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Intervention and the Problematisation of Consent

Dino Kritsiotis*

I. INTRODUCTION

Towards the end of January 2019, in the midst of mass demonstrations against the government of President Nicolás Maduro (successor to Hugo Chávez), Juan Guaidó, the charismatic leader of the National Assembly, declared himself the interim president of Venezuela. A succession of states moved to immediate recognition of him as such and to acceptance of his proclamation: the United States was joined by Canada, Australia, and a host of Latin American countries, including Brazil; Austria, Denmark, France, Germany, Spain, Sweden, and the United Kingdom followed.[1] For his part, President Maduro regarded these developments as a 'gringo coup' inspired by the United States, which he was determined to repel.[2] He responded by closing the Venezuelan Embassy in Washington D.C.; Guaidó, in turn, appointed Carlos A. Vecchio as 'Ambassador of the Bolivarian Republic of Venezuela to the United States of America'.[3]

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[1] Ana Vanessa Herrero, 'Who Supports Venezuela's Opposition, and Why It Matters', *New York Times*, 5 February 2019, A6. By early February 2019, it was estimated that more than twenty states had been forthcoming with their recognition: Ernesto Londono, 'In Venezuela, Insurgent Sees Path to Victory', *New York Times*, 4 February 2019, A1.

[2] Matthew Campbell, 'Defiant Maduro Vows Venezuela Will Crush Any "Gringo Coup"', *The Sunday Times* (London), 27 January 2019, 14.

[3] Vecchio was one of several 'ambassadorial' appointments made by Guaidó: Edward Wong and Nicholas Casey, 'Duelling Diplomats Lobby Nations to Pick Sides in the Venezuelan Conflict', *New York Times*, 2 February 2019, A10.

The episode was also notable because of the reactions of international organisations – and especially the stark differences between those reactions – to these developments: UN Secretary-General António Guterres declared that the United Nations would continue to offer its 'good offices to the parties to be able at their request to help find a political solution'.[4] In contrast, the Organization of American States wasted no time in indicating its support for Guaidó.[5] Meanwhile, the International Monetary Fund maintained that it would heed the positions of its member states, and the Organization of the Petroleum Exporting Countries (OPEC), of which Venezuela is a founding member, remained silent on the matter.[6]

With indications that 'a parallel government' had been formed in Caracas[7] and that 'a cold war style geopolitical imbroglio' was emerging,[8] the overwhelming impression was one of intractability – the absence of any conceivable breakthrough. The Venezuelan army stood – apparently firmly – on the side of their president,[9] and, yet, as the weeks rolled by, Juan Guaidó came to make a formal request to Admiral Craig S. Faller, Commander of the US Southern Command, for some form of assistance to help Venezuelans cope with conditions worsening 'as a consequence of the corrupt and incompetent regime of Nicolas Maduro'. He did so through his 'Ambassador' to the United States, in a letter dated 11 May 2019, which '[w]elcomed strategic and operational planning so that we may fulfil our constitutional obligation to the Venezuelan people in order to alleviate their suffering and restore our democracy'.[10] In that communication, he also expressed concern at 'the impact of the presence of uninvited foreign forces that place our country and others at risk'.[11]

Moreover, earlier in the year, it had been 'Ambassador' Vecchio who had approached the US Congress for further humanitarian aid to Venezuela – further, that is, to the 20 million USD in food and medical aid already pledged

[4] Herrero, 'Who Supports Venezuela's Opposition' (n. 1), A6.

[5] By way of a tweet from its president, Luis Almagro, on 23 January 2019, even though not all thirty-five members of the OAS were on board: *ibid*.

[6] *Ibid*.

[7] John Paul Rathbone and Gideon Long, 'A Parallel Government', *Financial Times* (London), 2–3 February 2019, 7.

[8] *Ibid*. (for China, Russia, Turkey, and Cuba all continued to back President Maduro).

[9] Stephen Gibbs and Marc Bennetts, 'Army Vows Loyalty to Maduro as Putin tells US to Back Off', *The Times* (London), 25 January 2019, 32–3.

[10] And this is why it was styled as a formal request: Julian Borger, 'Venezuela: Opposition Leader Guaidó asks US Military for "Strategic Planning" Help', *The Guardian* (London), 13 May 2019.

[11] *Ibid*. Undoubtedly a reference to the visit by two Russian military airplanes, 'which landed in broad daylight' in late March: Anatoly Kurmanaev, 'Russia Shows Open Support for Maduro with 2 Planes', *New York Times*, 26 March 2019, A6.

by the United States since Guaidó had come on the scene.[12] This approach was made on the very day that President Maduro launched a video warning the United States that any intervention in his country 'would lead to a Vietnam worse than they can imagine'.[13] President Maduro closed the border to air and sea traffic from three Caribbean islands – Aruba, Bonaire, and Curaçao – from where the Venezuelan opposition wanted to stage the flow of supplies.[14] The closure represented 'a sovereign decision', according to Venezuelan Vice President Delcy Rodríguez, against the attempt of Venezuela's neighbours to 'ignore the legitimate authority of the country'.[15] This was part of President Maduro's concerted effort to deny that Venezuela was in need of any assistance[16] – but, with malnutrition and infant mortality rates rising explosively in the country, the Maduro government took a decision at the end of March 2019 to allow the Red Cross to deliver medical supplies.[17]

What exactly is public international law to make of these developments? Where does – and where should – it stand in the event of competing, and even contradictory, claims? These developments were no aberration. Nor were they unique in terms of their numbing complexity: they came at a time when Libya was once again convulsed by a struggle for the soul of political power[18] and at the same moment as President Bashar al-Assad's fortunes were shifting in Syria.[19] They came, too, after President Abdo Rabbo Mansour Hadi of Yemen made an 'appeal' to five member states of the Gulf Cooperation Council (GCC) – Saudi Arabia, the United Arab Emirates, Bahrain, Kuwait, and Qatar – in March 2015 'to stand by the Yemeni people as you have always done and come to the country's aid' in the face of what he called 'the ongoing Houthi aggression'.[20] More recently

[12] Wong and Casey, 'Duelling Diplomats' (n. 3), A10.

[13] Ana Vanessa Herrero and Austin Ramzy, 'Maduro Warns that U.S. Intervention Would Create a Vietnam Nightmare', *New York Times*, 31 January 2019, A6.

[14] Nicholas Casey, 'Venezuela Shuts Borders to 3 Islands over Dispute on Aid', *New York Times*, 21 February 2019, A10.

[15] *Ibid*.

[16] Although this should be read against claims of the politicisation of humanitarian provision within the country: Nicholas Casey, 'Trading Lifesaving Treatment for Maduro Votes', *New York Times*, 17 March 2019, A1.

[17] Anatoly Kurmanaev and Isayen Herrera, 'Agreement Allows Red Cross to Deliver Aid to Desperate Venezuelans', *New York Times*, 30 March 2019, A4 (reporting that the Red Cross had considered this to be a 'diplomatic waiver' granted from President Maduro).

[18] David D. Kirkpatrick, 'Militia Advances in Libya, Raising Prospect of Renewed Civil War', *New York Times*, 5 April 2019, A4.

[19] Carlotta Gall and Hwaida Saad, 'Bombs Again Find Fleeing Syrians Trapped Near Closed Border with Turkey', *New York Times*, 31 May 2019, A10.

[20] Contained 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: UN Doc. S/2015/217, 27 March 2015, 4.

still, in March 2020, the *New York Times* reported that both President Ashraf Ghani of Afghanistan and his chief rival, Abdullah Abdullah, had taken the oath of presidential office in duelling inauguration ceremonies that were held in Kabul on the very same day – '[j]ust a few minutes and a thin wall apart'.[21]

To be sure, this is decidedly not a new problem for public international law: over the decades, it has had to contend with situations described variously as 'intervention by consent', 'intervention by invitation', and 'intervention on request', such consent, invitation or request delivered by an incumbent government on behalf of its respective state. Examples range from the Soviet intervention in Hungary of November 1956 and the Oman and Muscat incident of July 1957, through the interventions of the United States in Grenada of October 1983 and in Panama of December 1989, to the Italian-led action in Albania of April 1999 and President Viktor Yanukovych's invitation to the Russian Federation for military assistance in the Ukraine of March 2014. Each of these characterisations relies, of course, on the 'potential legalizing element' or 'substantive element' of consent,[22] but they also gently prompt investigation of the relevant institution under public international law that governs such matters – that is, the law concerning intervention. At other times – although by no means always – the law on force, as it is found in the 1945 Charter of the United Nations, has come into focus,[23] and the argument must surely be made for a systematic engagement of *both* of these prohibitions. In this chapter, I will consider the laws of the ius ad bellum holistically, exploring the assumptions, content, and ambitions of each prohibition, aiming to coordinate more precisely and more deliberately how each relates – or should relate – to the matter of 'consent'.

That consent typically emanates from the government of a state, once said to be 'the most important single criterion of statehood, since all others depend upon it'.[24] That criterion is famously itemised in the 1933

[21] As a consequence of the contested presidential election there six months previous: Mujib Mashal, Fatima Faizi and Najim Rahim, 'Ghani Takes the Oath of Afghan President. His Chief Rival Does, Too', *New York Times*, 10 March 2020, A4. See also Rick Gladstone, 'Quandary at U.N.: Who Gets to Speak for Myanmar and Afghanistan?', *New York Times*, 12 September 2021, A10, and the report on Guinea-Bissau following the election there: 'The Presidents Came in Two by Two', *The Fifth Floor Podcast* (BBC), 21 March 2020, available at www.bbc.co.uk/programmes/w3csyntz.

[22] Eliav Lieblich, *International Law and Civil Wars: Intervention and Consent* (New York: Routledge 2013), 1.

[23] As is done by Heini Tuura, 'The Ambivalence of Armed Intervention by Invitation: Caught between Sovereign and Global Interests', Ph.D. submitted to the University of Helsinki, April 2019 (copy on file with author).

[24] James Crawford, *The Creation of States in International Law* (Oxford: OUP 2nd edn 2006), 56.

Montevideo Convention on the Rights and Duties of States, alongside 'defined territory' and 'permanent population', as one of the qualifications for statehood (where 'government' and 'independence' have been argued to be 'closely related as criteria' for statehood – and 'in fact may be regarded as different aspects of the requirement of effective separate control').[25] That said, on the independence of the Republic of the Congo in August 1960, it was contended – not unduly, let us admit – that '[a]nything less like effective government it would be hard to imagine',[26] so one must wonder whether there are other contexts in which a 'less stringent' approach can be taken towards the question of the government of a given state[27] – that is, whether a certain release from rigour does and ought to prevail. Naturally, and as the opening of this chapter indicates, the institution of recognition is never far from the sidelines in these situations, and while it might be tempting to think of the role of recognition as dispositive from one case to the next, it has been known to occur prematurely,[28] thereby opening up the recognising state to accusations of unlawful intervention.[29]

At the same time, the incumbent government of state cannot rest on the laurels of its status as such to consent to assistance at any moment of its pleasing. In March 1976, for example, the UN Security Council adopted Resolution 387 on Angola, in which it 'recall[ed] 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'.[30] That right – 'the inherent and lawful right of every State' – seemed to proceed from 'the exercise of its sovereignty' in the Council's view, which, in turn, was strongly suggestive of the essential conditions in which consent can permissibly be given in law – by the state, as well as on its behalf. Over time, public international law has attempted variously to calibrate what this threshold might be – from the recognition of belligerency to the occurrence of civil war; from the test of effective control to (most recently) the (democratic) legitimacy of the beleaguered government. The chapter takes a decidedly historical stance in examining how and why these limitations on consent took root in the way that they did; as it does so, it will give some consideration to the impact of the laws of not only the ius ad bellum but also the ius in bello – commonly

[25] *Ibid*., 55.
[26] *Ibid*., 57.
[27] *Ibid*.
[28] As suggested by Crawford, *ibid*.
[29] See Stefan Talmon, 'Recognition of Opposition Groups as the Legitimate Representative of a People', *Chinese Journal of International Law* 12 (2013), 219–53 (247).
[30] UN SC Res. 387 of 31 March 1976, cons. 4.

omitted from the narrative. Reclaiming the latter is critical to the enterprise, for they too trade in the currency of consent.

When the UN Security Council adopted Resolution 387 in March 1976, it did so in the context of 'acts of aggression committed by South Africa against the People's Republic of Angola and the violation of its sovereignty and territorial integrity'.[31] That refrain suggests that the Security Council had Angola's 'inherent right' of self-defence at the top of its mind – and that the reference to the request for assistance implicated the law of collective self-defence under the Charter of the United Nations. This is a crucial line of enquiry for us to pursue, because it is a potent reminder that consent operates elsewhere in the laws of the ius ad bellum: its function and utility is not confined to solicited interventions of the order that frames the focus of this volume. It therefore becomes important to chart the conditions of consent in these other contexts and to examine more closely how consent relates to 'justifications' such as collective self-defence, counter-intervention, and pro-democratic intervention, as well as authorisations from the Security Council.

The chapter is structured as follows.

- In section II, we discuss three preliminary matters: the general relationship between the prohibitions of intervention and force; the terminological question of the 'third state'; and the method(s) that are at work in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua* of June 1986.[32]
- We then move on, in section III, to consider the assumptions and broad ambitions of each prohibition, as well as and their relation with consent more broadly.
- This is followed, in section IV, by an exposition of the actual limitations of consent, primarily as articulated by the Institut de droit international (IDI), but, also with a view to the laws of the ius in bello.
- In the penultimate section of the chapter, section V, we come to examine the function of consent within other components of the ius ad bellum, and it is here that we can observe how the terms and purposes of consent can be structured differently.

[31] *Ibid.*, cons. 6.

[32] ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), merits, judgment of 27 June 1986, ICJ Reports 1986, 14. I identify plural methods, not the singular 'method' intimated by Olivier Corten, 'Intervention by Invitation: The Expanding Role of the UN Security Council', Chapter 2 in this volume, section I.B, 107.

- In its concluding part, section VI, the chapter offers some general reflections by returning to the significance of the principle of self-determination in this normative context, especially in view of its own evolution since its articulation in the Charter of the United Nations in June 1945.

II. THREE PRELIMINARY MATTERS

A. *Force and Intervention: The Laws of the Ius ad Bellum*

The first preliminary matter to call for our attention is the fact – of long pedigree within the realm of public international law – that the prohibition of intervention, as it applies to states, is 'not, as such, spelt out in the Charter' of the United Nations.[33] Article 2(7) of the Charter does provide that '[n]othing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII'[34] – a provision that notably addresses the prohibition of intervention *to the organisation of the United Nations itself*. In this, the provision is altogether different from the formulation of the prohibition of force contained in Article 2(4), which – very deliberately and quite explicitly – is addressed to all UN member states, although it ought to be said that the *chapeau* to Article 2 of the Charter makes clear that '[t]he Organisation and its Members' shall act in accordance with the principles it sets out.[35]

When it came to the UN General Assembly's enactment of Resolution 2625 (XXV) of October 1970, the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, the General Assembly committed itself to the codification and progressive development of seven principles of public international law, among which were the principle that 'States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other

[33] ICJ, *Nicaragua* (n. 32), para. 202.

[34] Rosalyn Higgins, Philippa Webb, Dapo Akande, Sandesh Sivakumaran and James Sloan, *Oppenheim's International Law: United Nations*, vol. I (Oxford: OUP 2017), 334.

[35] Andreas Paulus, 'Article 2', in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte and Andreas Paulus (eds), *The Charter of the United Nations: A Commentary*, vol. I (Oxford: OUP 3rd edn 2012), 121–32 (123).

manner inconsistent with the purposes of the United Nations' (the prohibition on force) and '[t]he duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter' (the prohibition on intervention).[36] There are, evidently, shades of the Charter present in both of these iterations, but when the General Assembly came to proclaim each of these principles in greater detail in its text, it directed their application to *states* – and deliberately so, the General Assembly simply repeating the conception of the prohibitions of intervention[37] and force[38] it had already shared in the preamble.[39] This is fully understandable: with Resolution 2625 (XXV), the General Assembly aimed to promote the rule of law among nations, 'and particularly the universal application of the principles embodied in the Charter',[40] since the United Nations was able to boast only 127 member states by the end of that calendar year.[41] The switch to 'states' in the Resolution from the 'member states' of the Charter extricated the principles from their conventional embedding and suggested that these principles were amenable to universal application.

There was some early sense in history of the United Nations that one of these principles could not operate without the other: it had been proposed that Article 2(7) of the Charter 'applied only to intervention by the United Nations, and [that] the intervention by one State in the affairs of another was illicit under the Charter only when it was accompanied by the threat or use of force'.[42] This conjoined reading of the two principles was by no means the preferred view when it was first uttered,[43] nor was it to find much success as time went on. Prompted by the substantive claims made by Nicaragua against the United States in April 1984, the International Court of Justice (ICJ) determined, in the *Nicaragua* case, that one set of facts could result in the

[36] UN GA Res. 2625 (XXV) of 24 October 1970, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, cons. 7.

[37] *Ibid*., cons. 8.

[38] *Ibid*., cons. 10.

[39] Importantly, 'coercion' was treated in separate terms in the ninth preambular recital to the Declaration. Its inclusion in this way was an indication, at least for Robert Rosenstock, that 'a restrictive interpretation of the term "force" is called for': Robert Rosenstock, 'The Declaration of Principles of International Law Concerning Friendly Relations: A Survey', *American Journal of International Law* 65 (1971), 713–35 (725).

[40] UN GA Res. 2625 (XXV) (n. 36), preamble.

[41] So, to give a flavour of the predicament of that time, Bahrain, Bhutan, Oman, Qatar, and the United Arab Emirates were to join in 1971; the Bahamas, the Federal Republic of Germany, and the German Democratic Republic, in 1973.

[42] As the United States maintained: UN Doc. A/AC.119/SR.32, 2 October 1964.

[43] Rosenstock, 'The Declaration of Principles' (n. 39), 726.

coterminous application of both principles (it decided that the supply of arms and other support by one state to armed bands located in the territory of another state 'may well constitute a breach of the principle of the non-use of force and an intervention in the internal affairs of a State').[44] To similar effect, in its *Case Concerning Armed Activities on the Territory of the Congo* of December 2005, the ICJ concluded that Uganda's actions had 'constituted an interference in the internal affairs of the [Democratic Republic of the Congo]' – and that, at one and the same time, this 'unlawful military intervention' in Uganda 'was of such a magnitude and duration that the Court considers it to be a grave violation of the use of force expressed in Article 2, paragraph 4 of the Charter'.[45]

We are thus able to appreciate why it has been said of the principle of non-intervention that it 'is an autonomous principle of customary law';[46] it is autonomous of the other principles articulated in the Declaration on Friendly Relations in the sense that it does not depend on them for its activation, meaning or application – although there can be no doubt of its 'close relationship' with the prohibition of force with which it shares an indisputably 'large overlap'.[47] The Declaration enunciates that intervention includes 'armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements'.[48] 'Intervention' therefore knows, or can assume, different forms of state activity.[49] An identical observation cannot, however, be made for 'force', as incorporated in the Charter: as constructed, but also as presently conceived, its compass extends only to

[44] ICJ, *Nicaragua* (n. 32), para. 247.

[45] ICJ, *Armed Activities on the Territory of the Congo* (DR Congo v. Uganda), merits, judgment of 19 December 2005, ICJ Reports 2005, 168, para. 165.

[46] ICJ, *Nicaragua* (n. 32), 534, dissenting opinion of Judge Jennings.

[47] Maziar Jamnejad and Michael Wood, 'The Principle of Non-Intervention', *Leiden Journal of International Law* 22 (2009), 345–81 (348–9), viewing '[t]he rules on the use of force [as] a specific application of the principle of non-intervention, indeed the most important application of the principle'.

[48] See, especially, Lori Fisler Damrosch, 'Politics across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs', *American Journal of International Law* 83 (1989), 1–50. It is important not to gloss over the seamless transition made from 'intervention' to 'interference' in the Declaration: the clear suggestion is that intervention is but one manifestation of interference – that it is *interference* that is the distinct species of state activity of which intervention forms one part. For Damrosch, 'the sister terms' of 'intervention' and 'interference' are both 'fraught with connotations of illegality and immorality', and she prefers instead 'influence' as the framework for assessing 'forms of conduct' that are 'legal or illegal, benign or misguided': *ibid.*, 12.

[49] Hence the Declaration's specification that '[n]o State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind'.

threats or uses of *armed* force.[50] Furthermore, one cannot mistake the categorical language that accompanies the principle of non-intervention in the Declaration: at face value, this can be read only as ruling out the possibility of any exceptions to the principle,[51] which stands in telling contrast to the prohibition of force and its exceptions, as set forth in the Charter.[52]

It is clear, then, that the Declaration cannot be read independently of the Charter; the Charter is the foundation and raison d'être of the Declaration, and the Declaration is to be read 'in accordance with' the Charter.[53] Yet there is no mention of 'consent' for either of the principles under current discussion: all we are given is a series of detailed perorations, listed in the Declaration,[54] so that for non-intervention, to take one example, '[e]very State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State',[55] and for non-use of force, to take another, '[e]very State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States'. With each peroration, the generality of the specified principle edges towards the practicalities of the particular, but it is still difficult to make meaningful headway on the relevance of consent for either 'intervention' or for 'force', at least as conceived of or announced in the Declaration.[56]

Perhaps the overall idea was that the presence of any consent to an 'intervention' or to an exercise of 'force' disqualifies that act from attracting either of those characterisations. Perhaps it was thought that this understanding was too

[50] Notwithstanding some endeavours made in that very direction: Christine Gray, *International Law and the Use of Force* (Oxford: OUP 4th edn 2018), 10, 34.

[51] That is, for any permissible interventions at all – an approach to be treated with the greatest of caution: Vaughan Lowe, 'The Principle of Non-Intervention: Use of Force', in Colin Warbrick and Vaughan Lowe (eds), *The United Nations and the Principles of International Law: Essays in Memory of Michael Akehurst* (London: Routledge 1994), 66–84. See also Anthony Carty, *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs* (Manchester: Manchester University Press 1986), 87 (writing of the 'remarkably absolute terms' used to express the principle of non-intervention) and 88 ('the tendency to absolutise it the more it is disregarded').

[52] Namely, the right of (individual and collective) self-defence and Security Council authorisation.

[53] As per its title.

[54] Or, much less flatteringly, 'a series of broad statements calculated to mask the divisions that existed among states as to the application of the core principle': Jamnejad and Wood, 'The Principle of Non-Intervention' (n. 47), 353.

[55] A form of words inclined to suggest a synonymy between intervention and interference: see further n. 48.

