

Intervention by Invitation and the Alleged Prohibition of Military Assistance to Governments in Civil Wars

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Abstract

The use of military force by one state on another's territory with the consent of its government has been a frequent occurrence in international relations since 1945.

Government consent as a legal justification for force has only increased in prominence in recent years. Yet the existing academic commentary reveals significant disagreement as to how consent as a legal basis for force is to be reconciled with important structural elements of international law.

One such tension is with the widely-accepted view that the prohibition on the use of force is *jus cogens*, and hence non-derogable. This seemingly conflicts with the asserted ability of consent to legalize what would otherwise be a contravention of the prohibition. Chapter 1 of this thesis examines the scope of the peremptory prohibition on the use of force and establishes that consensual force does not breach the prohibition. It then shows that this does not leave the peremptory status of the prohibition devoid of effect, thus also contributing to a deeper understanding of *jus cogens* and its role in international law.

Another point of tension arises where foreign military assistance helps maintain in power a government which is being challenged by opposition groups. Accepting the legality of intervention in this situation appears in conflict with the idea that the identification of governments in international law is based on effective control of the State's territory, and with fundamental principles such as non-intervention and self-determination. Reflecting such concerns, there is a long-standing debate in the scholarship about whether there is a general prohibition on military intervention in favour of governments faced with civil wars or internal conflicts, although one subject to a range of limitations and exceptions.

The remainder of the thesis focuses on whether such a prohibition exists. It demonstrates that the disagreement in part reflects different methodological approaches to how international law is established, thus providing a broader insight into international legal

argumentation. The thesis suggests grounds for scepticism as to the existence of a general legal prohibition of the type proposed. Although there are obvious risks of abuse of pro-government intervention, States see it as capable of furthering valuable aims. Rather than establishing a general legal prohibition of such interventions, the international community assesses the legitimacy of such actions on the basis of a complex set of ethical and political factors, against the background of their general legality (subject to compliance with obligations imposed by international humanitarian law and human rights law, which cannot be displaced by consent).

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Table of Abbreviations

AFDI	Annuaire Française de Droit International
Afr SR	African Security Review
AIDI	Annuaire de l'Institut de Droit International
AJIL	American Journal of International Law
API	Additional Protocol I to the Geneva Conventions
APII	Additional Protocol II to the Geneva Conventions
AQAP	Al-Qaeda in the Arabian Peninsula
Asian JIL	Asian Journal of International Law
ASR	Articles on the Responsibility of States for Internationally Wrongful Acts
AU	African Union
AUILR	American University International Law Review
AYIL	Australian Yearbook of International Law
Berkeley JIL	Berkerley Journal of International Law
BUJIL	Boston University Journal of International Law
BYIL	British Yearbook of International Law
Cam JICL	Cambridge Journal of International and Comparative Law
CAT	Convention Against Torture
CJIL	Chinese Journal of International Law
CLP	Current Legal Problems
Col JTL	Columbia Journal of Transnational Law
Col LR	Columbia Law Review
Conn JIL	Connecticut Journal of International Law
CSTO	Collective Security Treaty Organization
CYIL	Canadian Yearbook of International Law
DRC	Democratic Republic of the Congo
Duke JCIL	Duke Journal of Comparative and International Law

ECOMOG	Economic Community of West African States Monitoring Group
ECOWAS	Economic Community of West African States
EJIL	European Journal of International Law
FRD	Friendly Relations Declaration
FYIL	Finnish Yearbook of International Law
Ga JICL	Georgia Journal of International and Comparative Law
GC	Geneva Conventions
GCC	Gulf Cooperation Council
Georgetown JIL	Georgetown Journal of International Law
GLJ	German Law Journal
Harvard ILJ	Harvard International Law Journal
Harvard LR	Harvard Law Review
HC Deb	House of Commons Debates
HL Deb	House of Lords Debates
HoR	House of Representatives (Australia)
HRLR	Human Rights Law Review
Hitotsubashi JLP	Hitotsubashi Journal of Law and Politics
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICSID	International Centre for the Settlement of Investment Disputes
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDI	Institut de Droit International
IHL	International Humanitarian Law
ILA	International Law Association
ILA Rep Conf	Report of the Conference of the International Law Association
ILC	International Law Commission
ILM	International Legal Materials
ILSA JICL	ILSA Journal of International and Comparative Law

Indon JICL	Indonesian Journal of International and Comparative Law
Intl Comm LR	International Community Law Review
IRRC	International Review of the Red Cross
ISAF	International Security Assistance Force
ISIL	Islamic State (of Iraq and the Levant)
J Conf Res	Journal of Conflict Resolution
JCSL	Journal of Conflict and Security Law
JICL	Journal of International Criminal Justice
JNSLP	Journal of National Security Law and Policy
JUFIL	Journal on the Use of Force and International Law
Leiden JIL	Leiden Journal of International Law
Mich JIL	Michigan Journal of International Law
Mich LR	Michigan Law Review
Mich St ILR	Michigan State International Law Review
Mizan LR	Mizan Law Review
MLR	Military Law Review
MPYUNL	Max Planck Yearbook of United Nations Law
Nordic JIL	Nordic Journal of International Law
NTC	National Transitional Council
NYIL	Netherlands Yearbook of International Law
NYT	New York Times
NYUJILP	New York University Journal of International Law and Politics
NZYIL	New Zealand Yearbook of International Law
OAS	Organization of American States
OEF	Operation Enduring Freedom
OJLS	Oxford Journal of Legal Studies
ONUC	United Nations Operation in the Congo
PCIJ	Permanent Court of International Justice

Penn St ILR	Penn State International Law Review
Proc ASIL	Proceedings of the American Society of International Law
PYIL	Polish Yearbook of International Law
RBDI	Revue Belge de Droit International
RdC	Recueil des Cours de l'Académie de Droit International
Rev ICJ	Review: International Commission of Jurists
RGDIP	Revue Générale de Droit International Public
RIAA	Reports of International Arbitral Awards
SCJIL	Santa Clara Journal of International Law
SOFA	Status of Forces Agreement
Touro LR	Touro Law Review
UCLR	University of Chicago Law Review
UNGA	United Nations General Assembly
UN Jurid YB	United Nations Juridical Yearbook
UNSC	United Nations Security Council
UNSWLR	University of New South Wales Law Review
UNTS	United Nations Treaty Series
UNYBILC	United Nations Yearbook of the International Law Commission
U Pa JIL	University of Pennsylvania Journal of International Law
Vand JTL	Vanderbilt Journal of Transnational Law
VCLT	Vienna Convention on the Law of Treaties
VJIL	Virginia Journal of International Law
Wis ILR	Wisconsin International Law Journal
Yale JIL	Yale Journal of International Law
Yale JWPO	Yale Journal of World Public Order
Yale LJ	Yale Law Journal
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

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Introduction

Consent from the territorial government is a common legal justification for the use of force in international law. Its prominence has only increased in recent years. Relevant cases have cropped up with increasing regularity: from Sierra Leone and Guinea-Bissau in the 1990s to Bahrain, Mali, Ukraine, Iraq, Syria, South Sudan, Yemen and the Gambia in the 2010s. The practical importance of ‘intervention by invitation’ in the *jus ad bellum* is thus unquestionable. Yet the topic remains rather undertheorized, with relatively few book-length works devoted to it.¹ It has not received the same amount of in-depth attention as the other established legal bases for the use of force, self-defence under art 51 of the UN Charter and authorisation by the Security Council.

The scholarship which does exist on ‘intervention by invitation’ is characterised by deep divisions about how far consent can go to legalize military action by one State on another’s territory, particularly where such action helps to bolster a government in the face of civil war or internal strife. The debate about whether a government can consent to foreign military assistance in such circumstances is an old one, stretching back to the pre-Charter era, but at no point has a clear consensus emerged. In 1975 the *Institut de Droit International* adopted an influential resolution on ‘The Principle of Non-Intervention in Civil Wars’ which took a strictly anti-interventionist position, but the resolution was adopted by a far from convincing majority.² When the IDI returned to the issue in 2009 and 2011, Rapporteur Gerhard Hafner expressed surprise at the ‘diametrically opposed’ views expressed by IDI members about the legality of military assistance to governments.³ The subsequently adopted

¹ Théodore Christakis and Karine Bannelier, ‘Volenti non fit injuria? Les effets du consentement à l’intervention militaire’ (2004) 50 AFDI 102, 103; Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Christopher Sutcliffe tr, Hart 2012) 249.

² See (n512) below.

³ ‘Délibérations de l’Institut’ (2011) 74 AIDI 277, 277.

resolution on ‘Military Assistance on Request’ masterfully avoided a clear statement on the centrally contested issue.⁴

The topic of ‘intervention by invitation’ is thus both practically important and doctrinally unsettled. Nor is this all that makes it particularly deserving of further scholarly attention. Consensual use of force lies at a critical intersection of some of the most basic structural elements of international law, and hence provides a useful testing point for clarifying an understanding of the system as a whole.

State consent itself forms the general basis for the creation, suspension and termination of norms and obligations in the horizontal and decentralized international legal system.⁵ The legality of ‘intervention by invitation’ may seem to be simply a particular application of the consent-based nature of international law. But in the use of force context an appeal to consent can be challenged by reference to other structural features of the system. The first feature is the existence of peremptory norms (*jus cogens*). Such norms are non-derogable and cannot be displaced by the consent of States *inter se*. The prohibition of the use of force is commonly considered a cardinal example of a peremptory norm. But this seems to cast doubt on the availability of State consent as a legal basis for the use of force.

The second feature concerns the relationship between the State, the government of the State, and the State’s people. While States form the primary subjects of the international legal order, a State is an abstract entity which can only express its will through its government.⁶ Yet there remains a conceptual distinction between the State (the principal) and the government (its agent). This renders problematic the scenario of a government

⁴ Georg Nolte, ‘The Resolution of the *Institut de Droit International* on Military Assistance on Request’ (2012) 45 RBDI 241, 248.

⁵ Brad Roth, ‘Sovereign Equality and Non-Liberal Regimes’ (2012) 43 NYIL 26, 30; Max Byrne, ‘Consent and the Use of Force: An Examination of “Intervention by Invitation” as a Basis for US Drone Strikes in Pakistan, Somalia and Yemen’ (2016) 3 JUFIL 97, 101.

⁶ *German Settlers in Poland* (1923) PCIJ Ser. B No 6, 1, 22; Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (OUP 2001) 115.

which seeks to consent to the use of foreign force on its territory. Where consent cannot be given by the potential ‘victim’ of a potentially illegal action, but only by the potential victim’s agent, there is an obvious risk that consent is given not in the interests of the victim but of the agent.⁷ This concern is particularly pressing when the consenting government’s grip on power is being challenged by civil war or rebellion. Civil war can be seen as an attempt by the State to exercise its political independence by changing its government. By hindering this attempt, foreign military assistance to a government in this situation may appear to violate the principle of non-intervention, or perhaps art 2(4) of the Charter itself. The right of peoples to self-determination provides another basis for scepticism about the legality of government consent in such circumstances. Applied in the context of an existing State, self-determination suggests that a State’s political order is ultimately to be determined by the State’s people, who retain the right to change their government. Foreign military assistance which helps keep the government in power against a competing force which seeks to represent the State’s people seems in tension with this right. Such considerations underlie the widely held view that there is a general prohibition on military assistance to governments in civil wars, although one subject to a range of limitations and exceptions.

Chapter 1 of this thesis explores the first tension identified in the preceding paragraph: that between the availability of consent as a legal justification for force and the widely accepted status of the prohibition of the use of force as peremptory, and hence non-derogable. It begins by considering how the existence of peremptory norms is to be determined and what effects flow from a norm’s peremptory status. Adopting the positivist approach laid down in art 53 VCLT, it then seeks to determine to what extent States have recognized the prohibition on the use of force as *jus cogens*. While some authors have suggested that only the use of force which rises to the level of aggression violates a peremptory norm, this approach is rejected. Aggression is a term which has multiple

⁷ See A/C.6/34/SR.43, [3] (Kenya).

potential meanings in international law, some of which are little narrower than the prohibition on the use of force itself. More importantly, States' *opinio juris* suggests recognition of the peremptory status of the prohibition of the use of force more broadly, not just of a core prohibiting the most serious violations. The chapter then argues that the broader peremptory status of the prohibition of the use of force can be reconciled with the legality of consensual force (as well as with the permissibility of self-defence and force authorised by the Security Council) by arguing that these exceptions are incorporated within the peremptory norm itself. As long as the consent is valid, consensual force does not constitute even a *prima facie* violation of the peremptory norm, since it is not force used against another State's 'territorial integrity or political independence' and is not inconsistent with the purposes of the UN. It then demonstrates that this explanation does not leave the peremptory status of the prohibition devoid of effect. The chapter also contributes to a more sophisticated understanding of *jus cogens* and its role in international law, which is often presented in an over-simplistic way.

Chapter 2 of the thesis considers the basic requirements for consent to force to be considered a valid expression of State will. There are no formal requirements for such consent, but it must be clear and non-retrospective. It must also emanate from the highest officials of the State's government. A more difficult problem may arise when seeking to determine which entity constitutes the government of a State experiencing internal conflict. Despite the fundamental importance of identifying a State's government for the workings of international law, there is no single clear test. The traditional test based on effective control of the State's territory remains the starting point, but considerations of constitutional, democratic and humanitarian legitimacy have been increasingly employed on an *ad hoc* basis to justify the identification of partially or wholly ineffective authorities as the State's government. In practice, international recognition plays the decisive role in cases of potential dispute. Since the international community is reluctant to leave a State without a legal

government, States generally retain such a government even in internal conflict situations. Such a government is *prima facie* capable of consenting to foreign military assistance on the State's behalf, so any restriction must be established on a separate basis.

The rest of the thesis will examine closely whether one such restriction exists: the alleged general prohibition of military assistance to governments in civil wars. As already mentioned above, there is a long-standing scholarly debate about whether intervention in a civil war, clearly prohibited when on the side of the opposition, is also prohibited when it assists the government. Chapter 3 provides an account of the relevant literature. It emphasises how scepticism about the alleged prohibition has increased in the post-Cold War era, but that it also retains much support. It also highlights the disagreements among the alleged prohibition's proponents about its exact scope, including the threshold for its application (whether the correct threshold is in fact the existence of a civil war, and if so how this concept is to be defined), whether the prohibition includes indirect as well as direct military assistance to the government, and whether the prohibition is limited in its application to military assistance given *for the purpose* of helping the government to prevail in the internal conflict. Potentially relevant case law of the ICJ, in the form of the *Nicaragua* and *Armed Activities* cases, is also considered. Neither of these cases provides support for the alleged prohibition, although they are not necessarily inconsistent with it either.

The remainder of this thesis seeks to provide an original contribution to the academic debate about the alleged prohibition's existence *de lege lata*, arguing that the better view is that it is not a rule of contemporary international law. In making this argument, the thesis seeks to take a methodologically sophisticated approach. It has been observed that methodology is not a strong point of international legal scholarship.⁸ Yet methodological differences underly many of the most intractable debates about the content of international

⁸ Stefan Talmon, 'Determining Customary International Law: The ICJ's Methodology Between Induction, Deduction and Assertion' (2015) 26 EJIL 417, 418.

law.⁹ Chapter 4 seeks to bring out more clearly the contrasting approaches to interpreting the ambiguous body of relevant State practice and *opinio juris* which have given rise to opposing views. The most relevant internationally-endorsed texts bearing on intervention in internal conflicts, the UNGA Declaration on the Inadmissibility of Intervention and the Friendly Relations Declaration, are unclear as to whether they include pro-government intervention within the scope of their condemnation. Proponents of the alleged prohibition tend to emphasise the fact that States do not solely rely on government consent when seeking to justify intervention in an internal conflict, but also provide other justifications, such as alleging previous foreign assistance to the opposition or, more recently, categorizing the opposition as terrorists. However, it is argued that such justifications do not necessarily imply that States consider that consent in itself is not legally sufficient; rather, they may be interpreted as attempts to legitimize intervention morally and politically. Even during the Cold War, *opinio juris* supportive of the alleged prohibition co-existed with broad affirmations of the legality of intervention with the consent of the government. States also often seemed to condition legality on their assessment of requesting government's popular legitimacy (generally interpreted in an ideologically polarized way on Cold War lines). It is argued that the prohibition had not come into existence by the end of the Cold War. If this is correct, it has certainly not come into existence since, given that clear support for the alleged prohibition has completely dried up in the post-Cold War era. To provide a solid basis for its analysis, Chapter 4 includes a careful and relatively comprehensive consideration of the major cases of pro-government intervention from 1945 to the present, which forms a useful addition to the existing literature.

Chapter 5 provides a new perspective on the methodological approach underlying the alleged prohibition, drawing on the insight that rules of customary international law are often established by a combination of inductive and deductive reasoning. Induction

⁹ Corten (n1) 4, 27; Jean d'Aspremont, *Epistemic Forces in International Law* (Edward Elgar 2015) 97.

establishes customary rules by relying on a range of individual instances of State practice and *opinio juris*, while deduction establishes (more specific) rules by showing that they logically follow from existing (more general) rules or principles.¹⁰ While the previous chapter expressed a sceptical view on whether the alleged prohibition could be established by induction from State practice and *opinio juris*, this would not suffice to establish its non-existence if it logically follows from fundamental principles of international law such as the prohibition of the use of force, the principle of non-intervention and the right of peoples to self-determination. Rules can be established by deduction in this way even if States' *opinio juris* is ambiguous. However, it is argued that deductive reasoning also fails to establish the existence of the alleged general prohibition on pro-government intervention in civil wars. Deduction from the fundamental principles of international law must remain sensitive to indications of how States understand these principles. Civil wars and internal strife can reasonably be understood to detract from a State's ability to exercise its political independence and from its people's ability to determine their own political future. They also inevitably create negative consequences for other States and for the international order which, as Security Council practice shows, can be considered a threat to the international peace. Further, as shown in Chapters 2 and 4, the international community now clearly assumes that it is capable in many cases of judging which of the contending forces within a State is 'legitimate'. All these developments undercut the deductive case for the alleged prohibition.

The final chapter of the thesis presents another argument against the alleged prohibition's existence: the difficulty in defining its scope in a workable way. As discussed in Chapter 3, there is a lack of consensus among the proponents of the prohibition as to its exact scope. There is generally an acceptance that the alleged prohibition needs to be defined in a relatively limited way to accord with State practice, which is in fact characterised by

¹⁰ See Talmon (n8) 419–21 and generally Chapter 5, Part A of this thesis.

broad acceptance of pro-government intervention. Thus for example, indirect military assistance is often excluded from the scope of the prohibition, and 'counter-intervention' in response to prior foreign assistance to the opposition is widely accepted. Moreover, prohibited intervention for the purpose of helping the government prevail in a civil war is often contrasted with permissible operations to protect nationals, uphold 'security and stability' or fight terrorism. However, although necessary to reconcile the rule with State practice (using inductive reasoning), these limitations on its scope are malleable enough to drain it of almost all its practical effect. The rule is thus inherently ineffective in promoting the principles which allegedly underlie it, undercutting the 'deductive' case for its existence. It is important to stress that pro-government intervention in civil wars does not take place in a legal vacuum, since the obligations imposed by international humanitarian law and human rights law apply to such interventions and are not displaced by consent. But there is no *general* prohibition against military assistance to governments in internal conflicts.

Chapter 1: Reconciling the Lawfulness of Consensual Force and the Prohibition of the Use of Force as *Jus Cogens*

This initial chapter of the thesis considers a basic difficulty in understanding the general lawfulness of the use of force with government consent: reconciling it with the widely accepted status of the prohibition of the use of force as a peremptory norm of international law. Art 53 VCLT¹¹ establishes that peremptory norms are ‘non-derogable’ and that treaties conflicting with them are void. From the non-derogable nature of *jus cogens* it follows that a peremptory norm cannot be set aside by State consent in a particular case. This view is confirmed by the ILC’s Articles on State Responsibility (ASR).¹² The ASR provide for six circumstances which preclude the wrongfulness of otherwise illegal State action, of which valid consent is the first (art 20). But art 26 indicates that these circumstances do not preclude wrongfulness in relation to a breach of a peremptory norm. However, commonplace practice shows that States can validly consent to acts, such as deployments of foreign troops on their territory, which without consent would constitute violations of the prohibition of the use of force.¹³ The legality of consensual force raises the issue of whether the prohibition of the use of force can meaningfully be characterised as peremptory. States appear to be able to affect its applicability to their relations by an exercise of their will, in a way that would be unimaginable for other commonly accepted examples of *jus cogens* such as the prohibitions on genocide, torture, slavery and apartheid.

Further consideration reveals other aspects of the prohibition of the use of force which appear to distinguish it from the absolute interdiction effected by other canonical peremptory norms. Notably, self-defence in accordance with the UN Charter is one of the

¹¹ (Adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

¹² ‘Responsibility of States for Internationally Wrongful Acts’ (2001) A/56/10, reprinted in [2001] 2 UNYBILC 20.

¹³ See for example ‘Report on the Legal and Policy Framework Guiding the United States’ Use of Force and Related National Security Operations’ (December 2016) 11, available at <www.justsecurity.org/wpcontent/uploads/2016/12/framework.Report_Final.pdf>.

general ‘circumstances precluding wrongfulness’ recognized in ASR (art 21), which art 26 indicates does not apply to breaches of peremptory norms. But clearly self-defence pursuant to art 51 of the Charter does provide a valid legal justification for what would otherwise be an illegal use of force. *Jus cogens* has also commonly been asserted to impose limits on the powers of the Security Council, so that resolutions which authorise violations of a peremptory norm are *ultra vires*.¹⁴ But under Chapter VII of the UN Charter the Council clearly may authorise enforcement action which would otherwise violate the prohibition of the use of force. Again, the prohibition of the use of force seems to lack the absolute bindingness of other peremptory prohibitions.

This chapter will seek to clarify how the peremptory status of the prohibition of the use of force can be reconciled with the legality of consensual force, as well as the self-defence and Security Council exceptions to the prohibition. Firstly, as a necessary starting point, it will briefly provide an account of the deeply contested concept of *jus cogens*, including how the existence of such norms is to be determined and the exact effects of their peremptory status. Secondly, it will consider whether the prohibition of the use of force can be considered as *jus cogens*, or whether, as some have argued in light of its apparently qualified nature, only the ‘hard core’¹⁵ of the norm, often described in terms of a prohibition of ‘aggression’, is peremptory. It will be argued that it is difficult to identify with precision what would constitute such a hard core. Further, it seems that States have recognized the peremptory status of the prohibition of the use of force more broadly. Thirdly, the chapter will conclude that the peremptory status of the prohibition of the use of force can be reconciled with the legality of consensual force (as well as of force in self-defence and UNSC-authorized force) when it is understood that these limitations are incorporated in the

¹⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993* [1993] ICJ Rep 325, Separate Opinion of Judge Lauterpacht, 439–40; *Kadi v Council and Commission Case T-315/01* [2005] ECR II-3649.

¹⁵ See Tom Ruys, *Armed Attack and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (CUP 2010) 26–27.

scope of the peremptory prohibition itself, and therefore do not involve derogation from the peremptory norm. The possible objection that this solution empties the peremptory status of the prohibition of all meaning is met by identifying additional constraints imposed on States as a result of its peremptory status. However, the analysis does show that the common conception of *jus cogens* is a category of exceptionless ‘absolute’ norms is misleading.¹⁶

A. *Jus Cogens*: Nature and Effects

Assessing the status of the prohibition of the use of force as a peremptory norm requires some initial consideration of the concept of *jus cogens*. The emergence of this concept can only be understood against the background of the classical voluntarist and bilateralist model of international law which it seeks to qualify.¹⁷ On this model, international law binds States because of their consent, express or tacit, to be bound.¹⁸ International law takes its binding quality from the cardinal principle of *pacta sunt servanda*. Once a State has consented to be bound, it cannot unilaterally free itself from a particular norm. But, reflecting the consensual nature of the system, two or more States can agree to set aside or contract out of any norm *inter se*.¹⁹ Although such an agreement could not alter the parties’ obligations to third parties, as between the parties themselves the agreement, whatever its content, will be valid and prevail over the generally applicable legal position as *lex specialis*.

This has remained the general position in international law.²⁰ However, in the early years of the twentieth century there were increasingly prominent suggestions that international law must impose some limits on States’ ability to contract out of generally

¹⁶ Robert Kolb, *Peremptory International Law: Jus Cogens – A General Inventory* (Hart 2015) 73.

¹⁷ Bruno Simma, ‘From Bilateralism to Community Interest in International Law’ (1994) 250 RdC 217, 232.

¹⁸ Stephen C Neff, ‘A Short History of International Law’ in Malcolm D Evans (ed), *International Law* (4th ed OUP 2014) 14–17; Roth (n5) 30.

¹⁹ ASR Commentary art 20, para (2).

²⁰ *North Sea Continental Shelf Cases* [1969] ICJ Rep 3, 42: ‘it is well understood that, in practice, rules of international law can, by agreement, be derogated from in particular cases or as between particular parties.’

applicable rules of great moral importance.²¹ World war and genocide indicated the need for a system of international law which would impose more substantive limits on States and their behaviour in the interest of international peace and human rights.²² The ILC's project, commencing in 1949, to draft a convention on the law of treaties squarely raised the issue of whether States' power to create and set aside their legal obligations by treaty was unlimited, or whether there existed norms so important that any treaty which attempted to displace them would be void. The existence of such norms of *jus cogens* was endorsed in the reports of successive Special Rapporteurs involved in the ILC's drafting process²³ and despite significant resistance the concept was incorporated in the VCLT. Art 53 VCLT, now the *locus classicus* for the existence of peremptory norms in international law, provides:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Art 64 further provides that an existing treaty 'becomes void and terminates' if a new peremptory norm emerges with which it conflicts.

As the years have passed, the concept of *jus cogens* has attained a firm foothold in international legal discourse.²⁴ While the ICJ long appeared to hesitate regarding the concept, since 2006 the court has directly acknowledged the existence of peremptory norms against

²¹ See Alfred Verdross, 'Forbidden Treaties in International Law' (1937) 31 AJIL 571.

²² Paul B Stephan, 'The Political Economy of *Jus Cogens*' (2011) 44 Vand JTL 1073, 1081; Dire Tladi, 'First Report on *Jus Cogens*' (8 March 2016) A/CN.4/693, [24].

²³ G G Fitzmaurice, 'Third Report on the Law of Treaties' [1958] 2 UNYBILC 20, 40; Humphrey Waldock, 'Fifth Report on the Law of Treaties' [1966] 2 UNYBILC 1, 23–24.

²⁴ See Tladi (n22) [44]–[49].

genocide²⁵ and torture²⁶ and the concept was again referred to with apparent acceptance in the *Kosovo Advisory* opinion.²⁷ The concept has come into regular use by States, and as mentioned has been enshrined in the ASR. Scholarly consensus, with few dissenting voices,²⁸ now accepts the existence of *jus cogens* in international law.²⁹ A broad consensus has also developed about a core canon of peremptory norms, including the prohibition of the use of force and/or of aggression,³⁰ as well as the prohibitions of genocide, torture, slavery and racial discrimination.³¹ The fundamental rules of international humanitarian law³² and the right to self-determination³³ are also often considered peremptory, although there has been a greater degree of scepticism about these examples.³⁴ A range of other norms have also been asserted to be peremptory.³⁵

²⁵ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda) Jurisdiction and Admissibility, Judgment* [2006] ICJ Rep 6, 27.

²⁶ *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* [2012] ICJ Rep 422, 457.

²⁷ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion* [2010] ICJ Rep 403, 437.

²⁸ For continued scepticism see Gordon A Christenson, 'Jus Cogens: Guarding Interests Fundamental to International Society' (1988) 28 VJIL 585, 590; Michael J Glennon, 'De l'absurdité du droit impératif (*jus cogens*)' (2006) 110 RGDIP 529. See further the discussion in James A Green, 'Questioning the Prohibition on the Use of Force as *Jus Cogens*' (2011) 32 Mich JIL 215, 217–18.

²⁹ Andreas Paulus 'Jus Cogens in a Time of Hegemony and Fragmentation: An Attempt at Re-appraisal' (2005) 74 Nordic JIL 297, 297–98.

³⁰ The possible difference will be discussed in Part B(ii) of this chapter.

³¹ Commentary to art 40.

³² *ibid*; see also *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* [1996] ICJ Rep 226, 257 (reference to 'intransgressible principles' of international humanitarian law).

³³ *ibid*; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136, 199–200. Although in this case the court did not explicitly characterise the norms in question as peremptory, this would seem to be implied by its conclusion that they gave rise to obligations *erga omnes* and imposed on all States an obligation not to recognize situations arising from their breach.

³⁴ Dapo Akande and Sangeeta Shah, 'Immunities of State Officials and Foreign Domestic Courts' (2011) 21 EJIL 815, 833–34 (in relation to humanitarian law); Wladyslaw Czaplinski, 'Jus Cogens and the Law of Treaties' in Christian Tomuschat and Jean-Marc Thouvenin (eds) *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (M Nijhoff 2006) 88; Thomas Weatherall, *Jus Cogens: International Law and Social Contract* (CUP 2015) 253 (in relation to self-determination)

³⁵ For example, scholars have classified as peremptory the prohibition of piracy, as well as a general prohibition of discrimination and of deprivation of life, liberty or property without due process of law:

However, the apparent consensus about *jus cogens* fractures when examined more closely.³⁶ The concept's lack of clarity has inspired an ongoing ILC project.³⁷ Two difficulties will be considered here. Firstly, there is the problem of how precisely to identify the existence of particular norms as *jus cogens*. On a positivist view, these norms are invested with peremptory status by States. In contrast, others suggest that peremptory status is inferred from the content of particular norms, on the basis of their ethical value or policy importance. Secondly, there is the issue of what further effects a norm's peremptory status has, beyond those specifically provided for in the VCLT. A number of additional consequences have been asserted to flow from the categorisation of a norm as *jus cogens*, sometimes unconvincingly.

i) The Identification of Peremptory Norms

Jus cogens has inspired much legal scholarship, but no clear consensus has emerged as to how such norms arise and are to be identified.³⁸ Courts and authors have often classified norms as *jus cogens* with little or no explanation of how they determined these norms to be peremptory.³⁹ Where analysis is provided, fundamental differences are apparent. Although

George Haimbaugh, 'Jus Cogens Root and Branch (An Inventory)' (1987) 3 *Touro LR* 203, 217–19. The Inter-American Commission on Human Rights has identified a peremptory norm prohibiting imposition of the death penalty on minors: *Michael Dominguez v US*, Case 12.285, Report No 62/02, Inter-Am CHR, 22 October 2002, Doc 5 rev 1 at 913, para [85]. Further, the Inter-American Court of Human Rights had asserted that 'the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*': *Juridical Condition and Rights of the Undocumented Migrants*, Inter-Am Ct HR Advisory Opinion OC-18/03, 17 September 2003, para [101]. As President of the Special Tribunal for Lebanon, Antonio Cassese identified the right of access to a court as *jus cogens*: *In the Matter of El-Sayed*, Order of the President Assigning Matter to Pre-Trial Judge, Case No CH/PRES/2010/01 (15 April 2010), paras [28]–[29].

³⁶ Anthony Aust, *Handbook of International Law* (2nd edn, CUP 2010) 10.

³⁷ ILC, 'Peremptory Norms of General International Law (*Jus Cogens*)' <http://legal.un.org/ilc/guide/1_14.shtml>

³⁸ A Mark Weisburd, 'The Emptiness of Jus Cogens, As Illustrated by the War in Bosnia-Herzegovina' (1995) 17 *Mich JIL* 1, 28; UNGA 'Report of the Study Group of the ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (13 April 2006) A/CN.4/L.682, 167; A/C.6/70/SR.19, 7 (Slovakia).

³⁹ Mary Ellen O'Connell, 'Jus Cogens: International Law's Higher Ethical Norms' in Donald Earl Childress (ed), *The Role of Ethics in International Law* (CUP 2012) 79; Matthew Saul, 'Identifying *Jus Cogens* Norms:

the most venerable basis for *jus cogens*, natural law, still has its proponents,⁴⁰ in contemporary literature the two dominant approaches have been the positivist view, according to which a norm's status as *jus cogens* is ultimately determined by the social fact of whether States recognize it as such, and a conception of *jus cogens* as 'public order' norms, whose peremptory quality can be deduced from their fundamental importance to the international community and its values.⁴¹

The positivist view of *jus cogens* finds support in the definition of the concept provided in art 53 VCLT.⁴² This article provides two pieces of information about peremptory norms: that they are norms of 'general international law', and that they are 'accepted and recognized by the international community as a whole' as non-derogable. The statement that *jus cogens* is made up of norms of 'general international law' indicates that it can be fitted within the standard framework for the identification of international legal norms set out in art 38 of the ICJ Statute. Although some have argued that quasi-universal treaties, notably the UN Charter, can form 'general international law',⁴³ this seems doubtful

The Interaction of Scholars and International Judges' (2015) 5 Asian JIL 26, 39; also A/C.6/70/SR.18, 2 (Israel).

⁴⁰ Dan Dubois, 'The Authority of Peremptory Norms in International Law: State Consent or Natural Law?' (2009) 78 Nordic JIL 133; Patrick Capps, *Human Dignity and the Foundations of International Law* (Hart 2009) 155. A major difficulty with a natural law theory of *jus cogens* is that natural law principles are thought of as unchanging moral norms, while art 53 VCLT indicates that *jus cogens* can be modified: Saul (n39) 31; Tladi (n22) [52]. Further, John Finnis, the leading contemporary natural law theorist, has emphasised that 'natural law...makes no pretence that natural reason can identify the one right answer' to questions not directly involving a small number of absolute rights and duties: John Finnis, 'Natural Law and Legal Reasoning' in Robert P George (ed), *Natural Law Theory: Contemporary Essays* (Clarendon 1992) 151. Thus, even if natural law theory is accepted, authoritative sources will still be necessary to effectively determine the content of *jus cogens*.

⁴¹ Karl Zemanek, 'The Metamorphosis of Jus Cogens: From an Institution of Treaty Law to the Bedrock of the International Legal Order' in Enzo Cannizzaro (ed), *The Law of Treaties beyond the Vienna Convention* (OUP 2011) 384–91; cf Asif Hameed, 'Unravelling the Mystery of *Jus Cogens* in International Law' (2014) 84 BYIL 52, 58; Tladi (n22) [50].

⁴² Antonio Cassese, *International Law in a Divided World* (Clarendon Press 1988) 114; Weisburd (n38), 14–15.

⁴³ Cf Michael Akehurst, 'Enforcement Action by Regional Agencies, with Special Reference to the Organization of American States' (1967) 42 BYIL 175, 284; Grigory Tunkin, 'Is General International Law Customary Only?' (1994) 4 EJIL 534, 538; Tarcisio Gazzini, *The Changing Rules on the Use of Force in*

given that treaties cannot in themselves bind non-parties,⁴⁴ although such treaties may help establish a mirroring customary rule that may be peremptory.⁴⁵ Most commonly, States and scholars have indicated that they take ‘general international law’ to mean norms of universal (as opposed to regional) customary international law.⁴⁶ An alternative conception, that peremptory norms fall within the category of ‘general principles of law recognized by civilized nations’, has also received some scholarly support.⁴⁷ The key argument for the latter view is that art 53, while it refers to ‘acceptance and recognition’ of the norm by States, does not refer to State practice, and that it is doubtful whether State practice can ever be found for a peremptory norm of abstention, which involves *not* doing something.⁴⁸ However, this argument is undermined by the ICJ’s case law indicating that norms of abstention such as the prohibition of the use of force form customary international law on the basis of States’ verbal statements and *opinio juris*,⁴⁹ and also by the fact that general principles have not been widely accepted as playing more than a limited and residual role as a source of international law.⁵⁰

Thus, the most compelling positivist conception of peremptory norms is a special set of customary norms which are raised to the status of *jus cogens* by an additional kind of *opinio juris*: acceptance and recognition by the international community of States of their non-

International Law (Manchester University Press 2005) 121; Yoram Dinstein, ‘The Interaction Between Customary International Law and Treaties’ (2006) 322 RdC 243, 398.

⁴⁴ Hans Kelsen, *Principles of International Law* (Rinehart 1952) 188.

⁴⁵ Dire Tladi, ‘Second Report on *Jus Cogens*’ (16 March 2017) A/CN.4/706, 28–29; *Prosecutor v Tolimir* (Judgment) IT-05-88-2-T (12 December 2012) [733].

⁴⁶ See *United Nations Conference on the Law of Treaties: Official Records, Second Session, Plenary Meetings* (Vienna, 9 April–22 May 1969) 102 (United States), 102–03 (Bulgaria); more recently A/C.6/69/SR.27, 7 (Jamaica).

⁴⁷ Bruno Simma and Philip Alston, ‘The Sources of Human Rights Law: Custom, *Jus Cogens* and General Principles’ (1988–89) 12 AYIL 82, 104; Tladi (n45) [48]. See also A/C.6/71/SR.26, 16 (Iran).

⁴⁸ Simma and Alston (n47) 104–05.

⁴⁹ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits [1986] ICJ Rep 14, 97–101.

⁵⁰ Hameed (n41) 96; Kyoji Kawasaki, ‘A Brief Note on the Legal Effects of *Jus Cogens* in International Law’ (2006) 34 Hitotsubashi JLP 27, 29–30.

derogability.⁵¹ A number of objections have been raised to this approach. Some have argued that it is contradictory to establish peremptory norms on the basis of States' *opinio juris*, when their distinguishing effect is that States cannot set them aside.⁵² If *jus cogens* is brought into legal existence by States, why cannot States escape its grasp by contracting out of it? However, this point seems to reveal confusion between two separate issues: the positivist nature of international law and its traditional consensualist nature.⁵³ According to art 53, norms are invested with peremptory status by the international community of States.⁵⁴ This requires acceptance of the norm by the great majority of States, but not unanimity.⁵⁵ It is widely considered that unlike 'ordinary' customary norms, *jus cogens* binds even dissenting 'persistent objector' States, as an aspect of their non-derogability.⁵⁶ As art 53 indicates, the international community can modify peremptory norms in the same way as they are made. But a group of States on a non-universal scale, acting apart from the international community, cannot set aside *inter se* established peremptory norms.⁵⁷ This reflects a departure from a purely consent-based model of international law, but it is not incompatible with the positivist view that whether a norm's legal status depends on social fact: whether it has been recognized as law by the authoritative social actors.

⁵¹ Andre de Hoogh, 'Jus Cogens and the Use of Armed Force' in Marc Weller (ed) *The Oxford Handbook on the Use of Force in International Law* (OUP 2015) 1163; Tladi (n45) [77].

⁵² Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006) 36, 44; Report (n38) 190.

⁵³ Samantha Besson, 'Theorizing the Sources of International Law', in Samantha Besson and John Tasioulas (eds) *The Philosophy of International Law* (OUP 2010) 166.

⁵⁴ Levan Alexidze, 'Legal Nature of Jus Cogens in Contemporary International Law' (1981) 172 RdC 219, 253–54.

⁵⁵ See *United Nations Conference on the Law of Treaties: Official Records, First session, Plenary Meetings* (Vienna, 26 March–24 May 1968), 47 (Mr Yasseen); Tladi (n45) [67].

⁵⁶ 'Report of the ILC on the Work of its 68th Session' (2016) A/71/10 [121].

⁵⁷ Antonio Gomez Robledo, 'Le ius cogens international : sa genèse, sa nature, ses fonctions' (1981) 171 RdC 9, 25.

A more powerful objection to the positivist conception is that it is unclear exactly how States accept and recognize particular norms as *jus cogens*.⁵⁸ Sceptics argue that direct, explicit statements by States that a particular norm is peremptory are relatively rare, and doubt whether an overwhelming majority of States have explicitly identified any norm as *jus cogens*.⁵⁹ As for implicit recognition of a norm as *jus cogens*, there is an apparent lack of clarity as to what actions or statements by States constitute such recognition.⁶⁰ In *Belgium v Senegal*, in finding the prohibition of torture to be peremptory the ICJ relied on the fact that it was enshrined in treaties of universal application and endorsed in UNGA resolutions, that it was prohibited in almost all domestic legal systems, and that States regularly condemned other States for failure to comply with it.⁶¹ However, none of these tests seem decisively to establish that a State considers a particular norm as *jus cogens* within the meaning of art 53. For example, it has been pointed out that many universal treaties include provisions which might be seen as lacking the fundamental importance associated with the canonical lists of peremptory norms.⁶² In practice, such lists are often based on case law and scholars' views, generally without any detailed reference to States' *opinio juris*— a process which is not in line with the State-based positivist approach reflected in art 53.⁶³

These difficulties in establishing that the international community has accepted and recognized any particular norm as *jus cogens* have led a number of scholars to support an alternative approach, conceptualizing *jus cogens* as norms of 'international public order'.⁶⁴

⁵⁸ Hameed (n41) 70–71.

⁵⁹ Czaplinski (n34) 87; Green (n28) 245.

⁶⁰ Evan J Criddle and Evan Fox-Decent, 'A Fiduciary Theory of *Jus Cogens*' (2009) 34 *Yale JIL* 331, 340; Stephan (n22) 1089.

⁶¹ (n26); Saul (n39) 32.

⁶² Hameed (n41) 70.

⁶³ Green (n28), 242–43; Curtis A Bradley and Mitu Gulati, 'Withdrawing From International Custom' (2010) 120 *Yale LJ* 202, 213.

⁶⁴ Orakhelashvili (n52) 29–31, 46; see also Jean d'Aspremont, 'The Foundations of the International Legal Order' (2007) 18 *FYIL* 219, 247–48.

Peremptory norms are explained as occupying an equivalent role in international law to rules of public policy which in domestic legal systems impose limits on private persons' freedom to contract. They exist to safeguard fundamental values of the international community. In the light of this understanding of *jus cogens*' function, scholars argue that peremptory norms can be identified by their content.⁶⁵ A norm is peremptory if permitting consensual derogation from it would be incompatible with the international legal system or its fundamental values.⁶⁶ Which norms are peremptory can thus be deduced from the structure of the legal system and its fundamental values, without requiring a more specific demonstration that States have recognized them as such. In the words of one member of the ILC involved in drafting the VCLT text, a rule of *jus cogens* 'must...be found to be necessary to international life and deeply rooted in the international conscience.'⁶⁷

As will be discussed again in a later chapter in this thesis, even on a positivist view the use of deductive reasoning to draw conclusions about the law's contents from the basic structure and fundamental principles of a legal system is an inevitable feature of legal reasoning.⁶⁸ However, the kind of deduction commonly relied upon by proponents of the 'public order' approach to *jus cogens* appears vague and subjective.⁶⁹ While certain principles like *pacta sunt servanda* are logically fundamental to the structure of international law and could not without absurdity be subject to derogation,⁷⁰ such structural principles are not what is commonly understood as the concept of *jus cogens* under art 53.⁷¹ Rather than a strictly limited set of 'structural' norms, the generally accepted canon of peremptory norms are 'substantive'

⁶⁵ Christian Tomuschat, 'Obligations Arising for States Without or Against Their Will' (1993) RdC 195, 307.

⁶⁶ Orakhelashvili (n52) 10–11, 109; Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (Lakimiesliiton Kustannus 1988) 20, 207.

⁶⁷ [1963] 1 UNYBILC 63 (Mr Yasseen).

⁶⁸ See further Chapter 5, Part A.

⁶⁹ Hameed (n41) 67.

⁷⁰ Mark W Janis, 'The Nature of *Jus Cogens*' (1988) 3 Conn JIL 359, 362–63, Kolb (n16) 38–39.

⁷¹ Hameed (n41) 65.

norms which the public order approach suggests can be identified as peremptory by deduction from the fundamental values of the international community.⁷² But this test lacks the precision required to identify *jus cogens*, since it is unclear exactly how these fundamental values are identified or why exactly it follows that a particular norm must be non-derogable to safeguard the value in question.⁷³ The analogy with public policy in domestic legal systems casts no light on the problem, since in domestic law the content of non-derogable public policy is authoritatively determined by legislatures and courts, whereas the contents of international *jus cogens* is apparently meant to be able to be established by reason alone in the absence of any authoritative determination.⁷⁴ The public order approach thus seems destabilizing, allowing the assertion of peremptory norms on a highly uncertain basis.⁷⁵

This chapter therefore proceeds on the basis that peremptory norms are norms of customary international law whose peremptory status is determined by reference to their acceptance and recognition as such by States. The criticism that this test is unworkable because there are relatively few occasions where norms have been expressly ‘labelled’ as *jus cogens* by States is exaggerated. In fact, as will be seen in seeking to determine the peremptory status of the *jus ad bellum*, a large number of States have made such statements at some point.⁷⁶ This evidence from individual States’ recognition of particular norms as peremptory forms a secure basis for the judgment that the international community sees *jus cogens* as a device for enshrining a relatively small number of norms which States understand as protecting or reflecting fundamental moral values.⁷⁷ Thus, consistent evidence that States

⁷² *ibid.*

⁷³ Markus Petsche, ‘*Jus Cogens* as a Vision of the International Legal Order’ (2010) 29 Penn St ILR 233, 259; Tladi (n45) [56]. Cf Cassese (n42) 128.

⁷⁴ Jerzy Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties: A Critical Appraisal* (Springer-Verlag 1974) 8–9, 190–91; Weisburd (n38) 25–26; Saul (n39) 31.

⁷⁵ Roth (n5) 35–38; Andrea Bianchi, ‘Human Rights and the Magic of *Jus Cogens*’ (2008) 19 EJIL 491, 507. For similar criticisms from States, see A/C.6/71/SR.24, 16–17 (China); A/C.6/71/SR.26, 17 (US).

⁷⁶ See Part B(iii) of this chapter.

⁷⁷ Tladi (n45) [20]–[22]; Hameed (n41) 82–85.

recognize a norm as ‘fundamental and universal in international relations’,⁷⁸ for example its codification at the heart of a quasi-universal treaty and the repeated reiteration of its importance in UNGA resolutions and in State discourse, can be taken as implied recognition of its peremptory status to supplement express statements to that effect.⁷⁹ This account acknowledges that the function of *jus cogens* is to protect a core set of norms reflecting fundamental community values, but ties the identification of these norms closely to States’ *opinio juris*, in line with the requirements of art 53.⁸⁰

ii) Effects of Peremptory Norms Beyond the VCLT

What effects arise from a norm’s peremptory status, beyond those specified in the VCLT, also remains a matter of some uncertainty.⁸¹ Art 53 VCLT identifies two effects of *jus cogens*: a peremptory norm voids conflicting treaties by which States attempt to derogate from the norm *inter se*, and can only be changed by another peremptory norm. However, additional effects can be argued to follow logically from the VCLT definition.⁸² From the fact that peremptory norms are ‘non-derogable’ and void conflicting treaties, it appears that their universal observance is a central priority of the international legal system. Thus, States should be prevented from circumventing them in any way and special measures should be taken to respond to any breaches.⁸³

But the ICJ’s case law indicates that caution is required when attempting to deduce a wide array of additional effects of *jus cogens* from its non-derogable status in the law of

⁷⁸ Antonio Cassese, *Self-Determination of Peoples: a Legal Reappraisal* (CUP 1995) 140.

⁷⁹ *ibid*; Tladi (n45) [80]–[89].

⁸⁰ Tladi (n22) [70]. Cf Hameed (n41) 52.

⁸¹ Kolb (n16) 48; Kawasaki (n50) 28; Ulf Linderfalk, ‘What Is So Special About *Jus Cogens*?’ (2012) 14 *Intl Comm LR* 3.

⁸² Giorgio Gaja, ‘*Jus Cogens* Beyond the Vienna Convention’ (1981) 172 *RdC* 271; Michael Byers, ‘Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules’ (1997) 66 *NJIL* 211, 215.

⁸³ Petsche (n73) 249.

treaties.⁸⁴ It is clear that *jus cogens* status does not trump any rule of law, substantive or procedural, which could conceivably interfere with its enforcement.⁸⁵ Thus, the ICJ has rejected the argument that the fundamental importance of *jus cogens* provides the Court with a non-consensual basis for jurisdiction over disputes relating to peremptory norms.⁸⁶ Similarly, the court has rejected the argument that *jus cogens* status creates an exception for State immunity.⁸⁷ Thus, in general assertions of additional effects arising from peremptory status beyond those established by the VCLT need to be established by induction from State practice and *opinio juris*, rather than asserted to logically follow from peremptory status.⁸⁸

However, certain alleged effects of peremptory status do seem to be logically deducible from their non-derogability in treaty law.⁸⁹ If *jus cogens* voids a conflicting treaty, it seems to follow that it cannot be set aside by other means of consensual displacement, such as consent not in treaty form or the development of conflicting regional customary international law.⁹⁰ It has also been contended that reservations to treaties reproducing peremptory norms are void,⁹¹ although this is controversial.⁹² Further, peremptory norms impose a legal limit on international organizations and their organs, as such organizations are creations of States exercising their treaty-making power which is itself constrained by *jus*

⁸⁴ Kawasaki (n50) 28; Bianchi (n75) 501

⁸⁵ Kolb (n16) 113–14.

⁸⁶ *DRC v Rwanda* (n25) 32.

⁸⁷ *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)* [2012] ICJ Rep 99, 140–42.

⁸⁸ Carlo Focarelli, 'Promotional *Jus Cogens*: A Critical Appraisal of *Jus Cogens*' Legal Effects' (2008) 77 *Nordic JIL* 429, 449; Kolb (n16) 113-14.

⁸⁹ Kolb (n16) 63–64.

⁹⁰ Roberto Ago, 'Eighth Report on State Responsibility' [1979] *UNYBILC* 3, 38; Michel Virally, 'Reflexions sur le *jus cogens*' (1966) 12 *AFDI* 5, 19.

⁹¹ UN Human Rights Committee, General Comment 24 (2 November 1994) *CCPR/C/21/Rev.1/Add.6*, [8].

⁹² France, the US and the UK objected to this statement in General Comment 24: see Orakhelashvili (n52) 188; also 'Report of the International Law Commission on the work of its 49th session' [1997] 2 *UNYBILC* 1 (vol 2) [106].

cogens.⁹³ Case law supports the view that even UNSC resolutions will be *ultra vires* if contrary to peremptory norms.⁹⁴

Outside the VCLT, the most authoritative instrument ascribing additional effect to *jus cogens* has been the ASR. Although not in treaty form, the ASR have proved influential on the formation of international custom; many of them were cited in practice and case law even before the adoption of the final reading.⁹⁵ As adopted in its final draft, the ASR make the following references to peremptory norms:

- The six ‘circumstances precluding wrongfulness’ (valid consent, self-defence, countermeasures, *force majeure*, distress and necessity), which can justify a prima facie breach of the law, will not preclude the wrongfulness of a breach of a peremptory norm (art 26).
- In the event of ‘a serious breach by a State of an obligation arising under a peremptory norm of general international law’, i) States shall cooperate to bring such a breach to an end through lawful means, and ii) no State shall recognize as lawful a situation created by a serious breach, nor render aid or assistance in maintaining that situation (arts 40, 41)
- Countermeasures which would affect obligations under peremptory norms of general international law are prohibited (art 50).

The recognition of *jus cogens* in the law of State responsibility appears a major development.

The practical effects of peremptory status in its original treaty law context have been limited.

Open attempts to set aside a peremptory norm in the formal context of a treaty are likely to

⁹³ *Fragmentation Report* (n38) 176–77; Kolb (n16) 63–64.

⁹⁴ (n13); Erika de Wet, *The Chapter VII Powers of the UN Security Council* (Hart 2004) 188–89; S/PV.5779, 23 (Qatar). The fact that the Charter may predate *jus cogens* is not relevant, considering the effect of art 64 VCLT.

⁹⁵ For example, *Gabčíkovo–Nagymaros Project (Hungary/Slovakia) Judgment* [1997] ICJ Rep 7, 39.

be relatively rare. Further, the VCLT allows only the parties to a treaty to initiate a claim that it is invalid,⁹⁶ which only is likely to occur after a radical change in the perspective of the claimant State and which greatly lessens the practical impact of the VCLT provisions.⁹⁷ In contrast, in the State responsibility context, the invocation of *jus cogens* is open to States injured by unilateral acts and also, in certain circumstances, to all States. Whereas in the treaty law context ‘the car has remained in the garage’⁹⁸ in the State responsibility context the vehicle is much more likely to be taken for a drive – and its roadworthiness tested.⁹⁹

There is some authority to support the view that the additional effects recognized in the VCLT reflect customary international law. The ASR’s provisions on peremptory norms have been referred to approvingly (although not directly applied) in judgments of international tribunals and domestic courts,¹⁰⁰ and the obligation of non-recognition reflected in art 41 has been recognized by the ICJ.¹⁰¹ However, there has been scholarly criticism of some of the effects ascribed to *jus cogens* in the ASR, on the basis that they can neither be deduced from the original VCLT concept of non-derogability nor are supported by State practice or *opinio juris*.¹⁰²

⁹⁶ VCLT arts 42, 65–68.

⁹⁷ Christos L Rozakis, *The Concept of Jus Cogens in the Law of Treaties* (North-Holland Publishing Company 1976) 119–20.

⁹⁸ Ian Brownlie, ‘Comment’ in Antonio Cassese and J H H Weiler (ed), *Change and Stability in International Law Making* (de Gruyter 1988) 110.

⁹⁹ Gaja (n82) 290.

¹⁰⁰ *CMS Gas Transmission Company v Argentina (ICSID Case No ARB/01/8)*, Award of 12 May 2005 14 ICSID Rep 152, 212; *R (on the application of Al-Jedda) v Secretary of State for Defence* [2006] EWCA Civ 327, [66], cited in Maja Ménard, ‘Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Compliance with Peremptory Norms’ in James Crawford, Alain Pellet, Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010) 452.

¹⁰¹ *Wall Opinion* (n33) and *Kosovo* (n27).

¹⁰² Kolb (n16) 64.

B. The Peremptory Status of the Prohibition of the Use of Force: Limited or Non-Existent?

Having provided a basic definition of the concept of *jus cogens* and its effects as a foundation for its analysis, this chapter can now turn to its main subject: establishing whether there is a peremptory norm governing the use of force, and if so, explaining how it is to be reconciled with the legality of consensual force. The prohibition of the use of force was identified during the drafting process of the VCLT as a ‘conspicuous example’ of a peremptory norm,¹⁰³ and it is still regularly asserted as one of the most obvious examples of *jus cogens*.¹⁰⁴ However, there is an apparent tension between its widely asserted peremptory status and the general acceptance of States’ right to consent to the use of foreign force on their territory. It has been observed that this issue has received relatively little close consideration in the scholarship,¹⁰⁵ although the puzzling nature of the prohibition of the use of force as a peremptory norm is still raised as an unsolved problem in the theory of *jus cogens*. For example, in 2014 the South African representative in the UNGA Sixth Committee asked whether the ability of a State to consent to force made the prohibition of the use of force ‘the exception that proves the rule’ about the non-derogable nature of peremptory norms.¹⁰⁶ This chapter seeks to cast some light on this question.

One potential solution to this problem suggested in the limited scholarship on the subject is that the prohibition on the use of force is not in fact peremptory as a whole. Rather, only a more limited core of the *jus ad bellum*, the prohibition on aggression, is

¹⁰³ ILC, ‘Report of the International Law Commission to the General Assembly’ [1966] 2 UNYBILC 72, 247.

¹⁰⁴ See for example Orakhelashvili (n52) 50; Corten (n1) 201, 213; James Crawford, *Brownlie’s Principles of Public International Law* (8th ed, OUP 2012) 595–96; Eliav Lieblich, *International Law and Civil Wars: Intervention and Consent* (Routledge 2013) 193–94; and further, the extensive list provided by Green (n28) 216, fn 4. There are also a number of individual opinions in ICJ judgments supporting the prohibition’s peremptory status: *Nicaragua* (n49) 153 (Separate Opinion of Judge Nagendra Singh), 199–200 (Separate Opinion of Judge Sette-Camara); *Oil Platforms (Iran v US) Judgment* [2003] ICJ Rep 161, 260 (Separate Opinion of Judge Koojimens), 291 (Dissenting Opinion of Judge Elaraby), 329–30 (Separate Opinion of Judge Simma); *Wall* (n33) 254 (Separate Opinion of Judge Elaraby); see Green (n28) 224.

¹⁰⁵ Kolb (n16) 73.

¹⁰⁶ A/C.6/69/SR.20, 18.

peremptory. This narrow view of the peremptory norm was supported by Roberto Ago in 1980 during the course of his work as Special Rapporteur of the ILC's State responsibility project.¹⁰⁷ A similar approach has been taken in a number of subsequent scholarly works.¹⁰⁸ One recent author, James Green, has gone further, casting doubt on whether a peremptory norm can be shown to exist in the area of the *jus ad bellum* at all, on the grounds that there is insufficient evidence that States have accepted and recognized such a peremptory norm.¹⁰⁹

The idea that only the 'core' prohibition of aggression is peremptory (the 'limited peremptory norm' approach) is tempting given the apparently derogability of the prohibition on the use of force compared with other canonical examples of *jus cogens* such as the prohibitions on genocide and torture. However, this section of the chapter will argue that this approach, along with the suggestion that there may not be any peremptory *jus ad bellum* norm at all, should be rejected. It will firstly provide an overview of scholars' arguments that only the core of the prohibition on the use of force is peremptory. Since this core is often identified with the prohibition of 'aggression', the difficulties in defining this term will then briefly be discussed. It will then be argued that there is sufficient evidence to establish that States have recognized a peremptory norm on the use of force, and that it is not limited to the 'core' of the *jus ad bellum*.

i) The Limited Peremptory Norm Approach in the Scholarship

Although the exact scope of the peremptory norm on the use of force has received little close attention in legal scholarship, the issue did arise during the ILC's work on state

¹⁰⁷ Roberto Ago, 'Addendum to the Eighth Report on State Responsibility' [1980] UNYBILC 3, 37–44, 51.

¹⁰⁸ Natalino Ronzitti, 'Use of Force, *Jus Cogens* and State Consent' in A Cassese (ed) *The Current Legal Regulation of the Use of Force* (M Nijhoff 1986) 159; also *Rescuing Nationals Abroad Through Military Intervention on the Grounds of Humanity* (M Nijhoff 1985) 74–75; Hannikainen (n66) 325; Ademola Abass, 'Consent Precluding State Responsibility: A Critical Analysis' (2004) 53 ICLQ 211, 225; Ademola Abass, *Regional Organisations and the Development of Collective Security: Beyond Chapter VIII of the UN Charter* (Hart 2004) 198–99; Affef ben Mansour 'Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Consent' in James Crawford, Alain Pellet, and Simon Olleson (eds), *The Law of State Responsibility* (2010 edn, OUP 2010) 446–47.

¹⁰⁹ Green (n28) 219; also Byrne (n5) 99.

responsibility, specifically in the context of its attempts to define the circumstances which would preclude the wrongfulness of a *prima facie* breach of international law.¹¹⁰ In 1979, the then Special Rapporteur, Roberto Ago, proposed that the consent of a State to an otherwise wrongful act precluded the act's wrongfulness in relation to the consenting State. Among his examples were cases involving the sending of foreign troops into a State with its consent.¹¹¹ In the same report Ago recognized *jus cogens* as a limitation on the validity of consent as a circumstance precluding wrongfulness, without considering the problem this raised as to lawfulness of consensual force.¹¹² However, in an addendum to the report, Ago considered the peremptory character of the prohibition of the use of force in relation to a separate 'circumstance precluding wrongfulness': necessity. There were concerns about the inclusion of necessity in the draft, considering the abuse of the concept in the past to justify blatant aggression. In response to such fears, Ago stated that *jus cogens* served as a limit on necessity, which would rule out the preclusion of wrongfulness in such circumstances:

It would be an absurd situation if the obligation prohibiting any use of force *which constituted aggression* had the power, because of its peremptory nature, to render void any agreement to the contrary concluded between States, so that the prior consent by the State subjected to the use of force could not have the effect of constituting a ground, but that such an effect could be attributed to an assertion of necessity...(emphasis added)¹¹³

So despite his earlier reliance on consensual armed intervention to illustrate consent as a circumstance precluding wrongfulness, Ago indicated here that States cannot consent to the use of force which would constitute aggression.

¹¹⁰ Christakis and Bannelier (n1) 105.

¹¹¹ Ago (n90) 32; Antonio Tanca, *Foreign Armed Intervention in Internal Conflict* (M Nijhoff 1993) 13.

¹¹² Ago (n90) 31–33. He did however in a footnote acknowledge that limits on the effectiveness of consent could result from the fact that the obligation to comply with the prohibition of the use of force was owed *erga omnes*: *ibid* 37, n 171.

¹¹³ Ago (n107) 38. See also Oscar Schachter, *International Law in Theory and Practice* (M Nijhoff 1991) 171.

Ago thus seemed to rely on a distinction between a peremptory norm confined to the prohibition of ‘aggression’ and the broader prohibition on the use of force. For Ago, the quintessential case of aggression was ‘assault on the very existence of another State, or on the integrity of its territory or the independent exercise of its sovereignty.’¹¹⁴ In contrast, Ago expressed doubt as to whether more limited uses of force constituted aggression. Ago’s examples of less serious violations of art 2(4) involved short-term operations in foreign territory to counteract a grave and imminent danger where the territorial State is unable to do so: for example, ‘hot pursuit’ of armed bands into foreign territory, strikes against terrorist bases, Entebbe-style missions to rescue nationals, or the use of cross-border force to prevent a natural catastrophe such as the spread of fire.¹¹⁵ He thus left open the possibility that necessity might be able to preclude the wrongfulness of such violations of art 2(4), since they were only doubtfully prohibited by *jus cogens*.

The debate which followed provided no clarification as to the scope of the peremptory norm on the use of force. While the Commission’s 1980 report referred broadly to ‘the obligation of all States to refrain from any forcible violation of the territorial integrity or political independence of another State’ as peremptory,¹¹⁶ the commentary provisionally adopted defined ‘the prohibition on the use of force *constituting aggression*’ (emphasis added) as the ‘most typical and incontrovertible prohibition of *jus cogens*’.¹¹⁷ The ILC avoided framing the question of whether necessity could preclude the wrongfulness of ‘limited’ violations of art 2(4) in terms of *jus cogens*, instead asking whether art 2(4) should be interpreted as excluding necessity, apparently independently of whether it was peremptory or not.¹¹⁸ Ago’s

¹¹⁴ *ibid* 38-39.

¹¹⁵ *ibid* 41-44.

¹¹⁶ ILC, ‘Report of the International Law Commission on the Thirty-Second Session: State Responsibility’ [1980] 2 UNYBILC 26, 50.

¹¹⁷ *ibid* 43.

¹¹⁸ *ibid* 44-45.

approach was however taken up in the scholarship. In the 1980s two writers, Natalino Ronzitti and Lauri Hannikainen, argued for the between the peremptory core of the prohibition of the use of force and its non-peremptory penumbra.¹¹⁹ Ronzitti concluded that the prohibition on force is peremptory only ‘when used for particularly odious ends, such as aggression or the maintenance of colonial domination’.¹²⁰ For Hannikainen, practice indicated that States could consent to force for ‘non-aggressive’ purposes, and therefore the peremptory norm had to be limited to the ‘aggressive’ use of force.¹²¹

As will be discussed later in this chapter, the final Special Rapporteur of the ILC’s state responsibility project, James Crawford, suggested a different approach to reconciling the prohibition on the use of force with the ASR provisions on circumstances precluding wrongfulness.¹²² However, the ‘limited peremptory norm’ approach put forward by Ago retains its influence in international scholarship. The ASR commentary refers to the ‘prohibition of aggression’, rather than the prohibition on the use of force, as an example of *jus cogens*.¹²³ And a number of recent authors have continued to argue that the legality of armed intervention with consent casts doubt on the peremptory status of the prohibition on the use of force as a whole.¹²⁴

¹¹⁹ Also Jean Raby, ‘The State of Necessity and the Use of Force to Protect Nationals’ (1988) 26 *CYIL* 253.

¹²⁰ Ronzitti (n108) 159.

¹²¹ Hannikainen (n66).

¹²² See further Part C of this Chapter, below; also Ole Spiermann, ‘Humanitarian Intervention as a Necessity and the Threat or Use of *Jus Cogens*’ (2002) 71 *Nordic JIL* 523, 538-39; de Hoogh (n51) 1169

¹²³ Commentary to arts 26, 40, 41; Jean d’Aspremont, ‘Mapping the Concepts Behind the Contemporary Liberalization of the Use of Force in International Law’ (2010) 31 *U Pa JIL* 1089, 1103-04.

¹²⁴ Abass (n108) and ben Mansour (n108). See also Georg Nolte, *Eingreifen auf Einladung : zur völkerrechtlichen Zulässigkeit des Einsatzes fremder Truppen im internen Konflikt auf Einladung der Regierung* (Springer 1999) 136-40; Paulus (n29) 306; Dino Kritsiosis, ‘Topographies of Force’ in M N Schmitt and J Pejic (ed), *International Law and Armed Conflict: Exploring the Faultlines: Essays in Honour of Yoram Dinstein* (M Nijhoff 2007) 49; Weatherall (n34) 224.

ii) Aggression as the Peremptory 'Core' of the Prohibition of the Use of Force?

Proponents of the 'limited peremptory norm' approach generally rely on the term 'aggression' to delineate the peremptory aspects of the *jus ad bellum*. But the term in itself lacks clarity, since it has a range of different meanings, both in the *jus ad bellum* proper and in international criminal law.¹²⁵

The UNGA Definition of Aggression¹²⁶ provides the most detailed and authoritative exposition of the concept of aggression in the *jus ad bellum*.¹²⁷ The chapeau describes aggression as 'the most serious and dangerous form of the illegal use of force', indicating a distinction between the two concepts. Art 2 of the definition also suggests that aggression must involve more than a *de minimis* use of force, by providing that the Security Council may conclude that the first use of armed force by a state may not justify a finding of aggression 'in the light of other relevant circumstances, including the facts that the acts concerned or their consequences are not of sufficient gravity.'

However, the rest of the Definition makes it difficult to give substance to the distinction between aggression and the illegal use of force, suggesting that the 'threshold in question can be situated only slightly above any *de minimis* level inherent in the concept of the use of force within the meaning of art 2(4)...'.¹²⁸ Art 1 is almost identical to art 2(4) of the Charter, except that i) it is limited to the use, not the threat, of force, ii) it is specifically limited to *armed* force, iii) it applies to the use of such force against the 'sovereignty, territorial integrity and political independence' of another State (art 2(4) mentions only the latter two) and iv) it also applies to force 'in any other manner inconsistent with the Charter

¹²⁵ M Ellen O'Connell and M Niyazmatov (2012) 'What is Aggression?: Comparing the *Jus ad Bellum* and the ICC Statute' 10 JICJ 189, 194–95.

¹²⁶ UNGA Res 3314 (XXIX) (14 December 1974).

¹²⁷ For an overview see Thomas Bruha, 'The General Assembly's Definition of the Act of Aggression' in Claus Kress and Stefan Barriga (eds) *The Crime of Aggression: A Commentary* (CUP 2017).

¹²⁸ Claus Kress, 'The State Conduct Element' in Kress and Barriga (n127) 427.

of the United Nations’, whereas art 2(4) refers to the use of force ‘inconsistent with the Purposes of the United Nations’.¹²⁹ Apart from the exclusion of the threat of force, none of these differences appear to narrow the art 2(4) prohibition. Similarly, the list of examples of acts qualifying as aggression in art 3 appears broad, including an attack on the victim State’s territory, any occupation, however temporary, ‘the use of any weapons by a State against the territory of another State’, and relevantly, under Art 3(g):

The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement.

This indicates that the mere presence of foreign troops in a state without consent constitutes aggression, which does not lend itself to a concept of aggression as narrower than the art 2(4) prohibition. Further, it demonstrates that the territorial State’s consent can legalise what would otherwise be an act of aggression within the meaning of the Definition. On the approach to peremptory status taken by the scholars discussed above, it follows that the Definition of Aggression cannot form the basis of a peremptory norm, since it can be set aside by consent.¹³⁰

It has been suggested that the ICJ’s reasoning in the *Nicaragua* case supports the distinction between a peremptory core of the prohibition on the use of force and other, non-peremptory aspects,¹³¹ although this distinction was drawn to establish the contours of the right of self-defence rather than of the prohibition of aggression.¹³² The Court contrasted

¹²⁹ Yoram Dinstein, *War, Aggression and Self-Defence* (5th edn, CUP 2012) 101-02; Bruha (n127) 159.

¹³⁰ Corten (n1) 251–52.

¹³¹ Abass (n108) 195.

¹³² See Dapo Akande and Antonios Tzanakopoulos, ‘The International Court of Justice and the Crime of Aggression’, in Kress and Barriga (n127) 222–24.

‘the most grave forms of the use of force’ and ‘other less grave forms’,¹³³ defining the concept of an ‘armed attack’ giving rise to the right to self-defence as limited to the former category. As criteria for distinguishing the concepts, it referred to the ‘scale and effects’ of an armed attack and contrasted this with a ‘mere frontier incident’. This suggests that the geographical scope of the violence, the ‘volume’ of physical force brought to bear (for instance, in terms of troop numbers and firepower), and the amount of destruction caused could all be relevant. However, the judgment gives little concrete guidance as to exactly how serious the use of force must be.¹³⁴ In the later case of *Oil Platforms*, the Court stated that the mining of a single vessel could constitute an armed attack, suggesting that the threshold is relatively low.¹³⁵ In *Nicaragua* the Court also refers to the ‘circumstances’ and ‘motivations’ of the use of force as relevant criteria, which complicates matters further.¹³⁶

More recently, aggression has been considered primarily in the context of international criminal law, with the adoption of an amendment to the ICC Statute defining the Court’s jurisdiction over the crime of aggression.¹³⁷ The amendment uses the concept of an ‘act of aggression’ as defined in the 1974 Definition of Aggression as the basis for the State conduct element of the crime. But it imposes a further limit: to constitute to criminal offence of aggression, the ‘act of aggression’ must be one ‘which, by its character, gravity and scale, constitutes a manifest violation of the [UN] Charter...’.¹³⁸ Again this test seems quite unclear, although it suggests a relatively high threshold.¹³⁹ Some contend that even a large-

¹³³ *Nicaragua* (n49) 101.

¹³⁴ James A. Green, *The International Court of Justice and Self-Defence in International Law* (OUP 2009) 42.

¹³⁵ *Oil Platforms* (n104) 195; *Kress* (n128) 513-14.

¹³⁶ *Nicaragua* (n49) 120.

¹³⁷ International Criminal Court, Assembly of States Parties, Review Conference, The Crime of Aggression, ICC Res. RC/Res.6, Arts. 15 bis(2–3), 15 ter(2–3) (June 11, 2010); O’Connell and Niyazmatov (n125) 203–04.

¹³⁸ *ibid.*

¹³⁹ ‘Understandings’ adopted by States at the Kampala Conference state that aggression is ‘the most serious and dangerous form of the illegal use of force’, that a determination that it has been committed

scale use of force could not constitute the crime of aggression if it fell within an allegedly 'grey area' such as humanitarian intervention.¹⁴⁰

Because of its multivalent quality, the meaning intended by the term 'aggression' is often unclear. The commentary to the ASR provides an example of this ambiguity in its statement that the prohibition of aggression as a peremptory norm. The authorities provide to support this classification generally refer more broadly to the prohibition on the use of force, which suggests that the two terms are largely synonymous.¹⁴¹ However, the footnote seems to distinguish between the two norms, referring to 'the *prohibitions* against aggression and the use of force' (emphasis added).¹⁴² A later passage indicates that the peremptory prohibition on aggression applies only to 'intentional' violations 'on a large scale'.¹⁴³

Scholars who assert a peremptory norm confined to aggression have referred to a mix of scale and purpose to define the concept. Ago implied that a use of force is only 'non-aggressive' if it is both limited in scope and for a non-aggressive purpose.¹⁴⁴ Hannikainen laid greater stress on the 'aggressive (including dictatorial) intent' of the operation,¹⁴⁵ suggesting that any use of force motivated by humanitarian intervention, protection of nationals or anticipatory self-defence is non-aggressive,¹⁴⁶ although he conceded the distinction is often

requires a consideration of all the circumstances, including the acts themselves and their consequences, and that all three criteria (character, gravity and scale) must be sufficient to justify a 'manifest' determination: Kress (n128) 418.

¹⁴⁰ *ibid* 523–26.

¹⁴¹ Commentary to Art 40.

¹⁴² *Ibid*, fn 644.

¹⁴³ *Ibid* 113. Abass (n108) 198. argues from this that *jus cogens* norms prohibit only serious breaches, but this seems to be a misreading; the text of arts 40 and 41 indicates rather the opposite, that breaches of some *jus cogens* norms can be less serious, in which case the effects of *jus cogens* referred to in art 41 do not apply. It is not necessarily implied that none of the effects of *jus cogens* would apply in the context of less serious breaches.

¹⁴⁴ Ago (n115).

¹⁴⁵ Hannikainen (n66) 783.

¹⁴⁶ *ibid* 340, 356 (although earlier, at 337, also refers to limited 'times and means employed' as relevant to determining whether the use of force is aggressive, though this seems to be used as evidence of the purpose of the force rather than as an independent criterion). Cf de Hoogh (n51) 1175.

not clear in practice.¹⁴⁷ In UNSC practice, in contrast, the term has largely been reserved for the use of force by regimes widely unpopular in the international community.¹⁴⁸

The above analysis has shown the difficulties in using the concept of aggression to define the peremptory core of the norm. As defined in the 1974 Definition of Aggression, ‘aggression’ seems only slightly more restrictive as a concept than ‘illegal use of force’.¹⁴⁹ Restricting the peremptory norm to this concept would not narrow it enough to account for the legality of consensual force.¹⁵⁰ The boundaries of more onerous definitions such as the *actus reus* of the crime of aggression remain rather nebulous and form an uncertain basis for defining the peremptory ‘core’ of the *jus ad bellum*.¹⁵¹ However, some uncertainty about a norm’s scope and boundaries is not an obstacle to its peremptory status.¹⁵² Thus the key argument against the ‘limited peremptory norm’ approach is not the difficulty in defining the ‘core’ of prohibition. It is rather that States’ *opinio juris* supports the view that the broader prohibition on the use of force is peremptory, not just its core.

iii) The Scope of the Peremptory Norm: States’ *opinio juris*

Applying the methodology established earlier in this chapter, States’ *opinio juris* is the ultimate determinant of the existence and scope of the peremptory norm on the use of force. It will be argued that the evidence supports the view that States have ‘accepted and recognized’ such a peremptory norm, and that it is not limited to a core of ‘aggression’.

