted at that date nor had it mentioned them in the debates that preceded adoption of those texts.[112] When the Council refers to the letter of 24 March written by the Permanent Representative for Yemen, it carefully selects an excerpt consistent with the logic it has been defending for months, never mentioning the reference to self-defence that can be found elsewhere in the letter. The same remark holds for its reference to the resolution of the Arab League of 29 March 2015, which also evokes self-defence within the meaning of Article 51 of the Charter.[113] The Security Council does not reproduce this argument. True, the Security Council does establish control mechanisms and sanctions, so that no military support can be provided to the irregular forces operating in Yemen,[114] but it does not denounce any state for interfering in the conflict – especially not Iran.

Confining ourselves to the relevant resolutions and presidential declarations, the military operation by Saudi Arabia and its allies is justified not with respect to this argument nor, more generally, to the argument of counter-intervention, but rather as a measure designed to ensure a process of peace and stability supervised by the Security Council itself – a process that is capable of preventing destabilisation, especially in the evolving context of the activities of terrorist groups such as Al-Qaeda.[115] The whole justification is based on the defence of the will of the 'people of Yemen',[116] which may be interpreted as an allusion to the right of peoples to self-determination. When procedures are undertaken to implement it under international supervision, this right excludes the use of force by any group that would call into question these procedures, especially if it has been characterised as a terrorist group.

At this stage, we might draw two intermediate conclusions from the Yemen case study. First, the intervening states did not merely settle for mentioning the invitation from the country's president to justify their operation. Of course, in this case, as in others on the international plane, states often emphasise the political rather than the legal. However, when expressing their views about the legitimacy of their action, the intervening states insisted on its legitimate

[112] Yemen is the only state denouncing Iran during the debates: see UN Doc. S/PV.7411, 22 March 2015, 4; UN Doc. S/PV.7426, 14 April 2015, 9.

[113] Final Communiqué of the 26th Arab League Summit, 29 March 2015.

[114] See also UN SC Pres. Statement on the Middle East (Yemen), S/PRST/2017/7, 15 June 2017.

[115] UN SC Res. 2266 of 24 February 2016; UN SC Res. 2342 of 23 February 2017; UN SC Res. 2402 of 26 February 2018.

[116] See, e.g., UN SC Res. 2216 of 14 April 2015; UN SC Res. 2342 of 23 February 2017, UN SC Res. 2402 of 26 February 2018. See also several statements made by states, e.g., Uruguay (UN Doc. S/PV.7999, 12 July 2017, 8) and Bolivia (*ibid.*, 9; UN Doc. S/PV.8017, 18 August 2017, 9; UN Doc. S/PV.8066, 10 October 2017, 6).

object, which was allegedly to put an end to outside interference in the conflict – or perhaps even end an actual armed attack – as indicated by the meaning of Article 51 of the Charter. Given the characteristics of this discourse, it can be argued that the full respect of the right of peoples to self-determination recommended by the IDI and by numerous legal instruments was confirmed in this particular instance.[117]

Second, all of the difficulties that attach to this counter-intervention argument (the impossibility of proving any military implication and, a fortiori, an armed attack by Iran, lack of effective control by the president at the time he made the appeal, etc.) were avoided by the Security Council, which carefully abstained from enshrining the collective self-defence argument – or, more generally, the counter-intervention argument. Of course, this reluctance can also be explained by political motivations and the difficulty of reaching an agreement between its permanent members. In any event, the Security Council instead preferred to emphasise the legitimacy of the government in place because of its origins, which were anchored in a peace process conducted under the United Nations' own supervision. It also denounced the risks of destabilisation in the region that any challenge to the process would entail – especially given the developing activity of terrorist groups related to Al-Qaeda in the territory of Yemen. When a civil war deteriorates and threatens international peace, especially as a result of the involvement of foreign terrorist groups, the classical scheme of neutrality is no longer tenable.

In short, beyond ius contra bellum in general international law, we are faced here with an illustration of the Security Council's prerogatives in the area of maintaining international peace and security – especially in the context of the fight against international terrorism: a characteristic that can be further illustrated by analysis of the fight against ISIL in Iraq and Syria.

III. THE FIGHT AGAINST INTERNATIONAL TERRORISM: THE WAR AGAINST ISIL IN IRAQ AND SYRIA

A. *The Existing Legal Framework: Self-Determination and the Fight against International Terrorism*

Whereas they do contain a direct trace of the argument of counter-intervention, the IDI resolutions adopted during its sessions at Wiesbaden in 1975 and in Rhodes in 2011 do not evoke the fight against terror as a valid

[117] Ferro and Ruys, 'The Saudi-Led Military Intervention' (n. 67), 911; Fabri, 'La licéité de l'intervention' (n. 63), 93–4.

argument. Acts of terrorism are mentioned only in the scope of Rhodes, which applies to 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, including acts of terrorism'.[118] As for Wiesbaden, its field of application extends to all situations of civil war – especially when government forces oppose 'insurgent movements whose aim is to overthrow the government or the political, economic, or social order of the State, or to achieve secession or self-government for any part of that State'.[119] This definition is also applicable to foreign terrorist groups. However, a terrorist group – especially one composed of foreign elements – cannot, by definition, claim to express the will of all or part of the population of a state. Terrorism is stigmatised as a crime and not characterised as a political struggle or a rebellion.[120] In this context, helping a state to fight against an international terrorist movement is in no way incompatible with the right to self-determination of the people of the state.[121] Quite the contrary: to help public authorities to repress such criminal acts, as perpetrated by foreign elements, is to defend the most fundamental rights of the population – the rights to security, to freedom of expression, and to choose leaders through the peaceful exercise of political rights without external interference. In this context, the fight against international terrorism appears closely linked to the argument of 'counter-intervention', as set out above.[122]

This legal logic can be reflected in practice by two main forms of support for the authorities engaged in the fight against disturbances or disorder, especially when acts of international terrorism are in question. These forms may be distinguished by their increasing degrees of intensity.

First, it is very common for states to engage in military cooperation programmes – that is, to supply weapons, train officers, take part in joint manoeuvres, etc. In addition to mechanisms involved in regional collective security organisations – such as the North Atlantic Treaty Organization (NATO), the Organization of American States (OAS), the Association of Southeast Asian Nations (ASEAN), and the African Union – many bilateral treaties have been concluded along these lines, whether between France and the United Kingdom, with regard to certain of their former colonial possessions in Africa, or by the United States with countries of Latin

[118] IDI, Rhodes Resolution II (n. 22), Art. 2(1).
[119] IDI, Wiesbaden Resolution III (n. 18), Art. 1(1)(a).
[120] See Denis Duez, 'De la définition à la labellisation: le terrorisme comme construction sociale', in Bannelier et al., *Le droit international face au terrorisme* (n. 75), 105–11.
[121] Christakis and Bannelier, '*Volenti non fit injuria?*' (n. 1), 124.
[122] See above, section II.

America or Asia, or by China with various developing states.[123] This practice may be observed more broadly in international relations, and it is generally aimed simply at allowing the state receiving assistance both to defend itself against foreign interference and, more generally, to maintain order within its own territory, pursuant to its international commitments in the matter of human rights.[124] This obligation to maintain order may apply not only in normal situations but also in the event of civil war. Article 3 of the Wiesbaden Resolution of 1975 provides that 'third States may . . . : b) continue to give any technical or economic aid *which is not likely to have any substantial impact on the outcome of the civil war*'.[125] It is difficult to show that this restriction reflects customary law and it is particularly difficult to evaluate in practice – but it does mean at least that, even in a situation of civil war, a foreign state may continue to cooperate militarily with a government challenged by an irregular group: an observation that applies a fortiori if it is a terrorist group containing elements from abroad.[126] In the latter case, it may additionally be doubted whether cooperation is limited as to its effects, as we shall subsequently observe in view of existing practice.

Another form of cooperation, beyond the supply of weapons or training, is the leading of military action in support of an operation to maintain order. Examples of this are legion. In the 1960s, the British Army supported the authorities of several African states confronted with mutinies by officers. The United Kingdom justified its actions by recalling that it was not a matter of helping those authorities in the context of civil war but of assisting with simple operations to maintain order, with no political character.[127] In 2011, Saudi Arabia and the United Arab Emirates responded to a request from the Bahrain authorities looking to put down local demonstrations that it denounced as violent and which it said were supported from outside. The GCC immediately sent troops 'to contribute to the maintenance of order and security' under an 'agreement on defence and cooperation by which the GCC countries share a responsibility for the preservation of security and stability.'[128] Here, again,

[123] See, e.g., Jacques Basso and Julia Nechifor, 'Les accords militaires entre la France et l'Afrique sub-saharienne', in Louis Balmond (ed.), *Les interventions militaires françaises en Afrique* (Paris: Pedone 1998), 41–67; Corten, *The Law against War* (n. 29), 255–7.

[124] See, e.g., ECtHR, *Issaieva and Others v. Russia*, judgment of 24 February 2005, app. nos 57947/00, 57948/00, and 57949/00, para. 180.

[125] IDI, Wiesbaden Resolution III (n. 18), Art. 3 (emphasis added).

[126] Christakis and Bannelier, '*Volenti non fit injuria*?' (n. 1), 125–56.

[127] Bennouna, *Le consentement à l'ingérence militaire* (n. 16), 43; Schindler, 'Le principe de non-intervention dans les guerres civiles' (n. 19), 450–1.

[128] Agatha Verdebout, 'The Intervention of the Gulf Cooperation Council in Bahrain – 2011', in Ruys et al., *Use of Force* (n. 67), 795–802 (797, fn. 14). See Statement of GCC Foreign

support for the authorities is meant to ensure the maintenance of order by means of the effective repression of criminal or tortious acts supported by foreign actors; it is not presented as intervention in a purely domestic political conflict.[129]

Whatever form it takes, this practice is widespread and is generally aimed at restoring law and order, without the represented repressed acts being characterised as terrorist acts. When this is the case, it is self-evident that military cooperation is not considered a fortiori to be contrary to international law. In her reference work, Christine Gray evokes the United States' military support of the Colombian government, which was officially to counter drug-trafficking and terrorism.[130] Likewise, in a bilateral agreement in 2008 between the two states, the presence of US troops in Iraq is justified by 'efforts to maintain security and stability in Iraq, including cooperation against Al-Qaeda and other terrorist groups'.[131]

Of course, it would be easy to denounce some of the operations just mentioned by pointing out that, in actual fact, the actions taken by the government and the state it called on for backing went well beyond the repression of serious crimes or offences – that, quite simply, they punished a peaceful political opposition movement. Some months after the military intervention in Bahrain, the IDI adopted the Rhodes Resolution II, denouncing such assistance when 'its object is to support an established government against its own population'.[132] The whole difference, then, lies in appreciation of the facts – of the true motives of those intervening, or the means and effects of the intervention. However, if we confine ourselves to the states' pronouncements, we observe significantly that – even though the argument is open to criticism – states prefer to invoke the argument of maintaining law and order and the fight against international terrorism rather than to assume responsibility for a direct intervention in an internal conflict. Here, too, it is the necessity of respect for the right of peoples to self-determination that seems to reflect customary practice.

It is important now to test this hypothesis in the context of a case study: the fight against ISIL that developed in the 2010s, primarily in Iraq and Syria.

Ministers following 119th Ministerial Council Session, 15 June 2011, Royal Embassy of Saudi Arabia in Washington, D.C.

[129] Corten, 'La rébellion et le droit international' (n. 38), 161–4.

[130] Christine Gray, *International Law and the Use of Force* (Oxford: OUP 4th edn 2018), 91–2.

[131] Quoted in Lieblich, *International Law and Civil Wars* (n. 11), 149.

[132] IDI, Rhodes Resolution II (n. 22), Art. 2(1).

B. *Invocation of the Fight against International Terrorism in the Iraqi and Syrian Context*

ISIL was created by armed opponents of the Iraqi government, which was installed in the aftermath of the 2003 US-led intervention in that country.[133] Originally, its members essentially opposed the Baghdad authorities, which they accused of providing Iraq's Shi'a majority with disproportionate benefits and of oppressing the Sunni minority with the support of foreign powers. However, ISIL quickly expressed broader ambitions: from 2013 onwards, it claimed exclusive political and theological authority over the world's Muslims, and it succeeded in attracting many fighters from foreign countries – mainly from the Arab world, Western Europe, Russia (particularly Chechnya), and North Africa. Some sources also suggest that ISIL has been supported by – or from – other states such as Saudi Arabia or Turkey, either financially or even through the provision of arms.[134] Moreover, the gains made against the Iraqi Army, facilitated by the massive withdrawal of US troops in 2011, enabled the organisation to acquire a considerable amount of military equipment, as well as control of numerous oil facilities. Another important element in this situation was the development of the Syrian war, which led to a power vacuum in substantial parts of the Syrian territory that ISIL would exploit. Those factors help to explain why, in 2014, ISIL was able to control an impressive stretch of territory, crossing the Iraqi–Syria boundary – a boundary ISIL denounced as a product of the colonial division of the world.[135] This self-proclaimed 'Islamic State' thus managed to control a vast amount of territory, in which it installed a de facto government and elaborated a domestic political, legal, and judicial system based on a particularly radical interpretation and application of sharia law.

Numerous sources have denounced massive violations of human rights in the ISIL-controlled territories.[136] The United Nations has labelled ISIL a terrorist organisation, as have numerous other organisations and

[133] See, generally, Patrick Cockburn, *The Rise of Islamic State: ISIS and the New Sunni Revolution* (London: Verso Books 2015). See also Olivier Corten, 'The Military Operations against the "Islamic State" (ISIL or Da'esh) – 2014', in Ruys et al., *Use of Force* (n. 67), 873–98 (873–7).

[134] See, e.g., the Iraq crisis: Patrick Cockburn, 'How Saudi Arabia Helped Isis Take Over the North of the Country', *The Independent* (London), 13 July 2014; David L. Phillips, 'Research Paper: ISIS–Turkey Links', *The Huffington Post*, 8 September 2016.

[135] *Keesing's Record of World Events* (2014), 53494–5. See Tom Ruys, Nele Verlinden and Luca Ferro, 'Digest of State Practice 1 January–30 June 2014', *Journal on the Use of Force and International Law* 1 (2014), 323–73 (356); Tom Ruys and Nele Verlinden, 'Digest of State Practice 1 July–31 December 2014', *Journal on the Use of Force and International Law* 2 (2015), 119–62 (131–2).

[136] *Keesing's Record of World Events* (2014), 53535–6, 53441.

states.[137] By contrast, and unsurprisingly, it has itself never been recognised as a 'state'[138] – even though a massive military intervention was launched against it by several states. In the summer of 2014, the United States formed an international coalition against ISIL at the invitation from the Iraqi authorities. Then, a year later, Russia answered a call from the Syrian authorities and actively cooperated with them in what, officially, was also designated as an armed fight against terror. Successive defeats of ISIL marked 2017 and 2018, and, at the time of writing, it controls very few, small areas of territory in Syria and Iraq, if any. The fight against terrorism has thus formed the essential argument justifying the intervention of states in Iraq and Syria.