[56] See further Jacques Noël, *Le principe de non-intervention: théorie et pratique dans les relations inter-américaines* (Brussels: Éditions de l'Université de Bruxelles 1981), 2.

self-evident to be put into words. Speculations aside, the Declaration does not enter into extensive disquisitions on the 'essence',[57] or the 'core of the mischief',[58] of either of these terms, and we are none the wiser, after reading the Declaration, of the impact that consent has on any intervention or exercise of force in international relations. Equally importantly, however, towards its end, the Declaration goes on to specify that, '[i]n their interpretation and application[,] the above principles are interrelated and each principle should be construed in the context of the other principles'[59] – a pronouncement that is vital, for present purposes, because the principle of self-determination was included as one of the seven principles of the Declaration.[60] That means not only that our deliberations on consent are not – or, at least, are no longer – the exclusive purview of the laws of the ius ad bellum, but also it may be doubly significant for our analysis because, in that Declaration, the General Assembly appeared to develop the Charter's conception of self-determination beyond 'the rights of the peoples of one state to be protected from interference by other states or governments',[61] envisioning additionally its role for peoples subjected to 'alien subjugation, domination and exploitation'.[62] This is somewhat more expansive than the legal right of colonised peoples to obtain 'speedy and unconditional' decolonisation that had already been endorsed by the General Assembly in its earlier Resolution 1514 (XV) of December 1960.[63] The Declaration is thus an example par excellence of the 'numerous faces' of self-determination, quite possibly including a right of secession where there is no 'fully representative form of government' of which to speak.[64]

57 Jamnejad and Wood, 'The Principle of Non-Intervention' (n. 47), 348.

58 *Ibid.*

59 UN GA Res. 2625 (XXV) (n. 36).

60 *Accord* Corten on self-determination as a condition which 'must be taken into account in each particular case': Corten, 'Intervention by Invitation', Chapter 2 in this volume, section I.A, 102. See also Marcelo G. Kohen, 'Self-Determination', in Jorge E. Viñuales (ed.), *The UN Friendly Relations Declaration at 50: An Assessment of the Fundamental Principles of International Law* (Cambridge: CUP 2020), 133–65 (133): self-determination 'constitutes the most important fundamental principle of contemporary international law' – alongside the prohibition of force.

61 Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press 1994), 112 and 113 (referring to 'the cautious way in which self-determination is referred to in the Charter'). Higgins is rather emphatic in stating that '[w]e cannot ignore the coupling of "self-determination" with "equal rights"' in the Charter – since 'it was equal rights of *states* that was being provided for, not of individuals': *ibid.*, 112 (emphasis original).

62 *Ibid.*, 115.

63 UN GA Res. 1514 (XV) of 14 December 1960, Declaration on the Granting of Independence to Colonial Countries and Peoples, cons. 12.

64 Frederick L. Kirgis Jr., 'The Degrees of Self-Determination in the United Nations Era', *American Journal of International Law* 88 (1994), 304–10 (306).

The Declaration is important for our study from one further angle, which might be briefly mentioned here (and returned to in due course): one of its perorations on self-determination stipulates that '[e]very State has the duty to refrain from any forcible action which deprives peoples ... of their right to self-determination and freedom and independence', and that, '[i]n their actions against, and resistance to, such forcible action in pursuit of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter'.[65] Evidently, the notion of an entitlement – and a legal entitlement at that – to 'seek and to receive support' in the name of self-determination is qualified by reference to the purposes and principles of the Charter,[66] but the formulation is notable for the way in which it fashions this law of response – that is, the response by said peoples *against* any forcible action taken by states that is forbidden under the Declaration[67] – in terms of the right of self-determination rather than of any right of self-defence.[68] In this arrangement, the consent of peoples who are exercising their right to self-determination – 'and freedom and independence', according to the precise terms of the Declaration – is nowhere summoned by that name, but it is not a stretch to imagine the relationship of these peoples' consent to the seeking and receiving of such support.[69]

B. *The Third State*

A second preliminary matter arises in relation to the vocabulary that is often used to address 'intervention' and 'force': the terminology of the so-called third state. This phrase is a frequent staple of the literature on intervention, and it has also made various appearances within that on

[65] UN GA Res. 1514 (XV) (n. 63).

[66] Introduced at the behest of Western powers: see Kohen, 'Self-Determination' (n. 60), 149, who regards that 'this support cannot be considered as a breach of the principle of non-intervention'.

[67] Rosenstock, 'The Declaration of Principles' (n. 39), 732–3: 'a violation of the duty owed', also writing of 'a delict giving rise to rights on the part of the people concerned'.

[68] Georges Abi-Saab has contended that, by virtue of the Declaration, 'liberation movements have a *jus ad bellum* under the Charter': Georges Abi-Saab, 'Wars of National Liberation and the Laws of War', *Annales d'études internationales* 3 (1972), 93–117 (100). For a view contrary to this 'generous interpretation' of the Declaration, see Heather A. Wilson, *International Law and the Use of Force by National Liberation Movements* (Oxford: Clarendon Press 1988), 99. See also Kohen, 'Self-Determination' (n. 60), 149.

[69] Although 'support' was not therein defined – opening up another point of contention between 'arms and men' versus 'only moral and political support': Rosenstock, 'The Declaration of Principles' (n. 39), 732.

force.[70] Fundamentally, the idea is to depict the *identity* of the intervenor(s) or applier(s) of force in a given situation, so that we find invocations aplenty of the 'third state' or of 'third states'.[71] Sometimes, the term 'third-country intervention' has been used.[72] An eagle-eyed reader might be disoriented for a moment: whom, intuitively, are they to imagine the *second* state in this sequence? Indeed, the 'second state' never seems to earn a mention in the literature, and the reader is left adrift in any breakdown of the respective dramatis personae of a specific situation. We therefore find ourselves in quite different territory from that of the general rule on third states expounded in Article 34 of the Vienna Convention on the Law of Treaties (VCLT), in which the identity of the 'third state' might be said to be self-explanatory.[73]

It may be worth exploring this further, then: why does the 'third state' command the currency it does today? If the phrase may be somehow bound up in the original conception of 'intervention' as foretold in public international law, why has it cascaded unchecked from one generation to the next? Indeed, when we do return to the earlier discourse, we discover that, at its root, an 'intervention' could take place 'in the external as well as in the internal affairs of a State'[74] – a distinction that sheds a shard of light on the Charter's designation of 'matters which are essentially within the domestic jurisdiction of any state'.[75] Yet it is also a distinction that pivots us towards a much better understanding of who the third state might have been, for the

[70] See, e.g., Gray, *International Law and the Use of Force* (n. 50), 65. Christine M. Chinkin elects to use the terminology of 'unilateral third-party responses': Christine M. Chinkin, *Third Parties in International Law* (Oxford: Clarendon Press 1993), 315. In a recent and much-valued collection of some sixty-five substantive chapters offering a case-based approach on the use of force in public international law, note the reference to 'the positions of the main protagonists and the reaction of third States and international organisations' for each 'case': Tom Ruys, Olivier Corten and Alexandra Hofer, 'Introduction: The Jus contra Bellum and the Power of Precedent', in Tom Ruys, Olivier Corten and Alexandra Hofer (eds), *The Use of Force in International Law: A Case-Based Approach* (Oxford: OUP 2018), 1–4 (3).

[71] See, e.g., Cóman Kenny and Seán Butler, 'The Legality of "Intervention by Invitation" in Situations of R2P Violations', *New York University Journal of International Law and Politics* 51 (2018), 135–78 (142, 159).

[72] Robert W. Gomulkiewicz, 'International Law Governing Aid to Opposition Groups in Civil War: Resurrecting the Standards of Belligerency', *Washington Law Review* 63 (1988), 43–68 (48).

[73] Consider Luke T. Lee, 'The Law of the Sea Convention and Third States', *American Journal of International Law* 77 (1983), 541–68 (541).

[74] According to Lassa Oppenheim, *International Law: A Treatise*, vol. I (London: Longmans, Green and Co. 1905), 182, para. 134; also 183, para. 135.

[75] Art. 2(7) UN Charter. See further Georg Nolte, 'Article 2(7)', in Simma et al., *The Charter of the United Nations* (n. 35), 290–307.

'external' affairs of a state would invariably involve its relations with any other state, and it is into this relationship that yet another state – that is, the *third* state – would make its intervention. Indeed, in an important set of articles published by the *British Yearbook of International Law* early in its history, P.H. Winfield identified what he called 'three disparate significations' for intervention: that of 'interference in the relations of two other states, that of interference in the internal disputes of a single state, and that of some measure of redress falling short of war directed by one state against another for some alleged breach of international law committed by the latter'.[76] In each of these three scenarios – external, internal and punitive intervention[77] – the reader is assured by the clarity of exposition how many states are actually involved, but it is only in the first of these scenarios – 'interference in the relations of two other states'[78] – that any reference to a third state can make sense.[79] To intervene 'in the internal dispute of a single state' can be the work of only one other – or a second – state; 'some measure of redress short of war', too, specifically envisages an intervention by one state against another state.[80]

Certainly, there are obvious persistent echoes in all of this of the terminology of 'third state' in the context of the recognition of belligerency (as known within the laws of the ius in bello).[81] According to this doctrine, 'hostilities waged between two communities, of which one is not or, possibly, both sovereign States, are of such character and scope as to entitle the parties to be treated as belligerents engaged in a war in a sense ordinarily attached to that

[76] P. H. Winfield, 'The History of Intervention in International Law', *British Yearbook of International Law* 3 (1922–23), 130–49 (131). Winfield goes on to label each of these significations as external, internal and punitive intervention, respectively: *ibid.*, 132.

[77] *Ibid.*, 132.

[78] Or Oppenheim's 'intervention' in the 'external … affairs of a State': Oppenheim, *International Law*, vol. I (n. 74), 190, para. 135.

[79] Truth be told, we do not make much of this incantation or possibility today, but it is interesting that, in contentious proceedings before the ICJ, the very language of 'intervention' is employed '[s]hould a state consider that it has an interest of a legal nature which may be affected by the decision in the case' between two other States: Art. 62(1) of the 1945 Statute of the International Court of Justice, Cmd. 7015 (the ICJ Statute). Indeed, '[e]very state so notified [by the Registrar of the Court regarding the construction of a convention to which states other than those concerned in the case are parties in question] has the right to intervene in the proceedings': Art. 63(2). That intervention – or right to intervention – in proceedings must be staged by a third party or, indeed, by third states (as 'states other than those concerned in the case', per Art. 63(1)).

[80] Note the equation that Winfield cultivates between 'interference' and 'intervention': Winfield, 'The History of Intervention in International Law' (n. 76).

[81] See, e.g., the references in Wyndham Legh Walker, 'Recognition of Belligerency and Grant of Belligerent Rights', *Transactions of the Grotius Society* 23 (1937), 177–210.

term by international law'.[82] The granting of belligerent rights was by no means automatic: the outbreak of 'hostilities waged between [those] two communities' did not, in and of itself, entail the recognition of belligerency; rather, the law set down a series of exacting conditions whereby 'any State can recognise insurgents as a belligerent Power, provided (1) they are in possession of a certain part of the territory of the legitimate Government; (2) they have set up a Government of their own; and (3) they conduct their armed contention with the legitimate Government according to the laws and usages of war'.[83] Satisfaction of these conditions was the basis of the entitlement of which Hersch Lauterpacht was to write in 1947,[84] recognising belligerency as occurring at the behest of either the 'parent State' or of 'outside States'.[85]

The development of the recognition of belligerency would entail a fundamental repurposing of these 'hostilities', such that the laws of war would then become applicable to them on a plenary basis – for, ordinarily, the exclusive provenance of these laws was any 'contention' that was 'going on *between States*',[86] and emphatically so. The recognition of belligerency was thus devised to expand the possible application of the laws of war beyond their original remit; in so doing, a fiction of sorts was indulged whereby 'the contesting parties [were] legally to be treated as if they [were] engaged in a war waged by two sovereign States'.[87] Yet, crucially, the recognition of belligerency should not be mistaken for the recognition of a new state – for it was assuredly not this and was never intended to be this.[88] The 'entities' engaged in those 'hostilities' were to remain as such but were to be treated differently purely from the standpoint of the laws of war (and neutrality): the recognition of belligerency decidedly did not entail 'an entity's matriculation to statehood'.[89] No case can thus be made for recourse to the terminology of the 'third state' in this context, which is why other formulations – such as 'third

[82] Hersch Lauterpacht, *Recognition in International Law* (Cambridge: CUP 1947), 175, para. 56.

[83] Lassa Oppenheim, *International Law: A Treatise*, vol. II (London: Longmans, Green and Co. 1906), 86, para. 76.

[84] To finesse the point, Lauterpacht believed that that entitlement stemmed from 'a duty following from an impartial consideration of the facts of the situation': Lauterpacht, *Recognition in International Law* (n. 82), 329.

[85] Lord Arnold Duncan McNair and Arthur D. Watts, *The Legal Effects of War* (Cambridge: CUP 4th edn 1966), 32. See also Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford: OUP 2012), 10.

[86] Oppenheim, *International Law*, vol. II (n. 83), 58, para. 56 (emphasis original).

[87] Lauterpacht, *Recognition in International Law* (n. 82), 175, para. 56.

[88] McNair and Watts, *The Legal Effects of War* (n. 85), 32. And 'it is a status which [belligerents] possess only in so far as States recognize them to possess it': *ibid.*, 33.

[89] James Crawford, 'Introduction to the Paperback Edition', in Hersch Lauterpacht, *Recognition in International Law* (Cambridge: CUP 2013), xxi–lix (xxxvii).

Powers'[90] or 'outside States'[91] and, more recently, 'third-party states'[92] and 'third parties'[93] – have properly been put to service. They are most certainly more accurate depictions of the general legal landscape in which the recognition of belligerency has occurred, and they explain why we shall encounter references to one or more 'second' state(s) in much of the analysis that follows, with 'third state' reserved for situations in which three identifiably different states are at issue.

C. *Method and the* Nicaragua *Case*

And so we come to our third and final preliminary consideration, which concerns the manner by which laws within the international system can be posited and successfully argued. In an important passage from its judgment in the *Nicaragua* case, the ICJ adverted to the fact that intervention 'is already allowable at the request of the government of a State'.[94] It did so by way of contrast with an intervention that had been premised on 'a mere request for assistance made by an opposition group in another State' – which, from what the Court then said, is not allowed.[95] Both of these statements occur in a paragraph of the judgment where the ICJ was addressing the question of '*prima facie* acts of intervention' by the United States in relation to the activities of the contras in Nicaragua that 'may nevertheless be justified on some legal ground'.[96] Indeed, they form part of the broader analysis that the Court outlined at the outset of its consideration of the principle of non-intervention – whereby it sought to configure 'the exact content of the principle so accepted'[97] and then to investigate whether 'the practice [is] sufficiently in conformity with [the principle] for this to be a rule of

[90] Vernon A. Rourke, 'Recognition of Belligerency and the Spanish Civil War', *American Journal of International Law* 31 (1937), 398–412.

[91] As cautious as ever: McNair and Watts, *The Legal Effects of War* (n. 85), 32.

[92] Sam Foster Halabi, 'Traditions of Belligerent Recognition: The Libyan Intervention in Historical and Theoretical Context', *American University International Law Review* 27 (2012), 321–90 (325).

[93] As is done by 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 (822 – 'how third parties should relate to civil wars'– and 819 – 'when other states interacted with parties to a civil war'). See also Joseph Klingler, 'Counterintervention on Behalf of the Syrian Opposition? An Illustration of the Need for Greater Clarity in the Law', *Harvard International Law Journal* 55 (2014), 483–523 (487, 509, 520).

[94] ICJ, *Nicaragua* (n. 32), para. 246.

[95] *Ibid.*

[96] *Ibid.*

[97] *Ibid.*, para. 205.

customary international law'.[98] Since the ICJ is bound to the terms of its Statute, it was compelled to consider the evidence of 'a general practice accepted as law' for the customary international law on intervention.[99]

We might refer to this as the Court's empirical method: its fundamental commitment – at least as advertised in its Statute and at different intervals in its judgment of June 1986 – to ascertaining the settlement or oscillation of state practice, in terms of both the *content* of the principle (i.e., 'on the nature of prohibited intervention')[100] and its essential *scope* or *parameters* (i.e., to a 'right' or 'exception' to 'the principle of its prohibition'),[101] for the ICJ was mindful that any contrarian practice emerging from its investigation could form the basis of 'a new customary rule'.[102] As the Court was to make clear:

> The significance for the Court of cases of State conduct *prima facie* inconsistent with the principle of non-intervention lies in the nature of the ground offered as justification. Reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law.[103]

At least as a theoretical matter, therefore, cases of 'state conduct' were to become the mainstay of the Court's deliberations when assessing the content, as well as the scope or parameters, of the principle before it. The Court had to be 'satisfied', it said, 'that State practice justifies' the conclusions it would reach on both of these fronts[104] – and the Court felt this especially keenly given the United States' failure to appear during the merits phase of the proceedings and its failure to attend to the accusations of intervention that Nicaragua had made against it. Once the ICJ had found that 'the activities of the United States in relation to the activities of the *contras* in Nicaragua constitute[d] *prima facie* acts of intervention',[105] it was incumbent on the Court – for 'the Court will . . . have to determine',[106] it proclaimed – 'whether there are present any circumstances excluding lawfulness, or whether such acts may be justified upon any other ground'.[107]

98 *Ibid.*
99 Art. 38(1)(b) ICJ Statute.
100 ICJ, *Nicaragua* (n. 32), para. 206.
101 *Ibid.*, para. 207.
102 *Ibid.*
103 *Ibid.*
104 *Ibid.*, para. 206.
105 *Ibid.*, para. 246.
106 *Ibid.*, para. 226.
107 *Ibid.*

These are the bare bones of the framework that the Court articulated within which to examine whether any 'right' or 'exception' to 'the principle of its prohibition' might have supported the legal position of the United States, although (as we have seen) the Court was also attentive in this to the possibility that 'a new customary rule' may have formed[108] – one that could have emerged from the practice of the United States (presumably, among other states). The first such ground or justification that the ICJ examined seriously was 'a kind of general right for States to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another State, whose cause appeared particularly worthy by reason of the political and moral values with which it was identified'.[109] The Court did so, however, immediately after remarking as an aside that it was 'not here concerned with the process of decolonisation'.[110]

What was the point of the Court's binding together, in the same breath, of these two propositions – decolonisation and support for a 'particularly worthy' cause of political or moral values – only to decouple them so very quickly afterwards? Plainly, at base, both of these propositions envisage situations in which 'an internal opposition' is arraigned against the government of its respective state; it is simply the case that Nicaragua was not then involved in an (or any) act of decolonisation, so that the first proposition was an easy point for the Court to defer or dismiss. But why, then, mention it at all? One interpretation of why the ICJ did so is that while 'the process of decolonisation' could suitably have come within the compass of the latter proposition (on supporting the 'political and moral values' of which the Court also spoke), the existence of any such 'process' would have affected the substantive outcome – that is, what the Court found in relation to that proposition.[111] The Court therefore felt it necessary to pry apart one proposition from another, so that the legal validity of each would not be confused or somehow conflated.

[108] *Ibid.*, para. 207.
[109] *Ibid.*, para. 206.
[110] *Ibid.*
[111] This interpretation is fuelled by the blistering dissent that Judge Stephen M. Schwebel appended to the judgment in the *Nicaragua* case, asserting that the Court had 'compromised' its judgment 'by its inference that there may be a double standard in the law governing the use of force in international relations: intervention is debarred, except, it appears, in "the process of decolonization"': *ibid.*, 273, para. 16. In a more generous mood, Judge Schwebel admitted that '[p]erhaps the best that can be said of this unnecessary statement of the Court is that it can be read as taking no position on the legality of intervention in support of the process of decolonization, but as merely referring to a phenomenon as to which positions in the international community differ': *ibid.*, 351, para. 181. See also Oscar Schachter, *International Law in Theory and Practice* (Leiden: Martinus Nijhoff 1991), 120.

Another interpretation might be that this is an example of overreach in that part of the Court's judgment, but we might accept that the Court did offer 'a faint hint in that direction'[112] – that is, on the lawfulness of intervention in the context of decolonisation.[113]

As for the latter proposition appearing in the Court's analysis, this has frequently travelled under the guise of a right of 'political' or 'ideological' intervention as it came to be associated with the high politics of superpower rivalry during the period of the Cold War. We should be clear on this matter, however: the ICJ broached the general idea of 'intervening in the affairs of a foreign State for reasons connected with, for example, . . . its ideology'[114] and, at one point, wrote of 'a legal argument derived from a supposed rule of "ideological intervention"'.[115] Although it did not fully elaborate on what this proposition might (or might not) have entailed at that point in time, it is reasonable to assume that the Court's reach would have extended to cover both the Brezhnev Doctrine and the Reagan Doctrine,[116] with the ICJ wasting little, if any, time concluding that such a 'fundamental modification of the customary law principle of non-intervention' had not in fact transpired in practice.[117] Elsewhere, the Court said, this proposition would have been 'a striking innovation' for the law.[118] And the Court arrived at its conclusions by recourse – at least, to some extent – to its empirical method: its took its cue from the actual conduct of states, observing that '[t]he United States authorities have on some occasions clearly stated their grounds for intervening in the affairs of a foreign State' (grounds that had included the ideological disposition of the target state), but adding that '[t]hese were statements of international policy, and not an assertion of rules of existing international law'.[119] Somewhat fatally, then, from the Court's perspective, the United States had not supplied the requisite opinio iuris in respect of the relevant 'right' for its interventions,[120] and the Court was moved to issue an identical remark in

[112] Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge: CUP 6th edn 2017), 73.
[113] Especially in view of the terms of UN GA Res. 2625 (XXV) (n. 36).
[114] ICJ, *Nicaragua* (n. 32), para. 207.
[115] *Ibid.*, para. 266.
[116] See further W. Michael Reisman, 'Old Wine in New Bottles: The Reagan and Brezhnev Doctrines in Contemporary International Law and Practice', *Yale Journal of International Law* 13 (1988), 171–98.
[117] Such was the Court's description of the potential impact of this proposition: ICJ, *Nicaragua* (n. 32), para. 206.
[118] *Ibid.*, para. 266.
[119] *Ibid.*, para. 208.
[120] Or, as the Court also put it, 'the United States has not claimed that its intervention, which it justified in this way on the political level, was also justified on the legal level, alleging the exercise of a new right of intervention regarded by the United States as existing in such

respect of the conduct of Nicaragua in El Salvador, Costa Rica, and Honduras.[121] In consequence, the ICJ found against the existence of 'such general right of intervention … in support of an opposition within another State' as a matter of the extant international law.[122]

At a later point in its judgment, the Court reaffirmed its finding – but how it did so warrants much closer attention, because it drew upon considerations other than the actual conduct of states. At this point of its analysis, it moved beyond the empirical method, as the following statement demonstrates:

> However the regime in Nicaragua be defined, adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make [a] nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State. Consequently, Nicaragua's domestic policy options, even assuming that they correspond to the description given of them by the [US] Congress finding, cannot justify on the legal plane the various actions of the Respondent complained of. The Court cannot contemplate the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system.[123]

At stake here was the same 'general right' that the ICJ had assessed earlier in its judgment,[124] but here the Court is appearing to say more – much more – than it had said previously. Indeed, this statement seems to be more than a mere reaffirmation of the law as it had itself stated; rather, it takes us beyond an exposition of accrued or selected evidence towards a deeper appreciation of the 'fundamental principle' of state sovereignty and its consequences for the international system. The Court anchors this part of its analysis in an idea 'on which the whole of international law rests', no less – one eye focused on securing the overall coherence and cohesion of public international law.[125] Evidently, the plan was to mark out the various emendations of the logic of sovereignty as it deemed pertinent to the case. This is quite different from an empirically minded

circumstances': *ibid.*, para. 208. See further Gray, *International Law and the Use of Force* (n. 50), 108–9.