¹⁴⁷ *ibid* 349.

¹⁴⁸ Such as Rhodesia, apartheid South Africa and Israel: see overview provided by Nicolaos Strapatsas, ‘The Practice of the Security Council Regarding the Concept of Aggression’ in Kress and Barriga (n127) 181-82.

¹⁴⁹ Paulus (n29) 306-07.

¹⁵⁰ de Hoogh (n51) 1174–75.

¹⁵¹ Paulus (n29) 306. It has been argued that *jus cogens*’ content mirrors that of offences under international criminal law and hence the peremptory norm should be confined to those acts which would form the State conduct requirement for the crime of aggression: Weatherall (n34) 270-71. But this reasoning seems misguided: the right of self-determination is widely seen as *jus cogens*, despite the fact that violations are not individually punishable as crimes.

¹⁵² See Ruys (n232) below and accompanying text.

The starting point, as argued earlier, is provided by express statements from States giving their views on the contents of *jus cogens*. Sceptics argue that such statements are not common enough to indicate that States have recognized the norm as peremptory,¹⁵³ but this is misleading. In fact there is a significant body of such statements, made at the Vienna Conference which adopted the VCLT, in UN fora, and in international litigation. Corten provides an impressive collection of such statements,¹⁵⁴ although the additional evidence provided below shows that it is not complete. In contrast, as Green concedes, there appear to be only two explicit denials by States of the peremptory status of *jus ad bellum* rules, by the US and Hungary during the drafting of the UNGA's FRD.¹⁵⁵ Both these States have contradicted this position on other occasions.¹⁵⁶

In general, the verbal formulations of the peremptory norm support the view that it is coextensive with the prohibition on force. At the Vienna Conference, fifteen delegations referred specifically to the prohibition of the use of force as *jus cogens*.¹⁵⁷ Thirteen referred with varying degrees of specificity to the UN Charter as *jus cogens*, some specifically drawing attention to the core principles in art 2.¹⁵⁸ Neither of these formulations provides any evidence that these States limited their acceptance of the peremptory status of the norm to its core. Only seven States used the term 'aggression' or 'war' when describing the

¹⁵³ Green (n28) 244; Criddle and Fox-Decent (n60) 340.

¹⁵⁴ Corten (n1) 200–07.

¹⁵⁵ Green (n28) 246, citing 'Report of the Special Committee on Principles of International Law Concerning Friendly Relations and Co-Operation Between States', A/8018, at 63, 119.

¹⁵⁶ For Hungary see (n157), below; for the US see (n162)–(n 164), below.

¹⁵⁷ *United Nations Conference on the Law of Treaties* (n55): 282 (Hungary), 288 (Guinea), 295 (Greece), 296 (Kenya), 303 (Uruguay), 305 (Cyprus), 320 (Ecuador), 321 (Tanzania), 332 (Ukrainian SSR), 323 (Philippines), 325 (Norway), 326 (Malaysia); Second session, 96 (Federal Republic of Germany), 104 (Italy) 105 (Byelorussian SSR).

¹⁵⁸ *ibid*, First session: 270 (Peru), 294 (Soviet Union), 297 (Cuba), 297 (Lebanon), 298 (Nigeria), 300 (Sierra Leone), 301 (Madagascar), 302 (Poland), 312 (Romania), 318 (Czechoslovakia); Second session: 96 (Ecuador), 97 (Cuba) 100 (Ukrainian SSR), 107 (Nepal).

peremptory norm,¹⁵⁹ and three of these did so in addition to a more general reference to the prohibition on force or the Charter.¹⁶⁰ Subsequently, States have continued to refer to the prohibition on the use of force as peremptory in broad terms at UN meetings.¹⁶¹ The US, for example, has on several occasions and in different contexts referred to art 2(4) as a whole as *jus cogens*, including in the General Assembly,¹⁶² in a critique of the Soviet Treaty of Friendship with Afghanistan,¹⁶³ and in its pleadings before the international court in *Nicaragua*.¹⁶⁴ In addition, States have frequently asserted the peremptory status of the prohibition of force in the context of international litigation.¹⁶⁵ There is also domestic case law to support this position: the German Federal Administrative Court found in 2005 that ‘[t]he strict prohibition of the use of force’ was part of *jus cogens*.¹⁶⁶

¹⁵⁹ *ibid*, First session: 275 (Netherlands), 294 (Soviet Union), 295 (United States), 300 (Uruguay), 319 (Ceylon), 323 (Canada); Second session, 105 (Byelorussian SSR), 107 (Nepal).

¹⁶⁰ Uruguay, Nepal and Byelorussian SSR.

¹⁶¹ For example, the United Kingdom, ‘UK Materials on International Law’ (1983) 54 BYIL 370, 379; Pakistan, A/C.6/34/SR.22 (19 October 1979) 8; Japan, S/PV.2350 (3 April 1982), 7; India S/PV.4037 (Resumption 1) (25 August 1999) 22; Netherlands, A/C.6/54/SR.21 (29 October 1999) 7; South Korea, A/C.6/69/SR.21 (29 October 2014) 9; Cyprus A/C.6/71/SR.22 (26 October 2016) 10.

¹⁶² Robert Rosenstock, US Representative in the Sixth Committee (Legal) (22 November 1976) [1976] *Digest of US Practice in International Law* 685.

¹⁶³ ‘Contemporary Practice of the United States’ (1980) 74 AJIL 419: ‘there is universal agreement that the exemplary illustration of a peremptory norm is Article 2, paragraph 4 [of the Charter]’ (Memorandum of State Department Legal Adviser).

¹⁶⁴ *Nicaragua* (n49) 101. Nicaragua also recognized the prohibition as peremptory: *ibid*.

¹⁶⁵ See, in addition to the examples given by Corten (n1) 207 n 91–n 96, the following: *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v Nigeria; Equatorial Guinea Intervening)*, Memorial of Cameroon, [6.119]; *Aerial Incident of 3 July 1988 (US v Iran)* Memorial of Iran, [3.03], [3.71]; *Territorial Dispute (Libya v Chad)*, Memorial of Libya, [6.11]; Counter-Memorial of Chad [3.24]; *Legality of the Use of Force (Serbia v Belgium)*, Memorial of Yugoslavia, [2.1.1]; *DRC v Rwanda* (n24) Memorial of Rwanda 34; *Kosovo* (n27), oral pleadings of 3 December 2009 (Azerbaijan), par [13]; oral pleadings 8 December 2009 31 (US), 38 (Jordan); *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* (n32), Written Statements of Nauru 3-4, Mexico 3; Oral Statements, Monday 13 November 1995, 48 (Samoa); *Wall Opinion* (n33), Written Statements, League of Arab States, 106; Jordan [2.99].

¹⁶⁶ Federal Administrative Court Order of 21 June 2005 - 2 WD 12.04, available at <http://legal.un.org/docs/?path=../ilc/sessions/68/pdfs/english/jc_germany.pdf&lang=E>.

All in all, a large number of States have at one time or another expressed the view that the prohibition as a whole is peremptory in unqualified terms.¹⁶⁷ It is true that there are also statements describing the prohibition on aggression as *jus cogens*, particularly in the debates leading up to the Definition of Aggression.¹⁶⁸ But this phrasing appears significantly less common than references to the peremptory norm in unqualified terms. Corten cites sixty-one States, from all sections of the international community, as having stated that the prohibition on the threat or use of force was peremptory in the debate leading up to General Assembly's Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations¹⁶⁹ and a preparatory special committee report indicated consensus among participating States on this point.¹⁷⁰

Further, as discussed above, the term aggression is used in different ways in international legal discourse. References by States to the term a peremptory norm against 'aggression' may be interpreted as simply meaning a peremptory prohibition on all *illegal* use of force. In other words, the term likely does not indicate that the peremptory prohibition covers only a 'hard core' of particular serious violations art 2(4), but rather that the peremptory prohibition covers all use of force contravening art 2(4) *except* those cases which fall within the exceptions provided for in the Charter (self-defence and Security Council-authorized force), exceptions which themselves form part of the peremptory norm. It does

¹⁶⁷ See Corten (n1) 200–07; cf Raphael van Steenberghe, 'The Law Against War or *Jus Contra Bellum*: A New Terminology for a Conservative View on the Use of Force' (2011) Leiden JIL 747, 769–70.

¹⁶⁸ Corten (n1) 203. See also Azerbaijan A/C.6/63/SR.8, 3; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Written Statement of Nauru [74] (referred to armed aggression; however, note Nauru's broader reference cited above (n165) to the prohibition of Article 2(4) as *jus cogens*; *Germany v Italy* (n87) Reply of Germany [67] (but this appears to be used as a synonym for 'unlawful use of force', the expression used to identify the *jus cogens* norm in the oral argument: Mr Kolb (for Germany), Monday 12 September 2011, [46].

¹⁶⁹ UNGA Res 42/22 (18 November 1987) A/RES/42/22; Corten (n1) 204–06.

¹⁷⁰ 'Report of the Special Committee' A/34/41, para [31]; Corten (n1) 203.

not appear that any State has ever explicitly asserted that the whole of the prohibition on the use of force is not peremptory, but only a narrower core.¹⁷¹

To supplement the express statements recognizing the prohibition on the use of force as peremptory, there is also a large amount of practice indicating States' acceptance of the norm's fundamental importance which impliedly supports its status as *jus cogens*.¹⁷² Firstly, there is the central place of art 2(4) as the 'heart' or 'cornerstone' of the UN Charter,¹⁷³ a treaty to which practically all States are parties and which identifies its primary purpose as the maintenance of international peace and security. Although the Charter predates the VCLT and does not use the language of *jus cogens*, there are several indicators that it is meant to have a binding effect even on non-members and despite conflicting treaty commitments. Art 2(6) requires that the UN ensure that non-member States act in accordance with art 2(4) (and the other principles in art 2). Art 103 provides that the obligations under the Charter take precedence over other conventional obligations.¹⁷⁴ This is not identical to the effect of peremptory status, which voids conflicting obligations rather than merely taking precedence over them,¹⁷⁵ but it nonetheless imputes a similar hierarchical superiority to Charter norms, and was identified by several States during the Vienna Conference as an indication of the existence of *jus cogens* in international law.¹⁷⁶ Considering this, it seems unlikely that States would intend to establish a significant difference between the Charter norm on the use of

¹⁷¹ Corten (n1) 202–03. In *Vienna Convention on the Law of Treaties: A Commentary* (Oliver Dörr and Kirsten Schmalenbach eds, Springer 2012) 904 it is asserted that Netherlands defined the peremptory norm as limited to armed aggression at [1966] 2 UNYBILC 317. But it is clear that the Netherlands used this phrase to distinguish armed force from economic or political coercion. There was no assertion that only some elements of the prohibition of armed force were *jus cogens*.

¹⁷² Cf Cassese (n78) 140; Tladi (n45) [89].

¹⁷³ Oliver Dörr and Albrecht Randelzhofer, 'Article 2(4)' in Bruno Simma, Daniel Erasmus-Khan *et al* (eds), *The Charter of the United Nations: A Commentary*, vol I (3rd ed, OUP 2012) 207.

¹⁷⁴ R St J Macdonald, 'Fundamental Norms in Contemporary International Law' (1987) 25 CYIL 115 126–28, 144–45 (argues Charter provides concrete formulation of existing *jus cogens* rule).

¹⁷⁵ Gaja (n82) 282–83; *Fragmentation Report* (n38) 170–71.

¹⁷⁶ *Official Records, First session* (n55): 298 (Nigeria), 307 (Byelorussian SSR), 308 (India), 326 (Malaysia); *Second session* (n46): 99 (Poland).

force and the peremptory one. Although earlier in this chapter it was argued that treaty provisions, even those in a quasi-universal treaty, cannot in themselves be *jus cogens*, it seems likely, following the ICJ's decision in *Nicaragua*, that the customary international law prohibition on force largely mirrors the Charter.¹⁷⁷

Certain important UNGA resolutions also suggest an implied recognition of the peremptory status of the whole of the prohibition on the use of force. Art 26 ASR, as discussed above, suggests that it is characteristic of peremptory norms that violations cannot be excused in any circumstances. The Definition of Aggression indicates that 'no consideration of any nature...may serve as a justification for aggression',¹⁷⁸ which it will be recalled was defined broadly. A later resolution, the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force,¹⁷⁹ adopted without dissent in 1987, provided yet more broadly that 'the threat or use of force in violation of the Charter' could not be justified in any circumstances. Nor do States generally refer in practice to secondary 'circumstances precluding wrongfulness' such as necessity to justify the use of force.¹⁸⁰ Finally, reference can also be made to ICJ case law as a subsidiary source for determining the scope of the peremptory norm. Support for the limiting the peremptory norm to 'aggression' might be found in the fact that this was the term used by the Court in *Barcelona Traction* while providing examples of a related concept, obligations owed *erga omnes* to the international community as a whole.¹⁸¹ However, later case law seems to support the peremptory status of the broader prohibition on the use of force. In *Nicaragua* the Court cited with apparent approval the ILC view that the prohibition on the use of force

¹⁷⁷ Ruys (n15) 19; Raphael van Steenberghe, 'State Practice and the Evolution of the Law of Self-Defence: Clarifying the Methodological Debate' (2015) 2 JUFIL 81, 91. Cf Dörr and Randelzhofer (n173) 230–31.

¹⁷⁸ (n126).

¹⁷⁹ (n169).

¹⁸⁰ Corten (n1) 225; de Hoogh (n51) 1170.

¹⁸¹ *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain)* [1970] ICJ Rep 3, 32. See also Separate Opinion of Judge *ad hoc* Dugard, *DRC v Rwanda* (n25) 87, 89.

was *jus cogens*.¹⁸² And the *Kosovo* Advisory Opinion indicated that ‘the unlawful use of force’ violated a peremptory norm.¹⁸³ Nor can the fact that the prohibition has often been violated in practice,¹⁸⁴ or that such violations are sometimes met with ‘relative leniency’,¹⁸⁵ count against its peremptory status. The customary status of prohibitions has to be determined primarily by *opinio juris* rather than State practice ‘on the ground’.¹⁸⁶ In the *jus cogens* context, any other approach would drain the whole of *jus cogens* of most its content, given how frequently norms like the prohibition on torture are violated.¹⁸⁷

Thus, contrary to the claims of supporters of the limited peremptory norm approach, it appears that the international community of States has recognized the peremptory status of the prohibition on the use of force, rather than just its core. However, this leaves the problem raised by the legality of consensual force unsolved. One conclusion might be that States’ *opinio juris* is flatly contradictory: they have labelled the prohibition on the use of force as peremptory while in practice denying in its peremptory status by accepting that consensual force is legal. This would suggest that States have been using the *jus cogens* concept in a rhetorical way. Their references to the prohibition as peremptory mean merely that it is considered important, not that it actually has the defining quality of *jus cogens*, non-derogability.¹⁸⁸ However, this would be the wrong conclusion to draw. The next section of the chapter will explain how the peremptory status of the prohibition on the use of force is to be understood.

¹⁸² (n49) 100. See also the separate judgments referred to at (n104) and by Orakhelashvili (n52) 50–51.

¹⁸³ (n27) 437.

¹⁸⁴ Thomas Bruha, ‘Use of Force’ in Rudiger Wolfrum (ed), *UN: Law, Policy and Practice*, vol ii (2nd edn, M Nijhoff 1995) 1392.

¹⁸⁵ Hannikainen (n66) 337.

¹⁸⁶ (n662), below.

¹⁸⁷ Ruys (n15) 27. Cf Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (OUP 1994) 20–22; Orakhelashvili (n52) 113.

¹⁸⁸ Ulf Linderfalk, ‘The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?’ (2007) 18 EJIL 853, 871; cf Kolb (n16) 23–24.

C. A Peremptory Norm Incorporating Limitations and Exceptions

It will be argued that the apparent difficulty of accepting the peremptory status of the prohibition on the use of force is based on a misunderstanding of the non-derogability of *jus cogens*. Art 53 VCLT indicates that States cannot validly agree to set aside or suspend a peremptory rule *inter se*. While a group of two or more States can agree to contract out of a non-peremptory norm of general international law and replace it with a separate rule which will take precedence among themselves as *lex specialis*,¹⁸⁹ this is not permitted in relation to a norm recognized by the international community as *jus cogens*.¹⁹⁰ Such a norm must apply universally, unless and until the international community as a whole modifies it. But non-derogability of this kind is compatible with the peremptory norm containing a limitation within itself which means that State consent will bring an action which would otherwise breach the norm outside its scope. In such a case, consent does not derogate from the norm in the sense of suspending its application and replacing it with a different norm. The norm is still being applied; it is simply that the action taken, being consensual, does not violate it.¹⁹¹

This distinction was made by James Crawford in his role as the final Special Rapporteur of the ILC's State responsibility project. In contrast to the approach of his predecessor Ago, Crawford did not assume that the legality of consensual force indicated that the norm could as a whole not be peremptory. Rather, he contended that:

Some peremptory norms contain an 'intrinsic' consent element. For example, the rule relating to the non-use of force in international relations...does not apply in certain cases where one State has consented to the use of force on its territory by another State. Thus, it may be necessary to distinguish between a consent which applies Article 2, paragraph 4, which may be valid, and a purported consent which

¹⁸⁹ Spiermann (n122) 537.

¹⁹⁰ Stefan Talmon, 'The Constitutive versus the Declaratory Theory of Recognition: *Tertium Non Datur?*' (2004) 75 BYIL 101, 133.

¹⁹¹ Kolb (n16) 73-74; David Wippman, 'Treaty-Based Intervention: Who Can Say No?' (1995) 62 UCLR 607, 622; Orakhelashvili (n52) 68-69.

displaces or excludes it entirely, which, if Article 2, paragraph 4 is peremptory in character, would be invalid.¹⁹²

This position, distinguishing between consent applying a primary norm in accordance with its own terms, and consent of the kind referred to in art 20 ASR which seeks to displace the norm in a particular context, had already been put forward by some ILC members during Ago's period as Rapporteur.¹⁹³ Despite Crawford's influence, some ambiguity remains in the ASR Commentary about how consent operates in the context of the use of force. Examples involving the sending and stationing of foreign troops are still present in the commentary to art 20.¹⁹⁴ This might indicate that consent operates in this context as a secondary norm precluding wrongfulness, casting doubt on the peremptory status of the prohibition of the use of force as a whole. However, the commentary to art 26, in line with the view expressed by Crawford, adverts to the fact that consent can also be relevant in the application of a peremptory norm itself, giving consent to a foreign military presence as an example. While some of the subsequent literature clearly attributes the general legality of consensual force to the primary norm itself,¹⁹⁵ in other cases no clear distinction is drawn between consent applying the primary norm and consent under art 20 ASR to displace the norm.¹⁹⁶

The correct view is that the general legality of consensual force is an application of the prohibition on the use of force itself, not a displacement of it. It is thus consistent with

¹⁹² James Crawford, 'Second Report on State Responsibility' [1999] 2 UNYBILC 3, 63.

¹⁹³ 'State Responsibility: Draft Articles Submitted by Mr Ago' [1979] 1 UNYBILC 38 (Vallat); 45-46 (Schwebel). See also Crawford (n192) 147 (Simma).

¹⁹⁴ Cf Corten (n1) 252.

¹⁹⁵ Christakis and Bannelier (n1) 104–11 ; Corten (n1) 250–54; David Wippman, 'Military Intervention, Regional Organizations and Host-State Consent' (1996) 7 Duke JCIL 209, 210: 'It seems more plausible...to conclude simply that consent or its absence is central to the definition of wrongful intervention in the first place.'

¹⁹⁶ Compare Alexander Orakhelashvili, 'Legal Stability and Claims of Change: The International Court's Treatment of the *Jus ad Bellum* and the *Jus in Bello*' (2006) 75 Nordic JIL 371, 380 (basing the effectiveness of consent on Art 20 ASR) and Orakhelashvili (n52) 68 (consent based on a limit within the scope of the norm). See also Lieblich (n104)122–24.

States' widespread identification of the prohibition as peremptory.¹⁹⁷ The norm prohibits States from using force 'in their international relations...against the territorial integrity or political independence of any [other] State', or which is inconsistent with the purposes of the UN. Consent from the 'target' State will generally bring military action which would otherwise violate the prohibition outside its scope.¹⁹⁸ This is reflected in *opinio juris*. For example, the UK in 2014 stated that the prohibition on the use of force 'does not apply to the use of military force by one State on the territory of another if the territorial State so requests or consents'¹⁹⁹ The US in 1963 stated that the prohibition on the use of force applied only to disputes between States²⁰⁰ and recently reiterated that 'the Charter does not prohibit an otherwise lawful use of force when undertaken with the consent of the State upon whose territory the use of force is to be used'.²⁰¹ This position is also indirectly supported by the ICJ's discussion of the meaning of 'enforcement action' under Chapter VII in the *Certain Expenses Advisory Opinion*, the Court finding that the language used in an UNGA resolution referring to the peacekeeping force 'might suggest measures of enforcement, were it not that the force were to be set up with the consent of the nations concerned.'²⁰²

Two different views have been expressed in the literature as to the textual basis in art 2(4) for the legality of consensual force. The first relies on the circumscription of the prohibition to the use of force by States 'in their international relations'. This phrase clearly

¹⁹⁷ Kolb (n16) 74.

¹⁹⁸ Tanca (n111) 47; Peter E Harrell, 'Modern Day "Guarantee Clauses" and the Legal Authority of Multinational Organizations to Authorize the Use of Military Force' (2008) 33 Yale JIL 417, 427; Byrne (n5) 99–100.

¹⁹⁹ 'UK Materials on International Law' (2015) 85 BYIL 301, 622.

²⁰⁰ UNGA Summary Record (11 November 1963) A/C.6/SR.808.

²⁰¹ State Department Legal Adviser Brian Egan, 'Keynote Address' (2016) 110 Proc ASIL 300, 302; also Legal and Policy Framework (n13) 11.

²⁰² *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), Advisory Opinion* [1962] ICJ 151, 162.

excludes the use of force by a State on its own territory.²⁰³ Some argue that it also excludes a foreign State's use of force in another State with its consent.²⁰⁴ On this reading, even cross-border force only occurs 'in...international relations' if it brings two States into opposition with each other, rather than reflecting consensual coordination between them. Support for this view might be found in the fact that cross-border force with consent will not give rise to an 'international armed conflict' for the purposes of the application of IHL.²⁰⁵ But this reading of the words in art 2(4) seems strained. In contrast to the IHL concept of an 'international armed conflict', which implies conflict *between* States, the use of force 'in international relations' seems on a plain reading to include force used by one State on the territory of another State with the latter's consent. Such force is not purely domestic, but occurs outside the acting State's borders in the course of its 'international relations' with the consenting State.

The better view is that force with the consent of the receiving State is not 'against the territorial integrity or political independence' of the consenting State, or 'in any other manner inconsistent with the Purposes of the United Nations'.²⁰⁶ Scholars have generally been averse to giving any meaning to these words in art 2(4), since they could be read to narrow the prohibition so that it would not capture the use of force for 'benign' ends.²⁰⁷ The *travaux* and subsequent practice indicate that these clauses are not to be read this way: art 2(4) includes any use of force against another State, whatever its duration or purpose.²⁰⁸ But it is

²⁰³ Dörr and Randelzhofer (n173) 214–15 ; Christakis and Bannelier (n1) 112.

²⁰⁴ *ibid*; Karine Bannelier and Theodore Christakis, 'Under the Security Council's Watchful Eyes: Military Intervention by Invitation in the Malian Conflict' (2013) 26 *Leiden JIL* 855, 860.

²⁰⁵ ICRC, 'Commentary of 2016', para [223], available at <<https://ihl-databases.icrc.org/applic/ihl/ihl-search.nsf/content.xsp>>.

²⁰⁶ For explicit or implicit support for this view, see Oscar Schachter, 'The Right of States to Use Armed Force' (1984) 82 *Mich LR* 1620, 1645; Tanca (n111) 47; Harrell (n198) 427; Corten (n1) 254, 259; Lieblich (n104) 123–24; Byrne (n5) 99.

²⁰⁷ Schachter (n206) 1625–26.

²⁰⁸ Crawford (n104) 747; Dörr and Randelzhofer (n174) 215–17.

contrary to normal interpretative methods to assume that these words are entirely redundant.²⁰⁹ The best reading is that this clause imposes a blanket prohibition on *coercive* inter-State force, but indicates the general legality of *consensual* force. The consent of the territorial State suffices (at least in general)²¹⁰ to establish that force is not being used against its territorial integrity or political independence, and hence that there is no violation of the prohibition.

Since consent brings force outside the scope of the prohibition, its legality is compatible with the prohibition's peremptory status. The two other instances in which international law recognizes the legality of force, self-defence in accord with art 51 of the Charter and Security Council authorization under Chapter VII, may seem more difficult to reconcile with the prohibition's peremptory status. While valid consent means that there is no violation of the prohibition on the use of force *ab initio*, these two situations seem like 'excused violations' of the prohibition.²¹¹ It will be recalled that arts 21 and 26 ASR indicate that self-defence will not preclude the wrongfulness of a peremptory norm, and that the Security Council is generally thought to be bound by *jus cogens*. The fact that the Charter includes these two exceptions to the prohibition on the use of force contained in art 2(4) might seem as impermissible derogation from a peremptory norm, which would suggest that the Charter itself was void.²¹²

Obviously this is an untenable conclusion. The answer to this conundrum is similar to the explanation for the legality of consensual force. The peremptory norm does not

²⁰⁹ Schachter (n206) 1625.

²¹⁰ It has been argued that military assistance to a government in a civil war may constitute a use of force against the 'political independence' of the relevant State, despite the government's consent: see Christakis and Bannelier (n1) 113. The alleged prohibition on assistance to governments in civil wars will be considered in the later chapters of this thesis: for the relevance of the reference to 'political independence' in art 2(4), see particularly Chapter 5, Part B(i).

²¹¹ See ILA Use of Force Committee, 'Draft Report on Aggression and the Use of Force' (2016) 77 ILA Rep Conf 248, 267; d'Aspremont (n123) 1131.

²¹² Linderfalk (n188) 863; de Hoogh (n51) 1171.

simply mirror the text of art 2(4) but incorporates within itself the exceptions for self-defence and Security Council authorized force.²¹³ In recognizing the prohibition on the use of force as peremptory, States must be taken as also recognizing these two exceptions as part of the norm. This follows from the basic fact that the prohibition as expressed in art 2(4) is inextricably linked, under the Charter and in State practice and *opinio juris*, with these two exceptions.²¹⁴ At the Vienna Conference many States' recognition of the peremptory prohibition referred more generally to the Charter.²¹⁵ There is also *opinio juris* identifying the right to self-defence explicitly as peremptory.²¹⁶ This view is supported by a careful reading of the ASR. The ILC's 1999 report on the draft articles identified as *jus cogens* 'the rules governing the use of force in the Charter.'²¹⁷ Although the inclusion of self-defence as a circumstance precluding wrongfulness in art 21 has caused some confusion in later scholarship,²¹⁸ its relationship with the peremptory norm on the use of force is explained clearly in the Commentary. Self-defence applies generally as a circumstance precluding wrongfulness (a secondary rule) to justify acts which *prima facie* breach a legal obligation, but in the use of force context art 51 'forms part of the definition of the obligation...laid down in article 2, paragraph 4', so that a State exercising its right to self-defence is 'not even potentially in breach' of the obligation.²¹⁹ Further, art 59 ASR provides that the articles are without prejudice to the Charter.

²¹³ Orakhelashvili (n52) 72–73; d'Aspremont (n123) 1106; Kolb (n16) 75; Hameed (n41) 101.

²¹⁴ Carin Kahgan, 'Jus Cogens and the Inherent Right to Self-Defense' (1997) 3 ILSA JICL 768, 788. See also Judge Tomka's Declaration in *Armed Activities on the Territory of the Congo (DRC v Uganda)* [2005] ICJ Rep 168, 354 (provisions on self-defence delineate prohibition on use of force). Cf Dinstein (n129) 192–93.

²¹⁵ See (n158).

²¹⁶ Raphael Van Steenberghe, 'Le Pacte de Non-Aggression et de Defense Commune de l'Union Africaine: Entre Unilateralisme et Responsabilité Collective' (2009) 113 RGDIP 125, 145 citing A/C6/35/SR51, 17 (Iraq), A/C.6/35/SR.53 15 (Jamaica). See also the US Rejoinder in *Oil Platforms* [5.05]; Statement of Jordan in *Wall* Advisory Opinion [5.39].

²¹⁷ 'Report of the ILC' (23 July 1999) A/54/10, Supp. No. 10 (1999), para [375].

²¹⁸ Antonio Cassese, *International Law* (2nd edn, OUP 2005) 257; Kawasaki (n50) 28.

²¹⁹ ASR, Commentary to art 21. For a clear differentiation of these two aspects of self-defence see Federica Paddeu, 'Self-Defence as a Circumstance Precluding Wrongfulness: Understanding Article 21 of

The approach suggested here has met with some criticism. Green has suggested that it results in a norm that is ‘unwieldy to the point of losing worth.’²²⁰ However, this concern seems overstated. Green himself eventually provides a definition of the peremptory norm, which can be endorsed in somewhat adapted form:

The use by a State in its international relations of armed force directed against the territorial integrity or political independence of another State or which in any other manner inconsistent with the purposes of the UN is prohibited other than when it is employed in a necessary and proportional manner in individual or collective self-defence in response to an armed attack by another State against a member of the UN, or when authorized by the Security Council under Article 42 of the UN Charter, following a threat to the peace, breach of the peace or act of aggression as determined by the Security Council.²²¹

This definition of the peremptory norm incorporates the Charter exceptions, as well as the additional customary international law requirements of necessity and proportionality which *opinio juris* show to be inextricably linked with the right of self-defence.²²² Although Orakhelashvili defined the entirety of the *jus ad bellum* as peremptory,²²³ this is not quite right. There may be Charter provisions on the use of force that are not reflected in customary international law, a notable example referred to in *Nicaragua* being the requirement that States report the use of force in self-defence to the Security Council immediately, and therefore are not part of the peremptory norm.²²⁴ But the peremptory norm does incorporate

the Articles on State Responsibility’ (2015) 85 BYIL 90. This approach is supported by the comments of numerous States in the 6th Committee when considering the Draft ASR that a State acting in lawful self-defence is not even potentially in breach of the prohibition on the use of force: *ibid* 105–06, fn 80.

²²⁰ Green (n28) 234.

²²¹ Cf Green (n28) 234. Defining the norm in this way is in line with Joseph Raz’s work in legal theory on the individuation of norms, in particular the criterion that each law ‘should contain a relatively complete part of the legal system’: Joseph Raz, *The Concept of a Legal System* (2nd ed Clarendon 1980) 144. See also d’Aspremont (n123) 1106.

²²² Green (n28) 234.

²²³ Orakhelashvili (n52) 51; cf Green (n28) 230-31.

²²⁴ *Nicaragua* (n49) 105; see Green (n28) 231-32.

all the fundamental aspects of the Charter regime governing the use of force which are reflected in custom.

Three further possible objections will be briefly addressed. Firstly, the complexity of the peremptory norm as defined, a complex sentence of several clauses drawn from different sources of international law, has been criticized. But in fact this is not starkly different from other peremptory norms, for example the prohibition of torture.²²⁵ The definition in the Convention Against Torture (CAT)²²⁶ differs from that in other instruments, and the Trial Chamber of the ICTY found the CAT was not the sole source for the customary international law definition.²²⁷ A second objection refers to the significant disagreement among States about many aspects of the *jus ad bellum*, for example the meaning of the concept of ‘armed attack’. Green casts doubt on whether a norm can be said to have been recognized as peremptory when there is such a lack of consensus on its application.²²⁸ However universal consensus on the exact meaning of the norm in all circumstances is an impracticable standard for the emergence of *jus cogens*, which like all norms require interpretation.²²⁹ Other peremptory norms also have vague and uncertain aspects, for example whether a particular mode of punishment constitutes torture.²³⁰ Thirdly, it is argued that practice indicates that aspects of the *jus ad bellum* can evolve with relatively ease. This seems to contradict art 53 VCLT, which indicates that peremptory norms are ‘entrenched’ and can only be modified by a norm of the same character, that is, one recognized by the

²²⁵ David Kretzmer, ‘Prohibition of Torture’ in Rüdiger Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (online edition).

²²⁶ 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 July 1984, entered into force 26 June 1987) 1465 UNTS 85.

²²⁷ *Prosecutor v Kunarac* (Judgment) IT-96-23 (12 June 2002), [482].

²²⁸ Green (n28) 238. See also Ronzitti (n108) 94; Rein Müllerson, ‘*Jus ad Bellum*: Plus Ça Change (Le Monde) Plus C’Est La Même Chose (Le Droit)?’ (2002) 7 JCSL 149, 169–70.

²²⁹ Cf Matthew Saul, ‘The Normative Status of Self-Determination: A Formula for Uncertainty in the Scope and Content of the Right?’ (2011) 11 HRLR 609, 636.

²³⁰ Stefan Kadelbach, ‘Genesis, Function and Identification of *Jus Cogens* Norms’ (2015) 46 NYIL 147, 169–70.

international community of States as a whole as non-derogable.²³¹ A brief point in response is that, as in the law of treaties, a distinction must be made between re-interpretation and modification.²³² Thus, while the introduction of a completely new exception to the prohibition on force (such as, for example, a right of humanitarian intervention) would need to meet the requirements for a new norm of *jus cogens*, a change in interpretation of an existing exception (such as a broadening of the right of self-defence to allow the defensive use of force against non-State actors conducting armed attacks from the territory of a State ‘unable or unwilling’ to take effective action against them) would not.²³³

D. The Emptiness of the Prohibition as *Jus Cogens*?

The argument has clarified the sense in which a peremptory norm must be non-derogable. Peremptory status does not require that the rule be absolute, completely without exceptions and limitations. Rather, it ensures that the peremptory norm, incorporating its exceptions, cannot be displaced by an agreement between States to create a more permissive norm *inter se*. This explains how the prohibition on the use of force, incorporating its recognized exceptions, can be non-derogable. It is true that the distinction between exceptions incorporated within a norm and derogation from the norm has not always been clearly recognized. Thus, human rights instruments generally allow States, under strict conditions, to derogate in public emergencies from most of the rights they contain, but define a small number of rights as non-derogable even in emergencies.²³⁴ Prohibitions which are non-derogable in this sense have provided the dominant examples of *jus cogens*. Understandably, some scholars have referred to the non-derogability of such norms in public

²³¹ Green (n28) 237; cf d’Aspremont (n123) 1105.

²³² Ruys (n15) 19–29.

²³³ van Steenberghe (n177) 93–96.

²³⁴ For example, Art 4, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

emergencies to establish their status as *jus cogens*.²³⁵ However, this kind of non-derogability is conceptually distinct from that referred to in art 53 VCLT.²³⁶ It is coherent for a norm to contain within itself a limited exception, such as derogability in public emergencies, and yet be *jus cogens*.²³⁷ Such a rule allows a State to take advantage of a limitation built into the rule, but not to escape its bounds altogether.

The obvious critique of this position is that, while it provides a formal explanation of how the prohibition on the use of force can be considered peremptory, it drains this status of any real meaning.²³⁸ The distinction between applying exceptions within the primary norm, and hence practically ‘derogating’ from it, and derogation which sets aside the norm altogether may seem a strained example of *Begriffsjurisprudenz*.²³⁹ In the context of the peremptory prohibition on force as defined above, one may ask what purpose has been served by recognizing it as *jus cogens*. The key effect of peremptory status, that the norm cannot be set aside by consent, seems to have no practical meaning since if there is consent there is no use of force in international relations against another State, and hence no violation of the norm.

This objection is misguided. By preventing States from setting aside the primary norm *inter se*, the peremptory status of the norm imposes real limits on States’ capacity to legalize the use of force by consent. Firstly, it invalidates treaties which require the illegal use of force against a third State, even between the parties. Secondly, it prevents States from agreeing to resort to the use of force *directly against each other*, which may impose significant

²³⁵ Hannikainen (n66), 440; Linos-Alexander Sicilianos, ‘The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility’ (2002) 13 EJIL 1127, 1137; Dinah Shelton, ‘Normative Hierarchy in International Law’ (2006) 100 AJIL 291, 314.

²³⁶ Hameed (n41) 70-71; Roth (n5) 37.

²³⁷ See UNHRC General Comment 29 (31 August 2000) CCPR/C/21/Rev.1/Add.11; Kolb (n16) 79.

²³⁸ Hannikainen (n66) 262 makes a similar observation, in the context of a different norm (non-refoulement).

²³⁹ Spiermann (n122) 534; see also Eric David, ‘Primary Rules and Secondary Rules’, in Crawford et al (eds) *The Law of State Responsibility* (n100) 33.

limitations on open-ended treaties allowing forcible intervention under set conditions.

Thirdly, it would prevent the development of a regional custom allowing force to be used in a way prohibited by the peremptory norm. Fourthly, it makes the norm more difficult to modify, since any modifying norm must meet the requirements for *jus cogens*.

The peremptory status of the prohibition on the use of force clearly means that any treaty in which States agreed to use illegal force against a non-party would be void.²⁴⁰ Notoriously, treaties of this kind were not unknown in the pre-Charter period. The most notorious example of such a treaty, the Ribbentrop-Molotov Pact of 1939, was recognized in 1989 by the Soviet legislature to have been void.²⁴¹ It could be objected that this result does not require *jus cogens*, since the *pacta tertiis* rule means that any such treaty cannot affect the right of the third State not to be attacked.²⁴² However, there remains the question of whether the agreement would create obligations between the parties. If one party failed to play its part in the illegal use of force, would it be liable for its breach of the treaty to the other? This would appear unimaginable; such a treaty would surely be a nullity even *inter se*.²⁴³ This result follows directly from the status of the prohibition on force as *jus cogens*.²⁴⁴

Secondly, the prohibition on the use of force restricts a State's ability to provide open-ended consent by treaty to the future use of force on its territory for specified purposes. Some scholars have argued that consent in this form is just as valid as *ad hoc* consent to intervention in a particular case, as States' capacity by treaty to assume binding

²⁴⁰ Kolb (n16) 74-75; Corten (n1) 254.

²⁴¹ Kadelbach (n230) 152.

²⁴² James Crawford, *The Creation of States in International Law* (2nd ed, Clarendon 2007) 100.

²⁴³ Louise Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government' (1985) 56 BYIL 189, 250; cf Christian Tomuschat, 'The Security Council and *Jus Cogens*' in Enzo Cannizzaro (ed) *The Present and Future of Jus Cogens* (Sapienza 2015) 20.

²⁴⁴ Kolb (n16) 24.

obligations which limit their future freedom is an inherent feature of their sovereignty.²⁴⁵ However, States cannot by treaty escape the limits of imposed by a peremptory norm such as the prohibition on the use of force. The peremptory norm establishes a crucial difference between *ad hoc* consent to force in particular case (whether given in treaty form or otherwise) and open-ended consent for the future.²⁴⁶ As argued, *ad hoc* consent brings force outside the peremptory prohibition, meaning that it is no longer ‘against the territorial integrity or political independence of the consenting State’. But if force is opposed by a State’s current government, it seems to fall within the scope of the prohibition even if the circumstances are covered by consent given in a past treaty. Lacking contemporaneous consent, foreign military intervention necessarily constitutes the use of force *against* the ‘target’ State.²⁴⁷ It violates its territorial integrity (i.e. inviolability) and interferes with its political independence, since a State’s continuing right to make the final decision about whether force can be used on its territory seems an inherent element of sovereignty.²⁴⁸ This interpretation is supported by the fact that the prohibition’s object is not solely to protect individual victim States, but also the broader interests of the international community.²⁴⁹ These interests are undermined if past consent in a treaty can legalize what is in fact, at the time it takes place, a non-consensual inter-State use of force, with the inevitable humanitarian consequences and risk of spillover effects on other States. Any attempt by a particular group of States to expand the legal justifications for the use of inter-State force *inter se* undermines the universal authoritativeness of the *jus ad bellum*.

²⁴⁵ Ann van Synen Thomas and A J Thomas, *Non-Intervention: The Law and Its Import in the Americas* (Southern Methodist 1956) 92, Abass (n108) 202–04, Harrell (n198) 430–31; see Doswald-Beck (n243) 245–46, Wippman (n191) 616–18.

²⁴⁶ Lieblich (n104) 194–95, Corten (n1) 254–55.

²⁴⁷ Corten (n1) 255; Brad Roth, *Governmental Illegitimacy in International Law* (OUP 2001) 192.

²⁴⁸ Crawford (n242) 70.

²⁴⁹ Doswald-Beck (n243) 246; Dinstein (n139) p 107; d’Aspremont (n64) 219, 235, Frédéric Megret, ‘What is the Specific Evil of Aggression?’ in Kress and Barriga (n127) 1413–14.

Does this asserted effect of peremptory status accord with State practice? Pre-Charter treaties vesting great powers with non-reciprocal rights of intervention in weaker States have since been superseded or abrogated.²⁵⁰ But treaties consenting to the sending of foreign military forces onto a State's territory for specified purposes in the future have continued to be made in the Charter era. For example, States enter agreements to allow 'hot pursuit' of criminals or non-State actors on each other's territory under specified conditions.²⁵¹ A more recent trend in African practice has been to accord regional and subregional organizations a right of intervention in member States to prevent serious international human rights violations or to uphold democracy.²⁵² It seems clear from practice that despite the potential tension with *jus cogens* such treaty provisions are not void.²⁵³ But their validity likely results from the fact they can be interpreted in line with the peremptory prohibition, given the 'strong interpretative principles' generated by the latter.²⁵⁴ Thus, it is widely held that such treaties must be interpreted either to require *ad hoc* consent in each particular case,²⁵⁵ or at least to allow a State's government to withdraw consent at any time without formalities.²⁵⁶ This view is supported by the fact that apart from the precedent of

²⁵⁰ For an example see the Treaty of Friendship between Persia and Russia (adopted 26 February 1921) 1921 LNTS 384, art 6, abrogated by Iran in 1979: W Michael Reisman, 'Termination of the USSR's Treaty Right of Intervention in Iran' (1980) 74 AJIL 144.

²⁵¹ Corten (n1) 256. See for example Protocol on Non-Aggression and Mutual Defence in the Great Lakes Region (2007) 46 ILM 173, art 8(7).

²⁵² See Art 4(h) Constitutive Act of the AU (adopted 1 July 2000, entered into force 26 May 2001); art 25, Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (adopted 10 December 1999), ECOWAS Doc A/P10/12/99.

²⁵³ Yoram Dinstein, *Non-International Armed Conflicts in International Law* (CUP 2014) 81; Wippman (n191) 623; cf Lieblich (n104) 195–97; 'Contemporary Practice' (n163) 419.

²⁵⁴ ASR Commentary to art 26.

²⁵⁵ 'Military Assistance on Request' (2011) 74 AIDI 359; Nolte (n4) 254.

²⁵⁶ Thomas and Thomas (n245) 96; Wippman (n191) 630–31. In a genuine failed State scenario, where a State has no internationally recognized government capable of withdrawing consent, this would seem to allow intervention on the basis of the treaty: Dinstein (n129) 123, Lieblich (n104) 163–64. Some authors have asserted further limits on the ability of a government lacking representative or humanitarian legitimacy to withdraw consent: Wippman (n191) 631–32; Gregory H Fox, 'Intervention by Invitation' in Weller (ed) (n51) 833; Lieblich (n104) 201–02. But while practice shows that such legitimacy factors may affect whether the previously existing government retains its status as such in the eyes of the international community (see Chapter 2, Part B.2 of this thesis), in the absence of such international

Turkey's actions in Cyprus justified in part by reference to the 1960 Treaty of Guarantee,²⁵⁷ there have been no cases since 1945 where a treaty right has been clearly asserted to justify the use of force against the will of the target State's existing government.²⁵⁸ The restriction of States' ability bindingly to consent to force into the future is an important effect of the peremptory status of the prohibition on the use of force, although it should be acknowledged that this restriction could independently be established by referring to the precedence under art 103 of the Charter over other treaties.²⁵⁹

A third effect of the prohibition's status as *jus cogens*, which has already been mentioned, is to make it more difficult to modify than non-peremptory norms of customary international law. As art 53 VCLT indicates, *jus cogens* can only be modified by a norm of the same character.²⁶⁰ This sets a high bar for the development of new exceptions to the prohibition.²⁶¹ Although it has been suggested that new legal bases for the use of force, such as humanitarian intervention or upholding democracy, could develop as regional custom,²⁶² this is ruled out by the peremptory status of the norm, which can only be modified by the international community as a whole recognizing the modifying norm as non-derogable.

derecognition the argument that an illegitimate government cannot withdraw past consent remains highly doubtful.

²⁵⁷ Treaty Concerning the Establishment of the Republic of Cyprus (Treaty of Nicosia) (16 August 1960) 382 UNTS 3. See Doswald-Beck (n243) 246–50. Cyprus has repeatedly asserted that to the extent that the Treaty can be interpreted to allow military intervention by the Guarantor Powers it is void, referring both to *jus cogens* and art 103 of the Charter: see for example S/PV.1098, 15-18. Greece has endorsed this position: A/C.6/42/SR.21, 20. International debate about the legality of the Treaty (as opposed to Turkey's 1974 invasion, which clearly went beyond what the Treaty could be read as permitting) was inconclusive: Roth (n247) 193.

²⁵⁸ Corten (n1) 257.

²⁵⁹ Egon Schwelb, 'Some Aspects of International *Jus Cogens* as Formulated by the International Law Commission' (1967) 61 AJIL 946, 959–60; Wippman (n191) 619–20. See also Reisman (n250) 150: 'Contemporary Practice' (n163) 418.

²⁶⁰ Although note the distinction between reinterpretation and modification: (n232) and accompanying text, above.

²⁶¹ Corten (n1) 43–47.

²⁶² Jeremy Levitt 'Pro-Democratic Intervention in Africa' (2006) 24 Wis ILJ 785, 833.

It remains to consider which of the other asserted effects of *jus cogens* apply to the prohibition on force. Of the other ‘circumstances precluding wrongfulness’ which according to art 26 ASR do not apply to justify breaches of *jus cogens*, it has already been argued that self-defence is incorporated as an exception within the primary norm.²⁶³ The norm’s peremptory status is thus deprived of effect in this regard. In contrast, the peremptory status of the norm would appear to prevent the application of the other circumstances precluding wrongfulness: distress, *force majeure*, countermeasures, and necessity. It would seem difficult for the first two circumstances to arise in the context of the use of force.²⁶⁴ The exclusion of the latter two circumstances is a more substantive limit. However, it appears that the unavailability of these justifications in the use of force context can be established to be aspects of the primary norm, rather than following by deduction from recognition of its peremptory status.²⁶⁵ Thus the illegality of forcible reprisals is referred to in several important General Assembly resolutions,²⁶⁶ and is recognized in ASR art 50(1)(a) separately from the more general illegality of countermeasures which violate a peremptory norm in art 50(1)(d). Similarly, the Commentary to art 25 states that the (un)availability of the plea of necessity to justify the use of force is to be determined by reference to the primary norm, not by reference to the secondary rules expressed in art 25 and 26. The exclusion of these justifications for inter-State force can thus be established independently of its peremptory status.²⁶⁷

A similar point can be made in relation to the consequences of serious breaches of peremptory norms identified in ASR arts 40-41, although a detailed discussion is not possible

²⁶³ Paddeu (n219).

²⁶⁴ On distress, see Corten (n1) 221.

²⁶⁵ See Ago (n107) 40; Crawford (n192) 72; Kress (n128) 507.

²⁶⁶ See Commentary to art 50 ASR; also *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 4, 35; *Guyana v Suriname* (2008) 47 ILM 166, 231.

²⁶⁷ Cf Focarelli (n88) 452–54.

here. Art 41(2) identifies a duty of non-recognition of situations arising from such breaches, a position seemingly endorsed by the ICJ in the *Wall* Advisory Opinion.²⁶⁸ However, it is questionable whether such an obligation can be deduced from a norm's peremptory status, rather than established by induction from practice on a case-by-case basis.²⁶⁹ The duty of States not to recognize as lawful territorial acquisitions resulting from the use of force is recognized in the FRD²⁷⁰ and can be supported by instances of State practice such as the international response to the Iraqi annexation of Kuwait in 1990.²⁷¹ Similar practice can be found to support a duty of non-recognition of situations arising from a breach of the right to self-determination, as in Rhodesia.²⁷² But this can be interpreted as supporting a duty of non-recognition specifically in relation to breaches of these norms, rather than one resulting from *jus cogens* status.²⁷³ It is in fact difficult to see how a breach of other canonical peremptory norms could provide the basis for a claim to a legal status such as statehood or territorial change that could be subject to non-recognition.²⁷⁴ Moreover, the obligation does not seem to have been observed rigorously following the Indian interventions in Goa and Bangladesh²⁷⁵ and NATO's Kosovo campaign, suggesting at least that the duty can lapse once the causal link with the illegal use of force is considered to have been broken.²⁷⁶ Articles

²⁶⁸ *Wall* (n33).

²⁶⁹ Kolb (n16) 106–08.

²⁷⁰ UNGA Res 2625 (XXV) (14 October 1970).

²⁷¹ Commentary to art 41.

²⁷² *ibid.*

²⁷³ Petsche (n73) 254.

²⁷⁴ See *Wall* (n33), Separate Opinion of Judge Koojijmans, 231–32; Stefan Talmon, 'The Duty Not to 'Recognize as Lawful' a Situation Created by the Illegal Use of Force or Other Serious Breaches of a *Jus Cogens* Obligation: An Obligation without Real Substance?' in Tomuschat and Thouvenin (eds) (n34) 104.

²⁷⁵ Cf Crawford (n242) 131–48.

²⁷⁶ Kolb (n16) 48; cf Hersch Lauterpacht, *Recognition in International Law* (CUP 1947) 429.

40 and 41 may in fact partially reflect ideas for ‘progressive development’ rather than strict expressions of *lex lata*.²⁷⁷

Finally, the peremptory status of the prohibition on force does not provide a real limit on the powers of the Security Council.²⁷⁸ The peremptory norm incorporates the exception for Chapter VII authorization, which grants the Council broad power to legalize force.²⁷⁹ It has been argued that since the right to self-defence is itself peremptory, the Council’s ability to supersede or suspend it is limited.²⁸⁰ However, this posits the right to self-defence as a separate peremptory norm, rather than as an exception built into the peremptory prohibition on force. Although self-defence may have this dual existence, the topic thus falls outside the scope of this dissertation. In any case, any limitation on the Security Council’s powers in this area would flow from art 51 as a Charter provision, rather than separately from the norm’s peremptory status.²⁸¹

Conclusion

This analysis has attempted to provide greater clarity about the role of peremptory norms in international law. *Jus cogens* is often presented simplistically as an undifferentiated category of ‘absolute’ norms with a set list of far-reaching effects.²⁸² This is misleading. Peremptory norms can incorporate exceptions and limitations in their scope of application. Because it includes a significant number of such limitations and exceptions, the peremptory prohibition on force is less absolute than other canonical peremptory norms. State consent,

²⁷⁷ Crawford (n104) 598; David Turns, ‘The Stimson Doctrine of Non-Recognition: Its Historical Genesis and Influence on Contemporary International Law’ (2003) 2 CJIL 105, 134.

²⁷⁸ Cf Orakhelashvili (n52) 424–25, who states that the Council is not ‘entirely free to disregard the basic prohibition.’

²⁷⁹ Kolb (n16) 85.

²⁸⁰ Abid Qureshi Craig Scott, Paul Michell, Jasminka Kaladzic, Peter Copeland and Francis Chang, ‘A Memorial for Bosnia: Framework of Legal Arguments Concerning the Lawfulness of the Maintenance of the UN Arms Embargo on Bosnia and Herzegovina’ (1994) 16 Mich JIL 1, 57–59.

²⁸¹ Winston P Nagan, ‘Rethinking Bosnia and Herzegovina’s Right of Self-Defence: A Comment’ (1994) 52 Rev ICJ 34, 41–45; cf de Wet (n94) 249.

²⁸² Kolb (n16) 74

self-defence and Security Council authorization can legalize the use of force, whereas they clearly could not legalize genocide or apartheid.²⁸³ Nonetheless, the ascription of peremptory status to the prohibition remains meaningful, since its non-derogability performs some substantive functions.

The limits within the prohibition on force reflect some important differences between it and the other canonical examples of *jus cogens*. The most compelling examples of peremptory norms, such as the prohibition on genocide and torture prohibit acts which are widely accepted as absolute evils that can never be justified, whatever the circumstances. The use of force is not considered an absolute evil in the same way.²⁸⁴ The exercise of force to support governmental authority within a State is necessary to secure an ordered environment in which individuals and groups can flourish. While it is impossible to imagine that a valid response to genocide could be ‘counter-genocide’,²⁸⁵ in inter-State relations the right to use force in self-defence is accepted as necessary to uphold the prohibition on non-defensive force.²⁸⁶ The Security Council’s broad power to authorize force reflects a further recognition that forcible intervention can potentially be a morally acceptable response to a broader range of situations and that its inherent risks can be sufficiently lessened by requiring the degree of international consensus reflected in a Chapter VII resolution.

The apparent strangeness of the prohibition on use of force as a peremptory norm can be linked to the increasingly dominant conception of *jus cogens* as a body of norms protecting the most fundamental rights of the human person from any infringement by

²⁸³ Kolb (n16) 85

²⁸⁴ Arthur Watts, ‘The Importance of Law in International Politics’, in Michael Byers (ed) *The Role of Law in International Politics: Essays in International Relations and International Law* (OUP 2000) 10; Charles Leben, ‘Obligations Relating to the Use of Force and Arising from Peremptory Norms of International Law’ in Crawford *et al* (eds) (n100) 1202.

²⁸⁵ Commentary to art 26 ASR.

²⁸⁶ Focarelli (n88) 454; *Fragmentation Report* (n38) 52–53.

States.²⁸⁷ Although there is a core of truth to this account, it is also potentially simplistic. In the lead-up to the adoption of art 53 VCLT, the function of *jus cogens* often seemed to be conceptualized primarily as a protection of the equal sovereignty of States, which could potentially be undermined by treaties forced on weaker States with limited bargaining power.²⁸⁸ A distinction has been suggested between two different categories of peremptory norms: norms which protect vital State interests and/or the maintenance of peace between States, and norms protecting the basic rights of individuals and peoples.²⁸⁹ In the Cold War period, States (particularly socialist ones)²⁹⁰ commonly identified as *jus cogens* the principle of non-intervention, sovereign equality, and the prohibition of unequal treaties.²⁹¹ However, such ‘State-protecting’ sovereignty norms seem largely to have dropped off the accepted list of peremptory norms since the 1990s, reflecting the growing emphasis on human rights protection as the ultimate value underlying international law, and in particular *jus cogens*.²⁹²

The peremptory nature of the prohibition on the use of force is difficult to place within this scheme. As has been correctly identified in recent scholarship, at its heart it reflects a humanitarian motive aimed at the protection of individuals – in the words of the Preamble to the Charter, ‘to save succeeding generations from the scourge of war, which

²⁸⁷ Leben (n284) 1202; Weatherall (n34) 339; Bianchi (n75) 491-92. See also Tladi (n22) [71]; A/71/10, para [126] (in response to the Special Rapporteur’s report, States expressed the view that ‘the reference to “fundamental values” was too narrow if it only referred to those *jus cogens* norms of a humanitarian character, to the exclusion of others, such as the prohibition on the use of force’).

²⁸⁸ Roth (n5) 33-34.

²⁸⁹ Haimbaugh (n35) 216. Cf ASR Commentary to art 40: peremptory norms prohibit conduct which is seen as intolerable ‘because of the threat it presents to States and their peoples and to the most basic human values’; Simma (n17) 319.

²⁹⁰ Stephan (n22) 1092 (quoting Tunkin).

²⁹¹ Sztucki (n74) 120-21.

²⁹² Bianchi (n75) 491-92; Roth (n5) 34-35. This conception of *jus cogens* seemed to influence the Special Rapporteur’s first report: Tladi (n22) [71] but was criticised as simplistic by certain members of the ILC; A/CN.4/SR.3315, 11 (Nolte); A.CN.4/SR.3316, 14 (Park). See also ILC Report (n56), [126].

twice in our lifetime has brought untold sorrows to mankind.²⁹³ This may be seen as the basis for its moral value. Nonetheless, despite the sufferings the use of military force may cause to individuals, it is not considered as an absolute evil, but an action which can be justified in certain circumstances. Reflecting this judgment, the prohibition of the use of force relates only to inter-State relations and contains exceptions for self-defence and collective security. It thus differs from other canonical peremptory norms. But despite these differences, it shares the essential feature of a peremptory norm: States cannot derogate from it *inter se*.

²⁹³ Megret (n249) 1428–30; Tom Dannenbaum, ‘Why Have We Criminalised Aggressive War?’ (2017) 126 Yale LJ 1242, 1286–87 (although both focussing on the crime of aggression rather than the prohibition of force).

Chapter 2: What Counts as Consent, and Who Can Give It?

Chapter 1 of this thesis considered how consent from a State, expressed on its behalf by its government, could form a legal basis for the use of force on its territory despite the status of the prohibition of the use of force as a peremptory norm. But the conclusion that consent is *capable* of legalizing force by bringing it outside the peremptory prohibition does not establish the precise circumstances in which it will do so. The rest of this thesis will consider the conditions which international law lays down for the validity of consent to the use of force in the context of a particular scenario: where consent to foreign use of force on the State's territory is given by a government whose authority within the State is being challenged by civil war and other forms of internal conflict.²⁹⁴ In particular, the thesis will focus on the question of whether, as many scholars have argued, there exists a broad legal prohibition on the provision of military assistance to governments which are fighting a civil war against domestic opposition.

Before turning to assess this alleged prohibition in subsequent chapters, however, two fundamental preliminary issues will be considered. Two elements can be identified as inherent to the idea of consent 'reflecting the free expression of will of the requesting State...'²⁹⁵ The first element is that the purported act of consent must reflect genuine acceptance of the use of force by the giver of the consent – for example, it must not have been coerced.²⁹⁶ The requirements for valid consent in the use of force context are largely the same as those imposed in international law generally for the creation, modification and

²⁹⁴ The difficulties in defining the relevant concepts – 'civil war' and 'internal conflict' – and hence the scope of the alleged prohibition will be discussed in Chapters 3 and 6.

²⁹⁵ 'Military Assistance on Request' (n255). Unlike the IDI resolution of 2011, this thesis uses the term 'consent' rather than 'request'. The latter suggests that the impetus for seeking the deployment of forces by one State on another's territory must come from the territorial State, but a genuine 'free expression of the will' by the territorial State appears possible even if it is in response to an initial proposal by the other State. Cf S/PV.1172, 6 (Algeria).

²⁹⁶ Eliav Lieblich, 'Intervention and Consent: Consensual Forcible Interventions in Internal Armed Conflicts as International Agreements' (2011) 29 *BUJIL* 337, 341.

termination by States of legal rights and obligations.²⁹⁷ The second element is that the giver of the consent is capable of giving it *on behalf of the State*.²⁹⁸ Since it is a basic feature of international law that States are legally represented by their governments, this part of the chapter considers what criteria international law utilises to identify a State's government in circumstances where this is disputed. The chapter concludes that the standards for the recognition of governments are not clear-cut and that in practice international recognition plays a central role.

While the first set of issues is relevant in any scenario in which government consent to force is claimed, the second arises more particularly in situations of serious political strife within the State in which the established government is at risk of breaking down or being supplanted by a rival claimant to governmental authority, the situation on which this thesis is focussing. It therefore potentially intersects with the following chapters of the thesis, on the alleged prohibition on assistance to governments in civil war. If it could be shown that wherever there is a civil war within a State it lacks a government capable of representing the State in international law, the prohibition on military assistance to governments in civil wars would inevitably follow. In the eyes of international law, there would be no government to consent to such assistance. However, this chapter demonstrates that States undergoing even high-intensity civil wars generally continue to have an internationally recognized legal government, despite its factual loss of effective control. Thus, the civil war prohibition cannot be established by arguing that a civil war indicates by definition that a State has no

²⁹⁷ Ibid; Wippman (n195) 209. Although, as argued in Chapter 1, consent as a legal justification for the use of force operates as part of the primary norm (the prohibition of the use of force) and not as a secondary circumstance precluding wrongfulness, the requirements for assessing the validity of consent as an expression of the will of the State will generally be the same under both frameworks.

²⁹⁸ See Lieblich (n104) 124.

government capable of representing the State internationally.²⁹⁹ The prohibition, if it is to be established, must be established on other grounds.

A. What Counts as Genuine Consent?

The first part of this chapter will consider what criteria international law applies to determine the reality of consent to the use of force as an expression of the consenting political actor's will. It will however exclude the complex question of whether consent given in a past treaty can validly legalize the use of force against the will of the government at the time the intervention takes place, an issue briefly considered in the previous chapter.

Formal Requirements?

International law generally imposes no requirement that State consent must be expressed in a particular form to be valid.³⁰⁰ Consent to a particular instance of deployment of foreign force on its territory can be given by a formally adopted treaty.³⁰¹ However, consent to the introduction of foreign forces is commonly given by simple letter.³⁰² There are also examples of consent being given orally, notably in the recent ECOWAS intervention in the Gambia requested by Adama Barrow, the winner of the 2016 presidential election, in the course of his speech delivered at his inauguration-in-exile at the Gambian embassy in

²⁹⁹ Doswald-Beck (n243) 199-200.

³⁰⁰ See *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Jurisdiction and Admissibility)* [1994] ICJ Rep 112, 12-14; Nolte (n124) 638.

³⁰¹ For example, 'Security and Defense Agreement Between the Islamic Republic of Afghanistan and the United States of America' (Afghan Ministry of Foreign Affairs, 30 September 2013), <<http://mfa.gov.af/Content/files/BSA%20ENGLISH%20AFG.pdf>>.

³⁰² As for example in Yemen: Tom Ruys and Luca Ferro, 'Weathering the Storm: Legality and Legal Implications of the Saudi-Led Military Intervention in Yemen' (2016) 65 ICLQ 61, 66.

Senegal.³⁰³ The ICJ's judgment in the *Armed Activities* case also supports this view, suggesting that consent could be withdrawn, and hence also presumably given, 'without...formalities'.³⁰⁴

It would be practically difficult to comply with any onerous obligations of form in crisis situations, which are often the context for a decision to consent to intervention. One potential concern with the lack of any formal requirements is that this may facilitate fraudulent claims of consent, such as the fictitious request invented to justify the 1968 Soviet invasion of Czechoslovakia. However, in practice, as Nolte has observed, the international community has proved capable of identifying such deceit. Completely false claims of consent are unlikely to stand up to sustained international scrutiny.³⁰⁵

Covert/Tacit Consent?

It is helpful to distinguish potential scenarios which could be described as involving tacit consent. One is where sufficiently clear consent is in fact given by the territorial government in confidential communications, but this is not clearly publicly acknowledged, perhaps because of political sensitivities within the State whose government is consenting (as may have been the case with US drone strikes in Pakistan).³⁰⁶ This situation could more precisely be called one of 'covert' consent.³⁰⁷ The UN Special Rapporteur on extrajudicial

³⁰³ Claus Kress and Benjamin Nussberger, 'Pro-Democratic Intervention in Current International Law: The Case of the Gambia in January 2017' (2017) 4 JUFIL 1, 2. For an earlier example, see President Chamoun of Lebanon's alleged request for US intervention by telephone in 1958, discussed in Ashley Deeks, 'Consent to the Use of Force and International Law Supremacy' (2013) 54 Harvard ILJ 1, 19.

³⁰⁴ *Armed Activities on the Territory of the Congo (DRC v Uganda)*, Judgment [2005] ICJ Rep 168, 197.

³⁰⁵ Nolte (n4) 258–59.

³⁰⁶ Alexandra H Perina, 'Black Holes and Open Secrets: The Impact of Covert Actions in International Law' (2015) 52 Col JTL 507, 517. Cf the claims made by States intervening in Grenada in 1983 that the Governor-General's request could not initially be made public because of fears for his safety: Joseph H H Weiler, 'Armed Intervention in a Dichotomized World: The Case of Grenada' in Antonio Cassese (ed), *The Current Legal Regulation of the Use of Force* (M Nijhoff 1986) 253.

³⁰⁷ *Ibid.* See Sikander A Shah, *International Law and Drone Strikes in Pakistan* (Routledge 2015) 102; Byrne (n5) 105.

executions has stated that there is no absolute requirement that consent be made public,³⁰⁸ a view also endorsed by the US.³⁰⁹ There are obvious transparency and rule of law concerns about covert consent, which may make it difficult for the international community to assess the legality of military operations (which are not themselves secret) where consent has not been openly and explicitly given. Nonetheless, consent will be valid if it can be reasonably inferred from the parties' public actions.³¹⁰ In contrast, covert consent should lose any legal force it may have when the government actively denies its existence in public, as has occurred in Pakistan.³¹¹

Another scenario arises where the territorial State is informed of the intervening State's plans or desires to take military action in advance and does not clearly consent, but does not expressly object either. It may also take action which has the effect of facilitating the use of force, such as Pakistan clearing its airspace before US drone strikes.³¹² Such a scenario might be argued to be one of 'tacit consent.' However, while it cannot be ruled out that consent could potentially be given clearly but implicitly,³¹³ mere acquiescence does not constitute consent.³¹⁴ Given the serious possible implications of the use of force and the

³⁰⁸ Christof Heyns, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions' (13 December 2013) A/68/382, [83]. Cf UNGA Res 41 (I) (14 December 1946) suggesting that consent to foreign forces' presence must be 'freely and *publicly* expressed' (emphasis added).

³⁰⁹ Legal and Policy Framework (n13) 11.

³¹⁰ Cf *Armed Activities* (n304) 196–97.

³¹¹ Christine Gray, 'Targeted Killings: Recent US Attempts to Create a Legal Framework' (2013) 66 CLP 75, 103. Cf ILA Use of Force Committee (n211) 268: 'situations of apparent contradiction between the public denial of consent occurring alongside secret approval by the same government are a matter for evidentiary proceedings...'

³¹² Z Ahmed, 'Strengthening Standards for Consent: The Case of the US Drone Strikes in Pakistan' (2015) 23 Mich St ILR 460, 498-99.

³¹³ Lieblich (n296) 349.

³¹⁴ Cf however the statement by then UN Secretary-General on the US-led airstrikes in Syria, seeming to indicate that despite the lack of a 'direct request' by the Syrian Government it was relevant that the Government 'was informed beforehand': Ban Ki Moon, 'Remarks at the Climate Summit Press Conference (including comments on Syria) (23 September 2014) <www.un.org/sg/en/content/sg/speeches/2014-09-23/remarks-climate-summit-press-conference-including-comments-syria>. The US action was criticised by Russia, which said that international law required 'not the formal unilateral "notification" of strikes but the clearly expressed approval of the government of Syria...': Statement by the Russian Ministry of Foreign

likely power imbalance which is likely to exist between the State which proposes to use force and the territorial State, consent must be ‘clearly established.’³¹⁵ Even less convincing is what might be called ‘presumed consent,’ where the territorial State may not be informed of a planned use of force at all, but its consent presumed on the basis of its acquiescence to similar actions in the past. Although the possibility of consent based on ‘historic acquiescence’ has been endorsed by Daniel Bethlehem,³¹⁶ this argument has been met with scepticism by other international lawyers.³¹⁷ It seems right to require that consent be ‘actually expressed by the State rather than merely presumed on the basis that the State would have consented had it been asked.’³¹⁸

Rejection of Consent by Intervening States

Another interesting scenario is where the government of the territorial State is willing to give consent to a foreign State to use force against non-State actors on its territory, but the foreign State disclaims any reliance on such State because of its objections to the legitimacy of that government. Such a situation has arisen in relation to US and allied airstrikes on ISIL targets in Syria. During the early stages of these airstrikes there were indications from the Syrian government of its willingness to consent to them (since ISIL is also one of its adversaries). However, the US and the other participants refused to seek the consent of the Assad regime or to coordinate the airstrikes with it, and relied on self-defence as its legal justification for the airstrikes.³¹⁹ In such cases where there is no ‘meeting of

Affairs (23 September 2014), cited in Ruth Deyermond, ‘The Uses of Sovereignty in Twenty-First Century Russian Foreign Policy’ (2016) 68 *J Europe-Asia St* 957, 966.

³¹⁵ ASR Commentary to art 20; see also Weiler (n306) 254; Karine Bannelier-Christakis, ‘Military Interventions Against ISIL in Iraq, Syria and Libya and the Legal Basis of Consent’ (2016) 29 *Leiden JIL* 768.

³¹⁶ ‘Self-Defence Against Imminent or Actual Armed Attack by Nonstate Actors’ (2012) 106 *AJIL* 1, 7.

³¹⁷ Priya Urs, ‘The Role of the Security Council in the Use of Force against Islamic State’ (2016) 19 *MPYUNL* 65, 71; Elizabeth Wilmschurst and Michael Wood ‘Self-Defence Against Nonstate Actors: Reflections on the “Bethlehem Principles”’ (2013) 107 *AJIL* 390, 395.

³¹⁸ (n315).

³¹⁹ Ryan Goodman, ‘International Law on Airstrikes against ISIL in Syria’ (*Just Security* 28 August 2014) <www.justsecurity.org/14414/international-law-airstrikes-isis-syria/>; Claus Kress, ‘The Fine Line Between

minds' between the intervening States and the territorial government, consent clearly cannot provide a legal basis for force.³²⁰

Coercion and Retroactive Consent

Arts 48-52 VCLT provide that the consent of a State to enter treaties may be vitiated by various factors including error, fraud, corruption or coercion. As the commentary to art 20 ASR states, the same factors can vitiate consent more generally, including consent to the use of force. Thus, putative consent coerced by an illegal threat or use of force is invalid.³²¹

A related question concerns the timing of consent. It is often held that consent must come prior to the use of force.³²² This statement however needs further analysis. It is true that consent which follows the use of force will 'require a high threshold of proof that the consent was not coerced'.³²³ And even if it can be shown that such retroactive consent was issued independently of coercion, *ex post* consent cannot cure the initial illegality of the use of force prior to consent being given. The commentary to the ASR indicates that consent in such circumstances amounts to a form of waiver or acquiescence regarding a wrong which has already occurred,³²⁴ but also that waiver may not be effective following the breach of a peremptory norm.³²⁵ Once the use of force has taken place without consent, there is an

Collective Self-Defence and Intervention by Invitation: Reflections on the Use of Force Against "IS" in Syria' (Just Security, 17 February 2015) <<https://www.justsecurity.org/20118/clus-kreb-force-isil-syria/>>.

³²⁰ Bannelier-Christakis (n315) 770.

³²¹ See for example *Border Treaty, Re Karins and Ors v Parliament of Latvia and Cabinet Ministers of Latvia* ILDC 884 (LV 2007) (Latvian Constitutional Court), [25]–[27] (consent of Latvia to USSR occupation given under duress and hence invalid). Coercion of the State's representative could also be relevant: see Giovanni Di Stefano, 'Article 51' in Olivier Corten and Pierre Klein (eds) *The Vienna Convention on the Law of Treaties* (OUP 2011) 1188-89, referring to the alleged coercion of the ruler of Sharjah to agree to the stationing of Iranian troops on Abu Musa island.

³²² Heyns (n308) [82], Corten (n1) 267–69.

³²³ Lieblich (n104) 25; Dinstein (n253) 79–80.

³²⁴ ASR, Commentary to art 20.

³²⁵ ASR, Commentary to art 45. Lieblich (n296) 381 suggests, relying on arts 9 and 10 ASR, that the consent to foreign intervention of an insurrectional movement can retroactively legalize the use of force once that movement comes to power as the government. This, however, neglects the peremptory status of the

already existing breach of a peremptory norm which is of concern to the international community as a whole and cannot be waived solely by the consent of the territorial state.³²⁶

But although retroactive consent cannot cure the illegality of force used prior to consent being granted, it is a separate question whether consent following the use of force can legalise the continuing use of force *from that point forward*. Obviously it cannot if it is considered to be coerced. However, practice shows that the international community may accept the prospective legal effect of consent which follows an initial non-consensual intervention, for example the continued presence of US and allied troops in Afghanistan and Iraq at the request of governments which came to power after the invasion of these States and the forcible removal of the previous regimes.³²⁷ The international acceptance of these governments' consent as free and non-coerced reflects a judgment that there is no causal relationship between the initial non-consensual intervention and the subsequent consent.³²⁸ This is tied up with international recognition of the legitimacy of the later consenting governments (issues which will be discussed in the second part of this chapter on government recognition), which seems to overcome any concerns that the consent is the result of an initial act of coercion.³²⁹

prohibition of the use of force; an already existing breach of a peremptory norm cannot be retroactively legalized in this way.

³²⁶ Although it potentially can be waived by the international community as a whole: cf Lauterpacht (n276) 429.

³²⁷ Lieblich (n104) 155; cf Olivier Corten, 'Le *Jus Post Bellum* remet-il en cause les règles traditionnelles du *Jus Contra Bellum*?' (2011) 44 RBDI 38, 59-60.

³²⁸ Kolb (n16) 48; Oliver Corten, 'Article 52', in Corten and Klein (n321) 1219.

³²⁹ Cf Marcelo Kohen, 'The Use of Force by the US After the End of the Cold War, and its Impact on International Law' in Michael Byers and Georg Nolte (eds) *United States Hegemony and the Foundations of International Law* (CUP 2003) 212-13.