1. Invocation of the Argument by Iraq and Syria

The two governments of these states were particularly clear in this regard. The Iraqi authorities sent a letter to the Security Council on 25 June 2014, saying:

> ISIL has . . . been terrorizing citizens, carrying out mass executions, persecuting minorities and women, and destroying mosques, shrines and churches. This group now threatens several governorates, including Baghdad, *thanks to external support and the influx of thousands of foreign terrorists of various nationalities from across the border in Syria*.
>
> [. . .]
>
> . . . We therefore call on the United Nations and the international community to recognize the serious threat our country and the international order are facing. . . . To that end, we need your support in order to defeat ISIL and protect our territory and people . . . [139]

At this stage, Baghdad asked for logistical aid to 'protect [its] territory and people' against a terrorist group that had been infiltrated by foreign elements, mainly (but not exclusively) from Syria. In a letter dated 25 September 2014, it called for a more robust form of support, but still for the same reasons.[140]

[137] See, e.g., the lists of designated persons and entities of the United Nations: UN Security Council, ISIL (Da'esh) & Al-Qaeda Sanctions List (Sanctions List Materials).

[138] See, e.g., the positions expressed by several states during the debates within the Security Council: UN SC Verbatim Records (19 September 2014), UN Doc. S/PV.7271; UN SC Verbatim Records (24 September 2014), UN Doc. S/PV.7272. Concerning the United States, see also 'Statement by the President on ISIL', The White House – Office of the Press Secretary (10 September 2014).

[139] Letter dated 25 June 2014 from the Permanent Representative of Iraq to the United Nations, addressed to the Secretary-General (UN Doc. S/2014/440) (emphasis added).

[140] Letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council (22 September 2014), UN Doc. S/2014/691.

For its part, the Syrian government also called on third states for aid in militarily quelling ISIL forces. On 25 August 2014, it affirmed that:

> Syria is ready to cooperate and coordinate with regional and international efforts to combat terror in accordance with UN resolutions and respect of Syrian sovereignty … Everyone is welcome, including Britain and the United States, to take action against ISIS and Nusra with a prior full coordination with the Syrian government.[141]

On 25 May 2015, Damascus reaffirmed its readiness 'to cooperate bilaterally and at the regional and international levels to combat terrorism'.[142]

2. Invocation of the Argument by the Intervening States

The intervening states relied on these invitations as a basis for their military operations. Russia sent a letter to the United Nations specifying that 'in response to a request from the President of the Syrian Arab Republic, [… it had begun] launching air and missile strikes against the assets of terrorist formations in the territory of the Syrian Arab Republic on 30 September 2015'.[143] Syria then confirmed that:

> The Russian Federation has taken a number of measures in response to a request from the Government of the Syrian Arab Republic to the Government of the Russian Federation *to cooperate in countering terrorism and to provide military support for the counter-terrorism efforts* of the Syrian Government and the Syrian Arab Army … This support, which is being provided in response to a request from the Government of the Syrian Arab Republic, is fully consistent with international law … [144]

The states of the Western coalition developed an ambiguous discourse. As a matter of principle, it is incontrovertible that they referred to intervention by

[141] *CBS News* (25 August 2014), quoting a press conference made in Damascus by the Syrian Minister of Foreign Affairs Wallid al-Moallem. See also *BBC News*, 25 August 2014.

[142] Identical letters dated 25 May 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council (1 June 2015) UN Doc. A/69/912–S/2015/371.

[143] Letter dated 15 October 2015 from the Permanent Representative of the Russian Federation to the United Nations, addressed to the President of the Security Council (UN Doc. S/2015/792). See also UN SC Verbatim Record (30 September 2015), UN Doc. S/PV.7527, 4. For its part, Iran did not send a letter justifying its – more limited – military involvement in support of the Syrian authorities: see Ruys et al., 'Digest of State Practice 1 January–30 June 2014' (n. 135), 351.

[144] Identical letters dated 14 October 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations, addressed to the Secretary-General and the President of the Security Council (UN Docs A/70/429 and S/2015/789) (emphasis added).

invitation, relating it to the fight against ISIL. The United Kingdom's position is significant in this respect:

> International law is clear that the use of force in international relations is prohibited, subject to limited exceptions. However, international law is equally clear that this prohibition does not apply to the use of military force by one State on the territory of another if the territorial State so requests or consents. It is clear in this case that Iraq has consented to the use of military force to defend itself against ISIL in Iraq.[145]

As for the United States, it declared that:

> Iraq has asked that the United States lead international efforts to strike ISIL sites and military strongholds in Syria in order to end the continuing attacks on Iraq, to protect Iraqi citizens, and ultimately to enable and arm Iraqi forces to perform their task of regaining control of the Iraqi borders.[146]

Two remarks should be made at this point, after reading the Iraqi position.

- It is apparent that ISIL is denounced not only as a terrorist group but also as a group connected with foreign elements, either from Syria or from many other states through which terrorists allegedly find passage. A close connection with the counter-intervention argument can therefore be established.
- It is also apparent that the Iraqi government's invitation was interpreted as justification for military operations against ISIL not only in Iraq but also in Syrian territory, on the basis of Article 51 of the Charter, as invoked by several states in this context.[147]

In short, intervention by invitation would *in itself* supposedly justify the military operations by Russia in Syria and by the Western powers in Iraq. Besides, the notion of collective self-defence would allegedly warrant Western strikes not only in Iraqi, but also in Syrian, territory. In both instances, the fight against terrorism is claimed as a legitimate purpose, associated in part with that of counter-intervention. However, in both instances, such an argument undeniably

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

[146] Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations, addressed to the Secretary-General (UN Doc. S/2014/695). See also UN Doc. S/PV.7271 (n. 138), 16.

[147] See, particularly, the letters sent to the Security Council by the United States (UN Doc. S/2014/695, 23 September 2014), the United Kingdom (UN Doc. S/2014/851, 26 November 2014) and France (UN Doc., S/2015/745, 9 September 2015).

raises problems that should be underscored – notably, by mentioning the criticism emanating from certain states.

C. *Problems Raised by the Invocation of the Fight against International Terrorism in the Iraqi and Syrian Context*

The main problem with the fight against international terrorism as a justification for intervention relates to the very definition of this controversial concept;[148] others can be highlighted too. Here, again, the aim is not to demonstrate the illegality of the interventions that have taken place in Iraq and Syria, but rather to highlight certain legal problems that have been circumvented thanks to the resolutions adopted by the Security Council.

1. A Definition of 'Terrorism'?

A first illustration of a state citing the fight against terrorism as justification is the way in which Russia argued for its military intervention in Syria not only against ISIL but also against other irregular forces, which were also characterised as 'terrorists'[149] – in particular, the groups who had been supported, including militarily, by the Western and Arab states since the beginning of 2013, if not before. It is significant that Russia has not justified its joint military operations with the Syrian Army by relying on the argument of prior military support, which it could have claimed by referring to the argument of counter-intervention. Moscow preferred to encompass all of the Syrian opposition movement under the heading of 'international terrorism', since the close connections among these different movements made any distinction impossible. This characterisation is far from universally accepted, however, and many states have consequently called on Russia to abstain from targeting what are described as 'moderate' Syrian opposition forces. From 3 October 2015 – that is, slightly after the beginning of the Russian engagement – the Western and Arab coalition states issued an appeal: 'We call on the Russian Federation to immediately cease its attacks on the Syrian opposition and civilians and to focus its efforts on fighting ISIL.'[150] On 12 October, the

[148] Bannelier-Christakis, 'Military Interventions against ISIL' (n. 6), 747. See Pierre Klein, 'Le droit international à l'épreuve du terrorisme', *Recueil des Cours* 321 (2006), 209–484.

[149] See Olivier Corten, 'L'intervention de la Russie en Syrie: que reste-t-il du principe de non-intervention dans les guerres civiles?', *Questions of International Law* 5 (2018), 3–16.

[150] France, Germany, Qatar, Saudi Arabia, Turkey, the United Kingdom, and United States, Joint Declaration of Recent Military Actions of the Russian Federation on Syria (2 October 2015).

Council of the European Union adopted a resolution whereby it declared that '[t]he recent Russian military attacks that go beyond Da'esh and other UN-designated terrorist groups, as well as on the moderate opposition, are of deep concern, and must cease immediately'.[151] On 16 December 2016, the UN General Assembly adopted a resolution in which it:

> . . . strongly condemn[ed] *all attacks* against the Syrian moderate opposition, and call[ed] for their immediate cessation, given that such attacks benefit so-called ISIL-Da'esh and other terrorist groups, such as Al-Nusrah Front, and contribute to a further deterioration of the humanitarian situation.[152]

In the context in which they were adopted, those resolutions were probably motivated by the serious violations of IHL attributed to the Russian forces. However, their condemnation is framed in broad terms as covering 'all attacks' against the 'moderate opposition'. We therefore cannot exclude its application, to some extent, to aspects of ius contra bellum. What is sure is that there is a deep disagreement between Russia and its allies, on the one side, and most states, on the other, about whether or not opposition groups in Syria can be characterised as 'terrorists'.[153] Moreover, and more importantly, it would be excessive to assert that an unlimited right to intervene in favour of a government in a civil war would have been recognised in the Syrian instance. On the contrary, even if those statements are not expressed in strictly legal terms, it is submitted that they suggest a legal conviction that the Russian intervention breached the right of the Syrian people to determine its own political regime without outside interference.

2. Other Problems Raised by the Russian Argument

A second problem raised by the Russian argument relates to the characterisation not of the rebel forces but of the government forces. It may be questioned whether the Damascus authorities could validly formulate an invitation to intervene in Syria. Many states deny that the regime of Bashar El Assad has legitimacy to represent the Syrian people. Yet those same states, whether Western or Arab, continue to deal with representatives of the regime as the representatives of the state. At the United Nations, it is the Damascus delegation

[151] Council of the European Union, 'Council Conclusions on Syria', Press release, 12 October 2015.

[152] UN GA Res. 71/203 of 19 December 2016 ('Situation of human rights in the Syrian Arab Republic'), UN Doc. A/RES/71/203 (emphasis added); UN GA Res. 72/191 of 19 December 2017 ('Situation of human rights in the Syrian Arab Republic'), para. 28.

[153] Bannelier-Christakis, 'Military Interventions against ISIL' (n. 6), 764–6.

that continues to exercise the rights of Syria – and yet when, for example, the General Assembly '[d]eplores and condemns in the strongest terms the continued armed violence by the Syrian authorities against its own people since the beginning of the peaceful protests in 2011',[154] it is clear that the 'Syrian authorities' are those acting under the leadership of Bashar El-Assad. The Syrian government has therefore continued to be recognised continuously as such since the beginning of the conflict, even at times when it held only weak effective control over its territory.[155] This is a far cry from the interventions in Somalia (1992), Haiti (1994), or Albania (1996), for which invitation was expressed by a government or a leader that had no longer any authority, so that the Security Council was called upon to adopt a resolution authorising third states to intervene. In those cases, it was evidently understood that no one was in any position to formulate valid consent.[156] The case of Syria seems closer in this respect to more recent instances, such as those of Yemen or Mali, examined as case studies in this chapter.

3. Problems Raised by Western Intervention in Syria and Iraq

What of the flaws in the argument on the invitation to fight against international terrorism invoked not by Russia but by the Western states? It is notable that the question can be framed differently depending on whether it concerns Syria or Iraq.

On the one hand, in the case of Syria, Iraq's consent seems, according to Western states, to justify military action. Yet the letters sent by Baghdad to the United Nations do not mention this possibility nor is it easy to see how Iraq could 'invite' third states to intervene militarily in a territory over which it has no sovereignty. It is without a doubt in view of these difficulties that the United States, followed by some of its allies, combined the reference to Iraqi consent with a call to collective self-defence.[157] Thus the idea was to defend Iraq against armed attack by ISIL from Syria on the grounds of a broad

[154] UN GA Res. 71/203 (n. 152), para. 25.

[155] Bannelier-Christakis, 'Military Interventions against ISIL' (n. 6), 762; Stefan Talmon, 'Recognition of Opposition Groups as the Legitimate Representative of a People', *Chinese Journal of International Law* 12 (2013), 219–53 (219); Corten, 'The Military Operations against the "Islamic State"' (n. 133), 887.

[156] Olivier Corten, *Le droit contre la guerre* (Paris: Pedone 3rd edn 2020), 471 *et seq.*

[157] Olivier Corten, 'The "Unwilling or Unable" Theory: Has It Been, and Could It Be, Accepted?', *Leiden Journal of International Law* 29 (2016), 1–23; Olivier Corten, 'L'argumentation des États européens pour justifier une intervention militaire contre l'"État islamique" en Syrie: vers une reconfiguration de la notion de légitime défense?', *Revue belge de droit international* 51 (2016), 31–67.

interpretation of Article 51 of the UN Charter. Of course, it would have been easier to legally combine the invitation from Baghdad and that very real one from Damascus, but this option was excluded for political reasons, since Western states did not want to be perceived as in any way working with the government led by Bashar El-Assad.

The problem is that, if we confine ourselves to traditional international law, the validity of the argument of self-defence would involve demonstrating that Syria 'sent' ISIL forces into Iraqi territory, or had 'substantial involvement' with the group's actions, which would constitute an armed attack by Syria.[158] As it was plainly impossible to prove as much (because, quite to the contrary, Syria too has been fighting against ISIL), the coalition states proposed an extensive interpretation of self-defence, insisting both on the indirect responsibility of Syria – which would, from a literal perspective, have been 'unwilling or unable' to end ISIL's activities in its territory – and on an assertion that the attacks were not aimed at Syria but only at ISIL forces. The relevance of these particularly extensive interpretations – which many states[159] and writers[160] have called into question – goes beyond the context of the present chapter.[161] Suffice it to say that, in them, there is an obvious shift away from the argument of intervention by invitation towards the argument of self-defence, within the meaning of Article 51 of the Charter, and that this argument raises some serious questions.

On the other hand, in the case of the military intervention against ISIL in Iraq, it is indeed the invitation from the Baghdad authorities that forms the essential argument of the Western and Arab states. This does not mean, though, that every problem has been overcome. First, it should be observed that the Iraqi government itself could see that its legitimacy would be challenged insofar as it came to power only as the result of the war in 2003 against the regime of Saddam Hussein – a war that the majority of UN member states considered plainly contrary to international law.[162] By application of the

[158] Article 3.g) ('Definition of Aggression'), annexed to UN GA Res. 3314 (XXIX) of 14 December 1974; Corten, 'The Military Operations against the "Islamic State"' (n. 133), 889–96.

[159] See, e.g., Non-Aligned Movement, 17th Summit of Heads of State or Government, Final Document, September 2016, para. 25.2.

[160] Olivier Corten, 'A Plea against the Abusive Invocation of Self-Defence as a Response to Terrorism', *Revue belge de droit international* 51 (2016), 10–11.

[161] See O'Connell et al., *Self-Defence against Non-State Actors* (n. 4).