[121] ICJ, *Nicaragua* (n. 32), para. 208.

[122] *Ibid.*, para. 209.

[123] *Ibid.*, para. 263.

[124] A framing that would suggest that the right would not obtain simply for the two superpowers but would necessarily apply to all States – in consequence of the sovereign equality of all states, as upheld by Art. 2(1) UN Charter.

[125] On coherence as 'connect[ing] to a network of other rules by an underlying general principle', see Thomas M. Franck, 'Legitimacy in the International System', *American Journal of International Law* 82 (1988), 705–59 (741).

Court calling the conduct of states as it saw it.[126] And, crucially, as the Court did so, it struck a much more strident and unrelenting tone, for not only did it decide against any 'new rule opening up a right of intervention by one state against another on the ground that the latter has opted for some particular ideology or political system' by virtue of the operation of that fundamental principle,[127] but also that – again, by virtue of that very principle – it could not contemplate the existence of that rule at any time hence. Such a rule seemed to be quite beyond the contemplation – beyond the imagination – of the Court.

It is interesting that, in its various deliberations on the matter, the ICJ imparted little on the physiognomy of this right of political or ideological intervention – on what it would look like or how it would really function in practice, especially as far as the 'consent' of the internal opposition in the target state was concerned.[128] This is, of course, understandable in view of the Court's repeated observations that states themselves had not yet begun to debate this proposition in legal terms: it is therefore small wonder that more pragmatic details of this 'right' did not surface anywhere in the Court's judgment. Certainly, the ICJ did make reference to a 'general right' of states when it addressed the matter of political or ideological intervention,[129] and this may be taken to suggest that the proposition was framed without privileging any one ideology – any one form of politics – over any other. The Court was speaking in deliberately general terms here: its remarks were not confined to 'any particular doctrine' but, as it said, to Nicaragua's 'freedom of choice' regarding 'domestic policy options' – or (also in its words) to opt for 'some ideology or political system'.[130] Yet it is notable that the Court spoke too, in the very same breath, of interventions 'in support of an internal opposition in another State',[131] while nowhere translating this consideration into any question of consent by that opposition to intervention. Arguably, for the ICJ, the proposition that it had itself devised for assessment concerned a right *of* – and not a right *to* – political or ideological intervention, as undertaken by states. This would suggest

[126] See, e.g., Stefan Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion', *European Journal of International Law* 26 (2015), 417–43 (422–3), arguing that processes of (normative) deduction guided part of the Court's reasoning.

[127] ICJ, *Nicaragua* (n. 32), para. 263.

[128] Reisman, for one, has questioned what each of these doctrines demanded as a matter of rhetoric: Reisman, 'Old Wine in New Bottles' (n. 116), 172.

[129] Actually, three times in its judgment: ICJ, *Nicaragua* (n. 32), paras 206 (twice) and 209.

[130] *Ibid.*, para. 263. Schachter regards the main tenet of the Reagan Doctrine to be that it 'openly proclaimed the legitimacy of foreign military intervention to overthrow leftist totalitarian governments': Schachter, *International Law in Theory and Practice* (n. 111), 122.

[131] Consider Gray, *International Law and the Use of Force* (n. 50), 108, on the Reagan Doctrine and assistance to 'freedom fighters'.

that, if such a general right could be said to exist at all, it would have ultimately derived from 'the admitted determination of superpowers'[132] – although, in accordance with the principle and implications of sovereign equality, it is fair to assume that it would have been available to all states.[133] It is this consideration, above all, that seemed to form the 'core of lawfulness'[134] – at least as the ICJ understood it in June 1986 – rather than any consent that may have been forthcoming from the internal opposition in the state targeted for intervention. Admittedly, such an approach would have necessitated a more nuanced conclusion than that which the Court reached elsewhere in its judgment on 'a mere request for assistance made by an opposition group in another State',[135] but it was not, in the end, to be given the categorical position that the Court developed against any right of political or ideological intervention.

III. INTERVENTION, COERCION, AND FORCE

A. *Intervention and Coercion*

Through to this point, we have not given much detailed thought to how the consent of a state can cohere with the very idea of an *intervention*, at least as understood by the UN General Assembly in its Declaration on Friendly Relations of October 1970. That Declaration, we can recall, considered different forms of intervention as interference[136] – that is, those that 'coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind'.[137] The General Assembly then went on immediately to declare 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 interference in civil strife in another State'.[138] We might regard this latter cohort of illustrations as instances of the coercion that the Assembly had had in

[132] Carty, *The Decay of International Law?* (n. 47), 87. Under President Gorbachev, the Soviet Union was to abandon even the rhetorical value of the Brezhnev Doctrine: Gray, *International Law and the Use of Force* (n. 50), 96.

[133] As might be said for the general content of the ius ad bellum.

[134] W. Michael Reisman, 'The Brezhnev Doctrine and the Reagan Doctrine: Apples and Oranges?', *Proceedings of the American Society of International Law* 81 (1987), 561–78 (562).

[135] ICJ, *Nicaragua* (n. 32), para. 246.

[136] UN GA Res. 2625 (XXV) (n. 36).

[137] *Ibid.* Said to be a 'criterion' that is 'so vague as to be almost useless': Derek W. Bowett, 'International Law and Economic Coercion', *Virginia Journal of International Law* 16 (1976), 245–59 (248).

[138] UN GA Res. 2625 (XXV) (n. 36).

mind in its elaboration of intervention – although it is worth noting that while 'coercion' had been used to impart some sense of what 'intervention' meant on that occasion, the General Assembly had not yet fully defined its meaning.[139] Still, it should be evident from what the General Assembly said that it was the *intention* behind the alleged coercion (i.e., 'to obtain from it the subordination of the exercise of its sovereign rights', 'to secure from it advantages of any kind')[140] rather than the *effect* of that coercion which mattered more.[141] Indeed, the abject banishment in the Declaration of any organisation, assistance, fomenting, financing, inciting or toleration of subversive, terrorist or armed activities 'directed towards the violent overthrow of the regime of another State' does serve to reinforce this point of view; it is on account of their essential ambition ('directed towards') that such activities could have no redeeming feature in the eyes of the law.[142]

As for its judgment in the *Nicaragua* case, the ICJ seized on '[t]he element of coercion' as 'the very essence' – or so it said – of *prohibited* intervention.[143] According to the Court:

> A prohibited intervention must … be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of a foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State.[144]

With this passage, the Court appeared to regard intervention as prohibited when it is 'wrongful' or when it has coercion (or the bearing down on matters

[139] Difficult though this must have been to do: Bowett, 'International Law and Economic Coercion' (n. 137), 248 ('To say merely that there must be "coercion" is scarcely adequate, for all forms of economic competition are coercion in the sense that other States are forced to adjust their own policies in response').

[140] Problematic though the evidence for this might be for Corten, 'Intervention by Invitation', Chapter 2 in this volume, section I.B, p. 107.

[141] See Bowett, 'International Law and Economic Coercion' (n. 137), 248. Consider also Robert J. Art and Kelly M. Greenhill, 'Coercion: An Analytical Overview', in Kelly M. Greenhill and Peter Krause (eds), *Coercion: The Power to Hurt in International Politics* (Oxford: OUP 2018), 3–32 (4).

[142] Part of the provisions of the Declaration that 'are declaratory of customary international law': ICJ, *Congo* (n. 45), para. 162.

[143] ICJ, *Nicaragua* (n. 32), para. 205.

[144] *Ibid*.

of free choice) at its heart,[145] and the form of words used could be taken to suggest that the Court intended to make a general statement on the core elements of prohibited intervention irrespective of how any intervention in particular manifests itself. We might contrast this approach with the example-led definition of 'armed attack' that the Court provided in the same judgment,[146] but there are those who have contended that coercion is in fact 'just one form of unlawful intervention'.[147] By this token, the ICJ would have had within in its sights only the intervention that had been referred to it by Nicaragua in April 1984: its concern was not to set down a definitional metric for *all* prohibited interventions as a matter of law.[148] However, the forthright way in which the Court expressed itself on that occasion (where coercion 'defines, *and indeed forms the very essence of*, prohibited intervention'[149]), taken together with the immediate context in which the above passage was framed,[150] appears to implicate the Court in stapling into place a formulation of generic application, with 'a stricter meaning' emerging for 'intervention' beyond its use in common parlance.[151] And all of this as a prelude to the Court's investigation of 'cases of State conduct *prima facie* inconsistent with the principle of non-intervention' and 'the nature of the ground offered as justification' for those actions.[152]

[145] See further Jamnejad and Wood, 'The Principle of Non-Intervention' (n. 47), 348: 'The non-intervention principle is sometimes criticised for apparently precluding all state-to-state interaction; the requirement of coercion properly delimits the principle.'

[146] ICJ, *Nicaragua* (n. 32), para. 195, where interestingly, at one point in its definition, the Court made reference to 'the prohibition of armed attacks'.

[147] Marcelo Kohen, 'The Principle of Non-Intervention 25 Years after the *Nicaragua* Judgment', *Leiden Journal of International Law* 25 (2012), 157–64 (161). See further the dissent of Judge Schwebel in the *Nicaragua* case, where he drew a distinction between 'the sweeping provisions of the [Organisation of American States (OAS)] Charter' and 'customary and general international law': ICJ, *Nicaragua* (n. 32), 305, para. 98. See also Jean Michel Arrighi, 'The Prohibition of the Use of Force and Non-Intervention: Ambition and Practice in the OAS Region', in Weller, *The Oxford Handbook of the Use of Force in International Law* (n. 93), 507–32.

[148] With the Court focusing on 'generally accepted formulations' of the principle of non-intervention: ICJ, *Nicaragua* (n. 32), para. 205.

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

[150] *Ibid*.

[151] Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law*, vol. I (London: Longman 9th edn 1992), 430, para. 129, offering the example of criticism of another state's conduct (and emphasising behaviour 'calculated to impose certain conduct or consequences on that other state').

[152] ICJ, *Nicaragua* (n. 32), para. 207. See further Dire Tladi, 'The Duty Not to Intervene in Matters within Domestic Jurisdiction', in Viñuales, *The UN Friendly Relations Declaration at 50* (n. 60), 87–104 (101–3).

B. *Dictatorial Interference*

For what it is worth, 'coercion' has not always commanded this degree of prominence in fashioning a metric for 'intervention' in public international law. It is therefore instructive to return to an earlier period of the discipline's history to try to appreciate how 'intervention' was then understood, explained, rationalised. We do so, additionally, because of the framework of regulation that has resulted for the practice of intervention, which is not just 'a series of broad statements' floated towards a single end,[153] but a more intricate set of ideas about intervention. Our reference point for this exercise is the landmark treatise of Lassa Oppenheim, which was published at the beginning of the twentieth century – in particular, the first of his two volumes, which concerned the laws of peace. I have selected this work not only because of the effort its author made to provide a systemic treatment of the relevant practice up to that point in time[154] – something that understandably eluded the jurisprudence of the ICJ in June 1986[155] – but also because of the temporal dimension brought about as a consequence of its successive editions: its most recent, the ninth, appeared in 1992.[156]

In the first volume of his original treatise, published in 1905, in the chapter devoted to the position of states within the Family of Nations, Oppenheim allocates an entire section to the law and practice of intervention – 'a dictatorial interference', as he so memorably called it, 'by a State in the affairs of another State for the purpose of maintaining or altering the actual condition of things'.[157] With this definition in hand, Oppenheim proceeded to distinguish between those interventions that he thought could 'take place by right or without a right':[158]

> That intervention is a rule forbidden by the Law of Nations which protects the International Personality of the States, there is little doubt. On the other hand, there is just as little doubt that this rule has exceptions, for there are interventions which take place by right, and there are others which, although they do not take

[153] Jamnejad and Wood, 'The Principle of Non-Intervention' (n. 47).

[154] Indeed, in the preface to the work, Oppenheim mentions the objective of 'a complete survey of the subject': Oppenheim, *International Law: A Treatise*, vol. I (n. 47), vii.

[155] So, e.g., in the *Nicaragua* case, the Court admitted that 'the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised' and that, in consequence, it 'expressed no view on that issue': ICJ, *Nicaragua* (n. 32), para. 194.

[156] Jennings and Watts, *Oppenheim's International Law*, vol. I (n. 151), 430–2, para. 129.

[157] Oppenheim, *International Law*, vol. I (n. 47), 181, para. 134 (intervention 'always concerns the external independence or the territorial or personal supremacy of the respective State').

[158] *Ibid*. *Accord* Henry Wheaton, *Elements of International Law* (Boston: Little, Brown, and Co. 8th edn by Richard Henry Dana 1866), 1210, para. 72.

> place by right, are nevertheless admitted by the Law of Nations and are excused in spite of the violation of the Personality of the respective States they involve.[159]

For Oppenheim, when intervention 'takes place by right', it is not to be regarded as a violation of the external or internal affairs of a state, 'because the right of intervention is always based on a legal restriction upon the independence or territorial or personal supremacy of the State concerned, and because the latter is in duty bound to submit to the intervention'.[160]

Oppenheim then identified 'several grounds' whereby interventions could occur as a matter of right:[161]

- where the suzerain state has 'a right to intervene in many affairs of the vassal, and the State which holds a protectorate has a right to intervene in all the external affairs of the protected State';[162]
- should 'the right of protection of its citizens abroad, which a State holds, … cause an intervention by right to which the other party is legally bound to submit';[163]
- 'if a State which is restricted by an international treaty in its internal independence or its territorial or personal supremacy, does not comply with the restrictions concerned, [in which case] the other party or parties have a right to intervene';[164]
- 'if an external affair of a State is at the same time by right an affair of another State, [in which case] the latter has a right to intervene in case the former deals with that affair unilaterally';[165] and

[159] Oppenheim, *International Law*, vol. I (n. 47), 182, para. 134. Certainly, there are traces of this approach ('by right' vs 'admitted'/'excused') in the modern scholarship on intervention with the dichotomy regarding the legality vs legitimacy of intervention: see Anthea Roberts, 'Legality versus Legitimacy: Can Uses of Force be Illegal but Justified?', in Philip Alston and Euan MacDonald (eds), *Human Rights, Intervention, and the Use of Force* (Oxford: OUP 2008), 179–214.

[160] Oppenheim, *International Law*, vol. I (n. 47), 183, para. 135.

[161] *Ibid.*

[162] *Ibid.* For an explication of the nature of such relationships, consider Zhang Shiming, 'A Historical and Jurisprudential Analysis of Suzerain–Vassal State Relationships in the Qing Dynasty', *Frontiers of History in China* 1 (2006), 124–57.

[163] Oppenheim, *International Law*, vol. I (n. 47), 183, para. 135. For an appreciation of this strand of thinking and its place in practice, consider Natalino Ronzitti, *Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity* (Leiden: Martinus Nijhoff 1985). See, however, the position – in reviewing this work – of D.W. Bowett, *British Yearbook of International Law* 57 (1986), 398–9 (398) (on 'the views of many States (and authors) that rescue operations were regarded as legitimate self-defence prior to 1945').

[164] Oppenheim, *International Law*, vol. I (n. 47), 183, para. 135.

[165] *Ibid.*

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- 'if a State in time of peace or war violates those principles of the Law of Nations which are universally recognised, [in which case] other States have a right to intervene and to make the delinquent submit to the respective principles'.[166]

These interventions were to be contrasted with circumstances in which there existed 'no right to intervention' at all, but in which the intervention 'may be admissible and excused',[167] and where, Oppenheim claimed, 'such State has by no means any legal duty to submit patiently and suffer the intervention'.[168] Within this register, Oppenheim placed those acts necessary for self-preservation[169] and those undertaken in the interest of the balance of power[170] – two 'kinds' of intervention that exemplified intervention 'in default of right', in his view.[171] A third kind of intervention – intervention in the interest of humanity – was also mooted, but Oppenheim felt that 'whether there is really a rule of the Law of Nations which admits such interventions may well be doubted'.[172]

Significantly, for our purposes, Oppenheim proceeded from a most crucial assumption: at the outset of his assessment of this topic, he made a point of emphasising the difference between 'dictatorial interference' and what he called 'interference pure and simple' – for 'many writers', he insisted, 'constantly commit this confusion'.[173] And it is a distinction that has been sustained right through to the present edition of the treatise,[174] notwithstanding the fact that – at least in the parlance of the UN General Assembly – 'intervention' and 'interference' have somehow come to be treated as

[166] *Ibid*.

[167] *Ibid*. (where the intervention *does* violate either the external independence or the territorial or the personal supremacy of said state).

[168] *Ibid*., 185, para. 136.

[169] *Ibid*. (where 'if any necessary violation committed in self-preservation of the International Personality of other States is . . . excused, such violation must also be excused as is contained in an intervention').

[170] *Ibid*. (remarking that, alongside self-preservation, 'it is likewise obvious that it must be excused').

[171] *Ibid*.

[172] *Ibid*., 186, para. 137.

[173] *Ibid*., 182, para. 134. See David Wippman, 'Pro-Democratic Intervention', in Weller, *The Oxford Handbook of the Use of Force in International Law* (n. 93), 797–815 (805): 'It is "dictatorial interference" in the internal affairs of another state that is impermissible, not intervention per se.' See further Klingler, 'Counterintervention on Behalf of the Syrian Opposition?' (n. 93), 488.

[174] Where Jennings and Watts distinguish between 'loose' invocations ('to cover such matters as criticism of another state's conduct') and its 'stricter meaning' ('intervention is forcible or dictatorial interference by a state in the affairs of another state'): Jennings and Watts, *Oppenheim's International Law*, vol. I (n. 151), 430, para. 129.

normative synonyms.[175] Yet Oppenheim was quite adamant that there was *purpose* in intervention as dictatorial interference and that there was *purpose* in ensuring that this term was not put to use indiscriminately:

> [I]ntervention must neither be confounded with good offices, nor with mediation, nor with intercession, nor with co-operation, because none of these imply a *dictatorial* interference. Good offices is the name for such acts of friendly Powers interfering in a conflict between two other States as tend to call negotiations into existence for the peaceable settlement of the conflict, and mediation is the name for the direct conduct on the part of a friendly Power of such negotiations. Intercession is the name for the interference consisting in friendly advice given or friendly offers made with regard to the domestic affairs of another State. And, lastly, co-operation is the appellation of such interference as consists in help and assistance lent by one State to another at the latter's request for the purpose of suppressing an internal revolution.[176]

For Oppenheim, then, one state's 'request' for help from another state could not count as 'intervention' in the sense developed by public international law: the presence of any request – or, more broadly, of consent – by, or on behalf of, the 'target state' of the intervention meant that there was really no 'dictatorial interference' of which to speak.[177] Indeed, in the ninth edition of his treatise, 'dictatorial' interference is actually described as a 'requirement' if an interference is indeed to 'amount to an intervention',[178] although it is also stated there that 'the interference must be forcible or dictatorial, or otherwise coercive'.[179] Satisfaction of this requirement, it is reasoned, 'excludes from intervention assistance rendered by one state to another at the latter's request and with its consent',[180] so that it may be not only preferable but also advisable to speak in terms of (military) 'assistance on

[175] Jamnejad and Wood, 'The Principle of Non-Intervention' (n. 47), 347.

[176] Oppenheim, *International Law*, vol. I (n. 47), 182–3, para. 134 (emphasis original).

[177] Oppenheim gave as a solitary example of this Russia's sending of troops to Hungary in May 1849 at the request of Austria to suppress the Hungarian revolt: *ibid*., 183, para. 134. See further Eugene Horváth, 'Russia and the Hungarian Revolution (1848–49)', *Slavonic and Eastern European Review* 12 (1934), 628–45.

[178] Jennings and Watts, *Oppenheim's International Law*, vol. I (n. 151), 435, para. 130.

[179] *Ibid.*, 432, para. 129 (critically, 'in effect depriving the state intervened against of control over the matter in question'). Importantly, coercion is regarded on its own terms in the ninth preambular recital of UN GA Res. 2625 (XXV) (n. 36) ('military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any State'), as separate from 'intervention' (cons. 8) and 'force' (cons. 10) – although it was not one of the seven principles the General Assembly articulated in October 1970. See also above, n. 39 and n. 49.

[180] Jennings and Watts, *Oppenheim's International Law*, vol. I (n. 151), 435, para. 130 (even though this may include 'detachments of armed forces or the supply of military equipment').

request',[181] among other possibilities. Even the notion of 'consensual intervention' will not do,[182] because it conflates the *descriptive* component of this practice (the presence of consent) with its *normative* component (the idea of intervention itself, at least on the reading given here from public international law). Intervention by consent – whether through request or invitation – is therefore better regarded as something of a 'misnomer' that is really best avoided,[183] for it is apt to convey the impression that a state can admit to its own coercion. The descriptive and normative components contained in that formulation – of an 'intervention by consent' – await to be disentangled, and the terminological anointing of the proposition in question deserves to be reconceived.[184]

C. *Consent and Force*

This brings us to the topic of 'force' and what may be said of its basic relationship with 'consent'.[185] Article 2(4) of the Charter says nothing of the matter of 'consent' when it enjoins all UN member states to 'refrain in their international relations from the threat or use of force against the territorial integrity of political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations', but the wording of this formulation might give us pause for thought: can any force that has been consented to properly be quantified as force that is *against* the territorial integrity or political independence of the target state?[186] Certainly, it is an

[181] As Jennings and Watts do: *ibid.* See also James W. Garner, 'Questions of International Law in the Spanish Civil War', *American Journal of International Law* 31 (1937), 66–73 (68) ('rendering assistance to the established legitimate government').

[182] Although this phraseology is adopted by Gregory H. Fox throughout his chapter, 'Invitations to Intervene after the Cold War', Chapter 3 in this volume. See also Lieblich, *International Law and Civil Wars* (n. 22), 1; David Wippman, 'Treaty-Based Intervention: Who Can Say No?', *University of Chicago Law Review* 62 (1995), 607–87 (611) ('state consent to intervention'); André de Hoogh, 'Jus Cogens and the Use of Armed Force', in Weller, *The Oxford Handbook of the Use of Force in International Law* (n. 93), 1161–86 (1167–8) ('consensual rights of intervention').