Scope of Consent and Limits

Although it has been stated that consent must be ‘specific’,³³⁰ this cannot be interpreted too strictly. For example, in the context of drone strikes, although ideally prior consent would be sought for each strike it also seems possible for general permission for drone strikes to be given by agreement, as reports indicate the Saleh government in Yemen may have done.³³¹ However, some basic level of clarity about the purpose and parameters of the use of force is presumably required – for consent to be meaningful, there has to be some definition of what is being consented to.³³² The consenting State is of course also able to lay down precise limits on the scope of its consent, for example as to the duration of the use of force or the means to be employed. If the intervening State goes beyond the parameters of the territorial State’s consent, this will constitute an illegal use of force,³³³ unless another legal basis for the use of force such as self-defence or UNSC authorisation applies.

B. Who Can Consent?

Even if consent meets the criteria discussed above, there remains the question of whether the actor giving the consent is legally able to speak for the State on whose territory force is used. It is a basic structural feature of international law that States, being abstract entities, are represented by their governments.³³⁴ Thus only the consent of a State’s government and not opposition groups or other entities is capable of bringing a case of ‘intervention by invitation’ outside the scope of application of the prohibition on the use of force. The ICJ in *Nicaragua* clearly endorsed the view that the government is the only source

³³⁰ IDI Resolution (n255) arts 4, 6.

³³¹ Ben Emmerson, ‘Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism’ (10 March 2014) A/HRC/25/59, [29]. See also Sean D Murphy, ‘Protean Jus ad Bellum’ (2009) 21 Berkeley JIL 22, 40.

³³² Heyns (n308) [82]: ‘the parameters of...consent should also be made clear’; S/PV.833, 10 (US) (US forces in Lebanon at ‘specific request’ of the government).

³³³ See Definition of Aggression (n126), art 3(g) .

³³⁴ James Crawford, ‘The Rights of Peoples: “Peoples” or “Governments”?’ in James Crawford (ed) *The Rights of Peoples* (Clarendon 1988) 55.

of consent capable of legalizing intervention.³³⁵ State practice and *opinio juris* generally support this view.³³⁶ This thesis focuses exclusively on government consent as a basis for the use of force, and not that expressed by other groups, even if recognized as ‘legitimate representatives of the people.’ Such recognition does not accord a group the right to consent to the use of force.³³⁷

This of course leads on to further questions. A government is made up of multiple persons holding different offices, who may be divided among themselves as to whether consent should be given. One issue is which officials of a government have the capacity to consent to the use of force. This assumes of course that the set of office-holders constituting the government can be identified. A more fundamental question is how to determine the identity of the government in a situation where there is no unchallenged authority structure within the State. The latter problem is of particular relevance in a situation of internal conflict, the scenario which is the particular focus of this thesis. It will be argued that international legal standards for the identification of governments are difficult to reduce to a set of clear rules, with territorial control playing a role alongside a wide set of considerations of constitutional, democratic and humanitarian legitimacy. In practice, international recognition plays a key role. The existing established government generally continues to be treated as the legal government of the state on the international stage until other States, acting through the UN or regional organizations, identify a new ‘legitimate’ government. The result is that except in cases of complete government breakdown, States will continue to have an internationally recognized government even in a civil war situation – a government

³³⁵ *Nicaragua* (n49) 126.

³³⁶ See Patrick C R Terry, ‘Afghanistan’s Civil War (1979–1989): Illegal and Failed Foreign Interventions’ (2011) 31 *PYIL* 107, 130; Lieblich (n104) 238–40; Joseph Klingler ‘Counterintervention on Behalf of the Syrian Opposition: An Illustration of the Need for Greater Clarity’ (2014) 55 *Harvard ILJ* 483, 504–07 (dearth of *opinio juris* supporting right to aid opposition); Corten (n1) 260–62.

³³⁷ Stefan Talmon, ‘Recognition of Opposition Groups as the Legitimate Representatives of a People’ (2013) 12 *CJIL* 219, 243–44.

at least prima facie capable of giving consent to intervention, unless a prohibition can be established on other grounds.³³⁸

B.1 Which Officials of an Established Government Can Consent?

The commentary to art 20 ASR indicates that whether a particular person or entity has the authority to consent on behalf of the State may depend on the type of act to which consent is being sought. Given the seriousness of the potential breach of State sovereignty involved in the use of force, it is widely held that consent in this context must issue from ‘the State’s highest governmental authorities,’³³⁹ in other words the highest office holders in the executive branch of the national government. The provision in art 7 VCLT that heads of State, heads of government and foreign ministers are considered as representing the State for the purposes of treaty formation can by analogy be used to identify those officeholders capable of consenting to the use of force. State practice supports this supposition, with legal justifications for ‘intervention by invitation’ usually relying on consent issued by the head of State or government.³⁴⁰ Occasional attempts to rely on consent from regional authorities (an argument put forward by Belgium to justify its intervention in the Katanga province of Congo in 1960, and one justification proffered by Russia for its actions in Crimea) have been widely rejected.³⁴¹ Similarly, consent given by military or intelligence officials of the territorial State is not sufficient to legalise force.³⁴² Thus, the US’s reference to an invitation from

³³⁸ Doswald-Beck (n243) 199–200.

³³⁹ Heyns (n308) [82]; Corten (n1) 259–66.

³⁴⁰ Byrne (n5) 117. But the requirements may potentially be interpreted flexibly if the circumstances require, if for example the head of State is incapacitated. Thus when intervening in Gabon in 1964 France relied on a request for aid from the Vice-President after the President was taken prisoner: A Mark Weisburd, *Use of Force: The Practice of States Since World War II* (Pennsylvania State University Press, 1997) 219.

³⁴¹ Corten (n1) 262–65; S/PV.7125, 5 (US): ‘The prohibition on the use of force would be rendered moot if subnational authorities were able to unilaterally invite military intervention by a neighbouring State’.

³⁴² ILA Use of Force Committee (n211) 268.

unnamed 'Dominican law enforcement and military officials' was not widely accepted as justifying its 1965 intervention in the Dominican Republic.³⁴³

In the treaty law context, art 46 VCLT indicates that the general presumption that the head of State or government (or the foreign minister) has the competence to consent on behalf of the State may be displaced if this manifestly violates a rule of its internal law of fundamental importance.³⁴⁴ In the context of consent to the use of force, it would be highly formalistic for this condition to apply only where consent is given in the treaty form instead of, say, by letter. Given the seriousness for the inviting State of any decision to consent to force, it can reasonably be concluded that whatever the form of the consent it is subject to a condition equivalent to art 46. If this is correct, then if the State's constitution explicitly imposes limits on the head of State's ability to consent to force – for example, requiring that such an invitation be endorsed by the legislature³⁴⁵ – these will apply to determine the validity of consent in international law, so that the consent of the President (for example) without legislative endorsement will be invalid. This scenario arose in Ukraine, where the Constitution appeared to invest the legislature, and not the President, with legal authority to invite foreign troops onto Ukrainian territory.³⁴⁶ Such constitutional provisions are likely to be considered rules of fundamental importance,³⁴⁷ and breaches of them are likely to be considered 'manifest' given serious potential sovereignty implications of foreign use of force on the State's territory.³⁴⁸ Thus even assuming Yanukovich was still in office at the time he

³⁴³ Cf Christopher J Le Mon 'Unilateral Intervention in Civil Wars: The Effective Control Test Tested' (2003) 35 NYUJILP 741, 766.

³⁴⁴ See generally Michael Bothe 'Article 46' in Corten and Klein (n321) 1090–99.

³⁴⁵ *ibid* 1091.

³⁴⁶ Thomas D Grant, 'The Yanukovich Letter: Intervention and Authority to Invite In International Law' (2015) 2 *Indon JICL* 281, 299; Ronzitti (n108) 82. Ukrainian constitutional requirements for consent to intervention were discussed in the Security Council: S/PV.7125, 5, 16.

³⁴⁷ Grant (n346) 302: *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)* (Judgment) (2002) ICJ Rep 303, 430-31.

³⁴⁸ Grant (n346) 307.

requested the Russian intervention (which was highly doubtful), it is likely his consent was invalid as a manifest violation of Ukrainian constitutional law.

It has been suggested that even in the absence of ‘manifest’ constitutional regulation of the issue in the law of the territorial State, intervening States should be under a positive ‘duty to inquire’ as to whether the territorial State’s consent to foreign force is consistent with its domestic laws.³⁴⁹ However, it does not appear that State practice or *opinio juris* supports the imposition of such a duty. Unless the domestic illegality is indeed manifest, it should not condition international legality, since it will be very difficult for outsiders to determine what limits the State’s domestic law imposes on the head of State or government’s consent power; the potential for misunderstandings is severe.³⁵⁰

B.2 Identifying the Government

Governments, as the institutional representatives of States, play a central role in the international legal order. Identifying a State’s government in situations of dispute or uncertainty is thus crucial. Despite this, the criteria to be used to make this assessment are the subject of some confusion. Historically, there are numerous statements claiming that the decision by one State as to whether to recognize a particular entity as the government of another is not regulated by international law but involves the free exercise of political discretion.³⁵¹ But there is a need to distinguish two different issues commonly conflated as involving ‘recognition’. ‘Recognition’ of a government may betoken willingness to enter into official relations with the recognized entity, or may simply constitute an acknowledgment

³⁴⁹ Deeks (n303) 35–36.

³⁵⁰ Grant (n346) 306. The difficulties in assessing the domestic legal situation may be compounded where intervention is requested in circumstances of domestic crisis, which could be argued to bring into play undefined emergency or reserve powers within domestic constitutional law. Thus the Governor-General of Grenada, whose role was generally only formal and ceremonial, was nonetheless (according to a UK Minister) entitled in the context of the crisis situation in Grenada ‘to decide what steps it was appropriate for him to take to ensure that Her Majesty’s Government in Grenada was carried on’: HL Deb (1 November 1983) vol 444 col 440. See Weiler (n306) 253-54; also S/PV.66, 303 (USSR), 314–15.

³⁵¹ See for example S/PV.461, 3 (Ecuador); Thomas M Franck, *The Power of Legitimacy Among Nations* (OUP 1990) 123.

that the recognized entity *exists* as the government of the State in question (although recognition in the former sense also generally implies the latter).³⁵² The latter issue can be more clearly conceptualised as involving the *identification* of the State's government, rather than its recognition. While the decision whether to enter relations with a government may be left to each State's political choice, the more basic issue of the identification of the government cannot be a matter of individual States' unbounded discretion. Otherwise, one State could by its own say-so deprive another State of fundamental legal protections of international law, including those of the *jus ad bellum*. Simply by derecognizing a hostile government and recognizing instead a sympathetic alternative, a foreign State could legally justify military intervention, relying on the consent of the 'government' it has chosen to recognize.³⁵³ Leaving the identification of a State's government to the unbounded discretion of individual States would thus create a loophole within the *jus ad bellum* which would fatally undermine the prohibition on the use of force.³⁵⁴ The existence of the prohibition of the use of force and of other principles like non-intervention protecting the basic rights of States implies that international law imposes some form of regulation on how a State's government is to be identified, considering that governments can consent on behalf of the State to conduct which would otherwise violate these rules.³⁵⁵

What test, then, does international law utilise for the identification of governments? The scholarship suggests three possible criteria for determining whether a particular authority constitutes a State's government: 1) whether it has effective control over the State's territory; 2) its legitimacy as a representative of the State's people; and 3) the degree of

³⁵² Ian Brownlie, 'Recognition in Theory and Practice' (1982) 53 BYIL 197, 198; Talmon (n6) 33.

³⁵³ Talmon (n337) 232. A notorious instance of such an abusive practice occurred during the Spanish Civil War, where Italy and Germany provided military aid to the Nationalist insurgents after prematurely recognizing them as the government of Spain in November 1936: Lauterpacht (n276) 95.

³⁵⁴ Alexander Orakhelashvili, 'Undesired, yet Omnipresent: *Jus ad Bellum* in Relation to Other Areas of International Law' (2015) 2 JUFIL 238, 254–55.

³⁵⁵ Brownlie (n352) 209.

international recognition it has received by international and regional organizations and by the community of States.³⁵⁶ It will be shown that effective control is still the starting point for recognizing governments, although the test is generally applied with a preference for the State's established government over challengers. Certain prominent cases show that authorities which lack effective control may nonetheless be identified as the State's government if they are considered to be legitimate. However, these departures from the effective control test are *ad hoc* and based on criteria of legitimacy which cannot be reduced to a clear-cut legal test. Therefore, in practice the collective attitude of States plays a pivotal role in determining the identity of a State's government in cases of dispute.

Effective Control

According to the most well-established test, the authorities that exercise effective control of the State's territory constitute its government.³⁵⁷ The effective control test gained support in the nineteenth century,³⁵⁸ although States sometimes imposed additional requirements for recognition on governments coming to power extra-constitutionally, such as a commitment to fulfilling its international obligations³⁵⁹ or endorsement of some kind by the electorate or the legislature.³⁶⁰ An alternative approach apparently conditioning governmental status on *de jure* constitutional legitimacy was pursued in Central America in the early twentieth century with the enunciation of the 'Tobar doctrine', committing States in the region not to recognize governments which came to power unconstitutionally 'so long as the freely organized representatives of the people thereof have not constitutionally

³⁵⁶ Gerhard Hafner 'New Final Report (2011) 74 AIDI 181, 229.

³⁵⁷ Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law: Volume 1 – Peace* (Longman, 9th ed, 1996) 150; Talmon (n337) 232.

³⁵⁸ See for example H A Smith, *Great Britain and the Law of Nations* (P S King, 1932) 109, 114, 204; also the arbitral decisions surveyed by Doswald-Beck (n243) 192–94.

³⁵⁹ Lauterpacht (n276) 110.

³⁶⁰ Cf J Baty, *The Canons of International Law* (J Murray 1930) 217.

reorganized the country'.³⁶¹ However, the influential *Tinoco* arbitration determined that the authorities in effective control of the State's territory constituted its government in international law, even if they came to power in breach of domestic constitutional law.³⁶² By the inter-war period the effective control test had clearly become dominant in State practice.³⁶³ In 1950 it was endorsed by a memorandum of the UN Legal Advisor for use in determining the representation of UN Member States.³⁶⁴

Further support for the effective control doctrine can be inferred from the adoption by many States of a policy of 'recognizing States, not governments',³⁶⁵ avoiding any express pronouncement as to the legal status of new *de facto* governments which come to power in other States.³⁶⁶ The claim that recognition of governments is abolished by such a policy is misleading, since in the case where rival claimants to governmental status exist there is still a need to identify which constitutes the government of the State.³⁶⁷ The 'States not governments' approach seems in fact to mean accepting the authorities in effective control as the government. In the words of the British minister announcing the UK's adoption of the policy in 1980, the assessment is whether a foreign regime 'are able of themselves to exercise effective control of the State concerned, and seem likely to continue to do so.'³⁶⁸ In recent years effective control continues to be referenced by States and by international and regional organizations as the basis for decisions about governmental status. For example, the

³⁶¹ Art II, Additional Convention to the General Treaty (1908) 2 AJIL Supp 230. The US, without being a party, also adopted this approach for a time: Baty (n360) 222, Lauterpacht (n276) 129–30. See Thomas and Thomas (n245) 40–43.

³⁶² [1923] 1 RIAA 375.

³⁶³ Lauterpacht (n276) 122–36.

³⁶⁴ 'Legal Aspects of the Problems of Representation in the United Nations', Memorandum Prepared for the Secretary-General' (9 March 1950) S/1466.

³⁶⁵ Doswald-Beck (n243) 194–95; Talmon, 'Recognition of Governments: An Analysis of the New British Policy and Practice' (1992) 63 BYIL 231, 247–48.

³⁶⁶ Talmon (n365) 263–64.

³⁶⁷ Lauterpacht (n276) 156, Talmon (n365) 264.

³⁶⁸ HC Deb vol 983 col 278 (25 April 1980) (Sir Ian Gilmour).

State Department spokesperson explained that the United States had not recognized the Syrian Opposition Council as the government of Syria because ‘legal recognition goes to the question of the physical control of territory.’³⁶⁹ The effective control test can be defended on principled grounds, since any more demanding legitimacy-based criteria involve foreign evaluation of political developments within another State, in a way arguably inconsistent with the principle of non-intervention.³⁷⁰

Despite the authorities in support of the effective control test, it cannot be identified as the sole criterion for identifying a State’s government in international law. This is important for the topic of this thesis: ‘intervention by invitation’, particularly in a civil war situation. If governmental recognition were determined strictly on the basis of effective control, it would suggest that any State undergoing a conflict in which control of its territory was divided between different parties has no government capable of representing the State in international law. But this is clearly wrong.³⁷¹ For example, the Malian government’s international status was not lost despite its lack of control of the north of the country in 2012.³⁷² The Hadi government in Yemen equally has retained its governmental status, despite its loss of control of much of the State’s territory (including the capital) and the fact that President Hadi fled into exile in Saudi Arabia before requesting military intervention in favour of his government from the Gulf Cooperation Council.³⁷³ So it is clear from practice that the effective control test must be qualified.

Some of this practice may be explained by developing a more sophisticated understanding of the effective control test. The test, as explained above, is linked to the idea

³⁶⁹ US State Department, Daily Press briefing (12 December 2012), cited by Talmon (n337) 233.

³⁷⁰ Roth (n247) 27.

³⁷¹ Doswald-Beck (n243) 197–200; Lieblich (n104) 154; cf Brian Finucane, ‘Fictitious States, Effective Control and the Use of Force Against Non-State Actors’ (2012) Berkeley JIL 103, 115-120.

³⁷² Bannelier and Christakis (n204) 865-66.

³⁷³ Ruys and Ferro (n302) 81–86.

of non-intervention, since effective control provides a means of identifying a State's government independent of other States' ideological preferences. This underlying basis of the principle does not apply when the government's effective control is achieved only on the basis of foreign support,³⁷⁴ a qualification suggested by the 1980 UK statement indicating that the regime must exercise effective control 'of themselves.'³⁷⁵ Equally, it suggests that when a government's effective control is lost as a result of foreign intervention this should not put into question its claim to represent the State.³⁷⁶ However, the 'foreign involvement' proviso to the effective control test has not in fact been applied in any consistent way.³⁷⁷ Many governments which are in fact highly dependent on foreign support for their exercise even of partial effective control over the State's territory nonetheless continue to be accepted as governments by the international community.³⁷⁸ The post-invasion governments of Afghanistan and Iraq, faced with insurgencies and reliant on US support for the entire period of their existence, provide clear examples of this.³⁷⁹ In the case of Iraq, the government was accepted internationally despite the fact that it came to power following a foreign military intervention which was widely considered to be a serious breach of the prohibition of the use of force.³⁸⁰ It is evident from these examples that a government's reliance on foreign

³⁷⁴ Doswald-Beck (n243) 194. See for example S/PV.460 9–10 (Republic of China).

³⁷⁵ (n368).

³⁷⁶ See for example the debate in the UN on the credentials of the government of Cambodia/Kampuchea which came to power following the overthrow of the Khmer Rouge regime by Vietnamese military intervention: Franck (n351) 273.

³⁷⁷ Doswald-Beck (n243) 195; Talmon (n190) 140–41.

³⁷⁸ A UK Minister stated in 1985 that 'The receipt of external economic, military or other assistance does not necessarily detract from the attributes of...an effective government': HC Deb (20 March 1985) vol 75 col 532, cited by Talmon (n365) 271.

³⁷⁹ Lieblich (n104) 155; Erika de Wet 'The Modern Practice of Intervention by Invitation in Africa and Its Implications for the Prohibition on the Use of Force' (2015) 26 EJIL 979, 991–92.

³⁸⁰ Corten (n327) 50.

assistance, or even its origins in foreign military intervention, can be outweighed by other considerations.³⁸¹

Another caveat to the effective control test which helps explain some of the practice is the existence of a preference for established governments over rebel challengers.³⁸² It would be immensely destabilising to the international order, a system of States represented by governments, if any degree of loss of effective control caused the established government to lose its claim to represent the State. This would result in many States not having governments capable of representing the State in international law, depriving them of the ability to fully participate in the international legal system, a result which seems clearly in tension with the basic international legal principle of the sovereign equality of States. Thus, the previously established government tends to remain identified as such internationally until clearly displaced by a new government.³⁸³ In practice, there is a marked reluctance for international organizations and other States to conclude that a State no longer has a legal government.³⁸⁴ Such an outcome is reserved for the most drastic examples of governmental breakdown, where the previously established government has completely broken down, as in the Dominican Republic in 1965³⁸⁵ and in Somalia in the 1990s.³⁸⁶ Even in these situations, the international community has generally taken concerted action to help protect the State's

³⁸¹ Cf Stefan Talmon 'Who is a Legitimate Government in Exile? Towards Normative Criteria for Governmental Legitimacy in International Law' in Guy Goodwin-Gill and Stefan Talmon (eds), *The Reality of International Law. Essays in Honour of Ian Brownlie* (OUP 1999) 519, 527–28.

³⁸² Lauterpacht (n276) 94.

³⁸³ Byrne (n5) 109.

³⁸⁴ Doswald-Beck (n243) 198; Talmon (n381) 513; cf Finucane (n371) 119-20.

³⁸⁵ Doswald-Beck (n243) 200.

³⁸⁶ At the UN, Somalia did not present its annual credentials between 1991 and 2000: Gerard Kreijen, *State Failure, Sovereignty and Effectiveness: Legal Lessons from the Decolonization of Sub-Saharan Africa* (M Nijhoff 2004) 71. In 1992 the Secretary-General stated that Somalia lacked a government capable of consenting to the use of force: 'Letter dated 29 November 1992 from the Secretary General to the President of the Security Council' (30 November 1992) S/24868, 3; Ruys and Ferro (n302) 82.

continuing legal sovereignty by facilitating (even engineering) the establishment of a transitional government, as occurred in Somalia.³⁸⁷

Some have discerned a practice indicating that governments will continue to be recognized as long as they hold the capital and the existing governmental apparatus.³⁸⁸ However, this test is not unequivocally supported by recent practice: the Hadi government, for example, has continued to be recognized as the government of Yemen,³⁸⁹ despite its loss of control of Sana'a in late 2014—early 2015.³⁹⁰ A less precise test was put forward by Lauterpacht in 1947, who contended that the lawful established government fighting a civil war should be recognized '[s]o long as it offers resistance which is not ostensibly hopeless or purely nominal.'³⁹¹ Again, recent practice provides counter-examples to this position. The 32 Western and Arab States in the 'Libya Contact Group' recognized the National Transitional Council as the government of Libya months before the Gaddafi forces had clearly been defeated in Tripoli and elsewhere.³⁹² And both the Gbagbo government in Côte d'Ivoire³⁹³ and the Jammeh government in the Gambia³⁹⁴ were deprived of recognition while they were still clinging on to power.

Legitimacy-Based Criteria

Practice clearly indicates that effective control, even in an adapted form, is not the sole criterion for the identification of governments in international law. In the post-Cold

³⁸⁷ Liebllich (n104) 245.

³⁸⁸ Wippman (n195) 220; cf Byrne (n5) 108.

³⁸⁹ The UNSC has upheld Hadi's continued legitimacy: UNSC Res 2216 (14 April 2015).

³⁹⁰ Byrne (n5) 113.

³⁹¹ Lauterpacht (n276) 94; Ruys and Ferro (n302) 82; Georg Nolte, 'Secession and External Intervention' in Marcelo Cohen (ed) *Secession: International Law Perspectives* (CUP 2006) 79.

³⁹² Liebllich (n104) 247. For the statement of the Contact Group see 'Contemporary Practice of the United States' (2011) 105 AJIL 775, 780–81.

³⁹³ UNSC Res 1975 (30 March 2011); Yejoon Rim, 'Two Governments and One Legitimacy: International Responses to the Post-Election Crisis in Côte d'Ivoire' (2015) 25 Leiden JIL 683, 685–89.

³⁹⁴ UNSC Res 2337 (19 January 2017); Kress and Nussberger (n303) 8.

War era references to the ‘legitimate government’ and ‘legitimacy’ have become a commonplace feature of UN practice and of the pronouncements of individual States.³⁹⁵ The UK, for example, seems to have abandoned its established policy of ‘recognizing States, not governments’ to explicitly recognize the NTC as the government of Libya,³⁹⁶ invoking its ‘legitimacy’ and commitment to democracy and an inclusive political process.³⁹⁷ While by this point the NTC had already gained a degree of effective control over Libyan territory, other practice since the 1990s suggests that legitimacy may make up for a complete lack of effective control. Thus, in Haiti and Sierra Leone democratically elected governments overthrown by military coups no longer exercised effective control over any of the State’s territory, but retained international recognition and were eventually restored to power by foreign military intervention.³⁹⁸ And in Côte d’Ivoire and (most recently) the Gambia opposition candidates who won internationally monitored elections but then faced a refusal from the incumbent to step down received international recognition as ‘the legitimate President’, despite a lack of control of any State territory at the time of recognition.³⁹⁹

These departures from effective control test in favour of ‘legitimate’ governments raise the question of how the concept of legitimacy is being defined. It has been suggested that the underlying principle which can be discerned is that the government must, despite its lack of control, be ‘representative of the national will’.⁴⁰⁰ But this does not answer the critical question of how the ‘national will’ is to be determined. Various potential sources of legitimacy can be discerned in the discourse of States in international organizations, including

³⁹⁵ Talmon (n381) 500.

³⁹⁶ It also appears to have recognized the Ouattara government before it took effective control: ‘UK Materials on International Law’ (2012) 82 BYIL 676, 737.

³⁹⁷ Ibid, 741–43. See also Colin Warbrick, ‘British Policy and the National Transitional Council of Libya’ (2012) 61 ICLQ 247; *British Arab Commercial Bank v National Transitional Council of the State of Libya* [2011] EWHC 2274 (Comm).

³⁹⁸ David Wippman, ‘Pro-Democratic Intervention’ in Weller (n51) 806–08.

³⁹⁹ Rim (n393); Kress and Nussberger (n303).

⁴⁰⁰ Talmon (n381) 509–10; ‘Draft Resolution’ (2011) 74 AIDI 252, art 8.

the putative government's *de jure* constitutionality, its democratic credentials, and its commitment to peace and fair representation of various groups within the State, as well as to human rights. However, State practice shows that none of these criteria have emerged to provide a clear and consistently applied definition of legitimacy for the purpose of identifying governments.⁴⁰¹

There are some indications in State practice of a general rejection of unconstitutional changes of government. Article 4(p) of the AU Constitutive Act, for instance, establishes as one of the principles of the AU '[c]ondemnation and rejection of unconstitutional changes of government.'⁴⁰² In practice, however, the AU has not consistently imposed sanctions on governments which come to power unconstitutionally.⁴⁰³ More recently a crime of 'unconstitutional change of government' has been included in the jurisdiction of the embryonic African Criminal Court,⁴⁰⁴ but it only protects democratic governments, indicating that it relies primarily on a democratic principle of legitimacy rather than constitutionality *per se*.⁴⁰⁵ In the context of arguments about 'intervention by invitation', the constitutionality of the inviting governments is sometimes emphasised; for example, President Hadi in Yemen was referred to as the representative of 'constitutional legitimacy'.⁴⁰⁶ But again, *de jure* constitutional legality is clearly not decisive. Despite the fact that his removal was not endorsed by the constitutionally required supermajority in the

⁴⁰¹ 'Délibérations de l'Institut' (2011) 74 AIDI 278. Attempts to define the concept of 'legitimate government' in the 2011 IDI Resolution were ultimately abandoned, with the revised text speaking of only of requesting 'States': *ibid*, 321.

⁴⁰² Further, a 2003 amendment to the AU Constitutive Act would allow use of military force in response to threats to the 'legitimate order' in member States: Protocol on Amendments to the Constitutive Act of the African Union, adopted by the 1st Extra-Ordinary Session of the Assembly of the African Union, Addis Ababa (Ethiopia), 3 February 2003, art 4. This has been ratified by 28 of the 50 AU member States, falling short so far of the two-thirds majority required for it to come into force: <au.int/en/treaties/protocol-amendments-constitutive-act-african-union>.

⁴⁰³ de Wet (n379) 986.

⁴⁰⁴ See Harman van der Wilt, 'Unconstitutional Change of Government: A New Crime Within the Jurisdiction of the African Criminal Court' (2017) 20 *Leiden JIL* 967.

⁴⁰⁵ *ibid* 973.

⁴⁰⁶ For example S/PV.7426, 7 (Chad); S/PV.7527, 8 (Jordan).

legislature and he could hence be argued to retain constitutional legitimacy, President Yanukovich's invitation was not widely accepted as legalizing the Russian intervention in Crimea.⁴⁰⁷ This case also demonstrates a problem already discussed above: that often the position under domestic constitutional law in crisis situations will be unclear, and that international actors are inevitably ill-equipped to determine the domestic legal position.⁴⁰⁸ A strict requirement of *de jure* constitutionality would rule out the recognition of any revolutionary government which came to power contrary to existing constitutional forms, even if these forms in fact entrenched an unpopular authoritarian government.⁴⁰⁹ This would be clearly contrary to State practice such as the recognition of the NTC in Libya.⁴¹⁰

Democratic legitimacy appears to provide a more substantive test to determine whether a government legitimately represents the national will. It is clear that the holding of free and fair elections is not an absolute requirement for governmental status.⁴¹¹ There are many established governments which do not subject themselves to such elections but which are nonetheless universally accepted as governments. But it is also evident that since the end of the Cold War reliable electoral verdicts, where available, have often played an increasing role in resolving disputes about government status.⁴¹² In several cases such as Haiti, Sierra Leone, Côte d'Ivoire and the Gambia, authorities which have won elections have been internationally recognized despite the loss, or before the establishment, of effective control. Regional instruments could also be adduced to provide support for the importance of democratic legitimacy in assessing governmental status. For example, the Inter-American

⁴⁰⁷ See Brad Roth, 'The Virtues of Bright Lines: Self-Determination, Secession and External Intervention' (2015) 16 GLJ 384, 387–90; Grant (n346) 314–17.

⁴⁰⁸ (n350).

⁴⁰⁹ Lauterpacht (n276) 93; Roth (n247) 191–92.

⁴¹⁰ It also would have stood in the way of the recognition of Ouattara in Côte d'Ivoire, since the incumbent Laurent Gbagbo was recognised as the electoral winner by the domestic courts (in contrast to the verdict of international observers): Rim (n393) 692–93.

⁴¹¹ Cf Thomas Franck, 'The Emerging Right to Democratic Governance' (2002) 86 AJIL 46.

⁴¹² Fox (n256) 834–37.

Democratic Charter, adopted in 2001, bars a member State from participating in the Organization of American States during the persistence of ‘an unconstitutional interruption of the democratic order or an unconstitutional regime that seriously impairs the democratic order’ in that State,⁴¹³ a provision which was invoked to refuse recognition to the government that overthrew the democratically elected President Zelaya of Honduras in 2009 (despite the fact that the removal of Zelaya was endorsed by the Congress and Supreme Court).⁴¹⁴ Similar provisions are contained in the 2007 African Charter on Democracy, Governance and Elections,⁴¹⁵ and are now reflected in the African context in the newly established crime of unconstitutional change of government.⁴¹⁶

However, this practice does not establish that the authorities victorious in free and fair elections retain governmental status come what may. Firstly, the distinction between different forms of non-recognition needs to be borne in mind. Condemning an undemocratic government and barring it from participating in a regional organization may indicate an unwillingness to cooperate politically with the government, without also rejecting its legal status as the government capable of representing the State in international law. The contention of some that separate regional treaty or customary rules can determine the legal

⁴¹³ OAS GA Res 1 (XXVIII-E/01), OAS Doc OEA/SerP/AE/Res 1 (XXVIII-E/01) (11 September 2001), art 19; de Wet (n379) 986. See also Consolidated Version of the Treaty on the European Union, 2010 OJ C83/01, art 2, art 7.

⁴¹⁴ See also UNGA Res 63/301 (30 June 2009) A/63/301 calling ‘firmly and unequivocally upon States to recognize no government other than that of the Constitutional President...Zelaya...’. For analysis see Brad Roth, ‘The Honduran Crisis and the Turn to Constitutional Legitimism, Part 1: The Place of Domestic Constitutional Orders in the International Legal Framework (*EJIL:Talk!*, 23 September 2009) available at <www.ejiltalk.org/the-honduran-crisis-and-the-turn-to-constitutional-legitimism-part-i-the-place-of-domestic-constitutional-orders-in-the-international-legal-framework/>.

⁴¹⁵ Available at <www.achpr.org/instruments/charter-democracy/> (African Commission on Human and People’s Rights). See de Wet (n379) 986. It has also confusingly been suggested that assistance to overthrown democratic governments may be justified on the basis of art 51 of the Charter: ICISS, *The Responsibility to Protect* (International Development Research Centre, 2001) [4.26].

⁴¹⁶ (n404).

status of governments is doubtful.⁴¹⁷ As has been argued, the prohibition on the use of force is a peremptory and hence universal and non-derogable norm. Separate regional rules on the identification of governments able to consent to the use of force on behalf of the State would seem to constitute a regional derogation of the norm ‘through the back door’, undermining the universality which follows from its peremptory status.⁴¹⁸ Where democratic legitimacy is utilised to identify ineffective authorities as the State’s legal government, capable despite their lack of effectiveness of representing the State by (for example) consenting to the use of force, it is suggested this must be based on the judgement of the international community, not on regional practice alone.

Secondly, practice is inconsistent.⁴¹⁹ In contrast to the Haiti, Sierra Leone and Honduras cases, the international community did not continue to recognize President Yanukovych of Ukraine and President Morsi of Egypt after their fall from power, even though both had previously been democratically elected to office.⁴²⁰ Despite the relevant regional instruments, both in the Americas and in Africa coups have not invariably led to the new government being excluded for any length of time from the regional organizations.⁴²¹ This inconsistency in part reflects the fact that democratic legitimacy cannot be reduced to electoral legitimacy alone, but is in practice a far more complex concept.⁴²² Cases such as Ukraine and Egypt suggest that foreign States may judge that a government which was

⁴¹⁷ For example, Christina M Cerna ‘Democratic Legitimacy and Respect for Human Rights: The New Gold Standard’ (*AJIL Unbound*, 23 January 2015) <www.asil.org/blogs/democratic-legitimacy-and-respect-human-rights-new-gold-standard>.

⁴¹⁸ Roth (n247) 189-90; cf Talmon (n381) 534–35.

⁴¹⁹ James Crawford, ‘Democracy in International Law: A Reprise’ in Gregory Fox and Brad Roth, *Democratic Governance in International Law* (CUP 2000) 117.

⁴²⁰ On the Egyptian case see Zeray Yihdego, ‘Democracy, People’s Uprisings and Unconstitutional Change of Government’ (*EJIL: Talk!*, 8 July 2013); ‘UK Materials on International Law’ (2014) 84 BYIL 526, 566.

⁴²¹ de Wet (n379) 986–90.

⁴²² Roth (n247) 422; Rim (n393) 697.

democratically elected has since lost popular support and hence has lost its legitimacy.⁴²³ In some cases the democratic nature of the initial election will be dubious (President Hadi for example came to power in a single-candidate election in Yemen in 2012).⁴²⁴ And arguably democratic legitimacy cannot be assessed separately from human rights considerations. The legitimacy of an illiberal populist regime which maintains majority support but engages in widespread violations of minority and individual rights is highly questionable.⁴²⁵

Where there is an internal conflict within a State and there has been no previous opportunity to hold free and competitive elections (for example, a situation of internal strife following a long period of authoritarian government), international actors may seek to assess the representative legitimacy of the contending forces on the basis of their commitment to the establishment of peaceful, democratic political processes within the State. For example, the UK when recognizing the NTC as the Libyan government characterised it as working towards an ‘inclusive political process’.⁴²⁶ Such judgments, however, seem inherently highly uncertain. As events in Libya show, verbal assurances of commitment to peace, inclusivity and democracy, while easily given, may not be borne out by subsequent developments. As a criterion for whether an entity forms the basis for an inclusive peace, States seem to consider whether it is ‘broad-based’ and includes representatives from the different ethnic, religious and political factions within the State.⁴²⁷ But again, it is difficult to judge from the outside whether such broad-based representation is real or merely tokenistic. A beleaguered authority’s claim to be broadly representative appears most likely to be widely accepted when

⁴²³ See for example the British representative’s description of Yanukovich as ‘a former leader...who suppressed protests against his Government leading to over 80 deaths, and whose own party abandoned him. The idea that his pronouncements now carry any legitimacy whatsoever is far-fetched’: S/PV.7125, 7; Ruys and Ferro (n302) 83.

⁴²⁴ Byrne (n5) 113.

⁴²⁵ Jean d’Aspremont, ‘Legitimacy of Governments in the Age of Democracy’ (2006) 38 NYUJILP 877, 880; Roth (n247) 119; Rim (n393) 697. See also ‘UK Materials in International Law’ (2011) 81 BYIL 453, 465 (Foreign Secretary stating that ‘elections alone do not create a free and democratic society’).

⁴²⁶ ‘UK Materials in International Law’ (2012) 82 BYIL 676, 742.

⁴²⁷ Talmon (n337) 240 –41.

it is itself the product of an internationally sponsored process to end internal conflict and establish inclusive government within the State.⁴²⁸ Such a transitional ‘unity’ government will likely retain its legal status as the government despite a loss of effective control in the face of ‘spoiler’ rebel groups refusing to comply with the transition agreement. This helps to explain the continued international acceptance of the Hadi government (and the condemnation of the Houthi rebels) in Yemen.⁴²⁹

Widespread violations of human rights and humanitarian law may also put in question the governmental status of an entity in certain circumstances. This cannot be the decisive criterion by itself, considering the number of governments with abysmal human rights records which nevertheless unquestionably retain governmental status.⁴³⁰ But, when combined with a significant loss of effective control, a regime’s resort to atrocities may be put in question whether it can still be accepted as representing the ‘national will’ of the State.⁴³¹ For example, the UK’s statement recognizing the NTC as the government of Libya stated that the Gaddafi regime’s ‘brutality towards the Libyan people has stripped it of all legitimacy.’⁴³²

Despite the increased importance of assessments of legitimacy in the identification of governments in recent years, it is clear that a single test for the determination of a government’s legitimacy cannot be discerned from State practice.⁴³³ Multiple factors are involved in determining whether an entity can be said to legitimately represent the State’s people. The weight given to each of these appears to vary. Alongside legitimacy

⁴²⁸ Benjamin Nussberger, ‘Military Strikes in Yemen in 2015: Intervention by Invitation and Self-Defence in the Course of Yemen’s “Model Transitional Process”’ (2017) 4 JUFIL 90, 117–21.

⁴²⁹ Ruys and Ferro (n302) 69–70; Nussberger (n428) 121–22.

⁴³⁰ Talmon (n381) 523–24.

⁴³¹ *ibid* 513.

⁴³² ‘UK Materials’ (n426) 742. See also Talmon (n337) 238–39.

⁴³³ Christine Gray, *International Law and the Use of Force* (3rd edn, OUP 2008) 99; Ruys and Ferro (n302) 81.

considerations, effective control also retains great importance. ‘Legitimate’ government which completely lack effective control rarely retain government status. Such situations have been confined to two situations: 1) where, as in Côte d’Ivoire and the Gambia, the opposition candidate is internationally recognized as President despite the incumbent’s refusal to stand aside, immediately following an internationally monitored election which provides a decisive and up-to-date expression of the popular will, and 2) where governments elected in an internationally monitored election have been deposed by military coups, as in Haiti and Sierra Leone, which arguably had manifestly little popular support.⁴³⁴ However, there is no rigid rule applied to coups against elected governments. The international community implicitly asserts the right to judge the level of public support and democratic legitimacy for a deposed government on a case-by-case basis.

In situations of civil war where effective control of the State is divided, legitimacy factors are taken into account alongside effective control in determining recognition.⁴³⁵ Legitimacy factors may be used to justify what would be otherwise a premature recognition of a putative government that has established effective control over some of the territory but has not clearly defeated the existing government. This approach is reflected in the early recognition of the NTC by certain States, with the UK for example referring both to ‘the responsibilities it has taken on in the areas under its control’ and ‘its commitment to a more open and democratic Libya’.⁴³⁶ More commonly, however, legitimacy criteria appear to be used to support the continued recognition of the established government (reinforcing the general preference for established governments). Assessments of legitimacy appear able to compensate to a significant degree for a government’s lack of effective control or its reliance

⁴³⁴ Fox (n256) 837. Cf the situation in Honduras, where the President’s removal was not recognized despite its endorsement by the legislature and Supreme Court: Roth (n414).

⁴³⁵ For an example of the two criteria being utilised together, see ‘Contemporary Practice of the United States’ (2013) 107 AJIL 431, 436-37 (announcing recognition of the Somali Federal Government).

⁴³⁶ ‘UK Materials’ (n426) 742.

on foreign support.⁴³⁷ Thus, the weak and dependent but nonetheless (formally) constitutional and democratic governments of Afghanistan and Iraq remain governments.⁴³⁸ These cases also help demonstrate the relativity of recognition – since leaving a State without a recognized government is avoided if at all possible,⁴³⁹ an imperfectly effective and legitimate government may be nonetheless continue to be recognized if there is no viable alternative, either because the rebel forces are not sufficiently cohesive or because they are seen as entirely illegitimate.⁴⁴⁰ Thus the faults of the Afghan and Iraqi governments are palliated because the main challengers they face are the Taliban and ISIL.

Recognition by the United Nations, Regional Organizations and other States

It has been established that the identification of a State's government is not determined by a single clear-cut legal test. While effective control remains the starting point, practice shows that an authority's lack of effectiveness may be compensated for by other factors indicating that it is nonetheless the most legitimate representative of the 'national will.' But legitimacy, as has been shown, involves balancing a range of factors and applying them to the often complex facts of each particular case. Thus, the identification of a State's government requires a judgment in cases of dispute, one which inevitably involves a significant degree of discretion.⁴⁴¹ In the international legal order, such discretion can only be exercised by other States, either acting individually or acting collectively through international and regional organizations.⁴⁴² It has been observed that representation at the

⁴³⁷ Talmon (n381) 519; Byrne (n5) 115-16 (referring to widespread recognition of Somali Federal Government despite reliance on African Union troops for its continued existence).

⁴³⁸ Georg Nolte, 'Intervention by Invitation' in Wolfrum (n225).

⁴³⁹ Wippman (n195) 233.

⁴⁴⁰ Doswald-Beck (n243) 199; Byrne (n5) 116.

⁴⁴¹ Talmon (n365) 285 observes that even the criterion of effective control is relative and hence its assessment is often influenced by subjective political considerations of approval and disapproval of the regime in question.

⁴⁴² ILA Use of Force Committee (n211) 267–68.

UN (and in regional organizations)⁴⁴³ has in practice taken on a central role in determining governmental status, particularly since the end of the Cold War.⁴⁴⁴ Moreover, it has become common in recent years for the Security Council to explicitly endorse the legitimacy of particular governments facing challenges to their effective control – as in Mali, Iraq and Yemen – thus cementing their legal status.⁴⁴⁵ Regional organizations have also taken up an active role in identifying governmental status, decisions which may then be affirmed explicitly or implicitly through the United Nations. ECOWAS and the AU, for example, recognized Adama Barrow as President of the Gambia on his election victory, a decision endorsed by the Security Council in Resolution 2337.⁴⁴⁶ This constitutes a form of collective recognition process which provides a clear resolution as to the identity of a troubled State's government.

What about in cases where the Security Council does not speak so clearly? Does the increasing reliance of States on contentious legitimacy factors open the door to contradictory individual recognition decisions by States, with different States recognizing different sides in an internal conflict as the government of the State? This occurred to some degree during the Libyan Civil War, with arguably premature recognition of the NTC in July 2011 by some States such as the UK, while other States, particularly in Africa, continued to resist such a move until months later.⁴⁴⁷ However, a clear and explicit divergence on the identity of a State's legal government has remained rare. Even in cases of deep divisions as to the

⁴⁴³ See Rim (n393) 685 -87 for the role of ECOWAS and AU in the recognition of Ouattara as President of Côte d'Ivoire.

⁴⁴⁴ Rosalyn Higgins, 'International Law and Civil Conflict' in Evan Luard (ed) *The International Regulation of Civil Wars* (Thames and Hudson 1972) 181; Doswald-Beck (n243) 199, Roth (n247) 126; Lieblich (n104) 232; Ruys and Ferro (n302) 82; Grant (n346) 322; Nussberger (n428) 125. See also 'Draft Resolution' (n400).

⁴⁴⁵ Recognition by the Security Council of the legitimacy of the Malian government rebutted any questions which might have been raised about its loss of effectiveness over much of the territory and also its lack of legitimacy (given its origins in a military coup): Amy Laird 'Mali: A Legally Justifiable Intervention by France?' (2012) 10 NZYIL 123, 127.

⁴⁴⁶ Kress and Nussberger (n303).

⁴⁴⁷ Warbrick (n397) 253–56.

legitimacy of the different sides in an internal conflict, the existing legal government will generally continue to be accepted *as the government* until there is an international consensus for the recognition of a new government.⁴⁴⁸ The long-running Syrian conflict provides a demonstration of this point. A significant number of States have condemned the Assad regime as illegitimate and recognized the Syrian National Council as ‘the legitimate representative of the Syrian people’.⁴⁴⁹ Yet in the face of continued support of the Assad government by Russia and other States, these States have not gone so far as to recognize the Council as the *government* of Syria.⁴⁵⁰ In fact, over the course of the Syrian Civil War the Security Council, while carefully abstaining from identifying the Assad government as legitimate, nevertheless has continued to refer to it as ‘the Syrian government’ (as for example in SC Resolution 2268).⁴⁵¹ This practice suggests that even when many members of the international community reject the legitimacy of an existing government and desire its removal, they nonetheless are generally unwilling to take the step of derecognizing it *as the government* without international consensus.⁴⁵² This may reflect States’ understanding of the destabilising effect such divergence could cause for the *jus ad bellum*, potentially licensing

⁴⁴⁸ Cf John Norton Moore, ‘The Control of Foreign Intervention in Internal Conflict’ (1969) 9 VJIL 205, 277: ‘In most internal conflicts, it is readily apparent which side is the incumbent and which side is the insurgent. Such factors as wide diplomatic recognition, historical continuity of political authority, continuous exercise of administrative functions, control of the regular military apparatus, representation in international organizations, and continuous control of the major cities and ports, set the two factually apart.’

⁴⁴⁹ Talmon (n337) 219–26.

⁴⁵⁰ Claus Kress, ‘Major Post-Westphalian Shifts and Some Important Neo-Westphalian Hesitations in the State Practice on the International Law on the Use of Force’ (2014) 1 JUFIL 11, 26–27. Only Libya seems to have recognized the Syrian National Council as the Government of Syria: Mélanie De Groof, ‘Arms Transfers to the Syrian Arab Republic: Practice and Legality’ (GRIP 2013) 30, available at <www.grip.org/fr/node/1132>.

⁴⁵¹ The Assad regime also continues to control Syrian embassies abroad, even in countries which have recognized the opposition as the legitimate representative of the people: Talmon (n337) 231–32. Its capacity to accede to the Chemical Weapons Convention on behalf of Syria was also recognized, as was, it appears, its ability to consent to Russian airstrikes against ISIL: Bannelier-Christakis (n315) 761–63. In contrast to its continued acceptance at the UN, the Arab League has rejected the Assad government’s credentials: Jean d’Aspremont, ‘Regimes’ Legitimacy Crises in International Law: Libya, Syria and Their Competing Representatives’ in Rainer Grote and Tilmann J Röder, *Constitutionalism, Human Rights and Islam After the Arab Spring* (OUP 2016) 67.

⁴⁵² Talmon (n337) 239.

competing ‘interventions by invitation’ at the request of different parties.⁴⁵³ The practice of collective recognition through the Security Council and the general unwillingness of individual States to derecognize existing governments in the absence of an international consensus prevent such a divergence, although recent trends suggest grounds for concern as to whether States’ restraint in this regard will be maintained into the future.⁴⁵⁴

Conclusion

This chapter has outlined the basic contours which international law sets down for the operation of consent as a legal basis for the use of force. While international law requires that consent be free and genuine, there are no specific rules about the form and procedure by which consent can be expressed. Consent may only be given by the highest officials within the State’s government. There is no single test for identifying a State’s government, with effective control and a range of legitimacy criteria all being potentially relevant. In practice, international recognition usually provides a sufficiently clear answer as to the identity of a State’s government, even in situations of civil war and internal strife.

The thesis now turns to whether, as many argue, there exists a rule of international law which prohibits a State’s internationally recognized government from consenting to intervention in its favour in the course of a civil war. However, the issues discussed in this chapter remain of relevance in the remainder of the thesis. In particular, the apparent (and inconsistent) introduction of assessments of democratic, constitutional or humanitarian legitimacy as criteria for governmental recognition undermines the logic underlying the alleged prohibition on pro-government intervention in civil wars, an argument which will be developed further in the final chapters of the thesis.

⁴⁵³ Although this problem has occasionally arisen: for analysis of the competing interventions by France and Libya in Chad in the 1980s, see Gray (n433) 97; Le Mon (n343) 773, and Chapter 4 below.

⁴⁵⁴ As the Syrian case has shown, competing interventions can occur even without the formal recognition of different governments: Nolte (n4) 243.

Chapter 3: The Alleged Prohibition of Pro-Government Intervention in Civil Wars in Scholarship and Case Law

A. The Scholarly Debate: an Overview

The rest of this thesis will be dedicated to the question of whether an alleged prohibition on pro-government intervention in civil wars exists as a positive rule of international law, as is widely held in the academic literature.⁴⁵⁵ This chapter surveys the academic debate concerning the alleged prohibition on pro-government intervention in the UN Charter era, and also considers ICJ case law relevant to the issue. It will show that, as in the pre-Charter era, scholars have remained divided as to the existence of the alleged prohibition.⁴⁵⁶ Support for the prohibition increased as the Cold War intensified from the 1950s onwards. The case for it was bolstered during this period by a renewed emphasis on non-intervention⁴⁵⁷ and on the emergence of self-determination as a key international legal principle.⁴⁵⁸ Concern at the widespread occurrence in practice of intervention in internal conflicts in weaker (often newly independent) States by the rival ideological blocs, each seeking to ensure an ideologically sympathetic government, provided a practical motive for scholars to support the prohibition.⁴⁵⁹ However, it was often unclear whether scholars were asserting the prohibition was to be an existing rule of international law or rather endorsing it *de lege ferenda*, and there remained a significant body of scholarship which expressed scepticism about the alleged prohibition on the grounds that it did not accord with State practice and *opinio juris*. The post-Cold War era has seen an increase in the number of

⁴⁵⁵ The term 'intervention' in the phrase 'pro-government intervention' is used to denote the factual situation of one State's involvement in a conflict in another on the side of the latter's government. It is not intended to prejudge whether such a factual situation falls within the category of *illegal* intervention.

⁴⁵⁶ Moore (n448) 245, Bannelier-Christakis (n315) 745.

⁴⁵⁷ See Maziar Jamnejad and Michael Wood (2009) 'The Principle of Non-Intervention' (2009) Leiden JIL 345, 347.

⁴⁵⁸ See generally Cassese (n78) 101–40.

⁴⁵⁹ Moore (n448) 210, 232; Evan Luard, 'Civil Conflicts in Modern International Relations', in Luard (n444) 11–15; Nolte (n124) 632–33.

sceptics. This can be linked with a decline in fears about the escalation of intervention into superpower conflict, combined with a new openness to international action to address the instability and humanitarian distress caused by internal ethnic conflicts within weak or ‘failed’ States.⁴⁶⁰ Nonetheless, the general prohibition retains much support and no consensus view has been reached. Turning from the scholarship to the case law, the relevant ICJ judgments in *Nicaragua* and *Armed Activities* indicate a general acceptance of the legality of pro-government intervention and provide no support for the alleged prohibition, although neither are they necessarily incompatible with it.⁴⁶¹

Among those who accept the alleged prohibition as an existing international norm, there remains disagreement about its exact nature and scope. A key issue is to define more precisely in what circumstances the alleged prohibition applies. The prohibition is commonly described in the literature as applying in situations of civil war,⁴⁶² a framing which is reflected in the influential IDI resolution of 1975, entitled ‘The Principle of Non-Intervention in Civil Wars.’⁴⁶³ Because it is so common, the phrasing has been generally used to describe the alleged prohibition in this thesis.⁴⁶⁴ Delineating the prohibition this way does however raise the difficult question of what precisely the criteria are for ‘civil war’, a term which has no clear definition in current international law.⁴⁶⁵ An alternative conception of the prohibition understands it as prohibiting any foreign intervention which has the purpose of deciding a

⁴⁶⁰ Roth (n5) 45.

⁴⁶¹ Lieblich (n104) 150–52.

⁴⁶² See for example Rein Müllerson, ‘Intervention by Invitation’ in Lori F Damrosch and David J Scheffer (eds) *Law and Force in the New International Order* (Westview 1991), 132; Anthony C Arend and Robert J Beck, *International Law and the Use of Force: Beyond the UN Charter Paradigm* (Routledge 1993) 81–82, 84–85; Peter Malanczuk, *Akehurst’s Modern Introduction to International Law* (7th ed 1997) 318–26; Gray (n433) 81, 92; Fox (n256) 827–28.

⁴⁶³ ‘The Principle of Non-Intervention in Civil Wars’ (14 August 1975), available at <www.idi-iiil.org/app/uploads/2017/06/1975_wies_03_en.pdf>.

⁴⁶⁴ Cf Klingler (n336) 492–98.

⁴⁶⁵ As acknowledged by a 2007 legal opinion of the UN Secretariat: ‘Note to the Assistant Secretary-General for Political Affairs, Regarding the Usage of the Term “Civil War”’ (2007) UN Jurid YB 458, 459, quoted in Fox (n256) 827.

contest for political power within a foreign State, whether or not the conditions in the foreign State can be described as constituting a civil war.⁴⁶⁶ Another area of disagreement concerns the kinds of conduct that are ruled out by the prohibition when it does apply. While it is generally accepted by its proponents that the prohibition forbids direct deployment of foreign troops against opposition forces, there is less agreement as to whether it would prevent indirect assistance to a government such as the supply of arms or training and logistical support.⁴⁶⁷

The purpose of this chapter is to provide an overview of the disagreements in the scholarship about the existence, nature, and scope of the alleged prohibition. By showing that the treatment of the alleged prohibition remains contradictory and often confused, the chapter seeks to establish that it remains an issue worthy of further scholarly analysis. The remaining chapters of the thesis seek to provide an analysis of why there are such deep disagreements in the scholarship, tracing this to the ambiguities in the State practice and *opinio juris* and to the different methodologies of international law which it will be argued underlie the conflicting views.

B. Pre-Charter Debates: Non-Intervention and Recognition of Belligerency

Debates about the legitimacy of pro-government intervention in situations of internal conflict are not new. Before the Charter, a strand in the scholarship argued that the principle of non-intervention, already recognized as a cardinal rule of international law, prohibited foreign assistance to either side of a civil war.⁴⁶⁸ This view was connected with the doctrine of ‘recognition of belligerency’, according to which internal conflicts, once they passed a

⁴⁶⁶ Corten (n1) 288–89; Bannelier-Christakis (n315) 747.

⁴⁶⁷ Kress (n450) 18; Tom Ruys, ‘Of Arms, Funding and “Non-Lethal Assistance” – Issues Surrounding Third State-Intervention in the Syrian Civil War’ (2014) 13 CJIL 13, 43–44.

⁴⁶⁸ For an overall examination of pre-Charter law see Lieblich (n104) 71–121, 131–34. For a list of pre-1945 scholars taking this view, see Quincy Wright, ‘United States Intervention in the Lebanon’ (1959) 53 AJIL 112, 122 (fn 34).

certain threshold of gravity, could be recognized as carrying the same legal consequences as international conflicts, including the application of the law of neutrality to govern relations between the belligerents and third States.⁴⁶⁹ The criteria for belligerency recognized in a 1900 IDI resolution mirrored those in much of the literature: 1) the rebels must have established control over a determinate part of the national territory and 2) have established a regular government there, as well as 3) employing organized military forces subject to military discipline and acting in conformity with the laws and customs of war.⁴⁷⁰

Despite these arguments, it is clear that no prohibition on pro-government intervention in civil wars emerged during the pre-Charter era. Practice indicates that, in the absence of recognition of belligerency, there was no obligation to refrain from intervening in favour of a government faced with internal conflict.⁴⁷¹ Nor did States acknowledge any obligation to recognize belligerency when the factual criteria were met; the criteria were vague and the decision in practice remained a matter of free discretion.⁴⁷² This accords with the basic fact that international law during this period did not outlaw recourse to inter-State force.⁴⁷³ Any restrictions imposed on intervention by the 'law of peace' were able to be set

⁴⁶⁹ For overviews see Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012) 9-20; Yair M Lootsteen 'The Concept of Belligerency in International Law' (2000) 166 MLR 109; Sam Foster Halabi, 'Traditions of Belligerent Recognition: The Libyan Intervention in Historical and Theoretical Context' (2012) 27 AUJLR 321.

⁴⁷⁰ IDI, 'Droits et devoirs des Puissances étrangères, au cas de mouvement insurrectionnel, envers les gouvernements établis et reconnus qui sont aux prises avec l'insurrection' (8 September 1900), art 8, available at <www.idi-iil.org/app/uploads/2017/06/1900_neu_02_fr.pdf>.

⁴⁷¹ *ibid*, art 7; Convention on the Rights and Duties of States in the Event of Civil Strife (adopted 20 February 1928, entered into force 21 May 1929) 134 LNTS 45, art 1(3) (supply of arms to be forbidden, 'except when intended for the government', unless belligerency recognized); James Garner 'Questions of International Law in the Spanish Civil War' (1937) 31 AJIL 66, 68; Norman Padelford, 'The International Non-Intervention Agreement and the Spanish Civil War' (1937) 31 AJIL 578, 586.

⁴⁷² Luard (n459) 20; Charles Zorgbibe, 'Sources of the Recognition of Belligerent Status' (1977) 17 IRRC 111, 113; Sivakumaran (n469) 14; cf Lauterpacht (n276) 186. See Lootsteen (n469) 117-18; Fox (n256) 822-23.

⁴⁷³ Lieblich (n104) 75-76.

aside at any time by a decision by the intervening State to declare war, and were thus radically contingent.⁴⁷⁴

The general assumption in the post-1945 literature, that international law before the Charter imposed no limits on a State's ability to intervene in a civil war on the side of the government,⁴⁷⁵ is therefore correct. Even if the pre-Charter doctrine of belligerent recognition had imposed real limitations on foreign involvement in civil wars, the doctrine has fallen into general disuse in the Charter era.⁴⁷⁶ The extreme rarity of recognition of belligerency, despite the many internal conflicts which have occurred, establishes that there is no current duty to accord such recognition and thus that the doctrine provides no basis for a general prohibition on military assistance to governments faced with civil wars. If it is to be shown to exist, the prohibition must rather be established on the basis of developments since 1945.

C. Scholarship in the Cold War Period: Extensive Support for the Alleged Prohibition

Cold War Scholarship: the 1950s to the 1970s

A new era in the debate about the legal regulation of pro-government foreign intervention seems to have emerged in the mid to late 1950s.⁴⁷⁷ By this time the dominant role that internal conflict, rather than inter-State war, would play in the Charter era had become clear,⁴⁷⁸ and several prominent instances of 'intervention by invitation' had occurred. A number of scholars wrote to provide support for the view that international law imposed

⁴⁷⁴ Crawford (n242) 381-82; Lieblich (n104) 91.

⁴⁷⁵ Moore (n448) 316; Doswald-Beck (n243) 90. Cf Wright (n468) 121-22 and Higgins (n444) 171, who seem to assume that pre-1945 law prohibited pro-government intervention in civil wars.

⁴⁷⁶ Sivakumaran (n469) 19-20; Ministry of Foreign Affairs of Colombia, 'Recognition of State of War Respecting the FARC' (1999) 2 YIHL 440, 441; Higgins (n444) 171.

⁴⁷⁷ Doswald-Beck takes 1956 as her starting point, finding 'surprisingly consistent' practice since that point: (n243) 213.

⁴⁷⁸ Luard (n459) 7.

limits on a State's ability to consent to foreign intervention in situations of civil war or revolution, including Elihu Lauterpacht,⁴⁷⁹ Gerald Fitzmaurice,⁴⁸⁰ Ian Brownlie,⁴⁸¹ Quincy Wright,⁴⁸² and Ann van Synen and A J Thomas.⁴⁸³ These authors however differed both as to the scope of the prohibition and the degree of certainty with which they endorsed it.

Wright endorsed the most categorical rule against military assistance to governments. In his view, such assistance was prohibited in 'situations of rebellion, insurrection or civil war, whether its purpose is to form a new government, to establish a new State, or to unite with another State'.⁴⁸⁴ He justified the prohibition on the basis that such a rule is necessary to preserve State independence, as well as to prevent civil war escalating into inter-State war.⁴⁸⁵ For Wright, the precondition for the application of the prohibition was not the application of the traditional criteria for recognition of belligerency such as the exercise of territorial control by the rebels, but simply the existence of uncertainty as to the outcome of the insurrection,⁴⁸⁶ a test later criticised as unworkably vague.⁴⁸⁷ Unlike other proponents of the prohibition, Wright did not acknowledge an exception allowing military aid to the government in response to previous illegal assistance to the opposition forces, arguing that such 'counter-intervention' required UN approval.⁴⁸⁸

⁴⁷⁹ 'The Contemporary Practice of the United Kingdom in the Field of International Law – Survey and Comment' (1958) 7 ICLQ 92, 99.

⁴⁸⁰ 'The General Principles of International Law Considered from the Standpoint of the Rule of Law' (1957) 92 RdC 1, 179.

⁴⁸¹ Ian Brownlie, *International Law and the Use of Force by States* (Clarendon 1963) 321–27.

⁴⁸² Wright (n468) 119–25.

⁴⁸³ Thomas and Thomas (n245) 215–21.

⁴⁸⁴ Wright (n468) 121.

⁴⁸⁵ *ibid* 122.

⁴⁸⁶ *ibid*.

⁴⁸⁷ Moore (n448) 316–17.

⁴⁸⁸ Quincy Wright, 'Non-Military Intervention' in Karl Deutsch and Stanley Hoffmann (eds) *The Relevance of International Law* (Schenkman 1968) 16–17; cf Moore (n448) 327–31.

Lauterpacht's test for the application of the prohibition was more complex. He argued that a legal limitation on pro-government intervention arose from the inalienable right of the people of a State to determine their own future, free from foreign interference.⁴⁸⁹ However, he clarified that the scope of such a rule was somewhat limited: it did not apply 'to any degree of internal strife which could...be called a 'civil war' or revolution, but only to a struggle which reflected the development of a strong popular movement against the government, of such dimensions as to stand a reasonable chance of success if not obliged to contend against alien as well as domestic authorities'.⁴⁹⁰ He went on to assert that the test for the application of the prohibition is 'analogous to, if not identical with' that used for the recognition of belligerency of the rebels, suggesting that as well as the existence of a 'strong popular movement' the rebels have to exercise the degree of territorial control required by that doctrine.⁴⁹¹ A similar approach was taken by Brownlie, although his position was tentative, admitting 'diverse and contradictory trends' in State practice.⁴⁹² Fitzmaurice, in contrast, focussed more exclusively on the question of popular support as the decisive test, stating that '[t]he legality of assisting the government must depend in the last resort on how far the true national conscience and will seem to be involved in the opposition manifested to it'.⁴⁹³

The trend towards anti-interventionism in the scholarship continued during the 1960s and 1970s. In this context, Richard Falk suggested that military assistance to influence the outcome of a genuinely internal struggle for control of a national society was 'inappropriate' unless it was responding to prior foreign intervention or endorsed by the

⁴⁸⁹ Lauterpacht (n479) 103.

⁴⁹⁰ *ibid* 108.

⁴⁹¹ *ibid* 104.

⁴⁹² Brownlie (n481) 327.

⁴⁹³ Fitzmaurice (n480) 179.

United Nations.⁴⁹⁴ A particularly sophisticated schema for analysing the permissibility foreign intervention was put forward by John Norton Moore in 1969. Moore distinguished between 1) ‘non-authority oriented conflicts’ – situations of disorder within a State in the absence of an organized force seeking to overthrow and replace the government; 2) anti-colonial conflicts; 3) wars of secession; and 4) ‘indigenous conflict for the control of internal authority structures.’⁴⁹⁵ In the first kind of conflict military assistance to the government should be permitted, on the basis that the right to self-determination did not come into play in the absence of an alternative government seeking to represent the State’s people.⁴⁹⁶ In the second category, assistance to a colonial government should be prohibited on self-determination grounds.⁴⁹⁷ More tentatively, he asserted that in general assistance to either side in a war of secession should be prohibited absent UN authorisation, given the difficulties in identifying which peoples seeking secession possessed the right and the dangers of competing interventions.⁴⁹⁸ In the fourth category – an internal struggle in which rebels ‘aimed at the overthrow of the recognized government and its replacement by a political organization controlled by the insurgents’ – Moore argued that a prohibition on assistance to either side was ‘probably’ justified on self-determination grounds, given the difficulty of determining whether government or rebels had the better claim to represent the State’s people.⁴⁹⁹ However, for this limit based on self-determination to displace the general legality of military assistance to governments, the internal struggle for political authority had to be serious enough to be classified as an ‘insurgency.’ Relevant criteria for assessing this were whether the government was forced to make use of most of its regular military forces

⁴⁹⁴ Richard A Falk, *Legal Order in a Violent World* (Princeton 1968) 227–28.

⁴⁹⁵ Two other scenarios were also referred to: the external imposition of authority structures with no plausible claim of substantial indigenous support, and Cold War situations of ‘divided nations’.

⁴⁹⁶ Moore (n448) 259.

⁴⁹⁷ *ibid* 266.

⁴⁹⁸ *ibid* 269.

⁴⁹⁹ *ibid* 273.

against the rebels, whether the rebels prevented the government from exercising authority over a significant proportion of the population, and whether a significant proportion of the population supported the rebels.⁵⁰⁰ Even in an internal struggle for governmental control meeting these criteria, foreign military assistance to the government remained permissible: 1) as counter-intervention in response to previous foreign assistance to the opposition, or 2) if the foreign involvement was non-partisan and took place ‘for the purpose of restoring orderly processes of self-determination.’⁵⁰¹ Also, pre-insurgency levels of military assistance to the government could be maintained, since cessation of such assistance could itself constitute intervention in favour of the rebels.⁵⁰² Moore was tentative about whether his framework for assessing intervention in fact reflected existing international law, limiting himself to asserting that there was a ‘good case’⁵⁰³ that it did so and acknowledging the lack of clarity about the legal position.⁵⁰⁴

A survey of these scholars’ views show a shared sense that some kind of prohibition on assistance to governments in civil war situations was desirable, and that such a prohibition would be in line with the underlying principles of Charter-era international law. However, there were clearly variations in how firmly the prohibition was asserted as an existing rule of positive international law. The exact threshold for its application was also unclear. Various factors were referred to, including the nature of the internal strife confronting the government, the level of popular support enjoyed by the opposition, the degree of territorial control it exercised, its level of organization, and its prospects of success. Some also suggested that the purposes of the foreign intervention would be relevant, indicating that neutral or non-partisan action might be permitted. A right to counter-

⁵⁰⁰ *ibid* 275-76.

⁵⁰¹ *ibid* 280.

⁵⁰² *ibid* 334-35.

⁵⁰³ *ibid* 337.

⁵⁰⁴ *ibid* 210.

intervention in response to prior foreign assistance to the opposition was generally, but not universally, acknowledged.

In contrast to the growing strain in the literature supportive of the alleged prohibition, there remained other scholars who denied its existence. Commonly, this was on the basis that the regular occurrence of intervention in foreign internal conflicts indicated that no such prohibition on military assistance to governments could be established from State practice and *opinio juris*. J H Leurdijk indicated that, although a certain degree of academic consensus was developing in favour of an alleged prohibition on assistance to governments (at least concerning conflicts for control of an existing State, as opposed to secessionist conflicts), this view was contradicted by widespread practice.⁵⁰⁵ Some writers such as Tom Farer went so far as to question whether any prohibition on intervention in civil wars, either on the side of the government or the rebels, existed as part of international law *de lege lata*, given widespread contrary practice.⁵⁰⁶ Others took the view that while sufficient *opinio juris* could be found to support a prohibition on assistance to rebels (despite the regular occurrence of such assistance in practice), a corresponding prohibition on pro-government intervention did not exist.⁵⁰⁷ Thus, Antonio Cassese affirmed in 1975 that ‘in civil wars States are duty bound not to help insurgents, while they can give any assistance to the rightful government’, a position he described as ‘common knowledge.’⁵⁰⁸

⁵⁰⁵ J H Leurdijk, ‘Civil War and Intervention in International Law’ (1977) 24 NILR 143, 156.

⁵⁰⁶ ‘Intervention in Civil Wars: A Modest Proposal’ (1967) 67 Col LR 266, 272-73; see also Weisburd (n340) 207-08. Farer suggested *de lege ferenda* a rule prohibiting open participation by foreign troops in combat operations, but allowing all others forms of assistance to either side, on the grounds of its greater simplicity and transparency.

⁵⁰⁷ Eugene V Rostow, ‘Remarks’ (1973) 67 Proc ASIL 263, 268; ‘Book Review: Law and the Indo-China War’ (1973) 82 Yale LJ 829, 852-53.

⁵⁰⁸ Antonio Cassese, ‘The Spanish Civil War and the Development of Customary Law Concerning Internal Armed Conflicts’, in A Cassese (ed), *Current Problems of International Law: Essays on UN Law and the Law of Armed Conflict* (Giuffrè 1975) 287.

The 1975 IDI Resolution

The increasing attention to intervention in internal conflicts among international lawyers led to the topic being taken up by the IDI in the 1970s. The rapporteur, Dietrich Schindler, held in his 1973 report that the law in many aspects was unclear and that it was difficult to determine the existence of a general legal rule limiting the permissibility of military assistance to governments in civil wars.⁵⁰⁹ However, certain members pressed for the enunciation of a comprehensive prohibition on assistance to either side in a civil war.⁵¹⁰ After a complex series of debates, in its final resolution adopted at its 1975 Wiesbaden session the IDI endorsed a prohibition applying to assistance both to governments and rebels: ‘Third States shall refrain from giving assistance to parties to a civil war which is being fought on the territory of other States’ (art 2, para 1).⁵¹¹ However, the final vote for the resolution indicated a lack of deep consensus in support of the resolution, with 17 votes in favour, 6 against, and a very high 16 abstentions.⁵¹² It is not absolutely clear from the language used (States ‘shall refrain...’) whether the rule is envisaged as an existing prohibition of international law, or as desirable *de lege ferenda*. In fact, there were different views among IDI members on this question.⁵¹³

The threshold for application of the prohibition is delimited by the concept of ‘civil war.’ Art 1, para 1 defines this term as follows:

any armed conflict, not of an international character, which breaks out on the territory of a State and in which there is opposition between: a) the established

⁵⁰⁹ ‘Le principe de non-intervention dans les guerres civiles: Rapport provisoire’ (1973) 55 AIDI 416, 449-50.

⁵¹⁰ Nolte (n4) 242.

⁵¹¹ (n463).

⁵¹² ‘Délégations de l’Institut en séances plénières’ (1975) 56 AIDI 411, 473–74. Before this, the text of the core article prohibiting intervention was adopted 22-2-10: 458. However, there were varying reasons for the disagreement: some thought that the resolution was not supported by practice, others thought more needed to be said about self-determination, to guarantee the right of foreign States to support anti-colonial self-determination movements. Cf Nolte (n4) 242–43.

⁵¹³ ‘Délégations’ (n512) 413–14.

government of a State 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 part of the State, or b) between two or more groups contending for control of the State in the absence of an established government.

The resolution thus suggests two criteria which need to exist for a situation of internal strife to be classified as a civil war in which assistance to the government is prohibited (setting aside the situation in which there is no established government). Firstly, there must be an opposition movement (or several) animated by one of two purposes: either the overthrow of the existing government as the government of the whole State, or the achievement of independence or autonomy for a sub-unit within the State. The emphasis on the purpose of the opposition group as a basis for distinguishing different kinds of internal conflict is reminiscent of Moore's typology as discussed above.⁵¹⁴ The concept of 'civil war' used in the resolution applies to two of the kinds of conflicts distinguished by Moore: 1) indigenous conflict for the control of the State's authority structures and 2) secessionist conflicts. In contrast, Moore's category of 'non-authority oriented conflicts', where the opposition to the government does not have such a coherent and far-reaching aim, does not appear to fall within the definition. This suggests that foreign assistance to the government in such conflicts may be legal, impliedly upholding Moore's reasoning that such conflict does not raise an issue of self-determination owing to the lack of any real political alternative for the people of the State to choose in this situation.⁵¹⁵

As well as this requiring that the insurgent group be motivated by a sufficiently political purpose, the resolution suggests a second criterion for civil strife to constitute civil war: it must reach a certain degree of intensity and organization. The starting point of the

⁵¹⁴ Cf Arend and Beck (n462) 81.

⁵¹⁵ This assumes that the reference in the resolution to the aim of overthrowing of the government includes an aim to replace it, since the choice between government and anarchy could hardly be seen as validly raising a self-determination issue: Thomas and Thomas (n245) 220–21; Wippman (n195) 233.

definition is that a civil war is an ‘armed conflict, not of an international character’. The definition thus draws upon a concept recognized in IHL since the adoption of the Geneva Conventions of 1949,⁵¹⁶ common article 3 of which applies minimum rules to non-international armed conflicts. The concept is not further defined either in common article 3 or in the 1975 IDI resolution. The latter however does go on to explicitly exclude ‘local disorders and riots’ from its definition of ‘civil war.’ From the contrast drawn between ‘armed conflict’ and ‘local disorders and riots’, the following requirements for the existence of a ‘civil war’ can be discerned. Firstly, the insurgents must be deploying *armed* force, going beyond protest and ‘standard’ law-breaking to utilise military methods against the government. Secondly, and relatedly, rather than being a disorderly mass, the opposition must be an organized group capable of deploying military force in a coordinated way. The resolution thus implicitly reflects the two criteria developed later by the ICTY in *Tadić* and subsequent cases for the existence of a non-international armed conflict– the existence of ‘protracted armed violence’⁵¹⁷ (interpreted ‘in practice...as referring more to the intensity of the armed violence than to its duration’)⁵¹⁸ and of ‘parties that are sufficiently organized to confront each other with military means’.⁵¹⁹ The 1975 resolution seems to indicate a further requirement with its exclusion of ‘local’ disturbances from the concept of civil war, suggesting that to constitute a civil war the conflict must reach a certain geographical extent. By excluding internal strife that does not meet these criteria from the definition of ‘civil war’ which governs the scope of the prohibition, the resolution implies that assistance to governments in such circumstances generally remains legal.