[162] Letter dated 19 March 2003 from the Chargé d'affaires a.i. of the Permanent Mission of Malaysia to the United Nations, transmitting a statement of the Troika of the Non-aligned Countries, UN Doc. A/58/68-S/2003/357, 21 March 2003. See Olivier Corten, 'Opération *Iraqi Freedom*: peut-on accepter l'argument de "l'autorisation implicite" du Conseil de sécurité?', *Revue belge de droit international* 38 (2003), 205–47.

principle that illegal acts cannot create law (i.e., *ex iniuria ius non oritur*), there might have been an obligation not to recognise this government, as well as an obligation not to assist in or contribute to maintaining its authority.[163] This was not the position adopted by third states, including those that had vigorously criticised the war triggered by the United States. The new Iraqi government was considered to be representative of the state and, like its Syrian counterpart, it has continued to be recognised as such in recent years.[164]

Next, and in parallel, we should recall that ISIL originated in opposition to measures taken by the Iraqi authorities against a large part of the population, which were said to be discriminatory or excessive. Various opposition forces initially rose against these policies, which were thought to be dictated and supported by the foreign occupying forces – particularly, the United States. In other words, the evolution of the situation in Iraq could have been interpreted as an armed opposition movement rising against a repressive government – a government supported, for that matter, by foreign states. But this was not the case: ISIL, as well as the other movements from which it arose, was characterised from the outset as a terrorist group. It was denied any form of representative or political legitimacy, and internal debate on the legitimacy of the Baghdad authorities was simply ignored. This choice was widely accepted, with no state truly challenging whether it was legally apt to help the Iraqi government to end ISIL activities in its territory.

Ultimately, these two situations must be explored independently.

- When outside military intervention is limited to the territory of the state whose government has issued the invitation (Iraq, for the coalition states; Syria, for Russia), the legal validity of the invitation is not challenged.[165] Criticism is aimed at certain forms of intervention, such as military action against the 'moderate' Syrian opposition, which many states could not identify as a form of international terrorism. Yet the principle by which help can be given to a government to quell acts of international terrorism is never called into question.
- When outside military intervention targets a state that has not issued an invitation – or, rather, whose invitation has not been accepted (as was the case of Syria and the coalition states) – it is not consent that is invoked autonomously. Other arguments, such as self-defence, are additionally

[163] See Anne Lagerwall, *Le principe ex injuria jus non oritur en droit international contemporain* (Brussels: Bruylant 2016).

[164] Olivier Corten, 'Le *jus post bellum* remet-il en cause les règles traditionnelles du *jus contra bellum*', *Revue belge de droit international* 46 (2011), 38–69 (54–60).

[165] Bannelier-Christakis, 'Military Interventions against ISIL' (n. 6), 751–2.

> evoked, with all the problems this entails for the particularly extensive interpretation that they presuppose in existing international law. The debates that then take place no longer countenance the possibility, in principle, of combating terrorism only with the consent of the government of the state and the territory in which the intervention occurs.

The lack of any such challenge can largely be explained by the Security Council's characterisations of the circumstances, which have manifestly made it possible to mitigate the traditional problem: the absence of any universally accepted definition of 'terrorism'.

D. *The Decisive Role of the UN Security Council in the Iraqi and Syrian Context*

1. Iraq

The UN Security Council has played a particularly active part in the case of Iraq for many years now. Although its members were deeply divided over the expediency of authorising an intervention in late 2002 and early 2003, they did agree to manage the fallout of the invasion and occupation of the territory by the United States and some of its allies. On 22 May 2003, the Security Council called on states to 'assist the people of Iraq in their efforts to reform their institutions and rebuild their country, and to contribute to conditions of stability and security in Iraq';[166] some months later, it called on the Provisional Authority 'to return governing responsibilities and authorities to the people of Iraq as soon as practicable'.[167] At this stage, the Council already seemed to be centring the Iraqi people and their right to self-determination – but its members did not hesitate to make a pronouncement regarding the legitimacy of the relevant authorities. On 8 June 2004, the Security Council explicitly insisted on the validity on the power of a new government to further local elections:

> 1. *Endorses* the formation of a sovereign Interim Government of Iraq, as presented on 1 June 2004, which will assume full responsibility and authority by 30 June 2004 for governing Iraq . . . ;
> 2. *Welcomes* that, also by 30 June 2004, the occupation will end and the Coalition Provisional Authority will cease to exist, and that Iraq will reassert its full sovereignty . . . [168]

[166] UN SC Res. 1483 of 22 May 2003, para. 1.
[167] UN SC Res. 1511 of 16 October 2003, para. 6.
[168] UN SC Res. 1546 of 8 June 2004.

From that date on, the Baghdad government was recognised as an authority capable of legitimately expressing the will of the Iraqi people. The origins of this government – in particular, its formation from a foreign military intervention instituted under the direct control of the occupying forces – was, at the very least, not mentioned and may even have been deliberately omitted.

This pragmatic approach was dictated by concern for maintaining peace in the region, which required the establishment of a stable and secure state, and led to the creation of a UN force, the United Nations Assistance Mission for Iraq (UNAMI), which was tasked with assisting the Iraqi government in various matters relating directly to security.[169] In this context, it was logical for the Security Council to condemn the violent opposition forces – and it would soon dismiss them as terrorists. Thus, as early as 7 August 2009, the Security Council 'commend[ed] the important efforts made by the Government of Iraq … to improve security and public order and to combat terrorism and sectarian violence across the country';[170] a year later, it '[e]ncourag[ed] the Government of Iraq to continue … improving security and public order and combating terrorism and sectarian violence across the country'.[171] On 30 July 2014, the Security Council more specifically targeted ISIL – by then extending its activities – by:

> *Expressing* grave concern at the current security situation in Iraq as a result of a large-scale offensive carried out by terrorist groups, in particular the Islamic State in Iraq and the Levant (ISIL), and associated armed groups, involving a steep escalation of attacks, heavy human casualties …, *condemning* the attacks perpetrated by these terrorist groups and associated armed groups, … against the people of Iraq in an attempt to destabilize the country and region, and reiterating its commitment to Iraq's security and territorial integrity.[172]

Later that year, on 19 September, the Security Council 'urge[d] the international community, in accordance with international law to further strengthen and expand support for the Government of Iraq as it fights ISIL and associated armed groups';[173] on 15 July 2016, it '[e]mphasiz[ed] the need to continue efforts to promote international and regional cooperation aimed at

[169] UN SC Res. 1500 of 14 August 2003; UN SC Res. 1770 of 10 August 2007; UN SC Res. 1883 of 7 August 2009. See also UN SC Res. 2421 of 14 June 2018.

[170] UN SC Res. 1883 of 7 August 2009.

[171] UN SC Res. 1936 of 5 August 2010. See also UN SC Res. 2001 of 28 July 2011; UN SC Res. 2061 of 25 July 2012; UN SC Res. 2110 of 24 July 2013.

[172] UN SC Res. 2169 of 30 July 2014. See also UN SC Res. 2233 of 29 July 2015; UN SC Res. 2367 of 14 July 2017.

[173] UN SC Pres. Statement on Iraq, S/PRST/2014/20, 19 September 2014. See also UN SC Res. 2233 of 29 July 2015; UN SC Res. 2299 of 25 July 2016; UN SC Res. 2367 of 14 July 2017.

supporting Iraq both in its reconciliation and political dialogue and in its fight against ISIL (Da'esh)'.[174]

These words leave no doubt whether the Security Council's was willing to present the conflict as an altercation between legitimate authorities that emerged from a mechanism supervised by the United Nations, on the one hand, and criminal terrorist groups, on the other. Under no circumstances could those terrorist groups claim to reflect the will of all, or even part, of the Iraqi population. In this context, and beyond all the limits that the argument might present in the absence of any Security Council resolution, the outside interventions in support of the government are not only not prohibited but also explicitly encouraged.

Even if the two situations are in many ways different (especially as far as the legitimacy of the government is concerned), the same general view was, to some extent, reproduced in the Syrian case.

2. Syria

The divisions among permanent members of the UN Security Council led to relatively limited Council activity with respect to the conflict in Syria. However, a few days after the attacks in Paris of 13 November 2015, fifteen member states adopted Resolution 2249 (2015), whereby the Security Council:

> *Determin*[ed] that . . . the Islamic State in Iraq and the Levant (ISIL, also known as Da'esh), constitutes a global and unprecedented threat to international peace and security, . . .
>
> [. . .]
>
> 5. *Call*[ed] *upon* Member States that have the capacity to do so to take all necessary measures, in compliance with international law, in particular with the United Nations Charter, as well as international human rights, refugee and humanitarian law, on the territory under the control of ISIL also known as Da'esh, in Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL . . . and to eradicate the safe haven they have established over significant parts of Iraq and Syria . . . [175]

The Security Council's discourse could not be more typical: international terrorism (and, more specifically, ISIL and other named groups) are a threat to international peace and it is essential to fight them 'in compliance with

[174] UN SC Res. 2299 of 25 July 2016. See also UN SC Res. 2367 of 14 July 2017.

[175] UN SC Res. 2249 of 20 November 2015. See also UN SC Res. 2254 of 18 December 2015, para. 8.

international law, in particular with the United Nations Charter'. For the coalition states, this means they are invited to exercise self-defence in Syrian territory; for Russia, it implies that its action must be based on the consent given by the Syrian government. Beyond the differences in interpretation (which this chapter does not aim to settle), it is noteworthy that it occurred to no one to challenge the possibility of intervening in Iraq or Syria at the call of the concerned authorities. This helps to explain why, when the Security Council called for a ceasefire, it stated explicitly that the ceasefire:

> . . . shall not apply to military operations against the Islamic State in Iraq and the Levant (ISIL, also known as Da'esh), Al Qaeda and Al Nusra Front (ANF), and all other individuals, groups, undertakings and entities associated with Al Qaeda or ISIL, and other terrorist groups, as designated by the Security Council;[176]

The fight against these groups is held to be an incontrovertible and legitimate objective. The governments of directly targeted states can pursue this objective by validly calling on third states to intervene.

At this point, we might draw three intermediate conclusions from the case study of the fight against ISIL. First, and as in the case of Yemen, it is clear that the need to respect the right of peoples to self-determination is again reaffirmed.[177] The intervening states did not merely settle for reference to the validly issued consent from the recognised authorities of Iraq and Syria, which would have been sufficient if we were to accept the argument that no condition deduced from the right to self-determination need be fulfilled. On the contrary, all of the intervening states insisted on the legitimacy of the object of their action: the fight against international terrorism. In this sense, insofar as the intervening states also claimed to be acting to protect themselves against terrorist attacks, the consent given by Iraq and Syria is nothing more than the implementation of their international obligation to take all appropriate measures so that their territories are not used by irregular forces infringing the rights of other states.[178] Thus the legitimacy of the intervention against terrorist groups is further strengthened. All in all, we find a similar line of reasoning to that exercised in the Yemeni case.

The traditional problems that the argument of the fight against international terrorism raises (a unilateral characterisation of terrorism, the legitimacy of the government itself, etc.) have sometimes been formulated by

[176] UN SC Res. 2401 of 24 February 2018. See also UN SC Res. 2532 of 1 July 2020.
[177] Bannelier-Christakis, 'Military Interventions against ISIL' (n. 6), 754–6.
[178] UN GA Res. 2625 (XXV) of 24 October 1970.

states, but never has the possibility of targeting international terrorism at the invitation of the relevant government been called into question. This can probably be explained by the decisive role played by the Security Council, which supported the legality of the governments (explicitly for Iraq, implicitly for Syria) and, above all, denounced the irregular groups as terrorists, unequivocally calling for outside military intervention. This intervention was not 'authorised', which would presuppose the Security Council had provided a legal ground that is missing at first sight; rather, the Council merely recommended the intervention, '*call*[ing] *upon* Member States . . . to take all necessary measures, in compliance with international law' and hence presupposing that a legal basis might be found elsewhere.[179] In this respect, there is no question that the Council unanimously considered the government invitation, in principle, sufficient.

Second, we must position ourselves again here not in the context of general international law but in relation to the Security Council's powers under Chapter VII of the UN Charter. The Council establishes a link between the processes of pacification and securitisation under its aegis (especially in Iraq), and denounces terrorist groups, as well as certain kinds of outside interference related to the recruitment of jihadists from various states. The expression 'international terrorism', and the way it describes entities such as ISIL or Al-Qaeda, show that it is a case of denouncing not only criminals but also a transnational destabilising movement. Even if the transnational dimension of those groups were limited (the leadership of ISIL being mainly Iraqis and Syrians), it was undoubtedly one of the preoccupations of third states, some nationals of which were implicated in terrorist activities. Therefore, to some extent, the argument that intervention is justified in the fight against international terrorism might then be associated with that of counter-intervention – with states protecting the right to self-determination of the Iraqi and Syrian peoples against a challenge that is both criminal and marked by foreign involvement, threatening international peace and security.

[179] Michael P. Scharf, 'How the War against ISIS Changed International Law', *Case Western Reserve Journal of International Law* 48 (2016), 1–54 (51); Nabil Hajjami, 'De la légalité de l'engagement militaire de la France en Syrie,' *Revue du droit public* 1 (2017), 169–73; Michael Wood, 'The Use of Force in 2015 with Particular Reference to Syria', Hebrew University of Jerusalem Legal Studies Research Paper Series No. 16–05 (2016), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2714064; Jean-Christophe Martin, 'Les frappes de la France contre l'EIIL en Syrie à la lumière de la résolution 2249 (2015) du Conseil de sécurité', *Questions of International Law* 3 (2016), 11–14; Laurie O'Connor, 'Legality of the Use of Force in Syria against Islamic State and the Khorasan Group', *Journal on the Use of Force and International Law* 3 (2016), 70–96 (77); Corten, 'The Military Operations against the "Islamic State"' (n. 133), 888–9.

Third, in emphasising respect for the territorial integrity of Iraq and Syria, the Security Council's resolutions and declarations seem to condemn the secessionist dimension of ISIL – a dimension we can examine further, in another case study, as a legitimate argument justifying intervention by invitation.

IV. REPRESSION OF SECESSION? THE FRENCH-LED INTERVENTION IN MALI

A. *The Existing Legal Framework: Secession and Self-Determination*

If we confine ourselves to general international law, it is difficult to consider outside military intervention against secession compatible with the right to the self-determination of peoples. The phenomenon of a new state can be contemplated in two ways: in *law* (in relation to a right to self-determination); and in *fact* (in relation to the existence of a state).[180] In both cases, and supposing the secessionist claim has not been supported by foreign actors, it seems difficult to accept that outside military aid should be given to help put down attempts to gain independence.