[183] An appellation used by IDI Rapporteur Gerhard Hafner (University of Vienna): see *Annuaire de l'Institut de droit international* 79 (2009), 297–447 (309).

[184] See the useful interventions to this effect made by Agata Kleczkowska, 'The Misconception about the Term "Intervention by Invitation"', *Heidelberg Journal of International Law* 79 (2019), 647–9, and Laura Visser, 'What's in a Name? The Terminology of Intervention by Invitation', *Heidelberg Journal of International Law* 79 (2019), 651–3.

[185] See further Ashley S. Deeks, 'Consent to the Use of Force and International Law Supremacy', *Harvard International Law Journal* 54 (2013), 1–60.

[186] See, especially, Schachter, *International Law in Theory and Practice* (n. 111), 114, and Philip C. Jessup, *A Modern Law of Nations: An Introduction* (New York: Macmillan 1948), 162–3.

approach that appears to assume that every word of that provision shall be accorded weight or relevance in the final interpretative reckoning, but, in this, we must test whether states have developed such precious inclinations in their respective practices: at the time of Operation Urgent Fury in Grenada in October 1983, for example, the legal adviser to the US Department of State claimed that he was 'not aware of any authority for the proposition that military assistance in response to the request of lawful authority is contrary to the prohibitions of Article 2(4) of the U.N. Charter'.[187] If this were the case, the ius ad bellum would not thereby become engaged.[188]

Another possibility is to consider that force occurring with consent *does* come within the terms of Article 2(4) of the Charter, but that it forms an *exception* to that provision – akin to the inherent right of individual and collective self-defence, as contained in Article 51.[189] This would serve as the basis of its allowability. Along this line of thinking, the literature usually invokes the Articles on the Responsibility of States for Internationally Wrongful Acts published by the International Law Commission (ILC) in August 2001 – and, specifically, one of the six circumstances that the Commission identified for the preclusion of wrongfulness.[190] So, when he considered consent and force in his classic text, *War, Aggression and Self-Defence*, Yoram Dinstein refers reflexively and without comment to Article 20 of the ILC Articles,[191] which provides that '[v]alid consent by a State to the commission of a given act by another State precludes the wrongfulness of that

[187] Davis R. Robinson, 'Letter from the Legal Adviser, United States Department of State', *International Lawyer* 18 (1984), 381–7 (382–3) (yes; referring to 'prohibitions' in the plural).

[188] See further Prime Minister's Office, *Summary of the UK Government's Position on the Military Action against ISIL*, Policy paper, 25 September 2014, 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: '[I]nternational law is equally clear that this prohibition [of force] does not apply to military force by one State on the territory of another if the territorial State so requests or consents.'

[189] Cassese discusses the possibility of 'an implicit exception' to the Charter: Antonio Cassese, *International Law in a Divided World* (Oxford: Clarendon Press 1986), 239, para. 141. Consider also Federica I. Paddeu, 'Military Assistance on Request and General Reasons against Force: Consent as a Defence to the Prohibition of Force', *Journal on the Use of Force and International Law* 7 (2020), 227–69.

[190] ILC, Articles on the Responsibility of States for Internationally Wrongful Acts of the International Law Commission, August 2001: Arts. 20 (consent), 21 (self-defence), 22 (countermeasures), 23 (force majeure), 24 (distress), and 25 (necessity). See further Federica Paddeu, *Justification and Excuse in International Law: Concept and Theory of General Defences* (Cambridge: CUP 2018), 131–74.

[191] Dinstein, *War, Aggression and Self-Defence* (n. 112), 125. Note how Fox refers to 'the general role of consent as a circumstance precluding wrongfulness of state action': Fox, 'Invitations to Intervene after the Cold War', Chapter 3 in this volume, section II.B, 193; See also Fox, 'Intervention by Invitation' (n. 93), 821.

act in relation to the former State to the extent that the act remains within the limits of that consent'.[192] There might well be a certain logic to this reasoning, since the very next provision (Article 21) positions the circumstance of self-defence as an instance of the preclusion of wrongfulness ('The wrongfulness of an act of a State is precluded if the act constitutes a lawfulness measure of self-defence taken in conformity with the Charter of the United Nations').[193] However, is it really true to maintain that consent to force precludes the wrongfulness of that force?

In the Commentaries to Article 20, we are given a number of '[s]imple examples' of the 'daily occurrence' whereby 'States consent to conduct of other States which, without such consent, would constitute a breach of an international obligation': transit through the airspace or internal waters of a state; the location of facilities on a state's territory; the conduct of official investigations or inquiries within a state.[194] The ILC presents additional examples later in its analysis, and these directly relate to 'force': whether the consent expressed by a regional authority can legitimise the sending of foreign troops into the territory of a state; whether such consent can be given only by the central government of the relevant state; whether the government in question has the 'legitimacy' to issue that consent.[195] 'These questions', the Commentaries observe, 'depend on the rules of international law relating to the expression of the will of the State, as well as rules of internal law to which, in certain circumstances, international law refers.'[196]

In addition to 'the rules of international law relating to the expression of the will of the State', the Commentaries also draw our attention to the primary obligation that is at stake in any given situation and to 'consent in relation to the underlying obligation itself'.[197] In this context, that primary or underlying obligation is, of course, Article 2(4) of the UN Charter and its customary counterpart, which, we might recall, makes no utterance on consent. Yet the seamless juxtaposition of the ILC's provision on 'valid consent' and 'force' encountered in Dinstein's *War, Aggression and Self-Defence* does not fully acknowledge the considerable unease that marked deliberations within the Commission itself in respect of that very provision, such that Special

[192] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: CUP 2002), 163.
[193] *Ibid.*, 166.
[194] *Ibid.*, 163. Also: on consent to a search of embassy premises and to the establishment of a military base on the territory of a state, *ibid.*, 164. Further examples are provided by James Crawford, *State Responsibility: The General Part* (Cambridge: CUP 2013), 285–6.
[195] Crawford, *The International Law Commission's Articles* (n. 192), 164.
[196] *Ibid.*
[197] *Ibid.*, 163.

Rapporteur James Crawford was moved to remark that there might be a 'deeper problem' in existence – more than 'one simply of formulation'.[198] Such admission invites the user of the ILC Articles to dissect their contents more closely, alert not only to questions of formulation but also to the authority and persuasion steering each proposition of law. It is therefore worthwhile – and, arguably, necessary – to return to the account that Crawford gave of *his* misgivings:

> Is it possible to distinguish between, on the one hand, the issue of consent as an element in the application of a rule (which is accordingly part of the *definition* of the relevant obligation) and, on the other hand, the issue of consent as a basis for precluding the wrongfulness of conduct inconsistent with the obligation? ... [I]f consent must be given in advance, and if it is only validly given in some cases and not in others, and if the authority to consent varies with the rule in question, then it may be asked whether the element of consent should not be seen as incorporated in the different primary rules, possibly in different terms for different rules. For example, the rule that a State has the exclusive right to exercise jurisdiction or authority on its territory is subject to the proviso that foreign jurisdiction may be exercised with the consent of the host State, and such cases are very common (e.g. commissions of enquiry sitting on the territory of another State, the exercise of jurisdiction over visiting forces, etc.). They do not involve, even prima facie, conduct not in conformity with the international obligation, and thus they fall outside the scope of [circumstances precluding wrongfulness], and indeed outside the scope of the draft articles as a whole.[199]

Note how the 'daily occurrence' of the Commentaries to Article 20 is rendered here as practice that was 'very common' in view of 'the proviso that foreign jurisdiction may be exercised with the consent of the host State': some of the same examples (e.g., commissions of enquiry sitting on the territory of another state) were rallied but to somewhat different effect. What is most striking, though, is the Special Rapporteur's tone in staking out his position: he is adamant that the cases he mentions 'do not involve, even prima facie, conduct not in conformity with the international obligation', such that the primary rule does not even come into play. So these were no ordinary misgivings: these were not merely aesthetic differences or differences of style; rather, they were points of disagreement that went to the very heart of the exercises of

[198] James Crawford, *Second Report on State Responsibility*, Doc. A/CN.4/498 and Add.1-4, 17 March, 1 and 30 April, 19 July 1999, reproduced in *Yearbook of the International Law Commission* I (1999), 3–99 (61, para. 238).

[199] *Ibid.*, 61–2, para. 238 (emphasis original). See also Crawford, *State Responsibility* (n. 194), 275 (on the negative definition of circumstances precluding wrongfulness).

conceptualisation and categorisation. And, in point of fact, they are what led the Special Rapporteur to propose the *deletion* of the provision on consent from the final inventory of circumstances precluding wrongfulness:

> [I]t seems to me that to treat consent in advance as a circumstance precluding wrongfulness is to confuse the content of the substantive obligation with the operation of the secondary rules of responsibility, whereas to treat consent given in arrears as such a circumstance is to confuse the origins of responsibility with its implementation (*mise en oeuvre*).[200]

Before proposing this path forward, Crawford cited the rules on both intervention and force as crucial examples of rules 'which are not absolute prohibitions but which allow that the conduct in question may be validly consented to by the target State'.[201] These were, he said, to be contrasted with obligations that had been 'properly formulated in absolute terms':[202]

> In the absence of identifiable intermediate cases (i.e. cases where consent might validly be given in advance but where it is not part of the definition of the obligation) the position appears to be as follows: either the obligation in question allows that consent may be given in advance to conduct which, in the absence of such consent, would conflict with the obligation, or it does not. In the former case, and consent is validly given, the issue whether wrongfulness is precluded does not arise. In the latter, consent cannot be given at all. Both cases are distinguishable from waiver after a breach has occurred, giving rise to State responsibility.[203]

The Special Rapporteur's misgivings do seem to tap into a broader series of concerns that have been expressed about the very category of circumstances precluding wrongfulness and its place in the overall architecture of the law of state responsibility – that, on the one hand, the category purports to identify 'behaviour that is right' (and, presumably, right *ab initio*), but, on the other hand, it also incorporates 'behaviour that, though wrong, is understandable and excusable'.[204] Others have argued against confusing the 'preclusion' of

[200] Crawford, *Second Report on State Responsibility* (n. 198), 62, para. 241. Again, see Crawford, *State Responsibility* (n. 194), 275.

[201] Crawford, *Second Report on State Responsibility* (n. 198), 62, para. 240.

[202] *Ibid.* – '(i.e., without any condition or qualification relating to consent), but nonetheless the consent of the State concerned precludes the wrongfulness of conduct' – in which case, Art. 20 (as it now is) 'might have a valid, though limited, scope of application': *ibid.* The Special Rapporteur was not aware of any such case.

[203] *Ibid.*

[204] Vaughan Lowe, 'Precluding Wrongfulness or Responsibility: A Plea for Excuses', *European Journal of International Law* 10 (1999), 405–11 (406).

a primary obligation with 'defences to breach it',[205] and there is some sense of the distinctiveness of consent that emerges from the requirement that it be given beforehand (for 'such consent validly given implies that the conduct is perfectly lawful at the time it occurs').[206] That idiom of perfect lawfulness is an arresting choice of words with which the Special Rapporteur unpacks the significance of consent, and he continued:

> By contrast, where a State acts inconsistently with an obligation and its conduct is excused on grounds such as necessity, force majeure or distress, one is not inclined to say that the conduct is 'perfectly lawful'. Rather there is an apparent or prima facie breach which is or may be excused. Even in the case of self-defence or countermeasures, where the conduct may be intrinsically lawful in the circumstances, at least there is a situation which requires some explanation and some justification.[207]

All of this might well place us on the back foot of the actual demands of the primary obligation,[208] but it is difficult to take issue with Crawford's observation in respect of the instinctive interpretations that states have tended to make on consenting to force – and on the prohibition of force that is dealing fundamentally with 'hostile military action'.[209]

Consent for force is issued principally on an ad hoc basis or via prior conventional arrangement – that is, what may be termed 'attenuated consent', for the state is providing its consent to force in advance and as a matter of principle (the consent determining the circumstances for force, as set out in conventional form).[210] However, as we approach these specimens of consent,

[205] Higgins, *Problems and Process* (n. 61), 161. See further Ademola Abass, 'Consent Precluding State Responsibility: A Critical Analysis', *International and Comparative Law Quarterly* 53 (2004), 211–25 (223–4).

[206] Crawford, *Second Report on State Responsibility* (n. 198), 62, para. 239. See also Crawford, *State Responsibility* (n. 194), 287.

[207] Crawford, *Second Report on State Responsibility* (n. 198), 62, para. 239. See also Crawford, *State Responsibility* (n. 194), 288.

[208] See, e.g., de Hoogh, '*Jus Cogens* and the Use of Armed Force' (n. 182), 1167, who contends that 'the prohibitions of the use of armed force and (armed) intervention do not stand in the way of [foreign] troops engaging in the use of armed force on a state's territory with a government's consent'. See also Wippman, 'Treaty-Based Intervention' (n. 182), 622.

[209] Higgins, *Problems and Process* (n. 61), 243.

[210] Ditto for intervention. Much has been made in this respect of Art. 4(h) of the 2000 Constitutive Act of the African Union, OAU Doc. CAB/LEG/23.15, which provides for 'the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity'. Note how this has been separately conceived from 'the right of Member States to request intervention from the Union in order to restore peace and security' (Art. 4(j)). See Ben Kioko, 'The Right of Intervention under the African Union's Constitutive Act: From Non-Interference to Non-Intervention', *International Review of the Red Cross* 85 (2003), 807–26.

we need to be clear on what it is conceptually or as a matter of legal categorisation that the state is consenting to, for not all acts or actions count as 'force' even if that is how they might appear initially.

Much like intervention, then, 'force' is a legal term of art that comes with its own set of assumptions and shared appreciations, its historical background imbued with much meaning and relevance for the present discussion.[211] We do not, for example, consider the right of hot pursuit as an exception to the prohibition of force; this is because it is generally regarded as an exception to the principle of flag state jurisdiction, even though it is meant to be exercised 'only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect'.[212] Here, evidently, we are in the realm of the maritime enforcement of the laws and regulations of the coastal (and pursuing) state,[213] with the right established to facilitate the arrest of the offending ship[214] – but 'it is the mission, not the uniform worn by the actor, that determines how force should be classified and which doctrine controls that use of force'.[215]

Consider, too, the arrangements that have been made under the 1982 UN Convention on the Law of the Sea with respect to the controlling of piracy on the high seas, which have developed in something of the same vein.[216] There, 'every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize property on board',[217] with a right of visit envisaged for warships that encounter a foreign ship on the high seas, where there is reasonable ground for suspecting that ship's involvement

[211] See, most importantly, Tom Ruys, 'The Meaning of "Force" and the Boundaries of the *Jus ad Bellum*: Are "Minimal" Uses of Force Excluded from UN Charter Article 2(4)?', *American Journal of International Law* 108 (2014), 159–210. See also Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge: CUP 2009), 272–7.

[212] Art. 111(5) of the United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3 (UNCLOS). See also Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press 1963), 302 (hot pursuit as a 'particular customary right' that is 'independent of the legal category of self-defence').

[213] Art. 111(1) UNCLOS. See also Art. 111(2) UNCLOS.

[214] Art. 111(6)(b), 111(7) and 111(8) UNCLOS. Ditto the right of constructive presence, as discussed by Robin R. Churchill, Vaughan Lowe and Amy Sander, *The Law of the Sea* (Manchester: Manchester University Press 4th edn 2022), 408.

[215] Craig H. Allen, 'Limits on the Use of Force in Maritime Operations in Support of WMD Counter-Proliferation Initiatives', *International Law Studies* 81 (2006), 77–139 (82). Consider, too, the logic of so-called shiprider agreements: Holger W. Henke, 'Drugs in the Caribbean: The "Shiprider" Controversy and the Question of Sovereignty', *European Review of Latin American and Caribbean Studies* 64 (1998), 27–47.

[216] Following on from Arts. 14–22 of the Geneva Convention on the High Seas, 29 April 1958, 450 UNTS 11.

[217] Also in any place outside the jurisdiction of any state: Art. 105 UNCLOS.

with piracy.[218] With this Convention, states seem to have consented to a rare 'capacity' to enforce the universal jurisdiction they possess on the high seas[219] – again governed by the function, rather than the appearance, of the operation at hand. The resulting acts are thus not considered to be acts of 'force' and Article 2(4) is not generally considered to be implicated.[220] Given this context, and by way of contrast, it may be well worth recalling the 'discordant note'[221] sounded by the Arbitral Tribunal in the *Guyana/Suriname* arbitration, in which it described the communication of June 2000 from two patrol boats from the Surinamese Navy made in respect of drill ship *C.E. Thornton* and its service vessels as 'more akin to a threat of military action rather than a mere law enforcement activity'.[222]

Importantly, in the last decade or so, these arrangements had proven wholly insufficient to deal with the exponential increase in piratical action that had occurred off the coast of Somalia at a time when its government – the Transitional Federal Government (TFG) – could not take effective or appropriate action.[223] In its Resolution 1816 of June 2008, the UN Security Council recognised the 'lack of capacity of the [TFG] to interdict pirates or patrol and secure either the international sea lanes off the coast of Somalia or Somalia's territorial waters',[224] and acknowledged that the TFG had written to the UN Secretary-General, specifying that it 'needs and would welcome international assistance to address the problem'.[225] A separate communication of February 2008 from the Permanent Representative of the Somali Republic to the United Nations, addressed to the President of the Security Council, had 'convey[ed] the consent of the TFG to the Security Council for urgent assistance in securing the territorial and international waters off the coast of Somalia for the safe conduct of shipping and navigation',[226] so there could be

[218] Art. 110(1)(a) UNCLOS.

[219] James Crawford, *Brownlie's Principles of Public International Law* (Oxford: OUP 9th edn 2019), 286.

[220] Ditto abductions undertaken across international boundaries: Ruys, 'The Meaning of "Force"' (n. 211), 193.

[221] Vasco Becker-Weinberg and Guglielmo Verdirame, 'Proliferation of Weapons of Mass Destruction and Shipping Interdiction', in Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (n. 93), 1017–33 (1024).

[222] *Guyana/Suriname* Arbitration, Award of the Arbitral Tribunal Constituted Pursuant to Article 287, and in Accordance with Annex VII, of the United Nations Convention on the Law of the Sea (17 September 2007), 147, para. 445.

[223] UN Doc. SC/9344, 2 June 2008.

[224] UN SC Res. 1816 of 2 June 2008, cons. 7.

[225] *Ibid.*, cons. 10.

[226] *Ibid.*, cons. 11.

no doubt that Somalia's consent had been given – and given purposefully – for outside assistance.

Acting under Chapter VII of the Charter, the Security Council thus decided that, for a six-month period:

> 7. . . . States co-operating with the TFG in the fight against piracy and armed robbery off the coast of Somalia, for which advance notification has been provided by the TFG to the Secretary General [of the United Nations], may:
>
> (a) Enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; and
> (b) Use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery . . . [227]

In a subsequent enactment of the Security Council – Resolution 1851 of December 2008 – it provided further authorisation under Chapter VII of the Charter to states and regional organisations acting with the advance notification, provided by the TFG to the Secretary-General, to take 'all necessary measures that are appropriate *in Somalia*, for the purpose of suppressing acts of piracy and armed robbery at sea, pursuant to the request of the TFG, provided, however, that any measures undertaken pursuant to the authority of this paragraph shall be undertaken consistent with applicable international humanitarian and human rights law'.[228]

Both of these resolutions proceeded from the consent of (the government of) Somalia, but it is important to stress that this applied at two separate levels of engagement: one was its reaching out to the Council for assistance in the first place;[229] the other was the operational relevance of the individual actions that participating states and regional organisations planned to take.[230] Given that Resolution 1816 contemplated the use of all necessary means to repress acts of

[227] *Ibid*., para. 7.

[228] UN SC Res. 1851 of 16 December 2008, para. 8 (emphasis added).

[229] According to Treves, the reference 'to the authorization of the coastal state' in both Resolution 1816 and Resolution 1851 'takes away all, or much of, the revolutionary content of the resolutions': Tullio Treves, 'Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia', *European Journal of International Law* 20 (2009), 399–414 (406).

[230] Hence the requirement of advance notification. Indeed, in the Security Council debate that preceded the adoption of Resolution 1816, Indonesia emphasised that actions envisaged 'shall only apply to the territorial waters of Somalia, based on its prior consent': UN Doc. S/PV. 5902, 2 June 2008, 2. See further Douglas Guilfoyle, 'The Use of Force against Pirates', in Weller, *The Oxford Handbook of the Use of Force in International Law* (n. 93), 1057–76 (1062).

piracy and armed robbery, 'in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law', it is arguable that what the Security Council was doing here was conducting an intra-territorial expansion of the conventional regime of 'police powers'[231] – that is, first, into the territorial waters (or better, the territorial sea) of Somalia, with Resolution 1816 and then, with Resolution 1851, into the territory of Somalia itself.[232] Without the consent of the TFG or the authorisation of the Council, any action in these allocated spaces was at very real risk of being interpreted (and potentially reclassified) by states as an act of force under Article 2(4) of the Charter – and as an unlawful act of force at that.

This brings us to the practice of inter-state counter-terrorist operations and the particular example of the force deployed by the United States against Osama bin Laden, as leader of al-Qaeda, after his whereabouts had been pinned to Abbottabad in northeastern Pakistan. The raid was successfully undertaken in May 2011 by twenty-three US Navy SEALs, belonging to the Naval Special Warfare Development Group – who, apparently, 'had surreptitiously entered the country on ten to twelve previous occasions'.[233] Quite apart from the position the United States took on its relationship with al-Qaeda under the laws of the ius in bello and the importance of those laws in determining the lawfulness of the raid, the United States did accept that the sovereignty of Pakistan was also in contention by virtue of the laws of the ius ad bellum. Naturally, the United States considered whether Pakistan's consent could be one way around 'the sovereignty problem':[234] at an earlier point in time, Pakistan had issued its consent for air strikes in the tribal areas adjacent to Afghanistan.[235] However, secrecy was regarded as integral and indispensable to the ultimate success of the operation, and this meant that the United States had to explore the option of claiming its right of self-defence in the absence of consent.[236] With the Foreign Office of Pakistan taking the view that '[t]his event of unauthorized unilateral action cannot be taken as a rule',[237] the episode

[231] As put by Guilfoyle, *ibid.*, 1063.

[232] Indonesia made reference to 'the inability of [Somalia's] law enforcement to maintain stability and security' as the overall context of UN SC Resolution 1816: UN Doc. S/PV. 5902, 2 June 2008, 3.

[233] According to Nicholas Schmidle, 'Getting Bin Laden', *The New Yorker*, 8 August 2011 (and reporting that the raid was by far the deepest stretch into the territory of Pakistan).

[234] See Charlie Savage, *Power Wars: Inside Obama's Post-9/11 Presidency* (Boston: Little, Brown & Co. 2015), 263.

[235] 'U.S. Embassy Cables: Pakistan Backs US Drone Strikes on Tribal Areas', *The Guardian*, 30 November 2010.