⁵¹⁶ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (and accompanying conventions), art 3.

⁵¹⁷ *Prosecutor v Tadić*, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995) [70].

⁵¹⁸ *Prosecutor v Haradinaj* (Judgement) IT-04-84-T (3 April 2008) [49].

⁵¹⁹ *ibid* [60]. See also de Wet (n379) 993; Klingler (n336) 496.

The concept of ‘civil war’ as defined in the IDI resolution seems broader than the criteria for recognition of belligerency,⁵²⁰ lacking the territorial and administrative control requirements of the latter.⁵²¹ Nor is there an explicit requirement that the rebels must be subject to military discipline and abiding by the laws of war.⁵²² Also lacking are the requirements suggested by Lauterpacht, Brownlie and others that the insurgents must have a reasonable chance of success and substantial popular support, reflecting an attempt to impose a stricter, more objective anti-interventionist rule. The original draft resolution proposed by Schindler had in contrast limited the application of the prohibition to situations where the rebels had gained the control of determinate part of the State’s territory and the support of at least a significant proportion of the population.⁵²³ As adopted, the resolution seemed to envisage a relatively low threshold for the application of the alleged prohibition: it would apply as long as the opposition are using armed force for one of the specified political aims on a more than local scale.

Once the existence of a civil war had been established, another issue which arises is what kinds of action by a foreign State constitute impermissible intervention. The IDI’s formulation, a general prohibition on ‘assistance’ to either party, was specified to include not only the sending of troops, but also providing training to regular or irregular forces or supplying weapons or war material (or allowing them to be supplied by private actors). Even the giving of financial and technical aid was included in the prohibition if likely to influence the outcome of the civil war (art 2, para 2). However, purely humanitarian aid, the continuation of technical or economic aid which is not likely to have any substantial impact

⁵²⁰ Dietrich Schindler ‘Rapport définitif’ (1973) 55 AIDI 545, 549; de Wet (n379) 993.

⁵²¹ Cf Klingler (n336) 497.

⁵²² Although the provision in the chapeau reserving for further study ‘severe infringements of human rights during civil war’ may be relevant in circumstances where the opposition are committing serious war crimes.

⁵²³ ‘Projet de resolution’ (1973) 55 AIDI 568, 570 (art 3).

on the civil war, and assistance prescribed, recommended or authorised by the United Nations were permitted (art 3).

As an exception to the general prohibition on assistance to either party, in line with the scholarship the resolution allows for counter-intervention where assistance has been already given to the other party (art 5), although with the caveat that such counter-intervention must comply with the Charter and international law.⁵²⁴ The prospect raised by Moore of a foreign State taking non-partisan action in a civil war scenario to ‘restore order’ is not clearly dealt with in the resolution. On one view if the action is truly neutral it would not seem to fall within the text of the prohibition in art 2, since there is no intent to provide assistance to either party. On the other hand, this distinction will often seem artificial where the means used to restore order is to restore the authority of the government.⁵²⁵ An additional limitation is hinted at in the chapeau of the resolution, which reserves for future study ‘the issues arising from the danger of exterminations of ethnic, religious or social groups or from other severe infringements of human rights’. This raises the possibility that assistance to a party to the conflict may be justified for the purposes of ending grave human rights abuses.

Later Cold War Scholarship

In 1985, ten years after the IDI resolution, Louise Doswald-Beck wrote an article which has remained probably the most cited item in the literature arguing for the existence of a general prohibition on pro-government intervention.⁵²⁶ Doswald-Beck considers the basis of the prohibition and concludes that it is not part of the prohibition on the use of

⁵²⁴ This caveat may be interpreted as indicating that ‘counter-intervention’ on the side of the *opposition* in response to prior impermissible assistance to the government is not permitted: Moore (n448) 279; cf Klingler (n336) 501–07.

⁵²⁵ On this issue, see further discussion in Chapter 6, Part C.

⁵²⁶ Doswald-Beck (n243).

force itself,⁵²⁷ nor can it be primarily based on the right of peoples to self-determination, which she describes as ‘largely illusory’ in the context of an existing State.⁵²⁸ Rather, the prohibition is one aspect of ‘a newly developed and separate customary norm’ prohibiting intervention in the internal affairs of other States which has emerged since the mid-1950s.⁵²⁹ The article attempts to justify this claim about a new customary rule by undertaking a detailed consideration of a number of cases of foreign military assistance to governments. Doswald-Beck’s conclusion from this analysis is that States consistently rely on assertions of prior foreign assistance to the opposition to justify pro-government intervention, which provides *opinio juris* that such intervention in a purely internal conflict is illegal.⁵³⁰ She asserts that this *opinio juris* is consistent enough to have ‘hardened into a legal requirement’,⁵³¹ although this is prefaced by the less committal statement that ‘at the very least, a very serious doubt exists’ about the legality of foreign aid to a government to suppress a rebellion.⁵³²

Doswald-Beck does not clearly delineate the threshold for the application of the alleged prohibition, variously using the terms ‘civil war’,⁵³³ ‘insurrection’⁵³⁴ and ‘rebellion’⁵³⁵ to describe the circumstances in which assistance to the government will be impermissible. She describes the prohibition as applying ‘particularly if the rebellion is widespread and seriously aimed at the overthrow of the incumbent regime’.⁵³⁶ This indicates, in line with the 1975 IDI resolution, that there is some requirement of intensity and scale that the internal strife must meet, although the resolution’s requirement that there be an ‘armed conflict’ is

⁵²⁷ *ibid* 244; Kress (n450) 18.

⁵²⁸ *ibid* 207.

⁵²⁹ *ibid* 213, 244.

⁵³⁰ *ibid* 251.

⁵³¹ *ibid*.

⁵³² *ibid*.

⁵³³ *ibid* 197, 252.

⁵³⁴ *ibid* 189, 243.

⁵³⁵ *ibid* 208, 234, 251.

⁵³⁶ *ibid* 251.

not reiterated. Doswald-Beck also on several occasions describes the prohibition as applying to assistance against ‘popular’ insurrections or rebellions,⁵³⁷ implying that the level of support for the opposition among the State’s people will be relevant. In contrast to the 1975 resolution, it is somewhat unclear whether Doswald-Beck envisages the prohibition as limiting assistance to governments fighting against secessionist movements.⁵³⁸ As for whether foreign military action for non-partisan purposes is permissible, she states that ‘limited operations’ such as peacekeeping, rescue actions and ‘help with minor disturbances not aimed at the political organization of the country’ are legal with government consent.⁵³⁹ Thus it appears that even where an insurrection is taking place, the prohibition only prevents foreign assistance whose purpose is to ‘quell’⁵⁴⁰ or ‘suppress’⁵⁴¹ the insurrection and conversely to ‘prop up a beleaguered government.’⁵⁴²

Doswald-Beck acknowledges two exceptions to the rule, one in line with the IDI resolution and previous academic literature and one more novel. In line with the previous trend, she permits counter-intervention to assist a government against an opposition receiving significant foreign support, since this is clearly supported by the *opinio juris*.⁵⁴³ But unlike the IDI, she also limits the kinds of assistance to which the rule applies. It only prohibits the actual sending of foreign troops to take ‘direct action against the rebels.’⁵⁴⁴ In contrast, State practice and *opinio juris* do not support any limitation on the provision of arms

⁵³⁷ *ibid* 234, 243.

⁵³⁸ *ibid* 202.

⁵³⁹ *ibid* 189.

⁵⁴⁰ *ibid* 189, 234.

⁵⁴¹ *ibid* 251.

⁵⁴² *ibid*.

⁵⁴³ *ibid* 213.

⁵⁴⁴ *ibid* 251.

or other kinds of indirect aid to a government, even where these are provided to help it prevail in a purely internal conflict.⁵⁴⁵

Other writers writing around the same time also endorsed a general prohibition on pro-government assistance in civil wars. Oscar Schachter presented a general prohibition on foreign assistance to either side in an internal conflict as arising from the right of a nation's people to determine their form of government for themselves, including by armed revolt.⁵⁴⁶ He went on, in contrast to Doswald-Beck, to present this rule as embedded in art 2(4) – if foreign force interferes with this right, it will violate the prohibition on the use of force, since this disallows, *inter alia*, the use of force against the 'political independence' of another State.⁵⁴⁷ Approaches similar to Doswald-Beck's were taken by other authors of the 1980s and early 1990s by other authors, such as John A Perkins,⁵⁴⁸ Rein Müllerson,⁵⁴⁹ Anthony Arend and Robert Beck,⁵⁵⁰ and Antonio Tanca.⁵⁵¹

D. Post-Cold War Scholarship: Increasing Scepticism, but Divisions Remain

The transition to the post-Cold War era reinforced existing doubts about the alleged prohibition, as noted by several authors such as Georg Nolte,⁵⁵² Eliav Lieblich,⁵⁵³ and Gregory H Fox.⁵⁵⁴ One underlying fear which motivated the desire for limiting foreign

⁵⁴⁵ *ibid* 251; Kress (n450) 18.

⁵⁴⁶ Schachter (n206) 1641.

⁵⁴⁷ *ibid*.

⁵⁴⁸ John A Perkins, 'The Right of Counterintervention' (1987) 17 *Ga JICL* 171 (although Perkins went further than Doswald-Beck and endorsed a prohibition on indirect military assistance unless appropriate measures are taken to ensure that such aid is not used to support the government in internal strife: *ibid*, 196).

⁵⁴⁹ (n462).

⁵⁵⁰ (n462) 92 (although also doubting that the rule exercised control over State's conduct in practice).

⁵⁵¹ (n111).

⁵⁵² (n124).

⁵⁵³ (n104).

⁵⁵⁴ (n256).

intervention in civil wars – fear that interventions on either side could spiral into inter-State war, potentially between the superpowers – seemed less relevant in a now largely unipolar world order. In the 1990s, ideological proxy wars between superpowers were replaced by ethnic and religious strife and the problem of ‘failed States’ as the major sources of internal conflict.⁵⁵⁵ Foreign action to support governments against these internal forces of breakdown often appears to gain wide international support as a way of addressing such situations.⁵⁵⁶ The proposed general requirement for neutrality in civil wars, whatever the values espoused by the different sides, reflected a world order as divided between ideological blocs and a conception of international law as a normatively thin regime aimed at ensuring the peaceful coexistence of States with radically different internal political systems and values.⁵⁵⁷ To the extent that authors discerned in the post-Cold War era a greater consensus on liberal democratic values and protection of human rights as the standards for domestic legitimacy,⁵⁵⁸ a prohibition on supporting governments that met these standards of legitimacy seemed less justifiable.⁵⁵⁹

Nolte’s 1999 work in German, *Eingreifen auf Einladung*, provided a more detailed study of the phenomenon of ‘intervention by invitation’ than any previous author, with close consideration of sixty-one case studies of intervention by invitation. Nolte concluded that government consent was appealed to in purely internal conflicts as well as those involving previous foreign assistance to the rebels, and stated that most instances of pro-government intervention involved situations in between mere local unrest and full-scale civil war, such as low-intensity conflicts, military coups, and popular uprisings. He contended that practice supported a more nuanced rule than a general prohibition on pro-government intervention.

⁵⁵⁵ Nolte (n124) 630-31.

⁵⁵⁶ Nolte (n4) 243.

⁵⁵⁷ Roth (n247) 414–15; Lieblich (n104) 138.

⁵⁵⁸ Cf Russell Buchan, *International Law and the Construction of the Liberal Peace* (Hart 2013) 18–19.

⁵⁵⁹ d’Aspremont (n123) 1131.

In his view, States, as well as accepting the legality of operations with limited and non-partisan purposes (such as rescue of nationals or protection of key infrastructure) also generally seemed to accept military assistance with the direct aim of helping a government against military coups or secessionist groups.⁵⁶⁰ Responses to assistance in a full scale civil war in which rebels aimed to overthrow and replace the government of an existing State were more mixed. But Nolte still concluded that such assistance was not prohibited, as long as it did not ‘call the political control of the inviting government into question.’⁵⁶¹ In contrast, intervention to support governments against ‘clear and comprehensive popular uprisings’ is prohibited in light of the principle of self-determination.⁵⁶² Thus, Nolte left some room for a prohibition on pro-government intervention, but his version of the prohibition is much narrower than that put forward by the IDI in 1975 and by Doswald-Beck and other writers. It applies only to intervention where the government has been ‘comprehensively’ rejected by the State’s people, or where the intervention is on such a large scale as to go beyond auxiliary assistance to the government and in effect replace its authority.⁵⁶³

Similar conclusions have been reached more recently by Eliav Lieblich. Lieblich argues that practice and *opinio juris* did not clearly oppose the principle that governments could invite intervention even in the most controversial cases of the Cold War era.⁵⁶⁴ He further argues that, in the post-Cold War era, a general right to provide assistance to established governments ‘has virtually come to be taken for granted.’⁵⁶⁵ In Lieblich’s view there are limits on a government’s power to consent, but these limits do not arise simply

⁵⁶⁰ Nolte (n124) 637. On secessionist conflicts, see Nolte (n391) 78–87.

⁵⁶¹ Nolte (n124) 638.

⁵⁶² *Ibid.* He also recognized limits on assistance to governments committing genocide or systematic violations of human rights.

⁵⁶³ For further analysis see Chapter 5, Part B(ii) and (iii), below.

⁵⁶⁴ Lieblich (n104) 143.

⁵⁶⁵ *ibid* 142.

because there is a civil war or internal conflict on the State's territory. Rather, they arise from newer developments in international order such as the emergence of the concept of the responsibility to protect civilians as an essential element of sovereignty. While this can restrict the legal capacity to consent of a government which is committing atrocities against civilians, it can also confirm government consent power, including in a civil war situation, when it is seeking assistance 'for the purpose of fulfilling its protection responsibilities.'⁵⁶⁶

A number of other scholars have rejected the existence of a prohibition on pro-government intervention in civil wars, again primarily on the basis that it is not supported by practice. Yoram Dinstein brusquely states that such a prohibition 'is irreconcilable with traditional international law, and it is equally inconsistent with the modern practice of States'.⁵⁶⁷ Other sceptics include Christopher Le Mon,⁵⁶⁸ Malcolm Shaw,⁵⁶⁹ Erika de Wet,⁵⁷⁰ and Claus Kress,⁵⁷¹ who considers recent practice arising from the post-Arab Spring turmoil in the Middle East. Maziar Jamnejad and Michael Wood opine that there is 'little support...in practice' for the view that intervention in civil wars on the side of the government is illegal,⁵⁷² while Alexander Orakhelashvili describes the 1975 resolution as 'both dubious and overtaken by subsequent developments.'⁵⁷³ Fox more cautiously observes that the alleged prohibition 'has not yet attracted a consensus among scholars and indeed remains controversial, for it is vulnerable to the same criticism of disjunction from state practice used to criticise pre-Charter belligerency doctrine'.⁵⁷⁴

⁵⁶⁶ *ibid* 190.

⁵⁶⁷ Dinstein (n129) 119–20.

⁵⁶⁸ Le Mon (n343) 791.

⁵⁶⁹ Malcolm N Shaw, *International Law* (6th ed CUP 2008) 1151–52.

⁵⁷⁰ de Wet (n379) 998.

⁵⁷¹ Kress (n450) 14, 26.

⁵⁷² Jamnejad and Wood (n457) 378.

⁵⁷³ Orakhelashvili (n354) 244.

⁵⁷⁴ Fox (n256) 828.

In contrast to these views, other leading scholars continue to recognize the existence of a prohibition on pro-government intervention. Doswald-Beck in 2012 stated that she stood by the position in her 1985 article, indicating that she saw no change in relevant State practice.⁵⁷⁵ Christine Gray endorsed the view that the duty of non-intervention had led to a prohibition on assistance to governments in civil wars, presenting this as the ‘generally agreed position’.⁵⁷⁶ However, Gray’s definition of the prohibition was relatively narrow. In her view, the concept of ‘civil war’ does not apply to the full range of non-international conflicts but only applies to those falling within the more restrictive definition used in the 1977 APII to the Geneva Conventions, so that the prohibition will only apply where the rebels ‘exercise such control over a part of [the State’s] territory as to enable them to carry out sustained and concerted military operations’.⁵⁷⁷ This suggests that pro-government intervention in situations falling beneath this threshold is legal,⁵⁷⁸ even if the scenario is one where applying the *Tadić* criteria of intensity and organization there is a non-international armed conflict within the meaning of common article 3. Gray follows Doswald-Beck in admitting the legality of the provision of support falling short of the actual use of force of foreign troops, such as the provision of financial support, arms and training to government forces,⁵⁷⁹ and accepts the standard right of counter-intervention against previous assistance to the opposition.⁵⁸⁰ A number of other authors also continue to assume the existence of a prohibition on pro-government intervention in civil wars.⁵⁸¹ One notably rigorous defender

⁵⁷⁵ Louise Doswald-Beck ‘Unexpected Challenges: The Increasingly Evident Disadvantage of Considering International Humanitarian Law in Isolation’ (2012) 11 SCJIL 1, 11–12.

⁵⁷⁶ Gray (n433) 81.

⁵⁷⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609, art 1(1).

⁵⁷⁸ Gray (n433) 81, 84–85.

⁵⁷⁹ *ibid* 84.

⁵⁸⁰ *ibid* 81.

⁵⁸¹ Roth (n247) 187–88; Jennings and Watts (n357) 437–38; Laird (n445) 126; Byrne (n5) 100–01; Raphael van Steenberghe, ‘The Alleged Prohibition on Intervening in Civil Wars is Still Alive after the Airstrikes

of the alleged prohibition, Patrick Terry, has argued (following Wright⁵⁸² but contrary to most of the prohibition's proponents) that there is no exception allowing counter-intervention, on the basis that States intervening in internal conflicts do not refer to a right of counter-intervention but rather use the language of collective self-defence, and also that in practical terms this exception would seriously undermine the rule.⁵⁸³

Some of the clearest recent defences of a prohibition on pro-government intervention in internal conflicts have come from Francophone international lawyers. Karine Bannelier and Theodore Christakis argue that a prohibition on pro-government assistance in internal conflicts arises from the principle of self-determination⁵⁸⁴ (not, as Doswald-Beck had argued, from the principle of non-intervention).⁵⁸⁵ They contend that such a rule can be reconciled with State practice by understanding that the rule is limited in scope. Self-determination does not prevent military action on the territory of a State experiencing civil war with the consent of its government in general, but only intervention undertaken for a specific purpose— to decide a contest for governmental power within a State.⁵⁸⁶ Military action is thus permitted as counter-intervention, for neutral purposes such as protecting essential infrastructure, or where the conflict cannot be equated with a struggle for power, for example a simple mutiny. Further, assistance to a government against a secessionist rebel

against Islamic State in Iraq: A Response to Dapo Akande and Zachary Vermeer' (*EJIL:Talk!*, 12 February 2015), available at <www.ejiltalk.org/the-alleged-prohibition-on-intervening-in-civil-wars-is-still-alive-after-the-airstrikes-against-islamic-state-in-iraq-a-response-to-dapo-akande-and-zachary-vermeer/>. Stefan Oeter suggests that in cases where support of population is divided there are 'good grounds not to intervene in the conflict in support of one side': Stefan Oeter, 'Self-Determination', in Simma et al (eds) (n173) 333.

⁵⁸² (n488).

⁵⁸³ Terry (n336) 128–30.

⁵⁸⁴ Bannelier and Christakis (n204) 861.

⁵⁸⁵ Christakis and Bannelier (n1) 113–18.

⁵⁸⁶ *ibid* 129; see also Bannelier-Christakis (n315) 745–49.

movement is permitted,⁵⁸⁷ as is assistance against opposition forces that are internationally recognized as terrorists.⁵⁸⁸

Olivier Corten, in his influential book *The Law Against War*, also argues for the existence of a prohibition on assistance to governments for the purpose of prevailing in an internal conflict. Corten presents the rule as arising from all three of the principles which have been asserted as its basis – non-intervention, non-use of force against the political independence of a State, and self-determination – but sees it as primarily arising from the last.⁵⁸⁹ However, he also bases it more directly on *opinio juris*, which he suggests was established by the late 1950s.⁵⁹⁰ Corten accepts the same list of limitations and exceptions on the prohibition as Doswald-Beck, including its exclusion of the mere provision of arms and indirect support. Unlike Christakis and Bannelier, he does not explicitly acknowledge the emergence of a new exception for military assistance to governments against terrorism, and he specifically rejects their argument that there is a separate rule permitting military assistance to governments faced with secessionist conflicts.⁵⁹¹

However, in his 2014 Hague Lectures on rebellion in international law,⁵⁹² Corten appears to take a less committed position than in *The Law Against War*, with an emphasis on the ambiguity of practice and State discourse. In these lectures, Corten acknowledges the existence of practice supporting new developments in international law, including the increasing application of ideas of democratic, constitutional and human rights legitimacy to justify foreign assistance to one side or another in foreign conflicts, the apparent acceptance

⁵⁸⁷ *ibid* 133–35; cf Doswald-Beck (n243) 202.

⁵⁸⁸ Bannelier and Christakis (n204) 866–67; Bannelier-Christakis (n315) 745.

⁵⁸⁹ Corten (n1) 288.

⁵⁹⁰ *ibid* 309–10.

⁵⁹¹ *ibid* 308–09. A similar position to Corten's (and to Doswald-Beck's) is taken by Ruys (n467) 42; Ruys and Ferro (n302) 88–89; but cf Tom Ruys 'Divergent Views on the Charter Norms on the Use of Force – A Transatlantic Divide' (2015) 109 *Proc ASIL* 70.

⁵⁹² Olivier Corten, 'La rebellion et le droit international: le principe de neutralité en tension' (2015) 374 *RdC* 53.

of the use of foreign force to uphold peace accords previously signed by all sides in a foreign conflict, and the delegitimising of opposition forces which are categorised as terrorists.⁵⁹³ While he continues to draw attention to another stream of State discourse which denies direct interference in internal conflicts, potentially supporting the existence of the prohibition, Corten apparently qualifies his earlier position by highlighting the factors in State practice and discourse which stand in tension with the existence of such a prohibition, without attempting to reach a conclusion as to whether the rule exists as a matter of positive international law.⁵⁹⁴

Other scholars have also taken rather equivocal positions. As Lieblich notes,⁵⁹⁵ Antonio Cassese's 2005 position (in contrast to his earlier view clearly affirming the legality of assistance to governments in civil war)⁵⁹⁶ posed some difficulties in interpretation. Cassese's newer view was that 'State practice makes extensive use of the consent exception, even though this practice hardly conforms to present-day international law'.⁵⁹⁷ Cassese did not go into much detail about the exact limitations imposed by international law on pro-government intervention, but did suggest that the prohibition on the use of force and the right to self-determination would not necessarily rule out military assistance to governments faced with civil wars in all cases, but only where, for example, force is used 'with a view to establishing control over the population of the consenting State, or to appropriating a portion of the territory of that State'.⁵⁹⁸

Another somewhat equivocal treatment of the issue is found in the report of the International Fact-Finding Mission on the 2008 war between Russia and Georgia, which

⁵⁹³ *ibid* 81–84, 128–172.

⁵⁹⁴ *ibid* 85.

⁵⁹⁵ Lieblich (n104) 137.

⁵⁹⁶ (n508).

⁵⁹⁷ Antonio Cassese (n218) 370.

⁵⁹⁸ *ibid* 371.

Russia had justified on the basis of an invitation from the South Ossetian authorities.⁵⁹⁹ The report observed that ‘State practice has been chaotic in this field’, but concluded that the traditional approach would allow assistance to the established government (in this case, the Georgian government), but not to the rebels (in this case, the South Ossetians).⁶⁰⁰ However, the report concluded that the traditional approach did not comply with State practice, since ‘[t]hird parties have not availed themselves of a right to intervene in any instances of attempted secession solely on the grounds that the government had asked them to intervene...’.⁶⁰¹ The report seemed to endorse a prohibition on assistance to either side in a civil war, based on the principles of non-intervention and self-determination, described as ‘the most recent trend in scholarship’.⁶⁰²

The IDI Returns to the Issue: the Ambiguous Resolution of 2011

The issue of intervention by invitation was revisited by the IDI between 2009 and 2011, which only highlighted the continuing divisions on the alleged prohibition.⁶⁰³ Special Rapporteur Hafner questioned the continued relevance of the 1975 resolution in the post-Cold War international order, and cast doubt whether it had been supported by practice.⁶⁰⁴ In contrast, several IDI members defended the general prohibition on assistance to governments in civil wars contained in the 1975 resolution.⁶⁰⁵ Hafner in response suggested that the resolution recognize a rebuttable presumption that military assistance to governments in cases of non-international armed conflict constituted impermissible

⁵⁹⁹ Independent International Fact-Finding Mission on the Conflict in Georgia, *Report* vol 2 (September 2009), available at <www.mpil.de/files/pdf4/IIFMCG_Volume_II1.pdf>; see also Lieblich (n104) 137.

⁶⁰⁰ Report (n599) 276–77.

⁶⁰¹ *ibid* 277 (citing Corten).

⁶⁰² *ibid* 277–78, 279–80. Confusingly, it also referred to a ‘third view’ according to which third States would be able to assist either side in a civil war, wrongly ascribing this (clearly outdated) position to Gray.

⁶⁰³ For an overview see Nolte (n4).

⁶⁰⁴ Gerhard Hafner, ‘Final Report’ (2009) 73 AIDI 364, 366–67.

⁶⁰⁵ See for example ‘Responses to Questionnaire’ (2009) 73 AIDI 340 (Duino-Degan), 350 (Vukas); cf 345 (Arsanjani and Reisman), 353 (Irgoine-Barrenne); (2011) 74 AIDI 276 (Bennouna).

interference with the right of self-determination.⁶⁰⁶ This compromise did not however satisfy those who wished to uphold a strict anti-interventionist position.⁶⁰⁷

In the end, the IDI reached agreement by curtailing the scope of the resolution and by resort to ambiguity.⁶⁰⁸ Art 4 of the resolution indicated that military assistance could be provided for the purpose of assisting the requesting State against non-State actors (art 2(2)) on the basis of a valid, specific and ad hoc request from the receiving State (art 4). But the significance of this recognition of the permissibility of pro-government intervention was limited, as its scope was confined by art 2

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 Art 1 of [APII].

By acknowledging the legality of assistance to the government only in cases where the opposition to the government did not reach the level of a non-international armed conflict, the 2011 resolution could potentially be read in line with its 1975 predecessor, so that military assistance would be permitted before internal strife reached the level of a non-international armed conflict, but not after. Interestingly, however, the definition of ‘non-international armed conflict’ used in the 2011 resolution is the APII definition.⁶⁰⁹ This may be taken as endorsing Gray’s apparent view that the prohibition on assistance to governments only applies where there is an APII non-international armed conflict, and that it remains legal to assist a government if the opposition does not exercise the required level

⁶⁰⁶ Hafner (n356) 242.

⁶⁰⁷ ‘Déliberations de l’Institut’ (2011) 73 AIDI 277, 287 (Pellet); Nolte (n4) 251–52.

⁶⁰⁸ Nolte (n4) 247–49.

⁶⁰⁹ Gray (n433) 81.

of territorial control.⁶¹⁰ The 2011 resolution would on this reading significantly narrow the reach of the general prohibition as enunciated in 1975.

However, the 2011 resolution also recognized that the validity of consent was always subject to the rules of non-intervention and self-determination (art 3) – the very principles which have been put forward as potential bases for the alleged prohibition. Neither the resolution nor the preceding debates gave consistent concrete guidance as to the extent to which these principles affected the legality of government consent.⁶¹¹ Furthermore, the 2011 resolution addressed only the sending of armed forces from one State to another (art 1(a)), and did not cover indirect provision of military assistance such as arms supply. It is hard to avoid the conclusion that the 2011 resolution purposefully avoided a clear statement on the critical issues.⁶¹² It did however state that direct military assistance to the government was not permitted ‘when its object is to support an existing government against its own population’ (art 3). The opposition and ultimate revisions to Hafner’s proposals indicates the continued strength of support for a prohibition on pro-government intervention in civil wars among many international lawyers.⁶¹³

E. The ICJ Case Law: Absence of Support for the Alleged Prohibition

In contrast to the significant body of support for the alleged prohibition in the scholarly literature, judicial support for it has been lacking both before and after the end of the Cold War. In the two ICJ cases dealing with foreign intervention in internal conflicts, *Nicaragua* and *Armed Activities*, the court appeared to affirm the broad legality of foreign force which occurs with government consent.⁶¹⁴ But although the case law does not support the

⁶¹⁰ Also Lieblich (n104) 136; Ruys and Ferro (n302) 89.

⁶¹¹ Nolte (n4) 256–57.

⁶¹² *ibid* 248.

⁶¹³ Nor does the current draft report of the ILA Use of Force Committee take a clear position on the issue (although it remains a work-in-progress): ILA Use of Force Committee (n211) 268.

⁶¹⁴ d’Aspremont (n123) 1131.

prohibition's existence, they are not clearly incompatible with it either, at least if the prohibition is understood as applying only to intervention *for the purpose of propping up the government*.⁶¹⁵

In *Nicaragua* the court found that assistance given by one State to the opposition in an internal armed conflict in another State constituted a breach of the customary principle of non-intervention (and in the case of more serious assistance like the provision of arms or training or the sending of troops, constituted also a breach of the prohibition of the use of force). However, in reaching this conclusion, the Court observed that 'it is difficult to see what would remain of the principle of non-intervention if intervention, *which is already allowable at the request of the government of a State*, were also to be allowed at the request of the opposition' (emphasis added).⁶¹⁶ This broad statement seems to affirm the general permissibility of pro-government intervention, including in situations where opposition forces are attempting to overthrow the government in an armed conflict, as was the case in Nicaragua.⁶¹⁷ But the Court's focus here was on the illegality of the United States' intervention on the side of the Contra rebels, and the affirmation of assistance to governments was in the form of a brief dictum.⁶¹⁸ The Court expressly stated that it would 'define' only aspects of the principle of non-intervention which were relevant to the case.⁶¹⁹ Moreover it has been observed that 'allowable' does not necessarily mean 'generally allowed', but can also be interpreted as merely *capable* of being allowed.⁶²⁰ This would not be incompatible with those definitions of the prohibition which apply only to intervention for

⁶¹⁵ Cf Lieblich (n104) 150–52.

⁶¹⁶ *Nicaragua* (n49) 126.

⁶¹⁷ Lieblich (n104) 150–51.

⁶¹⁸ Gray (n433) 80.

⁶¹⁹ (n49) 108; Lieblich (n104) 151.

⁶²⁰ Nolte (n124) 170.

the purpose of supporting the government against domestic opposition, while allowing the government to consent to the use of force for other purposes.

Earlier in the judgment, when considering the extent of its jurisdiction, the Court referred to the fact that Nicaragua's application, 'according to that State, does not cast doubt on El Salvador's right to receive aid, military or otherwise, from the United States...in order to help combat the insurrection with which it is faced...'.⁶²¹ This could be read as contradicting the alleged prohibition. However, the statement simply affirms a limitation contained in the Nicaraguan application rather than necessarily reflecting the Court's view. Further, given that the Court later found that the Salvadoran insurgents had until 1981 received aid from Nicaraguan territory,⁶²² such assistance could potentially have been reconciled with the alleged prohibition by reference to the exception allowing 'counter-intervention'.⁶²³

The Court in *Armed Activities* considered government consent more directly as a basis for foreign military involvement in a State torn by internal strife. In 1997 and the first part of 1998, Ugandan troops were engaged in military action in the DRC, with the consent of the DRC Government, against non-state actors such as the Lord's Resistance Army who had been using the eastern DRC as a base.⁶²⁴ The DRC's claims against Uganda did not relate to this period but to Uganda's actions commencing in August 1998, by which point the Court found the consent had been withdrawn.⁶²⁵ But although the legal status of the Ugandan forces before August was not directly at issue between the parties, the Court seemed to assume that before its withdrawal, the DRC Government's consent was effective to legalise

⁶²¹ (n49) 36.

⁶²² *ibid* 82–83.

⁶²³ Perkins (n548) 194–95.

⁶²⁴ *Armed Activities* (n304) 196; Gary Cleaver and Simon Massey 'DRC: Africa's Scramble for Africa' in Oliver Furley and Roy May (eds), *African Interventionist States* (Ashgate 2001) 195.

⁶²⁵ *Armed Activities* (n304) 196.

the Ugandan military operations, despite the widespread conflict already taking place on the DRC's territory at the time.⁶²⁶ This has been presented as clearly incompatible to the alleged prohibition.⁶²⁷ But it has also been argued that the judgment is not incompatible with the prohibition correctly understood. If the prohibition applies only where the foreign action is aimed at propping up the consenting government against domestic rebels, the facts of the case would seem to fall outside its scope.⁶²⁸ Uganda's aim, at least initially, appears to have been to have been defensive: to protect itself from cross-border attacks from non-state actors based in the DRC.⁶²⁹

Conclusion

This overview of the Charter-era scholarly literature on the existence of a prohibition on pro-government intervention in civil wars shows the contentious nature of the issue. While a significant body of academic literature exists to support its existence,⁶³⁰ no consensus position has ever been reached on this point, and the number of sceptics seems to have increased in the post-Cold War period.

Even among those who support such a prohibition, there are significant points of disagreement concerning its exact scope. The prohibition is commonly described as a rule which applies in circumstances of 'civil war', perhaps reflecting the continued influence of the criteria for belligerent recognition laid down in the pre-1945 literature. However, some scholarly formulations suggest criteria other than the existence of a civil war should provide the threshold for assessing the permissibility of intervention. Thus for Fitzmaurice, and later Nolte, the key test appeared to be whether the scale of the opposition clearly indicated a

⁶²⁶ *Armed Activities* (n304) 196–99.

⁶²⁷ Lieblich (n104) 151–52.

⁶²⁸ Corten (n1) 291–92.

⁶²⁹ Cleaver and Massey (n624) 195.

⁶³⁰ Ruys and Ferro (n302) describe it as the majority view: 88. Similarly, Arend and Beck (n462) 84.

comprehensive popular rejection of the government. For Lieblich the critical test is whether the government is requesting assistance for the purpose of fulfilling its responsibility to protect its citizens from grave human rights breaches. Such alternative versions are in fact quite distinct from the established presentation of the prohibition as applying in all civil wars. They would potentially allow military assistance to a government in a civil war which retains a significant level of popular support and/or a good human rights record, while prohibiting such assistance to a government which lacks such credentials even in the absence of an armed conflict (in a situation, for example, of widespread demonstrations but lacking an organized military campaign to remove the government). Reliance on such 'legitimacy-based criteria', however, raises the obvious problem of how to assess a government's level of popular support or the adequacy of its fulfilment of its human rights obligations.⁶³¹

If civil war is kept as the threshold concept for the application of the prohibition, further disagreements remain. There appear to be different views as to whether the concept of civil war requires only a common article 3 non-international armed conflict meeting the criteria laid down in *Tadić*, or whether the opposition needs to exercise territorial control as defined in art 1 APII. The concept of civil war also seems to require that the opposition be pursuing political ends, but exactly what ends count is unclear. While it is widely accepted among proponents of the prohibition that a conflict aimed at overthrow and replacement of the government counts as a civil war in which assistance to the government would be prohibited, there is less agreement as the prohibition also applies to secessionist conflicts. More recently, conflicts where the opposition forces are categorised as a terrorist group have also been argued to be excluded from the prohibition's scope. Another difficulty which can be raised is whether the outbreak of civil war requires the discontinuation of aid which the

⁶³¹ Dinstein (n253) 80.

government was previously receiving, or whether such a discontinuation would in itself constitute an illegal intervention against the government by in effect aiding the opposition.⁶³²

A further limitation on the scope of the alleged prohibition arises from the fact that it applies only to acts of ‘intervention’ or to ‘military assistance’ to a party (depending on the formulation). It has been suggested that this prohibits only foreign intervention provided with the purpose of helping the government to prevail against the opposition. Foreign military action on the territory of the State with the consent of its government, even ‘against the background’ of a civil war, is considered not to fall within the prohibition if it is undertaken for a non-partisan purpose such as rescue of nationals or peacekeeping.⁶³³ A broader application of this exception would allow foreign military action to take place with government consent for the purposes of upholding ‘orderly processes of self-determination’ within the receiving State, which would potentially allow deployment of foreign forces to create the conditions for, or uphold the results of, fair elections.⁶³⁴ An obvious problem in practice, however, is that it may be difficult to distinguish such supposedly non-partisan involvement from intervention to support the government against the opposition, which will often be their inevitable effect.

Two more areas of potential uncertainty need to be mentioned. There is disagreement among scholars as to whether the prohibition applies to indirect aid to the government in a civil war situation such as provision of arms, training, logistical and financial aid, or only to more direct uses of force such as the sending of troops to fight the opposition or airstrikes on opposition forces. Finally, the most widely (although not universally) accepted exception to the alleged prohibition allows foreign military assistance to the government in response to prior foreign military assistance to the opposition. However, the

⁶³² See Moore (n448) 196; Luard (n459) 18; Perkins (n548) 195–97; Arend and Beck (n462) 85.

⁶³³ Ruys and Ferro (n302) 89–90.

⁶³⁴ Moore (n501).

literature generally fails to consider what threshold the foreign military assistance to the rebels must reach to justify such ‘counter-intervention.’⁶³⁵

The rest of this thesis will seek to cast light on the deep-seated differences of approach in the scholarship. It will be argued that the lack of consensus on the alleged prohibition’s existence and scope reflects methodological divisions as to how to interpret and weigh the complex body of relevant State practice and *opinio juris*, and to what extent deductive reasoning from fundamental principles of international law can be utilized.

⁶³⁵ Ruys and Ferro (n302) 93.

Chapter 4: Pro-Government Intervention in Civil Wars and Internal Strife: State Practice and *Opinio Juris*

The previous chapter has outlined contradictory views as to whether the alleged prohibition on pro-government intervention is supported by State practice and *opinio juris* in the UN Charter era. Sceptics argue there is relatively little practice and *opinio juris* to support it and that the alleged prohibition is more a creation of scholars than of States.⁶³⁶ Proponents in contrast contend that State practice and *opinio juris* provide ample support for its existence.⁶³⁷ This chapter seeks to make a contribution to this debate by providing a methodological framework for interpreting the complex mass of relevant practice and *opinio*. While acknowledging the existence of some *opinio* supportive of the alleged prohibition, particularly during the Cold War period, it argues that the stronger view is that it has never attained the status of a rule of customary international law. To back up this conclusion, the chapter then provides a broader overview of the relevant practice than has previously been available. It thus seeks to avoid a general problematic tendency in legal scholarship: the assertion, or denial, of the existence of customary rules ‘on a fairly flimsy basis’.⁶³⁸

As has been commonly observed, civil strife within States has been a regular occurrence since 1945, clearly overtaking inter-State war as the most prevalent form of serious violence.⁶³⁹ Foreign intervention in such conflicts has also been common, both in support of the government and of opposition groups.⁶⁴⁰ The body of practice potentially relevant to the alleged prohibition on pro-government intervention in internal conflicts is

⁶³⁶ Lieblich (n104) 140, Dinstein (n253); Hafner (n356) 186.

⁶³⁷ Doswald-Beck (n243) 213, Corten (n1) 301–02.

⁶³⁸ Andrea Bianchi, ‘The International Regulation of the Use of Force: The Politics of Interpretative Method’ (2009) 22 Leiden JIL 651, 663.

⁶³⁹ Moore (n448) 209, Luard (n459) 7–11.

⁶⁴⁰ Moore (n448) 238.

thus both voluminous and complex.⁶⁴¹ The sheer extent of this practice, the ambiguities of the justifications given by the intervening States and the responses of other States, and the apparent inconsistencies in States' positions over time,⁶⁴² all make it difficult to come to a clear conclusion as to the existence or lack of existence of a general prohibition of the type discussed in the literature. In truth, the ambiguities of practice and *opinio juris* over the years provide a large amount of material both for those arguing for the existence of the rule, and those arguing against it.⁶⁴³

Given these ambiguities, much depends on the methodology – of how exactly State practice and *opinio juris* are to be filtered to reach a conclusion as to the existence or non-existence of an asserted customary norm. As has been increasingly recognized, methodological differences underlie most of the intractable divides in the *jus ad bellum* literature.⁶⁴⁴ The fact is that 'the identification and weighing of State practice and *opinio juris* is not a matter of exact science.'⁶⁴⁵ However, these differences about how to interpret States' actions and discourse have not been clearly brought out in the literature on the alleged prohibition on pro-government intervention, although in fact they underlie the entire debate.

Part A of this chapter (along with Chapter 5) seeks to provide a clearer analytical framework for understanding the diverging methodological approaches which have led to such persistent disagreement about the existence of the alleged prohibition. While the next chapter will consider whether the alleged prohibition can be derived by deductive reasoning from the structure and fundamental principles of international law, this chapter will consider

⁶⁴¹ Cf Brownlie (n481) 327; Christakis and Bannelier (n1) 102.

⁶⁴² Malanczuk (n462) 325.

⁶⁴³ Higgins (n444) 169–70, notes that practices are uncertain and particular instances can be picked out to argue either way. Cf Christakis and Bannelier (n1) 101.

⁶⁴⁴ Christian J Tams and Antonios Tzanakopoulos, 'Use of Force' in Jörg Kammerhöfer and Jean d'Aspremont (eds), *International Legal Positivism in a Post-Modern World* (CUP 2014) 499; see also Jörg Kammerhöfer, 'Uncertainty in the Sources of International Law: Customary International Law and Some of its Problems' (2004) 15 EJIL 532, 551–52.

⁶⁴⁵ Ruys (n15) 551.

whether the prohibition can be established by ‘induction’ from the broad range of instances of State practice and *opinio juris* that are discussed.

Proponents of the alleged prohibition rely largely on three kinds of State discourse to support its existence. Firstly, there are textual endorsements by States of such a rule, either explicitly or (it is argued) by necessary implication, in the form of UNGA resolutions, multilateral treaties and individual statements by States. Secondly, there are States’ justifications of, and responses to, specific instances of pro-government military intervention. Despite the regular occurrence of *prima facie* intervention by one State on the territory of another State experiencing an internal conflict, with the consent of the latter State’s government, authors arguing for a general prohibition on pro-government intervention contend that States rarely or never rely *only* on government consent to justify such actions. Rather, additional justifications are put forward: for example, prior foreign intervention on the side of the opposition. This is taken as indicating, *a contrario*, that States recognize that, absent such justificatory factors, pro-government intervention would be contrary to international law.⁶⁴⁶ This form of reasoning relies on the methodology endorsed in the *Nicaragua* decision: that when States rely on exceptions acknowledged to be part of a rule to justify actions which would otherwise be contrary to the rule, the rule is strengthened rather than undermined.⁶⁴⁷ Sceptics about the rule have generally not closely engaged with this argument, contending simply that States have commonly relied on government consent as their legal justification for military involvement.⁶⁴⁸ Thirdly, proponents of the rule argue that other States generally react critically to pro-government intervention which contravenes the alleged prohibition.

⁶⁴⁶ Doswald-Beck (n243) 251, Corten (n1) 301, Bannelier and Christakis (n204) 863, Bannelier-Christakis (n315) 749.

⁶⁴⁷ *Nicaragua* (n49) 98.

⁶⁴⁸ Dinstein (n253) 76–79; Lieblich (n104) 142.

By considering in turn each of these three potential bases for the alleged prohibition's existence, Part A will seek to provide a more analytically developed basis for scepticism about the alleged prohibition's existence. Considering firstly whether States have textually endorsed the rule, the most promising UNGA resolutions – the Declaration on the Inadmissibility of Intervention⁶⁴⁹ and the FRD⁶⁵⁰ - are ambiguous on the topic of pro-government intervention and the *travaux préparatoires* do not help to clarify them. Explicit endorsements of the rule by States in other contexts are few and have dried up completely since the end of the Cold War. Furthermore, there have always been other statements by States affirming the broad legality of intervention with government consent, which weaken the case for the alleged prohibition. Turning to the second main argument used to establish the rule's existence, it is certainly true that States generally refer to other factors to justify foreign intervention in internal conflict situations in addition to government consent. However, this does not show that States accept the existence of a prohibition which would rule out intervention in an internal conflict in the absence of such additional factors. Such factors may be put forward to justify an intervention morally or politically, although its legality is not doubted, or to provide alternative legal bases for intervention to maximise its international acceptance. As for the third argument, that States generally condemn contraventions of the alleged prohibition, during the Cold War negative responses were polarised on ideological lines. States certainly reacted critically to claims of States in the opposing bloc to provide military assistance to allied governments faced with internal strife. But in many of these cases it was unclear whether prior consent had in fact been given at all. Further, the criticism was usually tied up with (ideologically-based) assessments of the *legitimacy* of the inviting government, so that it did not necessarily indicate an acceptance of a *general* prohibition on assistance to governments whatever their perceived legitimacy. Thus, it

⁶⁴⁹ Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, UNGA Res 2131 (XX) (21 December 1965).

⁶⁵⁰ (n270).

seems unlikely that the alleged prohibition can be shown to have come into existence by the end of the Cold War.⁶⁵¹ If the prohibition had not emerged by then it certainly has not emerged since, as post-Cold War practice shows broad international acceptance of military assistance to governments widely considered to be legitimate.

Part B of the chapter seeks to support these conclusions by providing a relatively thorough and up-to-date examination of the relevant practice and *opinio juris*, filling a gap in the existing literature. Part B.1 considers the potential textual endorsements of the rule in the form of GA resolutions, multilateral treaties and individual State statements. Part B.2 considers specific cases of pro-government intervention in situations of internal strife in the Cold War era. Part B.3 considers cases of military assistance to governments in post-Cold War period. The Cold War practice is examined in detail because it is crucial to the debate about the alleged prohibition's existence, as already suggested. If the prohibition came into existence during the Cold War, the fact that recent practice does not support the rule would likely not suffice to show that it has been superseded. But practice shows that the stronger view is that the rule did not come in to existence even during the heights of Cold War non-interventionism.

A. Assessing the State Practice and *Opinio Juris* on the Alleged Prohibition: Methodological Considerations

Action vs Statements

The provision of foreign military assistance to governments in situations of internal strife has been a common occurrence in actuality since 1945. In reality, this assistance has the effect of propping up the government, even if States often do not openly present this as their aim. A view of customary international law which focussed on State practice in the form of States' actions 'on the ground' would conclude that in fact there is no prohibition on

⁶⁵¹ Cf Hafner (n356) 186.

foreign military intervention in internal conflicts.⁶⁵² But such an approach to custom, although put forward in a persistent dissenting trend in the scholarship,⁶⁵³ it has been clearly rejected by the ICJ in the *Nicaragua* case.⁶⁵⁴ The Court found that the prohibition on the use of force and the principle of non-intervention were customary international law, despite large-scale violations of the rules in practice. Although the Court reiterated the orthodox view that both State practice and *opinio juris* are required to establish custom,⁶⁵⁵ it indicated that practice did not have to be in ‘absolutely rigorous conformity’ with the rule, as long as it was consistent ‘in general’ and instances of inconsistent practice ‘should generally have been treated as breaches of the rule, not as indications of the recognition of a new rule.’⁶⁵⁶ Further when States committing *prima facie* violations of a rule attempt to justify their actions ‘by appealing to exceptions or justifications contained within the rule itself’, this supports rather than undermines the rule.⁶⁵⁷

The methodology of custom applied in *Nicaragua* suggests a liberalisation of the requirements for establishing the existence of customary international law, focussing on whether what States *say* indicates their acceptance of a particular rule, rather than whether their ‘real world’ actions bear that out.⁶⁵⁸ One way of conceptualising this approach is to see it as placing the emphasis on *opinio juris*, without any real separate requirement for State practice.⁶⁵⁹ Another could be to view verbal indications that States acknowledge a rule both

⁶⁵² See Farer (n506).

⁶⁵³ Anthony d’Amato, ‘Trashing Customary International Law’ (1987) 81 AJIL 101 at 101–02; Michael J Glennon, ‘How International Rules Die’ (2005) 93 Georgetown LJ 939, 960.

⁶⁵⁴ See Olivier Corten, ‘The Russian Intervention in the Ukrainian Crisis: Was *Jus Contra Bellum* “Confirmed Rather Than Weakened”?’ (2015) 2 JUFIL 17, 38–39.

⁶⁵⁵ (n49) 97–98.

⁶⁵⁶ *ibid* 98.

⁶⁵⁷ *ibid*.

⁶⁵⁸ For further analysis see Tams and Tzanakopoulos (n644) 508–10.

⁶⁵⁹ See Frederic L Kirgis, ‘Custom on a Sliding Scale’ (1987) 81 AJIL 146.

as State practice (taking precedence over actual conduct) and *opinio juris*.⁶⁶⁰ A third, more cautious view would suggest that both State practice (in the form of actual compliance in ‘the usual practice of States’) and *opinio juris* are both necessary for a customary rule to come into existence, but that once the rule exists it can survive wide contrary practice as long as ‘*opinio juris* as to its normative status continues to exist.’⁶⁶¹ This approach however, with its apparent continued emphasis on actual compliance as ‘the usual practice of States’ as a condition for the formation, although not the continuance, of customary norms, runs up against a profound conceptual difficulty in establishing *prohibitive* rules from compliant practice. This is because for a prohibition compliant practice is *not* doing something, and States can have countless reasons for not (for example) using force.⁶⁶² Thus, States’ acceptance of prohibitions must inevitably be established in a different way, relying primarily on statements which indicate their acceptance (or not) of the prohibition. *Nicaragua* suggests three main contexts in which such verbal affirmation of the rule can take place: firstly, when States endorse a text containing a formulation of the rule, such as a UNGA resolution or multilateral treaty, secondly, when States that are committing or supporting potential violations of the rule proffer arguments that the actions falls outside its scope, thus indicating that they accept the rule’s authority, and thirdly, when other States criticise a State for violating of the rule. These three different potential sources of support for a customary prohibition will be examined in turn to determine the amount of support they provide for the alleged prohibition on pro-government intervention in civil wars.

⁶⁶⁰ Tams and Tzanakopoulos (n644) 508–10, Simma and Alston (n47) 96.

⁶⁶¹ Higgins (n187) 22; see also *Nicaragua* (n49) 109.

⁶⁶² Simma and Alston (n47) 103-04; Vaughan Lowe, *International Law* (OUP 2007) 41; Tams and Tzanakopoulos (n644) 509–10.

Textual Endorsements of the Alleged Prohibition

Although this thesis' subject is the alleged prohibition on military assistance to governments in civil wars, briefly considering the prohibition on military assistance to the *opposition* provides a useful contrast to illustrate the difficulties in the establishing the existence of the former. In *Nicaragua*, the main evidence utilised by the ICJ to establish the customary status of the prohibition on the use of force and the principle of non-intervention was that texts formulating these norms were contained in UNGA resolutions adopted unanimously or quasi-unanimously, most notably the FRD and the Declaration on the Inadmissibility of Intervention. As the ICJ decided, these same resolutions clearly establish the illegality of the provision of military assistance to opposition forces in an internal conflict, despite contrary practice.⁶⁶³ In recent years, there has been significant further practice in violation of the rule, with a significant number of States openly arming the 'moderate' opposition in Syria.⁶⁶⁴ However, these States have not provided a formal legal justification for this action which would provide *opinio juris* to support a change in the law.⁶⁶⁵ In contrast, other States have clearly stated that this assistance violates international law.⁶⁶⁶ This recent practice therefore is not sufficient to displace the clear and unanimous *opinio juris*

⁶⁶³ *Nicaragua* (n49) 118–19.

⁶⁶⁴ See Jonathan Weisman and Jeremy Peters 'Congress Gives Final Approval to Aid Rebels in Fight with ISIS', (NYT, 18 September 2014) <www.nytimes.com/2014/09/19/world/middleeast/senate-approves-isis-bill-avoiding-bigger-war-debate.html>; Edith Lederer, 'Arab League Rejects UN Call to Stop Arming Syrian Rebels' (*Times of Israel*, 23 April 2013), available at <www.timesofisrael.com/arab-league-rejects-un-call-to-stop-arming-syrian-rebels/>

⁶⁶⁵ Cf *Nicaragua* (n49) 109; Michael Byers, 'International Law and the Responsibility to Protect' in Christine Chinkin and Freya Baetens (eds) *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (CUP 2015) 45–46; Christian Henderson, 'The Provision of Arms and "Non-Lethal" Assistance to Governments and Opposition Forces' (2013) 36 UNSWLJ 642, 678–79.

⁶⁶⁶ See for example Austria and Russia, cited in Ruys (n467) 16.

in favour of the rule provided in the past General Assembly resolutions, and it remains binding customary international law.⁶⁶⁷

In contrast, it will be shown that there is much less clear explicit support in State *opinio juris* for a prohibition on foreign assistance to governments facing internal conflicts than for a prohibition on assistance to rebel groups. Neither the Charter nor any widely signed treaty provides clear recognition of such a prohibition. And critically, the UNGA resolutions which were the decisive sources of *opinio juris* for the court in *Nicaragua* do not clearly prohibit pro-government intervention. Turning to the *travaux préparatoires* of these resolutions does not help: as will be shown in Part B.1 of this chapter, although some States did appear to support a prohibition on intervention to keep governments in power, a roughly equal number seemed to reject it, and most States made no relevant comment. Although some Eastern bloc States explicitly embraced the alleged prohibition in the Security Council in the first few years of the Cold War in order to criticise Western military assistance to anti-Communist governments,⁶⁶⁸ clear endorsements of the rule after that became rare, with a statement made in a 1984 UK Foreign Office Document being one of the very few examples.⁶⁶⁹ And in the post-Cold War period such endorsements of the rule seem to have entirely dried up. The express *opinio juris* for the rule was thus quite weak during the Cold War period and non-existent afterwards, providing little support to the contention that the alleged prohibition ever became part of customary international law.

An alternative methodological approach could be applied to the same material to lead to a different conclusion. Corten has argued in favour of the existence of the rule on the basis that several States have insisted on the existence of the rule, and no State has clearly

⁶⁶⁷ Byers (n665) 45; Michael N Schmitt, 'Legality vs Legitimacy Redux: Arming the Syrian Rebels' (2014) 7 JNSLP 139, 159, comparing these actions with the NATO airstrikes against Yugoslavia in 1999, characterised by some as illegal but legitimate. Cf Ruys (n591).

⁶⁶⁸ See (n799), (n813) below.

⁶⁶⁹ 'UK Materials on International Law' (1986) 57 BYIL 487, 616.

contradicted such an assertion.⁶⁷⁰ This could be taken as endorsing a methodology of custom according to which, once a rule has been explicitly asserted by ‘several States’, those denying the rule need to show an express denial of the rule by other States, otherwise the rule can be taken to have been established. However, there are three strong objections to this approach. The first is that statements made on one or two occasions by ‘several States’ cannot in themselves constitute practice or *opinio juris* of sufficient generality and consistency to give rise to a customary rule, even if these statements were not expressly rejected by other States.⁶⁷¹ Secondly, contrary to Corten’s assertion, there are in fact statements by other States during the same period which at least come close to an explicit repudiation of the alleged rule, as has been shown.⁶⁷² Thus the express *opinio juris* during the Cold War period was balanced in a way Corten does not acknowledge. Thirdly, the complete lack of explicit *opinio juris* from States after the 1980s surely weakens the weight that can be placed on a limited number of statements made decades earlier. Corten’s approach here reflects contentious aspects of his methodology identified by Raphael van Steenberghe: firstly, ‘ambiguity concerning the interpretation of particular texts, case law or precedents is sometimes resolved...in a way that supports or at least does not conflict with his restrictive view [of the permissibility of intervention], even when it seems that this ambiguity should be left unsettled’,⁶⁷³ secondly, beginning from ‘the presumed starting point that there is a prohibition with regard to the use-of-force aspect under review’, then proceeding ‘to demonstrate the maintaining of this presumed prohibition by showing that there are no or only few practices evidencing the modification thereof.’⁶⁷⁴

⁶⁷⁰ Corten (n1) 290; also Ruys and Ferro (n302) 88–89.

⁶⁷¹ In *North Sea Continental Shelf* (n20) 43 it was indicated that the relevant State practice needed to be ‘extensive and virtually uniform’.

⁶⁷² See for example the Thai representative’s statement, 1st Committee (n747); US State Department Legal Adviser on Grenada (n963), below.

⁶⁷³ van Steenberghe (n167) 755.

⁶⁷⁴ *ibid* 773.

Justifications Relied on in Cases of Pro-Government Intervention

States' justifications of, and reactions to, particular instances of foreign military involvement in internal conflicts with the consent of the territorial government constitute a potentially more promising source of *opinio juris* for the alleged prohibition than the limited number of specific State statements on the issue. Proponents of the prohibition's existence argue that States rarely if ever rely solely on government consent to justify such intervention, at least in the form of direct deployment of troops, but put forward additional justifications. One common justification has been that the opposition has itself received illegal foreign assistance.⁶⁷⁵ Another common justification is to suggest that the purpose of the military action is not to prop up the government against the opposition, but for another purpose, such as to protect nationals, to protect civilians and bring to an end a humanitarian disaster, to enforce a peace deal or process, or simply to help uphold stability and security. In the post-2001 period, States intervening with the consent of the territorial government have commonly categorised the targets of the intervention as terrorists.⁶⁷⁶

As will be demonstrated in Parts B.2 of this chapter, proponents of the prohibition are correct that additional factors are almost always referred to in some way by intervening States, at least when they are directly deploying force on the consenting State's territory.⁶⁷⁷ The critical question is whether it follows that by so doing participating States are indirectly recognizing that the alleged prohibition is law and that their action would be illegal in the absence of these further factors, which would constitute 'exceptions or justifications contained within the rule itself.'⁶⁷⁸ It is submitted that this is a highly doubtful interpretation

⁶⁷⁵ Gray (n433) 94.

⁶⁷⁶ See (n1097)–(n1125) and accompanying text (Mali); (n1148)–(n1159) (anti-ISIL intervention in Iraq) and (n1162)–(n1168) (Russian anti-ISIL intervention in Syria); (n1201)–(n1202) (GCC intervention in Yemen). See also the general analysis accompanying (n 1493)–(n 1517) in Chapter 6.

⁶⁷⁷ Cf Lieblich (n104) 13.

⁶⁷⁸ *Nicaragua* (n49) 98.

of States' intentions in providing these additional justifications for consensual intervention. A very plausible alternative reason for why States consistently refer to such additional justifications is that they wish to justify military assistance *morally* and *politically*, although as a matter of law consent would be sufficient.⁶⁷⁹ It is unsurprising that domestic and world opinion demands more to justify a military intervention in another State than the mere fact that it occurs with the consent of the government.⁶⁸⁰ However, while the provision of such justifications suggests a recognition that pro-government intervention in internal conflicts may be morally or politically problematic, it does not follow that States also consider it to be in general legally prohibited.⁶⁸¹ This interpretation of State discourse is supported by the fact that commonly such additional justifications are invoked alongside statements which affirm in broad terms the legality of military assistance to governments (or at least 'legitimate' governments) at their request.⁶⁸² This pattern can be seen in many of the cases considered in Part B.⁶⁸³ Thus while the British government did refer to ISIL as terrorists to justify its participation in anti-ISIL airstrikes in Iraq, when focussing specifically on the *legal* basis for the action the government referred simply to the consent of the Iraqi government.⁶⁸⁴ Such broad affirmations of the legality of consensual intervention create a presumption that States do not recognise the legal existence of the alleged prohibition on pro-government

⁶⁷⁹ See Raphael van Steenberghe, 'Self-Defence in Response to Attacks by Non-State Actors in the Light of Recent State Practice: A Step Forward?' (2010) 23 *Leiden JIL* 183, 187; Ruys (n15) 511. Cf Corten (n1) 41.

⁶⁸⁰ Lieblich (n104) 13, 143 (consent 'supplemented' by claims of counter-intervention during the Cold War); Laird (n445) 137.

⁶⁸¹ Cf Doswald-Beck (n243) 251.

⁶⁸² Lieblich (n104) 142.

⁶⁸³ Van Steenberghe (n581) suggests in the context that more formal legal justifications tend to support the prohibition (by referring for example to terrorism or prior assistance to the opposition) whereas broad affirmations of the legality of consensual intervention tend to arise in less formal contexts. As a generalisation from the *opinio juris* discussed above this seems dubious: it is unclear, for example, that the UK Government's 2014 Legal Position on the airstrikes against ISIL, broadly affirming the legality of consensual intervention, (n771) below, should be given decidedly less weight than the 1984 Foreign Office document (n669).

⁶⁸⁴ (n1137) – (n1140).

intervention in civil wars,⁶⁸⁵ a presumption not clearly rebutted by States' reference to additional factors to justify such intervention.

Further reason to doubt that the additional factors put forward by States are intended as exceptions to a legal rule, rather than as political and moral justifications for something which is legally permissible, is that as exceptions to a legal rule they seem particularly ill-defined and value-laden. For example, what kind of foreign assistance to the opposition is necessary to justify 'counter-intervention' on the side of the government, and how much?⁶⁸⁶ What differentiates terrorists from rebels, or action to restore order and security from action to prop up a government? As has been shown, even during the Cold War period, and even more so in recent times, States have justified pro-government intervention on the basis of an assertion that the States' people support the government and reject the rebels, but if this is also part of the legal rule, how will the people's will be assessed?⁶⁸⁷ In Chapter 6, the workability of a prohibition including such limitations and exceptions will be discussed. It will be argued that in practice such exceptions and limitations would 'swallow the rule'.⁶⁸⁸ If this is the case, it is surely grounds for scepticism about whether States' reference to these additional justifications should be interpreted as support for a practically unworkable legal rule, rather than as political and moral arguments.

A somewhat different issue arises when States seek to justify pro-government intervention relying not only on government consent, but on grounds that are clearly alternative legal bases for the use of force. In a number of cases considered in Part B.2 and B.3, States have referred to art 51 of the Charter to justify their action as self-defence instead

⁶⁸⁵ Cf Klingler (n336) 494.

⁶⁸⁶ For further discussion see Chapter 6 Part D.

⁶⁸⁷ Dinstein (n253) 80, cf Roth (n407) 392.

⁶⁸⁸ See generally Chapter 6, below.

of relying simply on government consent.⁶⁸⁹ For example, Lebanon presented its request for US intervention in 1958 as collective self-defence against the threat posed by UAR assistance to the opposition; the US's continued claim to self-defence against terrorism seems one basis for its continued intervention in Afghanistan since 2002; and collective self-defence was briefly invoked by France to justify its intervention in Mali and by the Yemeni President in his request for GCC intervention. States have also often sought Chapter VII authorisation for military interventions that also have the consent of the internationally recognized government, such as intervention to restore the Aristide government in Haiti in 1994 and the NATO-led ISAF mission in Afghanistan from 2002-14.⁶⁹⁰ It has been argued that this provides some support for the view that government consent is not, by itself, enough to justify military intervention in internal conflicts in foreign countries; the reliance on other legal bases for the intervention seems to indicate that consent is not sufficient.⁶⁹¹ But this is not a safe conclusion to draw. States often adduce as many justifications as they can for military actions which they undertake.⁶⁹² Even if government consent is considered legally sufficient in itself, States may appeal to self-defence or seek Security Council authorisation to help bolster the political legitimacy of the operation in the eyes of other international actors. Another motive for States to rely on these alternative grounds for the legality of the use of force is that they provide a more secure basis for continued military operations than the consent of the territorial States' government, in case the latter is withdrawn.⁶⁹³ Security Council authorisation may also perform the function of clarifying a contested government's

⁶⁸⁹ Bianchi (n638) 670 notes the trend in practice for States to rely as much as possible on self-defence as a justification for force.

⁶⁹⁰ Corten (n1) 285–87, 304.

⁶⁹¹ *ibid.*

⁶⁹² Karsten Nowrat and Emily W Schabacker, 'The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone' (1998) 14 *AUJLR* 321, 399; Laird (n445) 137 (observing that multiple legal justifications may be given for political reasons); see also Legal and Policy Framework (n13) 11.

⁶⁹³ Lieblich (n104) 36.

right to speak for the inviting State as its internationally recognized government.⁶⁹⁴ All these factors explain why States adduce additional legal justifications for pro-government military intervention even if they do not recognize the alleged prohibition.

Instances where States were requested to intervene by a foreign government but did not do so provide another potential source of support for the rule, if the State indicated that their reason for abstaining was the existence of the prohibition.⁶⁹⁵ Two such instances are examined below: France in Côte d'Ivoire in 2002,⁶⁹⁶ and the CSTO in Kyrgyzstan in 2010.⁶⁹⁷ However, in both cases whether an acceptance of the alleged prohibition truly motivated the refraining was doubtful. The first case can be seen as primarily a policy decision rather than indicating acceptance of a legal obligation,⁶⁹⁸ and the second seems to have been based on an interpretation of the CSTO Charter rather than necessarily reflecting general international law.⁶⁹⁹

Reactions of Other States to Pro-Government Interventions

Another relevant source of State practice is how third States have responded to instances of pro-government intervention, and whether apparent violations of the rule have been widely criticised as illegal. During the Cold War, each camp reflexively condemned the interventions of the other, while non-aligned States tended to take a critical view towards all intervention. However, States taking a negative view of instances of consensual intervention usually gave a variety of reasons for their opposition. The most fiercely condemned cases were generally those where despite the intervening government's claim it seemed clear that no valid prior consent had been given, such as the Soviet interventions in Hungary,

⁶⁹⁴ Bannelier and Christakis (n204) 865–66.

⁶⁹⁵ See (n662).

⁶⁹⁶ (n1020) – (n1024).

⁶⁹⁷ (n1063) – (n1068).

⁶⁹⁸ Cf Christakis and Bannelier (n1) 129.

⁶⁹⁹ (n1066).

Czechoslovakia, and Afghanistan and the US interventions in the Dominican Republic and Grenada.⁷⁰⁰ In addition, critical States usually also cast doubt on the legitimacy of the consenting government as a representative of the people of the State, presenting the inviting government as a puppet, clique or oppressive minority clearly opposed to the popular will.⁷⁰¹ It thus often remained unclear whether States' criticism of instances of intervention implied support a blanket prohibition on pro-government intervention in internal conflicts, or whether it was compatible with the legality of military support at the valid request of a 'legitimate' government considered to authentically represent the State's people.

In the post-Cold War period there have been very few clear instances where third States have condemned consensual intervention as unlawful. The majority of cases of military action with government consent, including the ECOWAS interventions in Africa, the US-led post-invasion involvement in Afghanistan and Iraq, the French intervention in Mali, and the anti-ISIL action in Iraq, have been met with wide acceptance. Despite scholars' attempts to reconcile these widely accepted precedents with the alleged prohibitions by categorising them as reflecting new exceptions, their general tenor is to indicate that the international community will accept intervention to support or re-impose the authority of a government widely considered to be legitimate against armed groups widely considered to be illegitimate, whether because they are considered to be terrorists or for some other reason.⁷⁰² This development, which reflects the emergence of a greater degree of ideological consensus among States in the post-Cold War period, is clearly deeply in tension with the alleged rule, the underlying assumption of which is that outside forces should not be permitted to intervene in internal contests for power within a State on the basis of such legitimacy judgments. This argument will be further developed in the next chapter.

⁷⁰⁰ Nolte (n124) 634; see generally Part B.2 of this chapter.

⁷⁰¹ See for example (n800) (Greece); (n826) (Hungary); (n859) (Lebanon); (n871) (DRC); (n950) (Afghanistan), below.

⁷⁰² Le Mon (n343) 742–43.

The recent years of post-Arab Spring turmoil in the Middle East has seen a fracturing of this general consensus on legitimacy. Their attitude to the internal conflicts arising out of the Arab Spring have polarised States, with Western and most Sunni Arab States on one side and Russia and Iran on the other. This febrile environment has provided the context for such instances of pro-government intervention in circumstances of internal civil strife as the GCC's deployment of troops to Bahrain, Russia and Iran's assistance to the Assad regime, and the GCC's military action in Yemen. But while there has been some criticism of these actions by other States, there has been very little clear condemnation of these actions as unlawful. And particularly in Yemen, there has been a large degree of support for the action, despite the difficulty in conceptualising it as 'counter-intervention' given how grossly disproportionate it is to the alleged Iranian assistance to the Houthis.⁷⁰³ Thus this recent practice remains unsupportive of the alleged prohibition.

B. State Practice and Opinio Juris Since 1945: A Detailed Overview

B.1 Textual Endorsements of the Alleged Prohibition

In its approach to determining the customary status of the prohibition on the use of force and the principle of non-intervention in the *Nicaragua* case, the ICJ laid primary weight on States' textual endorsement of the prohibition in such contexts as General Assembly resolutions and multilateral treaties, as well as individual statements by States.⁷⁰⁴ Explicit textual endorsement of the rule, it seems, can provide a strong basis for establishing a particular rule as custom, even if the rule appears to be regularly disregarded in particular cases. However, the alleged prohibition on military assistance to governments in civil wars has only been expressly endorsed by a small number of individual States, in statements dating to the Cold War era. While there are a number of UNGA resolutions and multilateral

⁷⁰³ See (n1195)–(n1196) and text, below.

⁷⁰⁴ *Nicaragua* (n49) 99–101 (referring to the FRD, the Montevideo Convention and 'statements by State representatives').

instruments endorsing non-intervention more generally, there are several problems with interpreting this body of practice as establishing the prohibition on pro-government intervention in civil wars. Firstly, the formulations are not clear as to whether they include assistance to the government within the scope of prohibited intervention, and the *travaux préparatoires* indicate no consensus on the issue. Secondly, there is other State discourse which seems to exclude assistance to governments from the scope of prohibited intervention. Thirdly, potentially supportive *opinio juris* has diminished since the end of the Cold War. Statements by individual States endorsing the alleged prohibition, always few, have also dried up. So if the rule did not emerge during the Cold War, it has certainly not emerged since.

i. Opinio Juris from UN Resolutions and Regional Organizations

The 1948 Charter of the Organization of American States⁷⁰⁵ is the first important post-war legal instrument to enunciate in some detail a conception of the principle of non-intervention, in a way that would be influential in later formulations of the principle in the General Assembly.⁷⁰⁶ Article 15 of the Charter provides that:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements.

By referring to ‘interference...against the personality of the State or against its political, economic and cultural elements’, this text appears to abstract the idea of the State (and its constitutive elements) from that of its representative agent, its government.⁷⁰⁷ A plausible interpretation of this passage is that intervention is prohibited even if it takes place in support of the State’s government. But the passage does not clearly compel this reading. The Charter

⁷⁰⁵ (Adopted 30 April 1948, entry into force 13 December 1951) 119 UNTS 1609.

⁷⁰⁶ Jamnejad and Wood (n457) 350, Thomas and Thomas (n245) 3.

⁷⁰⁷ Cf Doswald-Beck (n243) 243.

also refers to each State's right to freely develop its political, economic and cultural life, but this is qualified by the earlier statement of principle requiring 'the political organization of these States on the basis of the effective exercise of representative democracy' (art 5).

Another treaty of the 1940s, the 1945 Charter of the Arab League,⁷⁰⁸ appears quite clearly to target the prohibition on intervention only at actions directed against the governments of foreign States.⁷⁰⁹

Ambivalence of a similar kind can be seen in early resolutions passed by the UNGA. Resolution 290(IV) of 1949, on the 'Essentials of Peace', spoke in broad terms, calling upon 'every nation...to refrain from any threats or acts, direct or indirect, aimed at impairing the freedom, independence or integrity of any State, or at fomenting civil strife and subverting the will of the people in any State.'⁷¹⁰ This can be read as covering pro-government intervention. Although it could be queried whether assistance even to an unpopular government would constitute 'fomenting civil strife', it could potentially subvert the will of the people of the target State. In contrast, the 1950 'Peace Through Deeds' resolution condemned intervention in a State 'for the purpose of changing its legally established government by the threat or use of force',⁷¹¹ thus seemingly excluding assistance to an established government from its scope.⁷¹²

The 1960s and 1970s saw an increased focus at the United Nations on defining and strengthening norms to protect States from foreign intervention.⁷¹³ One factor driving this trend was the increasing number of newly independent former colonies, which remained

⁷⁰⁸ (Adopted 22 March 1945, entry into force 10 May 1945) 70 UNTS 237.

⁷⁰⁹ Article VII: 'Each [member] shall pledge to abstain from any action calculated to change established systems of government.'

⁷¹⁰ UNGA Res 290 (IV) (8 December 1949), art 3.

⁷¹¹ UNGA Res 380 (V) (17 November 1950).

⁷¹² Christakis and Bannelier (n1) 115–16.

⁷¹³ *ibid.*

vulnerable to outside interference fuelled by competition between the superpowers.⁷¹⁴ Two major UNGA resolutions dealing with non-intervention were adopted during this period: the 1965 Declaration on the Inadmissibility of Intervention,⁷¹⁵ and the 1970 FRD.⁷¹⁶ The 1965 Declaration is formulated in broad terms. Art 1 states:

No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any State. Consequently, 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, are condemned.

This clearly draws on the OAS Charter text, the interpretation of which was discussed above.

Art 2 includes a further elaboration:

...no State shall organize, assist, foment, finance, encourage, or tolerate subversive, terrorist, or armed activities directed towards the violent overthrow of the regime in another State, or interfere in civil strife in another State.