The first hypothesis in this scenario, of secession in law, deals with a people who have the right to self-determination: a right that implies the right to create a new state – by violence, if need be – against the will of a colonial or occupying power.[181] Third states, then, cannot have the power to quell what is designated a legitimate national liberation movement. This is not in the context of a classical civil war, in which the principle of legal neutrality prevails.[182] The people have a genuine right, which implies a corresponding duty to allow it to be exercised as a choice in self-determination, and that choice is obviously incompatible with an intervention meant to maintain the grip of a colonial or occupying power.[183] For some, it might even be possible to

[180] James Crawford, *The Creation of States in International Law* (Oxford: OUP 2nd edn 2007); Théodore Christakis, 'L'État en tant que "fait primaire": réflexions sur la portée du principe d'effectivité', in Marcelo Kohen (ed.), *Secession: International Law Perspectives* (Cambridge: CUP 2006), 138–70 (142–3); Olivier Corten, François Dubuisson, Vaios Koutroulis and Anne Lagerwall, *A Critical Introduction to International Law* (Brussels: éditions de l'Université de Bruxelles 2019), 55 *et seq*.

[181] UN GA Res. 1514 (XV) of 14 December 1960; UN GA Res. 1541 (XV) of 15 December 1960.

[182] Corten, 'La rébellion et le droit international' (n. 38), 74–81.

[183] See UN GA Res. 2625 (XXV) of 24 October 1970; UN GA Res. 1514 (XV) of 14 December 1960, para. 4; 'Definition of Aggression' annexed to UN GA Res. 3314 (XXIX) of 14 December 1974, Art. 7. See also Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: CUP 1995).

contemplate one or more third states supporting the oppressed people,[184] even if it is far from obvious that such support should extend to a military intervention.[185] Support for the government, though, is excluded.

The second hypothesis, of de facto secession, covers not a people subject to colonial power or a foreign occupation but a minority living in an existing state.[186] This context is not a people exercising its right to self-determination but an attempt at secession: an attempt to create an entity that in fact claims to fulfil all the characteristics of the state (territory, population, and sovereign government) – that is, an entity that manages to exercise its power in an effective and stable way, independently of any higher authority.[187] The situation is akin to civil war, as the IDI confirmed in its Wiesbaden Resolution III.[188] The principle of legal neutrality reflected in the Resolution – prohibiting support for either party in a civil war – applies.[189] At first sight, providing military aid to a government to quell the choice of a part of its population to secede does not seem readily compatible with the principle of non-intervention in civil wars.

In this hypothesis of de facto secession – that which we will consider here – the right of people to self-determination should no longer be envisioned as conferring the right to create a *new* state but as a protection of the right of the population in an *existing* state to determine its political regime without outside interference. The choice of the form in a federal or confederal state, or even its division into two or more entities, is incontrovertibly a matter of its national competence. From this perspective, if an internal political debate arises and bears on the expediency of such a choice, third states are supposed to abstain from any interference and let the population of the state in question determine

[184] Gregory Starouchenko, 'La liquidation du colonialisme et le droit international', in G. Tounkine (ed.), *Droit international contemporain* (Moscow: éd. du progrès 1972), 134–5; ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, advisory opinion of 21 June 1971, separate opinion of Judge Ammoun, ICJ Reports 1971, 70; Julio Faúndez, 'International Law and Wars of National Liberation: Use of Force and Intervention', *African Journal of International and Comparative Law* 1 (1989), 85–98.

[185] Corten, *Le droit contre la guerre* (n. 156), 235–6.

[186] Schindler, 'Le principe de non-intervention dans les guerres civiles' (n. 19), 454–5; Helen Quane, 'The United Nations and the Evolving Right to Self-Determination', *International and Comparative Law Quarterly*, 47 (1998), 537–72 (554 and 555–6).

[187] Crawford, *The Creation of States in International Law* (n. 180).

[188] IDI, Wiesbaden Resolution III (n. 18), Art. 1(1)(a).

[189] Marcelo Kohen, 'La création des états en droit international contemporain', *Cours Euro-Mediterranéens Bancaja de Droit International* 6 (2002), 546-635 (596); Antonio Tancredi, 'Secession and the Use of Force', in Christian Walter, Antje von Ungern-Sternberg and Kavus Abushov (eds), *Self-Determination and Secession in International Law* (Oxford: OUP 2014), 68–94 (68).

its own future. One objection might be that a unilateral attempt at secession challenges the territorial integrity of a state, especially if this attempt is made by violent means. Such reasoning, though, has been dismissed by the ICJ in its advisory opinion on the *Unilateral Declaration of Independence of Kosovo*, in which it affirmed that:

> Several participants in the proceedings before the Court have contended that a prohibition of unilateral declarations of independence is implicit in the principle of territorial integrity. The Court recalls that the principle of territorial integrity is an important part of the international legal order and is enshrined in the Charter of the United Nations, in particular in Article 2, paragraph 4 … Thus, the scope of the principle of territorial integrity is confined to the sphere of relations between States.[190]

Accordingly, an attempt at secession does not a priori violate any principle of international law but falls within the national competence of the state concerned. The group that is located there and claims its independence cannot rely on any *right* nor is secession *prohibited* by international law. It is logical, from this perspective, to consider that third states should therefore refrain from supporting any of the parties in internal conflicts.

Some writers have argued that practice tends to recognise the right to intervene against a secessionist movement.[191] Yet practice does not seem to plead unequivocally along these lines, because it is marked by a degree of ambiguity. Some outside military operations have been conducted in support of governments against secessionist entities, but without openly declaring such support. Thus the intervention by the UN Operation in the Congo (ONUC) in the early 1960s was not presented as an intervention in favour of the Congolese government in the internal conflict opposing the secessionist forces of Katanga; rather, the repression of the secession was justified both as a peacekeeping operation, pursuant to the principle of neutrality, and as a counter-intervention, in reaction to the outside support Belgium had provided to the secessionist forces.[192] The same observation can be drawn from the NATO intervention against the Serbs in Bosnia-Herzegovina in 1995: that

[190] ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, advisory opinion of 22 July 2010, ICJ Reports 2010, 438, paras 82–3.

[191] See Christakis and Bannelier, '*Volenti non fit injuria*?' (n. 1), 133–5; Nolte, *Eingreifen auf Einladung* (n. 60), 637.

[192] Bennouna, *Le consentement à l'ingérence militaire* (n. 16), 108–22; Donald W. McNemar, 'The Postindependence War in the Congo', in Richard A. Falk (ed.), *The International Law of Civil War* (Baltimore: Johns Hopkins University Press 1971), 244–302 (292 and 295–6); Corten, 'La rébellion et le droit international' (n. 38), 114–20.

intervention was not justified by the right of government authorities acting to put down the attempted secession but by the implementation of Security Council resolutions authorising military operations for humanitarian purposes.[193] Accordingly, it seems difficult to identify instances in which the fight against secession has been seen as an *autonomous* legitimate ground for intervention with the consent of the government. The case of Mali in 2013, however, might tend to challenge this established practice – and we examine that question in what follows.

B. *Was the Repression of Secession Invoked in the Malian Context?*

Early in 2012, the National Movement for the Liberation of Azawad (Mouvement national de libération de l'Azawad, or MNLA), a Tuareg movement that originally emerged in October 2011,[194] successively took control of several localities in northern Mali, with the aim of establishing an independent secular state.[195] On 6 April 2012, the MNLA proclaimed 'Azawad' independent, with reference to the 'main international legal instruments governing the right of people to self-determination, and especially the United Nations Charter'.[196]

1. Condemnation of the Declaration of Independence

This reference to the right to self-determination outside a decolonised situation did not convince international organisations and states. Aside from the UN Security Council, to whose action we will return, we might mention the following illustrations.

- The Economic Community of West African States (ECOWAS):

> . . . denounce[d] the declaration and consider[ed] it null and void, and of no effect. The Commission wishes to remind all the armed groups in the North of Mali that Mali is one and indivisible entity, and ECOWAS shall take all necessary measures, including the use of force, to ensure the territorial integrity of the country. ECOWAS wishes to reaffirm its commitment to

[193] Pierre Klein, 'The Intervention in Bosnia and Herzegovina – 1992–1995', in Ruys et al., *Use of Force* (n. 67), 495–503 (499–500).

[194] *Keesing's Record of World Events* (2011), 50695.

[195] *Keesing's Record of World Events* (2012), 50852; Julia Dufour and Claire Kupper, 'Groupes armés au Nord Mali: état des lieux', *Groupe de recherche et d'information sur la paix et la sécurité*, 6 July 2012, 4.

[196] Déclaration d'indépendance de l'Azawad, prononcée par le secrétaire général du MNLA Bilal Ag Achérif, Gao, 6 April 2012, available at www.mnlamov.net/component/content/article/169-declaration-dindependance-de-lazawad.html.

the unity and territorial integrity of Mali. In this regard, it wishes to put all on guard against any temptation to proclaim any part of Mali as a sovereign State, as it will never recognise any such State.[197]

- The African Union (AU), through the chair of the Commission:

> . . . expresse[d] AU's total rejection of the statement made by an armed group, the 'National Movement for the Liberation of Azawad (MNLA)', regarding the so-called 'independence' of 'Azawad'. [The chair] firmly condemns this announcement, which is null and of no value whatsoever. . . .
>
> The [chair] recalls the fundamental principle of the intangibility of borders inherited by the African countries at their accession to independence and reiterates AU's unwavering commitment to the national unity and territorial integrity of the Republic of Mali. He stresses that the AU and its Member States will spare no efforts to contribute to the restoration of the authority of the Republic of Mali on its entire territory . . . [198]

- The Organization of the Islamic Conference (OIC) dismissed the declaration of independence, 'recalling the attachment of the OIC as a matter of principle to the territorial integrity and inalienable sovereignty of Mali over its internationally recognised borders'.[199]

States such as France,[200] China,[201] Algeria,[202] and Egypt[203] made similar declarations. A reading of them offers a vision of international law that seems somewhat remote from the concept the ICJ defended in its advisory opinion on Kosovo. The question of territorial integrity does not seem to be a purely domestic matter, which a secession would not infringe upon as such.[204] As ECOWAS mentioned, some months after the declaration of independence: 'Authority recalls its commitment to the unity and territorial integrity of Mali . . .

[197] ECOWAS Commission Declaration following the declaration of independence of Northern Mali by the MLNA, M. Ouédraogo, Abuja, 6 April 2012. See also Extraordinary Summit of ECOWAS Heads of State and Government, Abidjan, 26 April 2012, evoking an 'occupied territory' by the rebels in the North of Mali (para. 17).

[198] African Union Press Statement, 6 April 2012, available at www.peaceau.org/en/.

[199] Secretary General of the Organisation of Islamic Cooperation, Ekmeleddin Ihsanoglude, 7 April 2012, available at www.oic-oci.org/.

[200] Press communiqué, 6 April 2012, available at www.diplomatie.gouv.fr/fr.

[201] Liu Weimin, Foreign Minister, 9 April 2012, available at www.gov.cn.

[202] Ahmed Ouyahia, Foreign Minister, 6 April 2012, available at www.premier-ministre.gov.dz/fr.

[203] Mohamed Amr, Minister of Foreign Affairs, 10 April 2012, available at http://mfa.gov.eg/.

[204] See, more generally, Christakis, *Le droit à l'autodétermination en dehors des situations de décolonisation* (n. 13), 177 *et seq.*; Georg Nolte, 'Secession and External Intervention', in Kohen, *Secession* (n. 180), 65–93 (68–9); John Dugard, 'The Secession of States and Their Recognition in the Wake of Kosovo', *Recueil des Cours* 357 (2013), 133–40.

To this end, Authority demands the disarmament of all armed groups, including the MNLA.'[205] From this perspective, far from excluding it in the name of the right of the Malian people to determine their own political future without external interference, ECOWAS explicitly affirmed the possibility of an outside intervention in favour of the government authorities.

2. Justification of the French-Led Intervention

A military intervention did indeed occur in January 2013.[206] 'Operation Serval' – led by France, with the participation of Chad – precipitated the failure of the attempted secession and ensured the restoration (admittedly relative, the region still being unstable at the time of writing) of Bamako's authority over the territory of northern Mali. It is essential to point out that Paris did not invoke the fight against secession as the object of its intervention. Initially, the French minister of foreign affairs preferred to rely on the following arguments: 'Firstly, the appeal and the request made by Mali's legitimate government, so here this is a case of legitimate self-defence; and secondly, all the United Nations resolutions, which not only allow but require those countries capable of doing so to support the fight against the terrorists in this matter.'[207]

It is no easy matter to identify the legal basis for France's action with any precision, especially from an analysis of the Security Council resolutions to which reference is made: they contain no authorisation for France's use of force. In any case, France did not simply refer to the repression of secession; rather, it invoked the argument for the fight against international terrorism, combined with that of self-defence as a form of counter-intervention.[208] The French foreign minister evoked the specifics of what may generally be referred to as the 'Malian rebellion', which comprised two quite separate groups: the Tuareg independence movement, the MNLA; and forces linked to the Movement of Unity and Jihad in Western Africa (MUJWA) or to Al-Qaeda in Islamic Maghreb (AQIM), whose purpose was not to create a new state in the north, but to take control of all of Mali in relation to the expansion of political

[205] Forty-Second Ordinary Session of the ECOWAS Authority of Heads of State and Government, Yamoussoukro, 27–28 February 2013, Final Communiqué, para. 37.

[206] Karine Bannelier and Théodore Christakis, 'The Intervention of France and African Countries in Mali – 2013', in Ruys et al., *Use of Force* (n. 67), 812–27 (812–15).

[207] Laurent Fabius, Minister of Foreign Affairs (11 January 2013), available at www.basedoc.diplomatie.gouv.fr/.

[208] Raphaël van Steenberghe, 'Les interventions française et africaine au Mali au nom de la lutte armée contre le terrorisme', *Revue générale de droit international public* 118 (2014), 273–302 (276–7).

Islam.[209] Because of these connections, Azawad was not considered the result of a 'simple' secessionist movement operating within a state but instead as intrinsically linked to international criminal activities threatening peace and security in the region.[210] And it was these criminal activities that were to justify support for the Malian government, as the French authorities expressed more clearly in a letter sent to the United Nations on the day the operation was triggered:

> France has responded today to a request for assistance from the Interim President of the Republic of Mali, Mr Dioncounda Traoré. *Mali is facing terrorist elements from the north, which are currently threatening the territorial integrity and very existence of the State and the security of its population*.[211]

The fight against secession is therefore not mentioned as an autonomous argument.[212] Likewise, it is interesting to note that the MNLA, for its part, supported Operation Serval in various declarations, promising to contribute to the 'operations against terrorism'.[213] The Tuareg movement then became allied with the French military forces in the north of the country, while waiving its declaration of independence and still claiming autonomy.

3. A Precedent in Favour of Repressing an Internal Secession?

In analysis, it is therefore difficult to consider Mali a precedent for intervening militarily to help a government put down an attempted internal secession. Even the position of ECOWAS, which seemed to move in this direction, was in fact more measured. From April 2012, the Community insisted on the international dimension of the Malian rebellion and on the criminal activity that characterised it:

> The secessionist onslaught and criminality has turned the northern parts of Mali into the most insecure zone in West Africa today. *The situation not only poses a serious threat to the unity and territorial integrity of Mali, but also, and*

[209] See, e.g., Serge Daniel, *AQMI. Al-Qaeda au Maghreb islamique. L'industrie de l'enlèvement* (Paris: Fayard 2012); cf. the MNLA's website, available at www.mnlamov.net.