[236] Savage, *Power Wars* (n. 234), 264 (under the so-called unwilling or unable doctrine).

[237] Tom Wright, 'Pakistan Criticizes U.S. Raid on bin Laden', *Wall Street Journal*, 3 May 2011, noting a 'change in tone' from the statement made in the immediate wake of the action (indicating Pakistan's cooperation with intelligence-gathering in the past).

revealed the abiding worth of consent in the dynamics of the laws of the ius ad bellum, but it also spoke to its fragility: its presence cannot be assumed or extended.[238] This is not to mention any difficulty in getting at or establishing the facts of consent – which may well remain elusive, and even permanently so. Fundamentally, once given, the remit of consent cannot be generalised but is instead wrapped in the politics and normativity of the particular.[239]

IV. THE LIMITATIONS OF CONSENT

A. *The Basis of Allowability*

We have thus far attended to the idea of the 'allowability' of military assistance 'at the request of the government of a State', as the ICJ expressed it in June 1986 – although it should be sufficiently clear by now that considerable difficulties surround the exact juridical basis of that proposition. What is of concern to us at this juncture is the Court's employment of the word 'allowability' in its analysis: this seems to be different from saying that military assistance in such circumstances is 'allowed'; still less that it is allowed no matter what the prevailing facts are or how enfeebled the government of the day might be. By contrast, 'allowability' injects an aspect of contingency – of negotiability, if you will – into the overall equation: the immediate implication is that certain conditions must be met if such assistance is to be deemed allowable as a matter of law. In the context of this Trialogue, I am therefore more in agreement with the reading of Corten ('allowable' and not 'allowed'[240]) than that of Fox on this point, who writes of the 'unqualified statement'[241] of the Court and of its 'sweeping language',[242] providing 'blanket approval of governmental invitations'.[243] For, as a more general matter emerging from that judgment, the Court proceeded to discerningly identify the legal propositions it brought to its analysis, including propositions that were not at issue before it.[244] In any event, with an eye to the relevant evidence, we have already seen how the

[238] Jane Perlez, 'U.S. Relations with Pakistan Falter in Rift over Drone Strikes', *New York Times*, 18 April 2011, A8.

[239] See further Zohra Ahmed, 'Strengthening Standards for Consent: The Case of U.S. Drone Strikes in Pakistan', *Michigan State International Law Review* 23 (2015), 459–517.

[240] For this point of emphasis, see Corten, 'Intervention by Invitation', Chapter 2 in this volume.

[241] Fox, 'Invitations to Intervene after the Cold War', Chapter 3 in this volume, section I, 183.

[242] *Ibid*, section II.B, 194.

[243] *Ibid*, 193.

[244] For example, 'the lawfulness of a response to the imminent threat of armed attack': ICJ, *Nicaragua* (n. 32), para. 194. See also the discussion of 'the process of decolonization' at n. 110.

UN General Assembly expressly struck out against intervention 'in civil strife in another state' in its enunciation of the principle of non-intervention in Resolution 2625 (XXV).[245] And we have canvassed the consequences of neutrality in the event of an (external) recognition of belligerency,[246] so the preliminary proofs suggest that the allowability of such assistance to the government of a state is not unlimited.[247]

In this section, we shall try to probe in more detail what these conditions for – these dynamics of – consent in law are, or could be, and we shall once again have recourse to historical material to guide our analysis. I shall concentrate on three IDI resolutions adopted over the course of a century or so. The first of these, the Neuchâtel Resolution II (Droits et devoirs des Puissances étrangères, au cas de mouvement insurrectional, envers les gouvernements établis et reconnus qui sont aux prises avec l'insurrection), was adopted in September 1900. The second, the Wiesbaden Resolution III (Le principe de non-intervention dans les guerres civiles), was adopted in August 1975. The third and most recent, the Rhodes Resolution II (Assistance militaire sollicitée), was adopted in September 2011. Much like the successive editions of Oppenheim's treatise on public international law at which we looked for the definition of 'intervention' in section III, these IDI resolutions are a most useful mechanism through which to assess changing ideas and expectations of consent in and across time. The resolutions are significant because they are concerned with invitations made by states, but also, and equally importantly, because they speak to the crossover that occurs – or is meant to occur – from the laws of the ius ad bellum to the laws of the ius in bello. As we shall see, that latter corpus also has relevance to the matter of consent.

[245] The terminology might seem rather dated today, but it has historical bearing on our topic: see the 1928 Convention on Duties and Rights of States in the Event of Civil Strife, 134 LNTS 45. See also Quincy Wright, 'International Law and Civil Strife', *Proceedings of the American Society of International Law* 53 (1959), 145–53.

[246] See discussion accompanying n. 89. During the Spanish Civil War, a Non-Intervention 'Agreement' was formed in August 1936, which involved a series of individual declarations made by twenty-seven governments on non-intervention in the Spanish Civil War: Norman J. Padelford, 'The International Non-Intervention Agreement and the Spanish Civil War', *American Journal of International Law* 31 (1937), 578–603 (580). For obvious reasons, this development brings to mind Talleyrand's famous observation that 'non-intervention is a term of political metaphysics signifying the same as intervention': quoted in Deon Gueldenhuys, *Foreign Political Engagement: Remaking States in the Post-Cold War World* (London: Macmillan 1998), 15.

[247] Jennings and Watts, *Oppenheim's International Law*, vol. I (n. 151), 437–9, para. 130 (noting that '[s]o long as the government is in overall control of the state and internal disturbances are essentially limited to matters of local law and order or isolated guerrilla or terrorist activities, it may seek assistance from other states which are entitled to provide it').

Before we examine the content of these resolutions, reference should be made to Louise Doswald-Beck's important study, published in the *British Yearbook of International Law* in 1985, in which she concluded that 'there is, at the least, a very serious doubt whether a State may validly aid another government to suppress a rebellion, particularly if the rebellion is widespread and seriously aimed at the overthrow of the incumbent regime'.[248] That conclusion was propelled by a detailed appreciation of both practice and principle,[249] and it is these elements that forged the 'substantial evidence' she found 'to support a theory that intervention to prop up a beleaguered government is illegal'.[250] It therefore matters – and it matters a great deal – that the relative successes of a given rebellion in a given territory (or territorial state) be calibrated, for therein lies the gauge whereby the lawfulness of an action that claims the consent of the relevant state through its government can be measured. To put it another way, the challenge is to benchmark how beleaguered a government may be against the rebellious activity. Problematic though it is to implement this in practice, we ought not to miss the essential point: that, as far as historic and contemporary public international law is concerned, the ebbing of governmental power more or less correlates with the authority of that government to consent to any outside action. And, to make fuller sense of this position, Doswald-Beck refers us to one of the 'basic assumptions of international law',[251] which reflects the notion of the actual representation of the state:

> The duty not to intervene in the civil strife of another State can only be rationalized by perceiving the recipient of the duty as the State *in abstracto*. The personality of the State as such thus holds the right and for the purpose of this norm [of self-determination] the government does not exclusively represent the State. [. . .] The personality of the State, having as its components

[248] Louise Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government', *British Yearbook of International Law* 56 (1985), 189–252 (251).

[249] And the principles she mentioned there were independence, self-determination, and non-intervention in internal affairs: *ibid.*, 251. As for the prohibition of force, see *ibid.*, 244:

> [I]t would seem unlikely that an action to aid a government against rebels was perceived as contrary to Article 2(4) when it was drafted, given the fact that generally accepted customary law at that time did not forbid it. Such a prohibition has therefore arisen as a newly developed and separate customary norm and tends to be referred to as such, although it is, of course, possible for the interpretation of Article 2(4) to evolve so as to include a wide prohibition against intervention. One would have to rely on the words 'political independence' to encompass such a rule as a government is, of course, perfectly entitled to invite lawful military assistance which does not violate the norms of self-determination and non-intervention in internal affairs.

[250] *Ibid.*, 251.

[251] *Ibid.*, 242.

> territory and people, could thus be represented by a body other than the regime in power, if that body is perceived as more truly representing the State [. . .] Such a body would be in a position to complain of the breach of the duty of non-intervention against the State. [. . .] A successor government would also be able to bring a claim in law against another State on the basis that it had violated international law by keeping in power a previous regime in the face of popular insurrection.[252]

B. *Resolutions of the Institut de droit international*

The first major statement from the IDI appeared in the form of its Neuchâtel Resolution II of September 1900, which concerned the imposition on 'third Powers', in the event of an insurrection or civil war, of 'certain obligations towards established and recognised governments, which are struggling with an insurrection'. Insurrection formed part of the focus of the Resolution, as per its title,[253] and reference was made in due course to 'civil war' (Articles 1 and 3–5) and to 'recognition of belligerency' (Articles 4–9). The general idea behind the initiative was to calibrate the normative arrangements for foreign powers in accordance with the changing fortunes and status of what was termed 'a revolutionary party'[254] – namely, any party pitted against an established and recognised government within a state. The Resolution was therefore dedicated to mapping the various stages of struggle – insurrection, civil war, and recognition of belligerency – of that cause and, of course, of setting forth the corresponding legal regimen.[255]

Given this brief background, it is perhaps surprising that nowhere did the Resolution commit to a definition of either 'insurrection' or 'civil war', with the picture emerging of a commanding hand afforded by law to any government of an 'independent nation' setting about 'the reestablishing of internal peace'.[256] In matter of fact, at one point, the Resolution referred to the 'armed *defence* against

[252] *Ibid.*, 243.

[253] Consider, too, Resolution I, also adopted at Neuchâtel: IDI, Règlement sur la responsabilité des Etats à raison des dommages soufferts par des étrangers en cas d'émeute, d'insurrection ou de guerre civile (Neuchâtel Resolution I), 10 September 1900.

[254] IDI, Rights and Duties of Foreign Powers and their *ressortissants* towards Established and Recognized Governments in Case of Insurrection (Neuchâtel Resolution II), 8 September 1900, Art. 8 (my translation; in the original French version, 'au parti révolté').

[255] Hence the focus of Chapter I (on insurrection) and of Chapter II (on recognition of belligerency) – and typified by the statement that '[t]he simple fact of applying, for humanitarian reasons, certain laws of war to the insurgents, does not in itself constitute a recognition of a state of belligerency': *ibid.*, Art. 4(2). For further discussion, see Roscoe R. Oglesby, *Internal War and the Search for Normative Order* (Leiden: Martinus Nijhoff 1971).

[256] IDI, Neuchâtel Resolution II (n. 254), Art. 2(1).

insurrection' – namely, the armed defence of 'the State within whose territory an insurrection has broken out'[257] – as if a government facing down an insurrection were to be treated as one and the same thing as 'the State' itself. By omitting definitions, it may initially be thought that the Resolution was the IDI's attempt to establish a certain equivalence of meaning between 'civil war' and 'a recognition of a state of belligerency',[258] but the Resolution moved quite quickly to disabuse the reader of any such notion and to affirm that these were actually to be treated as separate propositions: 'The government of a country where a civil war has broken out may recognize the insurgents as belligerents either explicitly or by categorical declaration, or implicitly by a series of acts which leave no doubt as to intentions.'[259]

This apparent discretion of a government to 'recognize the insurgents as belligerents'[260] should be juxtaposed with the recognition of belligerency taking place at the hands of '[t]hird Powers',[261] which became a matter of close regulation under the Resolution. Such recognition was not to occur:

> Section 1. If [a revolutionary party] has not acquired a distinct territorial existence through the possession of a definite portion of the national territory;
>
> Section 2. If it has not the elements of a regular government exercising in fact the manifest rights of sovereignty over this portion of the territory;

[257] *Ibid*., Art. 3 (emphasis added).

[258] As it is put *ibid*., Art. 4(2). See also especially, *ibid*., Art. 1 ('in case of insurrection or civil war'). It might be helpful in this regard to recall Oppenheim's distinction between civil wars that are wars 'in a wider sense of the term' and those that are wars '[i]n the proper meaning of that term'. In his view:

> [A] civil war exists when two opposing parties within a State have recourse to arms for the purpose of obtaining power in the State or when a large fraction of the population of a State rises in arms against the legitimate Government. As war is an armed contention between *States*, such a civil war need not be from the beginning, nor become at all, war in the technical sense of the term. But it may become war through the recognition of each of the contending parties or of the insurgents, as the case may be, as a belligerent Power. Through this recognition a body of individuals receives in so far as an international position as it is for some part and in some points treated as though it were a subject of International Law.

Oppenheim, *International Law*, vol. II (n. 83), 65, para. 59 (emphasis original). Elsewhere, Oppenheim had written '[t]hat in every case of civil war a foreign State can recognise the insurgents as a belligerent Power if they succeed in keeping a part of the country in their hands and set up a Government of their own': Oppenheim, *International Law*, vol. I (n. 47), 112, para. 74.

[259] IDI, Neuchâtel Resolution II (n. 254), Art. 4(1).

[260] *Ibid*.

[261] The preferred nomenclature of Art. 8 (as opposed to 'third States').

> Section 3. If the fight is not carried on in its name by organized troops, subject to military discipline and conforming to the laws and customs of war.[262]

This was the fulcrum around which the main legal change would result for 'third Powers': 'such recognition', the Resolution maintained, would entail 'all the usual consequences of neutrality',[263] including – we can presume – the stopping of supplies of arms, munitions, military goods, or financial aid to the beleaguered government.[264] Yet it was in terms of the idiom of neutrality – and not intervention – that the core change in consequences was framed.[265]

Let us now move forward to the next instrument in the IDI series, Wiesbaden Resolution III of August 1975, which *was* explicitly framed in terms of the principle of non-intervention and which *did* position 'civil wars' front and centre – so much so, in fact, that the very first provision of that Resolution announced its definition of 'civil war' as:

> . . . any armed conflict, not of an international character, which breaks out in the territory of a State and in which there is opposition between
>
> a) the established government and one or more insurgent movements 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 party of that State, or
> b) two or more groups which in the absence of any established government contend with one another for the control of the State.[266]

Thus it was the occurrence of civil war and not the recognition of belligerency that would ultimately prove legally significant, for Article 2 of the Resolution made clear that '[t]hird States' – yes, problematically, *third* states – were prohibited from 'giving assistance to parties to a civil war which is being fought in the territory of another State'.[267] In effect, this meant the prohibition of

[262] *Ibid.*, Art. 8. Importantly, however, according to Art. 4(3), '[a] government which has recognised its revolting nationals either explicitly or implicitly as belligerents, becomes powerless to criticise the recognition accorded by a third Power'.

[263] *Ibid.*, Art. 7 (although a 'third Power' may 'withdraw such recognition even when the situation of the parties in the struggle has not been changed', such retraction would have no retroactive effect: *ibid.*, Art. 9).

[264] Prohibited for insurgents *ibid.*, Art. 2(2), but not for the government.

[265] Art. 2(1), did, however, make clear that '[e]very third Power, at peace with an independent nation, is bound not to interfere with the measures which this nation takes for the reestablishing of internal peace'.

[266] IDI, The Principle of Non-Intervention in Civil Wars (Wiesbaden Resolution III), 14 August 1975, Art. 1(1).

[267] *Ibid.*, Art. 2(1).

assistance related to any and all parties to a civil war, *including those aligned with the government*, and the Resolution elaborated that this prohibition would extend to the sending of 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,[268] as well as the supply of weapons or other war material to any party to a civil war, or allowing them to be supplied,[269] among numerous other activities.[270]

Also problematic for our analysis – perhaps even more so – is the fact that, in its attempt to define 'civil war' and hence regulate the conduct of states under the ius ad bellum, the Resolution pivoted to the language of 'armed conflict, not of an international character' found in common Article 3 of the Geneva Conventions of August 1949 under the ius in bello.[271] It did so at the very moment when that concept was being repurposed and redefined to mark out an enhanced threshold for the material field of application of Additional Protocol II to the Geneva Conventions of June 1977.[272] This activity was tied up with building the necessary diplomatic consensus for its adoption.[273] This process – of, first, the development of a specific concept so as to expand the opportunities for application of the laws of war as they were originally known and, second, of the dichotomisation of that concept so as to secure the adoption of Additional Protocol II – speaks volumes about the particularity of function (or functions) that certain laws may have.[274] And it gives real pause for thought: can

[268] *Ibid.*, Art. 2(2)(a).

[269] *Ibid.*, Art. 2(2)(c).

[270] Certainly, Art. 3 did go on to outline three 'exceptions' to the prohibition set out in Art. 2:

> Notwithstanding the provisions of Article 2, third States may:
>
> a) grant humanitarian aid in accordance with Article 4;
> 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;
> c) give any assistance prescribed, authorized or recommended by the United Nations in accordance with its Charter and other rules of international law.

[271] Common Article 3 of the Geneva Conventions of August 1949, 75 UNTS 31; 75 UNTS 85; 75 UNTS 135; 75 UNTS 278.

[272] Additional Protocol II to the Geneva Conventions of June 1977, 1125 UNTS 609, Art. 1(1): '[A]rmed conflicts . . . which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.' On the relation between this threshold and that for the recognition of belligerency, see Sivakumaran, *The Law of Non-International Armed Conflict* (n. 85), 191.

[273] See Sylvie Junod, 'Additional Protocol II: History and Scope', *American University Law Review* 33 (1983–84), 29–40.

[274] Consider, again, the customary definition of non-international armed conflict: Dino Kritsiotis, 'The Tremors of Tadic', *Israel Law Review* 43 (2010), 262–300.

one aspect of the lex specialis for the ius in bello be conscripted and grafted without more onto the lex specialis of the ius ad bellum? They are, after all, striving for different ambitions and outcomes; they are setting out to do very different things.[275] Yet this seamless juxtaposition of propositions from one lex specialis to the next has scarcely caused a ripple in the literature.[276]

A final word really ought to be shared on Wiesbaden Resolution III's invocation of the principle of non-intervention, upon which we touched earlier. While it appears in the title of the Resolution and in two preambular indulgences, 'intervention' is mentioned only once in its substantive body – in Article 5 – in relation to remedial foreign intervention (or counter-intervention). As we have seen, the mainstay of the Resolution is the prohibition of assistance contained in Article 3,[277] but it is telling that, in making accommodation for counter-intervention in Article 5, the formulation used is that 'third States may give assistance to the other party [in the civil war] only in compliance with the Charter and any other relevant rule of international law'.[278] Is 'assistance'

[275] And there very much is a ius ad bellum 'feel' to the contents of the Resolution, notwithstanding what is said on humanitarian aid: IDI, Wiesbaden Resolution III (n. 266), Art. 4.

[276] In her analysis of 'intervention and invitation', and in a subsection entitled 'classification of conflicts', Gray, *International Law and the Use of Force* (n. 50), 85–6, for example, writes that '[q]uestions as to classification – is the conflict civil or international? – may be decisive as to the applicable law and as to the legality of the use of force' (noting that '[t]he issue of classification [is] also central to the application of the laws of war'). For his part, Fox does intimate, early on in his chapter in this volume, that 'internal conflict' and 'civil wars' are interchangeable: see Fox, 'Invitations to Intervene after the Cold War', Chapter 3 in this volume. See also the discussion of the Court's designation of non-international armed conflict in *Nicaragua* and, later on the same page, the reference to 'no civil war threshold (as in *Nicaragua*)': *ibid.*, section II.B, 196. See also section II.D *ibid.*, 205 ('a civil war intensity threshold'). Fox, however, then makes a persuasive case for the distinct context in which these terms have come about, concluding that '[o]ne could well imagine the threshold for recognising such polarisation [i.e., in civil wars] being much higher than the threshold for applying individual IHL protections': *ibid.*, section III.B, 218. Yet he proceeds to invoke the terminology of international humanitarian law for the purpose of dissecting his dataset. There may well be a 'lack of clarity on legal thresholds' – but note the acceptance of the IDI's use of 'civil war' and its relation to the Uppsala Conflict Data Program episteme (which 'requires at least twenty-five battle-related deaths per conflict year'): a 'difference [that] is again marginal', according to Fox (*ibid.*, 222). The correlation between 'older belligerency doctrine' and 'civil wars' (*ibid.*, section I, 185) dissipates as the chapter evolves.

[277] Presumably following through from the observation made in the second preambular recital that 'any civil war may affect the interests of other States and may therefore result in an international conflict if no provision is made for very stringent obligations of non-intervention'.

[278] Further, that is, to the third preambular recital of the Resolution ('the violation of the principle of non-intervention for the benefit of a party to a civil war often leads in practice to interference for the benefit of the opposite party').

therefore to be taken as coterminous with 'intervention'? Examples of assistance were neatly assembled in Article 2 of the Resolution, of course, but each of these invites further examination as to whether they can be said to constitute 'intervention' in the eyes of the law. The 'sending [of] 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'?[279] Almost certainly, yes. But what about 'prematurely recognizing a provisional government which has no effective control over a substantial area of the territory of the State in question'?[280] And what of the 'exception' of humanitarian aid?[281] Exception to *what*, exactly?

Finally, for this section, we turn to Rhodes Resolution II of September 2011 – on military assistance on request (defined as 'direct military assistance by the sending of armed forces by one State to another State upon the latter's request').[282] For reasons articulated earlier in this chapter, this Resolution signals a most welcome recalibration of the relevant terms of reference,[283] the Resolution designed to address some of the more practical matters (or, as it calls them, 'terms and modalities')[284] that attend such situations: the author and nature of requests;[285] the notification of requests to the UN Secretary-General;[286] and the possibility of their withdrawal.[287] The Resolution is significant in adopting a teleological approach towards the practice of military assistance on request ('The objective of military assistance is to assist the requesting State in its struggle against non-State actors or individual persons within its territory, with full respect for human rights and fundamental freedoms'),[288] and, in so doing, it reconnects with the holistic assessment of relevant international laws set out by the UN General Assembly in its

[279] IDI, Wiesbaden Resolution III (n. 266), Art. 2(2)(a).

[280] *Ibid.*, Art. 2(2)(f). Oppenheim, *International Law*, vol. I (n. 47), 112, para. 74, did not think so: 'It is frequently maintained that such untimely recognition contains an intervention. But this is not correct, since intervention is . . . *dictatorial* interference in the affairs of another State.'

[281] IDI, Wiesbaden Resolution III (n. 266), Arts. 3(a) and 4. Consider in particular that, in the *Nicaragua* case, the ICJ concluded that '[t]here can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law': ICJ, *Nicaragua* (n. 32), para. 242.

[282] IDI, Military Assistance on Request (Rhodes Resolution II), 8 September 2011, Art. 1(a).

[283] *Pace* the 'existing State practice on military assistance on request' that is noted in the fourth preambular recital of the Resolution: *ibid.* See also Erika de Wet, *Military Assistance on Request and the Use of Force* (Oxford: OUP 2020).

[284] IDI, Rhodes Resolution II (n. 282), Art. 1(b).

[285] *Ibid.*, Art. 4(1)–(3).

[286] *Ibid.*, Art. 4(4).

[287] *Ibid.*, Art. 5.