Although the first part of this text is clearly limited to intervention against the established regime, the rule against interfering in civil strife in another State can be interpreted as preventing assistance to a government faced with significant internal unrest.⁷¹⁷ Art 5 of the resolution can also be interpreted as implying a prohibition on foreign support of a government facing revolution, providing that '[e]very State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State'. Then in 1970, the General Assembly adopted the celebrated FRD.⁷¹⁸ This likewise condemned as violating international law armed intervention 'against the personality

⁷¹⁴ Doswald-Beck (n243) 209. See for example A/C.6/SR.815 192 (Ghana): 'State sovereignty would be meaningless if States were allowed to intervene, especially in a world where there was such a great disparity in the military and economic power of States.'

⁷¹⁵ UNGA Res 2131 (XX) (21 Dec 1965) A/RES/20/2131.

⁷¹⁶ (n270).

⁷¹⁷ See Terry (n336) 121; cf Le Mon (n343) 752, interpreting the resolution as applying only to intervention against the government.

⁷¹⁸ (n270).

of the State or against its political, economic and cultural elements' and upheld each State's 'inalienable right to choose its political...system' without interference. The Declaration also provided that:

Every State has the duty to refrain from organizing, encouraging, assisting or participating in acts of civil strife or terrorist acts in another State...when the acts...involve a threat or use of force.

However, none of these formulations clearly indicates that military assistance to governments confronted by civil war is illegal.⁷¹⁹

Nor are the *travaux préparatoires* conclusive.⁷²⁰ Their ambiguity has led them to being used both for and against the existence of the prohibition. Thus, Doswald-Beck contends that:

one can certainly extract from the overall tenor of the speeches the idea that the principle of intervention was aimed at allowing certain changes of government and would thus entail the illegality of aiding either side in a revolution.⁷²¹

In contrast, in Nolte's view, while the reference to the impermissibility of interference in civil strife might seem to rule out pro-government intervention in internal conflicts, 'a more permissive picture...emerges from the debate.'⁷²² He indicates that:

a number of Western States...insisted that such interventions would remain legal even under a broadly formulated prohibition, and only a very few States contradicted them.⁷²³

⁷¹⁹ Moore (n448) 243, Lieblich (n104) 140-41; see also Le Mon (n343) 754.

⁷²⁰ Doswald-Beck (n243) 208-09.

⁷²¹ *ibid* 210.

⁷²² Nolte (n391) 81-82.

⁷²³ *ibid* 82.

Both Doswald-Beck and Nolte provide only a relatively short overview of UNGA Committee debates leading up to these resolutions. A more detailed look at the *travaux* is worthwhile to seek to determine which interpretation they better support.

There are some clear statements in favour of the prohibition on pro-government intervention, notably from the United Kingdom, which stated that:

if civil war broke out in a state and the insurgents did not receive outside help or support, it was unlawful for a foreign state to intervene, even on the invitation of the regime in power, to assist in maintaining law and order.⁷²⁴

This provides support for the existence of the rule as put forward in later scholarship – a prohibition on military assistance to governments in conflicts reaching the threshold of a ‘civil war’, with an exception for ‘counter-intervention’.⁷²⁵ Doswald-Beck also quotes the representatives of Argentina and Italy as providing support for the prohibition.⁷²⁶ Argentina stated that while it accepted ‘the right of weak countries to conclude agreements to ensure their defence and security, and in exceptional cases to call on foreign military assistance’, agreements of this kind:

should only be concluded where the government concerned was in full possession of its governmental prerogatives and was supported by the people and its representatives. On the other hand, their value would be extremely debatable if they were concluded in a highly revolutionary situation on the basis of a personal decision taken in desperation.⁷²⁷

This indicates a sceptical view as to the legality of pro-government intervention in a ‘highly revolutionary situation.’ However, two caveats should be noted. Firstly, the statement does not indicate with absolute clarity that such intervention would contravene existing

⁷²⁴ A/C.6/SR.822, 235.

⁷²⁵ As generally reflected in the 1975 IDI resolution (n463); see Chapter 3, Part C(ii), above.

⁷²⁶ Doswald-Beck (n243) 209–10.

⁷²⁷ A/C.1/SR.1398, 266.

international law, stating rather that the legality of pro-government intervention in this situation would be ‘extremely debatable’. Secondly, with its reference to the question of whether the government is ‘supported by the people and its representatives’, it raises the prospect that the application of the potential prohibition on pro-government assistance would depend not (only?) on the existence of civil war or insurrection, but would also require a separate assessment of the level of popular support of the government – that is, its degree of popular legitimacy. Such a legitimacy-based approach undermines the case for a broad prohibition on intervention on either side in any civil war. The Italian representative on the First Committee stated that:

no war was lawful and no one had the right to intervene in any way, either for or against movements or governments, according to how he judged them: such was the essence of the principle of non-intervention...⁷²⁸

This is another instance of support for the alleged prohibition. However, in context the representative was discussing situations involving ‘colonialism and racial segregation.’⁷²⁹ The intention seems to have been to rebut the claim by non-Western States of a right to assist ‘national liberation movements’ rather than to rule out assistance to governments not tainted by colonialism or apartheid. In a later meeting of the First Committee, Italy stated that ‘nothing in the draft resolution should be interpreted as being prejudicial to the right of a State to request aid in any form it desires’,⁷³⁰ without any reference to a prohibition on assisting governments faced with internal conflicts. Indeed, this is one of the references Nolte gives *for* the continued legality of pro-government intervention.⁷³¹

⁷²⁸ A/C.1/SR.1402, 296.

⁷²⁹ *ibid.*

⁷³⁰ A/C.1/SR.1422, 433.

⁷³¹ Nolte (n391) 82.

Some other States provided statements in support of significant limitations on governments' ability to request military assistance. Finland noted that theorists were divided on the question of assistance to governments, but that the prevalent opinion was that:

third States should not interfere, at least by military means, in civil wars, even at the request of the 'legal government'[...].⁷³²

Chile stated that:

...the principle of non-intervention prohibited intervention by a State in the internal or external affairs of another State even at the request of an established government.⁷³³

Bolivia made a similar statement, purporting to represent a general view among Latin American States:

From the point of view of the American States, it mattered little whether an intervention had been requested by an established government or by a political faction which was seeking to gain power. They considered that sovereignty could not be delegated...⁷³⁴

However, the Bolivian representative also stated that the principle of non-intervention was interpreted more broadly in the Americas than elsewhere,⁷³⁵ which arguably affects the weight of this statement as *opinio juris*.⁷³⁶

There was also some apparent support for restrictions on pro-government intervention from several socialist and newly independent States. Certain States laid emphasis on a State's ability to choose its own political, economic and social system in a way which

⁷³² A/C.6/SR.1086, 5.

⁷³³ A/C.6/SR.804, 121.

⁷³⁴ A/C.6/SR.814, 179.

⁷³⁵ *ibid.*

⁷³⁶ Also cf the Protocol to the OAS Convention on the Duties and Rights of States in the Event of Civil Strife (adopted 1 May 1957) 284 UNTS 201, which indicates that there is no prohibition on indirect military support of a government before recognition of rebels' belligerency (art 2).

arguably supports the prohibition.⁷³⁷ More specific statements on the issue of military intervention by invitation were made by Ghana, Indonesia and Nigeria.⁷³⁸ Ghana expressed the view that it was illegal for former colonial powers to use mutual defence treaties as a pretext for ‘buttressing an unpopular regime.’⁷³⁹ Indonesia stated that:

Intervention through the deployment of armed forces at the invitation of a sovereign State...could not only create tensions in the regions concerned, but might threaten international peace and security. If legally recognized, it could be exploited by fascist or puppet dictators to suppress indigenous groups fighting for their basic rights. Neighbouring countries would be affected, with resulting political, economic and social instability.⁷⁴⁰

Nigeria stated that any threat or use of force to compel or maintain any ideology in a particular State, or ‘the forcible establishment or maintenance by certain States of puppet regimes without any popular support in other States’ were ‘reprehensible.’⁷⁴¹ But all three statements can be read as supporting a narrower prohibition, one which would only forbid assistance to regimes lacking all popular support.

In contrast, a number of States affirmed in broad terms the legality of intervention at the invitation of the established government. Belgium stated that:

The right of every government to request external assistance if it deemed it advisable should also be mentioned in any definition of non-interference in the affairs of another State. The Government concerned was alone competent to decide on so

⁷³⁷ Ceylon, A/C.6/SR.805, 127; Cuba, A/C.6/SR.820, 220–21; Yugoslavia, A/C.1/SR.1401 (8 December 1965) 287–88; Bulgaria A/C.1/1405 (9 December 1965) 316. See Doswald-Beck (n243) 209–10.

⁷³⁸ In addition, Poland expressly stated that foreign States were bound to abstain from interference on either side in wars of secession: A/5727/ADD.1, 69–70.

⁷³⁹ ‘Report of the Special Committee on Principles of International Law Concerning Friendly Relations and Cooperation Among States’ (1964) UN Jurid YB 1964, 150.

⁷⁴⁰ A/C.6/SR.935, 212.

⁷⁴¹ A/C.1/SR.1405, 320.

extreme a measure, and was under no obligation to justify its actions in that respect to any third party.⁷⁴²

This sweeping statement seems to rule out any general prohibition on assistance to governments in internal conflicts. (However, Belgium went on to justify its provision of ‘technical’ assistance ‘not accompanied by any conditions’,⁷⁴³ introducing a note of ambiguity). France stated that:

...the principle of non-intervention was limited by the right which every State possessed, by virtue of its sovereignty, to request assistance from any State or organization of its choice.⁷⁴⁴

Australia referred to:

the right of States to broadly accept such external assistance as they might decide to accept. Most States would regard such a right as an essential attribute of State sovereignty.⁷⁴⁵

As noted above, Italy took a similar position. The United States specifically contended that ‘the provisions on civil strife...did not limit the right of a State to provide military assistance to another State at the request of the latter’.⁷⁴⁶

Such statements were not limited solely to Western States. Thailand explicitly supported the legality of military assistance to governments fighting rebel groups:

Since the essence of the notion of intervention was the usurpation of sovereignty, aid supplied to a *de jure* government was not intervention, whereas aid supplied to the

⁷⁴² *ibid* 317.

⁷⁴³ *ibid*.

⁷⁴⁴ *ibid* 319–20.

⁷⁴⁵ A/C.1/SR.1422, 432.

⁷⁴⁶ A/C.6/SR.1180, 19.

rebels was intervention because it infringed on the sovereignty of the established government.⁷⁴⁷

Jamaica stated that since intervention ‘generally amounted to uninvited interference in the internal affairs of the country, it followed that intervention which had been requested could not be forbidden’, although it went on to observe that the question of the competence of those making the request also had to be considered.⁷⁴⁸ Kenya opined that a revolution against ‘a popular elected government’ constituted ‘a threat to the life of the nation’ and that ‘peoples...should be free to seek assistance from friendly States.’⁷⁴⁹ Congo stated that any declaration must ‘distinguish between intervention and the right of any State to appeal for external assistance in order to preserve its sovereignty or territorial integrity...’⁷⁵⁰ The fact that a number of newly independent States took this position is hardly surprising: while the governments of weak States wanted to obtain the maximal protection against foreign meddling by phrasing the declaration broadly, neither would it be in their interest to prohibit intervention in their favour.⁷⁵¹ Other statements, though they did not expressly indicate that assistance to governments was not illegal, defined prohibited intervention in terms which appeared to exclude assistance to governments: for example, as involving ‘upsetting the established order’⁷⁵² or ‘subversive activities.’⁷⁵³

It can be argued that these statements do not necessarily indicate States’ rejection of a general prohibition on assistance to governments in civil wars. States making broad statements asserting the legality of consensual intervention may not have had the specific

⁷⁴⁷ A/C.1/SR.1398, 265.

⁷⁴⁸ A/C.1/SR.1406, 328.

⁷⁴⁹ A/C.1/SR.1402, 295; cf Doswald-Beck (n243) 211.

⁷⁵⁰ A.C.1/SR.1400, 280.

⁷⁵¹ Nolte (n391) 82; Luard (n459) 22.

⁷⁵² A/C.1/SR.1402, 295 (Côte d’Ivoire).

⁷⁵³ A/C.6/SR.807, 155 (Algeria); A/C.6/SR.812, 69–70 (Mali). See also similar statements by Ghana, Mexico, Venezuela, and the US: ‘Report’ (n739) 151.

situation of assistance to a government faced by civil war or internal rebellion in mind.⁷⁵⁴

However, in the absence of any indications that these States considered such limitations to apply, these broad affirmations of the legality of pro-government intervention count against the existence of the prohibition. Again, certain statements such as Kenya's imply a more nuanced position which would involve an assessment of the democratic legitimacy of the inviting government. Overall, these *travaux* indicate significant divisions and much ambiguity on the issue.

Reflecting the seemingly stronger support for the prohibition from Latin American States, a 1972 resolution of the OAS General Assembly 'reaffirm[ing] the obligation of States to refrain...from intervening in a civil war in another State, or in its internal struggles',⁷⁵⁵ can be read as endorsing it. On the other hand, the General Assembly's 1974 Definition of Aggression suggests that the use of force by one state on another's territory with the latter's agreement cannot constitute aggression.⁷⁵⁶ This does not however exclude the possibility that military assistance to a government in a civil war scenario, while not constituting aggression may nonetheless be illegal under a separate rule.

The 1960s and 1970s constituted the 'high tide' of attempts by the UN General Assembly to enunciate broad formulations of the principle of non-intervention.⁷⁵⁷ The 1981 'Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States' did not contain a broadly phrased prohibition on intervention in 'civil strife', but instead spoke *inter alia* of duties to refrain from using force 'to disrupt the political, social, or economic order of other States, [or] to overthrow or change the political system of another

⁷⁵⁴ Although this clearly is not the case in relation to the Thai statement (n747) contrasting government and rebels.

⁷⁵⁵ AG/RES 78 'Strengthening of the Principles of Non-Intervention and the Self-Determination of Peoples and Measures to Guarantee their Observance' (21 April 1972). See *Nicaragua* (n49) 102. Cf Maurice Mendelson (1998) 'The Formation of Customary International Law' 272 RdC 1, 380.

⁷⁵⁶ (n126) art 3(e), (g); see further Chapter 1, Part B(ii).

⁷⁵⁷ Nolte (n391) 82.

State or its government...’ and from ‘military activity on the territory of a State without its consent’.⁷⁵⁸ This language does not suggest an obligation to refrain from supporting an existing government.⁷⁵⁹ Since the end of the Cold War, there have been no further attempts at the United Nations to clarify the principle of non-intervention.⁷⁶⁰ More recent references to non-intervention in UN practice appear to focus on intervention *against* governments.⁷⁶¹

On a regional level, developments have also undermined the case for the prohibition. The member States of the Conference on Security and Cooperation in Europe (forerunner of today’s OSCE) made a commitment in 1991 to ‘support vigorously, in accordance with the [UN Charter] in case of overthrow or attempted overthrow of a legitimately elected government of a participating State by undemocratic means, the legitimate organs of that State upholding human rights, democracy and the rule of law’,⁷⁶² although it is not evident that they envisaged the use of military means to do this. More clearly on point, the 1999 ECOWAS Security Protocol allows for intervention by that subregional organization ‘in cases of internal conflict a) that threatens to trigger a humanitarian disaster, or b) that poses a serious threat to peace and security in the sub-region’, as well as ‘in the event of the overthrow of a democratically elected government’.⁷⁶³ Such intervention can be initiated ‘at the request of a member State’.⁷⁶⁴ Similarly, art 4(j) of the 2000 Constitutive Act of the African Union recognizes as one of the principles of the Union ‘the right of Member States

⁷⁵⁸ UNGA Res 36/103 (9 December 1981).

⁷⁵⁹ Nolte (n391) 83; cf Doswald-Beck (n243) 211–12. Twenty-two States voted against the resolution, but for reasons unrelated to this issue: *ibid*.

⁷⁶⁰ Nolte (n391) 83.

⁷⁶¹ For example Sub-Commission on the Promotion and Protection of Human Rights Res 2002/1 (12 August 2002) E/CN.4/2003/2, 13; Christakis and Bannelier (n1) 117.

⁷⁶² See Roth (n247) 376.

⁷⁶³ (n252), art 25.

⁷⁶⁴ (n252) art 26(c).

to request intervention from the Union in order to restore peace and security'.⁷⁶⁵ The *opinio juris* of African States reflected in these treaties seems difficult to reconcile with the alleged general prohibition on pro-government intervention, unless a stark distinction is drawn between intervention by third States and by regional organizations.⁷⁶⁶

ii. Other Statements by States

Outside the UN context, occasional statements have been made by individual States in favour of a general prohibition on foreign military assistance to governments in civil wars. The most notable such statement came from the United Kingdom in a 1984 Foreign Office report. This indicated that 'any form of interference or assistance is prohibited (except possibly of a humanitarian kind) when a civil war is taking place and control of the state's territory is divided between warring parties', while acknowledging an exception allowing 'counter-intervention' in favour of one side of a conflict in response to previous outside intervention on the other side.⁷⁶⁷ This broad formulation of the prohibition (which would appear to cover provision of arms, training and financial support as well as the sending of foreign combat troops) endorses the position contained in the 1975 IDI resolution. Similarly, a 1983 Canadian Foreign Ministry statement expressed some support for the existence of the prohibition:

It seems to be generally accepted that such aid is justifiable when the government in question is substantially in control of the territory and its existence is not substantially threatened by an insurgent movement... However, when two rival factions are competing over control, neither of which has established effective control over the territory or over a substantial part of it, the problem becomes much

⁷⁶⁵ (n252); Lieblich (n104) 147, de Wet (n379) 989. See also the amendment which would allow the AU to uphold 'legitimate order' (n402).

⁷⁶⁶ Cf Nolte (n124) 638–39.

⁷⁶⁷ (n669).

more difficult... the legality of intervention in this situation is, to say the least doubtful.⁷⁶⁸

Another statement which has been adduced as *opinio juris* in favour of the prohibition is the following statement in a speech by President Mitterrand of France to a summit of African leaders in 1990, in which he disclaimed the previous French interventionist policy in Africa in the following terms:

Each time that an external threat arises which could put at risk your independence, France will be present at your side... But it is not our role, as a foreign country, although a friendly one, to intervene in internal conflicts. If they should arise, France in accord with the [territorial State's] authorities will seek to protect its nationals; but it will not aim to resolve the conflicts.⁷⁶⁹

However, these statements do not constitute a sufficient basis for concluding that the rule had emerged as customary international law by 1990. The only clear endorsement of the rule as a legal requirement is found in the British statement. The Canadian statement does not firmly commit itself to the existence of a prohibition *de lege lata*. President Mitterrand's words, meanwhile, could be taken as indicating a change of French policy in Africa, rather than the recognition of a strict legal obligation.

Since the early 1990s the trickle of clear statements in favour of the existence of the alleged prohibition has dried up. Britain, despite its previous endorsement of the prohibition, has in recent years made no mention of it in contexts where it might have been considered relevant. When asked in 2011 when UK forces should be deployed 'for the purposes of keeping internal order in another country', a Foreign Office minister replied:

We will deploy the [the armed forces] where key UK interests are at stake, where we have a clear strategic aim, where the likely political, economic and human costs are in

⁷⁶⁸ 'Canadian Practice in International Law' (1984) 22 CYIL 334.

⁷⁶⁹ Quoted in Christakis and Bannelier (n1) 129 (my translation).

proportion to the likely benefits, where we have a viable exit strategy, and where justifiable under international law.⁷⁷⁰

In a more concrete situation, in the official summary of its legal position on the justification for its air strikes on Islamic State forces on Iraqi territory in 2014, again no mention was made of the alleged prohibition. Rather, it was simply stated that force with consent is not legally prohibited:

International law is clear that the use of force in international relations is prohibited, subject to limited exceptions. However, international law is equally clear that this prohibition does not apply to the use of military force by one State on the territory of another if the territorial State so requests or consents.⁷⁷¹

High-ranking US legal officials have likewise made broad statements in recent years asserting the lawfulness of force used with the consent of the territorial government.⁷⁷² In December 2016 the US acknowledged the ‘significant challenges’ involved in applying the concept of consent as a legal basis for force in situations, *inter alia*, where ‘governments...have lost control of a significant part of the national territory’.⁷⁷³ But it did not go on to endorse the alleged prohibition, instead limiting itself to stating that ‘[t]he US government carefully considers these issues when examining the question of consent’.⁷⁷⁴

A 2016 ‘Joint Declaration on the Promotion of International Law’⁷⁷⁵ by China and Russia casts further doubt on the alleged prohibition on assistance to governments in civil wars. The Declaration proclaims that the two States ‘fully support the principle of non-

⁷⁷⁰ ‘UK Materials on International Law’ (2012) 82 BYIL 676, 1011–12.

⁷⁷¹ ‘UK Materials on International Law’ (2015) 85 BYIL 301, 622.

⁷⁷² ‘Attorney-General Eric Holder Speaks at Northwestern University School of Law’ (Department of Justice, 5 March 2012) <www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law>; Egan (n201) 302; Legal and Policy Framework (n13).

⁷⁷³ ‘Legal and Policy Framework’ (n13) 11.

⁷⁷⁴ *ibid.*

⁷⁷⁵ ‘Declaration of the Russian Federation and the People’s Republic of China on the Promotion of International Law’ (Russian Foreign Ministry, 25 June 2016) <www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2331698>.

intervention...and condemn as a violation of this principle any interference by States in the internal affairs of other States *with the aim of forging change to legitimate governments*' (emphasis added). The explicit condemnation is targeted solely against intervention against existing 'legitimate' governments. There is no reference, in contrast, to any prohibition on assistance to governments. The consistent failure by States in the post-Cold War period to make any express reference to the alleged prohibition weakens the case for its existence.

iii. Opinio Juris on Arms Sales

As discussed previously, there is disagreement among proponents of the alleged prohibition about whether it prevents the provision of arms to a government during a civil war. Recent international and regional instruments regulating the arms trade do not support such a general prohibition, imposing instead other restrictions on arms transfers. The Arms Trade Treaty,⁷⁷⁶ which currently has 92 State parties,⁷⁷⁷ forbids arms transfers which would violate Security Council arms embargoes or relevant international agreements to which a State is a party, or arms transfers where a State has knowledge that the arms would be used in commission of certain international crimes (art 5). Clearly, this is not equivalent to a general prohibition on arms provision to a government facing a civil war.

A number of regional instruments (some but not all legally binding) have been adopted to regulate arms exports.⁷⁷⁸ The EU's 2008 Common Position defining common rules governing the export of military technology and equipment⁷⁷⁹ includes among its criteria a requirement that States shall deny arms exports licenses if there is a clear risk that they will be used for 'internal repression', which is defined in terms of 'major violations of human rights and fundamental freedoms', or for serious breaches of international

⁷⁷⁶ Adopted 2 April 2013, entered into force 24 December 2014; UNGA Res 67/234 B (2 April 2013). Text available at <www.un.org/disarmament/convarms/att/>.

⁷⁷⁷ *ibid.*

⁷⁷⁸ Ruys (n467) 28–29.

⁷⁷⁹ Council Common Position 2008//944/CFSP [2008] OJ L355/99.

humanitarian law.⁷⁸⁰ Similar provisions appear in the ECOWAS Convention on Small Arms and Light Weapons⁷⁸¹ and the OSCE Document on Small Arms and Light Weapons.⁷⁸² These provisions however do not appear equivalent to a general prohibition on supplying arms to a government in a civil war in which the government is generally complying with its human rights and humanitarian law obligations. All three instruments also contain provisions requiring that States deny licenses for exports which would provoke or prolong armed conflicts or aggravate existing tensions in the country of destination.⁷⁸³ This is a potentially restrictive criterion, but again it is not equivalent to the alleged general prohibition. For example, arms supplies may be provided for the purpose of bringing an existing armed conflict to a quicker end through a swifter victory for the legitimate government⁷⁸⁴ – a case which would not seem to be caught by this provision. States in practice seem to interpret these norms in a flexible way allowing arms exports to continue in situations of internal strife. The UK, for example, though its own domestic standards for arms exports reflect the EU Common Position,⁷⁸⁵ has presented as compliant with these standards its continued arms provision to Bahrain⁷⁸⁶ and to the Saudi armed forces for use in Yemen,⁷⁸⁷ despite the

⁷⁸⁰ art 2(2)(a),(b)

⁷⁸¹ ECOWAS Convention on Small Arms and Light Weapons, their Ammunition and other related materials (adopted 14 June 2006), art 6(3)(a).

⁷⁸² 24 November 2000, available at <<http://www.osce.org/fsc/20783>>, section III(b)(i),(viii).

⁷⁸³ EU Common Position (n779) art 2(3), ECOWAS Convention (n781) art 3(c), OSCE Document (n782) Section III(b)(v).

⁷⁸⁴ Lieblich (n104) 138.

⁷⁸⁵ Consolidated EU and National Arms Export Licensing Criteria (25 March 2014) available at <www.publications.parliament.uk/pa/cm201415/cmselect/cmquad/186/186ii20.htm>.

⁷⁸⁶ HC Deb 20 January 2015, vol 591, col 66 (Foreign Secretary).

⁷⁸⁷ See *R (Campaign Against the Arms Trade) v Secretary of State for International Trade* [2017] EWHC 1726 (QB), [48].

repression of demonstrators in the first country⁷⁸⁸ and the bloody civil war occurring in the second.⁷⁸⁹

Conclusion

This section has shown the difficulties in establishing that States have endorsed the alleged general prohibition on military assistance to governments in internal conflicts. The leading anti-interventionist UNGA resolutions of the Cold War period can be read as endorsing the prohibition, but do not clearly do so. The preparatory debates indicate a lack of consensus on the issue, with many States affirming the general legality of intervention with government consent or seeming to condemn only assistance to a popularly illegitimate government. Other statements by States supporting the prohibition during the Cold War are few in number. So this body of *opinio juris* fails to establish that the rule came into existence before 1990. Since 1990, there has been no clear support for the prohibition from States, with States appearing broadly to affirm the legality of intervention with government consent.

B.2 Cases of Pro-Government Intervention in Practice during the Cold War Period

This section and the next will consider another possible source of support for the alleged prohibition: States' justifications of, and reactions to, specific cases of pro-government intervention. As indicated above, many authors argue for the existence of the prohibition relying primarily on such *opinio juris*, emphasizing that in practice States always rely on additional factors beyond the mere existence of government consent to justify intervention in internal conflict situations.⁷⁹⁰ Sceptics in contrast contend that States have focused on whether consent actually existed, and whether the consenting party was the legal

⁷⁸⁸ (n1069)–(n1080) and accompanying text, below.

⁷⁸⁹ (n1176) –(n1207) and accompanying text, below.

⁷⁹⁰ See (n646).

or 'legitimate' government of the State, rather than denying that even a government considered as being 'legitimate' could legalize intervention in a situation of internal strife.⁷⁹¹

The rest of this chapter will seek to cast light on these different characterizations of State practice and *opinio juris* by analyzing particular instances of pro-government intervention in situations of internal strife since 1945.⁷⁹² This section will consider relevant practice during the Cold War period, while the subsequent sections will consider practice in the immediate post-Cold War era and since 2001. The Cold War practice is considered in some depth because it is practice from this period that provides the strongest potential basis for the alleged prohibition. Just as in Part B.1 it was recognized that the most clearly anti-interventionist UNGA resolutions date back to the Cold War period, so practice during these decades seems potentially more supportive of the prohibition than post-Cold War practice. In fact the Cold War practice is likely to be decisive in determining whether the prohibition currently exists or not. If the prohibition did come into existence before the 1990s, the subsequent practice, although not supportive of the prohibition, would likely not reject it clearly enough to establish that it had fallen into desuetude. But as this Part will argue, the stronger view is that even during the Cold War the prohibition never emerged as a customary rule.

A preliminary point needs to be made about the scope of the consideration of State practice and *opinio juris*. In the previous chapter it was shown that while the alleged prohibition is commonly applied in situations of 'civil war', it is disputed whether this (however it is defined) is the correct threshold. Many situations of internal strife occur which seem to fall outside the category of civil war, such as *coups d'état* or widespread opposition

⁷⁹¹ Lieblich (n104) 143–50, Le Mon (n343) 754.

⁷⁹² Situations involving UN-authorized peacekeeping missions will be excluded from this survey, given the different legal context involved.

protests.⁷⁹³ In order to consider whether practice helps to clarify the contours of the alleged prohibition, this chapter considers interventions which have taken place in such scenarios as well as those which have occurred during ‘full-scale’ civil wars.

Overview of the Cold War Practice

The issue of the provision of military assistance to governments faced with civil war arose almost immediately after the end of the Second World War. The unsettled post-war situation created the conditions for civil strife in a number of countries, and the rapid onset of the Cold War made such conflicts a field for the rivalry between the increasingly hostile superpowers and their respective ideologies. Many proponents of the alleged prohibition on pro-government intervention in civil wars do not claim that it applied in the immediate post-war period, instead presenting it as having emerged in the mid to late 1950s.⁷⁹⁴ This division is however somewhat artificial, since both before and after that period States’ discourse on military assistance to governments generally remained ambiguous.

The Cold War competition between the ideological blocs spawned many ‘proxy war’ situations in which military assistance to governments was presented as a response to prior subversive intervention by the opposing bloc. This common framing can be interpreted as supporting the alleged prohibition by invoking the ‘counter-intervention’ exception supposedly contained within it. However, States also often seemed to assert or assume the broad legality of intervention with government consent. Often criticisms were based rather on denials that such consent had in fact been given. States also often seemed to tie their support or condemnation of particular interventions to claims about the inviting government’s level of popular support. Although such assessments of popular legitimacy can often be argued to have been in bad faith, since they inevitably reflected each bloc’s own

⁷⁹³ Moore (n448) 221.

⁷⁹⁴ Doswald-Beck (n243) 213, Corten (n1) 301–02. Tanca sees a divide around 1970: (n111) 48.

interests and ideological presuppositions, they undermine the case that States recognized a general prohibition prohibiting assistance to all governments faced with internal conflict, even 'legitimate' ones.

Greece

The Greek Civil War, fought between the monarchist, pro-Western government and left-wing insurgents from 1946 to 1949, provides the most prominent early example of pro-government military intervention in the Charter period. During this conflict, Britain stationed troops in Greece which provided training, logistical and operational assistance to the government forces, as well as supplying them with arms. This was later supplemented by US financial support.⁷⁹⁵ In justifying the action, the British Foreign Secretary asserted a broad right to deploy troops in a foreign State's territory at the invitation of its government even though he acknowledged that Greece was in a state of civil war.⁷⁹⁶ A similar position was expressed by the Greek government.⁷⁹⁷ In the early stages of the conflict, even Soviet-aligned States seemed to accept the consent of the Greek government meant that Britain's involvement was legal.⁷⁹⁸ But as the conflict went on a number of Eastern bloc States began to suggest that assistance to the Greek government was impermissible intervention in its internal affairs because of the existence of a civil war.⁷⁹⁹ This provides *opinio juris* in favour of the alleged prohibition. However, these States claimed that the government lacked popular support,⁸⁰⁰ casting doubt on whether the Soviet bloc would have opposed assistance to what

⁷⁹⁵ Weisburd (n340) 171–74.

⁷⁹⁶ S/PV.6, 94, 97.

⁷⁹⁷ S/PV.7, 119; see Corten (n1) 302.

⁷⁹⁸ *ibid*, 125 (Poland): 'If one keeps to the purely formal question, there is evidently nothing we can say, since an agreement has been reached' between the two governments.

⁷⁹⁹ S/PV.126, 708 (Bulgaria); S/PV.128, 739 (Poland); S/PV.130, 782–83 (Poland); S/PV.131, 792 (Yugoslavia).

⁸⁰⁰ S/PV.128, 738 (Poland); S/PV.183, 1974 (USSR); S/PV.188, 2082 (Albania), 2091–92 (Yugoslavia). The Soviet representative later described it as a 'monarcho-fascist clique': S.PV.489, 4.

it considered to be a popular government.⁸⁰¹ The Eastern bloc's critique of the intervention was clearly rejected by the pro-Western majority in the United Nations.⁸⁰²

The legality of the assistance to the Greek government could potentially be reconciled with the alleged prohibition as it later evolved in the scholarship, either on the basis that Britain did not directly deploy its own troops, at least on a large scale, against the communist forces, or as 'counter-intervention' since Britain later alleged foreign assistance to the guerrillas in the form of bases situated in Yugoslavia, Albania and Bulgaria.⁸⁰³ But overall the justifications of the action by the pro-Western majority of States suggest a broad acceptance of the right of governments to invite foreign military assistance to ensure 'domestic tranquillity' even in purely internal conflicts.⁸⁰⁴ During the course of the Greek crisis, the US President enunciated the 'Truman Doctrine', by which the US committed itself 'to support free peoples who are resisting attempted subjugation by armed minorities or by outside pressures.'⁸⁰⁵ The reference to 'outside pressures' suggests a counter-intervention rationale, but the claim to assist against 'armed minorities' relies rather on the government's popular legitimacy.

Other Early Cold War Western Interventions

The years immediately after the adoption of the Charter saw a number of cases where foreign States provided military assistance to governments facing insurgency, including American provision of military aid to the Nationalist government of China during

⁸⁰¹ Cf the Greek representative's emphasis on the democratic credentials of his government: S/PV.128, 750.

⁸⁰² See UNSC Res 34 (15 September 1947) Corten (n1) 302. Cf Weisburd (n340) 173.

⁸⁰³ S/360: 'Report by the Commission of Investigation Concerning Greek Frontier Incidents' 167.

⁸⁰⁴ S/PV.128, 747 (US); S/PV.130 771 (Brazil), 788 (Australia). Cf Corten (n1) 302; Nolte (n124) 630.

⁸⁰⁵ President Truman, Address to Congress, 12 March 1947, available at http://avalon.law.yale.edu/20th_century/trudoc.asp

the 1946-49 Civil War,⁸⁰⁶ the deployment of French troops and supply of American arms to Vietnam after it was nominally granted independence on 1949,⁸⁰⁷ and the intervention of British, Australian and New Zealand troops against Communist insurgents in Malaya, both before and after its independence from the UK.⁸⁰⁸ These cases involved Western States intervening on the request of pro-Western governments, and were largely accepted by the pro-Western majority in the United Nations. In justifying intervention, Western States asserted the broad legalizing effect of government consent.⁸⁰⁹ Similarly, the leading non-aligned State, India, when justifying its actions in Kashmir, asserted ‘the right to go to the aid of a legitimate government, even if the opposition to that Government is from its own insurgent nationals’.⁸¹⁰

It is true that in most of these cases allegations of external assistance to the rebels by Communist powers were also made. This could be taken as supporting the alleged prohibition by invoking an exception for ‘counter-intervention.’ However, often these allegations were not concrete but invoked an assumption that Communism as a monolithic international force directed from Moscow, so that any rebellion classified as ‘Communist’ could be considered as inspired from abroad.⁸¹¹ It was also asserted that such rebels were ‘terrorists’ supported only by a minority of the population.⁸¹² Thus to the extent that they

⁸⁰⁶ Weisburd (n340) 99-100; Lyman Van Slyke (ed), *The China White Paper 1949*, vol 1 (Stanford 1967) 404–05.

⁸⁰⁷ See Talmon (n6) 50; Weisburd (n340) 66; Thomas and Thomas (n245) 232–33.

⁸⁰⁸ Lauterpacht (n479) 107.

⁸⁰⁹ See for example S/PV.71, 439 (Netherlands); cf Corten (n1) 302–03.

⁸¹⁰ S/PV.236, 275–76.

⁸¹¹ See for example S/PV.674, 15 (US): ‘the United States has tried to respond to requests for aid by peoples and their governments who were attempting to defend their independence against imperialistic Communism...’; S/PV.690 (Republic of China): ‘what appears to be a civil war is in many cases really an international conflict’ inspired by communist powers; HoR Official Hansard (Australia) 30 May 1950, 3350 (Prime Minister); Weisburd (n340) 66–67.

⁸¹² For such characterisations of the Malayan rebels, see HoR Official Hansard (Australia) 8 June 1950, 4010–12 (Minister for External Affairs); 10 November 1953, 7 (Governor-General’s Speech); HL Deb 29 July 1957 vol 205 c 2333 (Commonwealth Secretary).

went beyond a broad reliance on consent, these States seemed to amount to a broad claim to uphold (allegedly) legitimate governments against the inherently oppressive force of ‘international Communism’, rather than accepting that they were only limited to assisting governments in response to previous concrete foreign assistance to the rebels. In contrast, Communist States consistently condemned these Western actions as foreign interventions in domestic conflicts, providing potential *opinio juris* in favour of the prohibition.⁸¹³ However, the Communist States’ attitude also seemed to depend on an ideological assessment of the legitimacy of the governments receiving assistance, with the PRC for example asserting that during the Chinese Civil War the Kuomintang government had been ‘a reactionary clique’ opposed by ‘the entire Chinese people’.⁸¹⁴ The dominance of this ideological criterion was shown in the Soviet Union’s justification for its own intervention in Hungary in 1956, undermining its previous *opinio juris* in favour of the alleged prohibition.

Hungary

Wide-scale protests in Hungary led the party leadership to request Soviet intervention on October 23, but before the Soviets took decisive action reformist elements within the leadership took over the Hungarian government on October 24, with Imre Nagy becoming Prime Minister.⁸¹⁵ Nagy announced an intention to hold free elections and to negotiate Hungary’s withdrawal from the Warsaw Pact. After a period of hesitation, the Soviets invaded on November 4. The Soviets claimed that the Nagy government had been overthrown before the Soviet intervention and that the new government, led by Janos

⁸¹³ See S/PV.527, 16–17 (PRC). The Soviet Union also invoked a general prohibition on intervention in civil wars to criticise the UN action in the Korean War, presenting this conflict as a domestic conflict within Korea rather than an inter-State one and arguing that it was illegal to intervene in such a conflict: UN Doc S/PV.482 (3 August 1950) 6, 8; S/PV.489, 3–4; Thomas and Thomas (n245) 230–31.

⁸¹⁴ *ibid.*

⁸¹⁵ Weisburd (n340) 211–12.

Kadar, had requested its action, although in reality the pro-Soviet regime only replaced the revolutionary government after, and as result of, the invasion.⁸¹⁶

The Soviet justification of the action seemed to contradict its opposition to pro-government intervention in previous cases, going so far as to deny that the Security Council had jurisdiction to consider the action because it took place with the consent of the Hungarian government.⁸¹⁷ But the crux of the Soviet argument was to reject the legitimacy of the anti-Soviet forces in Hungary, describing them as ‘criminal elements of a fascist type’⁸¹⁸ and as ‘counter-revolutionary gangs’ who had created a ‘state of terror.’⁸¹⁹ They also alleged that these counter-revolutionary forces had received (ill-defined) ‘help from abroad’.⁸²⁰ The Soviet Union’s approach to justifying its invasion of Hungary provided a mirror image of previous Western arguments: a broad assertion of the legality of military action with government consent, combined with an assertion that an anti-Communist uprising was (apparently by definition) a ‘fascist’ rebellion inspired by the West which could be legitimately suppressed.

Except by Soviet satellites, the invasion was almost universally condemned as illegal.⁸²¹ One obvious ground for this conclusion, referred to by several States, was that the intervention was not requested by the legal government but was aimed at toppling it.⁸²² But a broader basis for the condemnation was also widely evident: that whether or not the government consented, the invasion was a violation of the Hungarian people’s right to

⁸¹⁶ *ibid* 213.

⁸¹⁷ S/PV.746, 3; Doswald-Beck (n243) 223.

⁸¹⁸ *ibid* 4.

⁸¹⁹ S/PV.754, 8–9.

⁸²⁰ *Ibid*; see also S/PV.746, 25–26; S/PV.752, 24.

⁸²¹ A condemnatory resolution in the SC was blocked by the Soviet veto: S/PV.754, 12.

⁸²² S/PV.746, 15 (France); 23-24 (Australia); S/PV.752 9 (US), 12 (UK), 20 (France).

determine their own form of government.⁸²³ For example, Iran condemned the use of foreign troops ‘to stifle popular movements, even if the Government whose territory is occupied has consented to their use or asked for it’.⁸²⁴ But importantly, critical States emphasised that the Hungarian uprising was a genuine popular revolution supported by ‘the vast majority of the Hungarian people’.⁸²⁵ The UK representative, for example, emphasised that the revolution was not ‘a rebellion by an unimportant clique against existing law and order’ but ‘a popular nation-wide movement for the recovery of liberty and independence.’⁸²⁶ This emphasis does not suggest a general prohibition on all assistance to governments in internal conflicts, but rather on intervention against rebellions which are considered to have the status of ‘popular’ or ‘nation-wide’ movements – a criterion apparent based on assessment of their level of support and the perceived legitimacy of their goals.⁸²⁷

Oman

In 1957 the United Kingdom sent troops and air support to aid the Sultan of Muscat and Oman against a rebellion of certain tribes in Central Oman, who claimed to constitute a separate Imamate of Oman.⁸²⁸ The legality of the intervention was questioned by certain Arab States who asserted that the Imamate was an independent State and hence the action constituted inter-State aggression. The UK position was that the so-called Imamate was part of the territory of the Sultanate, and thus the situation did not involve an inter-State use of force.⁸²⁹ However, the classification of the conflict as an internal one raised the question of whether the UK was asserting a general right to provide direct military assistance to a

⁸²³ S/PV.746, 17 (France); 31-32 (Belgium); S/PV.752 8 (US), 11 (Cuba), 14 (Peru), 20 (France); see also Roth (n247) 266.

⁸²⁴ S/PV.746, 31; Doswald-Beck (n243) 224.

⁸²⁵ S/PV.752, 19 (France).

⁸²⁶ S/PV.746, 11.

⁸²⁷ Cf Fitzmaurice (n480) 177–79 (distinguishing popular movements from minority coups).

⁸²⁸ Tanca (n111) 150–51.

⁸²⁹ Lieblich (n104) 143.

requesting government in an internal conflict. In Parliament, the Foreign Secretary stated that '[t]he reasons for this action are that the dissidents have clearly received assistance from outside the territory of the Sultan',⁸³⁰ suggesting a counter-intervention rationale compatible with the alleged general prohibition on pro-government intervention.⁸³¹ No evidence of the foreign evidence was provided except that the rebels possessed modern arms which must have been imported.⁸³² However, the Foreign Secretary later stated that the intervention occurred 'at the invitation of a friendly ruler to help him in preserving law and order in his own domains',⁸³³ appearing to uphold the legality of assistance to governments more broadly. Another minister described the matter as an 'internal affair' of the Sultanate.⁸³⁴

In the Security Council, the UK did state that the rebellion against the Sultan 'had been encouraged and supported from the outside', without providing any details.⁸³⁵ However, the UK seemed to place primary reliance on the fact that the 'legitimate government' had requested the action, in a letter which did not refer to the rebels' assistance from the outside.⁸³⁶ Several States sympathetic to the UK in the Security Council emphasised the Sultan's request without referring to the alleged foreign assistance to the opposition,⁸³⁷ although in contrast France in defending the British action described its purpose as to 'counterbalance' assistance to the opposition.⁸³⁸ States critical of the intervention generally assumed the independence of the Imamate and thus condemned it as inter-State

⁸³⁰ HC Deb 22 July 1957 vol 574 col 32.

⁸³¹ Corten (n1) 303.

⁸³² HL Deb 23 July 1957 vol 205 col 64 (Undersecretary of State).

⁸³³ HC Deb 25 July 1957 vol 574 col 607.

⁸³⁴ HL Deb 25 June 1957 vol 205 cols 129–30.

⁸³⁵ S/PV.783, 7

⁸³⁶ Ibid, 10-11; Tanca (n111) 150.

⁸³⁷ S/PV.783, 14 (Cuba); S/PV.784, 3 (ROC), 5 (Australia).

⁸³⁸ S/PV.784, 5.

aggression.⁸³⁹ But the Philippines⁸⁴⁰ and Iraq⁸⁴¹ did raise the possibility of whether, even if the Imamate was part of the Sultan's territory, the intervention might, according to the views of some scholars, be illegal as assistance to a government suppressing an armed insurrection. Ultimately the proposal to add the matter to the agenda failed.⁸⁴² The *opinio juris* provided by the case is ambiguous, with broad affirmations of the validity of a government's request for assistance to uphold 'law and order' made alongside statements apparently presenting the military action as 'counter-intervention' against (vague) foreign subversion. Reflecting this ambiguity, the precedent has been interpreted both as supporting⁸⁴³ and as rebutting⁸⁴⁴ the existence of a general prohibition on pro-government intervention.

Lebanon and Jordan

The deployment of troops in 1958 by the US in Lebanon and by the UK in Jordan at the request of the governments of these States has been presented as a key precedent supporting the existence of the alleged prohibition.⁸⁴⁵ The States involved justified the action as a response to a request by these States to 'indirect aggression' against Lebanon and Jordan, alleging the infiltration of arms and irregular forces into these countries from the United Arab Republic.⁸⁴⁶ The US also relied on the need to protect its nationals in Lebanon and expressly disclaimed any intention 'to engage in hostilities of any kind, much less to fight a war.'⁸⁴⁷ These justifications can be interpreted indicating *a contrario* that assistance to a government simply for the purpose of assisting a government against internal unrest would

⁸³⁹ S/PV.783, 16 (USSR: UK intervening 'against...the lawful government' of the Imamate); S/PV.784, 9 (Iraq).

⁸⁴⁰ S/PV.783, 12.

⁸⁴¹ S/PV.784, 11.

⁸⁴² By a vote of 4-5-1: S/PV.784, 16.

⁸⁴³ Corten (n1) 304-05.

⁸⁴⁴ Lieblich (n104) 143; Brownlie (n481) 327.

⁸⁴⁵ Doswald-Beck (n243) 214, Corten (n1) 303-04.

⁸⁴⁶ S/PV.823, 4 (Lebanon); S./PV.827, 7-8 (US); S/PV.831, 4-5 (Jordan).

⁸⁴⁷ S/PV.827, 6-7.

be illegal. The Soviet Union, in its condemnation of the invasion, rejected claims of the UAR's involvement and characterised the conflict as an internal 'civil war'.⁸⁴⁸ The Soviet position, that the US action interfered with the right of the Lebanese people to determine their own government and hence breached the principle of non-intervention,⁸⁴⁹ seems to directly support the alleged prohibition on pro-government intervention in purely internal conflicts.

However, again a closer look at the reasoning reveals ambiguities. Alongside the statements emphasising prior foreign 'subversion', States supporting the intervention also used formulations which upheld the legality of assistance to governments more generally.⁸⁵⁰ Also, when questioned about the evidence for the UAR's alleged subversion in the Security Council, the intervening States claimed that only the requesting States that were entitled to assess this threat, not the Council or foreign States. The US referred very generally to 'the sharpened intensity of the violent events in the Middle East' which the Government of Lebanon was entitled to consider to have 'threatened its security in a new way'.⁸⁵¹ This vagueness undermines the case as *opinio juris* for a coherent doctrine of counter-intervention. Moreover, Lebanon and Jordan themselves, and other States supportive of the intervention like France, presented the legal justification for the deployment as collective self-defence under art 51,⁸⁵² although as other States pointed out, even if the more specific claims of arms supply and troop infiltration by the UAR were true, they would not constitute an 'armed attack' as required by art 51.⁸⁵³ The reliance on art 51 has been argued to implicitly support

⁸⁴⁸ S/PV.827, 18; cf S/PV.828, 5 (UAR: 'fighting...has virtually ceased').

⁸⁴⁹ S/PV.835, 15; 'Letter Dated 20 July 1958 from the Representative of the USSR Addressed to the Secretary-General' S/4059, 3–4.

⁸⁵⁰ S/PV.823, 14 (Lebanon: seeming to acknowledge the permissibility of intervention which was 'beneficent or friendly...aimed at supporting or strengthening or upholding the government' of a receiving State); S/PV.831, 6 (UK); S/PV.832, 7 (Iraq).

⁸⁵¹ S/PV.831, 9 (US); see also S/PV.838, 17–18 (UK).

⁸⁵² S/PV.827, 16 (Lebanon); S/PV.828, 2 (France), 3 (Canada); S/PV.831 5 (Jordan), 19 (ROC).

⁸⁵³ S/PV.828, 6 (UAR); S/PV.829, 9–10 (USSR); S/PV.830, 9 (Sweden).

the alleged prohibition, since if government consent were in itself enough to legalise the military assistance there would be no reason to refer to collective self-defence.⁸⁵⁴ But States' recourse to a strained reading of art 51 has also been argued to undermine the case that States acknowledge a separate right of 'counter-intervention',⁸⁵⁵ even though this has been generally presented in the scholarship as an exception integrally linked to the alleged prohibition on pro-government intervention.⁸⁵⁶

Further points deserve mention. The UK claimed at one point in general terms a right to uphold 'stability' against the forces of 'revolution', directly undermining the basis for the alleged prohibition.⁸⁵⁷ The US in justifying its action in Lebanon referred to the fact that the Lebanese government was 'democratically elected', suggesting that the internal legitimacy of the government could be relevant.⁸⁵⁸ Meanwhile the Soviet Union, as well as asserting the lack of any foreign subversion, proffered other justifications for its condemnation, claiming that the governments in question lacked all legitimacy as 'puppets' rejected by the people as a whole,⁸⁵⁹ as well as in the case of Lebanon questioning President Chamoun's authority under the Lebanese Constitution to make the request without legislative approval.⁸⁶⁰ There were thus suggestions from both sides that democratic and constitutional legitimacy played a role in the assessment of the intervention, considerations absent from the classic version of the civil war prohibition presented in the literature. Third States' responses added to the ambiguity. While Japan described the American intervention in Lebanon as 'regrettable',⁸⁶¹

⁸⁵⁴ Corten (n1) 304.

⁸⁵⁵ Terry (n336) 128–29.

⁸⁵⁶ See generally Chapter 3, above.

⁸⁵⁷ S/PV.832, 6.

⁸⁵⁸ S/PV.838, 14; see also S/PV.824, 44 (France).

⁸⁵⁹ S/PV.827, 20–21; 'Letter dated 20 July 1958 from the Representative of the USSR to the Secretary-General', S/4059, 4 (request issued by 'irresponsible rulers, who do not enjoy the support of their peoples...').

⁸⁶⁰ S/4059, 3.

⁸⁶¹ S/PV.832, 4.

Sweden expressed the view that a request for foreign military assistance to stabilise the internal situation of a State would be considered a domestic matter outside the jurisdiction of the United Nations⁸⁶² – a view difficult to reconcile with the existence of an international law prohibition preventing such assistance. Canada’s contribution suggested that the intervention would be legitimate if it ‘check[ed] the violent disorders and enable[d] us to help the Lebanese people to find political, rather than military, solutions to their troubles...’⁸⁶³ The General Assembly passed an ambiguous resolution⁸⁶⁴ calling on States to ‘abstain from any action calculated to change established systems of government’, a formulation which does not capture pro-government intervention, but also to ‘observe strict non-interference in each other’s internal affairs’, which can be interpreted as directed either against the United Arab Republic for their alleged subversion of the Lebanese and Jordanian governments, or at the US and the UK for their assistance to these governments.

Congo 1964 – the Stanleyville Operation

From the moment of its independence from Belgium in 1960, the Congo had been in a state of crisis, attracting foreign intervention.⁸⁶⁵ By 1964, the central government of the Republic of the Congo (Congo-Léopoldville) was under the control of pro-Western Prime Minister Moïse Tshombe, formerly the secessionist leader of Katanga. That same year the ‘Simba’ rebellion broke out. The rebels gained control of much of the territory of the country, including the major city of Stanleyville. The Tshombe government military forces were receiving assistance (in the form of training and arms) from the US, while it was later alleged that the rebels were receiving arms and logistical support from other African States.⁸⁶⁶ In September 1964 the rebels took white residents of Stanleyville hostage. In November, a

⁸⁶² S/PV.830, 8; Doswald-Beck (n243) 216.

⁸⁶³ S/PV.828, 4.

⁸⁶⁴ UNGA Res 1237 (ES-III) (21 August 1958); cf Doswald-Beck (n243) 216–17, Le Mon (n343) 758–59.

⁸⁶⁵ Weisburd (n340) 182–84.

⁸⁶⁶ *ibid* 266.

Belgian-US paratrooper operation was launched (with British logistical support) which liberated the hostages, with the consent of the Tshombe government, and then evacuated the area. Although brief, the operation coincided with an assault by government forces (with the participation of foreign mercenaries) on the city, which was soon after captured, leading to the collapse of the rebellion.⁸⁶⁷

The Stanleyville intervention was received with hostility by many African States: it was condemned by the OAU, and a complaint was brought by twenty-two non-aligned States to the Security Council.⁸⁶⁸ The criticism of an intervention which took place with the consent of the State's legal government provides potential support for the alleged prohibition on intervention to prop up a government faced by civil war. The Tanzanian representative, for example, seemed to endorse such a prohibition by stating that:

‘the very unrest and civil war in the Congo was proof enough that many Congolese questioned the legality of Mr. Tshombe’s government. The Stanleyville operation had constituted an intervention because it had been a conspiracy to impose upon the people of the Congo the disputed authority of the Tshombe government.’⁸⁶⁹

However, most criticism of the operation did not present the existence of civil war and the fact that the Tshombe government's authority was disputed as the key reasons for its impermissibility. Rather, it attacked the legitimacy of the Tshombe government, presenting it as a puppet of Western imperialism and a spearhead for neo-colonialism in Africa,⁸⁷⁰ which did not represent the Congolese people.⁸⁷¹ Reference was made to the history of Western interference in Congo which had paved the way for the Tshombe government to come to

⁸⁶⁷ *ibid* 267; Eleanor Lumsden, ‘An Uneasy Peace: Multilateral Military Intervention in Civil Wars’ (2003) 35 NYUJILP 795, 802–04.

⁸⁶⁸ Weisburd (n340) 267.

⁸⁶⁹ S/PV.1178, 3; Doswald-Beck (n243) 217–18. See also S/PV.1184, 3 (Kenya).

⁸⁷⁰ S/PV.1170, 2, 11–12 (USSR), S/PV.1171, 10 (Mali), S/PV.1172, 10 (Algeria), S/PV.1174, 2 (UAR); S/PV.1177, 3 (Burundi); S/PV.1178, 5 (USSR).

⁸⁷¹ S/PV.1185, 13 (USSR).

power,⁸⁷² and to the government's employment of white mercenaries.⁸⁷³ In contrast, the rebels were described as the true representatives of the nationalist aspirations of the Congolese people.⁸⁷⁴ States also attacked the Tshombe government for failing to cooperate in an OAU attempt to negotiate a ceasefire, tarring them as the aggressor in the civil war.⁸⁷⁵ The democratic credentials and constitutional legality of the Tshombe government were also questioned.⁸⁷⁶ These arguments again undermine the claim that there is a *general* prohibition on assistance to governments faced by civil wars, as opposed to a prohibition on assisting governments classed to be 'illegitimate'. Some States also seemed to concede that the consent of the government may have made the Stanleyville operation technically legal, while dismissing this as irrelevant, casting doubt on the value of their condemnation as *opinio juris*.⁸⁷⁷

States defending the operation in the Security Council stressed its limited humanitarian purpose.⁸⁷⁸ This has been argued to support the alleged prohibition, which as previously explained is often understood to forbid only action to 'prop up' a government in a civil war, and not 'neutral' humanitarian operations.⁸⁷⁹ The fact that the operation did in effect aid the government forces to retake Stanleyville, however, shows the difficulty in drawing this distinction in practice.⁸⁸⁰ Belgium and the United States also defended their

⁸⁷² S/PV.1178, 8 (Morocco); 23-24 (USSR). See Ronzitti (n108) 83-84.

⁸⁷³ S/PV.1175, 14 (Kenya); S/PV.1177, 23 (Uganda); S/PV.1178, 17-18 (USSR); S/PV.1179, 20 (Sudan).

⁸⁷⁴ S/PV.1178, 8 (Morocco); S/PV.1183, 5 (Algeria).

⁸⁷⁵ S/PV.1171, 6 (Guinea); S/PV.1177, 21-22 (Uganda).

⁸⁷⁶ S/PV.1170, 21 (Ghana); S/PV.1172, 3 (Algeria); S/PV.1175, 16 (Kenya), S/PV.1178, 5 (Tanzania), S.PV.1184, 24-25 (Congo-Brazzaville).

⁸⁷⁷ S/PV.1175, 16 (Kenya), S/PV.1177, 23-24 (Uganda), S/PV.1181, 20 (Sudan).

⁸⁷⁸ S/PV.1170, 2 (US), S/PV.1173, 37 (DRC), S/PV.1174, 12-13 (US), S/PV.1175, 4 (UK); S/PV.1177, 26 (ROC); S/PV.1183, 11 (Norway); 14 (Bolivia).

⁸⁷⁹ Doswald-Beck (n243), 218; Corten (n1) 292-94.

⁸⁸⁰ See Chapter 6, Part C, below.

provision of training and arms to government forces,⁸⁸¹ with Belgium drawing an express distinction between such assistance and direct participation in ‘systematic repressive operations’,⁸⁸² potentially supporting a version of the prohibition which forbids direct but not indirect military assistance to governments faced by civil wars.⁸⁸³ States defending the operation also referred to the alleged foreign support of the rebels, although generally simply to accuse the critical States of hypocrisy rather than to justify the Stanleyville operation as counter-intervention.⁸⁸⁴ However, there were also broad statements by several States, including Belgium, the US and Nigeria, that the Stanleyville operation could not be an illegal intervention for the simple reason that it was requested by the legal government of the Congo, and that illegal intervention by definition occurred without the government’s consent.⁸⁸⁵ These statements seem clearly incompatible with the alleged prohibition. There were also the usual references to the democratic and constitutional legitimacy of the consenting government,⁸⁸⁶ suggesting that such legitimacy factors were relevant to assessing the validity of the Tshombe government’s consent. The ultimate result of the Security Council debate was an ambiguous resolution requesting States to refrain from intervention in the Congo,⁸⁸⁷ which could be interpreted either as condemning the Stanleyville operation or the foreign assistance to the rebels.⁸⁸⁸

⁸⁸¹ S/PV.1174, 18 (US).

⁸⁸² S/PV.1173, 18.

⁸⁸³ Corten (n1) 294. The provision of arms to the ‘neo-colonialist’ Tshombe was also criticised by some States: for example S/PV.1184, 5 (Kenya).

⁸⁸⁴ S/PV.1173, 33–34 (DRC); S/PV.1174, 19–20 (US)

⁸⁸⁵ S/PV.1173, 15 (Belgium: ‘[t]here is no interference in the domestic affairs of a country when the lawful Government of that country is given the assistance for which it asks’); S/PV.1174, 20 (US); S/PV.1176, 3–4 (Nigeria), 15 (France); S/PV.1177, 19 (Brazil) 26 (ROC) cf S/PV.1177, 14 (Ivory Coast).

⁸⁸⁶ S/PV.1174, 18 (US); S/PV.1185 3-4 (DRC).

⁸⁸⁷ UNSC Res 199 (December 30 1964).

⁸⁸⁸ S/PV.1189: 11 (US), 13 (USSR).

British and French Intervention in Africa

In contrast to the 1964 Congo intervention, a number of foreign military interventions undertaken in Africa around the same time were more broadly accepted. Britain deployed small numbers of troops in Tanganyika, Uganda and Kenya to support their governments against army mutinies in 1964.⁸⁸⁹ These interventions received no criticism from other States, except when the DRC raised them in the Security Council to accuse these States of hypocrisy in condemning the Stanleyville operation.⁸⁹⁰ Proponents of a general prohibition on pro-government intervention in civil wars have explained this case as a situation falling outside its scope, because the British action was merely a small-scale ‘police measure’⁸⁹¹ in response to ‘minor disturbances not aimed at the political organization of the country.’⁸⁹² The justifications for the interventions provided by the requesting States in the Security Council seeking to distinguish them from the Stanleyville operation provide some support for this argument. It was argued that the mutinies were not politically motivated, were small in scale, and were distinct from the situation of ‘civil war’ in the Congo.⁸⁹³ However, emphasis was also placed by the Kenyan and Tanzanian representatives on the claim that their governments were democratic and popularly elected and that throughout they retained ‘complete popular support’,⁸⁹⁴ suggesting the importance of internal legitimacy factors.

A full-scale civil war occurred in Nigeria between 1967 and 1970, with the Federal Government fighting the attempted secession of Biafra. Britain did not deploy troops, but continued to provide the Federal Government with arms throughout the course of the

⁸⁸⁹ Doswald-Beck (n243) 189; Corten (n1) 295.

⁸⁹⁰ S/PV.1173, 25.

⁸⁹¹ Corten (n1) 295.

⁸⁹² Doswald-Beck (n243) 189.

⁸⁹³ S/PV.1175, 17 (Kenya), S/PV.1177, 21 (Uganda), S/PV.1178, 5 (Tanzania).

⁸⁹⁴ *ibid.*

conflict.⁸⁹⁵ This course was justified in Parliament on the basis that ‘there is a legal government in Nigeria, and...we are bound to support it’.⁸⁹⁶ It was also argued that the British Government was the traditional supplier of arms to Nigeria, and therefore that suspending the sale of arms after the outbreak of the civil war would not be a neutral act, but in effect would be supporting the rebellion.⁸⁹⁷ Possible ways to reconcile Britain’s supply of arms in this case with a general prohibition against pro-government intervention in civil wars include: 1) confining the prohibition to direct deployment of troops, and not mere arms supplies;⁸⁹⁸ 2) a more limited exception for the continuation of existing arms supplies after the outbreak of civil war;⁸⁹⁹ or 3) positing an exception to the rule against pro-government intervention in secessionist conflicts.⁹⁰⁰ The British government stated its opposition to the ‘fragmentation’ of Nigeria,⁹⁰¹ and the then Foreign Secretary justified Britain’s role by referring to the ‘misery’ that could be caused in Africa by ‘the principle of tribal secession’.⁹⁰² The latter justification was also apparently relied on by the other major supplier of arms to the Federal Government, the Soviet Union, whose Premier Kosygin announced support for ‘the desire of the Nigerian Federal Government to...prevent their country from being dismembered.’⁹⁰³

In Francophone Africa, France continued to pursue an activist role in the decades following the independence of its former colonies. France concluded a number of treaties

⁸⁹⁵ Malanczuk (n462) 326.

⁸⁹⁶ HL Deb 29 January 1968 vol 288 c 600 (Minister of State).

⁸⁹⁷ *ibid*, cc 90–91 (Minister of State).

⁸⁹⁸ Malanczuk (n462) 326; Luard (n459) 18; Corten (n1)295.

⁸⁹⁹ See (n632).

⁹⁰⁰ Doswald-Beck (n243) 202.

⁹⁰¹ HL Deb 13 Feb 1968 vol 289 c 86.

⁹⁰² Quoted in Nigel White, *Democracy Goes to War: British Military Deployments Under International Law* (OUP 2009) 209.

⁹⁰³ Bruce D Porter, *The USSR in Third World Conflicts* (CUP 1984) 99. The supply of Soviet arms was however announced to be ‘strictly for cash on a commercial basis’: *ibid*.

with Francophone African countries after independence, by which it agreed to provide military aid against internal as well as external threats.⁹⁰⁴ An early instance of post-colonial French intervention was its sending of troops to Gabon in 1964 to put down a military coup at the request of the Vice-President, an action which received more support than criticism from Francophone African States.⁹⁰⁵ This practice seems in tension with the alleged prohibition, although it could be explained on the basis that the coup did not constitute a civil war. Similarly, France sent troops to Chad from 1969-71 to aid the government against a rebellion which had gained control of much of the country's territory.⁹⁰⁶ Although the Chadian government claimed the rebels were supported by Libya, French officials stated that they did not believe this, meaning that the case cannot be explained as counter-intervention.⁹⁰⁷ The purpose of the intervention was described as to aid the Chadian government against acts of banditry and revolt,⁹⁰⁸ although it appears the French government also claimed that their troops did not engage in direct conflict with the rebels.⁹⁰⁹

In the 1970s and 80s, France's rhetoric seemed to move in a direction potentially supportive of a general prohibition on direct intervention in favour of governments faced with internal conflicts, with France's treaties with its African allies generally redrafted to focus on external defence and to include non-intervention clauses.⁹¹⁰ In line with this approach, in its second intervention in the Chadian civil war, France initially emphasized that it was confining its assistance to the Chadian government to logistical and training support. Only after large-scale Libyan intervention on the opposing side of the civil war became clear did France announce that it would deploy troops in combat to assist the Chadian

⁹⁰⁴ Nolte (n124) 634 -35; 299, 317 (for examples).

⁹⁰⁵ Weisburd (n340) 219.

⁹⁰⁶ Doswald-Beck (n243) 218-19.

⁹⁰⁷ *ibid.*

⁹⁰⁸ Nolte (n124) 312, 634.

⁹⁰⁹ Doswald-Beck (n243) 219.

⁹¹⁰ Nolte (n124) 634; see examples, 314-15.

government.⁹¹¹ This has been interpreted as supporting the alleged prohibition as formulated by Doswald-Beck and other scholars, which would allow generally for the provision of arms, training and logistical support to governments in internal conflicts, but would prohibit actual deployment of foreign combat troops except as ‘counter-intervention’ to foreign assistance to the other side.⁹¹² In the Security Council France presented the action as collective self-defence under art 51, rather than as counter-intervention.⁹¹³ No action was taken by the Council beyond a call for a negotiated solution.⁹¹⁴

Dominican Republic and Czechoslovakia

Mention should briefly be made of some other ambiguous precedents from the 1960s and 1970s. The US’s intervention in the Dominican Republic in 1965 was initially justified as solely aimed at the evacuation of its nationals, with the consent of unnamed Dominican ‘law enforcement and military officials’,⁹¹⁵ who as discussed above clearly could not speak for the State.⁹¹⁶ However, the US also alleged Communist subversion.⁹¹⁷ The President stated that the US would not accept ‘another Communist government in the Western Hemisphere’, a position which became known as the ‘Johnson Doctrine’.⁹¹⁸ The US also presented its action’s aim as ‘the re-establishment of constitutional government’ and the stability necessary for the ‘Dominican people to choose their government through free

⁹¹¹ Doswald-Beck (n243) 221. Zaire also provided troops, and the US provided indirect support: Weisburd (n340) 192-93

⁹¹² *ibid*; also Le Mon (n343) 777.

⁹¹³ S/PV.2462, 1 (Chad); see also 6 (Zaire). The Libyan air force was accused of directly participating in the conflict by bombing government targets: S/PV.2463, 5 (Zaire), 7 (Côte d’Ivoire).

⁹¹⁴ Weisburd (n340) 195.

⁹¹⁵ ‘Letter Dated 29 April 1965 from the Permanent Representative of the United States of America Addressed to the President of the Security Council’, S/6310; Lieblich (n104) 144-45.

⁹¹⁶ (n343).

⁹¹⁷ Doswald-Beck (n243) 227.

⁹¹⁸ Weisburd (n340) 221.

elections.⁹¹⁹ The emphasis on protection of nationals and alleged outside subversion may be seen as an attempt to avoid the alleged prohibition, but the apparent assumption of a broad right to intervene to preserve constitutional government and electoral democracy – and to prevent Communism – introduce a legitimacy-based criterion for intervention that seem incompatible with it. The intervention was widely criticized, but in many cases it is clear that this was because of the lack of any request by ‘the legally constituted government.’⁹²⁰ The Soviet Union’s critique drew on a judgment of the legitimacy of the various contending factions in the Dominican Republic, stating that the intervention’s purpose was ‘saving a bloody and rotten regime, hated by the people’.⁹²¹

The Warsaw Pact invasion of Czechoslovakia in 1968 was also initially legally justified by a request from unnamed figures in the Czechoslovak government,⁹²² although it was clear no governmental request had been made.⁹²³ As in Hungary, the Soviet bloc made vague allegations that forces of ‘internal reaction’ in Czechoslovakia were being assisted by outside ‘imperialists’.⁹²⁴ However, a new step was taken with the explicit enunciation of the Brezhnev Doctrine, which asserted a right to intervene to preserve the socialist system within the Soviet bloc, on the basis that the ‘commonwealth’ of socialist States was ‘indissoluble’ and its preservation essential for international peace.⁹²⁵ Although widely rejected by other States as clearly incompatible with international law, the Brezhnev Doctrine indicated the Soviet Union’s lack of consistent support for a prohibition on pro-government intervention in internal conflicts. The intervention was generally condemned on the basis

⁹¹⁹ Doswald-Beck (n243) 227-28.

⁹²⁰ S/P/1202, 4 (Ivory Coast); Le Mon (n343) 766.

⁹²¹ S/PV.1196, 4.

⁹²² S/PV.1441, 1, 23 (USSR).

⁹²³ See statement by Czechoslovak representative, S/PV.1441, 13.

⁹²⁴ S/PV.1441, 7 (USSR).

⁹²⁵ A/PV.1679 (USSR), 7; Nicholas Rostow, ‘Law and the Use of Force by States: the Brezhnev Doctrine’ (1981) 7 Yale JWPO 209, 235.

that it was against the ‘will of [Czechoslovakia’s] people and its lawful government.’⁹²⁶ States’ emphasis on the factual non-existence of government consent means that the international response does not provide *opinio juris* in favour of the alleged prohibition.⁹²⁷

Afghanistan (1979–89)

A left-wing, pro-Soviet government had come to power in Afghanistan in 1978 under Nur Muhammad Taraki, and was soon faced with a significant insurgency by opponents of the government’s land reforms and other policies. An internal party coup resulted in the deposition (and murder) of Taraki and his replacement by Hafizullah Amin, but the government continued to lose ground against the insurgency, who gained control of most of the countryside. The Soviets responded by launching a large-scale invasion in December 1979.⁹²⁸ It is unclear whether Amin consented to this, but it seems unlikely given that soon after the invasion he was killed, apparently by the Soviet forces (although this was denied by the Soviet Union and the new Afghan regime, which claimed an internal coup had occurred),⁹²⁹ and was subsequently denounced by the Soviet press as having been a CIA agent.⁹³⁰ A previously exiled Afghan Communist figure, Babruk Karmal, was installed in power and made the first public request for Soviet intervention on December 28th, several days after the invasion had commenced.⁹³¹ The Soviet intervention in Afghanistan in support of the Karmal government continued until 1989.⁹³²

The Soviet Union (supported in the Security Council by the Karmal government and closely allied States) asserted had it was intervening in Afghanistan at the invitation of the

⁹²⁶ S/PV.1441, 6 (Denmark); see Lieblich (n104) 145.

⁹²⁷ Lieblich (n104) 145.

⁹²⁸ For an overview see Weisburd (n340) 44-45; Doswald-Beck (n243) 230 –32.

⁹²⁹ S/PV.2190, 10 (Afghanistan), 12 (USSR).

⁹³⁰ Terry (n336) 140.

⁹³¹ Weisburd (n340) 45.

⁹³² *ibid.*

government,⁹³³ to provide it with aid against a counter-revolutionary insurgency assisted from abroad.⁹³⁴ It was alleged that the US and China were funding and arming the insurgents and that Pakistan was providing them with cross-border bases.⁹³⁵ This emphasis can be seen as an attempt to characterize the action as ‘counter-intervention’, thus indirectly supporting the existence of a general prohibition on pro-government intervention in purely internal conflicts.⁹³⁶ Internal Soviet records indicate that the Soviet leadership doubted whether Afghan government consent would constitute a sufficient legal basis for the intervention in the absence of prior external intervention against the government.⁹³⁷ Confusingly however, as in previous cases defenders of the intervention also characterized it as collective self-defence under art 51,⁹³⁸ despite the apparent lack of an ‘armed attack’, and simultaneously argued that the situation was an internal affair of Afghanistan and therefore the Council’s consideration of it was in breach of Article 2(7).⁹³⁹ Fitting the usual pattern, the Soviet-bloc States also emphasized the legitimacy of the inviting government, presenting it as a progressive government supported by the Afghan people,⁹⁴⁰ while its opponents were characterized as reactionary and extremist elements.⁹⁴¹

⁹³³ The Karmal regime’s representative argued that the request had been repeatedly made by the previous government: Le Mon (n343) 780.

⁹³⁴ S/PV.2185, 2 (USSR), 10 (Afghanistan), S/PV.2186 10 (Bulgaria), S/PV.2188, 5–6 (Czechoslovakia), 8 (Vietnam), S/PV.2189 4 (Mongolia), 10 (Laos).

⁹³⁵ S/PV.2186, 10 (Bulgaria), S/PV.2189 4 (Mongolia).

⁹³⁶ Doswald-Beck (n243) 234.

⁹³⁷ Terry (n336) 126.

⁹³⁸ S/PV.2185 11 (Afghanistan), S/PV.2186 2 (USSR), 15 (Poland), S/PV.2188 2 (GDR), 9 (Vietnam), S/PV.2189 4 (Mongolia), 10 (Laos). Confusingly, however, the Soviet representative also seemed to indicate that the intervention was not based on art 51 when justifying the failure to report it to the Security Council: S/PV.2190, 7. See Terry (n336) 110; cf Le Mon (n343) 780.

⁹³⁹ S/PV.2185 2 (USSR), 4 (GDR), 10 (Afghanistan); S/PV.2186, 10 (Bulgaria), 15 (Poland).

⁹⁴⁰ S/PV.2185, 11 (Afghanistan), S/PV.2188, 6 (Czechoslovakia), 9-10 (Vietnam), S/PV.2190 11 (Afghanistan), 12-13 (USSR).

⁹⁴¹ S/PV.2186, 16 (Poland), S/PV.2187, 14 (Hungary), S/PV.2188, 2 (GDR), 5 (Czechoslovakia), S/PV.2189 10 (Laos).

The Soviet intervention was universally condemned by Western and non-aligned States.⁹⁴² It is difficult to disentangle to what extent this condemnation supports a general prohibition on assistance to governments in civil wars. States rejected the Soviet claims of prior assistance to the rebels,⁹⁴³ and almost all States condemning the action referred broadly to the right of the Afghan people to determine their own political future, free from foreign interference.⁹⁴⁴ This has been taken to indicate support for the alleged prohibition, on the basis that even if there had been an invitation from the legal government, military action to aid it against the rebels would constitute an interference with this right.⁹⁴⁵ However, this conclusion was not spelt out and was not directly relevant to the situation,⁹⁴⁶ as many States also emphasized that the intervention had in fact never been invited (except retrospectively by a regime installed by the invader).⁹⁴⁷ The United States condemned the action on the basis that its aim was to ‘replace’ Afghanistan’s government,⁹⁴⁸ and China as an attempt ‘to change [Afghanistan’s] government by violent means’,⁹⁴⁹ apparently reserving their position on support to help an existing government stay in power. As usual, legitimacy issues were also

⁹⁴² A draft Security Council resolution condemning the action was opposed only by the Soviet Union and East Germany: S/PV.2190, 14. A resolution condemning the intervention was passed overwhelmingly in the General Assembly: Doswald-Beck (n243) 232.