[210] Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes' (n. 28), 866–7; Tancredi, 'Secession and the Use of Force' (n. 189), 83.

[211] Identical letters dated 11 January 2013 from the Permanent Representative of France to the United Nations, addressed to the Secretary-General and the President of the Security Council (UN Doc. S/1013/17) (emphasis added).

[212] See also letter dated 23 January 2013 from the Permanent Representative of the UK to the United Nations, addressed to the President of the UN Security Council (UN Doc. S/2013/58).

[213] Press releases from the MNLA: 'Communiqué N-46 – Protection des victimes civiles et respect de la frontière entre l'Azawad et Mali', Tinzawatane (Azawad), 12 January 2013; 'Communiqué N-47 – Récupérations des villes', Ougadougou, 28 January 2013; 'Mise au point concernant la situation dans l'Azawad au 28.01.2013', Ougadougou, 28 January 2013.

> *more critically, a danger to regional and international peace and security*. In that respect, the Authority [i.e., the executive ECOWAS body] views the rebellion in the north of Mali as an aggression directed against a Member State of the Community and, as such, *an aggression against the Community*.[214]

The scheme of things evoked in this discourse moves a considerable way from that of a secession supposedly developed in a purely internal context. On the contrary, ECOWAS appeals to the idea of aggression as it derives from various instruments relating to Chapters VII and VIII of the UN Charter, albeit somewhat elliptically. Either way, the Malian president was to make an official appeal for 'ECOWAS aid in recovering the occupied territories of the North and in the fight against terrorism'.[215]

In short, it does not seem that the fight against secession as such was invoked as a legitimate ground for intervention by consent; rather, it was a combination of the fight against terrorism and counter-intervention that states set about, with the latter element depending on the point that the forces of AQMI and other terrorist movements active in northern Mali were largely of foreign origin. As was the case in relation to Yemen, Iraq, and Syria, those groups were also denounced as a threat to international peace and security. The consent of the inviting government appears to be not only the exercise of a right but also the implementation of a legal obligation to not let territory be used by irregular groups in contravention with the rights of other states. Accordingly, the arguments in support of Operation Serval seem to fit the context of positive law. It is not purely a matter of settling an internal dispute between the Bamako authorities and the Tuareg movement, but of protecting both the right of the Malian people to determine their political regime freely by protecting it from terrorist forces from abroad, and the other states' right to security.

Even so, the Malian case study exposes certain problems when invoking the argument of intervention by invitation, which will now be briefly explored.

C. *Problems Raised by the Invocation of Intervention by Invitation in the Malian Context*

Among the problems raised by the argument of intervention by invitation as it was invoked in the Malian case are limits concerning the power and status of the Malian authorities at the time of the intervention.

[214] Letter dated 5 April 2012 from the President of the Commission of the Economic Community of West African States, addressed to the Secretary-General, 19 April 2012 (emphasis added).

[215] Letter dated 1 September 2012, Bamako; text reproduced in *Le Monde*, 7 September 2012.

First, it might be observed that the Bamako government no longer had substantial effective control over Malian territory at the time when the French intervention occurred – although it would be going too far to deny its legitimacy for that reason alone. The right to request outside military intervention to protect the Malian people is an exercise of the right of self-determination and we have already discussed the limited requirements of effective control in discussion of the Yemen context. Only those situations in which the consenting authority no longer had any power at all (e.g., Somalia in 1992) have been considered problematic.[216] In the case of Mali, the situation was not so extreme, with the capital and a substantial part of the country still under the control of the central government at the critical point in time.[217]

Next, we must return to the problem of whether or not the government could be considered representative in the circumstances at hand. The authorities that made the application for intervention stemmed from a coup d'état that drove former President Amadou Toumani Touré from power on 22 March 2012.[218] The military junta, styled the 'Comité national de redressement de la démocratie et de la restauration de l'État' (CNRDRE), justified their action in terms of the need to fight more effectively against the rebellion in the north of the country. Various actors called its legitimacy into question.

- The African Union reacted immediately by suspending Mali under Article 30 of its constituent instrument, which states that 'Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union'.[219]
- ECOWAS 'refused to attribute any form of legitimacy' to the CNRDRE, and suspended Mali from all its decision-making organs under the additional protocol on democracy and good governance (Articles 1 and 45(2)), and from the African Charter on Democracy, Elections, and Governance. It adopted various political, diplomatic, economic, and financial sanctions, while reiterating its 'firm commitment to support Mali in defending its territorial integrity upon the return to constitutional order'.[220]

[216] See above, section II.

[217] Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes' (n. 28), 865–6; Bannelier and Christakis, 'The Intervention of France and African Countries in Mali' (n. 206), 822–3.

[218] *Keesing's Record of World Events* (2012), 50968.

[219] See Erika de Wet, *Military Assistance on Request and the Use of Force* (Oxford: OUP 2020), 58.

[220] ECOWAS, Extraordinary Summit of ECOWAS Heads of State and Government, 27 March 2012.

In light of these measures and their justifications, it was doubtful that the Malian government that came to power unconstitutionally would be able to express the will of the Malian population. Admittedly, the CNRDRE clearly remains a 'government' (if one reads Article 30 of the constituent instrument of the African Union) to which requests and demands are made – but such recognition does not seem to extend beyond de facto power, which can be exercised only provisionally and with limitations. It would be hard to understand how, by this logic, such a government could call on other states to support it against irregular forces.

And yet this is what happened on the ground: first, for ECOWAS, in September 2012; and then, for France, in January 2013. Of equal significance is that, far from being criticised, the military intervention conducted on this basis was largely welcomed, including by those who questioned the legitimacy of the Bamako authorities. While some states may have been reluctant to trumpet their involvement, most congratulated themselves on the launch of Operation Serval. On that same day, the ECOWAS chair thanked the 'French Government for [its] expeditious reaction aimed to stabilise the military situation in Mali'.[221] Some days later, the ECOWAS heads of state and government expressed their 'immense gratitude to France for having successfully launched operations, while observing Malian sovereignty and international legality, that contained the advance of terrorist and extremist groups'.[222] Likewise, on 25 January, the Peace and Security Council of the African Union:

> . . . expresse[d] satisfaction at the fact that the prompt and efficient assistance extended by France at the request of the Malian authorities, within the framework of Security Council resolution 2085 (2012) and article 51 of the United Nations Charter, has made it possible to block the military offensive launched by these groups.[223]

Is the legality of the French intervention founded on the consent of the Malian government? Or is it founded on Security Council Resolution 2085 (2012) and/or Article 51 of the UN Charter? Or both? What is assured is that this intervention, which is based on invitation issued by the otherwise contested authorities of Bamako, is considered to be lawful.

To better understand why states might refuse to accord any legitimacy to the government and yet consider this (illegitimate) government capable of

[221] ECOWAS, Press release no. 005/2013, 11 January 2013.

[222] ECOWAS, Extraordinary Session of the Authority of ECOWAS Heads of State and Government, 19 January 2013. See also Forty-Second Ordinary Session of the ECOWAS Authority of Heads of State and Government, Yamassoukro, 27–28 February 2013, para. 25.

[223] Assembly/AU/Decl.3 (XX), para. 5.

expressing the will of the Malian population when requesting military intervention from the outside, as well as thereby to evaluate the scope of this instance, it is essential to analyse in detail the Security Council's changed position in respect of Mali.

D. *The Decisive Role of the UN Security Council in the Malian Context*

The UN Security Council was particularly active in the Malian crisis.[224] By deciding on certain intricate questions with which it characterised the situation in Mali, the Security Council seemed to allow France to rely on the invitation from the Bamako authorities.[225]

Initially, it appears that the Security Council denied all parties in the civil war the right to validly represent the will of the Malian population. Characteristic of this was the following presidential declaration of 26 March 2012, by which:

> The Security Council condemns the acts initiated and carried out by mutinous troops against the democratically-elected government and demands they cease all violence and return to their barracks. The Security Council calls for the restoration of constitutional order, and the holding of elections as previously scheduled.
>
> The Security Council condemns the attacks initiated and carried out by rebel groups against Malian Government forces and calls on the rebels to cease all violence and to seek a peaceful solution through appropriate political dialogue.
>
> The Security Council emphasizes the need to uphold and respect the sovereignty, unity and territorial integrity of Mali.[226]

Accordingly, the Security Council denounced both the new authorities in Bamako and the irregular forces out of respect for Mali's territorial integrity.

In this regard, the connection between the Malian rebels and terrorist groups from abroad was rapidly established. As early as 10 April 2012, members of the Security Council were demanding 'an immediate cessation of hostilities in the north of Mali by rebel groups', and expressing their 'deep concern at the increased terrorist threat in the north of Mali due to the presence among the rebels of members of Al-Qaida in the Islamic Maghreb and extremist

[224] See Bannelier and Christakis, 'The Intervention of France and African Countries in Mali' (n. 206), 824–7.

[225] Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes' (n. 28), section 2.

[226] UN SC Pres. Statement on Peace and Security in Africa, S/PRST/2012/7, 26 March 2012. See also Security Council Press Statement on the Mali Crisis, SC/10590-AFR/2359, 22 March 2012, in which the members of the Security Council 'strongly condemn[ed] the forcible seizure of power from the democratically-elected Government of Mali by some elements of the Malian armed forces'.

elements'.[227] In this context, the Security Council provided its resolute support for the measures adopted by ECOWAS.[228] On 18 June, it took note of ECOWAS's request for authorisation 'to ensure the protection of Malian State institutions and assist in upholding the territorial integrity of Mali and in combating terrorism'.[229] In the absence of any authority capable of issuing an invitation to intervene in the conflict, the Security Council, like the competent regional organisations, seemed to require authorisation under Chapter VII of the UN Charter to justify assistance of the 'Malian State' rather than the 'government'. Of course, it is difficult to determine whether this request was inspired only by political motives of by a genuine legal conviction. In any event, such authorisation was forthcoming on 20 December 2012, with the adoption of Resolution 2085 (2012), whereby the Security Council:

> *Reaffirming* its strong commitment to the sovereignty, unity and territorial integrity of Mali,
> [. . .]
> 2. *Demands* that Malian rebel groups cut off all ties to terrorist organizations, notably Al-Qaida in Islamic Maghreb (AQIM) and associated groups, . . .
> [. . .]
> 9. *Decides* to authorize the deployment of an African-led International Support Mission in Mali (AFISMA) for an initial period of one year, which shall take all necessary measures . . .
>
> (b) To support the Malian authorities in recovering the areas in the north of its territory under the control of terrorist, extremist and armed groups and in reducing the threat posed by terrorist organizations, including AQIM, MUJWA and associated extremist groups, . . . [230]

At this stage, the Security Council's logic was not difficult to identify. The Malian crisis was not considered a civil war but a threat to peace in the region, because of the involvement of terrorist groups, some of which came from abroad. It was therefore because of these particular circumstances that irregular forces were called upon to relinquish their demands, including their demands for secession, as can be inferred from the reference in para. 3 of the Resolution to the territorial integrity of Mali. As for the Bamako authorities, it appears that – because it would be difficult for them to represent the will of the Malian people

[227] Security Council Press Statement on the Mali Crisis, SC/10603-AFR/2370, 10 April 2012.
[228] UN SC Pres. Statement on Peace and Security in Africa, S/PRST/2012/9, 4 April 2012.
[229] Security Council Press Statement on Mali Crisis, SC/10676-AFR/2407, 18 June 2012.
[230] UN SC Res. 2085 of 20 December 2012.

in conformity with the principle of self-determination – they were not considered sufficiently legitimate to issue an invitation validating foreign intervention, which is why they asked the Security Council to authorise it. Alongside this, and contrary to what a reading of some of its earlier statements might suggest, ECOWAS could plainly intervene only on the basis of such authorisation. Neither the provisions of its constituent instrument nor its collective security instrument nor self-defence could apparently provide autonomous legal grounds. In other words, the Security Council seems here, in the absence of any validly issued invitation, to have reasserted its authority pursuant to Chapters VII and VIII of the UN Charter – in particular, Article 53.

However, and second, it seems that the Security Council decided an outside military intervention could indeed be conducted, without authorisation, solely on the basis of an invitation from the Malian government. It is important to know that the African forces authorised to intervene under Resolution 2085 (2013) were not ready, for operational reasons, to take action. Making the most of this situation, the forces of AQIM and their allies launched a big offensive in late 2012 and early 2013; it was then that Paris decided, in cooperation with Bamako, to intervene on the ground. It was under these circumstances that, on 10 January 2013 (i.e., on the eve of the launch of Operation Serval), the Security Council members recalled 'the urgent need to counter the increasing terrorist threat in Mali' and 'reiterate[d] their call to Member States to assist the settlement of the crisis in Mali and, in particular, to provide assistance to the Malian Defence and Security Forces in order to reduce the threat posed by terrorist organizations and associated groups'.[231]

In the context in which it was adopted, a press release of this kind could hardly be interpreted as anything other than a green light for French intervention. Legally, it appears the Security Council justified this in the name of assistance to the authorities in their fight against international terrorism. A reading of Resolution 2100 (2013), adopted on 25 April 2013, leaves little doubt about this, since the Security Council:

> ... welcom[es] the swift action by the French forces, at the request of the transitional authorities of Mali, to stop the offensive of terrorist, extremist and armed groups towards the south of Mali and commending the efforts to restore the territorial integrity of Mali by the Malian Defence and Security Forces, with the support of French forces and the troops of the African-led International Support Mission in Mali (AFISMA).[232]

[231] Security Council Press Statement on the Mali Crisis, SC/10878-AFR/2502, 10 January 2013.
[232] UN SC Res. 2100 of 25 April 2013 (emphasis added).

In the same Resolution, the Council reiterated its denunciation of terrorist groups and called for most rebel groups to lay down their arms while the peacekeeping operation (AFISMA) was set up, which was authorised to use force in carrying out its mandate. France itself was authorised to use force in support of the UN forces and in coordination with the UN Secretary-General, all without the legal basis of consent from the Malian government being called into question.[233]

The shifting of the position of the Security Council raises questions. In the period before the launch of Operation Serval on 10 January 2013, the Council seems to have thought that only the authorisation technique could provide a legal foundation for an outside military intervention, in light of the difficulty of relying on an invitation from the Malian authorities. After the intervention, such an invitation appears to have been considered sufficient, in consideration of the seriousness of the situation, with terrorist forces arriving at least partially from abroad. In this context, the only way of restoring a degree of coherence was to position the Bamako authorities as engaged in a normalisation process, which would suffice to enable them to validly issue an invitation in January 2013. It is important to realise that, as of 10 April 2012, a 'framework agreement providing for a series of steps for the restoration of constitutional order' had been concluded between the perpetrators of the coup d'état in Mali and the mediation of ECOWAS, which the Security Council welcomed.[234] The Council members also 'welcome[d] the appointment of a Government of National Unity in Mali' and 'expressed their support to the work of the Interim President of Mali, Dioncounda Traoré';[235] on 12 October 2012, the Security Council also '[w]elcome[d] the appointment of a Government of National Unity in Mali'.[236]

Ultimately, the Malian case study is interesting in more than one way. First, it does not challenge the IDI approach, according to which a valid intervention by invitation must respect the right of peoples to self-determination: the intervening authorities did not settle for a reference to consent provided by government authorities.[237] Like the international collective security organisations involved in the crisis, they constantly relied instead on the fight against

[233] Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes' (n. 28), section 2.2.