[288] *Ibid.*, Art. 2(2). See also Art. 3(1).

Resolution 2625.[289] The fact that Rhodes Resolution II confines itself 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 in the sense of Article 1 of [Additional] Protocol II'[290] might be thought to be anomalous: this formulation has relevance for the definition of non-international armed conflict (NIAC) more generally,[291] and we should ask which part of the resolution is contemplated by this – the prohibition of military assistance under Article 2 or the details of its provision under Article 4?[292] – especially in view of the stipulation in Additional Protocol II that '[n]othing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the States'.[293]

C. *Consent within Non-International Armed Conflicts*

The invocation of the concept of NIAC (as found in common Article 3 of the Geneva Conventions and Additional Protocol II) becomes significant for the purposes of consent from another perspective altogether: the question of humanitarian relief. Article 18(2) of Additional Protocol II provides that:

> If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.

[289] UN GA Res. 2625 (XXV) (n. 36). In fact, this Resolution is specifically recalled in the second preambular recital of Rhodes Resolution II. See also IDI, Rhodes Resolution II (n. 282), Art. 3(1): '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.'

[290] As part of its scope under *ibid*., Art. 2(1).

[291] Sivakumaran, *The Law of Non-International Armed Conflict* (n. 85), 162. And might be thus taken to safeguard the practice of military assistance upon request: Yoram Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge: CUP 2nd edn 2021), 100.

[292] Dinstein regards the qualification as 'blunted' by Art. 2(1): *ibid*.

[293] Additional Protocol II (n. 272), Art. 3(1). There are, of course, echoes here of Neuchâtel Resolution II (n. 257).

There is no equivalent stipulation for consent made in common Article 3,[294] and the immediate impression cast by these words is that the 'High Contracting Party' – whose armed forces are arraigned against 'dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol'[295] – retains the full and unadulterated liberty to deny its consent as it sees fit and so chooses. Acting through its government, any High Contracting Party thus has the ultimate say over whether or not humanitarian relief is to be delivered on its territory.[296]

To interpret the provision in this way would, however, hollow out the obligation of Article 18(2) ('shall be undertaken') – to pull any teeth it was designed to have: it would make that obligation subject not only to the consent but also to the slightest whim of any High Contracting Party.[297] And that was not the intention behind the provision, as the Commentary on the Additional Protocols makes adamantly clear: '[t]he fact that consent is required does not mean that the decision is left to the discretion of the parties', for '[t]he authorities responsible for safeguarding the population in the whole of the territory of the State cannot refuse such relief without good grounds'.[298] This means that there can be no arbitrary withholding of consent once the preconditions of the obligations are fulfilled.[299] The Commentary is also notable for its acceptance of the fact that – in exceptional, although unspecified, cases – 'when it is not possible to determine

[294] Common Art. 3 does provide, however, that '[a]n impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict'. The silence on consent in this provision has been regarded as 'understandable' because 'the liberty of parties to such a [non-international armed conflict] to accept or not the "offers" of services by "any impartial organization" is *in re ipsa*': Flavia Lattanzi, 'Humanitarian Assistance', in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (Oxford: OUP 2015), 231–55 (250).

[295] As *per* Art. 1(1) of Additional Protocol II (n. 272).

[296] To be contrasted with the 'ironclad' obligation of Art. 59(1) of Geneva Convention (IV) Relative to the Protection of Civilians in Time of War. 'If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal': Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge: CUP 4th edn 2022), 291. On the use of the word 'agreement' as opposed to 'consent' in Art. 70(1) of Additional Protocol I ('relief actions … shall be undertaken subject to the agreement of the Parties concerned'), see Lattanzi, 'Humanitarian Assistance' (n. 294), 242–3.

[297] Dinstein, *Non-International Armed Conflicts in International Law* (n. 291), 202.

[298] Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: ICRC/Martinus Nijhoff 1987), 1479, para. 4885.

[299] Sivakumaran, *The Law of Non-International Armed Conflict* (n. 85), 331. See also Lattanzi, 'Humanitarian Assistance' (n. 294), 251; Dapo Akande and Emanuela-Chiara Gillard, 'Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict',

which are the authorities concerned, consent is to be presumed in view of the fact that assistance for the victims is of paramount importance and should not suffer any delay'.[300] Thus even the laws of the ius in bello are alert to the signal complexities that may belie the untidy transition from one government to another.[301] The matter of exceptionality becomes an occasion for some ambiguity regarding 'which are the authorities concerned' – but also for the articulation of an important principle: the presumption of consent.

Subsequently, the Study of the International Committee of the Red Cross on customary international humanitarian law, published in March 2005, concludes that the arrangement set forth in Additional Protocol II for humanitarian relief applies to *all* NIACs – because the Study does not discriminate between different forms of NIAC as per the conventional arrangements discussed here (i.e., the Geneva Conventions and Additional Protocol II).[302] Rule 55 of the Study provides that '[t]he parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control'.[303] This might not be evident from what is said in common Article 3 of

International Law Studies 92 (2016), 483–511. Consider the much more explicit formulation in Art. 13(2) of the International Law Commission's 2016 Draft Articles on the Protection of Persons in the Event of Disasters: 'Consent to external assistance shall not be withheld arbitrarily.' See further Craig Allan and Thérèse O'Donnell, 'A Call to Alms? Natural Disasters, R2P, Duties of Cooperation and Uncharted Consequences', *Journal of Conflict and Security Law* 17 (2012), 337–71 (359–65). The IDI has concluded, in Art. VIII(1) of Resolution II ('L'assistance humanitaire') adopted at Bruges in September 2003, that:

> Affected States are under an obligation not arbitrarily and unjustifiably to reject a *bona fide* offer exclusively intended to provide humanitarian assistance or to refuse access to the victims. In particular, they may not reject an offer nor refuse access if such refusal is likely to endanger the fundamental human rights of the victims or would amount to a violation of the ban on starvation of civilians as a method of warfare.

[300] Sandoz et al., *Commentary on the Additional Protocols* (n. 298), 1479, para. 4884 (as distinct from 'the government in power').

[301] Art. 6(5) of Additional Protocol II speaks of 'the authorities in power' at the end of hostilities: *ibid.*, 1402.

[302] Note that, in its discussion of an offer of services from common Art. 3, the most recent Commentary makes reference to how 'exceptional circumstances' may render the seeking and obtaining of consent 'problematic' – which may be the case, 'for example, when there is uncertainty with regard to the government in control, or when the State authorities have collapsed or ceased to function': International Committee of the Red Cross (ICRC), *Commentary on the First Geneva Convention* (Cambridge: CUP 2016), 279, para. 830.

[303] Stylistically, at least, the emphasis has shifted from 'consent' to the 'right of control' of the parties to the conflict. According to the ICRC, the 'right of control' could include measures of verification on the nature of the assistance; the prescription of technical arrangements for delivery, and the temporary restriction of humanitarian activities by virtue of imperative military necessity: *ibid.*, 281–2, para. 839.

the Geneva Conventions;[304] let it also be observed that Rule 55 actually makes no reference to consent.[305] Still, the Study could not be clearer in articulating that consent is nevertheless required for humanitarian relief for civilians in need: it describes the value of consent as 'self-evident' in practical terms;[306] equally, it maintains that consent may not be refused on arbitrary grounds – for '[i]f it is established that a civilian population is threatened with starvation and a humanitarian organisation which provides relief on an impartial and non-discriminatory basis is able to remedy the situation, a party is obliged to give consent'.[307]

V. THE FUNCTION OF CONSENT WITHIN THE IUS AD BELLUM

We shall now examine four justifications for force or intervention under the ius ad bellum in which consent either has or is claimed to have a function, aiming to test alternative conditions in which consent can permissibly be given and to explore why differences may exist.

A. *Collective Self-Defence*

The first justification is collective self-defence. At one point in its decision in the *Nicaragua* case, the ICJ addressed the question of 'whether the lawfulness of the use of collective self-defence by the third State for the benefit of the attacked State ... depends on a request addressed by that State to the third State'.[308] This question succeeded the Court's conclusion that a state 'for whose benefit [the] right [of collective self-defence] is must have declared

[304] See above, n. 294. After remarking that the right of humanitarian initiative announced in common Art. 3 ('An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict') may 'appear at first sight to be merely decorative and without any real significance', the Commentary characterises it as 'of great moral and practical value', which has 'placed matters on a different footing, an impartial humanitarian organization now being legally entitled to offer its services. The Parties to the conflict can, of course, decline the offer *if they can do without it*. But they can no longer look upon it as an unfriendly act, nor resent the fact that the organization making the offer has tried to come to the aid of the victims of the conflict': Jean S. Pictet (ed.), *Commentary to Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Geneva: ICRC 1952), 58 (emphasis added).

[305] *Ibid.*

[306] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. I (Cambridge: CUP 2005), 196: 'It is nonetheless self-evident that a humanitarian organization cannot operate without the consent of the party concerned.'

[307] *Ibid.*, 197.

[308] ICJ, *Nicaragua* (n. 32), para. 196 – an appropriate invocation of the 'third State'.

itself to be the victim of an armed attack';[309] out of concern for the potential abuse of the right of collective self-defence, it observed that '[t]here is no rule in customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation'.[310] Whatever else the right of collective self-defence might have meant, it did not mean 'vicarious defence by champions' as far as the ICJ was concerned.[311]

To reach this conclusion, the Court pored over a series of provisions from select regional arrangements – Articles 3(f) and 27 from the 1948 Charter of the Organisation of American States (the Bogota Charter), and Article 3(1) and 3(2) of the 1947 Inter-American Treaty of Reciprocal Assistance (the Treaty of Rio de Janeiro).[312] In its analysis, the Court centred the 'requirement of a request on the part of the attacked State', as found in the last of these provisions,[313] which it considered to be significant because the Treaty of Rio de Janeiro was 'particularly devoted to these matters of mutual assistance'.[314] And, from here and without further ado, the Court went on to find that, 'in customary international law, whether of a general kind or that particular to the inter-American legal system, there is no rule permitting the exercise of collective self-defence in the absence of a request by the State which regards itself as the victim of an armed attack'.[315] Other than the manner in

[309] *Ibid.*, para. 195.

[310] *Ibid.*

[311] *Ibid.*, 545, dissenting opinion of Judge Robert Jennings. Note Brownlie's description of 'a customary right or, more precisely, a power to aid third states which have become the object of an unlawful use of force': Brownlie, *International Law and the Use of Force by States* (n. 212), 330.

[312] As modified by the 1975 Protocol of San José – although this was not in force at the time of the Court's decision.

[313] Art. 3(2) of the Treaty of Rio de Janeiro, 21 UNTS 77, reads in full:

> On the request of the State or States directly attacked and until the decision of the Organ of Consultation of the Inter-American System, each one of the Contracting Parties may determine the immediate measures which it may individually take in fulfilment of the obligation contained in the preceding paragraph and in accordance with the principle of continental solidarity.

The Court gave little shrift to whether a collective defence agreement might be evidence of attenuated consent by virtue of the development of a vicarious armed attack or act of aggression – as in the 1949 North Atlantic Treaty (obligation of assistance) and the 1955 Warsaw Pact ('immediate assistance'). See further Schachter, *International Law in Theory and Practice* (n. 111), 155.

[314] ICJ, *Nicaragua* (n. 32), para. 198.

[315] *Ibid.*, para. 199.

which the ICJ framed the relevant rule (i.e., the non-existence of a rule of *permission*) and its failure to share more of the details of its empirical mooring,[316] what is noteworthy is that it nowhere specified the conditions in which such requests could permissibly be made – in which the consent of the state for collective self-defence can be given.

It was to be only a matter of time before this law was put to the test. In the first hours of the Iraqi invasion of Kuwait on 2 August 1990, the UN Security Council met in New York, where Ambassador Mohammed Abdulhasan, the Permanent Representative of Kuwait to the United Nations, ended his urgent opening statement to the Council thus:

> Kuwait's request is very clear. We ask the Security Council to put an immediate halt to this invasion and to exercise its duty to ensure, by every means available, that Iraq withdraw immediately and unconditionally to the international boundaries that existed before the invasion. Kuwait appeals to and urges the Council in the name of justice and the sovereignty of the United Nations Charter to adopt a resolution in conformity with the Charter and with international law and norms.[317]

At this stage, the ambassador assured the Council that the amir or crown prince of Kuwait (Sheikh Jaber Al-Ahmed Al-Sabah), the prime minister of Kuwait (Sheikh Sa'ad Al-Abdulla Al-Sabah), and the government of Kuwait 'remain in control in Kuwait and are defending the country's security'.[318] Yet that situation changed rapidly: the crown prince was reported to have fled Kuwait by car for Saudi Arabia minutes before the first Iraqi soldiers entered the grounds of Dasman Palace in Kuwait City.[319]

Separate to the ambassador's request of the Security Council, it is believed that – some three hours after the invasion commenced – the crown prince had approached the US Embassy in Kuwait for assistance.[320] We might appreciate the importance of this transaction occurring outside of the Security Council setting, but – as a component of its quasi-informality – let it be noted that an

[316] Certainly, at a later point in its judgment, the Court did admit that 'if the victim State wishes another State to come to its help in the exercise of the right of collective self-defence, it will normally make an express request to that effect': *ibid.*, para. 232.

[317] UN Doc. S/PV. 2932, 2 August 1990, 8–10.

[318] *Ibid.*, 6.

[319] Reports differ on this. One suggests that Iraqi armed forces may have crossed the border with Kuwait at 2.00 a.m. local time, when 'Kuwait's ruling emir … fled to Saudi Arabia as the invasion was beginning, but his younger brother Fahd reportedly was killed defending the emir's palace, where some of the heaviest fighting took place': Carlyle Murphy, 'Iraqi Invasion Forces Seize Control of Kuwait', *Washington Post*, 3 August 1990.

[320] As per the account of Lawrence Freedman and Efraim Karsh, *The Gulf Conflict 1990–1991: Diplomacy and War in the New World Order* (Princeton: Princeton University Press 1994), 67.

appeal was made, too, for confidentiality at a crucial and uncertain moment in time. On 12 August 1990, a much more formal letter from the crown prince made its way to US President George H.W. Bush, which read in part:

> I therefore request on behalf of my government and in the exercise of the inherent right of individual and collective self defense as recognized in Article 51 of the UN Charter that the United States Government take such military or other steps as are necessary to ensure that economic measures designed to fully restore our rights are effectively implemented.[321]

Evidently, then, this communication was part of a sequence of requests from Kuwait, differing in both timing and form, made in the interval since the invasion,[322] but whether the crown prince had authority or effective control never became a point on which the validity of the requests was challenged.[323] Furthermore, it was never called into question whether 'the rights of the peoples' of Kuwait – including their self-determination – were directly in issue.[324]

Legally speaking, it therefore matters a great deal what legal justification (or set of justifications) are being pleaded for a given action: these should not be assumed or imagined, because they come to define the normative minutiae that are to be applied in line with the respective justification.[325] The 'appeal',

[321] The source of this letter is Thomas K. Plofchan, Jr., 'Article 51: Limits on Self-Defense?', *Michigan Journal of International Law* 13 (1992), 336–73 (336, fn. 1). The letter was also reported and summarised in the Statement of White House Press Secretary Marlin Fitzwater on 12 August 1990: *Public Papers of the Presidents of the United States: George Bush – 1990* (1 July–31 December 1990), 1128–9 (1128). This formal request was separate from the invitation issued to the United States by Saudi Arabia: Diane T. Putney, *Airpower Advantage: Planning the Gulf Air Campaign, 1989–1991* (Honolulu: University Press of the Pacific 2006), 28.

[322] For Thomas R. Pickering, the Permanent Representative of the United States of America to the United Nations, had addressed a letter to the President of the Security Council on 9 August 1990, in which he informed the Council of the deployment of military forces to the Persian Gulf region – and that '[t]hese forces have been despatched in exercise of the inherent right of individual and collective self-defense, recognized in Article 51, including requests from Kuwait and Saudi Arabia for assistance': UN Doc. S/21492, 10 August 1990.

[323] Quite the contrary, in fact; rather, concern centred on Iraq's claim to the Security Council that 'the Free Provisional Government of Kuwait requested my Government to assist it to establish security and order so that the Kuwaitis would not have to suffer. My Government decided to provide such assistance solely on that basis': UN Doc. S/PV. 2932, 2 August 1990, 11. See further Christopher Greenwood, 'New World Order or Old? The Invasion of Kuwait and the Rule of Law', *Modern Law Review* 55 (1992), 153–78 (155).

[324] Higgins, *Problems and Process* (n. 61), 115–16.

[325] Consider the 'analogy' of consent as a ground precluding wrongfulness within the context of 'intervention by invitation', as presented by 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 (72, 84–5).

cited at the outset of this chapter, which President Abdo Rabbo Mansour Hadi of Yemen made to GCC member states in March 2015, bore all the hallmarks of an invitation as a preface to intervention, but, in reaching out to these five member states 'to stand by the Yemeni people . . . and come to the country's aid',[326] President Hadi specifically invoked the right of self-defence set out in the UN Charter; he also made reference to the 1945 Charter of the League of Arab States and its 1950 Treaty on Joint Defence and Economic Co-operation. He requested 'immediate support in every form and [taking] necessary measures, including military intervention, to protect Yemen and its people from the ongoing Houthi aggression, repel the attack that is expected at any moment on Aden and the other cities of the South, and help Yemen to confront Al-Qaida and Islamic State in Iraq and the Levant'.[327] The appeal was made the day before President Hadi himself fled Aden for Riyadh to avoid advancing 'Houthi coup orchestrators'[328] and two days before Saudi Arabia led the multinational action of Operation Decisive Storm into Yemen.[329]

There is therefore a 'fine line' to be drawn, from the legal standpoint, between the consent offered for collective self-defence and that offered for an 'intervention by invitation',[330] as was made clear in a quick succession of events relating

[326] UN Doc. S/2015/217, 27 March 2015, 4.

[327] *Ibid.*, 4–5.

[328] As President Hadi labelled them: *ibid.*, 4 (militias who were 'being supported by regional Powers that are seeking to impose their control over the country and turn it into a tool by which they can extend their influence in the region'). See also Robert F. Worth, 'How the War in Yemen Became a Bloody Stalemate – And the Worst Humanitarian Crisis in the World', *New York Times Magazine*, 4 November 2018.

[329] Ruys and Ferro, 'Weathering the Storm' (n. 325), 62. The possibility of 'counter-intervention', as 'reflected in the leading protagonists' discourse justifying the action' in Yemen, is proposed by Corten: see Corten, 'Intervention by Invitation', Chapter 2 in this volume, section II.B, 116. It is indeed possible to extract this 'logic' from the letter of President Hadi of 24 March 2015 ('Houthi coup orchestrators'), but we might question whether the specific framing of that letter effectively privileged Yemen's claim of (collective) self-defence as the foundation for 'immediate support in every form': *ibid.* In any event, we ought to question whether an invitation by the Yemeni president occurring in the context of a claim of counter-intervention must satisfy any test of effective control, or whether the fact of the 'counter' is sufficient in and of itself to deem the resulting counter-intervention permissible, even if '*all* effective control had disappeared' – one of the factors Corten raises in that analysis (*ibid.*, section II.C, 122). The raison d'être of any justification of counter-intervention must surely be the fact of its response to 'prior military support' (*ibid.*, section III.C.1, 136) above and beyond any regulatory framework designed for intervention by invitation (and effective control).

[330] Claus Kreß, 'The Fine Line between Collective Self-Defense and Intervention by Invitation: Reflection on the Use of Force against "IS" in Syria', *Just Security*, 17 February 2015, available at www.justsecurity.org/20118/claus-kreb-force-isil-syria/. See also Masoud Zamani and Majid Nikouei, 'Intervention by Invitation, Collective Self-Defence and the Enigma of Effective Control', *Chinese Journal of International Law* (2017), 663–94, and Doswald-Beck, 'The Legal Validity of Military Intervention' (n. 248), 213.

to Iraq as the so-called Islamic State of Iraq and the Levant (ISIL) emerged there – seizing strategic facilities in Baiji, as well as the cities of Mosul and Tikrit. At the end of June 2014, Iraq requested assistance from the United Nations, calling upon its member states 'to assist us by providing military training, advanced technology and the weapons required to respond to the situation, with a view to denying terrorists staging areas and safe havens'.[331] On 7 August 2014, US President Barack Obama announced that targeted airstrikes had been launched within Iraq in respect of two operations: the protection of American personnel located in Erbil and Baghdad and a humanitarian effort to save thousands of Iraqi civilians trapped on Mount Sinjar and facing almost certain death. While this latter aspect might be suggestive of the right of humanitarian intervention in action, President Obama claimed that, 'when we have a mandate to help, *in this case a request from the Iraqi government*, and when we have the unique capabilities to help avert a massacre, then I believe the United States cannot turn a blind eye'.[332] This is to be contrasted with the (separate) request that the Iraqi government had extended to the United States to '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 Iraqi borders' – all apparently in the name of the right of collective self-defence.[333]

Set alongside one another in this way, these episodes are most convenient illustrations of how consent functions in different parts of the constellation of the ius ad bellum – and of how different conditions have come to regulate the issue of consent depending on the legal justification invoked for a given action.[334]

[331] UN Doc. S/2014/440, 25 June 2014.

[332] Helene Cooper, Marker Lander and Alissa J. Rubin, 'Obama Allows Airstrikes against Iraq Rebels', *New York Times*, 8 August 2014, A1 (emphasis added). See further Oona A. Hathaway, Julia Brower, Ryan Liss, Tina Thomas and Jacob Victor, 'Consent-Based Humanitarian Intervention: Giving Sovereign Responsibility back to the Sovereign', *Cornell International Law Journal* 46 (2013), 499–568.

[333] UN Doc. S/2014/695, 23 September 2014. See also Somini Sengupta and Charlie Savage, 'U.S. Invokes Defense of Iraq in Legal Justification for Syria Strikes', *New York Times*, 24 September 2014, A19.

[334] Where, to repeat, effective territorial control does feature for intervention by invitation but not for (collective) self-defence. Corten has contemplated, however, that, in requesting assistance for their fight against so-called Islamic State, Iraq and Syria 'both had lost control over substantial parts of their respective territory' but that their respective authorities were 'recognized as representing their states': Olivier Corten, 'The Military Operation against the "Islamic State" (ISIL or Da'esh) – 2014', in Ruys et al., *The Use of Force in International Law* (n. 70), 873–98 (887). This may well have been one of the 'elements' guiding the reactions of other states to these developments, but one must wonder whether any latitude afforded to intervening states was informed by the nature of the enemy faced in both Iraq and Syria.