⁹⁴³ S/PV.2185, 8 (Pakistan), S/PV.2186, 12 (Kampuchea), 16 (New Zealand), S/PV.2187, 11 (Italy), S/PV.2188, 11 (Jamaica), S/PV.2190 7 (Canada).

⁹⁴⁴ S/PV.2185, 8 (Pakistan), 13 (Japan), S/PV.2187, 4 (Australia), 6 (Norway), 8 (Malaysia), 11 (Italy), 13 (Liberia), S/PV.2188, 4 (Portugal), S/PV.2189, 2 (Zambia). 5 (Bangladesh), 6 (Niger), 6-7 (FRG), 8 (Canada), S/PV.2190, 12 (Tunisia), 14 (France). This was echoed in the GA resolution: Doswald-Beck (n243) 232.

⁹⁴⁵ Doswald-Beck (n243) 234; Roth (n247) 288–89.

⁹⁴⁶ Although some States used formulations which suggested that States must be left free to change their government: S/PV.2186, 14 (Saudi Arabia), S/PV.2188, 5 (Venezuela), S/PV.2189, 8 (Yugoslavia). See Terry (n336) 127.

⁹⁴⁷ S/PV.2185, 9 (Pakistan), S/PV.2186 6 (China), 7 (UK), 9 (Colombia), 12 (Kampuchea), 17 (Turkey), S/PV.2187 2-3 (US), 4 (Australia), 5 (Singapore), 6 (Spain), 8 (Malaysia), 9 (Costa Rica), 10 (Italy), S/PV.2188,4 (Portugal), 7 (Netherlands), S/PV.2189,6 (FRG), S/PV.2190, 2 (Panama), 5 (Zaire), 8 (Canada), 14 (France). Cf Doswald-Beck (n243) 233–34.

⁹⁴⁸ S/PV.2187, 3 (US); ‘Contemporary Practice of the United States’ (1980) 74 AJIL 418–20 (condemning intervention ‘forcibly to depose one ruler and substitute another’).

⁹⁴⁹ S/PV.2186, 6 (China).

raised, with critics of the intervention arguing that the Communist regime in Afghanistan was clearly opposed by the majority of the Afghan people.⁹⁵⁰

Grenada

The invasion of Grenada by the United States and some members of the Organization of Eastern Caribbean States following a bloody Marxist coup in 1983 was another case whose factual complications make it difficult to assess.⁹⁵¹ The primary justifications put forward for the intervention by the United States were the need to protect US nationals in Grenada and collective security under the OECS Treaty to respond to the alleged threat posed by Grenada to neighbouring States.⁹⁵² At a relatively late stage, a third argument was raised: an alleged invitation from the Governor-General of Grenada, Sir Paul Scoon, for intervention to respond to the 'lack of internal security' in Grenada and to facilitate a return to democratic rule.⁹⁵³ There were a number of antecedent problems with this claim, such as whether the consent was actually given prior to the invasion rather than retrospectively, the fact that by constitutional convention the Governor-General was ordinarily a solely ceremonial figure exercising his powers on ministerial advice,⁹⁵⁴ and whether the Constitution vesting the Governor-General with executive powers continued in force.⁹⁵⁵ Perhaps because of these weaknesses, the argument based on the Governor-General's consent was largely ignored in the Security Council debate.⁹⁵⁶ The Grenadian intervention was almost universally condemned by third States.⁹⁵⁷ In doing so, as in

⁹⁵⁰ S/PV.2185, 15 (Egypt), S/PV.2186, 8 (UK), 14 (Saudi Arabia), S/PV.2187, 7 (Somalia), S/PV.2189, 6 (FRG), S/PV.2190' 14 (France).

⁹⁵¹ For factual overview see Weisburd (n340) 234–38.

⁹⁵² Doswald-Beck (n243) 236; S/PV.2487, 19 (US); S/PV.2489, 2 (Dominica).

⁹⁵³ See Roth (n247) 305; also S/PV.2489, 2 (Dominica); S/PV.2491, 9 (US), 15 (Barbados).

⁹⁵⁴ Doswald-Beck (n243) 236.

⁹⁵⁵ Roth (n247) 304-05; further, (n350) above.

⁹⁵⁶ Doswald-Beck (n243) 237-38.

⁹⁵⁷ A condemnatory draft resolution received 11 votes but was vetoed by the US (Togo, Zaire and the UK abstained): S/PV.2491.

Afghanistan, many States referred in general to the right of the people of Grenada to choose their own system of government without foreign interference,⁹⁵⁸ which has been argued to support by implication the alleged prohibition on pro-government intervention in situations of internal conflict.⁹⁵⁹

On the other hand, several States' criticisms seemed to focus on the fact that there was no invitation from the government in power, and that the intervention was in fact aimed at the removal of the government.⁹⁶⁰ There were also the usual arguments about the legitimacy and level of popular support of the overthrown government,⁹⁶¹ although a number of States specifically rejected the existence of a right to intervene to impose 'democracy' on Grenada.⁹⁶² Outside the UN, the US State Department Legal Adviser relied more prominently on the Governor-General's consent, arguing that

[t]he lawful governmental authorities of a State may invite the assistance in the territory of military forces of other states or collective organizations in dealing with internal disorder as well as external threats.⁹⁶³

This seems to provide *opinio juris* contrary to the alleged prohibition, indicating that pro-government intervention is permissible in situations of purely internal disorder, not only as 'counter-intervention' in response to previous foreign intervention against the government,

⁹⁵⁸ S/PV.2487, 3 (Nicaragua), 7 (Guyana), 11 (Grenada), S/PV.2489, 4 (Poland), 6 (Bolivia), 7 (China), 9 (Algeria), 11 (Syria), Cuba (12), France (15), Laos (17); S/PV.2491, 10 (Benin), 11 (Egypt), 17 (Sao Tome), 18 (Bulgaria), 21 (India), 22 (Yugoslavia), 28 (Zambia), 37 (Jordan).

⁹⁵⁹ Doswald-Beck (n243) 239.

⁹⁶⁰ S/PV.2489, 7 (Argentina), 8 (Seychelles) (no country should interfere 'if not requested to do so'), S/PV.2491, 4 (Zimbabwe), 31 (Mongolia), 33 (Mozambique) (no country has right to intervene 'without being expressly invited').

⁹⁶¹ Contrast S/PV.2487, 17 (USSR) (Grenadian revolution was against an 'anti-democratic regime' and reflected the will of Grenadian people) and S/PV.2491, 16 (Hungary) with S/PV.2489, 5 (Jamaica) (regime came to power undemocratically, refused to hold elections and placed population in a state of siege), 16 (Antigua and Barbuda), S/PV.2491, 6-7 (US), 20 (UK).

⁹⁶² S/PV.2487, 10 (Grenada), S/PV.2489, 17 (Laos), S/PV.2491, 24 (Afghanistan).

⁹⁶³ 'Letter from Davis R Robinson, Legal Adviser, US Department of State to Professor Edward Gordon Reiterating US Legal Position Concerning Grenada' (10 February 1984), reprinted in J N Moore, *Law and the Grenada Mission* (Georgetown 1984) 125-26 ; Arend and Beck (n462) 212.

although proponents of the alleged prohibition could distinguish between situations of ‘internal disorder’ and full-scale civil war.⁹⁶⁴

Indian Intervention in Sri Lanka

Other pro-government interventions took place in the late Cold War period without meeting with much international criticism. Senegal sent troops to the Gambia in 1981 to overturn a military coup against President Jawara, at his request.⁹⁶⁵ More broadly significant was the deployment of Indian forces in Sri Lanka in the late 1980s.⁹⁶⁶ Although officially peacekeepers, these Indian troops ultimately took large-scale military action against the Tamil Tigers, who were considered to be frustrating the peace agreement they had previously signed with the Sri Lankan government under Indian auspices. The legality of the Indian intervention was welcomed by the Commonwealth and seems to have been accepted by the international community with little criticism.⁹⁶⁷ The acceptance of India’s action could potentially be reconciled with the existence of a broad prohibition on pro-government intervention by presenting it as the enforcement of a peace agreement, arguably a ‘neutral’ task even when its impact falls solely on one side if that side is the one which has broken the agreement, or as supporting an exception to the general prohibition allowing pro-government intervention against secessionists.⁹⁶⁸ However, in legally justifying its actions, India asserted broadly that it was acting ‘in response to a specific request from the Sri Lankan government, and in full conformity with international law.’⁹⁶⁹

⁹⁶⁴ In the Security Council, the US presented the situation as one of ‘anarchy’ and a ‘vacuum of authority’: S/PV.2491, 8; Weiler (n306) 253.

⁹⁶⁵ Nolte (n124) 635.

⁹⁶⁶ See Le Mon (n343) 782–86.

⁹⁶⁷ Nolte (n391) 77–78.

⁹⁶⁸ Christakis-Bannelier (n1) 134.

⁹⁶⁹ ‘Letter Dated 17 December 1987 from India to the President of the UNSC’ S/19354; Lieblich (n104) 145.

Analysis of the Cold War practice

A careful consideration of the Cold War practice reveals a deep sense of ambivalence in the attitudes of States to pro-government intervention. States did appear to have a sense of the vulnerability of pro-government military assistance to international criticism. Generally, additional factors beyond the mere existence of government consent were adduced to defend such interventions. In particular, allegations of prior outside assistance to the opposition were commonly made. In the bipolar international political situation of intense competition between the American and Soviet led blocs, justifying military intervention as a riposte to the machinations of the opposing bloc was a natural move.⁹⁷⁰ This strain of State discourse could be seen as supporting an alleged prohibition on intervention in purely internal conflicts. However, States also regularly used language which suggested the broad legality of intervention with government consent. Often it was unclear whether criticisms of pro-government intervention by other States relied primarily on an assertion of the illegality of such intervention in purely internal conflicts, or other factors such as the non-existence of consent or the lack of governmental status of the authority giving the consent. This ambiguity weakens the case for the alleged prohibition, since it means that States' criticisms do not necessarily reflect the view that actual consent from the legal government would be insufficient to legalize foreign involvement in an internal conflict.

Another important point can be discerned from this practice. States did not refrain from making judgments about the internal legitimacy of the parties in particular cases of 'intervention by invitation'. When debating such cases States almost always drew on competing assessments of the popular legitimacy of the inviting government and its opponents.⁹⁷¹ Such assessments were sharply polarised, reflecting the period's ideological

⁹⁷⁰ Cf Rein Müllerson, *Ordering Anarchy: International Law in International Society* (M Nijhoff 2000) 292; Buchan (n558) 104.

⁹⁷¹ Cf Arend and Beck (n462) 92.

divisions.⁹⁷² Thus, the Soviet bloc's position of intense criticism of Western interventions combined with strident justification of its own drew on the purely ideological criterion that interventions in favour of existing Communist governments are always justified (since, by definition, anti-Communist uprisings were the products of 'fascist' or 'reactionary' cliques supported by foreign intervention) while interventions in favour of non-Communist governments were illegal, because they consisted of attempts to suppress the revolutionary will of the people. Similar criticism can of course be made of the Western tendency to insist that left-leaning revolutions were inevitably the product of 'armed minorities' or of prior subversive intervention by Communist States. Reliance on such self-serving assessments of legitimacy helps explain the inconsistent nature of the practice of each side during the Cold War.⁹⁷³ But it also indicates that an ideologically neutral prohibition of intervention in favour of a government faced with a civil war, whatever external assessments of its legitimacy, did not emerge during the Cold War period.⁹⁷⁴

B.3 Post-Cold War Practice

In many ways post-Cold War practice has shown similar ambiguities to that before 1990. Consent has been presented as justifying pro-government intervention, often in quite general terms, but tends to be supplemented by other arguments which can be interpreted either as additional requirements for legality, or as merely as attempts to further justify such interventions politically. However, new trends were also discernible in the 1990s, although these developments were to a degree foreshadowed in the Cold War era. Perhaps the most common additional justification for pro-government intervention pre-1990 – prior foreign assistance to the opposition, allowing for 'counter-intervention' – although still used quite

⁹⁷² See Roth (n247) 75–76.

⁹⁷³ Lieblich (n104) 126, Malanczuk (n462) 324, Fox (n256) 824.

⁹⁷⁴ Cf Higgins (n444) 183–84; Nolte (n124) 639.

regularly, declined somewhat in significance.⁹⁷⁵ States seeking to justify pro-government intervention still attempted to identify an ‘international’ aspect to the conflict which lifts it out of the domain of purely internal conflict, but the factors which can give a conflict international significance became significantly more varied and protean. This reflected the fact that the boundary between purely internal conflicts and those of international concern was redrawn during this period, with the potential for almost all conflicts to be defined as falling in the latter category.⁹⁷⁶ The expansive interpretation by the Security Council as to what constitutes a ‘threat to the peace’ for the purposes of Chapter VII enforcement action to include what previously would generally have been considered purely internal conflicts, on the basis of the flow-on effects of such conflicts, the threats posed to regional and international stability, and the humanitarian crises caused within the affected State, was also reflected outside the context of Chapter VII, opening the door to pro-government intervention in civil wars on the basis of these factors without Security Council authorisation.⁹⁷⁷

More broadly, the comparative substantive legitimacy of the different sides in internal conflicts – in terms of their democratic, constitutionalist and human rights credentials – has taken on an increasing importance. This trend towards a greater international consensus on determinations of legitimacy has already been observed in the context of governmental recognition.⁹⁷⁸ Polarisation of States between liberal-democratic and communist theories of legitimacy during the Cold War has been replaced by a broad, although far from complete, hegemony of liberal-democratic values⁹⁷⁹ (although admittedly this consensus has been looking shakier over the last few years). While rebel groups during

⁹⁷⁵ Lieblich (n104) 169–70; Klingler (n336) 506.

⁹⁷⁶ Fox (n256) 824–26.

⁹⁷⁷ *ibid*; Nolte (n124) 639; Malanczuk (n462) 318.

⁹⁷⁸ See Chapter 2, Part B.2, above.

⁹⁷⁹ Roth (n5) 48; Buchan (n558) 220–22.

the Cold War could latch onto one of the ideologies of the opposing blocs to gain its support, in the post-Cold War era the most potent ideologies of rebellion have been ethnic and sectarian ones which have little support among States (at least openly).⁹⁸⁰ This has created conditions where there is commonly an international consensus about governmental legitimacy. Just as governments judged legitimate by such a consensus may continue to be recognized despite a loss of effectiveness,⁹⁸¹ so in the post-Cold War period an international consensus will often endorse action to support the authority of a government seen as legitimate against an illegitimate opposition group.⁹⁸² The post-2001 practice has reflected a related development. It has become clear that the international community recognizes the legality of foreign military assistance to assist a (legitimate) government combating terrorism.⁹⁸³

It needs to be acknowledged that, if (contrary to the argument made in this chapter) the alleged prohibition is considered to have come into existence during the Cold War, the post-Cold War practice would probably not be clear enough to show that it had fallen into desuetude. As proponents of the prohibition argue, the widespread acceptance of many instances of pro-government intervention could be interpreted simply as clarifying the prohibition's scope. On this view, military aid to a government for a legitimate international purpose, such as preserving regional security, upholding human rights or combatting terrorism can be distinguished from the field of application of the prohibition, intervention in a (purely domestic) civil war solely for the purpose of keeping the government in power. The problem with this argument, however, is that it preserves the theoretical applicability of the rule, while radically undermining its rationale and its substance. The underlining *raison d'être* of the alleged prohibition seems to be ensure that internal political contests within a

⁹⁸⁰ Roth (n5) 45.

⁹⁸¹ (n398), (n399) and text, above.

⁹⁸² Roth (n5) 47–48.

⁹⁸³ Lieblich (n104) 2–3; see also (n1492)–(n1516) and accompanying text, below.

State are determined solely internally, without interference by foreign States acting on their own judgments of the contenders' legitimacy. Recent practice however shows that foreign intervention to uphold a government perceived as legitimate is broadly accepted, even if formally the justification for such interventions can be argued to be upholding some international value (a category greatly expanded in scope since the end of the Cold War) rather than assisting the government *per se*. The only way to reconcile the rule with recent practice is to reduce it to an inherently ineffective rule, one 'swallowed by its exceptions'.⁹⁸⁴ Drawing on the practice analysed in this section, this argument will be developed further in the final two chapters of the thesis.

ECOWAS Interventions in Liberia and Sierra Leone

In the 1990s, forces acting under the auspices of ECOWAS intervened twice in troubled West African states: in 1990 in Liberia and in 1997 in Sierra Leone. In Liberia in 1990, a bloody civil war between a number of factions had led to the recognized government of President Samuel Doe losing control over almost all of the territory except a portion of the capital.⁹⁸⁵ Doe requested action by ECOWAS,⁹⁸⁶ five member States of which deployed troops in a peacekeeping mission (ECOMOG) to Liberia in August 1990.⁹⁸⁷ These forces ultimately participated in the military campaign against Taylor which continued for years until a final peace agreement. The legality of the ECOWAS action seemed to be broadly accepted by the international community. It has been suggested that this precedent supports the legality of 'intervention by invitation' even in circumstances of civil war.⁹⁸⁸ However, this seems clearly incorrect as ECOWAS never relied on Doe's invitation to justify the

⁹⁸⁴ See generally Chapter 6, below.

⁹⁸⁵ Georg Nolte, 'Restoring Peace by Regional Action: International Legal Aspects of the Liberian Conflict' (1993) 53 ZaöRV 603, 605.

⁹⁸⁶ *ibid* 621.

⁹⁸⁷ Nigeria, Ghana, Guinea, Gambia and Sierra Leone: Weisburd (n340) 204-05.

⁹⁸⁸ Nolte (n985) 621-26.

intervention, instead presenting it as an operation ‘to stop the senseless killing of innocent civilian nationals and foreigners, and to help the Liberian people to restore their democratic institutions.’⁹⁸⁹ Thus, the case does not provide *opinio juris* against the alleged prohibition.⁹⁹⁰ But it is also wrong to contend, as some scholars have suggested, that the failure of the intervening States to rely on Doe’s consent implies that States *accept* the alleged prohibition.⁹⁹¹ Doe’s government clearly lacked legitimacy (exercising minimal territorial control and guilty of serious human rights abuses) and relying on his consent would have interfered with ECOWAS’ aim: not restoring Doe to power,⁹⁹² but to create the conditions for a transitional government and internationally monitored elections.⁹⁹³ Thus, the failure to rely on Doe’s consent can be explained politically, rather than as indicating acceptance of a legal prohibition of the kind being discussed.

The 1997-98 intervention in Sierra Leone provides more relevant *opinio juris* casting doubt on the alleged prohibition. There had been a long-running conflict in the country since the early 1990s and ECOMOG forces were already present as peacekeepers. Against this backdrop, a military coup deposed President Ahmed Tejan Kabbah in May 1997. The coup was widely condemned internationally.⁹⁹⁴ From exile, Kabbah invited Nigerian intervention.⁹⁹⁵ Nigeria responded by sending troops and warships to attack the military junta, but after encountering strong resistance withdrew.⁹⁹⁶ After the failure of this first military intervention, efforts turned to seeking a negotiated solution, and in August 1997 an

⁹⁸⁹ Kress (n128) 493.

⁹⁹⁰ Although cf Harrell (n198) 439, referring to later ECOWAS reliance on mutual defence accords allowing action in response to threats to ‘sovereign integrity.’

⁹⁹¹ Cf Corten (n1) 299.

⁹⁹² Doe was in fact killed by rival forces soon after the intervention began: Nolte (n985) 628.

⁹⁹³ Wippman (n195) 226–27.

⁹⁹⁴ Wippman (n398) 807

⁹⁹⁵ Lumsden (n867) 823.

⁹⁹⁶ Nowrat and Schabacker (n692) 327.

agreement was signed, requiring the commencement of disarmament by the rebel forces and the restoration of Kabbah as President by April 1998.⁹⁹⁷ However, the junta did not keep to the agreed timetable, and meanwhile the humanitarian situation worsened. The final spark for a second military intervention appears to have been an attack by junta forces on an ECOMOG military base).⁹⁹⁸ In February 1998 a large-scale Nigerian offensive under ECOWAS auspices deposed the junta and restored Kabbah to power. International reaction was generally positive. The removal of the junta was welcomed by the Security Council, seeming to indicate a general acceptance in the international community of the legality of the action.

Kabbah's consent was relied upon by ECOWAS to justify the initial intervention, although reference was also made to the dire humanitarian situation and the general threat to regional peace.⁹⁹⁹ For the second military intervention in 1998, self-defence (in response to the attack on ECOMOG bases) appears to have been relied on as the primary justification.¹⁰⁰⁰ But as argued above, reliance on alternative legal justifications like self-defence when available does not indicate that States think that consent is not in itself a legal justification. The first intervention seems to provide *opinio* in favour of a broad right to take military action to aid a government whose legitimacy is internationally accepted. The pre-existing SOFA agreement between Nigeria and Sierra Leone supports this view, allowing the use of Nigerian forces against internal as well as external threats.¹⁰⁰¹ Although proponents of could argue that the purpose of the intervention was to end the humanitarian crisis or the threat to regional peace rather than to restore the government *per se*, this distinction seems highly artificial, given that the means of addressing these challenges was to defeat the junta

⁹⁹⁷ *ibid* 329-30.

⁹⁹⁸ *ibid* 365-66.

⁹⁹⁹ *ibid* 349-50.

¹⁰⁰⁰ *ibid*.

¹⁰⁰¹ Jeremy Levitt, 'African Interventionist States and International Law' in Furley and May (n624) 24.

and restore Kabbah's authority.¹⁰⁰² Another potential response by proponents of the rule could be to distinguish between intervention against a military coup (even when, as in Sierra Leone, they exercise large-scale effective control) and against rebels in a civil war.¹⁰⁰³ The military junta has been described as a 'criminal gang' focussed on looting resources rather than as a political force enjoying a degree of popular support.¹⁰⁰⁴ As will be argued further in the next chapter, however, this reasoning accepts the ability of foreign actors to make judgments based on the legitimacy of contending forces in an internal political conflict, which undermines the principled basis of the rule as a reflection of the principles of non-intervention and self-determination.¹⁰⁰⁵

Guinea-Bissau

Senegal and Guinea sent troops to assist the government against a large-scale military rebellion in Guinea-Bissau in 1998.¹⁰⁰⁶ Senegal justified the intervention first as a response to a humanitarian crisis, but later relied on Guinea-Bissau's invocation of 'legal, mutual defence accords' between the two countries, and the Senegalese Foreign Minister described it as aiming to 'end the threat to public security and to foreigners, and to contribute to reinforcing stability and security in the sub-region and in Africa'.¹⁰⁰⁷ In fact, its main motivation may have been a concern that the rebel faction in Guinea-Bissau had provided arms to secessionists in Senegal's Casamance region.¹⁰⁰⁸ ECOWAS and the OAU supported the

¹⁰⁰² See further Chapter 6, Part C.

¹⁰⁰³ Cf Nolte (n124) 637. Another African intervention, undertaken by the Southern African Development Community in Lesotho in 1998–99, responded to widespread rioting and a breakdown in 'law and order': Levitt (n1001) 37–40.

¹⁰⁰⁴ Gerry Cleaver, 'Sierra Leone: A Victim of Intervention' in Furley and May (n624), 213.

¹⁰⁰⁵ See further Chapter 5, Part B(ii) and (iii), below.

¹⁰⁰⁶ Lieblich (n104) 147.

¹⁰⁰⁷ Simon Massey, 'Intervention in Guinea-Bissau' in Furley and May (n624) 237.

¹⁰⁰⁸ Simon Massey, 'Multi-Faceted Intervention in the Guinea-Bissau Civil War' (2004) 32 *Scientia Militaria* 76, 79–80.

Senegalese-Guinean intervention against the rebels,¹⁰⁰⁹ although it ultimately proved unsuccessful (a peace accord was signed in November agreeing on the establishment of a Government of National Unity and the withdrawal of the Senegalese and Guinean troops)¹⁰¹⁰ This case suggests wide acceptance of the legality of intervention aimed at putting down a rebellion in order to restore ‘stability and security’. As in Sierra Leone, it could be argued by proponents of the alleged prohibition that the character of the rebellion, originating as a military mutiny, distinguishes it from a ‘civil war’ so that it does not fall within its scope.¹⁰¹¹ However, it seems artificial to classify the situation in Guinea-Bissau as a mutiny rather than a civil war, given that the military rebels quickly established a degree of territorial control and went on to significant military success. The practice seems rather to suggest the more general legality of assistance in a civil war to a legitimate government against rebels perceived as illegitimate.

British Intervention in Sierra Leone; French intervention in Côte d’Ivoire

Another pro-government intervention in Sierra Leone, this time by the United Kingdom, took place in 2000 when the rebel Revolutionary United Front (RUF) broke the Lomé Peace Accord signed in 1999 and launched an attack on Freetown, the capital, taking hundreds of UN peacekeepers hostage in the process.¹⁰¹² With the consent of President Kabbah, the UK deployed troops for the proclaimed purpose of securing Freetown airport to allow evacuation of UK and other foreign nationals and the reinforcement of the UN peacekeeping mission.¹⁰¹³ The UK also took on the role of training and equipping the Sierra

¹⁰⁰⁹ Massey (n1007) 235.

¹⁰¹⁰ Massey (n1008) 84.

¹⁰¹¹ Levitt (n1001) 28.

¹⁰¹² Matthias Goldman, ‘Sierra Leone: African Solutions for African Problems’ (2005) 9 MPYUNL 457, 475-79.

¹⁰¹³ HC Deb 8 May 2000 vol 345 cc 518-19; Gray (n433) 90–91.

Leone armed forces.¹⁰¹⁴ In justifying the intervention, UK Ministers referred to the responsibility of the RUF for breaking the peace agreement and for atrocities against the civilian population,¹⁰¹⁵ asserted that the rebels were deeply unpopular,¹⁰¹⁶ and emphasised the need to restore stability under the authority of the democratically elected government.¹⁰¹⁷ The precedent thus suggests that in a civil war in which the rebels are seen as illegitimate for such reasons, assistance to the government is permissible. However, it is also true that ministers denied that the UK was intervening in a civil war and stated that the UK troops' role was not to engage in combat in the RUF, beyond that necessary to secure the airport.¹⁰¹⁸ But this distinction seems somewhat artificial since the Foreign Secretary also proudly asserted that the UK troop presence was in part responsible for reverse of the rebel advance and the arrest of its leader.¹⁰¹⁹

In September 2002, an attempted military coup in Côte d'Ivoire resulted in rebels seizing control of much of the country's north.¹⁰²⁰ President Gbagbo requested that France provide assistance to the government under existing defence accords. French ministers indicated that they did not wish to directly intervene in the absence of an external threat. But France did send troops, ostensibly for purpose of protecting French nationals.¹⁰²¹ This has been interpreted as practice supporting the alleged prohibition.¹⁰²² But the lack of willingness to openly assist Gbagbo may be attributed to political concerns about his legitimacy rather

¹⁰¹⁴ Gray (n433) 91.

¹⁰¹⁵ 'UK Materials in International Law' (2001) 71 BYIL 517, 645.

¹⁰¹⁶ HC Deb 15 May 2000 vol 350 cc 32–33.

¹⁰¹⁷ HC Deb 6 June 2000; vol 351 c 163; Lieblich (n 104) 147-48; Gray (n433) 91. The UK did not rely on counter-intervention as a rationale, rejecting claims of current Liberian support to the rebels: HC Deb May 8 2000 vol 349 c 527.

¹⁰¹⁸ HC Rec 15 May 2000 vol 350 c23.

¹⁰¹⁹ HC Rec 6 June 2000 vol 351 c161; Gray (n433) 90.

¹⁰²⁰ Levitt (n262) 808–09.

¹⁰²¹ Christakis and Bannelier (n1) 129.

¹⁰²² *ibid*; Corten (n1) 307.

than necessarily indicating doubts about the strict legality of such assistance.¹⁰²³ Further, in actuality the supposedly limited French operation may well have saved the Gbagbo regime.¹⁰²⁴ This shows the practical difficulties of applying a ‘purpose-based’ prohibition on pro-government intervention in practice.¹⁰²⁵

Afghanistan (post-2001)

The terrorist attacks of September 11, 2001 have an obvious significance in any consideration of foreign military interventions in the post-Cold War world. The subsequent ‘war on terror’ has involved significant amount of military action abroad, both to depose governments considered to be sponsors of terrorism and to bolster governments challenged by forces considered to be connected to terrorism and/or Islamic extremism. In perhaps the most prominent interventions in the post-9/11 period – the US-led interventions in Afghanistan (beginning in 2001) and in Iraq (beginning in 2003) – the initial invasion took the form of a classic inter-State war against the government, leading quickly in both cases to its downfall. However, in both cases the new governments brought to power by the intervention were faced by an insurgency, and required significant foreign military assistance, including the long-term deployment of combat troops in both countries.¹⁰²⁶ The legality of this post-invasion military assistance to the Afghan and Iraqi governments seems to have been widely accepted in the international community.

In Afghanistan there were two foreign military operations between 2001 and 2014 – the Security Council-authorized, NATO-led International Security Assistance Force (ISAF),¹⁰²⁷ and the US-led ‘Operation Enduring Freedom’ (OEF), the continuation of the

¹⁰²³ The country had been deeply divided following the ‘bitterly contested’ election of 2000: Levitt (n262) 808.

¹⁰²⁴ Christakis and Bannelier (n1) 129.

¹⁰²⁵ See Chapter 6, Part C, below.

¹⁰²⁶ Corten (n327) 47–49.

¹⁰²⁷ UNSC Res 1386 (20 December 2001).

US-led original invasion mission.¹⁰²⁸ Although OEF did not receive Chapter VII authorisation from the Security Council, the Security Council did acknowledge and welcome its role.¹⁰²⁹ In 2005 the Council passed a resolution unanimously calling upon on the Afghan Government, with the assistance of (inter alia) the OEF Coalition

to continue to address the threat to the security and stability of Afghanistan posed by Al-Qaeda operatives, the Taliban and other extremist groups, factional violence among militia forces, and criminal activities, in particular violence involving the drug trade...¹⁰³⁰

This resolution indicates general international acceptance of the legality of the use of force by the OEF Coalition to help the Afghan government achieve stable control over the country's territory.¹⁰³¹ This seems difficult to reconcile with the alleged prohibition on pro-government intervention in a civil war. It is true that the use of force to help the Afghan government against remaining Al-Qaeda operatives in Afghanistan could be justified as action against an international terrorist network, not intervention in an internal conflict. But the primary insurgent force in Afghanistan has been the Taliban, which is primarily an indigenous Afghan force seeking to overthrow and replace the current government and which has disclaimed any aim of conducting terrorist attacks abroad.¹⁰³² Moreover, since at least 2005 the Taliban has with fluctuations exercised control of significant portions of the State's territory.¹⁰³³ Given that the conflict seems to fall within the definition of a 'civil war', the acceptance of a direct role for OEF forces in the fight against the Taliban undermines

¹⁰²⁸ Gray (n433) 203. The UK, Australia and Poland, as well as a number of other States in a supporting capacity, also contributed to the OEF: *ibid.* See also Lieblich (n104) 17–18.

¹⁰²⁹ See for example UNSC Res 1589 (24 March 2005): Gray (n433) 206-07.

¹⁰³⁰ *ibid.*

¹⁰³¹ Although Russia expressed reservations about the OEF role: S/PV.5744' 2, Gray (n433) 207.

¹⁰³² Ryan T Williams, 'Dangerous Precedent: America's Illegal War in Afghanistan' (2011) 33 UPa JIL 563, 586.

¹⁰³³ Sarah Alkmukthar and Karen Yourish, 'More Than 14 Years After US Invasion, the Taliban Control Large Parts of Afghanistan' (NYT, 19 April 2016) <www.nytimes.com/interactive/2015/09/29/world/asia/afghanistan-taliban-maps.html>.

the case for the alleged prohibition. Moreover, the resolution's reference to 'other extremist groups' suggests that military assistance to a government in a civil war can be justified if the opposition espouses an 'extremist' ideology.¹⁰³⁴ This approach is incompatible with the alleged prohibition, which bars intervention irrespective of assessments of the legitimacy of the contending parties.

Of course, the initial action against the Taliban had of course been justified as self-defence in response to the attacks of 9/11, on the basis that Afghanistan under the Taliban had harboured the attackers.¹⁰³⁵ It could be argued that this context sufficed to justify the categorisation of the Taliban as a continuing international threat even after its fall from power, so that the fight against the Taliban was not a purely internal conflict and therefore fell outside the scope of the alleged prohibition. Although not entirely clear, the US's primary justification for its long involvement in Afghanistan long appeared to remain the exercise of a continuing right to self-defence against terrorism, rather than the consent of the Afghan government.¹⁰³⁶ If so, the case would not seem to provide *opinio juris* concerning 'intervention by invitation'. However, more recent developments suggest otherwise. Although major combat operations officially ended in 2014, the Taliban insurgency continues and US forces remain present in Afghanistan. The attempted partial disengagement was unsuccessful; following rapid Taliban progress, in October 2014 President Obama authorised US forces to assist Afghan government forces in combat.¹⁰³⁷ In December 2016 the US government stated that 'US military operations...in the ongoing armed conflict in Afghanistan are now undertaken consistent with the Bilateral Security Agreement...and with the consent of the Afghan government',¹⁰³⁸ suggesting a shift in the

¹⁰³⁴ See also the references to 'violent extremism' in UNSC Res 2344 (17 March 2017).

¹⁰³⁵ Williams (n1032) 571.

¹⁰³⁶ Kohen (n329); Gray (n433) 207; See quotes from Presidents Bush and Obama, Williams (n1033) 576.

¹⁰³⁷ 'Contemporary Practice of the US' (2015) 109 AJIL 189, 190.

¹⁰³⁸ 'Legal and Policy Framework' (n13) 14.

legal basis for US involvement to government consent. Thus, the case does seem to provide *opinio juris* relevant to the alleged prohibition. The Bilateral Security Agreement identifies the goals of the mission as

...to strengthen security and stability in Afghanistan, counter terrorism, contribute to regional and international peace and security, and to enhance the ability of Afghanistan to deter internal and external threats against its sovereignty, security, territorial integrity, national unity and its constitutional order.¹⁰³⁹

This provision assumes a general right to help ensure ‘security and stability’ in Afghanistan against not only external threats, but also internal ones. In making clear that assistance to uphold national unity and constitutional order are permitted, the 2014 treaty seems to support the view that international law permits assistance to governments against secessionist threats and unconstitutional rebellions. The 2014 treaty also asserts a general right to counter terrorism. Thus, the treaty supports a wide view of the right to pro-government intervention against an insurgency. It is true the agreement envisaged the main role of the US forces as providing training and logistical assistance to the Afghan government forces rather than continuing to undertake direct combat operations. But special forces remain available to participate in ‘counter-terrorism’ operations,¹⁰⁴⁰ and in June 2017 the Trump Administration announced that several thousand additional US troops would be deployed there.¹⁰⁴¹

Iraq (2004-12)

From 2004 to 2008, the presence of the US-led Multi-National Force in Iraq was authorised by the Security Council under Chapter VII. This followed a request by the Iraqi government, which stated that ‘security and stability continue to be essential to our political

¹⁰³⁹ ‘Security and Defense Agreement’ (n301) art 2(1).

¹⁰⁴⁰ Contemporary Practice (n1037) 189.

¹⁰⁴¹ Mark Landler and Michael Gordon, ‘As US Adds Troops in Afghanistan, Trump’s Strategy Remains Undefined’ (NYT, 18 June 2017) < www.nytimes.com/2017/06/18/world/asia/us-troops-afghanistan-trump.html>.

transition’ and that international assistance was needed against ‘forces in Iraq, including foreign elements, that are opposed to our transition to peace, democracy and security.’¹⁰⁴² In 2008 however, the legal basis for the presence of US troops in Iraq shifted from Security Council authorization to Iraqi consent in the form of a Status of Forces Agreement (SOFA)¹⁰⁴³ – providing more directly relevant practice on the legality of pro-government intervention in the absence of intervention.¹⁰⁴⁴ In the treaty, Iraq requested

the temporary assistance of the United States forces for the purposes of supporting Iraq in its efforts to maintain security and stability in Iraq, including cooperation in the conduct of operations against Al-Qaeda and other terrorist groups, outlaw groups, and remnants of the former regime.¹⁰⁴⁵

After this temporary period of assistance, the treaty provided that US troops would withdraw from Iraq by the end of 2011.¹⁰⁴⁶ The final combat brigade was withdrawn in 2010, with around 50,000 US troops remaining as a training force.¹⁰⁴⁷ US attempts to gain Iraqi consent to a continued troop presence after 2011 failed, and the mission formally ended on 15 December 2011.¹⁰⁴⁸

As with the equivalent agreement in Afghanistan, the 2008 SOFA allowed military action aimed at assisting the government to ‘maintain security and stability’ within the country. Since this in practice means upholding the government’s authority against the forces

¹⁰⁴² ‘Letter dated 5 June 2004 from the Prime Minister of the Interim Government of Iraq’ (2004) 58 UNYB 351.

¹⁰⁴³ ‘Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of the US Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq’ (US State Department, 17 November 2008), <<http://www.state.gov/documents/organization/122074.pdf>>.

¹⁰⁴⁴ Lieblich (n104) 149–50.

¹⁰⁴⁵ (n1043) art 4.

¹⁰⁴⁶ *ibid*, art 24.

¹⁰⁴⁷ Ernesto Londoño, ‘Operation Iraqi Freedom Ends as Last Combat Soldiers Leave Baghdad’ (*Washington Post*, 19 August 2010) <www.washingtonpost.com/wp-dyn/content/article/2010/08/18/AR2010081805644.html>.

¹⁰⁴⁸ ‘US Flag Ceremony Marks Formal End of Iraq War Role’ (*BBC News*, 11 December 2011) <www.bbc.co.uk/news/world-us-canada-16192105>.

which are violently challenging it, this is difficult to reconcile with the alleged prohibition on pro-government intervention. The requested assistance is not limited to action against international Al-Qaeda network but also allows intervention against terrorist groups generally and against 'outlaw groups' and 'remnants of the former regime' which would appear to be primarily domestic. This precedent thus supports the view that international law permits foreign military assistance against terrorists and more generally against opposition groups which are perceived to be illegitimate.

Ethiopian Intervention in Somalia

Somalia has been the setting for one of the world's most intractable conflicts since 1991. Following the advent of the 'war on terror', there have been a number of foreign interventions against Islamist militia groups operating in the country. In 2006 Ethiopian troops were present in Baidoa in southern Somalia with the consent of the Transitional Federal Government, which was internationally recognized but controlled only a small percentage of the country.¹⁰⁴⁹ The Union of Islamic Courts (UIC) militias, which controlled much of Somalia's territory, came into conflict with these Ethiopian troops, and in response Ethiopia launched a full-scale offensive in December.¹⁰⁵⁰ The international community seemed generally to approve Ethiopia's actions.¹⁰⁵¹ Ethiopia's initial deployment of troops to Somalia was justified by reference to the TFG's invitation.¹⁰⁵² This is potentially supportive of the right of foreign States to militarily assist a State's legitimate government in a situation of internal conflict, at least where the rebels are considered to be terrorists,¹⁰⁵³ although it

¹⁰⁴⁹ Zeray Yihdego, 'Ethiopia's Military Actions Against the Union of Islamic Courts and Others in Somalia: Some Legal Implications' (2007) 56 ICLQ 666, 667–78; see also generally Awol Kassim Allo, 'Counter-Intervention, Invitation, Both or Neither? An Appraisal of the 2006 Ethiopian Military Intervention in Somalia' (2009) 3 Mizan LR 201.

¹⁰⁵⁰ *ibid.*

¹⁰⁵¹ *ibid.* 673.

¹⁰⁵² *ibid.* 668–69.

¹⁰⁵³ Gray (n433) 244; Lieblich (n104) 168–69.

could be questioned whether the TFG's struggle against the UIC constituted a 'civil war' given the latter's reliance on foreign fighters.¹⁰⁵⁴ After the onset of Ethiopian forces' full-scale offensive on the UIC, Ethiopia shifted its legal argument to self-defence. The Ethiopian Prime Minister disclaimed 'any attention to meddle in Somalia's internal affairs'.¹⁰⁵⁵ However, as argued above, States' tendency to rely on self-defence as a more politically compelling legal justification for military action does not imply recognition that 'intervention by invitation' in a civil war would be illegal.

The Comoros

Another pro-government intervention in Africa occurred in 2008 in the Comoros, whose government requested assistance to restore its authority of the island of Anjouan which was controlled by secessionist authorities.¹⁰⁵⁶ The Comoros request for intervention was endorsed by the Assembly of the African Union,¹⁰⁵⁷ following which Sudanese, Tanzanian and Senegalese troops (with French, US and Libyan logistical support) assisted Comoros forces in an invasion of the island which re-established the central government's control.¹⁰⁵⁸ This intervention was justified, inter alia, on the basis of the need to uphold the territorial integrity of the Comoros and a previously signed peace accord,¹⁰⁵⁹ and as aid to a 'democratic' government against 'illegal' authorities.¹⁰⁶⁰ As a widely-supported intervention involving direct deployment to help a government perceived as legitimate against opposing authorities exercising control over part of the State's territory, the case undermines the

¹⁰⁵⁴ Yihdego (n1049) 669.

¹⁰⁵⁵ *ibid* 671. Self-defence similarly seems to have been the primary justification given for the Kenyan intervention in Somalia in 2011 against Al-Shabaab: see Daley J Birkett, 'The Legality of the 2011 Kenyan Invasion of Somalia and Its Implications for the *Jus ad Bellum*' (2013) 18 JCSL 427.

¹⁰⁵⁶ Corten (n592) 217–18.

¹⁰⁵⁷ 'Decision on the Situation in the Comoros', Assembly/AU/Dec.186(X) (2 February 2008).

¹⁰⁵⁸ Corten (n592) 217.

¹⁰⁵⁹ *ibid* 218–19.

¹⁰⁶⁰ The operation was named 'Democracy in the Comoros': Corten (n592) 219. The authorities were described as illegal in the AU Assembly resolution (n1057).

alleged prohibition on pro-government intervention. It could potentially be reconciled with it by allowing an exception for pro-government intervention against secessionist local authorities¹⁰⁶¹ or to uphold peace accords previously signed by all internal parties.¹⁰⁶²

Kyrgyzstan: A Denied Request for Pro-Government Intervention

Events following from the 2010 outbreak of serious ethnic conflict in Kyrgyzstan have been argued to provide potential support for the prohibition.¹⁰⁶³ Violent clashes between ethnic Kyrgyz and Uzbeks led to the interim President, Roza Otunbayeva, to request the deployment of troops from the Collective Security Treaty Organization (CSTO), the regional security organization in the post-Soviet space, to help restore order.¹⁰⁶⁴ Russia, the leading military power within the CSTO, declined the request to send troops, although it did apparently provide equipment and other forms of support. President Dmitri Medvedev, in justifying this decision, stated that the CSTO Charter provided for collective security responses ‘only in the case of a foreign intrusion and an attempt to externally seize power’, not in circumstances of internal civil strife as in Kyrgyzstan.¹⁰⁶⁵ However, Medvedev’s words suggest that this refusal was based on interpretation of the requirements of the CSTO Charter.¹⁰⁶⁶ It thus does not provide *opinio juris* for the existence of the alleged prohibition in general international law. Confirming this lack of *opinio juris* supporting the alleged prohibition, there has been post-2010 debate within the CSTO about expanding the circumstances in which CSTO forces can be deployed, with the CSTO Secretary-General proposing that the sending of troops be permitted when the national authorities ‘are unable to protect the constitutional order, the lives and safety of the citizens are threatened, [and]

¹⁰⁶¹ Christakis and Bannelier (n1) 133–35.

¹⁰⁶² Corten (n592) 220–21.

¹⁰⁶³ Hafner (n356) 192.

¹⁰⁶⁴ Roy Allison, *Russia, the West and Military Intervention* (OUP 2013) 143.

¹⁰⁶⁵ ‘Medvedev Says No Multi-National Force for Turbulent Kyrgyzstan’ (*Sputnik News*, 11 June 2010), available at <<https://sputniknews.com/news/20100611159390386/>>.

¹⁰⁶⁶ Allison (n1064) 143.

violent mass disorders are under way.¹⁰⁶⁷ While such proposals met with resistance by certain CSTO member states, notably Uzbekistan, the basis of such objections seems to have been, not that it was illegitimate to prop up a government representing constitutional order, but that ‘these forces may be used in the interests of the enemies of the ruling regime.’¹⁰⁶⁸

Bahrain

Since 2011, the Arab Spring and its largely disastrous aftermath have provided the context for a number of proposed and actual deployments of foreign force in the Middle East, both in support of and against beleaguered governments. The GCC’s 2011 intervention in Bahrain provides an example of the former. In February 2011, large-scale protests began in Manama.¹⁰⁶⁹ King Hamad offered some concessions, but violent protests continued into March, when the King requested intervention from the GCC.¹⁰⁷⁰ Approximately 5000 GCC troops were deployed to guard critical installations. Although it seems that these troops did not directly participate in riot control operations, their presence played an important role in suppressing the uprising.¹⁰⁷¹ The purpose of the intervention was defined by the GCC member States as ‘to contribute to restoring order and security’¹⁰⁷² and to protect Bahrain’s institutions.¹⁰⁷³ Although the Bahraini government alleged Iranian involvement in the uprising, this claim does not seem to have been made by the intervening States.¹⁰⁷⁴

¹⁰⁶⁷ *ibid* 144.

¹⁰⁶⁸ Allison refers to reports that Uzbekistan expressed this concern: *ibid* 145. The other recent case of ‘intervention by invitation’ in the post-Soviet space, the Russian intervention in Crimea, will not be discussed here as the key legal issue was President Yanukovich’s lack of international recognition, considered in Chapter 2: see (n 420).

¹⁰⁶⁹ See generally *Report of the Bahraini Independent Commission of Inquiry* (23 November 2011) 65–170, available at <www.bici.org.bh/BICIreportEN.pdf>.

¹⁰⁷⁰ *ibid* 134.

¹⁰⁷¹ *ibid* 167.

¹⁰⁷² Qatar, quoted Corten (n592) 163; see also GCC Secretary-General, *ibid*.

¹⁰⁷³ Saudi Foreign Minister, quoted ‘UK Materials in International Law’ (2012) 82 BYIL 676, 715.

¹⁰⁷⁴ Terry (n336) 161.

The international reaction to the GCC intervention was described as ‘very timid’.¹⁰⁷⁵ Only Iran clearly condemned it, denying involvement in the protests and stating that ‘[t]he foreign military intervention in Bahrain has only taken place to strengthen the government’s hands in repressing the popular legitimate demands.’¹⁰⁷⁶ Western powers, in contrast, including the US and the EU, expressed concern and called for respect for human rights and a peaceful solution, but did not clearly condemn the GCC’s actions.¹⁰⁷⁷ The British Foreign Secretary limited himself to expressing concern at the situation in Bahrain and indicating that the intervention should be kept within certain parameters:

The Government of Bahrain should respect the right to peaceful protest, respond to the legitimate concerns of the Bahraini people and persist with their attempts to draw others into a dialogue on reform. The intervention by GCC partners at the request of the Bahraini Government should also be consistent with that, supporting reform and not repression, allowing a swift return to peaceful conditions and creating an environment in which dialogue can take place.¹⁰⁷⁸

The general international acquiescence to the GCC intervention in Bahrain does not support the existence of a prohibition on deployment of troops to support a government faced with an internal political challenge, suggesting that such an intervention can be an acceptable means of restoring ‘security’ within a State. One way to reconcile the precedent with the alleged prohibition is that the situation in Bahrain involved mass demonstrations rather than a non-international conflict amounting to a civil war, which would take the situation out of the scope of the alleged prohibition as enunciated in the 1975 IDI resolution.¹⁰⁷⁹ The fact that the troops were not directly deployed against the protesters might also bring the

¹⁰⁷⁵ Corten (n592) 161.

¹⁰⁷⁶ ‘Identical letters dated 15 April 2011 from the Chargé d’affaires a.i. of the Permanent Mission of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General, the President of the General Assembly and the President of the Security Council’ (19 April 2011) S/2011/253, 2.

¹⁰⁷⁷ Kress (n450) 27, Corten (n592) 161.

¹⁰⁷⁸ ‘UK Materials’ (n1074) 1011. As noted above, the UK has continued to export arms to Bahrain: see (n786).

¹⁰⁷⁹ Corten (n592) 163.

situation outside a narrow version of the alleged prohibition. Also clearly relevant to the international reaction to the intervention were assessments of the legitimacy of the Bahraini government and its openness to peaceful reform, with the British Foreign Secretary observing that '[i]n Bahrain the Government has offered a national dialogue to the opposition forces...[and] a referendum on a constitution.'¹⁰⁸⁰ This statement fits with the strand of practice suggesting that such legitimacy assessments are critical in determining a government's right to request foreign intervention.

The Syrian Civil War: Foreign Arms Supply to the Assad Regime

Also sparked by the 'Arab Spring' was the nightmare of the ongoing Syrian Civil War. Protests in Syria in early 2011 had by 2012 developed into a bloody civil war dividing the territory of Syria between the authoritarian government of Bashar Al-Assad and various opposition groups, including moderates, Kurdish groups, and extreme Islamist factions, with these opposition groups also fighting among themselves. From the beginning of the conflict, grave contraventions of humanitarian and human rights law have been committed both by the government and by opposition forces.¹⁰⁸¹

At least since mid-2012, the Syrian conflict has clearly fallen within the category of a high-intensity civil war.¹⁰⁸² It thus constitutes important practice for assessing the legality of military assistance to government faced with civil wars, particularly indirect forms of assistance. From the beginning of the conflict Russia has provided the Assad regime with large-scale supplies of arms and military equipment.¹⁰⁸³ Iran also appears to have provided the government with arms as well as sending Iranian Revolutionary Guards to act as military

¹⁰⁸⁰ 'UK Materials' (n1073) 986.

¹⁰⁸¹ See Ruys (n467) 14.

¹⁰⁸² Klingler (n336) 515.

¹⁰⁸³ Ruys (n467) 14-15, Klingler (n336) 518, 520 (stating that Russian military contract with the regime as of 2012 were valued at around US\$4 billion).

advisers.¹⁰⁸⁴ Although many other States expressed their disapproval of arms supplies to the Assad regime, they did not clearly condemn them as illegal.¹⁰⁸⁵ The United Kingdom, for example, confined itself to describing Russian arms provision as ‘deeply concerning’.¹⁰⁸⁶ The US representative to the UN, although condemning Russia’s involvement, conceded that it was not ‘technically...a violation of international law, since there’s not an arms embargo’,¹⁰⁸⁷ while Secretary of State Kerry characterised it as ‘not helpful’.¹⁰⁸⁸ The international reaction to these actions does not support the view that indirect assistance to a government in a civil war is illegal. A counter-argument could potentially be based on Russian Foreign Minister Lavrov’s attempts to justify the provision of arms to the Syrian regime in an interview. Lavrov stated that the arms were provided in accordance with pre-existing contracts,¹⁰⁸⁹ and that certain advanced anti-missile systems were solely intended to allow Syria to protect itself against foreign attack and ‘did not create any kind of advantages in the fight [of the Assad regime] against the opposition.’¹⁰⁹⁰ This could be interpreted as implicitly acknowledging that the provision of arms which were intended to aid the Assad regime against the opposition, or in the absence of pre-existing contracts, would be illegal. But it could also be merely an attempt to provide additional political justification in an interview for the provision of arms to a controversial regime accused of committing atrocities. On another occasion the Russian Prime Minister seemed to endorse a more general right to assist the government ‘which is

¹⁰⁸⁴ Klingler (n336) 519; Ian Black, ‘Iran Sending More Advisers to Syria to Defeat “Terrorism”’, Says Deputy Minister’ (*Guardian*, 21 October 2015), available at <www.theguardian.com/world/2015/oct/21/iran-advisers-syria-terrorism-deputy-minister>.

¹⁰⁸⁵ Henderson (n665) 669.

¹⁰⁸⁶ ‘UK Materials on International Law’ (2013) 83 BYIL 298, 595. The Iranian intervention, in contrast, was condemned as contrary to the Security Council-imposed arms embargo on Iranian arms exports: ‘UK Materials on International Law’ (2014) 84 BYIL 526, 791.

¹⁰⁸⁷ ‘Remarks by Ambassador Susan E Rice’ (31 May 2012), available at <<https://2009-2017-usun.state.gov/remarks/5451>>; Lieblich (n104) 153; Kress (n450) 28.

¹⁰⁸⁸ Ruys (n467) 17.

¹⁰⁸⁹ Kress (n450) 28. See (n632) above.

¹⁰⁹⁰ Ruys (n467) 44–45.

formally in power.¹⁰⁹¹ The French government's statement that it would consider providing arms 'as soon as [the opposition coalition becomes] a legitimate government of Syria' also suggests that it accepted a general right to aid a 'legitimate' government in a civil war.¹⁰⁹²

Foreign provision of arms and training to the Syrian government could also potentially be reconciled with the existence of a general prohibition on pro-government intervention by being brought under the asserted exception for counter-intervention. Reports suggest that Turkey and Saudi Arabia began supplying the rebels with arms by early 2012.¹⁰⁹³ By 2013 the United States was also arming the rebels through a covert CIA programme which continued until the Trump Administration ended it in July 2017.¹⁰⁹⁴ However, while Russia condemned the foreign assistance to the rebels as action 'aim[ed] at changing the government at another State' and hence a clear violation of international law, it did not seem to rely on this to justify its own assistance to the government.¹⁰⁹⁵ Thus, rather than supporting an exception for 'counter-intervention', the *opinio juris* in this case indicates there is no general prohibition on military assistance to a government in a civil war, at least in the indirect form of arms supplies.¹⁰⁹⁶

Mali

In 2012, an internal conflict broke out between the Malian government and a range of insurgent groups in northern Mali.¹⁰⁹⁷ These groups included the Tuareg-separatist

¹⁰⁹¹ Medvedev, cited Talmon (n337) 246; Ruys (n467) 16.

¹⁰⁹² Quoted by Ruys (n467) 36.

¹⁰⁹³ Klingler (n336) 517. Qatar was also a significant provider of arms: Ruys (n467) 15.

¹⁰⁹⁴ David Sanger, Eric Schmitt and Ben Hubbard, 'Trump Ends Covert Aid to Syrian Rebels Trying to Topple Assad' (NYT, 19 July 2017) <www.nytimes.com/2017/07/19/world/middleeast/cia-arming-syrian-rebels.html>

¹⁰⁹⁵ See Talmon (n337) 246. Nor did the US rely on Russian and Iranian assistance to the government to justify its aid to the opposition, instead leaving its legal justification unclear: Klingler (n336) 507-08. In contrast, the Secretary-General of the Arab League appears to have done so: Lederer (n664) ('Since the government receives weapons, the opposition receives weapons').

¹⁰⁹⁶ ILA Use of Force Committee (n211) 268.

¹⁰⁹⁷ See Laird (n445) 123–26 for a general overview.

National Movement from the Liberation of Azawad (MNLA), seeking the secession of the north of Mali, as well as Islamist groups. Frustrated at the government's ineffective response to the rebellion, a group of officers overthrew it in a military coup, but the instability simply contributed to further rebel gains. By late 2012 the Islamist groups, having fallen out with the MNLA, had taken control of northern Mali and were rapidly advancing towards the capital. In response to this development, the Security Council in December 2012 authorised the deployment of an African Union force to assist the Malian government 'in recovering the areas in the north of the territory under the control of terrorist, extremist and armed groups...'.¹⁰⁹⁸ However, before such an African-led force could be organized, the Islamist forces made rapid advances, capturing major towns. In response, France intervened in the conflict in January 2013 at the invitation of the transitional Malian government which had emerged following the coup. France conducted air strikes and sent 4500 combat troops to assist the Malian government forces against the Islamist groups.¹⁰⁹⁹ The French forces received logistical support from the US and the UK.¹¹⁰⁰ The French action was successful in turning the tide of the conflict and was widely welcomed by States in the region and internationally.¹¹⁰¹ Some months later, the Security Council passed a resolution which 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.'¹¹⁰²

The request from the Malian transitional government played the key role in France's justification for the intervention. The French Foreign Minister initially also referred to

¹⁰⁹⁸ UNSC Res 2085 (20 December 2012); Fox (n256) 242.

¹⁰⁹⁹ Bannelier and Christakis (n204) 856. Chad also deployed troops: *ibid*, and S/PV.6905, 12.

¹¹⁰⁰ 'Contemporary Practice of the US' (2013) 107 AJIL 467–68; 'UK Materials on International Law' (2014) 84 BYIL 526, 802–04

¹¹⁰¹ Bannelier and Christakis (n204) 857–59.

¹¹⁰² UNSC Res 2100 (25 April 2013); Fox (n256) 243.

collective self-defence under art 51,¹¹⁰³ but this justification was not employed before the Security Council,¹¹⁰⁴ presumably because the lack of an ‘armed attack’ from a foreign State.¹¹⁰⁵ France also referred to the Security Council’s earlier resolution authorising intervention in Mali, but this argument was weak given that the existing Chapter VII authorisation applied only to AU forces.¹¹⁰⁶ Mali’s consent was clearly the strongest legal basis for the action and was referred to repeatedly in the Security Council debate.¹¹⁰⁷ Since the insurgents had already gained control of a large proportion of Malian territory¹¹⁰⁸ and were seeking to advance on the capital and depose the existing government, the conflict could naturally be as a civil war falling within the definition of the 1975 IDI resolution.¹¹⁰⁹ Yet the international community welcomed direct foreign military intervention to save the government and push the rebels back. Nor generally did States rely on a claim of outside assistance to the rebels to justify the intervention.¹¹¹⁰

However, it is also true that the case could potentially be reconciled with the prohibition, assuming that it had come into existence during the Cold War. A number of authors have drawn attention to the fact that France and other States supporting the intervention had stressed that it was an intervention against terrorism.¹¹¹¹ As indicated above, the Security Council had previously classified the Islamist forces in Mali as ‘terrorist,

¹¹⁰³ Corten (n592) 227.

¹¹⁰⁴ Ibid. See ‘Identical letters dated 11th January 2013 from the Permanent Representative of France to the UN addressed to the Secretary-General and the President of the Security Council’ S/1013/17; Bannelier and Christakis (n204) 859; cf S/PV.6905, 13–14 (Niger).

¹¹⁰⁵ Laird (n445) 130.

¹¹⁰⁶ Bannelier and Christakis (n204) 869; cf Laird (n445) 136.

¹¹⁰⁷ Kress (n450) 26.

¹¹⁰⁸ ‘UK Materials in International Law’ (2013) 84 BYIL 526, 802.

¹¹⁰⁹ See Chapter 3, Part C(ii) above; Fox (n256) 828.

¹¹¹⁰ Although in fact the rebel forces do seem to have received cross-border support, with an influx of weapons and fighters from Libya after the fall of the Gaddafi regime: see S/PV.6905, 14–15 (Benin).

¹¹¹¹ Bannelier and Christakis (n204) 859, Laird (n445) 126–27; cf Corten (n1) 225–26.

extremist and armed groups’,¹¹¹² and the French letter to the Council categorised them as ‘terrorist elements.’¹¹¹³ A US spokesman also emphasised that the conflict involved action against terrorism in order to justify the legality of the assistance under US domestic law.¹¹¹⁴ One can also point to the fact that the intervention was apparently directed only against these Islamist forces, and not against the MNLA secessionists, who in fact seem to have cooperated with the intervention.¹¹¹⁵ Interpreted in this way, the precedent can be added to other post-2001 interventions to contend that recent practice has merely clarified the distinction between intervention in civil wars, which is covered by the prohibition, and intervention against terrorism, which with the consent of the government is permitted. This development can be justified on the basis that such conflicts are not truly purely internal ones, since terrorism is a phenomenon posing an international threat. Such an argument seems particularly plausible in the Malian context where the opposition Islamist groups appeared to be linked to and supported by a broader Islamist network destabilising other countries in the region, supporting statements made in the Security Council that the situation in Mali constituted a threat to regional peace.¹¹¹⁶

A major problem with this argument, which will be discussed further in a later chapter,¹¹¹⁷ is that there remains difficulty in defining the criteria by which ‘terrorists’ are to be distinguished from rebels in a civil war. Although clearly there was an international consensus that the Malian insurgents were terrorists in this case,¹¹¹⁸ they were also repeatedly

¹¹¹² UNSC Res 2085 (n1099).

¹¹¹³ ‘Identical letters’ (n1104).

¹¹¹⁴ ‘Contemporary Practice’ (n1100) 468.

¹¹¹⁵ Bannelier and Christakis (n204) 866-67.

¹¹¹⁶ S/PV.6905, 6 (Mali), 7 (AU), 11 (Senegal), 12 (Chad), 19 (EU).

¹¹¹⁷ (n1492) –(n1516), below.

¹¹¹⁸ Two of the three target groups had already been added to the SC’s Al-Qaeda sanctions list: Bannelier and Christakis (n204) 866-67.

described as ‘extremist’¹¹¹⁹ and ‘obscurantist’,¹¹²⁰ suggesting that their ideology was seen as illegitimate by definition and that this justified intervention against them. They were also accused of committing crimes against humanity.¹¹²¹ The government, in contrast, was described as ‘legitimate’ despite initially having come to power in a military coup,¹¹²² and it was claimed that it had the support of the Malian people.¹¹²³ There was also a general emphasis on the need to uphold the State’s ‘territorial integrity’ in the face of potential secession and State failure.¹¹²⁴ Rather than a clear distinction between ‘terrorists’ and ‘rebels’, these justifications suggest a general right to assist a government considered to be legitimate to regain stable control of the State’s territory when challenged by an ‘illegitimate’ opposition group.¹¹²⁵

South Sudan

Another military intervention in Africa began after the outbreak of fighting in South Sudan in December 2013 between rival factions of the ruling Sudan People’s Liberation Army/Movement, in which rebel forces took control of a number of towns.¹¹²⁶ Neighbouring Uganda soon sent troops to South Sudan; its President initially announced that the mission would involve ‘a small force to guard Juba airport with the agreement of President Salva Kiir’ and to facilitate the rescue of Ugandan nationals.¹¹²⁷ However, in January 2014 it was announced that Ugandan troops were also engaging in combat

¹¹¹⁹ S/PV.6905, 2 (Under S-G), 5 (Mali), 12 (Chad), 13 (Burkina Faso).

¹¹²⁰ *ibid* 11 (Senegal), 12 (Chad), 17 (Nigeria).

¹¹²¹ *ibid*, 15 (Benin).

¹¹²² *ibid*.

¹¹²³ *ibid*, 6 (Mali).

¹¹²⁴ See Corten (n592) 223, 226; S/PV.6905, 13 (Burkina Faso), 18 (EU).

¹¹²⁵ Cf de Wet (n379) 996–97.

¹¹²⁶ For a factual overview see Kasaija Phillip Apuuli, ‘Explaining the (Il)legality of Uganda’s Intervention in the Current South Sudan Conflict (2014) 23 Afr SR 352, 353–55.

¹¹²⁷ *ibid* 355–57.

operations against the rebels.¹¹²⁸ With this assistance, the government retook the rebel-held towns. Justifying this action, the Ugandan Defence Minister told Parliament that the South Sudanese President had written to the Ugandan government requesting assistance to ‘stabilise the situation’ there, a justification which suggests a broad assertion of the legality of intervention to restore governmental authority in a civil war situation.¹¹²⁹ The international response was muted. The Ugandan intervention was not condemned in the Security Council’s August 2014 Presidential Statement on South Sudan.¹¹³⁰

Intervention against ISIL in Iraq and Syria

2014 saw a worsening in the crisis arising out of the Syrian Civil War, with the extreme jihadist forces of Islamic State in the Iraq and the Levant (ISIL) proclaiming itself a global caliphate and making rapid territorial advances both in Syria and Iraq, committing shocking atrocities in the areas which fell under its control.¹¹³¹ The authorities in Iraq sought international assistance against the ISIL threat.¹¹³² Direct military action began in August 2014, when the United States began conducting airstrikes on ISIL targets within Iraqi territory. It was soon joined by a number of other States, including the United Kingdom, France, Canada, Australia, the Netherlands, Belgium, Jordan and Denmark.¹¹³³ Separately

¹¹²⁸ *ibid* 359.

¹¹²⁹ *ibid* 358.

¹¹³⁰ S/PRST/2014/16 (8 August 2014); de Wet (n379) 996.

¹¹³¹ ‘First Report of the Secretary-General Submitted Pursuant to Paragraph 6 of Resolution 2154’ (31 October 2014) S/2014/774, 9–12.

¹¹³² ‘Letter dated 25 June 2014 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General’, S/2014/440; ‘Letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council’ S/2014/691.

¹¹³³ Bannelier-Christakis (n315) 751.

from the US-led airstrikes, Iran and Russia have also conducted anti-ISIL strikes in Iraq.¹¹³⁴ The legality of all these actions was widely accepted.¹¹³⁵

When legally justifying their use of force against ISIL on Iraqi territory, participating States relied on the request of the Iraqi government.¹¹³⁶ States seemed to assert in broad terms that military action on a State's territory with the consent of its government is legal. The formulation used in the UK Government's legal position states that consent provides a 'clear and unequivocal' basis for the use of force.¹¹³⁷ Additionally, the UK parliamentary resolution passed to authorise the use of force in Iraq refers to 'the request by the Government of Iraq for international support to defend itself against the threat ISIL poses to Iraq and its citizens' as 'the clear legal basis' for the action,¹¹³⁸ a position emphasised both by the Prime Minister¹¹³⁹ and the Deputy Prime Minister.¹¹⁴⁰ In its legal justifications for action in Iraq, the US Government similarly focussed on the fact that 'US operations against ISIL are conducted with Iraqi consent and in furtherance of Iraq's own armed conflict with the group'.¹¹⁴¹ The French Minister for Defence, speaking in the French Senate on 24 September 2014, justified the legality of French action by stating: 'We act...in conformity with the Charter of the United Nations, for any State can in the exercise of its sovereignty request another State to provide it with assistance.'¹¹⁴² The Canadian Foreign Minister,

¹¹³⁴ *ibid* 752–53.

¹¹³⁵ *ibid* 751.

¹¹³⁶ Urs (n317) 68, Byrne (n5) 102. See also Dapo Akande and Zachary Vermeer, 'The Airstrikes against Islamic State in Iraq and the Alleged Prohibition on Military Assistance to Governments in Civil Wars (*EJIL:Talk!*, 2 February 2015), available at <www.ejiltalk.org/the-airstrikes-against-islamic-state-in-iraq-and-the-alleged-prohibition-on-military-assistance-to-governments-in-civil-wars/>.

¹¹³⁷ (n771); Byrne (n5) 102.

¹¹³⁸ 'UK Materials on International Law' (2015) 85 BYIL 301, 636.

¹¹³⁹ *ibid* 639.

¹¹⁴⁰ *ibid* 640.

¹¹⁴¹ Egan (n201) 302; see also Byrne (n5) 102.

¹¹⁴² 'Séance du 24 septembre 2014', available at <www.senat.fr/seances/s201409/s20140924/s20140924001.html>.

explaining to Parliament the legal justification for Canadian participation in the airstrikes on Islamic State targets in Iraq on 6 October 2014, stated that “[t]he legal authorisation is that the democratically elected Government of Iraq has invited and asked for this support and assistance. The Security Council does not need to authorise it...’¹¹⁴³. Similarly broad statements about the legality of the use of force with consent were made by the then Australian Prime Minister (who said in an interview on 16 September 2014 that ‘to operate in Iraq with the support, the consent, the approval, the welcome of the Iraqi government is...perfectly legal under international law’),¹¹⁴⁴ and by the Dutch government.¹¹⁴⁵ Meanwhile, separately from the US-led airstrikes, Iran has also undertaken airstrikes in Iraq, justifying them on the basis of ‘the request of the Iraqi authorities.’¹¹⁴⁶ The generality of these statements about the legality of the consensual use of force, combined with a lack of any reference at all to a prohibition on military assistance to governments involved in civil wars, provides no support for the existence of the prohibition.¹¹⁴⁷

But as with the Mali intervention, if the prohibition is thought to have come into existence during the Cold War period, this practice would not necessarily seem to undermine it. Again, it could be explained by reliance on a distinction between intervention in a civil war and intervention against a terrorist group.¹¹⁴⁸ ISIL has been widely condemned as a terrorist group, including by the Security Council.¹¹⁴⁹ The initial letters from Iraq requesting assistance

¹¹⁴³ Canadian House of Commons Debates (6 October 2014), available at <www.ourcommons.ca/DocumentViewer/en/41-2/house/sitting-123/hansard>.

¹¹⁴⁴ ‘Interview with Fran Kelly, ABC Radio National’ (16 September 2014), available at <pmtranscripts.dpmc.gov.au/release/transcript-23831>.

¹¹⁴⁵ See Van Steenberghe (n581). Cf the resolution of the Belgian Parliament on the issue, which referred to art 51 of the Charter: *ibid*.

¹¹⁴⁶ ‘Digest of State Practice’ (2015) 2 JUFIL 119.

¹¹⁴⁷ Urs (n317) 69-70; Akande and Vermeer (n1136).

¹¹⁴⁸ Bannelier-Christakis (n315) 754–56.

¹¹⁴⁹ See e.g. UNSC Res 2170 (15 August 2014), 2199 (12 February 2015).

stressed ISIL's status as a terrorist group.¹¹⁵⁰ States participating in the airstrikes emphasised that ISIL was the target and described it as a terrorist organization, as well as referring to the atrocities committed by the group and the need to protect civilians.¹¹⁵¹

This interpretation relies on a clear distinction between terrorist forces and insurgents in a civil war, a distinction which may be difficult to apply in practice. To use an example discussed above, it is difficult to know in which category to place the Taliban, a group which commits attacks on civilians within Afghanistan and has some links with Al-Qaeda and other international Islamist networks, but whose aim is to re-establish its control within Afghanistan and disclaim any intent to carry out attacks internationally.¹¹⁵² But ISIL in Iraq provides a much clearer case of a group which is not merely participating in an internal struggle for power within a State. It recruits fighters internationally and its professed aim is not to take over any particular country to establish a worldwide caliphate, undermining any potential claim that ISIL could be a legitimate contender to represent the Iraqi people.¹¹⁵³ It clearly aims at conducting and inspiring terrorist attacks internationally, and has been tragically successful in cases such as the Bataclan massacre in Paris. From the outbreak of the Syrian Civil War, it has operated both in Iraq and Syria, and the Iraqi request for assistance emphasised that ISIL operated from a 'safe haven' in Syria.¹¹⁵⁴ The integrated nature of ISIL across the Iraqi-Syrian border soon led many participants in the US-led coalition in Iraq to also commence attacking ISIL targets in Syria. Because of an unwillingness to cooperate with

¹¹⁵⁰ See (n1132).

¹¹⁵¹ For example Egan (n201) 302; 'UK Materials' (n1138); 'Letter' (n1132). See generally van Steenberghe (n581).

¹¹⁵² Anne Stenersen, 'Are the Afghan Taliban Involved in International Terrorism?' (Combating Terrorism Centre, 3 September 2009), available at < <https://ctc.usma.edu/posts/are-the-afghan-taliban-involved-in-international-terrorism-3>>.

¹¹⁵³ Christian Henderson, 'Editorial Comment: The Use of Force Against Islamic State' (2014) 1 JUFIL 209, 210; Urs (n317) 70; Lieblich (n104) 54. Iraq, in S/2014/440 (n1132) referred to 'external support' received by ISIL and its desire 'to eliminate borders...'.

¹¹⁵⁴ See S/2014/691 (n1132). It has since expanded to other countries, including Libya where airstrikes against it have also been conducted by Egypt and the US: Bannelier-Christakis (n315) 756–58.

the tainted Assad government,¹¹⁵⁵ to justify the legality of their actions in Syria States relied on collective self-defence of Iraq under art 51 against ISIL.¹¹⁵⁶ In its subsequent resolution calling upon States ‘to take all necessary measures, in compliance with the UN Charter’ to prevent and suppress ISIL terrorist acts and to eradicate its safe havens, the Security Council did not specify the legal basis for anti-ISIL action.¹¹⁵⁷ Nor has the Council drawn a distinction between anti-ISIL action in Iraq and in Syria.¹¹⁵⁸ All these factors seem to distinguish the conflict against ISIL in Iraq from a purely internal civil war,¹¹⁵⁹ arguably bringing it outside the scope of the alleged prohibition.

But although these arguments could be used to square the alleged prohibition with the anti-ISIL airstrikes in Iraq, the fact remains that the practice does not provide any positive support for the alleged prohibition. States’ specifically legal argument for the action in Iraq, as shown above, tended simply to assert in broad terms that the use of force on another State’s territory with its consent is legal. Although States also referred to the terrorist nature of ISIL, it is not clear that they endorsed this as a legal condition for intervention, as opposed to a moral or political justification for action which was legal because of government consent. States also referred more broadly to the need to ‘restore security and stability’ in Iraq,¹¹⁶⁰ a rationale which would seem to allow intervention directly aimed at bringing an internal conflict to an end. The fact that the US-led coalition later turned to collective self-defence under art 51 (still primarily relying, therefore, on Iraq’s consent) to

¹¹⁵⁵ (n319)–(n320) and text, above.

¹¹⁵⁶ S/2014/695 (US), S/2015/745 (France), S/2014/851 (UK). This justification relies on the controversial ‘unable and unwilling’ test: see Urs (n317) 79. States also relied on an expansive version of individual self-defence against the threat posed by ISIL to their security: Urs (n317) 71; S/2015/745 (France).