[234] Security Council Press Statement on the Mali Crisis, SC/10603-AFR/2370, 10 April 2012. See also Security Council Press Statement on Mali, SC/10741-AFR/2430, 10 August 2012.

[235] Security Council Press Statement on Mali, SC/10772-AFR/2443, 21 September 2012. See also Security Council Press Statement on Mali, SC/10851-AFR/2487, 11 December 2012.

[236] UN SC Res. 2071 of 12 October 2012.

[237] Bannelier and Christakis, 'The Intervention of France and African Countries in Mali' (n. 206), 827.

international terrorism. This is a comparable scheme to that found in the case studies of Yemen, Iraq, and Syria. Once again, to the extent that it is a matter of preventing the perpetration of terrorist acts throughout the region (or even beyond), the consent given by the Malian government can be considered an implementation of its international obligation to not allow its territory to be used for ends contrary to the rights of other states.

Second, it was not the fight against secession, as such, that was evoked as direct and autonomous justification. Beyond the claims of the Tuareg minority in Mali, ties with groups explicitly listed as terrorist organisations were denounced. The fact that those groups included in their ranks elements from abroad seems to have been decisive. It is within this context that it is possible to understand the reference to respect for Mali's territorial integrity and even, in some instances, the reference to a very broadly defined concept of 'aggression'. Such factors move us far away from a situation of 'civil war', or of classical secessionist conflict, within the meaning of the IDI's Wiesbaden Resolution III.

Third, the role of the Security Council was once again decisive in the case of Mali.[238] This time – and this factor is absent in the other cases analysed so far – both rebel groups and the government authorities were denied the right to express the will of all or part of the population of the state concerned. This double accusation logically led the Security Council to accept responsibility and, in the absence of any consent that might be validly issued, to authorise an intervention itself. However, in light of the changing situation on the ground, the Security Council suddenly accepted that an invitation from the Bamako authorities, while engaged in a normalisation process, could provisionally provide a basis for the French military operation. It is therefore pragmatism, rather than formal legal logic, that characterises the Security Council's action in the Malian context – an attitude we shall see again in exploring ECOWAS's intervention in The Gambia a few years later.

V. PROTECTION OF DEMOCRACY? THE ECOWAS INTERVENTION IN THE GAMBIA

A. *The Existing Legal Framework: Democracy and Self-Determination*

As we saw at the start of the chapter, common Article 1 ICCPR and Article 1 ICESCR states that '[a]ll peoples have the right to self-determination. By virtue of that right they freely determine their political status.' Self-determination is not

[238] Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes' (n. 28), 867 *et seq*.

envisaged here in its 'external' aspect – that is, with respect to another state – but rather 'internally', within the state itself.[239] Thus each people within a state has the right to choose its leaders. Article 1 is often connected with various other rights, such as freedom of thought or assembly, or of speech, and the right to free elections at reasonable intervals, as well as other political rights.[240] It is therefore fairly logical to associate self-determination with democracy, and it is on this basis that coups d'état or unconstitutional changes of government are increasingly condemned,[241] as just seen in the example of Mali in 2012. At the same time, it is difficult to present the protection of democracy as a legitimate ground for outside intervention. This is obvious for any unilateral military intervention conducted without authorisation from the UN Security Council or invitation issued by the local authorities.[242] Even in the event of an invitation, the lawfulness of such a military intervention may appear dubious.

The problem lies in defining what is meant by 'democracy' and in identifying those who can claim to be 'democratic' authorities. In the event of a civil war, each of the parties systematically claims to represent the will of the people, thereby denying such capacity to the other party. The very purpose of the internal struggle or debate is therefore to determine who can represent the will of the population (and how). Pursuant to the general principles set out above, international law in this respect is

[239] Edmond Jouve, *Le droit des peuples* (Paris: PUF 1986), 81 *et seq*.; James Crawford, 'Democracy and International Law', *British Yearbook of International Law* 64 (1993), 113–33 (116); Thomas Franck, 'The Emerging Right to Democratic Governance', *American Journal of International Law* 86 (1992), 46–91 (52–60).

[240] Antonio Cassese, 'The Self-Determination of Peoples', in Louis Henkin (ed.), *The International Bill of Human Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press 1981), 92–113 (154–5).

[241] Ndiva Kofele-Kale, 'Participatory Rights in Africa: A Brief Overview of an Emerging Regional Custom', *Netherlands International Law Review* 55 (2008), 233–59; Joseph Kazadi Mpiana, 'L'Union africaine face à la gestion des changements anticonstitutionnels de gouvernement', *Revue québecoise de droit international* 25 (2012), 101–41; Armel Lali, 'La perception de l'état de droit dans le droit et la pratique de l'Union africaine', in Société française pour le droit international (SFDI), *L'État de droit et le droit international* (Paris: Pedone 2009), 287–300; Romuald Likibi, *La Charte africaine pour la démocratie, les élections et la gouvernance. Analyse et commentaires* (Paris: Publibook 2012); P.J. Glen, 'Institutionalising Democracy in Africa: A Comment on the African Charter on Democracy, Elections and Governance', *African Journal of Legal Studies* 5 (2012), 149–75; Blaise Tchikaya, 'La Charte africaine de la démocratie, des élections et de la gouvernance', *Annuaire français de droit international* 55 (2009), 515–28.

[242] See Oscar Schachter, 'The Legality of Pro-Democratic Invasion', *American Journal of International Law* 78 (1984), 645–50; Michael Byers and Simon Chesterman. '"You, the People": Pro-Democratic Intervention in International Law', in Gregory H. Fox and Brad R. Roth (eds), *Democratic Governance and International Law* (Cambridge: CUP 2000), 259–92.

generally characterised by neutrality – and this is the case, in any event, when ius contra bellum comes into play. Here, a connection must be made between the internal and external aspects of the right to self-determination: without outside interference, each people has the right to determine its own political regime, including the ability to choose its own conception of democracy and the individuals who are best able to embody it. Third states cannot therefore use, as a pretext, the supposedly democratic character of one or other party, whether they are rebels or government authorities, to interfere in this debate.[243]

Some authors have, however, called this conception into question, observing that democracy has been regularly invoked in support of interventions conducted at the invitation of governments.[244] This argument does not readily square with the discourse of intervening and third states in the three precedents so far evoked along these lines. In the case of Haiti, too, the restoration of the legitimate president who had been overthrown by a coup d'état came about only as a consequence of the Security Council's authorisation, since the consent of President Aristide was plainly not sufficient.[245] The situation in Sierra Leone was different, ECOWAS forces intervening *without* authorisation from the Security Council against a military junta that had toppled the elected government.[246] At the same time, these forces – thought to be working to maintain peace[247] – did not directly invoke the consent of the government but rather relied on self-defence, with the organisation's troops present on the spot under an agreement previously accepted by all of the parties that had supposedly been attacked by the authorities in power.[248] Lastly, in the Côte d'Ivoire, it is recognised that the dispute in 2011 between incumbent President Laurent Gbagbo and his challenger, Allassane Ouattara, over the election results led to an outside military operation that enabled the latter to come to power.[249] However, the operation was not conducted on the basis of a call from Ouattara (whom the United Nations had designated the winner of the elections), but because the Security Council adopted a resolution authorising

[243] See ICJ, *Nicaragua* (n. 10), 133, para. 263.
[244] See Lieblich, *International Law and Civil Wars* (n. 11), 209 *et seq.*
[245] Corten, *The Law against War* (n. 28.), 306–9.
[246] *Keesing's Record of World Events* (1997), 41672. See ECOWAS, Communiqué, UN Doc. S/1997/499 of 27 June 1997, paras 9 and 14.
[247] UN SC Res. 1162 of 17 April 1998; UN SC Res. 1171 of 5 June 1998.
[248] Corten, *The Law against War* (n. 29), 286–7 and 379–82. See particularly the Conakry Agreement of 23 October 1997, UN Doc. S/1997/824, 28 October 1997.
[249] Julie Dubé Gagnon, 'ECOWAS's Right to Intervene in Cote d'Ivoire to Install Alassane Ouattara as President-Elect', *Notre Dame Journal of International and Comparative Law* 3 (2013), 51–72.

states to take all necessary measures to protect civilians affected by the conflict.[250] In short, the protection of democracy has been used only in support of another classical legal argument: Security Council authorisation, in the cases of Haiti and Côte d'Ivoire; and self-defence of the peacekeeping forces, in the case of Sierra Leone. Has this practice been called into question? This is the question that we will examine in what follows, in the context of the ECOWAS intervention in The Gambia – an intervention explicitly named 'Restore Democracy'.[251]

B. *Was the Protection of Democracy Invoked in the Gambian Context?*

The Gambia is a fine illustration of the controversies that may arise from democracy: it was a matter of making a pronouncement on the result of elections held in the country on 1 December 2016. According to the Independent Electoral Commission of The Gambia, one of the candidates, Adama Barrow, had won the most votes – more than incumbent President Yahya Jammeh.[252] But, after initially conceding defeat, the latter had had a change of heart: on 10 December, he suddenly denounced irregularities in the electoral process, refused to give up power, and instead called for new elections.[253]

This move was swiftly denounced by other African states.[254] As early as 11 December – that is, the day after Yahya Jammeh announced he was refusing to stand down – the chair of the ECOWAS Authority of Heads of State and Government reacted forcefully:

> [T]he will of the Gambian people, freely expressed in exercise of their franchise, must be respected by all without precondition. This includes President Jammeh and officials of his Government … Our common commitment to the precepts in the Charters and Treaties of these regional, continental and global institutions are binding and prescribe consequences for non-compliance.[255]

[250] UN SC Res. 1975 of 30 March 2011.

[251] Mohamed S. Helal, 'The ECOWAS Intervention in The Gambia', in Ruys et al., *Use of Force* (n. 67), 912–32 (932).

[252] Muhammed Jay, 'The Total Final Election Results, Independent Electoral Commission of The Gambia', *Independent Electoral Commission*, 5 December 2016.

[253] 'Gambia Leader Yahya Jammeh Rejects Election Result', *BBC News*, 10 December 2016.

[254] Helal, 'The ECOWAS Intervention in the Gambia' (n. 251), 912–19.

[255] ECOWAS, 'The Chairperson of ECOWAS Speaks on the Current Political Situation in The Gambia', *ReliefWeb*, 11 December 2016, available at https://reliefweb.int/report/gambia/chairperson-ecowas-speaks-current-political-situation-gambia.

Some days later, the ECOWAS Authority called on President Jammeh to 'accept the result of the polls and refrain from any action likely to compromise the transition and peaceful transfer of power to the President-elect', and it committed to taking the following measures:

a) To uphold the result of 1 December 2016 election in the Republic of The Gambia.
b) Guarantee the Safety and protection of the President-elect Mr. Adama Barrow.
c) The Head of States will attend the inauguration of the President-elect Adama Barrow who must be sworn in on 19 January 2017 in conformity with the Gambian constitution.

[. . .]

h) The Authority shall take all necessary measures to strictly enforce the results of the 1 December 2016 elections.[256]

In parallel, Dr Nkosazana Dlamini-Zuma, chair of the African Union Commission, reaffirmed 'the imperative need for the concerned Gambian stakeholders to strictly comply with the rule of law and respect of the will of their people',[257] while the Union's Peace and Security Council called upon 'the Government of The Gambia and all other concerned Gambian stakeholders to work together to facilitate a peaceful and orderly transfer of power to the new President of The Gambia', and stressed the 'determination of the AU to take all necessary measures, in line with the relevant AU Instruments, with a view to ensuring full respect and compliance with the will and desire expressed by the people of The Gambia on 1 December 2016'.[258] In another decision, the AU Council affirmed its 'zero tolerance policy with regard to coup d'état and unconstitutional changes of government in Africa', and specified that, 'as of 19 January 2017, President Yahya Jammeh would no longer be recognised as the legitimate Head of State of The Gambia'. That Council then threatened Yahya Jammeh with 'serious consequences in the event that his action causes any crisis that could lead to political disorder, humanitarian or human rights disaster, including loss of innocent lives and destruction of properties'. Lastly, it

[256] ECOWAS, Fiftieth Ordinary Session of the Authority of Heads of State and Government of the Economic Community of West African States (17 December 2016) (emphasis added).

[257] African Union, 'The AU Calls for a Speedy, Orderly and Peaceful Transition and Transfer of Power to the New Authorities in The Gambia', 10 December 2016, available at www.peaceau.org/en/article/the-au-calls-for-a-speedy-orderly-and-peaceful-transition-and-transfer-of-power-to-the-new-authorities-in-the-gambia.

[258] African Union Peace and Security Council, Communiqué of the Peace and Security Council on the Post-Election Situation in the Islamic Republic of The Gambia, 13 December 2016.

commended 'ECOWAS for its principled stand with regard to the situation in The Gambia, and reaffirm[ed]s its full support to the decisions adopted by ECOWAS . . . including the consideration to use all necessary means to ensure the respect of the will of the people of The Gambia.'[259]

Despite these condemnations and this pressure, Yahya Jammeh still had not left office by 19 January. On that day, Adama Barrow was nevertheless solemnly sworn in as the new president in the premises of the Gambian Embassy in Dakar, Senegal.[260] Hours later, at the invitation of new President Barrow, ECOWAS forces announced its launch of Operation 'Restore Democracy', Senegalese military units crossing the boundary with The Gambia without meeting any resistance.[261] It was in this context that, after some ultimate negotiations, Jammeh left the country for Equatorial Guinea on 21 January 2017. Since that date, Adama Barrow has effectively held office as president of the Republic of The Gambia, with no further contest.

So it is both in the name of the will of the Gambian people and therefore their right to self-determination, as well as in the name of respect for democracy, that this intervention by invitation was justified – an argument that, under the circumstances, raised certain questions, as the intervening powers themselves recognised.

C. *Problems Raised by the Invocation of Intervention by Invitation in the Gambian Context*

First of all, it should be pointed out that the operation was conducted in observance of the results in a contestable Gambian electoral procedure. Even before the vote was held, organisations for the defence of human rights denounced the conditions surrounding the electoral campaign, which were said to favour the incumbent president (Yammeh).[262] ECOWAS announced

[259] African Union, 'The 647th Meeting of the AU Peace and Security Council on the Post-Election Situation in The Islamic Republic of The Gambia', 17 January 2017, available at www.peaceau.org/en/article/the-647th-meeting-of-the-au-peace-and-security-council-on-the-post-election-situation-in-the-islamic-republic-of-the-gambia.

[260] 'Adama Barrow Sworn in as Gambia's President in Senegal', *Al Jazeera*, 19 January 2017, available at www.aljazeera.com/news/2017/1/19/adama-barrow-sworn-in-as-gambias-president-in-senegal.