B. *Counter-Intervention*

After rejecting the United States' claim to collective self-defence in the *Nicaragua* case, the ICJ turned to consider the predicament in which one state acts towards another state with 'less grave forms' of force (i.e., those not constituting 'armed attacks'),[335] but where there has been 'a breach of the principle of non-intervention'.[336] What would obtain in such cases, from the standpoint of the law, for any 'third state'? The Court said that it might be suggested 'that, in such a situation, the United States' – here, rightly described as a third state, given the context announced in the case – 'might have been permitted to intervene in Nicaragua in the exercise of some right analogous to the right of collective self-defence, one which might be resorted to in a case of intervention short of an armed attack'.[337] We might appreciate why the Court might have ploughed this furrow even if it did so for only the most cursory of moments: because the United States did not appear in contentious proceedings to which it was a party, the Court had to be satisfied that the claim before it was 'well founded in fact and law'.[338] However, no sooner had the ICJ floated this possibility than it moved to dismiss it, concluding that the acts of which Nicaragua had been accused 'could not justify counter-measures taken by a third State, the United States, and particularly could not justify intervention involving the use of force'.[339] If this was and remains an accurate statement of the law, then the clear implication is that there exists a crucial limitation on the power of a third state to consent to any collective counter-measures in another state, notwithstanding any 'less grave form'[340] of force – or intervention – that may have been committed against it.[341] The analogy with collective self-defence

[335] As per ICJ, *Nicaragua* (n. 32), para. 191.

[336] *Ibid.*, para. 210. See further Gray, *International Law and the Use of Force* (n. 50), 85.

[337] ICJ, *Nicaragua* (n. 32), para. 210.

[338] As per Art. 53(2) of its Statute.

[339] ICJ, *Nicaragua* (n. 32), para. 249.

[340] As per *ibid.*, para. 191.

[341] Although the Court did not rule out individual counter-measures – that is, action taken by the 'immediate victim', as pronounced by Judge Bruno Simma in his Separate Opinion in *Case Concerning Oil Platforms* (Islamic Republic of Iran v. USA), judgment of 6 November 2003, ICJ Reports 2003, 161, 332, para. 12. Importantly, and for the record, Judge Simma reasoned that:

> [B]y such proportionate counter-measures the Court [in the *Nicaragua* case] cannot have understood mere pacific reprisals, more recently, and also in the terminology used by the International Law Commission, called 'counter-measures'. Rather in the circumstances of the *Nicaragua* case, the Court can only have meant what I have just referred to as defensive military action 'short of' full-scale self-defence.

could be taken only so far, it transpires – and, for the Court, that was not very far at all.

Consider, in contrast, the 'right' of counter-intervention, where 'otherwise illegal actions can be justified by the need to counter [an] illegal intervention'.[342] Counter-intervention is therefore 'occasioned by a violation of law and is in turn governed by law',[343] and – as we saw earlier in this chapter – it was endorsed by the IDI at Wiesbaden in August 1975 ('Whenever it appears that intervention has taken place during a civil war in violation of [this Resolution], 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').[344] Oscar Schachter, too, has written of counter-intervention as '[a]n important qualification' of the rule that 'prohibits States from intervening on either side in a civil war, defined as an internal conflict in which insurgents are supported by a large number of people or occupy a substantial part of the territory'.[345]

Tellingly, counter-intervention did not make an appearance in the *Nicaragua* case, and this is perhaps because, as a general idea, it 'should be limited to the territory of the state' where 'the prior intervention was illegal'.[346] The involvement of El Salvador as the venue of an alleged armed attack by Nicaragua – at least as the United States presented it to the Court – meant that, as a legal justification, counter-invention was out of the running. We might now have a better grasp of why the Court sought out an 'analogy' with collective self-defence at all: it was more immediately relevant to the facts before it, as the Court saw them. Oscar Schachter regards '[t]his territorial limitation' as one of the principles that has been accepted as a limit on counter-intervention; the other is the principle of proportionality.[347] Writing before the *Nicaragua* judgment but after Nicaragua had initiated proceedings

[342] John A. Perkins, 'The Right of Counterintervention', *Georgia Journal of International and Comparative Law* 17 (1986), 171–227 (173).

[343] *Ibid.*, 176.

[344] IDI, Wiesbaden Resolution III (n. 266). Again, this is another occasion where 'third States' has been appropriately used – because it anticipates the 'intervention' of another (i.e., second) state. This 'right' may also be incorporated as an institutional power of action, as it is in Art. 18 of the 1981 Economic Community of West African States Protocol Relating to Mutual Assistance of Defence, 29 May 1981, UN Doc. A/SP3/5/81.

[345] Schachter, *International Law in Theory and Practice* (n. 111), 115. The IDI did not consider counter-intervention in terms as an 'exception' to its prohibition of assistance in Art. 2 – even though Art. 3 is addressed to third states on what they may do.

[346] Oscar Schachter, 'The Right of States to Use Armed Force', *Michigan Law Review* 82 (1984), 1620–46 (1643).

[347] *Ibid.*, 1644.

in the ICJ in April 1984, Schachter surmised that the United States had 'abandoned' the former limitation 'insofar as its "counter-intervention" on the side of the El Salvador regime has extended to support of anti-Sandinista forces fighting on Nicaraguan soil'.[348] In his reading of events, the United States had justified its actions in and against Nicaragua on the basis of collective self-defence, but it had also 'counter-intervened' against Nicaragua 'by mining approaches to Nicaraguan ports'.[349]

What is supremely interesting from this account is why it does not examine the behaviour of the United States in respect of Nicaragua as itself an instance of counter-intervention, even though the analysis hints at such ('Concretely, if the Nicaraguan Sandinista regime receives Cuban and Soviet military supplies and advisors, is the United States free to support the armed opposition by training, armed and technical advice?').[350] One might also mention in this regard the weapons and training supplied to the Sandinistas by Venezuela and Panama.[351] The critical matter from our perspective is that, to make any credible legal sense of these events, it is imperative to gain a firm handle of the exact chronologies of each and every 'intervention', for this will form the prerequisite to any chronology of the lawfulness of those respective actions. Counter-intervention thus emerges as an exercise in determining the 'precise point[s]' of state activity,[352] such as the temporal relation between the assistance awarded to President Bashar al-Assad of Syria by Russia, Iran, and Hizbollah, and that made available to his opponents (by, among others, Turkey, the United Kingdom, the United States, Qatar, Saudi Arabia, and France).[353] However, to make any serious headway on this front, we need also to understand very clearly the relative authority of the relevant government; only then can it be determined whether there has occurred any 'violation of law' in the first place[354] – the necessary prequel to any lawful act of counter-intervention.

[348] *Ibid.*, 1643.

[349] *Ibid.* Indeed, in June 1979, Zbigniew Brzezinski argued in the National Security Council for military intervention by the United States in view of 'the major domestic and international implications of a Castroite takeover of Nicaragua': Betty Glad, *An Outsider in the White House: Jimmy Carter, His Advisors, and the Making of American Foreign Policy* (Ithaca, NY: Cornell University Press 2009), 243.

[350] Schachter, 'The Right of States to Use Armed Force' (n. 346), 1642.

[351] Odd Arne Westad, *The Global Cold War* (Cambridge: CUP 2007), 340.

[352] Klingler, 'Counterintervention on Behalf of the Syrian Opposition?' (n. 93), 516.

[353] As is done by Klingler for Syria in terms of 'this loss of presumptive legitimacy': *ibid.*, 500 and 508–9.

[354] Schachter, *International Law in Theory and Practice* (n. 111), 159.

There is a complicating factor, too, that shades these assessments: the pluralist conception of 'intervention', as endorsed by the UN General Assembly in October 1970 – a conception that extends not only to armed intervention but also to 'all other forms of interference'.[355] This is sufficient to extend to 'arms or active participation',[356] as is the conception of 'assistance' developed by the IDI in August 1975 (which also includes the premature recognition of a provisional government).[357] If each of these instances can indeed qualify as an 'intervention' in law, why can any of the other instances not serve as an acceptable instance of 'counter' intervention? Schachter has insisted that '[t]here is good reason' to support a principle of proportionality for counter-intervention 'as a legal restriction and not merely as a prudential principle', which would require 'some rough equivalence between the counter-intervention and the illicit aid given the other side'.[358] That rough equivalence may be very difficult to achieve if 'intervention' knows of various forms, in contrast to the idea of 'force',[359] quite apart from any variations that might exist among ideas of what intervention itself encompasses.[360] There also appears to be a key assumption in this law that 'the quantum and character of outside aid' is known at all times to the opposing side,[361] and this is not always – if ever – the case. Finally, in this hypothesis, we might ask a genuine question about how the fracturing of the 'self' of self-determination can be reconciled with any dialectic of intervention vs counter-intervention – and whether the broader interest of 'friendly relations' might require a hierarchy in which self-determination supersedes any notion of prohibited intervention.[362]

355 Damrosch, 'Politics across Borders' (n. 48).

356 Rosalyn Higgins, 'Internal War and International Law', in Cyril E. Black and Richard A. Falk (eds), *The Future of the International Legal Order*, vol. 3 (Princeton: Princeton University Press 1971), 81–121 (94).

357 IDI, Wiesbaden Resolution III (n. 266).

358 Schachter, *International Law in Theory and Practice* (n. 111), 162.

359 See above, n. 50.

360 See further Doswald-Beck, 'The Legal Validity of Military Intervention' (n. 248), 251: 'There appears to be no prohibition against States providing governments with weapons and other military supplies during a civil war.' See also Schachter, *International Law in Theory and Practice* (n. 111), 115: 'It appears that States generally accord the *de jure* government the benefit of the doubt as to its right to receive military aid to be used against internal opponents.'

361 *Ibid.*, 162.

362 That is, an ordering among the fundamental principles: Kohen, 'Self-Determination' (n. 60). Corten usefully observes that counter-intervention 'may even take place in the name of *protecting* the people's right to self-determination': Corten, 'Intervention by Invitation', Chapter 2 in this volume, section II.A, 113 (emphasis original).

C. *Pro-Democratic Intervention*

We next turn to the so-called right of pro-democratic intervention. Reference was made earlier in the chapter to the possibility of a right of political or ideological intervention – a proposition that the ICJ raised but then rejected in 1986 – so we ought to explore why there is a need for a separate proposition of a right of 'pro-democratic intervention', which the Court did not deal with as such.[363]

Christine Gray has discussed this latter proposition in terms of both 'pro-democratic intervention' and 'pro-democratic invasion',[364] writing that '[t]he political goals underlying the use of force may include the re-establishment of "democratic" government'.[365] At the conceptual level, then, a broad berth is accorded to the right of pro-democratic intervention, which appears to include practices that would come within the compass of the right of political or ideological intervention, as discussed by the ICJ in the *Nicaragua* case.[366] Yet, in truth, it does seem to be the case that these propositions – the right of political or ideological intervention and the right of pro-democratic intervention – proceed from very different factual premises and thus deserve to be treated individually in normative terms.The difference may be specified thus:

- The right of political or ideological intervention was essentially a creation of the politics of the Cold War, designed to facilitate the installation of a democratic or socialist government where none existed previously. In other words, at its base, it offered the option for what might be called changes of ideological regime and/or constitutional infrastructure.[367]
- The right of pro-democratic intervention, on the other hand, assumes that a democratic constitutional order is already established in the target state – no argument is being made for either its instalment or dethronement, as it were – and that it has encountered certain existential challenges, which the right of pro-democratic intervention is there to fix or to

[363] Although, in its *Nicaragua* judgment, the ICJ did conclude that 'the use of force could not be the appropriate method to monitor or ensure such respect [for human rights]': ICJ, *Nicaragua* (n. 32), para. 268.

[364] Doubtlessly *pace* Oscar Schachter, 'The Legality of Pro-Democratic Invasion', *American Journal of International Law* 78 (1984), 645–50.

[365] Gray, *International Law and the Use of Force* (n. 50), 64.

[366] *Ibid.*, 65. An even broader berth is adopted by David Wippman, who regards 'pro-democratic intervention' in essentially descriptive terms and as separate from the question of 'legal bases': Wippman, 'Pro-Democratic Intervention' (n. 173), 802.

[367] See James Crawford, 'Democracy and International Law', *British Yearbook of International Law* 64 (1993), 113–33 (126).

> otherwise remedy. In this instance, self-determination might be read as an affirmation of the decision of 'self-direction of each society by its people', as well as the operation of 'the principle of democracy at the collective level'.[368]

In probing the premise underpinning any right of pro-democratic intervention, it is important to observe that the Security Council has authorised an intervention to reverse the effects of a coup d'état and reinstate the democratically elected government of a country; where the Council does so, there is no legal need to have recourse to that right. This is precisely what happened in Haiti in July 1994, when the Council, acting under Chapter VII of the Charter, authorised 'Member States to form a multinational force under unified command and control and . . . to use all necessary means to facilitate the departure of the military leadership [of General Raoul Cédras], the prompt return of the legitimately elected President [Bertrand Aristide] and the restoration of the legitimate authorities of the Government of Haiti'.[369] In September 1991, General Cédras had seized power from President Aristide following his resounding electoral win in December of the previous year, so that the language of 'restoration' becomes important: it more closely approximates the organising value for which the intervention of Operation Uphold Democracy was devised,[370] although the Council proved keen to promote the circumstances in which it found itself as exceptional ('the unique character of the present situation in Haiti and its deteriorating, complex and extraordinary nature, requiring an exceptional response').[371]

Equally, it is important to consider what legal significance any consent might have had for Operation Uphold Democracy: in enacting Resolution

[368] *Ibid.*, 116.

[369] Among other things: UN SC Res. 940 of 31 July 1994, para. 4. In cons. 3, 4 and 9 of the same Resolution, the Council had referred to 'the illegal de facto regime' and to 'the military authorities in Haiti'.

[370] See also UN SC Res. 940 of 31 July 1994, cons. 8: 'Reaffirming that the goal of the international community remains the restoration of democracy in Haiti and the prompt return of the legitimately elected President.' Arguably, there is an important dividing line to be drawn between the installation and the 'restoration' of democratic government, for the United States made use of the latter terminology in Operation Just Cause in Panama in December 1989 in circumstances in which General Noriega had nullified the election of May 1989 mid-count but remained in effective control of the country. Still, as Gray has observed, the United States distinguished between 'its legal justification and its goals', and, apparently, it is to the latter that the restoration of democracy pertained: Gray, *International Law and the Use of Force* (n. 50), 65.

[371] UN SC Res. 940 of 31 July 1994, para. 2. See also Brad R. Roth, 'Secessions, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine', *Melbourne Journal of International Law* 11 (2010), 393–440 (430) (on 'outlier cases').

940, the Council took note of the letter dated 29 July 1994 that it had received from President Aristide while he was in exile in the United States.[372] In that letter, President Aristide informed the Council that:

> . . . the military authorities [in Haiti], continuing to display their contempt for national sovereignty, have adopted an arrogant, provocative attitude and have stepped up their acts of defiance against the international community, as witnessed by the illegal installation of a provisional president and the expulsion of the United Nations International Civilian Mission to Haiti.[373]

Aristide reminded the Council of his own scrupulous respect for the commitments set out in the Governors Island Agreement of July 1993[374] and said that, to this end, he felt 'the time has come for the international community, as a party in the process which led to that Agreement, to take prompt and decisive action, under the authority of the United Nations, to allow for its full implementation'.[375] While this may be regarded as an instance of consent by the exiled president to Operation Uphold Democracy,[376] the Security Council ultimately rested its argument on implementation of the Governors Island Agreement and, to that extent, this invitation is out of line with the other examples that we have considered so far.[377] In any event, the invocation of Chapter VII of the Charter in Resolution 940 does suggest that the Council 'was unwilling to treat that consent as either a necessary or a sufficient legal basis for intervention'.[378]

An altogether different legal situation arose in May 1997, following the ouster from power in Sierra Leone of democratically elected President Ahmed Tejan Kabbah by mutinous troops who joined the Revolutionary United Front of Major Johnny Paul Koroma. After taking flight by helicopter to Guinea,

372 UN SC Res. 940 of 31 July 1994, cons. 6.

373 UN Doc. S/1994/905, 29 July 1994, 2.

374 UN Doc. S/26063, 12 July 1993 (which envisaged the return to Haiti of President Aristide by 30 October 1993).

375 UN Doc. S/1994/905, 29 July 1994, 2. See also the letter dated 30 July 1994 from the Permanent Representative of Haiti to the United Nations, addressed to the President of the Security Council (UN Doc. S/1994/910), which is also mentioned in UN SC Res. 940 of 31 July 1994, cons. 6.

376 Wippman, 'Pro-Democratic Intervention' (n. 173), 807.

377 Very much the line taken by the Permanent Representative of Haiti to the United Nations when addressing the Council: UN Doc. S/PV. 3413, 31 July 1994, 3: 'An agreement is a contract. Those who sign it must respect if or pay the price.' Note, too, the remark 'stating the consent of the Government of President Aristide to the draft resolution before the Council': *ibid.*, 4.

378 Wippman, 'Pro-Democratic Intervention' (n. 173), 807. Although Spain did contend that 'the clear position taken by the legitimate authorities of Haiti' was part of the reason it supported Resolution 940: UN Doc. S/PV. 3413, 31 July 1994, 20.

President Kabbah launched an appeal to the chair of the Economic Community of West African States (ECOWAS), President Sani Abacha of Nigeria, for immediate assistance in restoring civilian rule in his country.[379] As it happened, a contingent of some 900 troops was already stationed in Sierra Leone, in accordance with pre-existing treaty commitments regarding a battalion attached to the Economic Community of West African States Monitoring Group (ECOMOG), but 'no agreement had made provision for intervention to reverse a coup'.[380] This did not stop Nigerian naval vessels from shelling the Army headquarters in Freetown in early June; Nigerian troops also seized the international airport and brought in reinforcements.[381] This was followed by the Conakry Peace Agreement of October 1997, as well as by further multilateral military action;[382] in March 1998, President Kabbah was finally returned to power in Freetown, the capital of Sierra Leone.[383]

These developments were accompanied by a statement from United Nations Secretary-General Kofi Annan in which he contemplated the use of force as 'a last resort' – saying that 'it is inevitable it may have to come to that' – but denied that there was any question of a UN force entering Sierra Leone.[384] In June 1997, member states of ECOWAS, meeting in Conakry, Guinea, issued a Final Communiqué, in which they recognised the objectives to be pursued by ECOWAS as comprising the 'early reinstatement of the legitimate government of President Ahmed Tejan Kabbah, the return of peace and security and the resolution of the issues of refugees and displaced persons'.[385] Furthermore, they stressed that 'no country should grant recognition to the regime that emerged following the *coup d'état* of 25 May 1997, and that they would 'work towards the reinstatement of the legitimate government

[379] Press Briefing by Permanent Representative of Sierra Leone to the United Nations, 27 May 1997. Kabbah had been elected president in the general and presidential elections held in Sierra Leone in February and March 1996.

[380] 'Nigeria Imperatrix', *The Economist* (London), 5 June 1997. (This included the 1975 Treaty of the Economic Community of West African States itself: 1010 UNTS 17.)

[381] Apparently acting under the authority of ECOWAS: James Rupert, 'Nigerians Welcomed in Freetown', *Washington Post*, 15 February 1998, A27. Ghana warned coup leaders that they had 24 hours to step down, and Nigeria, Ghana, and Guinea dispatched troops and armoured personnel carriers to Sierra Leone: Claudia McElroy and Peter Beaumont, 'Invasion Ultimatum to Freetown Mutineers', *The Observer* (London), 1 June 1997, 2. See also Michael Binyon, 'Nigerian Gunboats Shell Freetown Coup Leaders' Base', *The Times* (London), 3 June 1997, 11.

[382] Howard W. French, 'Nigerian Troops Near Sierra Leone's Capital', *New York Times*, 11 February 1998, A8.

[383] James Rupert, 'Sierra Leone's President Reinstalled', *Washington Post*, 11 March 1998, A26.

[384] Michael Binyon, 'Annan Hints at Use of Force to Topple Sierra Leone Coup', *The Times* (London), 5 June 1997, 17.

[385] UN Doc. S/1997/499, 27 June 1997, 2–3.

by a combination of three measures, namely, dialogue, imposition of sanctions and enforcement of an embargo and the use of force'.[386]

The fact that 'objectives' for an intervention are specified is not to say that its legal justification (or justifications) have thereby been articulated,[387] and yet – in a thorough and rewarding examination of the possible justifications for that intervention by Karsten Nowrot and Emily Schabacker – it has been claimed that '[t]he primary justification offered by Nigeria and ECOWAS for the military intervention in Sierra Leone was the overthrow of the military junta and the restoration of the democratically elected government of President Kabbah'.[388] Those same authors, however, then conclude that 'the ECOWAS intervention in Sierra Leone can be regarded as a lawful exercise of the use of force in light of the changing concept of government legitimacy and the resulting modified doctrine of intervention by invitation under contemporary international law'.[389] There is an oddity to this claim, of course, because a 'modified'[390] doctrine of intervention by invitation does not explain why any need would then exist for recourse to – still less the innovation of – a 'right of pro-democratic intervention' as the authors initially proposed: the 'doctrine' itself, in its modified form, would presumably serve as *the* legal justification for intervention on this account.[391] And the task of the international lawyer is further complicated by the fact that, in Resolution 1156 of March 1998, the UN Security Council welcomed 'the return to Sierra Leone of its democratically elected President' – uttering not a word on the process that got him there.[392] Given the remarkably broad

[386] *Ibid.*, 3.

[387] See the discussion of Gray, *International Law and the Use of Force* (n. 50) at n. 370.

[388] Karsten Nowrot and Emily W. Schabacker, 'The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone', *American University International Law Review* 14 (1998), 321–412 (378) (in the section entitled 'The Right of Pro-Democratic Intervention'). Note the reference, too, to 'primary basis': *ibid.*, 385.

[389] *Ibid.*, 401–2. See also Jeremy Levitt, 'Pro-Democratic Intervention in Africa', *Wisconsin International Law Journal* 24 (2006), 785–833 (788), who presents a 'norm' of pro-democratic intervention but blends it with, among other things, 'the *consent* doctrine' (emphasis original).

[390] For this would entail 'foreign military interventions based on the consent of the democratically elected government-in-exile': Nowrot and Schabacker, 'The Use of Force to Restore Democracy' (n. 388), 401.

[391] See further *ibid.*, 386 ('consent of the legitimate government as the decisive factor'). The authors nevertheless persist with a 'legal construction' of the right 'capable of explaining the changed reactions of the international community from condemnation … to acceptance': *ibid.* See also Susan Breau, 'The ECOWAS Intervention in Sierra Leone – 1997–99', in Ruys et al., *The Use of Force in International Law* (n. 70), 527–40 (535).