¹¹⁵⁷ UNSC Res 2249 (20 November 2015); Dapo Akande and Marko Milanovic, ‘The Constructive Ambiguity of the Security Council’s ISIS Resolution’ (*EJIL:Talk!*, 21 November 2015), available at www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/.

¹¹⁵⁸ Urs (n317) 83.

¹¹⁵⁹ Urs (n317) 70, Henderson (n1153) 217, van Steenberghe (n581).

¹¹⁶⁰ S/2014/691 (n1132); see also UNSC Res 2233 (29 July 2015); S/PRST/2014/20 (19 September 2014); ‘UK Materials’ (n1138) 640.

justify airstrikes against ISIL in Syria is unsurprising given their hostile attitude to the Assad government, and does not imply a rejection of a broad conception of the legality of consensual intervention as the basis for the coalition's actions in Iraq.¹¹⁶¹

Separately from the coalition airstrikes on ISIL, Russia stepped up its involvement in Syria by commencing airstrikes on Syrian territory in September 2015.¹¹⁶² In a letter to the Security Council, Russia stated that this action occurred 'in response to a request from the President of the Syrian Arab Republic...to provide military assistance in combatting the terrorist group ISIL and other terrorist groups operating in Syria...'¹¹⁶³ In the Security Council, the Russian representative stated that the intervention was 'exclusively...to carry out strikes against ISIL positions in Syria' and called for coordination of all forces in Syria to fight terrorism, including both the government forces and 'armed ranks of the Syrian opposition.'¹¹⁶⁴ The Russian Foreign Minister clarified that it did not consider the US-assisted Free Syrian Army as a terrorist group.¹¹⁶⁵ In less formal contexts, however, there appeared to be Russian indications that non-ISIL Syrian opposition forces might be targeted.¹¹⁶⁶ President Putin stated in an interview that the intervention was 'in full compliance with international law, at the request of the...official government', and that its purpose was 'to stabilise the legitimate government and establish conditions that will make it possible to look for a political compromise', although he also stressed the aim of fighting terrorism.¹¹⁶⁷

¹¹⁶¹ See Egan (n201) 304 ('States generally rely on the consent of the relevant government...even when they may also have a self-defence basis to use force against these non-State actors...').

¹¹⁶² Bannelier-Christakis (n315) 750.

¹¹⁶³ Letter dated 15 October 2015 from the Permanent Representative of the Russian Federation to the United Nations addressed to the President of the Security Council' S/2015/792.

¹¹⁶⁴ S/PV.7527, 4.

¹¹⁶⁵ Michele Roberts, 'Russia Says US-backed Free Syrian Army Not a Terrorist Group' (Reuters, 1 October 2015), available at <www.reuters.com/article/us-mideast-crisis-lavrov-fsa-idUSKCN0RV51620151001>.

¹¹⁶⁶ 'Russia Admits Targeting Non-ISIS Groups in Syria as Airstrikes Continue' (*Guardian*, 2 October 2015) available at <www.theguardian.com/world/2015/oct/01/russia-targeting-non-isis-groups-syria-airstrikes>.

¹¹⁶⁷ Kashmira Gander, 'Vladimir Putin Rules Out Ground Operations in Syria' (12 October 2015) available at <www.independent.co.uk/news/world/europe/vladimir-putin-rules-out-ground-operations-in-syria-russian-presidents-rossiya-tv-interview-in-full-a6691331.html>.

Russia's emphasis in its formal justifications of the intervention to the Security Council that its airstrikes were solely directed against terrorist groups has been interpreted by Karine Bannelier-Christakis as *opinio juris* supporting the view that while anti-terrorist action is permitted, pro-government intervention in a civil war is not.¹¹⁶⁸ Again, however, this emphasis can alternatively be interpreted as an attempt to increase the political legitimacy of the intervention, rather than recognition of a legal requirement.

Many Western and Arab States reacted negatively to the Russian intervention, alleging that it was not in fact directed solely against ISIL and related groups but also targeted the 'moderate' Syrian opposition. Seven such States released a statement expressing 'deep concern' about the Russian action, stating

These military actions constitute a further escalation and will only fuel more extremism and radicalization. We call on the Russian Federation to immediately cease its attacks on the Syrian opposition and civilians and to focus its efforts on fighting ISIL.¹¹⁶⁹

Similar concerns were expressed by the Council of the European Union.¹¹⁷⁰ Some states also expressed dismay at any attempt to 'prop up' the Assad government.¹¹⁷¹ Other States such as China refrained from any obvious criticism of the Russian intervention. The critiques by some States of attacks directed at Syrian opposition rather than ISIL targets might be seen as supporting the alleged prohibition on pro-government intervention in a civil war. However, these expressions of 'deep concern' did not contain any clear legal condemnation on Russia,

¹¹⁶⁸ Bannelier-Christakis (n315) 764–65.

¹¹⁶⁹ 'Joint Declaration on Recent Military Actions of the Russian Federation in Syria' (2 October 2015), available at www.gov.uk/government/news/joint-declaration-on-recent-military-actions-of-the-russian-federation-in-syria.

¹¹⁷⁰ Bannelier-Christakis (n315) 763.

¹¹⁷¹ S/PV.7527, 24 (UK), US State Department, Daily Press Briefing (24 September 2015), available at <https://2009-2017.state.gov/r/pa/prs/dpb/2015/09/247265.htm>.

casting doubt on their value as *opinio juris*.¹¹⁷² They often focussed on the pragmatic assessment that after years of bloodshed Assad could never unite or pacify the country and that strengthening him would provide a new impetus to ISIL.¹¹⁷³ The international crimes committed by the Assad regime were also referred to by critics of the Russian action¹¹⁷⁴ and contrasted with the (alleged) democratic orientation of the opposition¹¹⁷⁵ suggesting as in previous cases that assessments of the legitimacy of the inviting government, and not simply the existence of a civil war, played a central role in influencing States' reactions to pro-government intervention.

Yemen

Military action by Saudi Arabia and other GCC members in Yemen, which has been ongoing since March 2015, provides recent State practice directly relevant to the legality of pro-government intervention in a civil war. In breach of a SC-endorsed political transition process, Houthi rebels succeeded in seizing control of the capital, arresting President Hadi, dissolving the Parliament and forming the 'Supreme Revolutionary Committee' as an interim government.¹¹⁷⁶ Hadi escaped and following further Houthi advances fled to Saudi Arabia, where he requested military intervention from the member states of the GCC.¹¹⁷⁷ An aerial, naval and ground campaign against the Houthis commenced which in 2017 is still continuing. The Saudi-led action received significant international support. It was endorsed

¹¹⁷² Laura Visser, 'Russia's Intervention in Syria' (*EJIL:Talk!*, 23 November 2015) available at <https://www.ejiltalk.org/russias-intervention-in-syria/>. Cf Bannelier-Christakis (n315) 764.

¹¹⁷³ S/PV.7527 14 (Lithuania), 22 (US), 23 (UK). See also 'Situation of Human Rights in the Syrian Arab Republic' (2 November 2015) A/C.3/70/L.47; Bannelier-Christakis (n315) 763.

¹¹⁷⁴ S/PV.7527, 10 (France), 41 (Qatar), 76 (Saudi Arabia). The US Defence Secretary described military support for the Assad regime as 'wrongheaded' and 'strategically short-sighted': 'Remarks' (13 October 2015), available at <<https://2009-2017.state.gov/secretary/remarks/2015/10/248180.htm>>.

¹¹⁷⁵ S/PV.7527 10 (France); also 23 (US).

¹¹⁷⁶ For an overview of the facts see International Crisis Group, 'Yemen at War' (27 March 2015), available at <www.crisisgroup.org/middle-east-north-africa/gulf-and-arabian-peninsula/yemen/yemen-war>.

¹¹⁷⁷ 'Identical letters dated 26 March 2015 from the Permanent Representative of Qatar to the United Nations addressed to the Secretary-General and the President of the Security Council' (27 March 2015) S/2015/217.

by the Arab League¹¹⁷⁸ and by a number of Western States, with the US and UK providing indirect assistance.¹¹⁷⁹ While other States were more reserved, emphasizing the need for a political solution,¹¹⁸⁰ the Security Council noted the GCC action without any indication of condemnation, endorsed Hadi as the legitimate President, demanded the Houthis end the violence and withdraw from the areas they had seized, and imposed an arms embargo on the rebel forces.¹¹⁸¹ Iran, widely considered to be aligned with the Houthis, condemned the airstrikes as a flagrant violation of the prohibition on the use of force.¹¹⁸² Apart from this, Russia seems to be the only State to describe the action as illegal,¹¹⁸³ although it did not make this criticism before the Security Council.¹¹⁸⁴

As has been discussed previously, continued international recognition meant that Hadi retained the capacity to speak for Yemen in international law.¹¹⁸⁵ Thus, his consent was *prima facie* sufficient to legalize the use of force on Yemeni territory. However, the conflict between the Hadi government and the Houthi rebels seems clearly to constitute a civil war, given the Houthis' control of much of Yemen's territory, their military success and their establishment of an alternative Yemeni government.¹¹⁸⁶ The GCC action was directly aimed against the Houthis.¹¹⁸⁷ Therefore, the intervention seems clearly to fall within the scope of

¹¹⁷⁸ Ruys and Ferro (n302) 67.

¹¹⁷⁹ *ibid* 67–68.

¹¹⁸⁰ *ibid* 68, 70.

¹¹⁸¹ UNSC Res 2216 (14 April 2015).

¹¹⁸² 'Letter dated 17 April 2015 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General' S/2015/263.

¹¹⁸³ 'Digest of State Practice' (2015) 2 JUFIL 276–77.

¹¹⁸⁴ Ruys and Ferro (n302) 70. Venezuela and Iraq also expressed reservations about the intervention: S/PV.7426, 5; Michael R Gordon and Eric Schmitt, 'Tensions Flare Between Iraq and Saudi Arabia in US Coalition' (NYT, 15 April 2015) <<http://www.nytimes.com/2015/04/16/world/middleeast/iraqi-prime-minister-criticizes-saudi-intervention-in-yemen.html>>. See also S/PV.7527, 74 (Pakistan).

¹¹⁸⁵ (n389).

¹¹⁸⁶ The Hadi government described the Houthis as 'fuel[ing] civil war': S/PV.7411, 3.

¹¹⁸⁷ See S/2015/217, 4–5.

the alleged prohibition. The widespread acceptance of the intervention by other States thus provides casts severe doubt on the prohibition's existence.¹¹⁸⁸

As in previous cases the participating States provided other justifications for the action which muddy the clarity of the precedent. Hadi's letter inviting intervention invoked art 51 of the UN Charter, apparently considering his request for intervention against 'ongoing Houthi aggression' as collective self-defence.¹¹⁸⁹ Collective self-defence under article 51 has since also been invoked by the GCC States in a *note verbale* to the Secretary-General.¹¹⁹⁰ But as argued above, attempts to rely on self-defence as an alternative legal basis for the use of force (one which is more politically compelling than consent alone) do not establish that States generally reject the legality of pro-government military intervention. In any case, given the difficulties in attributing the Houthis' actions to a foreign State this justification is untenable.¹¹⁹¹

GCC members have laid stress on the claim that the Houthis were receiving external support, including weapons and training, from Iran.¹¹⁹² Iran has rejected these claims as 'farcical'.¹¹⁹³ The allegations were vague and clearly did not amount an armed attack by Iran on Yemen.¹¹⁹⁴ The emphasis on Iranian involvement can be seen as intended to bring to justify consensual intervention within a civil war by invoking the exception for 'counter-intervention' against previous assistance to rebels, and thus as indirectly supporting the alleged prohibition rather than contradicting it. But again, it can be doubted whether the

¹¹⁸⁸ Cf Ruys and Ferro (n302) 89.

¹¹⁸⁹ S/2015/217, 4.

¹¹⁹⁰ 'Note verbale dated 27 October 2016 from the Permanent Mission of the United Arab Emirates to the United Nations addressed to the Secretary-General', A/71/581; see also S/PV.7426, 9 (Yemen).

¹¹⁹¹ Ruys and Ferro (n302) 76–77.

¹¹⁹² S/2015/217, 4; A/71/581, 2.

¹¹⁹³ 'Letter dated 16 November 2016 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General' A/71/617, 1.

¹¹⁹⁴ Ruys and Ferro (n302) 73–77.

‘counter-intervention’ rationale implies recognition of the alleged prohibition rather than a political need to justify the action within a defensive framework. Further, even if the GCC action is conceived of as an example of ‘counter-intervention’, it has clearly been massively disproportionate to the alleged Iranian involvement.¹¹⁹⁵ The widespread acceptance of the GCC action would therefore, on the view that it is only legal as ‘counter-intervention’, seem to indicate that there is no proportionality requirement for counter-intervention, which as will be discussed in the final chapter deeply undermines the coherence of the alleged prohibition.¹¹⁹⁶

Additional justifications for the action can also be discerned in the practice of participating and supportive States. The GCC States’ statement claimed that the Houthis posed a ‘grave and ongoing threat’ to them as neighbouring countries, alleging Houthi plans to attack Saudi Arabia.¹¹⁹⁷ Although this could be interpreted as an untenable claim to pre-emptive self-defence,¹¹⁹⁸ it could also be seen as an attempt to bring an instance ‘intervention by invitation’ outside the scope of the alleged prohibition by defining the intervention’s purpose as responding to a regional threat rather than interfering in an internal conflict. Another relevant international threat was terrorism. The GCC States did not initially accuse the Houthis of being terrorists,¹¹⁹⁹ but rather claimed that by undermining the security situation in Yemen they created opportunities for terrorist groups like Al-Qaeda in the Arabian Peninsula to gain ground, a concern also reflected in the Security Council.¹²⁰⁰ Later,

¹¹⁹⁵ Ruys and Ferro (n302) 94.

¹¹⁹⁶ Chapter 6, Part D, below.

¹¹⁹⁷ S/2015/217, 5.

¹¹⁹⁸ Ruys and Ferro (n302) 66.

¹¹⁹⁹ S/2015/217, 5 (drawing a distinction between Houthis and ‘terrorists’ like AQAP); Ruys and Ferro (n302) 92.

¹²⁰⁰ ‘Letter dated 24 April 2015 from the Permanent Representative of Qatar to the United Nations addressed to the President of the Security Council’, S/2015/279.

however, the GCC States directly condemned the Houthis themselves as terrorists.¹²⁰¹ This can be seen as attempt to classify the action as anti-terrorist action as distinct from intervention in a civil war, but also shows the ‘terrorist’ label’s potential for flexibility.¹²⁰²

A further strain of justification focussed on the ‘legitimacy’ of the government and the need to help it restore order and stability.¹²⁰³ The Hadi government had been produced by a Security Council-endorsed peace process and the Houthis were seen as ‘spoilers’ who had violated this.¹²⁰⁴ The Yemeni representative at the Security Council stressed the ‘constitutional’ status of the government and implied that the Houthis had no popular support.¹²⁰⁵ The United States in December 2016 more broadly stated that the legal justification for the support it has provided for the GCC action is ‘Yemen’s request for assistance...to protect the sovereignty, peace and security of Yemen.’¹²⁰⁶ Justifications of this kind cannot in practice be reconciled with the alleged prohibition. If direct military intervention is permitted to assist a government to restore the State’s ‘sovereignty, peace and security’ by crushing (domestic) rebel forces as long as the government is perceived as legitimate and the rebels are as illegitimate, the alleged prohibition becomes pointless – an argument which will be further developed in the final chapter.¹²⁰⁷

The Gambia

The most recent relevant case also suggests the broad legality of intervention in favour of a government internationally recognized as legitimate. After President Jammeh of

¹²⁰¹ ‘Identical letters dated 26 March 2015 from the Permanent Representative of Qatar to the United Nations addressed to the Secretary-General and the President of the Security Council’, S/2015/317; A/71/581, 2; Nussberger (n428) 111.

¹²⁰² See Chapter 6, Part C, below.

¹²⁰³ S/2015/217; S/PV.7527, 42 (Qatar), 53 (UAE)

¹²⁰⁴ Ruys and Ferro (n302) 94; Nussberger (n428) 120–22; S/PRST/2015/8 (22 March 2015); UNSC Res 2216 (n1181).

¹²⁰⁵ S/PV.7426, 9 (Yemen); see also S/PV.7527, 8 (Jordan).

¹²⁰⁶ ‘Legal and Policy Framework’ (n13) 18.

¹²⁰⁷ Cf Ruys (n591) 70.

the Gambia lost elections to opposition candidate Adama Barrow in December 2016, he refused to give up power. The international community widely condemned this and Barrow's legitimacy as President was recognized by ECOWAS and the AU, and later by the Security Council.¹²⁰⁸ From exile, Barrow called for intervention to enforce his electoral win. Although there is some lack of clarity about the facts, it appears that Senegalese troops crossed the border on 19 January 2017.¹²⁰⁹ Very shortly after a ceasefire was agreed and on 21 January Jammeh accepted defeat and left the country.¹²¹⁰ Although the Security Council refrained from directly authorizing military intervention, the case suggests widespread acceptance of the legality of military assistance to support the legitimate government of the country against an illegitimate opponent, despite the continued territorial control of the latter. Russia and the United Kingdom were quoted in the press as clearly recognizing Barrow's right to ask for assistance as the legitimate President of the Gambia.¹²¹¹ It could of course be argued that the case did not violate the alleged prohibition as the situation was not one which had yet risen to the level of a civil war. Nonetheless, the State was clearly politically divided between contending claimants to governmental authority and the international community nonetheless accepted intervention to put the legitimate government in power. It is hard not to see in this a clear rejection of the underlying idea behind the rule, that foreign States must not take sides militarily between contending political forces within a State.

Conclusion

The relatively thorough overview of the practice in this chapter helps to explain the continued scholarly debate about the prohibition's existence. The post-Cold War era has seen many instances where the provision of military assistance to 'legitimate' governments

¹²⁰⁸ (n446).

¹²⁰⁹ Kress and Nussberger (n303) 2.

¹²¹⁰ *ibid* 3.

¹²¹¹ *ibid* 5.

has been broadly accepted. But proponents of the alleged prohibition can argue that the widely accepted examples of ‘intervention by invitation’ do not indicate an abandonment of it, because they fall outside its scope: they are not, strictly speaking, interventions in a civil war. This assumes, however, that the rule came into existence during the Cold War period, which has been argued to be highly doubtful. A further problem with this attempt to reconcile the alleged prohibition with the post-Cold War practice is that it shows that the rule is inherently ineffective: assistance to a legitimate government can always be characterised in such a way as to be permissible. This argument will be developed in the final two chapters.

Chapter 5: Deducing the Alleged Prohibition from the Principles of International Law?

The previous chapter considered some of the methodological issues involved in assessing the complicated and ambiguous body of State practice and *opinio juris* on military assistance to governments in internal conflicts. It concluded that this practice was insufficient to support the emergence of a customary prohibition on pro-government intervention in such conflicts. The methodological approach assumed in that chapter focussed on *inductive* reasoning from individual instances of State practice and *opinio juris*. Induction from State practice and *opinio juris* is widely considered the standard way of determining the existence of norms of customary international law, and is sometimes presented as excluding interpretation of or deduction from existing rules.¹²¹² However, it seems clear that interpretation and deductive reasoning also play an essential role in determining the content of customary international law.¹²¹³ As Crawford¹²¹⁴ and Talmon have argued persuasively, a ‘systemic’ norm which logically follows from the fundamental principles and structures of international law can be considered to be law unless it is clearly contrary to States’ own understandings.¹²¹⁵

Once the role of interpretation and deductive reasoning in international law is appreciated, the arguments in favour of the prohibition on pro-government intervention in internal conflicts can be better understood. Many scholars seek to derive the prohibition from well-established norms of international law such as the prohibition on the use of force, the principle of non-intervention, and the right of peoples to self-determination. If such

¹²¹² Talmon (n8) 421; Mendelson (n755) 155, 181.

¹²¹³ Talmon (n8) 427; Panos Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato’s Cave* (Brill 2015) 263.

¹²¹⁴ James Crawford, ‘International Law and Foreign Sovereigns: Distinguishing Immune Transactions’ (1983) 54 BYIL 75, 85–86.

¹²¹⁵ See also Enzo Cannizzaro, ‘Customary International Law on the Use of Force: Inductive Approaches vs Value-Oriented Approach’, in Enzo Cannizzaro and Paolo Palchetti, *Customary International Law on the Use of Force: A Methodological Approach* (M Nijhoff 2005) 250–51.

reasoning is valid, the lack of unambiguous evidence in State practice and *opinio juris* that States themselves have understood these norms as establishing a general prohibition on pro-government intervention in internal conflicts is no longer a critical objection. It would not be necessary to demonstrate specifically that States have accepted the prohibition if it can be derived by interpretation or deduction from an existing rule recognized by States.

The first part of this chapter will discuss the role of interpretation and deductive reasoning in determining the existence of rules of international law. The second part will consider whether the alleged prohibition can actually be established by deduction from the prohibition on the use of force, the principle of non-intervention and the right to self-determination. It will be argued that it cannot, even in conjunction with the supportive elements of practice and *opinio juris*. This is because the reasoning used to deduce the alleged prohibition from these more general norms relies on conceptions of the meaning and purpose of these norms which are at least debatable and which appear to have been undermined by practice.

A. The Role of Interpretation and Deduction in Determining Rules of International Law

The famous *Lotus* principle lays down that '[r]estrictions upon the independence of States cannot...be presumed' because of the consensual nature of the international legal order.¹²¹⁶ The previous chapter has shown that States cannot clearly be shown to have recognized a general prohibition on pro-government intervention in internal conflicts. Applying the *Lotus* principle, it would seem to follow that the prohibition does not exist.

¹²¹⁶ *SS Lotus (France v Turkey)* PCIJ Rep Series A No 10, 18; cf Kammerhöfer (n644) 551.

However, careful consideration shows that a strictly voluntarist view of international law must be qualified to reflect the realities of international law and practice.¹²¹⁷ Once a relevant rule is consensually agreed, it ‘acquires objectively identifiable content that has to be construed and applied effectively in order to give proper effect to the individual consensual intentment.’¹²¹⁸ If the objective content of a norm to which States have consented includes a more specific obligation, States can be bound by this obligation even if there is no clear evidence that they considered, or consider, the norm to include that specific obligation.¹²¹⁹

The most obvious demonstration of this point is found in the area of treaty interpretation. Articles 31 to 33 VCLT set out rules of treaty interpretation that are also accepted as forming part of customary international law.¹²²⁰ A basic assumption underlying these rules is that their application allows the objective legal meaning of a treaty provision to be established. This provision thus interpreted is binding on all parties to the treaty. It is not necessary to establish that all or even any of the parties understood that the general treaty provision included the specific obligation – their consent to the treaty is taken as including consent to all specific applications of the treaty provision as established by the process of treaty interpretation.

Thus, the lack of consensus on the existence of a general prohibition on pro-government intervention, and the limited evidence supporting it, are not necessarily fatal to its existence. If it can be derived by interpretation from a Charter provision, the alleged prohibition would be binding on all parties notwithstanding the lack of consensus. At least

¹²¹⁷ Arnold Becker Lorca, ‘Rules for the “Global War on Terror”: Implying Consent and Presuming Conditions for Intervention’ (2012) 45 NYUJILP 1, 76.

¹²¹⁸ Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008) 2.

¹²¹⁹ *ibid* 60. See also Crawford (n104) 28 (referring to ‘disagreement as to the meaning or scope of an accepted rule, as to which the views of particular disputing states will not be decisive’).

¹²²⁰ *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* [1991] ICJ Rep 53, 70.

some,¹²²¹ although far from all,¹²²² of the authors who contend for the general prohibition present it in this way, as following by interpretation from the prohibition on the use of force in art 2(4) of the Charter. Others, it will be recalled, refer to the right to self-determination of peoples as the basis for the prohibition.¹²²³ These authors generally do not clearly distinguish between self-determination as a customary principle and as a treaty right.¹²²⁴ However, since self-determination is mentioned as a purpose of the UN in the Charter,¹²²⁵ and since it is recognized as a right in art 1 of both 1966 Human Rights Covenants,¹²²⁶ it would also be possible to frame this argument as an exercise in treaty interpretation.¹²²⁷

Nonetheless, references to the rules of treaty interpretation are uncommon in the academic literature arguing for the existence of the alleged general prohibition on pro-government intervention in internal conflicts. Although the issue is rarely dealt with explicitly, it seems more common to conceive of the alleged prohibition as arising out of custom.¹²²⁸ But custom is generally thought to be based on inductive reasoning from a wide range of instances of State practice and *opinio juris*.¹²²⁹ It seems that, if State practice and *opinio juris* are ambiguous and subject to disagreement on a particular point, as is the case with pro-government intervention in internal conflicts, they are not sufficient to bring a relevant customary rule into existence.

¹²²¹ Schachter (n206) 1641; Corten (n1) 289.

¹²²² Doswald-Beck (n243) 244; Christakis and Bannelier (n1) 113.

¹²²³ Bannelier and Christakis (n204) 860–61; Corten (n1) 289–90.

¹²²⁴ Bannelier and Christakis (n204) 860–61. cf. Saul (n229) 626.

¹²²⁵ arts 1(2) and 55.

¹²²⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 1; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR), art 1.

¹²²⁷ Corten (n1) 289 implicitly relies on the Charter right to self-determination, relying on the fact that it is one of the purposes of the United Nations.

¹²²⁸ Doswald-Beck (n243) 244; Gray (n433) 81.

¹²²⁹ See Talmon (n8) 421; d'Aspremont (n9) 185.

However, a purely inductive model provides an inaccurate model of custom. Stefan Talmon has emphasised the importance of deductive reasoning in determining customary norms. For Talmon, deduction is a process whereby reasoning is used to derive a more specific rule from a more general rule or principle. Successful deductive reasoning provides a convincing argument that, if the validity of the general norm is accepted, so must be the validity of the more specific norm.¹²³⁰ Talmon argues that despite the assumption that inductive reasoning drawing on a broad range of instances of State practice and *opinio juris* is the only valid way to establish norms of customary international law,¹²³¹ in fact the ICJ draws on a mixture of inductive and deductive approaches (as well as, frequently, simple *ipse dixit* assertion) to establish customary norms.¹²³² Talmon's concept of deduction seems similar in practice to the related idea that general customary norms can be the subject of interpretation.¹²³³ Both allow the concretization of a general customary norm into something more specific.

It thus seems that interpretation or deductive reasoning can potentially be used to help establish the existence of a general customary prohibition on pro-government intervention in internal conflicts, despite the ambiguities of State practice and *opinio juris* on the specific point. For Talmon, deductive reasoning does not replace but rather complements induction. Deduction can be used to strengthen results which could be equally demonstrated by induction.¹²³⁴ More importantly, deduction can lower the burden of proof so that a rule supported by deduction can be established on the basis of a smaller or less

¹²³⁰ Talmon (n8) 441.

¹²³¹ Cf Omri Sender and Michael Wood, 'The International Court of Justice and Customary International Law: A Reply to Stefan Talmon' (*EJIL: Talk!*, 30 November 2015), < <http://www.ejiltalk.org/the-international-court-of-justice-and-customary-international-law-a-reply-to-stefan-talmon/>>.

¹²³² Talmon (n8) 418, 424, referring to (*inter alia*) *Corfu Channel* (n266) 22; *Jurisdictional Immunities* (n87) 123.

¹²³³ Merkouris (n1213) 245–46.

¹²³⁴ Talmon (n8) 427

clear-cut body of State practice and *opinio juris*,¹²³⁵ or in situations where State practice ‘is conflicting or too disparate and thus inconclusive’ or ‘where *opinio juris* for various reasons cannot be established.’¹²³⁶ In such situations, deductive reasoning can be used to avoid a *non liquet*.¹²³⁷ The methodology here in line with that put forward twenty years earlier by James Crawford in the context of a discussion on the law of state immunity, which merits quotation at some length:

To establish a rule of law requires either a sufficient general consensus on the existence of the rule as such (universal agreement is not required) together with some agreement on key aspects of its formulation, or it requires that the rule be inducible by recognized methods of reasoning from other more clearly established rules; in the latter case support for the induced rule can be taken to exist in the absence of clear indications to the contrary. Rules can thus be ‘isolated’ or ‘positive’, or they can be ‘structural’ or ‘systematic’, deriving part at least of their validity from the assumption that international law is a system, not merely a set of primary norms... Where there is sustained disagreement over a rule, but agreement that the area is in principle subject to legal regulation, the presumption is that the ‘structural’ rule represents the law, a presumption which depends for its strength on the inferential or inductive links between that rule and other accepted rules and principles.¹²³⁸

There is potential for confusion of terminology here, since Crawford describes structural or systematic norms as ‘inducible by recognized methods of reasoning’ and depending on ‘inductive links’ with other accepted norms. Although he uses the terminology of induction, it is clear that this is the same process which Talmon calls deductive reasoning.¹²³⁹

This methodological analysis casts light on the debate about the existence of a general prohibition on pro-government intervention. The status of non-use of force, non-intervention and self-determination as fundamental rules of international law in the UN Charter era provides potential support for those arguing for the prohibition. If it follows

¹²³⁵ *ibid.*

¹²³⁶ *ibid* 422.

¹²³⁷ *ibid* 423; Cannizzaro (n1215) 254.

¹²³⁸ Crawford (n1214) 85–86.

¹²³⁹ Cf Kammerhöfer (n644) 542–46.

logically from these fundamental norms, ambiguities in State practice and *opinio juris* would not be enough to rebut the case that the rule exists. Rather, State practice and *opinio juris* would have to be clearly incompatible with the rule. Given the ambiguities analysed in the previous chapter, this does not appear to be the case. A methodology of this type can be seen as underlying the case for the rule made by many of its proponents, including Brownlie,¹²⁴⁰ Cassese,¹²⁴¹ Corten,¹²⁴² Roth,¹²⁴³ and Ruys.¹²⁴⁴ Nolte has noted that during the 2011 IDI debates those supporting the alleged prohibition responded to Rapporteur Hafner's scepticism, which was based on practice and case law, by arguing that the prohibition was implied by basic principles of international law.¹²⁴⁵

It is clearly true that interpretative rules and deductive reasoning play an important role in determining the content of international law. However, at the same time, some caution seems to be required in the use of these techniques. As Corten observes in another context, interpretation may easily become 'a highly subjective process' in which claims of logical necessity in fact disguise a controversial political choice.¹²⁴⁶ Similarly, concerns have been expressed that incautious use of deductive reasoning to turn vague and general principles into specific rules has the potential to introduce destabilising uncertainty into

¹²⁴⁰ Brownlie (n481) 323, 327 (relying on the principles of self-determination and non-intervention).

¹²⁴¹ Cassese (n218) 370.

¹²⁴² Corten (n1) 289–90. Corten's reasoning here can be seen as an application of Talmon's observation that deductive reasoning can shift the burden of proof applied to State practice and *opinio juris*.

¹²⁴³ Roth (n407) 389.

¹²⁴⁴ Ruys (n467) 52.

¹²⁴⁵ Nolte (n4) 249, 262. Deductive reasoning could also be used to indicate that the rule, if it exists, must give rise to obligations *erga omnes*. That a rule gives rise to *erga omnes* obligations appears to be something that can often be deduced from a rule's contents, where it is a functional necessity for its effective operation in the international system: cf *Barcelona Traction* (n181) 32; Paulus (n29) 313; Paolo Picone, 'The Distinction between *Jus Cogens* and Obligations *Erga Omnes*' in Cannizzaro (n41) 415. By definition, the 'victim' State's government would be complicit in any violation of the alleged prohibition, so the rule would be inherently flawed if were solely bilateral in nature. It is necessary for the rule's effective operation that other States be able to make a legal claim when such a violation takes place, for similar reasons as to why human rights norms can be deduced to give rise to obligations *erga omnes*. Cf Doswald-Beck (n243) 243–44; Perkins (n548) 211–12; Hafner (n356) 246.

¹²⁴⁶ Corten (n1) 17.

international law.¹²⁴⁷ One conclusion would be that these techniques inevitably draw on the moral judgments and/or policy preferences of the interpreter, rebutting the positivist view that what is law is a matter of social fact independent of such judgments.¹²⁴⁸ Such approaches inevitably radically subjectivize the identification of rules of international law, frustrating its ability to function in a community of States marked by wide moral and policy disagreements.¹²⁴⁹

Because of such concerns, this thesis has sought to analyse the existence of the alleged prohibition in the light of a positivist account of international law.¹²⁵⁰ Such an account requires a certain restraint from the scholar who uses the tools of interpretation and deduction to determine the content of existing law. The rules of interpretation used must be those which have been accepted by States, and when relying on the object and purpose of the rule,¹²⁵¹ a rigorous attempt must be made to determine what States consider to be its object and purpose, not to impose on the rule what one might consider the morally best purpose which is sufficiently consistent with it.¹²⁵² Similarly, Talmon indicates that deduction should be limited to bringing out the ‘direct and inevitable consequences’ of existing legal rules and principles recognized by States.¹²⁵³ As Crawford noted, the case for deducing a rule depends on the strength of the inferential reasoning that links it to the other rules or

¹²⁴⁷ Michel Virally, ‘Panorama du droit international contemporain: cours general de droit international public’ (1983) 183 RdC 9, 174–75; Roth (n5) 35.

¹²⁴⁸ For a ‘policy-oriented’ approach to international law, see Higgins (n187) 2–12. For a Dworkinian theory of customary international law which draws on conceptions of law’s moral purpose, see John Tasioulas, ‘In Defence of Relative Normativity: Communitarian Values and the *Nicaragua* Case’ (1996) 16 OJLS 85; see also Lieblich (n104) 4.

¹²⁴⁹ Prosper Weil, ‘Towards Relative Normativity in International Law’ (1985) 77 AJIL 413, 420–21; Tomuschat (n65) 303; cf Capps (n40) 130.

¹²⁵⁰ Cf Chapter 1, Part A; see also Mendelson (n755) 179.

¹²⁵¹ In line with art 31 VCLT.

¹²⁵² The latter approach is the Dworkinian ‘interpretivist’ methodology endorsed by Tasioulas (n1248) 111–15. Cf Cannizzaro (n1215) 260–63.

¹²⁵³ Talmon (n8) 441.

principles that are said to give rise to it.¹²⁵⁴ This reasoning may be weakened where the meaning or purpose of the broader norm or norms from which the rule is supposedly derived are unclear or disputed, or where the broader rule or principle has to be balanced and harmonised with other rules and principles of international law which stand in some degree of tension with it.¹²⁵⁵ Reasoning which deduces a specific rule on the basis of a debatable interpretation of a broader rule or principle will be of limited force, as will a deduction from a single norm which neglects the relevance of other relevant norms of international law which might support a different deduction.¹²⁵⁶ And the exact strength of the reasoning required to establish the rule will vary depending on to what degree it runs counter to more concrete examples of State practice and *opinio juris*.

B. Can the Alleged Prohibition Be Deduced from Fundamental Principles?

Bearing this need for caution in mind, it will now be considered whether the alleged general prohibition on pro-government intervention in internal conflicts can be said to follow logically from a) the prohibition on the use of force, b) the principle of non-intervention, and c) the right of peoples to self-determination. It will be argued that such a general prohibition cannot be derived with clarity from any of these rules of international law.

i) The Prohibition of the Use of Force

The text of art 2(4) is the obvious starting point for considering whether a prohibition on pro-government intervention in internal conflicts follows from the more general prohibition on force. In interpreting this provision, the general rule of interpretation laid down in Article 31 VCLT (as reflected in custom) needs to be complied with, requiring

¹²⁵⁴ Crawford (n1214); see also Baty (n360) 27.

¹²⁵⁵ Virally (n1247).

¹²⁵⁶ Tomuschat (n65) 195, 303.

that the provision be interpreted in accordance with the ordinary meaning of its terms in their context and in light of its object and purpose.

As discussed in the first chapter of this thesis, the prohibition on force is specifically a prohibition on *inter-State* force.¹²⁵⁷ While legal limitations on a government's right to use force on its own territory arise from international human rights and humanitarian law,¹²⁵⁸ an internal *jus ad bellum* which would generally prohibiting recourse to military force within a State has not developed.¹²⁵⁹ The first chapter also showed that the deployment of foreign forces within a State with the consent of its government does not (at least in general) fall within the scope of the prohibition on the use of force. The question considered here is whether despite the prohibition's general exclusion of consensual force it nonetheless captures within its scope intervention to aid governments in civil wars. The logic of this position is that the prohibition on force protects States, not governments,¹²⁶⁰ and that while usually a government is accepted as being able to consent to force on behalf of the State, this should not be the case in situations of civil war where the government is being actively challenged by a rebel movement which seeks to replace it. If the government's consent should be considered invalid on this basis, the use of force must be seen as involving the use of force between States 'against the territorial integrity or political independence' of the receiving State despite its putative consent. It is suggested that using force to support the government in a civil war situation threatens the 'political independence' of the State by

¹²⁵⁷ See Chapter 1, Part C, above. However, a customary norm has developed prohibiting the use of force against stable *de facto* States such as Taiwan: Dörr and Randelzhofer (n173) 213–14; Crawford (n242) 220–21. See also IDI (n463), article 1 para 2(b).

¹²⁵⁸ Kress (n450) 25.

¹²⁵⁹ Roth (n407) 391–93; Corten (n654) 23–24; Kress (n450) 20–21.

¹²⁶⁰ Lieblich (n104) 130–31.

preventing the State from changing its political order, and therefore would fall within the prohibition on the use of force despite the fact that the government gives consent.¹²⁶¹

But this reading seems strained.¹²⁶² As argued in the first chapter, it seems evident that government consent generally means that a potential use of force does not fall within the scope of the prohibition, as it is not ‘against the territorial integrity or political independence’ of the receiving State.¹²⁶³ To then contend that the existence of an internal conflict transforms this position is to read more into the words ‘political independence’ than they will bear.¹²⁶⁴ Nor is this interpretation supported in the FRD¹²⁶⁵ or the Definition of Aggression,¹²⁶⁶ UNGA resolutions discussed in the previous chapter which contain important evidence of subsequent agreement relevant to the interpretation of the prohibition.¹²⁶⁷ As discussed earlier,¹²⁶⁸ the elucidation of the prohibition of the threat or use of force in the FRD requires that States refrain from participating in acts of ‘civil strife or terrorist acts in another State’ involving force, a formula provides no clear indication that forcible assistance to governments can be covered by the prohibition and arguably suggests force used against rather than in support of the government.¹²⁶⁹ The Definition of Aggression includes in the concept the ‘sending...of armed bands, irregulars, groups or mercenaries, which carry out acts of armed force against another State’ of sufficient

¹²⁶¹ Schachter (n547); Levitt (n1001) 20; cf Doswald-Beck (n 243) 244.

¹²⁶² See Nolte (n124) 632–33.

¹²⁶³ (n206)–(n210) and text.

¹²⁶⁴ Cf Christakis and Bannelier (n1) 113.

¹²⁶⁵ (n270).

¹²⁶⁶ (n126).

¹²⁶⁷ See Article 31(3)(a) and (b) VCLT and E Jiménez de Aréchega, ‘International Law in the Past Third of a Century’ (1978) 159 RdC 1, 32 (presenting the Friendly Relations Declaration as evidence of both the subsequent agreement and subsequent practice of UN members).

¹²⁶⁸ (n719) and text.

¹²⁶⁹ Le Mon (n343) 754.

gravity,¹²⁷⁰ but it far from evident that this should be taken to include the sending of armed forces to assist the internationally recognized government. Such a government is recognized as representing the State, so the sending of armed assistance does not appear to be *against* the State. Also, as mentioned previously, the Definition elsewhere implies the broad legality of the use or presence of troops with the agreement of the receiving State.¹²⁷¹ As for the case law of the ICJ, although it never directly addresses the issue, it does not seem to support an interpretation of the prohibition on the use of force which would cover pro-government intervention.¹²⁷² In the *Armed Activities* case the Court appeared to accept that before the withdrawal of consent by President Kabila of the DRC, the presence of Ugandan troops in the DRC was legal.¹²⁷³ This was despite the fact that these Ugandan forces had earlier assisted Kabila in bringing down the previous Mobutu regime,¹²⁷⁴ a factual scenario in which it would be plausible to conclude that the Ugandan troops' involvement in the DRC had negatively affected its 'political independence.'

Moreover, the deductive logic which derives a general prohibition on pro-government intervention from the prohibition on the use of force against the territorial integrity or the political independence of another State is questionable. One of the constituent elements of independent statehood, along with territory and population, is possession of a government.¹²⁷⁵ Violence within a State seeking the overthrow of the government, leading in the worst case scenario to the State's collapse into anarchy, has a drastically negative effect on the State's capacity to exercise its political independence (and

¹²⁷⁰ (n126) art 3(g).

¹²⁷¹ Lieblich (n104) 123. Lieblich also refers in this context to art 20 ASR (precluding the wrongfulness of acts within the limits of consent). However, this ignores the inapplicability of 'circumstances precluding wrongfulness' arising out of the secondary rules of State responsibility to peremptory norms such as the prohibition on the use of force: see generally Chapter 1, above.

¹²⁷² Nolte (n124) 632.

¹²⁷³ *ibid* 196–99.

¹²⁷⁴ Lieblich (n104) 24–25.

¹²⁷⁵ Crawford (n242) 55–62; Finucane (n371) 106–12.

protect its territorial integrity).¹²⁷⁶ It is not difficult to form an argument that a forcible intervention in favour of an existing government in order to help it prevail against its opponents, to solidify its control of the State's territory and to bring the internal conflict to an end is an act which supports rather than detracts from the political independence of a State¹²⁷⁷ – at least assuming that the government is considered in some sense 'legitimate', at any rate more so than any potential replacement. Of course, a practical objection is that pro-government intervention is not an effective way of achieving the desired goal; that it tends to prolong rather than to help bring to an end internal conflicts within States.¹²⁷⁸ There is some empirical research to support this view.¹²⁷⁹ However, it remains a debatable claim and it should not be given great weight as an argument in favour of concluding that the prohibition on the use of force also implies a prohibition on pro-government intervention, since States themselves do not appear to take this view.¹²⁸⁰ As has been shown in the preceding chapter, States, especially since the end of the Cold War, do seem to accept that a 'legitimate' government faced with disorder and insurgency can request foreign military assistance as a means of restoring security and stable authority within a State.¹²⁸¹

A similar response can be made to a different, teleological argument that pro-government intervention in internal wars constitutes a violation of the prohibition on the use

¹²⁷⁶ Buchan (n558) 129.

¹²⁷⁷ Christakis and Bannelier (n1) 113; cf Crawford (n242) 58.

¹²⁷⁸ Ruys (n467) 44.

¹²⁷⁹ Patrick M Regan, 'Third-Party Intervention and the Duration of Intrastate Conflicts' (2002) 46 J Conf Res 55, 69. But note the surprising finding that, if intervention does occur, support for one side is likely to bring the conflict to a quicker end than 'neutral' intervention: *ibid*, 71.

¹²⁸⁰ Nolte (n124) 632. For an example of this view being expressed by a State, see Qatar's justification for its participation in the GCC intervention in Yemen, S/PV.7527, 42: 'The only way of putting an end to the conflict in Yemen is to help the legitimate government.'

¹²⁸¹ For statements during the Cold War referring to the desirability of upholding internal stability within foreign States see e.g. the UK's statement on its intervention in Jordan (n857) ('We want stability and peace and abhor revolution...') and Nigeria's statement on the situation in the DRC during the Stanleyville operation, S/PV.1176 (n885) 10. For more recent examples of supporting practice, see US-Iraq SOFA (n1043), art 4(1) (Iraq requests temporary assistance 'for the purposes of supporting Iraq in its efforts to maintain security and stability in Iraq') and Afghanistan-US Security and Defense Agreement (n301), art 2(1).

of force.¹²⁸² One fundamental purpose of the prohibition can be argued to be humanitarian, considering the horrific human misery inflicted by armed conflict – in the words of the Preamble to the UN Charter, ‘to save succeeding generations from the scourge of war.’¹²⁸³ This could potentially be argued to support a broad reading of the prohibition of the use of force which resolves any ambiguities in the prohibition in favour of tighter restrictions on the use of force, including in civil wars, the occurrence of which continues to cause immense human suffering. Again this assumes, however, that intervention on the side of the government will worsen the conflict and increase the suffering, rather than decrease it by bringing the conflict to a swifter end.¹²⁸⁴ Although this view may be convincing, it depends on an empirical judgment and one which in many cases does not appear to be shared by States.¹²⁸⁵

Perhaps a stronger argument for the alleged prohibition on pro-government intervention arises from the fear that allowing the participation of foreign troops in an internal conflict increases the risk of civil war escalating into international armed conflict, contrary to the clear object of the rule to minimise armed force between States.¹²⁸⁶ Such risks arise if different States deploy troops in aid of different sides in a civil war.¹²⁸⁷ However, it has been contended that the risk of escalation have decreased since the Cold War.¹²⁸⁸ This is based on the idea that, with the end of the bipolar division of the world into ideologically hostile blocks, greater international consensus is likely as to which side is the government

¹²⁸² Difficulties with applying such teleological reasoning in the *jus ad bellum* were identified by Raphael van Steenberghe ‘The Law of Self-Defence and the New Argumentative Landscape on the Expansionists’ Side’ (2016) 29 *Leiden JIL* 43, 55 (object and purpose of *jus ad bellum*, and the possible means of achieving this object and purpose ‘are so malleable that they may be used to support wide as well as restrictive conceptions’).

¹²⁸³ Lieblich (n104) 56, Nolte (n124) 632.

¹²⁸⁴ Cf Le Mon (n343) 792; Kress (n450) 53–54.

¹²⁸⁵ See (n1280).

¹²⁸⁶ Nolte (n 124) 632–33; Terry (n336) 163; S/PV.1184, 3 (Kenya).

¹²⁸⁷ Wright (n468) 122.

¹²⁸⁸ Nolte (n124) 632–33.

and whether it deserves foreign support, decreasing the risk of competing interventions leading to inter-State conflict. But this argument is not completely reassuring. Although it is true that in many of the post-Cold War cases show a broad international consensus on which side should be supported,¹²⁸⁹ this has not been in the case in the Syrian conflict.¹²⁹⁰ Moreover, the Syrian case shows the potential dangers that can arise through the interaction of pro-government intervention and the claimed right to self-defence against non-State actors operating in a State ‘unable or unwilling’ to take action against them.¹²⁹¹ The simultaneous Russian airstrikes (operating there with Assad’s consent) and US airstrikes (on the basis of collective self-defence of Iraq against ISIS) clearly do give rise to a worrying risk of escalation into great power conflict. But this risk, although concerning, is not enough to support a teleological interpretation of the prohibition on the use of force to prohibit such intervention in the face of contrary indications from practice.

The case for holding that the prohibition on the use of force, due to its reference to the force against the ‘political independence’ of a State, gives rise to a general prohibition on pro-government intervention in internal conflicts appears weak.¹²⁹² This conclusion confirms what was indicated by the survey of State practice and *opinio juris* in the previous chapter. Even during the Cold War, condemnation of pro-government intervention as aggression or a violation of art 2(4) was uncommon,¹²⁹³ and tended to be reserved primarily for cases where it was considered that there was in fact no valid prior consent emanating from the government of the target State, such as situations where a government was in fact installed

¹²⁸⁹ For example in the case of the ECOWAS intervention in Sierra Leone, discussed in Chapter 4, (n994) – (n1005). Cf Roth (n5) 48.

¹²⁹⁰ Nolte (n4) 243.

¹²⁹¹ For a general analysis of the interaction between ‘intervention by invitation’ and collective self-defence, see Kress (n319).

¹²⁹² Roberto Ago opined that limits on the right of a government to consent to force arose from self-determination, not the prohibition on the use of force: [1979] 1 UNYBILC 54.

¹²⁹³ Doswald-Beck (n243) 244.

by foreign intervention and gave consent *ex post facto*.¹²⁹⁴ It has been very rare in the post-Cold War period for intervention at the invitation of an internationally recognized government to be condemned as a violation of the prohibition on the use of force.¹²⁹⁵

As well as prohibiting the use of force against the territorial integrity and political independence of any other State, art 2(4) also prohibits the use of force in international relations ‘in any other manner inconsistent with the purposes of the United Nations’. One of these purposes is to ‘develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.’¹²⁹⁶ It would thus appear that if forcible assistance to a government faced by an internal conflict is a violation of the principle of self-determination, it could also be a violation of the prohibition on the use of force.¹²⁹⁷ Determining whether this is the case requires, of course, a consideration of the content of the right of the self-determination. Before turning to self-determination, however, it will be considered whether the general prohibition can be deduced from the principle of non-intervention.

ii) The Principle of Non-Intervention

The principle of non-intervention is closely related to the prohibition on the use of force; indeed the latter can be seen as a more specific instantiation of the broader principle of non-intervention, prohibiting those instances of intervention that involve force.¹²⁹⁸

However, unlike the prohibition on the use of force, this norm lacks an authoritative textual

¹²⁹⁴ See for example ‘Contemporary Practice’ (n163) 418. The State Department Legal Adviser stated that the ‘use of Soviet troops forcibly to depose one ruler and substitute another clearly is a use of force against the political independence of Afghanistan’, assuming the unreality of the claimed initial consent.

¹²⁹⁵ Cf the few exceptions referred to in Chapter 5, most notably Iranian and Russian statements on the Saudi-led intervention in Yemen (n1182), (n1183).

¹²⁹⁶ ‘Contemporary Practice’ (n163) 418.

¹²⁹⁷ Corten (n1) 289. This assumes the breach of a foreign people’s right to self-determination also means that the force occurs in ‘international relations’.

¹²⁹⁸ *Nicaragua* (n49) 109–10; Jamnejad and Wood (n457) 348–49.

formulation in the Charter.¹²⁹⁹ Partially as a result of this, the exact content of the principle is particularly vague and unclear, with different entities employing the term in somewhat different ways.¹³⁰⁰ This poses an obvious difficulty in attempts to deduce from the principle a rule prohibiting military assistance to governments in internal conflicts.

The ICJ has referred to the principle of non-intervention as a corollary of the even more basic principle of sovereign equality of States – one of Talmon’s examples of the use of deductive reasoning by the Court.¹³⁰¹ Traditional textbook formulations of the norm define illegal intervention as ‘forcible or dictatorial interference by a state in the affairs of another state, calculated to impose certain conduct or consequences on that other State.’¹³⁰² In the *Nicaragua* case, the contents of the norm were defined as follows:

...the principle forbids all States or groups of States to intervene directly or indirectly in the internal or external affairs of other States. A prohibited intervention must accordingly 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 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 forms the very essence of, prohibited intervention, is particularly evident in the case of an intervention which uses force...¹³⁰³

This formulation suggests that there are two elements which are needed for an action to constitute illegal intervention: it bears on matters which each State is free to decide for itself, and it involves coercion.¹³⁰⁴ The latter requirement poses an obvious challenge to the argument that military assistance to a government in a civil war situation is intervention of

¹²⁹⁹ Grant (n346) 285.

¹³⁰⁰ Lieblich (n104) 42; Jamnejad and Wood (n457) 359; Antonios Tzanakopoulos, ‘The Right to be Free of Economic Coercion’ (2015) 4 *Cam JICL* 616, 623; Steven Ratner, *The Thin Justice of International Law* (OUP 2015) 128–29.

¹³⁰¹ *Nicaragua* (n49) 106; Talmon (n8) 422–23.

¹³⁰² Jennings and Watts (n357) 430.

¹³⁰³ *Nicaragua* (n49) 108.

¹³⁰⁴ Jamnejad and Wood (n457) 381.

the type prohibited by the principle of non-intervention. A pro-government intervention does not appear to be dictatorial or coercive, since it is consented to by the government of the affected State.¹³⁰⁵ Thus, it seems not to be an intervention of the type prohibited by the principle of non-intervention. The Court itself, as it will be recalled, seemed to endorse this conclusion when it observed that since ‘intervention...is already allowable at the request of the government’,¹³⁰⁶ allowing intervention at the request of an opposition group also would deprive the principle of any effectiveness, although as was argued in Chapter 3 not too much weight should be given to this rather throwaway statement of the Court.¹³⁰⁷ But arguments for the existence of a general prohibition on pro-government intervention in internal conflicts would stress the statement that the principle of non-intervention protects a State’s ability to choose its own political system freely. It can be seen as logically necessary for this protection to be effective that a government cannot consent to foreign intervention to protect itself against overthrow in an internal conflict. Government consent in these circumstances therefore cannot alter the fact that the intervention is coercive – a violation of the rights of the State as an abstract entity, on one matter where its government cannot validly speak as its agent.¹³⁰⁸

There is a certain force to this reasoning. As discussed previously, the formulations of the principle of non-intervention provided in two important General Assembly resolutions, the 1965 Declaration on the Inadmissibility of Intervention¹³⁰⁹ and the 1970 FRD,¹³¹⁰ can be read as indicating that illegal intervention against a State can occur even if its

¹³⁰⁵ Christakis and Bannelier (n1) 114–15, Nolte (n392) 81, Jamnejad and Wood (n457) 378, Hafner (n356) 245. See also UNSC Res 387 (31 March 1976), recalling ‘the inherent and lawful right of every State, in the exercise of its sovereignty, to request assistance from any other State or group of States.’

¹³⁰⁶ *Nicaragua* (n49) 126.

¹³⁰⁷ See Chapter 3, Part E.

¹³⁰⁸ Doswald-Beck (n243) 243; for criticism see Christakis and Bannelier (n1) 114.

¹³⁰⁹ (n649).

¹³¹⁰ (n270).

government is consenting.¹³¹¹ But the *travaux* indicate that while some States saw these formulations as covering pro-government intervention, many other States affirmed generally that any action at the request of a State's legal government do not constitute illegal intervention.¹³¹² The case for deriving a general prohibition of pro-government intervention from the principle of non-intervention has become more difficult due to developments since the 1980s, which indicate a decline in the centrality and strictness of the principle since its apparent high tide in the 1960s and 1970s.¹³¹³

Another major conceptual obstacle to deducing a general prohibition on pro-government intervention from the principle of non-intervention is the relativity and progressive diminution of the content of the *domaine réservé* which it protects. As quoted above, in the *Nicaragua* case the ICJ indicated that 'A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely.'¹³¹⁴ The scope of State sovereignty thus defines the extent of the principle of non-intervention – it seems to protect from interference only those matters which are in the exclusive jurisdiction of the State. But as was famously stated by the PCIJ in the *Nationality Decrees* case, this exclusive jurisdiction is 'essentially relative' and 'depends on the development of international relations.'¹³¹⁵ The matters in which a State is 'sole judge' are those which 'are not, in principle, regulated by international law.'¹³¹⁶ On this view, the content of the principle of non-intervention is likely to be subject to a consistent

¹³¹¹ Doswald-Beck (n243) 208, Nolte (n391) 81–82. Cf *Le Mon* (n343) 752–53; *Fox* (n256) 829.

¹³¹² See Chapter 4, Part B.1. States also defined the principle of non-intervention as excluding intervention with consent in UNSC debates: see e.g. S/PV.1203, 4 (Ivory Coast), S/PV.2489, 33 (Mozambique).

¹³¹³ Nolte (n391) 82; Christakis and Bannelier (n1) 117–18; Roth (n5) 50.

¹³¹⁴ (n49) 108.

¹³¹⁵ *Nationality Decrees in Tunis and Morocco (French Zone) on November 8th 1921* (Advisory Opinion) (1923) PCIJ Ser B No 4, 24.

¹³¹⁶ *ibid* 23–24.

trend of diminution as international interdependence increases and international law expands into new areas in response.¹³¹⁷

One response to this could be that, while the *domaine réservé* has diminished, a State's choice of its government remains firmly within it. This argument however is flawed. While the ICJ in *Nicaragua* recognized a State's choice of political system as a matter on which the State is entitled to choose freely, it also indicated that the State could assume international legal obligations as to its form of government, for example by entering an international agreement to hold free elections.¹³¹⁸ In this case, it seems, a State's choice of government is no longer within the *domaine réservé* but has become a matter of international interest. This raises the possibility that a State's attempts to choose its form of government may become a matter of international interest in other ways: for example, if this 'choice' is being exercised through civil war. On this point UN practice provides a helpful analogy. Art 2(7) of the Charter, although not identical with the principle of non-intervention applying to individual States,¹³¹⁹ imposes a similar duty of non-intervention in matters essentially within the domestic jurisdiction of States, with an exception for Chapter VII enforcement measures.¹³²⁰ During the Cold War period the argument was made that this prevented UN involvement in purely internal conflicts, except as neutral peacekeepers.¹³²¹ However, even then the role of the UN peacekeeping mission deployed in response to the breakdown of governmental authority in the Congo in 1960 (ONUC) foreshadowed future developments undermining this restrictive approach. While initially the Security Council resolved that ONUC should not

¹³¹⁷ Georg Nolte, 'Article 2(7)' in Simma et al (n173) 292.

¹³¹⁸ *Nicaragua* (n49) 131–32; Talmon (n381) 535–36.

¹³¹⁹ Jamnejad and Wood (n457) 362; cf Nolte (n1317) 285–92.

¹³²⁰ Although it has been argued on occasion that the customary duty of non-intervention of individual States is stricter than the UN's duty under art 2(7): A/C.6/SR.822, 230 (Cyprus).

¹³²¹ Thomas and Thomas (n245) 225. See for example S/PV.834, 16 (USSR on potential UN involvement in Lebanon); S/PV.886, 15 (Argentina on ONUC role in Congo).

take sides in the conflict,¹³²² following a worsening of the disorder within Congo a later resolution, stating that the SC was ‘deeply concerned about the danger of widespread civil war’, ‘urge[d] that the UN take all appropriate measures to prevent the occurrence of civil war’, including ‘the use of force, if necessary, in the last resort.’¹³²³ A further resolution condemned the activities of the secessionist movement in Katanga and determined that the UN would assist the Congolese government ‘to maintain law and order and national integrity’,¹³²⁴ after which the UN forces helped suppress the secessionist movement. ONUC thus ultimately clearly did take action to support the Congolese government’s authority against its domestic opponents.¹³²⁵ It has been argued that the UN’s involvement did not constitute pro-government intervention in a *domestic* conflict since the aim was to preserve *international* peace and security, which would have been threatened by the Congo’s collapse.¹³²⁶ But as post-Cold War practice has shown, this line of reasoning opens the way to the evisceration of any limits on the UN’s capacity to involve itself in internal conflicts. Since 1991, the Security Council has regularly classified internal conflicts as threats to international peace justifying enforcement action under Chapter VII, initially referring to cross-border refugee flows¹³²⁷ but subsequently relying simply on the existence of humanitarian crisis within the State.¹³²⁸

¹³²² UNSC Res 146 (22 July 1960); Doswald-Beck (n243) 240.

¹³²³ UNSC Res 161 (21 February 1961).

¹³²⁴ UNSC Res 169 (24 November 1961).

¹³²⁵ Buchan (n558) 142-43. See S/PV.896, 28 (Yugoslavia); S/PV.901, 9 (USSR).

¹³²⁶ Buchan (n558) 143-44. In addition, SC Res 169 asserted that the secessionist activities were carried on ‘with the aid of external resources and foreign mercenaries’, gesturing towards a counter-intervention rationale.

¹³²⁷ UNSC Res 688 (5 April 1991) (responding to repression of Iraqi Kurds).

¹³²⁸ UNSC Res 794 (3 December 1992) (on Somalia). See Thomas Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (CUP 2002) 41–44; Buchan (n558) 110-12; Nolte (n1317) 302; *Prosecutor v Tadić* (n517) [30] (‘the practice of the Security Council is rich with cases of civil war which it classified as a “threat to the peace” and dealt with under Chapter VII’). See also Dinstein (n253) 92–93.

Although not directly relevant to cases of intervention by third States without SC authorisation, this practice does weaken the deductive logic of the position that foreign assistance to governments in internal conflicts is an impermissible infringement of the *domaine réservé*.¹³²⁹ With increasing globalisation, violent conflict in one State does affect the interests of other States and their populations.¹³³⁰ States without any effective government can function as safe havens for non-State actors such as armed groups, pirates, and terrorists which employ violence against other States and their nationals.¹³³¹ Large refugee flows are also likely to be caused by a situation of anarchy within a State, potentially inflicting a significant economic and logistical burden on other States.¹³³² Thus, while the 1975 IDI resolution used the interests of other States to argue against the permissibility of pro-government intervention (stating 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’),¹³³³ the interests of other States can also be used to justify pro-government intervention as necessary to prevent the negative and destabilising flow-on effects of internal conflict within a State.¹³³⁴ Again, this depends on the assumption that pro-government intervention will minimise rather than exacerbate the disorder within the State, which is certainly debatable. But whether rightly or wrongly, it seems that States do accept in practice that intervention to re-establish a legitimate government’s authority can be a useful way to address the negative flow-on effects of conflict and disorder within a particular State.

¹³²⁹ Fox (n256) 824–26.

¹³³⁰ Hannah Woolaver, ‘State Failure, Sovereign Equality and Non-Intervention’ (2014) 32 Wis ILJ 595, 600; S/PV.4392, 9 (Singapore): ‘It is now clearly in the interests of the entire international community to encourage the establishment of stable governments all over the world. Otherwise, as has already been shown, terrorism and other extremist elements can easily exploit pockets of instability’.

¹³³¹ Michael Brown, ‘Introduction’ in *The International Dimensions of Internal Conflict* (MIT Press 1996) 3–9; Christine Gray, ‘A Crisis of Legitimacy for the UN Collective Security System’ (2007) 56 ICLQ 157, 158.

¹³³² The problem of refugee flows was referred to by ECOWAS as one justification for action in Liberia in 1990: see Nolte (n985) 619.

¹³³³ (n463).

¹³³⁴ Cf van der Wilt (n404) 984.

In addition, the development of international human rights law is widely accepted to have shrunk the *domaine reserve*. While a State's treatment of its own citizens within its own territory was traditionally considered a matter solely within its domestic jurisdiction, this is no longer the case.¹³³⁵ This 'humanisation' of international law¹³³⁶ has had its effects within the collective security context, with the Security Council practice now indicating that a seemingly internal humanitarian crisis constitute a threat to the peace¹³³⁷ and decrying human rights violations.¹³³⁸ As discussed above, this assumption is reflected in the ECOWAS Security Protocol and the AU Constitutive Act.¹³³⁹ As Lieblich has emphasised,¹³⁴⁰ the 'Responsibility to Protect' concept contained in the 2005 World Summit Outcome builds on this trend, stating that each State 'has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity', and that '[t]he international community should, as appropriate, encourage and help States to exercise this responsibility...'.¹³⁴¹ These developments weaken the logical force of an inference from the principle of non-intervention to a general prohibition on pro-government intervention. It seems at least arguable that in many circumstances assistance to a 'legitimate' government to help it defeat rebel groups and restore order within the State may be the best way to bring a humanitarian crisis to an end and enable the State to exercise its responsibility to protect its population.¹³⁴²

¹³³⁵ Nolte (n1317) 296–99.

¹³³⁶ Theodor Meron, *The Humanization of International Law* (M Nijhoff 2006); Buchan (n558) 60.

¹³³⁷ See for example UNSC Res 751 (24 April 1992) on Somalia (referring to the 'deterioration of the humanitarian situation') and other examples referred to in Fox (n256) 824.

¹³³⁸ For example UNSC Res 2042 (14 April 2012) on human rights abuses in Syria; Fox (n256) 824.

¹³³⁹ (n252).

¹³⁴⁰ Lieblich (n104) 139–40, 181–82.

¹³⁴¹ 2005 World Summit Outcome Document, UNGA Res 60/1 (16 September 2005), para [138].

¹³⁴² See UN Secretary-General 'In Larger Freedom: Towards Development, Security and Human Rights for All' (21 March 2005) A/59/2005, 6: 'if states are fragile, the peoples of the world will not enjoy security, development and justice which are their right'; Ratner (n1300) 97.

One may object that some substantive core of sovereignty must remain protected from intervention whatever the development of international law and the increasing interdependence of States.¹³⁴³ This core can presumably be identified with the essential quality of independence which is necessary for sovereign statehood and without which a State is in substance reduced to a dependency of another State.¹³⁴⁴ This brings us back, however, to the same arguments as arose in the discussion of the implications of art 2(4)'s protection of the 'political independence' of each State from the threat or use of force, discussed above. Foreign intervention to assist a government to restore and consolidate its control over the State's territory can potentially be considered a means of preserving the State's political independence,¹³⁴⁵ as long as the intervening State does not exercise an inappropriate level of direct control over the internal functioning of the inviting government.¹³⁴⁶ One example of a situation falling within the latter category is the long-running Syrian military presence in Lebanon. In 2004 the Security Council passed a controversial resolution (by 9 votes, with 6 abstentions) calling on Syria to withdraw its troops from Lebanon,¹³⁴⁷ despite the fact that the Lebanese representative opposed its adoption and emphasised that Syrian troops were present in Lebanon in response to Lebanon's 'legitimate request'.¹³⁴⁸ The contentious nature of the meaning of the principle of non-intervention was in evidence during the Council meeting, with States voting for the resolution arguing that it was necessary to protect Lebanon's right to sovereignty and non-interference,¹³⁴⁹ while abstaining States argued that its adoption was contrary to the UN's

¹³⁴³ Nolte (n124) 632.

¹³⁴⁴ *Island of Palmas Case (US v Netherlands)* (1928) II RIAA 829, 838. See also Grant (n346) 297.

¹³⁴⁵ See generally Corten (n592) 53, 151–72.

¹³⁴⁶ Cf Nolte (n985) 628–29; FRD (n270): ('no State may...coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights...'); IDI (n255) art 6(3).

¹³⁴⁷ UNSC Res 1559 (2 September 2004). For an account see Gray (n433) 102–03.

¹³⁴⁸ S/PV.5028, 3.

¹³⁴⁹ *ibid* 4 (France), 7 (Chile), 8 (Benin).

own duty of non-intervention under Article 2(7) of the Charter.¹³⁵⁰ Despite these divisions, the adoption of the resolution does show that consent from a State's internationally recognized government does not in all circumstances deprive an act of interference by a foreign State of the character of an illegal intervention. But it is also important to bear in mind the special circumstances of the resolution. At the time of its adoption, Syrian troops had been present in Lebanon for decades.¹³⁵¹ Moreover, Syria was accused of using these forces not merely to uphold the existing government, but to meddle directly to change the fundamental constitutional structure underlying that government, by compelling the Lebanese Parliament to amend the constitution to extend the current President's term of office and to defer elections.¹³⁵² Given these circumstances, the majority of members of the Security Council could conclude that Lebanon's consent was vitiated.¹³⁵³ One cannot extrapolate from this precedent a general prohibition on military assistance to governments faced with internal conflicts, in circumstances where the government seeks to uphold the existing government without also dictating fundamental changes to that government's structure.¹³⁵⁴ Nolte's conclusion seems correct: that non-intervention logically requires that the pro-government intervening forces should not become so dominant that the inviting government is completely deprived of freedom of action.¹³⁵⁵ However (as he also observes) this assessment ultimately leaves much to the discretion of the international community, which in practice has often continued to accept the validity of consent issued by 'legitimate' governments which are heavily dependent on the intervening State for their continued

¹³⁵⁰ *ibid* 5 (Algeria), 6 (Pakistan, Brazil), 7 (Philippines).

¹³⁵¹ Gray (n433) 99–102.

¹³⁵² S/PV.5028, 4 (United States).

¹³⁵³ Gray (n433) 103.

¹³⁵⁴ The UNSC itself, however, has assumed the power to make detailed decisions about internal constitutional arrangements acting under Chapter VII: see UNSC Res 1633, discussed by Corten (n592) 155.

¹³⁵⁵ Nolte (n124) 638. Cf S/PV.7, 124 (Australia); *Armed Activities* (n304) 197–98.

existence. A notable example is the general acceptance of US military action in Afghanistan and Iraq with the consent of these States' post-invasion governments.¹³⁵⁶

The developments discussed show that the principle of non-intervention to be a weak basis for the alleged general prohibition on pro-government intervention in internal conflicts.¹³⁵⁷ More recent advocates for the existence of the prohibition tend to rely primarily on the right of peoples to self-determination, which will now be considered, as the main basis for the prohibition.¹³⁵⁸

iii) The Right of Peoples to Self-Determination

Like the principle of non-intervention, the right of peoples to self-determination in international law has been described as an 'unsettled' norm 'plagued by an excess of indeterminacy both in terms of its scope and content.'¹³⁵⁹ Although there is a core of relative certainty as to self-determination's content in relation to peoples struggling against 'colonial domination, alien occupation or racist regimes',¹³⁶⁰ its meaning in other situations is much less clear. This uncertainty about the scope and content of the norm, as with the principle of non-intervention, undermines attempts to deduce from it a general prohibition on assistance to governments in internal conflicts.

As already mentioned, the UN Charter provides that one of the purposes of the organization is to 'develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples',¹³⁶¹ but the Charter provides no more detailed definition of the principle. The principle began to assume greater prominence

¹³⁵⁶ Nolte (n438).

¹³⁵⁷ Cf Doswald-Beck (n243) 207.

¹³⁵⁸ Bannelier and Christakis (n204) 860–65; Corten (n1) 289.

¹³⁵⁹ Saul (n229) 610; see also Lowe (n662) 114. See generally Cassese (n78).

¹³⁶⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3, art 1(4).

¹³⁶¹ art 1(2).

and more determinate legal content in the context of the movement for decolonisation.¹³⁶² The 1960 General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples¹³⁶³ made clear that the right to self-determination granted the populations of overseas colonies within European-ruled empires the right to determine their own political status, including the right to choose independence.¹³⁶⁴ It was soon clarified that this carried with it a prohibition on the use of force by the colonial power to repress national liberation movements, and a prohibition on assistance to colonial powers fighting to repress such movements.¹³⁶⁵ It is clear therefore that self-determination does prohibit pro-government intervention in this context.¹³⁶⁶ However, with the process of decolonization now largely completed, this element of the right is of very limited continued relevance. The key issue is therefore the content of the right outside the colonial situation.

Reference also should be made to art 1(4) API,¹³⁶⁷ which extends the applicability of the law of international armed conflict to conflicts ‘where people are fighting against colonial domination, alien occupation and racist regimes in the exercise of their right to self-determination...’ This provision draws a parallel between peoples subject to colonial domination and those subject to ‘alien occupation’ and ‘racist regimes’. It appears to recognize that peoples in the latter categories enjoy a parallel right of self-determination to colonial peoples. Thus, it would also be prohibited to assist a government which is seeking to

¹³⁶² A Rosas, ‘Internal Self-Determination’ in Christian Tomuschat, *Modern Law of Self-Determination* (Brill, 1993) 233.

¹³⁶³ UNGA Res 1514 (XV) (14 December 1960).

¹³⁶⁴ Saul (n229) 613.

¹³⁶⁵ FRD (n270): ‘Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the present principle of their right to self-determination and freedom and independence.’

¹³⁶⁶ Wippman (n195) 215.

¹³⁶⁷ (n1360).

maintain ‘alien occupation’ or an apartheid-style ‘racist regime’.¹³⁶⁸ However, these two categories also appear to be of limited applicability in the current context.¹³⁶⁹

It is clear that the right continues to have some relevance outside situations of colonial domination, alien occupation or racist regimes. Article 1 of the 1966 UN human rights covenants¹³⁷⁰ provides that: ‘*All* peoples have the right to self-determination’ (emphasis added). The universal nature of the entitlement is confirmed by the FRD.¹³⁷¹ However, this leaves open the question of what kind of group is a ‘people’ enjoying the right to self-determination, and what more concretely the right entails.

Assessing the continued relevance of the right to self-determination outside the specific situations referred to above requires a distinction between two separate kinds of group that might be entitled to a right to self-determination. One case involves a national or ethnic group within an existing sovereign State that is distinct from the broader population of that State, and claims that the right to self-determination entitles it to determine its own future separately from the existing State, including by seceding from the existing State. Obviously, recognizing such a right would have the potential to greatly destabilise ethnically diverse States. Unsurprisingly, therefore, States have been unwilling to recognize that such groups generally have the right to ‘external’ self-determination – that is, to secede.¹³⁷² This is reflected in the ‘saving clause’ in the FRD,¹³⁷³ which provides that the right to self-determination as defined therein shall not be construed so as to authorize or encourage action which would

¹³⁶⁸ For an analysis of the delegitimation of ‘racist regimes’, see Roth (n247) 234–51.

¹³⁶⁹ For a discussion of self-determination and the question of Palestine, see James Summers, *Peoples and International Law* (Brill Nijhoff 2014) 539–50.

¹³⁷⁰ (n1226).

¹³⁷¹ (n270), in almost identical terms to the covenants; Saul (n229) 614.

¹³⁷² Cassese (n78) 122–24.

¹³⁷³ *ibid* 109–18.

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 equal rights and self-determination of peoples...and thus possessed of a government representing the whole people belonging to that territory without distinction of race, colour or creed.¹³⁷⁴

In the Vienna Declaration and Programme of Action,¹³⁷⁵ adopted by representatives of 171 States in 1993, a more general formulation of the same 'safeguard clause' was adopted which indicated that self-determination did not impair the integrity or unity of States with 'a government representing the whole people belonging to the territory without distinction of any kind.'¹³⁷⁶

It has been suggested that these clauses indicate, *a contrario*, that in cases where a government does not adequately represent a particular group within an existing sovereign State, that group may acquire a right to secede.¹³⁷⁷ Such a right of 'remedial secession', however, remains highly controversial, and it is doubtful whether it is part of international law as it stands.¹³⁷⁸ In the absence of such a right to secession, it is difficult to deduce from the right of self-determination a prohibition on pro-government intervention in a secessionist conflict. In such a conflict, the foreign intervention is assisting the existing State to uphold its territorial integrity, without appearing to impinge upon the right of self-determination, because the group which the rebels represent does not possess the right.¹³⁷⁹

¹³⁷⁴ (n270).

¹³⁷⁵ World Conference on Human Rights, 'Vienna Declaration and Programme of Action' UN Doc A/CONF.157/23 (25 June 1993).

¹³⁷⁶ Roth (n407) 410.