[261] Ruth Maclean, 'Troops Enter The Gambia after Adama Barrow is Inaugurated in Senegal', *The Guardian*, 19 January 2017, available at www.theguardian.com/world/2017/jan/19/new-gambian-leader-adama-barrow-sworn-in-at-ceremony-in-senegal.

[262] See *Human Rights Watch*, 'More Fear Than Fair: Gambia's 2016 Presidential Election', 2 November 2016, available at www.hrw.org/report/2016/11/02/more-fear-fair/gambias-2016-presidential-election.

that it would refuse to supervise, and therefore legitimise, the process;[263] observers from the European Union were prevented from entering The Gambia.[264] Only a small contingent from the African Union was finally able to act as impartial observer.[265] As for the Gambian Electoral Commission, it denounced irregularities, determining that they did not affect the outcome of the vote.[266] It was on this basis that Yahya Jammeh seized on 'serious and unacceptable abnormalities which have reportedly transpired during the electoral process', going on to 'recommend fresh and transparent elections which will be officiated by a God-fearing and independent electoral commission'.[267] An appeal was immediately laid before the Supreme Court[268] and the National Assembly. Given the exceptional circumstances, those domestic bodies decided to formally extend the incumbent president's term of office for three months.[269]

Was it legitimate for outside actors to substitute their own assessment regarding the legality of the elections for that of a competent Gambian court of law or legislative assembly? This is the paradox of an international norm meant to protect the 'rule of law', since it is in the name of respect for Gambian law that procedures and courts instituted by that same law were ultimately called into question.[270] In this case, outside actors questioned the independence of the Supreme Court judges, who allegedly had been subjected to strong pressure from the powers that be[271] – but it may be questioned whether the judicial systems of every member state of ECOWAS, or of the African Union, and all the electoral processes within those countries

[263] African News Agency, 'ECOWAS to Boycott Gambian Presidential Elections on Thursday', *Polity*, 30 November 2016, available at www.polity.org.za/article/ecowas-to-boycott-gambian-presidential-elections-on-thursday-2016-11-30.

[264] Reuters Staff, 'EU Says Refused Access to Observe Gambia's December 1 Election', *Reuters*, 18 November 2016, available at www.reuters.com/article/us-gambia-election-idUSKBN13D29N.

[265] 'Gambia's Jammeh Loses to Adama Barrow in Shock Election Result', *BBC News*, 2 December 2016, available at www.bbc.com/news/world-africa-38183906.

[266] Jay, 'The Total Final Election Results' (n. 252).

[267] 'Gambia Leader Yahya Jammeh Rejects Election Result', *BBC News*, 10 December 2016, available at www.bbc.com/news/world-africa-38271480.

[268] Edward McAllister, 'Gambia's President Jammeh to Challenge Election Loss at Top Court', *Reuters*, 11 December 2016, available at www.reuters.com/article/us-gambia-election-idUSKBN1400LN.

[269] 'The Gambia's Yahya Jammeh's Term Extended by Parliament', *BBC News*, 18 January 2017, available at www.bbc.com/news/world-africa-38662000.

[270] Barbara Delcourt, 'L'État de droit, pierre angulaire de la coexistence pacifique en Europe?', in Cao-Huy Thuan and Alain Fenet (eds), *La coexistence, enjeu européen* (Paris: PUF 1998), 241–57 (249).

[271] 'Gambia: Jammeh Trying to Use Nigerian Lawyers to Remain in Office – Gambian Lawyers', *AfricaNews*, 13 December 2016.

are themselves beyond reproach. This difficulty seems to plead in favour of the traditional principle of neutrality in situations of civil war or internal disorder, without prejudice to the action of the Security Council, which shall be examined below.

A second difficulty raised by Operation 'Restore Democracy' is that of the fragile – to say the least – authority of the person who issued the invitation, Adama Barrow.[272] He became president only after hastily swearing the oath in Senegalese territory.[273] It is difficult to state an opinion on the legality of this act under Gambian law, but one cannot help harbouring a few doubts[274] – particularly as another oath was later sworn on 18 February 2017, in the capital Banjul, at the national festival celebration.[275] And we might add that Adama Barrow's first political act was to consent to an outside military intervention in The Gambia. According to some sources,[276] the operation may even have begun before that consent was issued, which may legitimately cast doubt on its validity.[277]

Beyond these formal considerations, what prompts more questions in the case of Adama Barrow is his total lack of effective control at the time when he invited ECOWAS troops from Dakar to intervene. Barrow did so without controlling the tiniest parcel of Gambian territory. This plainly poses a problem with respect to the condition of effective control being exercised by the inviting authority.[278] The situation is not comparable to that which prevailed in Mali, Syria, Iraq, or even in Yemen, where President Hadi, even though driven from the capital, still held a degree of control over part of the

[272] Helal, 'The ECOWAS Intervention in the Gambia' (n. 251), 920–2.

[273] Callum Paton, 'Adama Barrow Inaugurated as President of Gambia amid Standoff with Predecessor Yahya Jammeh', *International Business Times*, 19 January 2017, available at www.ibtimes.co.uk/adama-barrow-inaugurated-president-gambia-amid-standoff-predecessor-yahya-jammeh-1602051.

[274] See also Claus Kreß and Benjamin Nußberger, 'Pro-Democratic Intervention in Current International Law: The Case of The Gambia in January 2017', *Journal on the Use of Force and International Law* 4 (2017), 239–52 (248); Sâ Benjamin Traoré and Alimata Diallo, 'De la légalité de l'intervention militaire de janvier 2017 en Gambie', *Revue belge de droit international* 52 (2017), 666–707 (675–7).

[275] Michael Oduor, 'Thousands of Gambians Flock Barrow's Inauguration and Independence Day', *Africa News*, 18 February 2017, available at www.africanews.com/2017/02/18/thousands-of-gambians-flock-barrow-s-inauguration-and-independence-day.

[276] Dionne Searcey, 'Why Democracy Prevailed in Gambia', *New York Times*, 30 January 2017.

[277] Kreß and Nußberger, 'Pro-Democratic Intervention in Current International Law' (n. 274), 251; de Wet, *Military Assistance on Request* (n. 219), 89.

[278] Georg Nolte, 'Intervention by Invitation', in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopaedia of Public International Law* (Oxford: OUP 2017), 587 (see also online edition, directed by Anne Peters, available at https://opil.ouplaw.com/home/mpil).

territory.[279] Here, instead we are faced with an authority in exile – an exile following not a foreign intervention or occupation but purely the result of internal conflict. And as a simple opposition candidate claiming victory in the elections, Adama Barrow *never* exercised any effective control, which again separates this from the other comparable case studies. Under the circumstances, as already pointed out, custom would seem to consecrate the need to rely on Security Council authorisation, as in Somalia, Haiti, or even Côte d'Ivoire. Never has an authority devoid of any effective control been able to issue an invitation capable of forming an autonomous legal basis for outside military intervention.

In the case of The Gambia, the intervening forces implicitly admitted the weakness of the intervention by invitation argument. In its decision of 15 December 2016, ECOWAS 'Request[ed] the endorsement of the AU and the UN on all decisions taken on the matter of The Gambia'.[280] Two days later, Senegal filed a draft resolution with the Security Council, by which draft approval was to be given to the will manifested by ECOWAS to take 'all necessary means' to settle the situation in The Gambia.[281] On 13 January 2017, during a Security Council debate, Mohamed Ibn Chambas, the UN Secretary-General's Special Representative for West Africa, confirmed that 'ECOWAS intends to seek the endorsement of the African Union Peace and Security Council *and the formal approval of the Security Council* to deploy troops to the Gambia'.[282]

This position is perfectly in keeping with the terms of the appeal made by Adama Barrow himself: 'I hereby make a special appeal to ECOWAS, AU, *and the UN, particularly the Security Council*, to support the government and people of the Gambia in enforcing their will, restore their sovereignty and constitutional legitimacy.'[283] The invitation was made very generally to the two regional organisations, ECOWAS and the African Union, but more 'particularly' to the Security Council.[284]

It might even be argued that the invitation does not cover an action by the two regional organisations without authorisation from the UN Security Council. Even so, this constant and resolute concern for the inviting authority

[279] Traoré and Diallo, 'De la légalité de l'intervention' (n. 274), 678–80.
[280] ECOWAS, Fiftieth Ordinary Session of the Authority of Heads of State and Government of the Economic Community of West African States, 17 December 2016.
[281] Security Council Report, 'Resolution on The Gambia', 19 January 2017, available at www.securitycouncilreport.org/whatsinblue/2017/01/resolution-on-the-gambia.php.
[282] UN SC Verbatim Record, UN Doc. S/PV.7862 of 13 January 2017 (emphasis added).
[283] See Maclean, 'Troops Enter The Gambia' (n. 261) (emphasis added).
[284] See Traoré and Diallo, 'De la légalité de l'intervention' (n. 274), 675–6.

and the invited powers to refer to the Security Council is significant: the invitation itself does not seem to be an autonomous and sufficient legal basis for intervention[285] – a position that is easy to understand in the context of customary law. It cannot readily be claimed, then, that the invocation of the restoration of democracy is sufficient to circumvent the necessity to respect the right of a people to determine their own political regime without external interference. If this had been the case, the constant reference to the requirement of the authorisation – or at least the support – of the Security Council would have been meaningless, legally speaking. The case of The Gambia therefore relates more particularly to the need to take the Council's position into account, which may also reveal why the lawfulness of this intervention has not been called into question.[286]

D. *The Decisive Role of the UN Security Council in the Gambian Context*

The UN Security Council showed itself to be particularly active in the case of The Gambia. Three key points emerge from a reading of the resolutions or declarations that it adopted during the crisis. First, the Council denied all legitimacy to President Jammeh's refusal to recognise the outcome of the elections of 1 December 2016. A statement released to the press on 10 December reads:

> [T]he members of the Security Council strongly condemned the statement by the outgoing President of the Gambia, Yahya Jammeh, on 9 December rejecting the 1 December official election results . . .
>
> They called on him to respect the choice of the sovereign people of the Gambia, as he did on 2 December 2016, and to transfer, without condition and undue delay, power to the President-elect, Adama Barrow.[287]

Accordingly, the Security Council members considered the elections transparent and that the decision of the Gambian Independent Electoral Commission was entirely legitimate. They called for compliance with the will of the Gambian people and hence, in a certain way, with the right to self-determination internally. They based their position on the regional instruments of international law adopted by ECOWAS and the African Union.

[285] *Ibid.*, 681–2.
[286] Helal, 'The ECOWAS Intervention in the Gambia' (n. 251), 931.
[287] Security Council Press Statement on the Gambia Elections, SC/12616-AFR/3501, 10 December 2016.

Second, and alongside this, the Security Council recognised Adama Barrow as the legitimate president-elect. In a presidential declaration of 21 December 2016, while reiterating its position with respect to Yahya Jammeh:

> The Security Council welcomes and is encouraged by the decisions on the political situation in the Gambia of the Fiftieth Ordinary Session of the ECOWAS Authority held in Abuja on 17 December 2016 and the decisions of the AU Peace and Security Council, at its 644th meeting held on 12 December 2016, and the African Union to *recognize Mr. Adama Barrow as President-elect of the Gambia*.[288]

This recognition was reiterated on the day Barrow was first invested in Dakar, when the Security Council adopted a resolution in which it:

1. *Urges* all Gambian parties and stakeholders to respect the will of the people and the outcome of the election which recognized Adama Barrow as President-elect . . . ;
2. *Endorses* the decisions of ECOWAS and the African Union to recognize Mr. Adama Barrow as President of the Gambia;
3. *Calls upon* the countries in the region and the relevant regional organisation to cooperate with President Barrow in his efforts to realize the transition of power.[289]

The Security Council therefore called on the states and organisations of the region to 'cooperate' with 'President Barrow', who was plainly considered to be an authority in a position to represent the Gambian people and express their will.[290]

Yet – and this third is a significant factor – the Security Council did not give any 'authorisation' to those states or organisations to intervene.[291] True, it 'commends', 'welcomes', and 'expresses its full support to' the action of ECOWAS and the African Union – but, in spite of the will initially expressed by Senegal,[292] no authorisation to use 'all necessary means' is to be found in the final text of the Resolution, which does not refer either to Chapter VII of the UN Charter, or to

[288] UN SC Pres. Statement on Peace Consolidation in West Africa, S/PRST/2016/19, 21 December 2016 (emphasis added).

[289] UN SC Res. 2337 of 19 January 2017. See the declaration of the Peace and Security Council of the African Union in a letter dated 13 January 2017 from the Chargé d'affaires a.i. of the Permanent Mission of Senegal to the United Nations, addressed to the President of the Security Council, UN Doc. S/2017/43, 16 January 2017.

[290] Traoré and Diallo, 'De la légalité de l'intervention' (n. 274), 677.

[291] *Ibid.*, 680–7; Helal, 'The ECOWAS Intervention in the Gambia' (n. 251), 926; Kritsiotis, 'Intervention and the Problematisation of Consent', Chapter 1 in this volume.

[292] Senegal renounced asking the Council to authorise 'necessary measures' in its draft dated 19 January 2017, UN Doc. S/2017/55.

the existence of a threat to international peace. An examination of the debates that surrounded the adoption of this Resolution confirms that several states rejected the argument of authorisation.[293] Those states developed a narrative presenting the measures as non-coercive (under Article 52 of the UN Charter) and not as coercive measures requiring Security Council authorisation (under Article 53).[294] The Council also evoked ECOWAS's 'mediation', preferring not to categorise the military operations as such. This does not mean that military intervention was excluded, but, under such circumstances, it would be on the basis of another legal foundation rather than its own resolution that such an intervention would unfold.[295] The invitation from the president is explicitly evoked, with, for example, the United Kingdom's affirmation: '[I]t's very clear that if President Barrow asks for assistance, then that's something as the legitimate president of Gambia he's perfectly entitled to do.'[296] Thus the Security Council – or at least some of its members – followed the line taken in other instances, such as Sierra Leone in the 1990s, in which it had, without authorising them, given its blessing to military operations by ECOWAS aiming to restore power to authorities that had won the elections but been victims of a coup d'état.[297] Unlike in Sierra Leone, however, the Security Council made its pronouncement *before* the intervention in The Gambia was launched.

To conclude, it is worth underscoring a number of lessons that both diverge and converge with those of the recent practice examined above. First, the intervening states did not settle for the invitation from the president of The Gambia, particularly since his status was somewhat open to debate. This is probably why Senegal and ECOWAS insisted on the legitimacy of their objective to restore democracy – that is, to protect the internal right of the Gambian people to self-determination.

Second, at the same time, it is not certain if argument of self-determination would again be considered sufficient to justify an intervention by invitation, which can be understood both for reasons of principle (in the name of what outside powers could claim to impose their own conception of democracy) and because of the specific circumstances of the case at hand (especially the doubtful validity of the office of Adama Barrow and his complete absence of any effective control).