[392] UN SC Res. 1156 of 16 March 1998, para. 1. The Security Council had earlier deplored 'the fact that the military junta has not taken steps to allow the restoration of the democratically-elected Government and a return to constitutional order': UN SC Res. 1132 of 8 October 1997, cons. 7.

support showered on the intervention that occurred in Sierra Leone between June 1997 and March 1998, it may very well be that the real oddity is that the legal justification of this intervention somehow remains elusive all these many years later.[393]

If the restoration of a democratically elected, but exiled, government presents one possible calibration for a right of pro-democratic intervention in practice,[394] then another might derive from the situation in which an incumbent government refuses to leave office after suffering defeat at the polls. This is precisely what happened in Côte d'Ivoire following the victory of Alassane Ouattara of the Rally of the Republicans in the presidential elections of November 2010, when (incumbent) President Laurent Gbagbo of the Ivorian Popular Front made it known that he was not going anywhere.[395] In January 2011, from his blockaded hotel room in Abidjan, President-elect Ouattara requested that ECOWAS intervene to unseat Gbagbo: 'Legitimate force', he claimed, 'doesn't mean a force against Ivorians.'[396] Be this as it may, the complication here was that Gbagbo remained in effective control of the country, with 'the sole authority to give consent to military force because the facts are not clear in terms of whom the population, by a high majority, supports'.[397] A further complication had

393 See Nowrot and Schabacker, 'The Use of Force to Restore Democracy' (n. 388), 379, who write of an 'overwhelmingly positive international reaction'. Cf. Wippman, 'Pro-Democratic Intervention' (n. 173), 808: '[T]he Council, and most states, tacitly approved or at least acquiesced in ECOMOG's decision, treating it more or less as another instance of an acceptable – or at least accepted – breach.' The critical element is to ascertain whether a right of pro-democratic intervention was indeed pleaded as 'an autonomous justification for the use of force': Jean d'Aspremont, 'Mapping the Concepts behind the Contemporary Liberalization of the Use of Force in International Law', *University of Pennsylvania Journal of International Law* 31 (2010), 1089–149 (1110).

394 Nowrot and Schabacker helpfully recognise the difference with interventions 'designed, at least in part, to establish a democratic government': Nowrot and Schabacker, 'The Use of Force to Restore Democracy' (n. 388), 385. See further Schachter, *International Law in Theory and Practice* (n. 111), 120, referring to this as the 'overthrow of repressive régimes'.

395 See further Julie Dubé Gagnon, 'ECOWAS's Right to Intervene in Côte d'Ivoire to Install Alassane Ouattara as President-Elect', *Notre Dame Journal of International and Comparative Law* 3 (2013), 51–72 (52), examining the intervention from the angle of '[t]he right to intervene using military force by a regional organization for pro-democratic motives'.

396 'Ivory Coast: Ouattara Wants Commandos to Snatch Gbagbo', *Modern Ghana*, 6 January 2011, available at www.modernghana.com/news/311101/ivory-coast-ouattara-wants-commandos-to-snatch-gbagbo.html, also reporting the limited nature of the intervention: '[T]here are non-violent special operations which allow simply to take the unwanted person and take him elsewhere.' See also Adam Nossiter, 'Ivory Coast Leader's Rival Remains under Blockade', *New York Times*, 6 January 2011, A8, describing the Hotel du Golf in Abidjan as 'the alternative seat of government of this West African nation'.

397 At least according to Gagnon, 'ECOWAS's Right to Intervene' (n. 395), 67. See further Yejoon Rim, 'Two Governments and One Legitimacy: International Responses to the Post-Election Crisis in Côte d'Ivoire', *Leiden Journal of International Law* 25 (2012), 683–705.

already arisen the previous month when ECOWAS had advised President Gbagbo to stand down or expect to face 'legitimate force',[398] because – as the ICJ pointed out in its advisory opinion in *Legality of the Threat or Use of Nuclear Weapons* in July 1996 '[i]f the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4 [of the UN Charter]'.[399] We might regard this as a broader value of a right of pro-democratic intervention when compared with the intricacies involved in an 'invitation' from a government in circumstances such as those of Côte d'Ivoire – separate, of course, from action taken pursuant to any conventional framework or, indeed, to any authorisation forthcoming from the Security Council.[400]

There are many echoes of this episode in the events leading up to and including Operation Restore Democracy – note the language, once again – in The Gambia in January 2017, after President Yahya Jammeh refused to cede power to Adama Barrow, who had won the presidential election of December 2016. President Jammeh had initially acknowledged defeat in that election, but he then underwent something of a change of heart.[401] Acting soon after the election, the African Union recalled its 2000 Constitutive Act, as well as the 2007 African Charter on Democracy, Elections and Governance ('on the total rejection . . . of unconstitutional changes of government, in particular any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections'),[402] emphasising its determination 'to take all necessary measures, in line with relevant [Union] instruments, with a view to ensuring full respect and compliance with the will and desire expressed by the people of the Gambia'.[403] This appeared to locate the basis of any planned action in *casus foederis*, in the law of the institution of the African Union. For its part, ECOWAS announced that, '[i]f [Jammeh] is not going, we have stand-by forces already alerted and these stand-by forces have to be able to intervene to restore the people's wish'.[404] That ECOWAS delivered an

[398] 'ECOWAS Bloc Threatens Ivory Coast's Gbagbo with Force', *BBC News*, 25 December 2010.

[399] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, advisory opinion of 8 July 1996, ICJ Reports 1996, 226, para. 47.

[400] Since Security Council authorisation is ultimately what brought President Gbagbo to heel: UN SC Res. 1464 of 4 February 2003; UN SC Res. 1975 of 30 March 2011. See further Dire Tladi, 'The Intervention in Côte d'Ivoire – 2011', in Ruys et al., *The Use of Force in International Law* (n. 70), 783–94 (786–7).

[401] Citing voting irregularities: Jaime Yaya Barry and Dionne Searcey, 'Uncertainty in Gambia after President Rejects Defeat', *New York Times*, 11 December 2016, A4.

[402] African Union Communiqué, PSC/PR/COMM. (DCXLIV) of 12 December 2016, 1 (citing Art. 23(4) of the Charter).

[403] *Ibid.*, 3.

[404] 'Gambia Crisis: Senegal Troops on Alert if Jammeh Stays On', *BBC News*, 23 December 2016.

ultimatum to President Jammeh, as well as the fact that Senegalese troops amassed on the border with The Gambia and Nigeria deployed its air force to Senegal to help with the transfer of power,[405] makes it difficult to doubt the existence of a threat of force as far as The Gambia was concerned.

There was an important difference between the situation in The Gambia and that in Côte d'Ivoire, however: apparently, as Operation Restore Democracy was taking its very first strides, Adama Barrow was being sworn into office in a brief ceremony about 240 kilometres outside of The Gambia – 'in a nondescript room at the Gambian Embassy in Dakar, Senegal, because [he] has so little control over his country that he did not go home for the funeral of his son'.[406] In this, the episode had some echoes of Operation Just Cause in Panama in December 1989, where Guillermo Endara had been sworn in as the president of Panama at a US military base just as that intervention was getting under way.[407] That intervention had also followed a highly contested election, which the country's president, General Manuel Noriega, had decided to nullify in May 1989.[408] With Operation Restore Democracy, however, the Security Council adopted a resolution in which it referred to Adama Barrow as both 'President-elect'[409] and 'President'.[410] Contrary to some of its previous practice, the Security Council did not go on to authorise an intervention in The Gambia in Resolution 2337 of January 2017, but it did express its 'full support' of ECOWAS 'in its commitment to ensure, by political means first, the respect of the will of the people of The Gambia as expressed in the results of the … elections'.[411] Within two days of the intervention, President Jammeh announced he would be stepping down after all,[412] and it was reported that, following his

[405] 'Senegal Troops Amass on Gambia Border as Deadline for President to Step down Nears', *France24*, 18 January 2017, reporting that residents of two Senegalese border towns had commented on the heavy troop movements close to the frontier.

[406] Dionne Searcey and Jaime Yaya Barry, 'Troops Enter Gambia to Dislodge Leader', *New York Times*, 20 January 2017, A3: 'Mr. Barrow's team ultimately decided that the embassy in Dakar was the closest they could safely get to Gambian soil to start the new administration.' Corten rightly refers to the 'fragile' authority of Barrow: Corten, 'Intervention by Invitation', Chapter 2 in this volume, section V.C, 167.

[407] Despite assertions that the ceremony had occurred on Panamanian territory: Associated Press, 'Panamanians in Secret Pact on Oath-Taking', *Los Angeles Times*, 27 December 1989.

[408] Lindsey Gruson, '3 Top Opponents of Noriega Assaulted in Street Melee; Disputed Election Nullified', *New York Times*, 11 May 1989, A1.

[409] UN SC Res. 2337 of 19 January 2017, para. 1.

[410] *Ibid.*, para. 3.

[411] *Ibid.*, para. 6.

[412] Dionne Searcey and Jaime Yaya Berry, 'In Speech, Gambia's Defeated Leader Agrees to Step Down', *New York Times*, 21 January 2017, A8.

return to the country, President Barrow asked ECOWAS forces to stay in the country for six months to help him consolidate his authority.[413]

One can therefore appreciate why 'intervention by invitation' has been considered to be the 'primary argument'[414] behind the ECOWAS intervention of January 2017: the Permanent Representative of Senegal to the United Nations had indeed informed the Security Council moments before it adopted Resolution 2337 that an 'appeal' had been made that day – the day of 'the oath-taking ceremony' at the Gambian Embassy in Senegal – by 'President Adama Barrow to the international community, and in particular ECOWAS, the African Union and the United Nations, to help ensure respect for the sovereign will of the people of The Gambia'.[415] One must query, though, not only the *generality* of the consent underpinning this appeal, issued as it was to the international community as a whole, but also its *timing*, coming as it did when President Barrow 'exercised no control, whether effective or otherwise, over The Gambia'.[416] Still, the considerations of 'the will of the Gambian people and therefore their right to self-determination', as well as 'respect for democracy', have been taken as shoring up the validity of the intervention by virtue of that invitation.[417] Significantly, however, this approach will invariably mean the relaxing of requirements for solicited interventions when undertaken in such circumstances.[418] Furthermore, any invitation of the incoming (or actual) president of The Gambia needed to contend with the verbal and physical actions of ECOWAS, as well as other actors, before it was even given and, to this extent, it is worth heeding the assessment that Resolution 2337 was 'elegantly formulated to express support for the possibility of a military solution called for and threatened by Senegal, ECOWAS and the [African Union]'.[419]

[413] Lamin Jahateh, 'Gambians Celebrate New President's Arrival after Veteran Ruler Flees', *Yahoo! News*, 26 January 2017.

[414] As claimed by Mohamed S. Helal, 'The ECOWAS Intervention in The Gambia – 2016', in Ruys et al., *The Use of Force in International Law* (n. 70), 921–32 (919). See also Corten, 'Intervention by Invitation', Chapter 2 in this volume, section V.

[415] UN Doc. S/PV. 7866, 19 January 2017, 2.

[416] Helal, 'The ECOWAS Intervention in The Gambia' (n. 414), 921–2, having formed the view that practice has not 'conclusively settled the debate between "effective control" and "democratic legitimacy"'.

[417] As per Corten, 'Intervention by Invitation', Chapter 2 in this volume, section V.B, 165. Note, too, the contrast between the 'primary argument' advanced (of intervention by invitation) and the 'potential' legal justification (of pro-democratic intervention): Helal, 'The ECOWAS Intervention in The Gambia' (n. 414), 922.

[418] See Fox's discussion of the 'democratic legitimacy' view: Fox, 'Invitations to Intervene after the Cold War', Chapter 3 in this volume, section II.

[419] 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 (244). Fox also emphasises the 'threatened' aspect of

D. *Authorisation from the UN Security Council*

The final justification to consider in this section is authorisation for intervention from the UN Security Council, in accordance with the powers awarded to it under Chapter VII of the Charter, for there have been situations in which the Council has provided such authorisation even though the incumbent government has proved amenable – and, indeed, has actually offered its consent – to the intervention at a time when it finds itself in potentially terminal peril. There have thus been no coups d'état or fallen governments in this hypothesis; rather, it centres the situation in which a government is facing maximum instability because its overall authority is being undermined.

When the Security Council adopted Resolution 1101 for Albania in March 1997, it referred to a letter that the President of the Security Council had received from the Permanent Representative of Albania to the United Nations, which had identified the situation in the country as 'serious', such that '[t]he control of the Government, law and order have yet to be achieved in a significant part of the country'.[420] That situation had arisen following support given by the government of President Sali Berisha to an investment pyramid scheme, which had collapsed in spectacular fashion,[421] with the letter mentioning 'the official appeal of the Government of Albania to a group of countries ... to participate with a military or a police force in the protection of humanitarian activities in Albania'.[422]

Italy had taken the initiative in promoting the creation of such a force and 'the conditions for launching a prompt, important and complex effort to assist Albania in this difficult phase'; in its own letter to the President of the Security Council, it considered that the 'objectives' of the force would be 'to help create a safe and secure environment for the action of international organisations to provide support in areas of international assistance. The force will also ensure the protection and safety of international personnel operating in Albania.'[423] The helping hand extended to the government of Albania was not, however,

Operation Restore Democracy: Fox, 'Invitations to Intervene after the Cold War', Chapter 3 in this volume, section II.D, 205.

[420] UN Doc. S/1997/259, 28 March 1997, 1. See also UN SC Res. 1101 of 28 March 1997, cons. 1.

[421] As detailed in Dino Kritsiotis, 'Security Council Resolution 1101 (1997) and the Multinational Protection Force of Operation Alba in Albania', *Leiden Journal of International Law* 12 (1999), 511–47.

[422] UN Doc. S/1997/259, 28 March 1997, 1: 'Albania is looking forward to the arrival of such a force.'

[423] UN Doc. S/1997/258, 27 March 1997, 1.

identified as part of the mission; rather, 'a legal framework for the provision of this assistance was envisaged' and, Italy maintained, '[t]his framework should . . . take the form of a resolution by the Security Council authorizing Member States who are willing to participate in such a multinational force to conduct the operation to achieve the [specified] objectives'.[424] This is the authorisation that came to pass in Resolution 1101.[425] It may immediately be appreciated that, given the worsening conditions in Albania at that time, it would have been precarious in the extreme for any intervention to have proceeded on the basis of an invitation from that country's government. Its fate could not then be known – and its authority was dissipating with each passing hour. Still, even though it had extended its invitation to outside help, Albania understood the need for Security Council authorisation.[426]

Now let us move forward in time to the situation in Mali in January 2013, when the Permanent Representative of France wrote to the UN Secretary-General and the President of the Security Council thus:

> 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. . . . [T]he French armed forces, in response to that request and in coordination with our partners, particularly those in the region, are supporting Malian units in combating those terrorist elements. The operation, which is in conformity with international law, will last as long as necessary.[427]

The reference to 'terrorist elements from the north' is to what has elsewhere been described as 'the Islamic seizure of northern Mali' – whereby 'a vast territory roughly twice the size of Germany [had] so easily fallen into the hands of extremists'.[428] In the second week of January 2013, these elements had suddenly begun to charge southward, 'taking over a frontier town [Konna] that had been the *de facto* line of government control'.[429] French President François Hollande held off dispatching French troops to Mali

[424] *Ibid.*, 2.
[425] UN SC Res. 1101 of 28 March 1997, para. 4.
[426] UN Doc. S/1997/259, 28 March 1997, 1: 'Taking into consideration the situation in Albania, we feel that such a force must also have the necessary support and authorization of the Security Council of the United Nations.'
[427] UN Doc. S/1013/17, 11 January 2013.
[428] Adam Nossiter and Eric Schmitt, 'France Battling Islamists in Mali', *New York Times*, 12 January 2013, A1.
[429] *Ibid.*

until it seemed that governmental collapse in Bamako was now on the horizon – developments that explain the letter to the Security Council and the commencement of Operation Serval.[430] In this case, then, the government's evident vulnerability and '[t]he partial lack of effectiveness of the Malian authorities'[431] did not inspire critical reactions to the 'assistance' – note particularly that France avoided the term 'intervention' in its communication to the Council – afforded to Mali with its consent.[432] In fact, the Security Council later welcomed 'the swift action by the French forces, at the request of the transitional authorities of Mali, to stop the offensive of terrorist, extremist and armed groups towards the south of Mali'[433] – an action that was separate to the African-led International Support Mission in Mali, which the Council had authorised in Resolution 2085 of December 2012.[434] Mali had consented to that action, too,[435] perhaps unsure of the assistance it would obtain from states independent of the Security Council and perhaps, too, because of the Malian transitional authorities' assessment of their own chances of survival. Once again, with both of these cases (Albania and Mali), it can be tempting to consider the 'self' as fracturing, or fractured, at its core – making it difficult to configure how the principle of self-determination can and should exert a 'tight rein' on the 'legitimating power of consent'.[436]

[430] Lydia Polgreen, Peter Tinti and Alan Cowell, 'As Troops Advance in Mali, U.S. Begins Airlift', *New York Times*, 23 January 2013.

[431] Karine Bannelier and Theodore Christakis, 'Under the UN Security Council's Watchful Eyes: Military Intervention by Invitation in the Malian Conflict', *Leiden Journal of International Law* 26 (2013), 855–74 (865).

[432] '[A] type of justification', Christine Gray maintains, that 'enabled France to avoid accusations of neo-colonial interference': Gray, *International Law and the Use of Force* (n. 50), 87.

[433] UN SC Res. 2100 of 25 April 2013, cons. 5. See further Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes' (n. 431), 868 ('the informal praise' of the Security Council).

[434] Among other things, '[t]o 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 extreme groups, while taking appropriate measures to reduce the impact of military action upon the civilian population': UN SC Res. 2085 of 20 December 2012, para. 9(b).

[435] For Resolution 2085 had recalled, in its seventh preambular recital, the letter from the transitional authorities of Mali dated 18 September 2012 requesting the authorisation of deployment through a Security Council resolution, under Chapter VII as provided by the United Nations Charter, of an international military force to assist the Armed Forces of Mali to recover the occupied regions in north of Mali: UN SC Res. 2085 of 20 December 2012.

[436] Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes' (n. 431), 860 – although rejected for Mali: *ibid.*, 859.

VI. CONCLUSION

Over four decades ago now, Derek Bowett wrote that intervention by the consent of the established or incumbent government was 'basically unsound' as a proposition for public international law – an unsoundness that stemmed, or so he claimed, from the subjectivity of recognition ('since an intervening State is free to recognize as the "government" whichever faction in an internal struggle it wishes to support and which will request intervention'), from the 'inevitable conflict' that 'such a doctrine arouses with the principle of self-determination of peoples', and from the 'fact' that 'such intervention frequently induces counter-intervention by some other state, with a consequent escalation of the conflict and greater risk to international peace'.[437] Bowett was of the view that it ought to be rejected from the system outright[438] – but it is worth noting that part of his contribution served to underscore the reality that 'intervention by consent' does not operate on its own; rather, it assumes its position within the laws of the ius ad bellum, as it does among the other principles and rules of public international law that have occupied much of the intellectual interest of this chapter.

It was one of the driving tasks of the chapter to investigate more fully the assumptions behind, and particulars of, the prohibitions of both intervention and force, as announced in the UN Charter and the Declaration of Friendly Relations of October 1970. As we have done so, it has become clear that traditional analysis of the topic – whether that topic be intervention by consent, intervention by invitation or intervention upon request – is itself the source of considerable difficulty because of the combination of descriptive points of reference (the outward appearance of an intervention or an act of force, let us say) with certain normative components (what public international law has made of, and how it uses, each of these terms). Remember that both of the terms that have shaped this chapter – 'intervention' and also 'force' – are invested with technical meaning. They are legal terms of art carrying specific connotations, and detailed engagement with their respective historical trajectories has brought more fully to light the oscillation between the *descriptivity* and the *normativity* of each. When all is said and done, I therefore prefer the term 'military assistance upon request' as advanced by the IDI in one of its more recent (and more helpful) contributions to this topic. Yet while these two prohibitions (of intervention and force) have tended

[437] Derek W. Bowett, 'The Interrelation of Theories of Intervention and Self-Defense', in John Norton Moore (ed.), *Law and Civil War in the Modern World* (Baltimore: Johns Hopkins University Press 1974), 38–50 (42).

[438] *Ibid.*

to dominate much of the analysis, they no longer hold the duopolistic sway they once did, because of the growing impact of the law on self-determination first in the Charter and then, as we have seen, in many subsequent iterations.

This approach might work well to the extent that one can be confident of 'a single relevant "self"' serving as the epistemic unit of any claim to self-determination (as one might maintain for Kuwait in the situation with Iraq after August 1990),[439] but more than once in these pages we have seen how the 'self' can become a hotly contested idea – because it is formed in opposition to the idea of the state and its government, as seen with the 'process of decolonisation',[440] or because it is locked in a headlong struggle for the soul of that state. There is also the question of secession occurring beyond situations of decolonisation: the situation in Crimea of March 2014 was one in which both the Ukraine and the Russian Federation rallied to the principle (or right) of self-determination for their cause,[441] in circumstances that included the infamous request for military assistance made by Ukrainian President Viktor Yanukovych to the Russian Federation.[442] This calls on us to question what good 'self-determination' can be in this set of deliberations if it means nothing more than that the determination of the self – or the selves – must take its course, free from all extraneous agents and agitators. Still, this chapter has reflected – as surely any serious study must do – on the changing shape of self-determination since it was first enunciated in the UN Charter all those years ago and on its many faces thus far.

It is instructive to recall in all of this that, when the Declaration on Friendly Relations provided that nothing 'shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of [self-determination]', it made reference to states 'thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour'.[443] This is proof positive that public international law has a theory of representation of some sort – one that is 'simple, but not

[439] Christine Chinkin and Hilary Charlesworth, *The Boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press 2000), 162.

[440] As discussed in the text accompanying n. 110.

[441] Christian Marxsen, 'The Crimea Crisis: An International Law Perspective', *Heidelberg Journal of International Law* 74 (2014), 367–91 (384).

[442] UN Doc. S/2014/146, 3 March 2014. A copy of the letter containing the request was waved before the Security Council by Vitaly I. Churkin, Russian Ambassador to the United Nations: Steven Erlanger and David M. Herszenhorn, 'Kiev Cites Campaign of Pressure by Russia', *New York Times*, 4 March 2014, A7.

[443] UN GA Res. 2625 (XXV) (n. 36).

necessarily simple-minded': the theory that 'an established government stands for, and has responsibility for, the State and its people for all or virtually all purposes'.[444] Through an array of formalist devices of varying degrees of coherence and of success, ranging from the recognition of belligerency to civil strife and civil war, from effective control to democracy legitimacy, public international law has entered a struggle of its own as it endeavours to define the life span of a government in the history of a given state. What if a government refuses to represent the people as a whole? What if representation gives in to distinction and to discrimination? What if the system of representation within a country is violently challenged – if it exists one day but not the next? What is the appropriate moment – the tipping point, if you will – for an internal transition of power? And what, if anything, is to be said about outside support for that cause? It is these and other questions that public international law has wrestled with, and with which it will continue to wrestle, as it seeks to make the giving of a state's consent a principled or regulated activity, so that governments the world over cannot always expect the fact of consent to be an end to the matter – to be the last word of the law.

[444] Crawford, 'Democracy and International Law' (n. 367), 129.