¹³⁷⁷ Cassese (n78) 118–21 (although denying that this had become customary law).

¹³⁷⁸ The ICJ has abstained from deciding the point when provided with the opportunity to do: *Kosovo* (n27) 438. See Corten (n592) 229; J Salmon, 'Internal Aspects of the Right to Self-Determination: Towards a Democratic Legitimacy Principle' in Tomuschat (n1362) 256–57.

¹³⁷⁹ Doswald-Beck (n243) 56, Christakis and Bannelier (n1) 133–35, Nolte (n391) 84–85; cf Corten (n1) 308–09; Roth (n407) 406.

The other side of the right to self-determination is a continuing right possessed by the people of an *existing* sovereign State (that is, all the people of the existing State, considered as a single unit rather than further divided into ethnic or other groups).¹³⁸⁰ The 1966 covenants indicate that the right allows each people ‘to freely determine their political status and freely pursue their economic, social and cultural development.’¹³⁸¹ The FRD defines the right in similar terms. The difficulty is to determine the exact content of the people’s right in this context.¹³⁸² The requirement that political, economic, social and cultural matters be freely determined by ‘the people’ might be read as requiring to some degree a democratic form of government, along with rights such as freedom of expression necessary for the effective exercise of popular choice. But this neglects the fact that among the major champions of the right to self-determination during the Cold War were the socialist and non-aligned States.¹³⁸³ Of course, most of these States also claimed to have governments which were based on the people’s will, but clearly their conception of this concept did not include multiparty elections and liberal ideas of individual rights to political participation.¹³⁸⁴ Thus, although some Western States expressed the view that the right to self-determination requires liberal democratic mechanisms within the State,¹³⁸⁵ the more prevalent view of self-determination at this time appears to have been as largely equivalent to a strict interpretation of the principle of non-intervention,¹³⁸⁶ recast as a right of the State’s people rather than of

¹³⁸⁰ Cassese (n78) 52–55.

¹³⁸¹ (n1226) art 1.

¹³⁸² For a sceptical view, see Talmon (n337) 236–37.

¹³⁸³ Cassese (n78) 48–52.

¹³⁸⁴ See Roth’s discussion of ‘revolutionary democracy’ as an ideological competitor to liberal democracy during the Cold War: Roth (n247) 75–76. In contrast, ‘Nazi, fascist or neo-fascist’ ideologies seem to have been rejected as ideological options: see UNGA Res 36/162 (16 December 1981), Salmon (n1378) 260.

¹³⁸⁵ See for example ‘UK Materials on International Law’ (1985) 55 BYIL 405, 432, and other statements quoted by Cassese (n78) 302–06; Rosas (n1362) 239.

¹³⁸⁶ Doswald-Beck (n243) 203–07; Wouter G Werner, ‘Self-Determination and Civil War’ (2001) 6 JCSL 171, 188.

the State itself.¹³⁸⁷ Self-determination conceived in this way protected the people's right to determine their political and economic system free from foreign interference, which included a right to choose, for instance, a one-party 'people's democracy' rather than a multiparty electoral democracy on the Western model.¹³⁸⁸

A general prohibition on pro-government intervention in internal conflicts, at least those in which the rebels' aim is to establish themselves as a new government of the existing State rather than to secede, can be argued logically to follow from the right to self-determination, thus understood. Such a conflict between different contenders to govern the State must be determined by the State's people rather than by outside forces.¹³⁸⁹ Allowing pro-government intervention would hinder the people from changing the State's political system, and hence constitute a violation of their right to self-determination; thus it must be prohibited, unless in response to a previous intervention on the side of the opposition.¹³⁹⁰ As has been shown in the previous chapter, there is a significant amount of practice from the Cold War period which could be interpreted as supporting this theory, with many States criticising instances of intervention as a violation of the people's right to determine their own political future, although most insistently in cases, such as the interventions in Hungary, the Dominican Republic, Czechoslovakia, Afghanistan and Grenada, where the validity of government consent was dubious for other reasons.¹³⁹¹ Moreover, as Roth argues, the logic of this interpretation of self-determination can be seen as underlying other fundamental structural aspects of international law such as the effective control of territory test for the recognition of governments.¹³⁹² Effective control of the territory is linked to some degree

¹³⁸⁷ Salmon (n1378) 258; cf Crawford (n334) 56.

¹³⁸⁸ Roth (n247) 14–15.

¹³⁸⁹ Lauterpacht (n276) 233; Lieblich (n104) 112.

¹³⁹⁰ Bannelier-Christakis (n315) 745–47.

¹³⁹¹ See discussion in Chapter 4, Part B.2.

¹³⁹² Roth (n407) 389.

with the popular will (if only in that it illustrates at least a degree of acquiescence) while as a factual test it provides a largely ideologically neutral way of determining this question of governmental status in an ideologically divided world.¹³⁹³

However, the key step in the deduction of a general prohibition of pro-government intervention in internal conflicts from the right to self-determination – that an internal conflict, at least one in which the opposition espouses the aim of replacing the existing government, will generally constitute an exercise of the right of self-determination by the people of the State – is flawed. Van Steenberghe has suggested an interpretation of the alleged prohibition which would only apply to conflicts where the opposition enjoys significant popular support.¹³⁹⁴ But clearly this would not be a *general* prohibition on pro-government intervention in internal conflicts of the kind put forward in the 1975 IDI resolution,¹³⁹⁵ which applies to all civil wars and contains no clear ‘popular support’ criterion. The basis for such a prohibition is that the existence of an internal conflict is sufficient evidence, at least presumptively, that the right to self-determination is being exercised.¹³⁹⁶ The mere existence of the conflict is enough to show that the people of the State are divided as to their political future, and the right of the people of the State themselves to determine their own political future requires that foreign States abstain from providing military assistance to either side.¹³⁹⁷ However, this presumption rests on very disputable assumptions. As Lieblich has identified, it relies on a rather Darwinian conception of self-determination – that a civil war, as long as it is free from external interference, constitutes an exercise of self-determination by the people of an existing State.¹³⁹⁸ This view is in tension with the

¹³⁹³ (n370).

¹³⁹⁴ van Steenberghe (n581); see also Schindler (n520).

¹³⁹⁵ (n463).

¹³⁹⁶ Hafner (n356) 242.

¹³⁹⁷ de Wet (n379) 995.

¹³⁹⁸ Lieblich (n104) 139–40

modern practice outlined above which sees in internal conflict the potential for human rights abuses and threats to international peace.¹³⁹⁹ Moreover, armed conflict is clearly an inherently problematic way of determining the will of the people as to their political future – there is no guarantee that the side which prevails by force of arms will be that which actually represents the views of majority of people within the State.¹⁴⁰⁰

Of course, even if the difficulties with armed conflict as a vehicle for self-determination are recognized, one may still conclude that it must be accepted as such, since there is no reliable or objective way for external actors to gauge the legitimacy of the claims of the various parties to a civil war as representatives of the people of that State.¹⁴⁰¹

However, contrary to this agnostic approach, international practice since the 1990s reflects an increasing belief among States that they should take action to help ensure that foreign peoples enjoy stable and ‘legitimate’ government.¹⁴⁰² This is reflected in developments in international practice on identifying governments discussed in Chapter 2, with democratically legitimate governments being recognized despite a lack of effective territorial control.¹⁴⁰³ There has been a trend for the international community to endorse and supervise elections as a means of resolving internal conflicts within troubled States.¹⁴⁰⁴ The international community acting through the UN has also been active in facilitating the formation of transitional national unity governments in such States, in many cases putting pressure on the contending parties to agree to participate in such governments and seeking to ensure that

¹³⁹⁹ Nolte (n391) 84–85

¹⁴⁰⁰ *ibid.* For an early discussion of this point in a different context, see James Madison, *The Federalist* 43, in Alexander Hamilton, James Madison and John Jay, *The Federalist Papers* (first published 1787–88, OUP 2008) 216–19.

¹⁴⁰¹ Roth (n247) 364. Cf Lauterpacht (n276) 234; Lieblich (n104) 112.

¹⁴⁰² Roth (n5) 47–48, referring to recent cases in Cote d’Ivoire, Libya, Mali and Guinea-Bissau; Lieblich (n104) 142. See also Chapter 4, Part B.3 above, including the analysis of the ECOWAS practice, US practice in Iraq and Afghanistan, and the GCC’s justifications for its intervention in Yemen.

¹⁴⁰³ For example, in Sierra Leone, Côte d’Ivoire and the Gambia: see Chapter 2, Part B.2 above.

¹⁴⁰⁴ Roth (n247) 365–66.

they contain sufficient representation of the different ethnic or religious groups within the State.¹⁴⁰⁵ Such governments, even if challenged by rebels, can be argued to have a strong claim to represent the people of the State. In such circumstances, foreign military assistance to the government can be seen as supporting rather than interfering with the people's right to choose their government. This interpretation of the principle of self-determination seems to fit with State practice, where governments produced by internationally-sponsored elections or peace deals, such as in Sierra Leone, Afghanistan, Iraq, and Yemen, have continued to receive foreign military assistance against domestic opponents with little international criticism.¹⁴⁰⁶

Some have gone so far as to submit that the right to self-determination is evolving into an international legal right to democratic governance.¹⁴⁰⁷ This is unlikely. The General Assembly in 2000¹⁴⁰⁸ and 2001¹⁴⁰⁹ adapted resolutions on the right to self-determination which were expressed in strongly non-interventionist terms. Moreover, a significant number of States still do not accept the liberal democratic model¹⁴¹⁰ and there are obvious inconsistencies in international responses to ruptures in democratic or constitutional order.¹⁴¹¹ However, even in the absence of a right to democracy, the significant number of cases in which the international community responds to civil strife by actively supporting the side which is perceived as legitimate (in democratic or 'unity' terms) undermines the argument that self-determination requires a general prohibition on pro-government

¹⁴⁰⁵ Lieblich (n104) 165, 245; cf Ruys and Ferro (n302) 94–95.

¹⁴⁰⁶ See the discussion in Chapter 4, Part B.3 above.

¹⁴⁰⁷ Franck (n411).

¹⁴⁰⁸ UNGA Res 55/85 (4 December 2000), para 2 (declaring 'firm opposition to acts of foreign military intervention, aggression and occupation, since these have resulted in the suppression of the right of peoples to self-determination and other human rights in certain parts of the world').

¹⁴⁰⁹ UNGA Res 56/141 (19 December 2001), para 2.

¹⁴¹⁰ Wippman (n398) 801–02.

¹⁴¹¹ de Wet (n379) 983–90. See (n419) – (n425) and text, above.

intervention, irrespective of international assessments of the government's legitimacy.¹⁴¹² Whether these developments in the direction of democratic legitimism are welcomed, or whether they are seen as a worrying shift away from a value pluralist conception of international law which seeks to allow the peaceful co-existence of States with widely different value systems,¹⁴¹³ is of course another matter.

A more narrowly conceived right of self-determination would support, not the general prohibition, but something significantly more restricted, such as a prohibition on military assistance to a government faced with a 'clear popular uprising'.¹⁴¹⁴ This reasoning is reflected in the 2011 IDI resolution on 'Military Assistance on Request',¹⁴¹⁵ which provides that intervention is prohibited when its object is 'to support an established government against its own population' (art 3(1)). Although this seems a reasonable deduction from the principle of self-determination, there would be inevitable difficulties in objectively determining the level of popular support for an uprising in practice, making the applicability of the prohibition deeply politicised and subjective.¹⁴¹⁶ Moreover, it is questionable whether this deduction accords with practice. In a recent situation which might potentially be considered as falling within this category, the Bahraini uprising of 2011, Saudi-led intervention on the side of the government was met with some expressions of concern but with almost no clear legal criticism.¹⁴¹⁷ And while the large-scale use of force by the Gaddafi and Assad regimes against portions of their populations has been widely criticised by other

¹⁴¹² See also ECOWAS Protocol Art 25 (n252).

¹⁴¹³ For an expression of such concerns see Roth (n5) 48.

¹⁴¹⁴ Nolte (n124) 638; see also Lauterpacht (n479) 7 104.

¹⁴¹⁵ (n255).

¹⁴¹⁶ Dinstein (n253) 80.

¹⁴¹⁷ Corten (n592) 161–64.

States, these criticisms have relied on the gross human rights and IHL abuses committed by these regimes rather than on self-determination.¹⁴¹⁸

Thus, the case for deriving a general prohibition on pro-government intervention from the prohibition on the use of force, the principle of non-intervention or the right to self-determination is not particularly strong. Although reasonable arguments can certainly be made that such a prohibition follows from these principles, uncertainty about the scope and meaning of these norms means that they can also be interpreted as permitting military assistance to governments in a wide variety of internal conflict situations. Developments in the interpretation of these norms in the post-Cold War period have weakened the case that they imply the alleged prohibition.

¹⁴¹⁸ Kress (n450) 25; although see A/C.3/70/L.47 (n1173).

Chapter 6: The Scope of the Alleged Prohibition: An Inherently Ineffective Rule

The final chapter considers a difficulty closely related to that of establishing the alleged prohibition's existence: that of defining its exact scope. As discussed in Chapter 3, proponents of the alleged prohibition have differed about the threshold for the prohibition's application (whether it only applies in 'civil wars' and if so, how this concept is to be defined), whether it applies to indirect as well as direct military assistance, and whether it only applies to assistance given for particular purposes. In many cases proponents of the alleged prohibition end up defending a highly circumscribed norm.¹⁴¹⁹ Applying the framework introduced at the start of Chapter 5, such limitations are suggested both by deductive and inductive legal reasoning. As has been shown, it is difficult to derive a broad prohibition on military assistance to governments in civil wars from the norms of non-use of force, non-intervention and self-determination which are argued to underlie the alleged prohibition. At least some types of military assistance to governments appear likely to be compatible with these broader norms. Inductive reasoning from the general trend of State practice and *opinio juris* also shows that the alleged prohibition, if it exists, must be quite circumscribed, since in many situations consensual intervention is clearly accepted as legal by States even when it takes place in a context of civil strife.

The mere fact that the rule is limited in scope, and that it has exceptions, is not in itself a problem. All norms have a defined scope of application and are in this sense limited, covering certain situations and not others. However, it is possible to imagine a situation where 'the exceptions swallow the rule'.¹⁴²⁰ In other words, a putative legal prohibition may be defined in such a way, and subject to such broad, indeterminate exceptions, as to in effect provide no substantial normative limit on the actions of those to whom the rule purports to

¹⁴¹⁹ See the list of exceptions provided by Bannelier-Christakis (n315) 747.

¹⁴²⁰ Cf Higgins (n444) 171–72.

apply.¹⁴²¹ While many if not most rules contain exceptions, (such as the self-defence and Chapter VII exceptions to the prohibition on the use of force), one can distinguish rules where the exceptions are ‘few and identifiable in relatively simple terms’¹⁴²² from those where the exceptions are many and open-ended.¹⁴²³ While the former kind of norms are relatively determinate rules, the latter kind are flexible standards which leave decision-makers discretion, allowing them to weigh up and balance a wide range of factors to determine the acceptability of conduct in each particular situation which arises.¹⁴²⁴ This thesis has argued for scepticism about whether the prohibition has been recognized as a norm of international law. But even if the contrary view were adopted and the alleged prohibition’s existence were accepted, it could only operate as a flexible standard leaving a large degree of discretion to States in determining whether pro-government intervention is justifiable in a particular case, rather than a relatively determinate rule providing clear boundaries as to the legal permissibility of such interventions.¹⁴²⁵ Because of this, the prohibition would be one with little ‘compliance pull’.¹⁴²⁶ While States are free to recognize a vague and indeterminate norm as law, where their *opinio juris* is unclear the inherent ineffectiveness of such a norm supports the view that its legal status has not actually been recognized.

The difficulty in defining the scope of the rule illustrates a particular problem which may arise when using the deductive method to determine the existence of a norm of international law, in combination with induction from State practice and *opinio juris*. It will be

¹⁴²¹ Cf d’Aspremont (n123) 1135.

¹⁴²² H L A Hart, *The Concept of Law* (3rd ed, OUP 2012) 133.

¹⁴²³ Cf P H Winfield, ‘The History of Intervention in International Law’ (1922–23) 3 BYIL 130, 137, referring to the non-intervention rule’s ‘host of disorderly exceptions.’

¹⁴²⁴ Hart (n1422) 132.

¹⁴²⁵ On the rule/standard distinction, see K M Sullivan ‘The Justices of Rules and Standards’ (1992) 106 Harv LR 22, 57–59; D Bodansky, ‘Rules vs Standards in International Environmental Law’ (2004) 98 Proc ASIL 275.

¹⁴²⁶ See Thomas Franck, *Fairness in International Law* (Clarendon 1995) 30–34; cf Ruys (n15) 535. Cf Sullivan (n1425) 106 (a rule may be corrupted by exceptions to the point that it resembles a standard).

recalled that according to Crawford and Talmon, there is an interplay between deduction and induction in determining the existence of a norm of customary international law: deductive logic can compensate for limited or ambiguous State practice and *opinio juris*, while clear and consistent State practice and *opinio juris* can rebut the existence of a norm which could otherwise be deduced from the existing norms and structure of international law.¹⁴²⁷ What is involved appears to be a form of ‘reflective equilibrium’¹⁴²⁸ which balances the two factors to reach a conclusion about the existence of a particular norm. However, a possible outcome of this process, where State practice and *opinio juris* are in fact difficult to reconcile with what is considered to follow deductively from other established norms, is a watered-down norm which seeks to uphold the position arrived at by deductive reasoning, while at the same time acknowledging State practice and *opinio juris* by incorporating broad limitations and exceptions within the norm. But the more the rule is adapted and watered-down to reflect actual State practice, the less compelling it as a deduction from the broader norms on which it is based. If the exceptions are broad and indeterminate enough, the norm will not in practice be functionally effective as a concretisation of the norm from which it is deduced, undercutting the deductive argument for its existence.¹⁴²⁹ This is the case with the alleged prohibition on pro-government intervention in internal conflicts.

A. ‘Civil War/Internal Conflict’?

An initial source of lack of clarity as to the scope of the alleged prohibition arises from the suggestion that it applies to governments faced with situations of ‘civil war’.¹⁴³⁰ The

¹⁴²⁷ See Chapter 5, Part A.

¹⁴²⁸ The phrase is taken from John Rawls, *A Theory of Justice* (rev ed, Belknap 1999) 18. It is applied to the process of discerning customary international law by Anthea Roberts, ‘Traditional and Modern Approaches to Customary International Law: A Reconciliation’ (2001) 95 AJIL 757, 779 (although in the course of applying a Dworkinian methodology which is not identical to the one put forward above).

¹⁴²⁹ Crawford (n1214) 86 (implicitly contrasting a situation where exceptions are compatible with deductive reasoning because they do not undermine the basic rule, and situations where they do).

¹⁴³⁰ Fox (n256) 827-28.

prohibition is presented in these terms in the 1975 IDI resolution¹⁴³¹ and in much of the literature.¹⁴³² This term ‘civil war’ is also used in the limited State *opinio juris* which clearly endorses the existence of the rule, notably the 1984 British Foreign Office document.¹⁴³³ Limiting the application of the rule to situations of ‘civil wars’ or internal armed conflicts, as opposed to lesser intensity situations such as ‘local disorders or riots’,¹⁴³⁴ can be seen as a recognition of the fact that the provision of military assistance from one government to another is a regular occurrence in international relations. To fit sufficiently with State practice, the prohibition on military assistance must be limited in scope to exceptional situations. A requirement that the government be challenged by a civil war provides such a limit. As has been seen, foreign military assistance to governments faced by army mutinies and military coups seems to have been widely accepted,¹⁴³⁵ providing potential support for limiting the rule’s applicability to full-scale civil war.

However, there are several problems with the existence of a ‘civil war’ or non-international armed conflict as a threshold requirement for the application of the prohibition. Firstly, since the term lacks legal definition in contemporary international law,¹⁴³⁶ it is unclear what threshold, in terms of duration and intensity, would be required to constitute a civil war.¹⁴³⁷ Chapter 3 pointed to disagreements about whether the prohibition requires only a non-international armed conflict of the type referred to in common article 3 GC,¹⁴³⁸ or whether it applies solely to armed conflicts meeting the definition in article 1 APII, which

¹⁴³¹ (n463).

¹⁴³² de Wet (n379) 992; Lieblich (n104) 161.

¹⁴³³ (n669).

¹⁴³⁴ (n463) art 1(2)(a).

¹⁴³⁵ As for example in Sierra Leone and Guinea-Bissau: see Chapter 5 Part B.3, above.

¹⁴³⁶ ‘Note to the Assistant Secretary-General’ (n465); Fox (n256) 821; A C Bundu, ‘Recognition of Revolutionary Authorities: Law and Practice of States’ (1978) 27 ICLQ 18, 21 (difficulty in ‘attempting precise definition of legal meaning’ of this and similar terms).

¹⁴³⁷ Klingler (n336) 515; Henderson (n665) 669.

¹⁴³⁸ See de Wet (n379) 993.

would require the rebels to exercise control of part of the State's territory.¹⁴³⁹ Logical deduction from principle does not provide an answer as to the exact nature of the alleged threshold. Nor does the State practice and *opinio juris* considered in Chapter 4 provide any clear guidance.

A more fundamental issue is that limiting the rule's application to situations of non-international armed conflict provides an example of the methodological dilemma raised above: it attempts to fit the rule with more permissive State practice and *opinio juris* in a way that undermines the putative basis for the rule in principle. If the principled basis of the rule is to allow 'the people' of the State to determine its political future independently of foreign interference, it is hard to see why the existence of a civil war or non-international armed conflict should be required for the prohibition to apply.¹⁴⁴⁰ It is true that the level of organization of the opposition is arguably relevant in determining whether they provide the potential basis for an alternative government, and thus whether they raise a sufficiently coherent political challenge to the existing government to bring the people's right to self-determination into play – anarchy cannot constitute a valid exercise of the right to self-determination.¹⁴⁴¹ But the level of intensity of armed violence that the opposition is able to bring to bear does not seem relevant at all. If the use of foreign force against opposition forces engaged in civil war is a violation of self-determination, surely the use of such force against a widespread opposition movement undertaking relatively peaceful protests must be too. But although logically coherent this position does not seem to fit with the realities of

¹⁴³⁹ Gray (n433) 81; see also Lieblich (n104) 136.

¹⁴⁴⁰ Lieblich (n104) 136.

¹⁴⁴¹ Cf Lieblich (n104) 54.

practice, considering for example the apparent international acceptance of the Saudi-led intervention against the widespread protests in Bahrain in 2011.¹⁴⁴²

It seems that, reasoning from the principles asserted as underlying the prohibition, its applicability should not be reliant on the existence of civil war or of a non-international armed conflict,¹⁴⁴³ which is likely a relic of the influence of the pre-Charter ‘recognition of belligerency’ doctrine.¹⁴⁴⁴ Rather, it would be better defined as prohibiting any use of foreign force on the territory of a foreign State for the purpose of settling an internal political dispute within that State. Corten,¹⁴⁴⁵ and Christakis and Bannelier,¹⁴⁴⁶ present the rule in this form. This formulation removes the requirement that the opposition be using force with sufficient intensity to create a situation of non-international armed conflict. It retains, however, the requirement that the dispute be a ‘political’ one, which seems to be in line with the IDI’s specification that the opposition must have a political aim. Thus, the prohibition would continue to allow foreign assistance to uphold ‘law and order’ against ‘non-political’ internal strife within a State, such as rioting, mutinies or criminal gangs.¹⁴⁴⁷ Again, the basis in principle of this exception seems clear - since disorganised or non-political strife does not offer the possibility of a viable alternative government, the people’s right to choose between them and the existing government without external interference is not engaged. Applying the same reasoning though, the IDI’s 1975 claim that that the prohibition extends to foreign military assistance to governments faced by secessionist conflicts is highly doubtful. As

¹⁴⁴² Although this could potentially be explained by the fact that the demonstrators were not sufficiently organized to offer a viable alternative government raising a self-determination issue.

¹⁴⁴³ Nussberger (n428) 109–10.

¹⁴⁴⁴ Cf Lauterpacht (n276) 104; Fox (n256) 820.

¹⁴⁴⁵ Corten (n1) 288–89.

¹⁴⁴⁶ Christakis and Bannelier (n1) 120–36; Bannelier and Christakis (n204) 860; Bannelier-Christakis (n315) 745–49. See also Perkins (n548) 184.

¹⁴⁴⁷ Corten (n1) 294 –96. See S/PV.1173, 25 (DRC) (contrasting ‘anarchists’ and ‘nationalists’).

discussed above, international law recognizes no general right to secession,¹⁴⁴⁸ and cases such as the UN involvement in Congo, foreign assistance to the Nigerian Government in the Biafran War and the African Union approved intervention in the Comoros suggest that foreign assistance directed against secessionist movements is often widely accepted.¹⁴⁴⁹

But practice shows that there are profound difficulties in applying the prohibition even to non-secessionist conflicts. The basis for the prohibition in principle is that the opposition in such cases offers an alternative political choice to the people of the existing State. But as this thesis has shown, in recent times the international community has shown a willingness to make judgments (in a rather *ad hoc* and inconsistent way) about which political alternatives are *legitimate* as potential governments of a State. This inevitably introduces a large degree of subjectivity into the application of the alleged prohibition which fatally undermines its effectiveness as a limit on pro-government intervention. Instead of a general ban on all military assistance to governments in internal political conflicts, what is seen in practice is acceptance of intervention to assist governments against rebel movements which are considered to be illegitimate, such as military coups or groups categorised as terrorists.¹⁴⁵⁰ This outcome can be superficially reconciled with the alleged prohibition if conflicts involving such groups are considered not to be internal political conflicts falling within its scope. In some cases, for example the conflict between ISIL and the Iraqi government, such an argument seems convincing. Although ISIL does aim to overthrow and replace the Iraqi government, it also sponsors a global campaign of jihad and asserts its ultimate goal to be a universal caliphate, distinguishing it from a traditional rebel group in a domestic civil war.¹⁴⁵¹ But in many conflicts foreign military action has been directed at groups, including the

¹⁴⁴⁸ See Chapter 5, Part B(iii).

¹⁴⁴⁹ (n895)–(n903) and (n1056)–(n 1062). Cf Roth (n407) 406.

¹⁴⁵⁰ For more discussion of the suggested distinction between pro-government intervention in an internal conflict and anti-terrorist action, see (n1492) – (n1516) and accompanying text..

¹⁴⁵¹ (n1148) –(n1159), above.

military junta in Sierra Leone,¹⁴⁵² the Taliban in Afghanistan,¹⁴⁵³ and the Houthis in Yemen,¹⁴⁵⁴ who seem in essence to be domestic political players seeking to establish themselves in power within their respective States. These cases thus appear to be examples of internal political conflicts of the type which the alleged prohibition is meant to shield from foreign interference. The general international acceptance of intervention in these cases suggests that the prohibition is not applied in practice where there is an international consensus that the government is 'legitimate'¹⁴⁵⁵ (in terms of commitment to democracy, broad-based ethnic and religious representation and human rights, as well as international peace and stability) and the rebel forces are not.¹⁴⁵⁶ The intrusion of such legitimacy-based factors makes the application of the alleged prohibition highly subjective and means that it cannot effectively achieve the non-interventionist goal which underlies it: to ensure that each State's form of government is determined domestically by preventing foreign powers from imposing a conception of legitimacy which may not be shared by the State's people.¹⁴⁵⁷

B. Indirect Military Assistance

As discussed in Chapter 3, there is a lack of agreement among proponents of a general prohibition on pro-government intervention as to whether the prohibition would forbid the provision of arms, training and logistical support to a government for the purposes of helping it to prevail in an internal conflict,¹⁴⁵⁸ or whether it would be limited to a prohibition on the direct deployment of foreign troops to fight the opposition.¹⁴⁵⁹ Again, this

¹⁴⁵² (n994)–(n1005), above.

¹⁴⁵³ (n1027)–(n1041), above.

¹⁴⁵⁴ (n1176)–(n1207), above.

¹⁴⁵⁵ See for example the stress on the legitimacy of the Hadi government in Yemen, S/PV.7124, 7–9.

¹⁴⁵⁶ See the discussion in Chapter 2, Part B.2. For an example of an appeal to the democratically elected nature of an assisted government, see the Canadian Foreign Minister's statement on the ISIL airstrikes, quoted above (n1143).

¹⁴⁵⁷ Cf Roth (n5) 48.

¹⁴⁵⁸ As indicated by the 1975 IDI resolution (n463) and the 1984 British Foreign Policy Document (n669).

¹⁴⁵⁹ Doswald-Beck (n243) 251; Corten (n1) 296. See Ruys (n467) 43–44.

can be seen as involving a tension between a methodology based on deduction from broader principles and one based on induction from State practice. As a matter of principle, indirect as well as direct military assistance to a government could potentially play a decisive role in helping a government to survive against an internal challenge, thus (according to the reasoning underlying the prohibition) depriving the people of their right of self-determination and violating the right to non-intervention. It could be argued, therefore, that all assistance to governments to help them stay in power, including indirect assistance, should be prohibited.¹⁴⁶⁰

However, arguments that the prohibition should apply indirect to military aid face the same objections, *a fortiori*, as can be raised against the very existence of the rule. Provision of arms and other forms of indirect assistance from one government to another is a quotidian reality of international affairs.¹⁴⁶¹ Such assistance generally continues even after a civil war breaks out, as the UK's justification for its assistance to the Nigerian government during the Biafran war shows.¹⁴⁶² More generally, in all the cases considered in Chapter 4 only where there was deployment of troops were there ever significant levels of criticism of pro-government intervention by other States.¹⁴⁶³ The mere provision of arms and indirect support to governments in an internal conflict situation has not been clearly condemned by other States as illegal, even in cases, such as Russia's arms supply to the Assad regime, where

¹⁴⁶⁰ Roth (n247) 179.

¹⁴⁶¹ Richard A Falk, 'Introduction' in Richard A Falk (ed) *The International Law of Civil War* (John Hopkins 1971) 22; Luard (n459) 18.

¹⁴⁶² (n897); see also Russian Foreign Minister Lavrov's reference to 'pre-existing contracts', (n1089). Cf Klingler (n336) 495.

¹⁴⁶³ See Higgins (n444), 173–74; Roth (n247) 186.

many other States are politically opposed to the territorial government and to the provision of indirect support to it.¹⁴⁶⁴

Therefore, it seems clear that indirect military assistance must be excluded from the scope of the alleged prohibition. Not only is this in deep tension in itself with the logic of the rule, it combines with the apparent legality of counter-intervention to almost entirely drain the alleged prohibition of its effectiveness, as will be discussed at the end of this chapter.¹⁴⁶⁵

C. Purpose as the Criterion for Legality

As referred to above, recent scholarship tends to emphasise the illicit *purpose* of pro-government intervention, rather than the existence or otherwise of a civil war or an internal conflict, as the factor which gives rise to illegality. On this view, an illegal pro-government intervention is one for the purpose of propping up a government against an internal political challenge. However, it is apparent that such a test is difficult to apply in practice.¹⁴⁶⁶

Experience shows that even where military operations have an ostensibly limited purpose, ‘mission creep’ is easily justified.¹⁴⁶⁷ A State’s decision to deploy troops in another State’s territory, or to provide military assistance to its government, will usually have several purposes and be able to be justified by reference to a number of different factors.¹⁴⁶⁸

Particularly since the end of the Cold War, the concept of what constitutes a legitimate international purpose sufficient to justify such foreign action is broad enough that a prohibition on intervention for the purpose of supporting the government against

¹⁴⁶⁴ Lieblich (n104) 153; Dapo Akande, ‘Would It Be Lawful for European (or other) States to Provide Arms to the Syrian Opposition?’ (*EJIL:Talk!*, 17 January 2013) < www.ejiltalk.org/would-it-be-lawful-for-european-or-other-states-to-provide-arms-to-the-syrian-opposition/>. See also (n1083)–(n1096), above.

¹⁴⁶⁵ See Part D of this chapter.

¹⁴⁶⁶ For the difficulties in applying legal tests based on purpose or motive, see Baty (n360) 101; Lowe (n662) 109.

¹⁴⁶⁷ The same problem has arisen in other contexts where a military force operates in pursuance of an officially limited mandate – see for example the expansion of the UN-authorized enforcement action in Libya from protection of civilians to, in effect, regime change: see the report of the Defence Committee of the House of Commons quoted in ‘UK Materials in International Law’ (2013) 83 BYIL 606, 608–10.

¹⁴⁶⁸ R J Vincent, *Non-Intervention and International Order* (Princeton 1974) 12; Nolte (n4) 260.

opposition forces will have little or no impact in practice.¹⁴⁶⁹ If intervention can generally be justified on the basis of upholding an accepted international interest, the practical effect will be to allow intervention which in fact supports the government against opposition groups in a very wide variety of cases.¹⁴⁷⁰

The international interests which can justify intervention can be roughly divided into three categories.¹⁴⁷¹ Firstly, military assistance can be justified as aimed at ensuring the ability of the receiving State to defend itself against possible attacks from abroad. The goal of the assistance can thus be classified, not as intervention, but as a deterrent against illegal armed attacks on the State from abroad and a means of facilitating collective self-defence should such an armed attack occur. Secondly, foreign military assistance or deployment of troops in another State's territory can be justified as a response to a threat posed to the State providing the assistance or deploying the troops, and/or to third States (or to the nationals of these States). Thirdly, military assistance or troop deployment can be justified on the basis that it is to be used, not simply to back the government against a political challenger, but to assist in 'neutral' action to uphold international norms, principles and values – for example, the enforcement of a peace process, or protection of civilians and human rights.

Deterring Foreign Attacks

Foreign military assistance to a State for the purpose of deterring potential foreign attacks has been a regular feature of State practice throughout the Cold War and post-Cold War period. Great powers provide military protection to weaker allies by supplying them with arms and other forms of indirect assistance and by establishing military bases on their territory. Although early in the Cold War period there were criticisms by States of the

¹⁴⁶⁹ The difficulties are acknowledged by Corten (n1) 292 and Bannelier-Christakis (n315) 747–48.

¹⁴⁷⁰ In contrast to the asserted purpose-based criterion for determining the illegality of pro-government intervention, the ICJ has found that use of force on a State's territory without government consent is illegal even if the purpose not to overthrow the government: *Armed Activities* (n304) 227.

¹⁴⁷¹ Cf Perkins (n548) 195–96.

placement of military bases on the territory of other States,¹⁴⁷² it is clear that any prohibition on pro-government intervention cannot extend to forbid such a widespread practice, one which moreover is not, in itself, targeted at depriving the State's people of the right to determine their own political future, but which falls within the sphere of collective self-defence. However, at the same time, the legality of military assistance for this purpose creates challenges, in practice, for the effective functioning of a prohibition on the military assistance for the purpose of interfering in internal political strife. Arms supplies and training assistance officially provided for the purpose of defence against external threats can relatively easily be turned against domestic opposition.¹⁴⁷³ Equally, the presence of foreign troops on military bases in the territory of a State, even if officially present for the purpose of defending the receiving State against external threats, can help deter internal rebellion against an unpopular government if there is a fear that such troops may in fact intervene in the case of such a rebellion.¹⁴⁷⁴ The Soviet military presence in Eastern Europe during the Cold War provides an example of this deterrent effect. This illustrates a recurrent problem: the difficulty in drawing a clear, workable boundary between permissible and impermissible intervention with government consent.¹⁴⁷⁵

Protecting Nationals

The problem is compounded when considering a second limitation on the scope of the alleged prohibition - military involvement for the purpose of defending the interests of the intervening State and/or other States from the effects of strife, disorder or violence on the territory of another State, with the consent of the latter's government. The most obvious category of such actions during the Cold War period were military operations for the

¹⁴⁷² Doswald-Beck (n243) 226, quoting the Nepalese representative's statement in the UNGA following the 1956 Soviet intervention Hungary; Gray (n433) 84. See also S/PV.196, 2241 (Syrian representative describing presence of foreign forces on territory of a friendly State as 'an exceptional measure').

¹⁴⁷³ Leurdijk (n505) 151.

¹⁴⁷⁴ See statement by Ghana quoted at (n739).

¹⁴⁷⁵ Falk (n1461) 22.

protection and rescue of nationals of the intervening State, and other foreign States, on the territory of the requesting State.¹⁴⁷⁶ The protection of nationals on the territory of the inviting State was invoked, *inter alia*, to justify the US intervention in Lebanon in 1958, the US/Belgian intervention in Congo in 1964, and the US intervention in Grenada in 1983, and more recently in Britain's actions in Sierra Leone in 2000 and France's in Côte d'Ivoire in 2002.¹⁴⁷⁷ In principle, such operations do not seem to contradict the principle which is argued to underlie the prohibition – their aim is not to assist the government of the territorial State to stay in power against internal opposition, but to protect their own citizens present on that State's territory. In practice, operations undertaken using this justification can, in addition to safeguarding nationals, have the more important practical effect of saving the inviting government from collapse.¹⁴⁷⁸ If the opposition forces are attacking foreign nationals, this justification would seem to allow the direct engagement of foreign military forces against them. Even if the foreign forces do not undertake such direct engagement, they can, if they remain any length of time, free up government forces for an assault on the opposition. The ease with which a 'protection of nationals' exception can be invoked to justify intervention was noted in the context of the Lebanon and Congo cases by certain States, who contended that the real effect and purpose of these interventions was to prop up governments which were being challenged internally.¹⁴⁷⁹

Self-Defence against Non-State Actors

Another form of justification based on the intervening State's own security interests involves foreign military action on a State's territory directed against non-State actors who are conducting military actions against the intervening State (or other foreign States).¹⁴⁸⁰ This

¹⁴⁷⁶ Christakis and Bannelier (n1) 121–24; Corten (n1) 292.

¹⁴⁷⁷ See the analysis of these cases in Chapter 4, above; also Gray (n433) 88–89.

¹⁴⁷⁸ Corten (n1) 292–93; Gray (n433) 88–92.

¹⁴⁷⁹ Cf Higgins (n444) 175.

¹⁴⁸⁰ Corten (n1) 291–92; Bannelier-Christakis (n315) 747.

issue has risen in prominence since 9/11. In a different context, it has provoked a great deal of debate as to whether a State which is a victim of an armed attack by such a non-State actor, operating from the territory of another State, has the right to use force in self-defence against the non-State actor's bases in the other State, without the consent of its government.¹⁴⁸¹ However, when the territorial State's government consents, it is not necessary to invoke the self-defence argument to establish that the use of force is not in violation of the prohibition on the use of inter-State force.¹⁴⁸² If the existence of a general prohibition on pro-government intervention is accepted, though, the defensive character of the action is still relevant, since it appears to suffice to bring the action outside the scope of the prohibition. Its purpose is not to interfere with the political choices of the consenting State, but to protect the State undertaking the action from armed attack. A potential example of this situation can be found in the facts of the *Armed Activities* case. On one view, the Ugandan presence was legal because its purpose was to fight against Ugandan rebel groups operating from the DRC.¹⁴⁸³ Another relevant case is the continuing US intervention in Afghanistan, where the fight of the US and its allies against the Taliban, accused of complicity with Al-Qaeda in the 9/11 attacks, has continued with the consent of the post-invasion Afghan government.¹⁴⁸⁴ The defensive element in these interventions can be argued to distinguish them from those interventions forbidden by the alleged prohibition on pro-government intervention.¹⁴⁸⁵ However, again, it will be difficult to keep this justification from in fact draining the alleged prohibition of its content. As argued above, the fact that Western military assistance to the Afghan government against the Taliban continues and seems to be

¹⁴⁸¹ See generally Ruys (n15) 419–510.

¹⁴⁸² Although note the issues with the US-led airstrikes on Syria, given the unwillingness to rely on the Assad regime's consent: (n319)–(n320).

¹⁴⁸³ Corten (n1) 291–92; see (n628)–(n 629).

¹⁴⁸⁴ (n1027)–(n 1041) and text.

¹⁴⁸⁵ Christakis and Bannelier (n1) 126–27.

widely accepted as legal, 16 years after 9/11, provides a demonstration of the potential expansiveness of this justification.¹⁴⁸⁶

Regional and International Security

Moreover, international security interests can be used to justify pro-government intervention in another State, not only where a non-State actor based on that State's territory has conducted armed attacks on other States, but in a very wide variety of circumstances.¹⁴⁸⁷ As discussed above, instability within a State can usually plausibly be asserted to have negative flow-on effects for other States, such as the emergence of ungoverned spaces which can be used as bases for inter-State crime and terrorism and the cross-border displacement of large numbers of refugees.¹⁴⁸⁸ An intervention to address these regional and international threats can plausibly be argued to fall outside the prohibition on pro-government intervention for the purposes of settling a purely internal dispute, because the unrest has is not purely internal and affects regional or international stability.¹⁴⁸⁹ This development was already foreshadowed in the 1960s, when what became effectively an intervention on the side of the government in Congo by officially neutral UN peacekeepers was justified as a response to the threat that widespread disorder in Congo posed to peace in the region.¹⁴⁹⁰ In the post-Cold War period, this trend has only increased.¹⁴⁹¹ Since, in an increasingly globalised and interlinked world, almost every undermining of order within a State can be argued to give rise to such regional and international threats, this narrowing of the concept of purely internal strife threatens to deprive the alleged prohibition of all real content, even if its existence is accepted.

¹⁴⁸⁶ Gray (n433) 203–07

¹⁴⁸⁷ Nolte (n985) 619.

¹⁴⁸⁸ Tomuschat (n65) 212–13.

¹⁴⁸⁹ Nolte (n4) 260; cf Weiler (n306) 263.

¹⁴⁹⁰ For analysis see Buchan (n558) 137–144.

¹⁴⁹¹ Fox (n256) 826.

Action against Terrorism and Extremism

A related limitation on the alleged prohibition would allow military assistance to governments for the purpose of fighting against terrorism. Lieblich rightly notes the widespread acceptance since 2001 of this justification for pro-government military action.¹⁴⁹² Christakis and Bannelier, discussing the French intervention in Mali, conclude that an exception has emerged to the general prohibition on pro-government intervention allowing assistance in the fight against terrorism.¹⁴⁹³ This can be linked with the previous discussion of the broadening of States' understanding of what constitutes a threat to international peace, with terrorism explicitly classified as such by the Security Council.¹⁴⁹⁴

However, as proponents of the prohibition accept, this exception is open to abuse.¹⁴⁹⁵ Despite the importance of the concept in international legal and political discourse, there remains no comprehensive international legal definition of terrorism.¹⁴⁹⁶ In particular, in the context of an armed conflict, the distinction in an internal conflict situation between 'rebels' and 'terrorists' remains radically unclear. Almost all governments faced with rebel groups label them as terrorists.¹⁴⁹⁷ The Special Tribunal for Lebanon, in the course of its controversial discernment of a customary international law crime of terrorism,¹⁴⁹⁸ identified the essence of the concept as the perpetration or threat of a criminal act with the intent to spread fear among the population or directly or indirectly to coerce a national or

¹⁴⁹² Lieblich (n104) 155.

¹⁴⁹³ Bannelier and Christakis (n204) 864.

¹⁴⁹⁴ For example, UNSC Res 1377 (12 November 2001); UNSC Res 2161 (17 June 2014). See Urs (n 317) 81–82.

¹⁴⁹⁵ Bannelier-Christakis (n315) 747–48.; also Ruys and Ferro (n302) 92.

¹⁴⁹⁶ See generally Rosalyn Higgins, 'The General International Law of Terrorism' in Rosalyn Higgins and Maurice Flory (eds) *Terrorism and International Law* (Routledge 1997) 28; George P Fletcher, 'The Indefinable Concept of Terrorism' (2006) 4 JICJ 894; Ben Saul, 'Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism' (2011) Leiden JIL 677; *R v Gul* [2013] UKSC 64, [44]; cf Weatherall (n34) 241–50.

¹⁴⁹⁷ de Wet (n379) 996.

¹⁴⁹⁸ *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, Case No. STL-11-01/I (16 February 2011) for criticism see Saul (n1496).

international authority to take or refrain from action.¹⁴⁹⁹ Any forceful insurgent movement which seeks to coerce the existing government to cease exercising of governmental authority (that is, to overthrow it) seems to meet these criteria.¹⁵⁰⁰ While in some contexts the concept of terrorism is confined to attacks directed against civilians,¹⁵⁰¹ overall practice does not appear to limit the concept in this way, with attacks on government armed forces also capable of being classified as terrorism.¹⁵⁰² There is also continued disagreement among States about how to distinguish between terrorists and ‘freedom fighters’ undertaking legitimate self-determination struggles.¹⁵⁰³

In practice, the justification of anti-terrorist action has been mainly used, since 9/11, to combat jihadist groups, as in Afghanistan, Iraq, Mali and Syria.¹⁵⁰⁴ There are various reasons why foreign military assistance to governments facing opponents of this kind might be considered to be justified. Firstly, such jihadist forces are generally considered to be part of broader transnational networks which extend beyond a single country, and which threatens to use force internationally, including in other regional States and in the West.¹⁵⁰⁵ Forces like Al-Qaeda in the Mahgreb (in Mali) and ISIL in Iraq and Syria recruit internationally and espouse goals beyond the overthrow of the government of a single State, such as ISIL’s professed aim of establishing a (potentially worldwide) Caliphate.¹⁵⁰⁶ Secondly,

¹⁴⁹⁹ *ibid*, [85]. For the international crime to exist, a transnational element was also necessary. The Tribunal found that the customary crime as yet only applies in peacetime, but that a crime of terrorism in armed conflict is *in statu nascendi*.

¹⁵⁰⁰ Thomas Weatherall, ‘The Status of the Prohibition of Terrorism in International Law’ (2015) 46 *Georgetown JIL* 589, 608.

¹⁵⁰¹ *ibid* 593-95, Fletcher (n1496) 903–04.

¹⁵⁰² *Gul* (n1496) [45]–[51]; UNSC Res 1566 (8 October 2004) (terrorist acts defined as ‘including acts against civilians’, but not clearly limited to such acts).

¹⁵⁰³ A/C.6/70/SR/27, 4 (noting continued failure to come to agreement on Comprehensive Terrorism Convention).

¹⁵⁰⁴ See discussion of each of these cases in Chapter 5, Part B.3, above.

¹⁵⁰⁵ Cf UNSC Res 2344 (n1034) calling for dialogue between all those in Afghanistan who, *inter alia*, ‘have no links with international terrorist organizations’.

¹⁵⁰⁶ Lieblich (n104) 54; Urs (n317) 70. See e.g. S/2015/792 (n1163).

such groups generally show a disregard for international humanitarian law and resort to the intentional infliction of violence on non-combatants for the purposes of intimidation in order to achieve their aims. However, neither of these elements seems necessarily decisive. Notably in Afghanistan, the Taliban, although a largely indigenous group, has been held condemned in Security Council resolutions for ‘violent and terrorist activities’, with reference not only to attacks on civilians but also on Afghan and international armed forces.¹⁵⁰⁷ A third criterion which seems important is that such groups are classified as ‘extremist’,¹⁵⁰⁸ a term which might be taken to indicate that, because of their open rejection of basic human rights principles recognised in international law, that they are not considered as legitimate alternative governments of existing States. There seems to be something like an irrebutable presumption that such an ‘extremist’ force cannot be the political choice of the people of the State in the exercise of self-determination. Thus a violent challenge by such a force does not put the will of the people in doubt so as to bar foreign assistance to a government.¹⁵⁰⁹ The vagueness of this criterion of ‘extremism’, however, is obviously problematic.¹⁵¹⁰

The use of the category of ‘terrorism’ or ‘extremism’ to justify intervention resembles how, during the Cold War, Western-allied States utilised the concept of ‘international Communism’, and Communist States the concept of international ‘reaction’ or ‘counter-revolution’.¹⁵¹¹ In these cases, applying this label to a rebel group was understood to automatically justify assistance to the government. Such rebels could never be seen as purely domestic forces, but were conceptualised as part of an international threat affecting all

¹⁵⁰⁷ See for example UNSC Res 2041 (22 March 2012), 2344 (n1034); also *Gul* (n1496) [49].

¹⁵⁰⁸ For examples of practice where military assistance to governments was requested for the purpose of combatting ‘extremist’ groups, see the treaties at (n1281). See also UNSC Res 2344 (n1034) (reiterates support for Afghan security forces in their fight against ‘terrorism and violent extremism’; ‘UK Materials on International Law’ (2015) 85 BYIL 301, 634–35.

¹⁵⁰⁹ Van Steenberghe (n581).

¹⁵¹⁰ Saul (n1496) 695, noting for example the intermingling of the concepts of ‘terrorism’, ‘separatism’ and ‘extremism’ in the Shanghai Convention on Combating Terrorism, Separatism and Extremism (entered into force 29 March 2003).

¹⁵¹¹ See (n811), (n819) above, and generally Chapter 4, Part B.2.

‘democratic’ or ‘socialist’ nations. Further, it was assumed that such an illegitimate ideology could never receive wide popular support within a country but could only threaten a government through foreign help. Just as these labels provided flexible justifications for the competing blocs’ interventions in the Cold War, the terrorism exception seems broad enough as to potentially apply to any opposition group using force that is considered as in some sense illegitimate.¹⁵¹²

Christakis and Bannelier acknowledge this concern, but seek to address it by referring to international consensus (in the form, for example, of a Security Council listing of the group as terrorists) to provide an authoritative decision.¹⁵¹³ In contrast to the ideologically divided Cold War world, the international community of today often seems broadly united in its condemnation of particular groups as terrorists. This does allay the concern to some degree, but not wholly. It still means that, wherever there is a sufficient degree of consensus from States as a whole on the illegitimacy of the opposition as ‘terrorists’, the alleged prohibition can be departed from, without the need to measure the situation against any strict criteria.¹⁵¹⁴ Furthermore, the terrorism exception would be unlikely to be confined only to cases of near international unanimity. The Yemeni conflict, where the GCC has begun condemning the Houthi rebels as terrorists,¹⁵¹⁵ shows the possibility of the application of this justification to more contentious cases. Moreover, as shown in Chapters 4 and 5, there is a tendency in justifications for pro-government intervention to refer not only to the threat of terrorism but also more generally to the need to uphold stability, an even more open-ended justification.¹⁵¹⁶

¹⁵¹² de Wet (n379) 996–97.

¹⁵¹³ Bannelier and Christakis (n204) 866.

¹⁵¹⁴ Cf Ruys and Ferro (n302) 97.

¹⁵¹⁵ ‘Identical Letters’ (n1201) S/2015/317; cf Ruys and Ferro (n302) 92.

¹⁵¹⁶ See for example the US assistance treaties with Afghanistan and Iraq (n1281); also the broad definitions of terrorism in domestic law as violence threatening ‘stability’ or ‘order’ catalogued by Saul

'Neutral' Involvement and Upholding a Peace Process

Military action in a State with the consent of its government can also be justified on the basis that its aim is not to impose that government on the people of the State against a domestic challenge by a rival political force, contrary to the people of the State's right to self-determination, but for a politically neutral purpose. Examples of such purposes are protection of vital infrastructure and peacekeeping.¹⁵¹⁷ The distinction between 'neutral' and partisan operations, however, has become difficult to maintain in practice. Ostensibly 'neutral' peacekeepers can in fact indirectly assist government troops to assault the opposition.¹⁵¹⁸ Rebels may be tempted to attack the foreign peacekeepers, which will then allow the foreign State to take action against the rebels in self-defence.¹⁵¹⁹ Contemporary practice evidences a reinterpretation of the traditional requirement that peacekeeping forces remain neutral between the parties to the conflict, to allow action against parties who are considered as breaking an internationally brokered ceasefire or peace process or violating international humanitarian or human rights law.¹⁵²⁰ Outside the peacekeeping context, practice indicates the wide acceptance of interventions against rebel groups widely seen as 'spoilers' refusing to cooperate with an internationally sponsored transitional process.¹⁵²¹ The ECOWAS and UK interventions against the Taylor forces in Sierra Leone, and the GCC intervention against the Houthis in Yemen, provide examples of this. A principled justification for such actions is that they do not interfere with the State's independence and

(n1496) 683. See further the Preamble to the AU Constitutive Act (n252) (referring to the need to promote 'peace, security and stability'), and the AU Constitutive Act amendment (n402) which would allow intervention to preserve or restore 'legitimate order'.

¹⁵¹⁷ Bannelier-Christakis (n315) 747.

¹⁵¹⁸ As with Russian 'peacekeepers' in Tajikistan in the early 1990s: Le Mon (n343) 786–91. Cf Higgins (n444) 180.

¹⁵¹⁹ As in Sierra Leone: see (n1000).

¹⁵²⁰ Nicholas Tsagourias, 'Consent, Neutrality/Impartiality and the Use of Force in Peacekeeping: Their Constitutional Dimension' (2006) 11 JCSL 465, 481; Buchan (n558), 149–53. See for an example the role of the Indian 'peacekeepers' in Sri Lanka: (n966)–(n969).

¹⁵²¹ See (n1204).

its people's self-determination, but facilitate it by re-establishing orderly processes by which the State and its people can exercise their independent choices.¹⁵²² But the fact remains that recognizing the legality of such interventions carves another significant hole in the alleged prohibition. Although the purpose of intervention could be described as supporting a transitional peace process rather than propping up the government against rebels, this distinction seems highly artificial, since suppressing the 'spoiler' rebel group is the means by which the transitional process is upheld.¹⁵²³

Upholding Humanitarian Norms

The enforcement of international human rights and humanitarian law seems to provide another accepted purpose for what is in effect an intervention against opposition groups in an internal conflict. This possibility was foreshadowed even in the 1975 IDI resolution, which in its preamble reserved for future study 'situations arising from the danger of extermination of ethnic, religious or social groups or from other serious infringements of human rights during civil war,'¹⁵²⁴ suggesting the possibility that the prohibition on intervention set down in the resolution might not apply to such situations. Since that time, the international interest in preventing such atrocities in the course of an internal conflict has only increased. As already emphasised, the Security Council has recognized that grave human rights abuses in the course of an internal conflict can give rise to a threat to international peace, and the concept of 'responsibility to protect' has laid further emphasis governments' duty to safeguard their own citizens from such crimes. A pattern can be discerned whereby military action against opposition groups – and therefore, in practice, assistance to governments – is justified for the purpose, not of helping the government survive as an end in itself, but as preventing rebel groups which are committing grave human rights abuses

¹⁵²² Cf Moore (n501).

¹⁵²³ Cf Rim (n393) 699.

¹⁵²⁴ (n463).

from continuing to commit them.¹⁵²⁵ Again, the coalition military action against ISIL provides an example, with the Iraqi government and the intervening States referring to the human rights abuses being committed by ISIL, *inter alia*, in Iraq's request for military assistance.¹⁵²⁶ This also creates a broad potential limitation to the alleged prohibition; as Roth observes, the R2P mandate for action 'renders almost any civil war a candidate for forcible intervention.'¹⁵²⁷

D. Counter-intervention

The above limitations allow for foreign military action or assistance with the consent of the territorial government for purposes other than supporting the government against the opposition. In contrast, the 'counter-intervention' exception to the alleged prohibition would allow military assistance to the government for the purpose of helping the government prevail over the opposition, where the opposition has itself received assistance from abroad.¹⁵²⁸ As has been demonstrated above, the existence of this exception has been widely accepted in the literature by proponents of the prohibition, reflecting the fact that pro-government intervention has often occurred in State practice, accompanied by a statement that the opposition has received foreign help.¹⁵²⁹ Some scholars have argued in contrast that *opinio juris* does not support an exception for counter-intervention. Terry contends that '[n]ever has a State officially relied on such an exception', arguing that States instead present this argument in the form of a collective self-defence claim under art 51.¹⁵³⁰ The survey of State practice in Chapter 4, however, shows that this is incorrect. Although States have often

¹⁵²⁵ Lieblich (n104) 189.

¹⁵²⁶ S/2014/440 (n1132) 2. See also UNSC Res 2344 (n1034), referring to the 'harmful consequences of violent and terrorist activities...on the capacity of the Afghan Government to guarantee the rule of law, to provide security and basic services to the Afghan people, and to ensure the improvement and protection of their human rights and fundamental freedoms.'

¹⁵²⁷ Roth (n5) 48.

¹⁵²⁸ Corten (n1) 301.

¹⁵²⁹ See for example (n543), (n580), and more generally Chapter 3, above.

¹⁵³⁰ Terry (n336) 128–29.

invoked article 51 to justify pro-government intervention despite the lack of an ‘armed attack’ from another State,¹⁵³¹ there are also a number of cases where States have more generally referred to the fact that the opposition is receiving help from the outside.¹⁵³² A right to assist the government as ‘counter-intervention’ against prior assistance to the opposition, even in the absence of an armed attack, is thus necessary to reconcile the alleged prohibition with State practice and *opinio juris*.

But although the exception for pro-government ‘counter-intervention’ is demanded by practice, it poses significant conceptual difficulties.¹⁵³³ Firstly, there is the problem of reconciling it with the prohibition in art 50 ASR on forcible countermeasures and other countermeasures involving violations of *jus cogens*. This can potentially be addressed by arguing that military assistance to a government in such a situation does not even *prima facie* violate the relevant peremptory norms.¹⁵³⁴ Thus, assistance to a government to counteract prior foreign assistance to the opposition can be seen as restoring the people of the State’s ability to determine their own political future, rather than interfering with it. However, in practice only ‘counter-intervention’ on the side of the government seems to be permitted. States have almost never claimed a right to assist the opposition in response to prior foreign assistance to the State’s government.¹⁵³⁵ But treating assistance to governments more favourably than assistance to oppositions in this way is in tension with the underlying logic of the alleged prohibition, which is that the same restrictions should be placed on foreign military assistance to governments and to oppositions in an internal conflict.¹⁵³⁶

¹⁵³¹ As in Lebanon (n852), Afghanistan (n938), Mali (n1103) and Yemen (n1189), (n1190).

¹⁵³² As in Hungary (n820), Oman (n830), Dominican Republic (n917), Czechoslovakia (n924), Afghanistan (n934) and Yemen (n1192).

¹⁵³³ Cf Nussberger (n428) 113.

¹⁵³⁴ Perkins (n548) 201; Klingler (n336) 502–04.

¹⁵³⁵ Gray (n433) 84, 94; Klingler (n336) 504–05; cf Malanczuk (n462) 320.

¹⁵³⁶ Klingler (n336) 501.

The exception to the alleged prohibition allowing counter-intervention on the government side also has the potential to be very broad, fatally undermining the rule's effectiveness.¹⁵³⁷ Firstly, since the alleged foreign assistance to the opposition will often be covert, there will be difficulties in establishing whether it has in fact taken place.¹⁵³⁸ This allows States wishing to undertake intervention to justify it quite easily by making vague allegations of foreign assistance to the opposition,¹⁵³⁹ as with the accusations of Iranian assistance to the Houthis in Yemen.¹⁵⁴⁰ Secondly, it is at least doubtful whether there is a requirement that pro-government 'counter-intervention' must be limited to action which is a proportionate means to counter-balance the prior outside assistance to the opposition. This is an issue where different methodological approaches are likely to lead to different results. On an approach which emphasises deductive reasoning from existing norms, some kind of proportionality to the foreign aid to the opposition seems logically required.¹⁵⁴¹ If what underlies the prohibition on intervention on either side of an internal political conflict is the right of the people of the State to determine their own political future free from foreign interference, counter-intervention on the side of the government seems logically permitted insofar as it counterbalances the previous aid to the opposition, thus restoring the choice to the people of the State, but not if it goes further. In that case it would become a new interference with the people's ability to choose, this time on the other side. But although it can be argued that a proportionality requirement follows logically from the very concept of counter-intervention, an approach which emphasises State practice is likely to come to a different conclusion. A survey of State practice and *opinio juris* indicates that proportionality

¹⁵³⁷ Terry (n336) 131.

¹⁵³⁸ Lieblich (n104) 171, Ruys (n467) 46–47. See also S/PV.847, 14 (UK) ('It is notoriously difficult...to be certain about the borderline between civil strife and foreign interference').

¹⁵³⁹ Wippman (n195) 221; see the US's presentation of the threat to Lebanon in 1958 as something 'beyond the scope of observers': S/PV.831, 10.

¹⁵⁴⁰ (n1194).

¹⁵⁴¹ Moore (n448) 280; Perkins (n548) 212; Tanca (n111) 82; Ruys and Ferro (n302) 93–94.

has rarely been suggested as a limit on States' assistance to governments following alleged foreign assistance to the opposition.¹⁵⁴² An obvious recent example is again the GCC intervention in Yemen: even accepting the allegations of Iranian aid to the Houthis, the GCC's assistance to the Hadi government, involving large-scale airstrikes and a later deployment of ground troops, seems clearly disproportionate to Iran's involvement.¹⁵⁴³ Yet as outlined above, the GCC intervention obtained a large degree of international support and little clear legal criticism from other States. Without clear evidence for a proportionality requirement, counter-intervention presents another gaping exception that threatens to swallow the rule.

Further, Brad Roth has compellingly argued that the apparent general legality of indirect military assistance to the government combines with the right of counter-intervention to eviscerate the prohibition in practice.¹⁵⁴⁴ The base position is that governments can legally receive significant foreign support, which oppositions cannot. In practice (unless they have the support of a faction within the existing armed forces), opposition groups are unlikely to be able to put up a forcible challenge to the government unless they obtain arms and other forms of support illegally from abroad. The fact of such assistance, applying the exception for counter-intervention, then allows the government to receive further support (including, it seems from practice, the direct deployment of foreign troops) from other States, in a way that in actual State practice and *opinio juris* seems to be unbounded by any principle of proportionality. Roth has identified a real paradox at the

¹⁵⁴² One possible exception seems to be the French intervention in Chad in the 1970s and 1980s: Doswald-Beck (n243) 221. Another is found in the US's response in the Security Council to Soviet accusations of prior Western intervention in Hungary by means of propaganda and espionage directed against the government. The US representative responded that the Soviet Union's invasion of Hungary was 'real interference, and of the most brutal kind', and that '[s]uch things as foreign radio broadcasts simply cannot be compared with it': S/PV.746, 33–34. Of course, the lack of proportionality between the asserted prior intervention and the response was particularly extreme in this case.

¹⁵⁴³ Ruys and Ferro (n302) 94.

¹⁵⁴⁴ Roth (n247) 185–86.

heart of the alleged rule as put forward in much of the scholarship which explains its impotence in practice.

It could be argued that Roth's critique does not fully eviscerate the alleged prohibition. Even if in most cases opposition forces must receive significant help from abroad to mount an effective challenge a government, this need not always be the case. ISIS in Iraq and the Houthis in Yemen, for example, seem to have obtained many, perhaps most, of their arms internally; in Iraq by capturing US-provided equipment from the weak and ill-disciplined government forces,¹⁵⁴⁵ in Yemen from elements in the official military loyal to the previous President, Ali Abdullah Saleh.¹⁵⁴⁶ But even in cases where the opposition do not rely on significant foreign assistance – some assistance from outside will almost always be able to be plausibly asserted¹⁵⁴⁷ –the alleged prohibition is still likely to be hollow in practice. This is because all the other possible justifications for pro-government intervention will still be available – in particular, claims that the intervention aims not to prop up the government but to further a legitimate international end. On this basis foreign forces can be introduced into the conflict. Even if these purposes are officially quite limited and do not involve direct assistance to the government against the opposition, the presence of foreign forces will often in practice turn the tide of the conflict against the opposition. Frustrated by this, the opposition forces may either give up or, in frustration or desperation, turn to direct attacks on the foreign forces or to clear violations of international humanitarian law and human rights. The foreign forces can then use these developments to justify direct engagement by the foreign forces to defeat the rebels.

¹⁵⁴⁵ Zachary Cohen, 'Amnesty Report: ISIS Armed With US Weapons' (CNN, 9 December 2015) <<http://edition.cnn.com/2015/12/08/politics/amnesty-international-isis-weapons-u-s/>>.

¹⁵⁴⁶ Gareth Porter, 'Houthi Arms Came from Saleh, Not Iran' (Middle East Eye, 23 April 2015) <www.middleeasteye.net/columns/houthi-arms-bonanza-came-saleh-not-iran-1224808066>.

¹⁵⁴⁷ Schachter (n206) 1641; Wippman (n195) 221.

Thus, Roth's critique on the impact of the counter-intervention exception can be extended.¹⁵⁴⁸ All the exceptions and qualifications to the alleged prohibition on pro-government intervention, even if theoretically placing limits on assistance, will in practice either defeat the opposition forces or compel them to conduct themselves in a way which will justify an escalation of the pro-government intervention, to the point that it is no longer effectively limited by the prohibition. Again, the limitations and exceptions introduced to the alleged prohibition to reflect the realities of State practice drain the rule of its effectiveness in maintaining the principles which supposedly underlie it.

¹⁵⁴⁸ (n1544).

Conclusion

This thesis has argued against the view, common in international legal scholarship, that there exists in international law a general prohibition on pro-government intervention in civil wars or internal conflicts. There is little explicit *opinio juris* to support this rule. The complex mass of State practice and *opinio juris* in particular cases is ambiguous and does not clearly indicate that States accept the prohibition. Attempts to derive the rule from existing norms on the non-use of force, non-intervention and self-determination, although they have some force, rely on certain conceptions of these rules which have been undermined by developments in the post-Cold War international order.¹⁵⁴⁹ And even if the contrary view were taken and the prohibition's existence accepted, to be reconciled with State practice and *opinio juris* it would need to be defined in such a way as to allow almost all instances of pro-government intervention to be plausibly justifiable by references to limitations and exceptions within the rule. This would take away its practical relevance and undermine its utility as a means of furthering the principles which are asserted to underlie it.

Although for these reasons the thesis has argued for scepticism about the alleged prohibition, it is understandable why scholars have been so divided on the issue. Intervention by invitation has been described as one of the 'grey zones' in the *jus ad bellum*.¹⁵⁵⁰ A reasonable policy argument can be made for the alleged prohibition. Pro-government intervention in an internal conflict raises the prospect of a government being sustained in a particular State on the basis of foreign military support, when without such support it would collapse and (potentially) be replaced by a different government. This situation seems in tension with a commitment to protecting the independence of States, and their peoples, from foreign domination. The normative distinction between invading a State to effect 'regime change', something which is (at least without Security Council authorisation) clearly

¹⁵⁴⁹ Fox (n256) 840.

¹⁵⁵⁰ Weiler (n306) 244; Kress (n450) 53.

contrary to international law,¹⁵⁵¹ and propping up a government to protect it against collapse can seem quite thin.¹⁵⁵² On the other hand, in many situations a strong case can be made for allowing military assistance to help support the authority of the government of a troubled State. Instability and conflict within a State are likely to have significant flow-on effects on regional and international security, as well as negatively affecting the humanitarian situation within the State. Allowing intervention in situations where the government consents provides a means to address these issues.¹⁵⁵³ The danger of transformation of such an intervention into an inter-State war is minimised as long as assistance is permitted only at the invitation of the government, and not of rebel groups.

These competing interests help explain the ambiguities of State practice, but also indicate why no general prohibition on pro-government intervention has evolved. States' *opinio juris* shows an awareness of the dangers and possible abuses of pro-government intervention, as is indicated by the direct or muted criticism sometimes made of such interventions, particularly during the Cold War. But States also seem to hold that these dangers can be outweighed and in many cases pro-government military action can be an understandable or desirable response to an internal crisis within a State. This is shown by the general acceptance of many such actions, especially in the post-Cold War period. It is also worth remembering the obvious point that international law is made by governments, many of which have a self-interested motive for refraining from imposing limits on their ability to receive, or give, military assistance.¹⁵⁵⁴

The criteria for the acceptance of such interventions seem relatively broad and open-ended, reflecting the fact that the desirability of intervention appears to be what in domestic

¹⁵⁵¹ Although this also appears to be being undermined: Roth (n5) 47.

¹⁵⁵² Perkins (n548) 191.

¹⁵⁵³ Nolte (n124) 639–40.

¹⁵⁵⁴ Lieblich (n104) 140; Nolte (n391) 82; Kress (n450) 53.

legal contexts has been described as a ‘polycentric’ question, that is, one which ‘involves a large number of interlocking and interacting interests and considerations’.¹⁵⁵⁵ The broader needs of regional and international stability must be considered alongside the interests of the people of the State subject to the intervention. The interests of the State’s people themselves are potentially complex and interacting; the risks that intervention will undermine their ability to freely determine their political future must be weighed against the negative effects that disorder and internal conflict have on their human rights, including their right to determine their own political future in an orderly and non-violent way. Much seems to depend on an assessment of the ‘legitimacy’ of the government receiving assistance, not necessarily in absolute terms but *vis-à-vis* the insurgent forces which could possibly replace them. A broad range of often contentious factors, such as democratic and constitutionalist credentials, popular support, human rights record, and commitment to peaceful negotiation all may play a role in such assessments of legitimacy. These complex and relative concepts, which play into the decision to recognize a government faced with internal conflict,¹⁵⁵⁶ also play into the assessment of its ability to invite intervention.

Such a complex set of considerations are not well-suited to being assessed according to a ‘bright line’ rule laid down in advance.¹⁵⁵⁷ Rules of this kind, as H L A Hart observed, are more appropriate for situations where certain conduct is considered so negatively ‘that very few concomitant circumstances incline us to regard them differently.’¹⁵⁵⁸ A rigorously negative judgment as to the justifiability of the use of force against a State without the consent of its government implicitly underlies the prohibition on the use of force itself, a

¹⁵⁵⁵ L L Fuller, ‘The Forms and Limits of Adjudication’ (1978) 92 Harvard LR 353; Peter Cane, *Administrative Law* (5th ed, OUP 2011) 274. Cf Moore (n448) 332.

¹⁵⁵⁶ See Chapter 2, above; also Sean D Murphy, ‘Democratic Legitimacy and the Recognition of States and Governments’, in Fox and Roth (n419) 153.

¹⁵⁵⁷ Roth (n407) 386 (opposing bright line rules to legitimacy considerations); cf Moore (n448) 222.

¹⁵⁵⁸ Hart (n1422) 133.

rule qualified only by two specific exceptions.¹⁵⁵⁹ However, as this thesis has attempted to show, States do not take the same relatively clear view concerning pro-government intervention. While they recognize that it can be a matter of concern, they also seem to accept that it can be justified on the basis of a wide range of factors. The situation thus lends itself to *ad hoc* assessment of each intervention, balancing these factors on a case-by-case basis.¹⁵⁶⁰

The trend in the post-Cold War period has been for general acceptance by the international community of intervention in support of the 'legitimate' government. Where the international community is deeply divided on the legitimacy of the inviting government, as in Syria, States' reactions have unsurprisingly been more polarised. But as the Syrian example shows, even those States critical of foreign assistance to a government they consider illegitimate are reluctant to clearly identify it as illegal intervention, as long as the government remains internationally recognized as the State's legal government.¹⁵⁶¹ This suggests that, while States may sharply disagree about the moral and political legitimacy of assistance to such a government, the *legal* position remains that assistance to the State's established government is permissible. This will be the case unless the government has clearly been 'delegitimised' by a sufficiently strong consensus in the international community, particularly if this is reflected in a Security Council resolution.¹⁵⁶²

The absence of a general prohibition on pro-government intervention against internal opposition may seem an unacceptable conclusion. Surely, one might argue, the law

¹⁵⁵⁹ Although of course this is also being undermined by attempts to turn prohibition on use of force from a rule to a variable standard, allowing case-by-case assessment: Corten (n1) 7.

¹⁵⁶⁰ Cf Byrne (n5) 114. Such a case-by-case assessment is suggested by the language used in the US Government's 2016 Legal and Policy Framework (n13), 11. Similar issues can be seen as justifying the lack of an internal *jus ad bellum* in international law: Roth (n407) 392.

¹⁵⁶¹ Cf Kress (n450) 29.

¹⁵⁶² Le Mon (n343) 792. For the important role of international institutions in judging legitimacy, see Higgins (n444) 177–81.

must impose limits the ability of a government to consent to the use of foreign force in these circumstances.¹⁵⁶³ Three responses can be made to this argument. Firstly, it blurs the distinction between the law *de lege lata* and the law *de lege ferenda*. Secondly, the non-existence of the general prohibition on pro-government intervention in internal conflicts does not mean that there are no legal limits on foreign military assistance to governments. Any foreign forces deployed in the conflict will be bound to comply with international humanitarian and human rights law.¹⁵⁶⁴ There are also compelling arguments that the secondary rules of international law on complicity,¹⁵⁶⁵ and/or the obligation reflected in art 1 GC to ‘ensure respect’ for IHL, will prohibit even indirect assistance to a government systematically committing breaches of IHL in the course of a non-international armed conflict,¹⁵⁶⁶ although the extent to which State practice supports this contention could be questioned.¹⁵⁶⁷ Such restrictions on military assistance to governments lie beyond the scope of this thesis, but provide an important area for further research and potential legal development. Thirdly, as has been emphasised, legal limits are not the only means by which States’ conduct can be assessed and, to a degree, controlled.¹⁵⁶⁸ Instead of a clear rule restricting the general *legality* of pro-government intervention in internal conflicts, international practice is better understood as States responding positively or negatively in each case on the basis of an assessment of its (moral and political) *legitimacy*, the criteria for the assessment of which appear quite open-ended and case-dependent.¹⁵⁶⁹ This nuanced approach reflects the complex attitude of States to pro-government intervention: a practice which has obvious

¹⁵⁶³ Bannelier-Christakis (n315) 748.

¹⁵⁶⁴ See Legal and Policy Framework (n13) 8 (consent allows the use of force ‘in an otherwise lawful manner’).

¹⁵⁶⁵ Kress (n450) 29–30; cf Legal and Policy Framework (n13) 14.

¹⁵⁶⁶ Ruys (n467) 26–31.

¹⁵⁶⁷ *ibid* 27.

¹⁵⁶⁸ Tams and Tzanakopoulos (n644) 518.

¹⁵⁶⁹ For an exposition of the legality/legitimacy distinction in another context see Corten (n1) 38–39.

risks, but nonetheless one which in a wide set of circumstances is seen an indispensable tool for the maintenance of regional and world order.¹⁵⁷⁰

¹⁵⁷⁰ Cf Nolte (n124) 639–40; de Wet (n379) 998.

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