[293] Uruguay (UN Doc. S/PV.7866, 3); Bolivia (*ibid.*); Egypt (*ibid.*, 6). See also the Russian position: Security Council Report, 'Resolution on The Gambia' (n. 281).

[294] UN Doc. S/PV.7866, 19 January 2017, paras 2, 3, 6.

[295] Kreß and Nußberger, 'Pro-Democratic Intervention in Current International Law' (n. 274), 244.

[296] Edith M. Lederer, 'UN Adopts Resolution Backing Gambia's New President Barrow', *APnews*, 19 January 2017.

[297] Corten, *The Law against War* (n. 29), 372–80.

The connection was therefore systematically made with the support of the Security Council, which seized on the matter from the outset. As in other cases, this strategy can be explained by political considerations – especially the broad legitimacy provided by such support. But, given the terms contained in some of the discourses at which we have looked in this chapter, it cannot be excluded that the obtention of an authorisation (or at least an approval) was considered as a legal requirement. In this sense, and even if it is not exempt from certain ambiguities, I argue that this case study exposes as problematic any outside military interference in an internal conflict without the approval of the Security Council.

The Security Council adopted a somewhat ambiguous position. Declining the request for authorisation from Senegal, which would have brought the operation within the ambit of Article 53 of the Charter, the Council preferred to validate the authority of the new president of The Gambia, apparently conceiving the ECOWAS action as non-coercive, pursuant to Article 52. This avoided the creation of a (new) precedent of authorisation to use force in an internal electoral dispute, for the benefit of a decentralised action carried out by regional organisations, pursuant to Chapter VIII of the UN Charter. Perhaps even more so than in respect of Yemen, Syria, Iraq, and Mali, then, the Security Council seems, to have played a decisive part in appraising the conditions surrounding the intervention by invitation in The Gambia[298] – a role that does, however, raise a number of questions at which we will now look in the final part of the chapter.

VI. THE EXPANDING ROLE OF THE UN SECURITY COUNCIL

A. *Towards a Rationalisation of the Appraisal of the Right to Self-Determination of Peoples?*

Finally, it is submitted that practices in recent years do not challenge the IDI position, which establishes that an outside intervention in favour of a government must respect the right of the concerned people to exercise their right to self-determination. Whether in Yemen, Iraq, Syria, Mali, or The Gambia, states that have intervened on the basis of an invitation have not merely mentioned the existence of that invitation and pointed out that it was issued by an official authority of the state. There is no trace of cynical discourse, whereby it would suffice for two governments to cooperate militarily to enable one or other to help to put down an insurrection or internal challenge, while denying third states the

[298] Kreß and Nußberger, 'Pro-Democratic Intervention in Current International Law' (n. 274), 250.

capacity to criticise them in the name of international law. On the contrary, those systematically intervening relied on additional arguments related to the right to the self-determination of the people in the state in which the intervention occurred. In the case of Yemen and Saudi Arabia, the GCC claimed to act in response to an earlier intervention by Iran because of its alleged support of the Houthi rebels. In the case of Iraq and Syria, with the Western states on one side and Russia on the other, more emphasis was placed on the fight against international terrorism. France finally invoked the same reason in the case of Mali, too. In these three instances, terrorist activities were also denounced as threats to the security of third states – a factor that definitively excludes the principle of neutrality traditionally applied in cases of purely internal conflicts. Lastly, with respect to the unique context of intervention in The Gambia, Senegal and ECOWAS claimed to be acting to restore democracy – but, given the intricate character of that ground, at the same time they called for an authorisation, or at least the backing, of the Security Council.

This brings us to the second lesson of this study: the UN Security Council played a crucial role in each of the cases examined. First, it appraised and sometimes reconfigured the objectives as they were advanced by the intervening states. In the case of Yemen, the Council did not mention the implication of Iran but emphasised the fight against international terrorism as a decisive factor. In the cases of Iraq, Syria, and Mali, this was again the objective given precedence: it was understood that the involvement of foreign elements in the terrorist groups was not unrelated to the idea of counter-intervention. In this context, the Security Council also logically discredited these groups in political terms, denying them the right to claim to represent all or part of the population of the state concerned – as was the case for ISIL and for AQIM, for example. In parallel, the Security Council also legitimised certain contested public authorities, such as President Hadi in Yemen, the Malian government that came to power by a coup d'état, or President Barrow in The Gambia. In all three cases, limited, precarious, or even non-existent effective control was evident. And, in all of the precedents examined, the argument of consent was thus evaluated, reshaped, and reinforced according to Security Council action. In this way – as it had in the past, especially in Côte d'Ivoire[299] – the Council decided on conflicting claims concerning both the interpretation of internal law and the result of the electoral process. Thus

[299] Olivier Corten and Pierre Klein, 'L'action des Nations Unies en Côte d'Ivoire: jusqu'où le Conseil de sécurité peut-il intervenir dans l'ordre juridique interne des États?', in *L'Afrique et le droit international: variations sur l'organisation internationale, Liber Amicorum Raymond Ranjeva* (Paris: Pedone 2013), 55–81.

it is unsurprising that the intervening states systematically invoked the positions taken by the Security Council.

Backing from the Security Council for these interventions tends to both multilateralise and rationalise the interpretation of the right of peoples to self-determination.[300] It also answers criticisms of subjectivity that might be made of it: because what is the meaning of this right if it is left to be determined sovereignly and subjectively by the intervening states themselves? To measure the advance that the role of the Security Council may represent, one need only compare the different cases analysed in this chapter with that of the 2014 Russian intervention in Ukraine. In the instances in which the Security Council played a decisive role, there was very little criticism of the military interventions consented to, in Yemen, Iraq and Syria, and Mali or The Gambia. By contrast, during the Ukrainian crisis, when the Security Council was unable to act because one of its five permanent members was directly involved, the intervention drew strong criticism.[301] Russia relied on the consent of a president whom it claimed had been illegally ousted, who had fled to Moscow, and who no longer had any effective authority over any part of Ukrainian territory. Russian troops unilaterally moved into Crimea,[302] resulting in the proclamation of independence in this part of the Ukraine and its annexation by Russia. The UN General Assembly, seized by the question,[303] firmly condemned the annexation and asked states not to recognise its effects.[304] It can be readily seen in this particular case, then, that paralysis of the Security Council leaves the door open to unilateral and subjective interpretations, and that serious disagreements among states are logically apparent. This is a situation that seemed to be the norm during the Cold War period; by contrast, the other cases examined in this chapter attest to a growing trend towards objectification of the condition of respect for the right of peoples to self-determination, which frames intervention by invitation.

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

[301] Olivier Corten, 'The Russian Intervention in the Ukrainian Crisis: Was *Jus Contra Bellum* "Confirmed Rather Than Weakened"?', *Journal on the Use of Force and International Law* 2 (2015), 17–41; Enrico Milano, 'The Non-Recognition of Russia's Annexation of Crimea: Three Different Legal Approaches and One Unanswered Question', *Questions of International Law* 1 (2014), 35–55; Antonello Tancredi, 'The Russian Annexation of Crimea: Questions Relating to the Use of Force', *Questions of International Law* 1 (2014), 5–34; Christian Marxsen, 'Territorial Integrity and International Law: Its Concept and Implications for Crimea', *Heidelberg Journal of International Law* 75 (2015), 7–26.

[302] *Keesing's Record of World Events* (2014), 53188.

[303] UN Doc. S/PV.7138, 15 March 2014; UN Doc. S/2014/189, 15 March 2014.

[304] UN GA Res. 68/262 of 27 March 2014.

However, this trend towards increased objectivity should not be overestimated. By simply making incidental pronouncements on certain legal conditions of this type of intervention, the Security Council leaves the states concerned unsupervised. It no longer proceeds, as it did in the 1990s, to authorise the use of force by defining its objectives nor does it establish any control mechanisms to contain the resulting military actions.[305] It should not be forgotten that – other than in a few cases, such as Iraq in 1990 or Libya in 2011 – the technique of authorisation has mostly been grafted onto invitation issued by the states concerned, whether in Somalia, Bosnia-Herzegovina, Haiti, Albania, Yugoslavia, Afghanistan, or Iraq (in the last three instances, after military operations were conducted unilaterally).[306] This practice had already been perceived as a form of retreat from the spirit of the UN Charter, which requires instead that the Security Council should itself undertake actions to maintain or restore international peace.[307] But in instances like those of Yemen, Iraq, Syria, Mali, or The Gambia, not only does the Security Council decline to act directly, but also it declines to authorise and supervise the actions of states. Instead, it gives them carte blanche to act in a decentralised manner, merely validating the argument of intervention with consent. In this sense, the centralisation that can be deduced from recent practice must be understood in a very relative way.[308] Moreover, it is reasonable to question the legality and the legal effects of such practice.

B. *A Lawful Practice? What Legal Effects?*

Other than in the particular instance of collective self-defence, there is often a tendency to consider consent an autonomous legal basis for military intervention. Yet the connection between consent and Security Council action appears quite obvious, if we follow the logic of the UN Charter. Thus three situations can be identified, which appear have been accepted by the UN member states.

[305] Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Oxford: Hart 2004), 265 *et seq.*; Théodore Christakis and Karine Bannelier, 'Acteur vigilant ou spectateur impuissant? Le contrôle exercé par le Conseil de sécurité sur les états autorisés à recourir à la force', *Revue belge de droit international* 39 (2004), 498–527. See also IDI, Rhodes Resolution II (n. 22), Art. 2.

[306] Lieblich, *International Law and Civil Wars* (n. 11), 30–5 and 183.

[307] Burns H. Weston, 'Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy', *American Journal of International Law* 85 (1991), 516–35 (526); Yves Le Bouthillier and Michel Morin, 'Réflexions sur la validité des opérations entreprises contre l'Iraq en regard de la Charte des Nations Unies et du droit canadien', *Canadian Yearbook of International Law* 29 (1991), 155–64.

[308] See de Wet, *Military Assistance on Request* (n. 219), 219 *et seq.*

1. It may be that the Security Council decides to *limit* the possibilities of outside military intervention by deciding on an arms embargo, for example. A decision of the kind may exclude military action on the basis of self-defence (as in the case of Bosnia-Herzegovina, during the 1992–95 war),[309] but also on the basis of an intervention by consent (as in the case of Somalia in 2006).[310] The Security Council may also more directly require the withdrawal of foreign forces, even though they have been invited in by a state; this is how it acted in 2004, when Syrian troops were stationed in Lebanon, with the consent of the Lebanese government.[311] In such cases, it is clear that compliance with Security Council resolutions must prevail over any other possible legal justification for the use of force.
2. The Security Council may give an *authorisation* to justify intervention in states whose government or authorities no longer exercise sufficient effective control. Its action then makes the military operation lawful, independently and, as the case may be, above and beyond the invitation issued by the official representatives of the concerned state. We can place in this category a long string of peacekeeping operations conducted both with the consent of the parties and under the supervision of the Security Council, which may also, in some instances, grant UN forces on the ground authorisation to use force to perform their mission.[312] This is then a hybrid arrangement combining government consent and Security Council action, pursuant to the UN Charter.
3. As the cases analysed have demonstrated, in recent years the Security Council seems to have given precedence to a new arrangement consisting of the informal *validation* of interventions by consent to be conducted without its formal *authorisation*. The exceptional scheme of things already observed in the case of Sierra Leone in 1996 seems to be

[309] See Craig Scott, Abid Qureshi, Jasminka Kalajdzic, Francis Chang, Paul Michell and Peter Copeland, 'A Memorial for Bosnia: Framework of Legal Arguments Concerning the Lawfulness of the Maintenance of the United Nations Security Council's Arms Embargo on Bosnia and Herzegovina', *Michigan Journal of International law* 16 (2004), 1–140.

[310] Olivier Corten, 'La licéité douteuse de l'action militaire de l'Ethiopie en Somalie et ses implications sur l'argument de l'intervention consentie', *Revue générale de droit international public* 111 (2007), 513–37 (529 *et seq.*).

[311] UN SC Res. 1559 of 2 September 2004. See Christakis and Bannelier, '*Volenti non fit injuria*?' (n. 1), 131.

[312] See, e.g., UN SC Res. 836 of 4 June 1993, para. 9 (Bosnia-Herzegovina); UN SC Res. 814 of 26 March 1993, para. 4 (Somalia); UN SC Res. 1270 of 22 October 1999, para. 14 (Sierra Leone); UN SC Res. 1493 of 28 July 2003, para. 25 (DR Congo); UN SC Res. 1528 of 27 February 2004, para. 8 (Côte d'Ivoire).

repeating itself. It has transformed into standard practice without ever becoming the subject of any real controversy.

Accordingly, the discretionary competence conferred on the Security Council by the Charter seems to have led to a new arrangement in institutional customs.

If it is accepted that this possibility now constitutes a customary practice, what remains is to ask: what legal effects may follow in each particular case of intervention by invitation? In this respect, two hypotheses may be posited.

1. If the Security Council has validated the argument of consent prior to the triggering of an operation, then its validity cannot readily be called into question. It is hard to imagine, however fragile the argument in the abstract, that the consent of an authority should be challenged when the Security Council has clearly validated the possibility that the authority might invite a third state to intervene, whether in the name of legitimate purposes that it sets out in its resolutions or in other statements of its position.
2. Then – and here we move into the prospective domain – the question arises whether the states that intervene on the strength of an invitation should not also seek a sort of prior approval from the Security Council. The practice whereby states (such as Saudi Arabia in Yemen, the United States in Iraq, Russia in Syria, France in Mali, or Senegal in The Gambia) inform the Security Council about their actions could be an argument in favour of this.[313] But the procedural requirement set out in Article 51 of the Charter is not systematically reflected in practice with respect to intervention by invitation, with the consequence that it is not easy to claim that this is, at present, a customary norm.[314] A fortiori, care is required when it comes to asserting that the Security Council's validation might, from now on, be a substantive criterion on which the lawfulness of an intervention by consent depends. Taking into account the probable use of the right to veto in situations in which a permanent member is involved, this condition would lead to a radical restriction of the right to intervene at the invitation of a government. Such a reduction would undeniably challenge the classical presumption in favour of the legality of such an intervention – and this is why it seems premature to plead in favour of it.

[313] Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes' (n. 28), 860 *et seq.*

[314] See IDI, Rhodes Resolution II (n. 22), Art. 4(4), prescribing the notification of the request to the Secretary-General of the United Nations. See also Larissa van den Herik, 'Replicating Article 51: A Reporting Requirement for Consent-Based Use of Force?', *Heidelberg Journal of International Law* 79 (2019), 707–11.

For these reasons, while the recent practice of intervention by invitation may cast some light on the legal context, it simultaneously raises further questions. Looking beyond positive law, it is difficult not to be mindful of the tension that persists between deeds and words – between a commonplace, hard-nosed interventionist practice and states' eagerness to explain away their actions through an appropriate discourse. Against this background, this practice also suggests that the various alternative justifications (counter-intervention, counter-terrorism, self-determination, etc.) given by the intervening states largely deprive the doctrine of non-intervention of all normative constraining effect.