INTERVENTION IN CIVIL WARS: INTERVENTION AND CONSENT

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**ABSTRACT**

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In modern international law, it is a near consensus that no state can use force against another – the main exceptions being self-defense and actions mandated by a U.N. Security Council resolution. However, one more potential exception exists: forcible intervention undertaken upon the invitation or consent of a government, seeking assistance in confronting armed opposition groups within its territory. Although the latter exception is of increasing importance – for instance, in light of the need to address humanitarian catastrophes caused by civil wars, or as a potential justification for transnational drone attacks – the numerous questions it raises have received scant attention in the literature. This dissertation seeks to fill this gap, by analyzing the consent-exception in a wide context, and attempting to delineate its limits – including, perhaps, cases in which government consent power is not only negated, but might be transferred to opposition groups. The dissertation discusses the concept of consensual intervention in contemporary international law, in juxtaposition to traditional legal doctrines, seeking to reveal that nowadays, the central determinant of consent power is the consenting party’s effective protection of civilians, rather than its effective control over territory. The dissertation traces the development of law in this context by drawing from historical examples such as the American and Spanish civil wars, to recent cases such those of the DRC, Somalia, Libya and Syria.
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**CONCLUSION AND DETAILED SUMMARY**

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INTRODUCTION

I. THE QUESTION

Forcible intervention in internal armed conflicts, by the invitation or consent of a beleaguered government, has been considered an exception to the prohibition on the use of force, as enshrined in article 2(4) of the U.N. Charter. While this is not an obvious conclusion, in recent years it has almost come to be taken for granted as part of the legal case for counter-insurgency operations in Afghanistan, Iraq and elsewhere. This work seeks to clarify the nature and the limits of this exception, and to place it in a wider legal and theoretical – and sometimes historical – context.

Doing so, this study discusses a broad spectrum of issues relevant to the question of intervention in international law, hopefully contributing to the general understanding of the concept. In this sense, no-less than it inquires into the question of intervention and consent, this study embarks on a journey into the perception of international law, throughout the centuries, of internal armed conflicts at large. It seeks to expose the fact that in contemporary international law such conflicts are assessed from a substantive standpoint, rather than from a technical, ostensibly impartial point of view. International law, at large, is concerned about the protection of civilians; much less so about the traditional formalist rights of sovereigns; notions of impartiality; the economic interests of third-party states; or even ideas of procedural democracy.

Indeed, in the decades since the coming into being of the U.N. Charter, a legal consensus has been solidified that no state may use force against another. The two primary exceptions to this rule – that a state may use force as self-defense or when
authorized to do so by the U.N. Security Council – have been robustly debated in the literature.¹ In the context of the latter exception, vast scholarship has been devoted to the questions whether the Security Council is at all authorized to act in relation to strictly “internal conflicts,” and whether, and in what circumstances, states or groups of states can decide to intervene unilaterally should the Security Council fail to do so. The latter discussion reflects the dilemma of humanitarian intervention, which was addressed thoroughly by many.²

The question of humanitarian intervention arises in the nexus between the general norm of non-intervention in internal affairs of states, the prohibition on the use of force, the law of international human rights and the principle of protection of civilians. However, at the same nexus, another much less explored, but equally important, question surfaces: what happens if during an internal armed conflict, one of the parties invites an external force to intervene, or consents to such an intervention? International law has been extremely unclear on this question. Some went as so far as to label state practice in this context as “chaotic.”³

Intervention of the latter type is widely referred to, in the literature, as intervention by invitation.⁴ However, as will be demonstrated, the potential legalizing element of such interventions is the wider element of consent. Thus, a proactive invitation is but only one form of expression of consent. It can also be expressed through

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acquiescence or any other conveyance of approval; it does not have to be initiated strictly by the consenting party; it can be, theoretically, proactive or retrospective. Therefore, this study suggests a more inclusive term – *consensual intervention*. A consensual intervention, thus, is every forcible intervention in an internal armed conflict, undertaken, in practice, for the benefit of one of the parties, in which an explicit or implicit – but genuine – consent can be inferred. Importantly, the term “consensual,” in our context, does not mean by agreement of all parties – quite the opposite. It must be against the will of at least one party; otherwise it would be a peacekeeping operation, rather than a forcible intervention.

The question of intervention and consent is especially important – but as we shall see, not only – when the U.N. Security Council fails to satisfy its responsibility to act in light of humanitarian catastrophes, which are common in internal strife. This special importance derives from the fact that when the consenting party is a government, and while the Security Council does not decide otherwise, the question can be viewed as removed from the realm of international *jus ad bellum*, since the government presumably consented to the intervention by exercising its own sovereign power. This notion has roots in traditional international law regarding the question of non-intervention, notwithstanding its inherent paradoxes that we shall discuss at length. However, it seems implausible that contemporary international law will be interpreted as accepting that a government, engaged in mass atrocities, will be able to crush its opposition merely because it can wield the power of consent, while the international community is left to observe the Security Council deadlock. Thus, it seems that contemporary international

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5 See, e.g., LASSA OPPENHEIM, 1 INTERNATIONAL LAW §134 (2nd ed., 1912) (labeling consensual intervention, such as Russia’s 1849 intervention in Hungary by request of Austria, as “co-operation” rather than intervention).
law – as opposed to traditional, effective-control based doctrines – allows us to substantively assess conflicting parties and their power to consent to external forcible support.

Nowadays, the question of consensual intervention is undoubtedly governed, first and foremost, by the law on the use of force. However, the question has deeper roots, reaching down to an era in which limitations on the war-right of sovereigns were still inconceivable. In essence, the problem of consensual intervention is a sub-question of the wider issue of recognition of entities in international law, and the determination of the rights and powers of parties to internal conflicts at large. As such, it is intrinsically woven in the centuries-long debate between effective control and legitimacy as sources of sovereign power. In this context, and perhaps in contrast to the common notion that “traditional” international law did not concern itself at all with internal armed conflicts, the status of conflicting parties in internal strife has disturbed diplomats and lawyers for centuries. Considerations of non-intervention, recognition, the motivation to avoid being drawn into the conflict, and, perhaps above all, the interest to secure maritime trade have forced states to develop an intricate system of norms regarding their relations to such conflicts.

Nevertheless, the question of the rights and powers – and indeed obligations – of parties to internal armed conflicts has been subject, like all areas of international law, to changes in the philosophy, jurisprudence and institutions of the international system that have taken place throughout the centuries. Within these processes, the question of consensual intervention gained substantial legal significance only with the prohibition on the use of force, which can be traced back to the 1928 Kellogg Briand Pact, and to
previous weaker attempts on the regulation of force, such as the 1907 Hague Convention on the Pacific Settlement of Disputes and the 1919 Covenant of the League of Nations.\textsuperscript{6} It can be said that the question, in its true legal sense, is only a product of this era, since the existence of a prohibition on the use of force is a logical precondition for any discussion of potential exceptions to it. Indeed, in the earlier era, in which states could go to war at will, it made little sense to ask whether the consent of the government or of its rivals has had any implications on the legality of the external intervention.

This realization does not imply that the norm of non-intervention, in some form, did not exist prior to the prohibition on the use force; it could have been, however, effectively extinguished by the war-right of states, if they were willing to pay the price that war entailed. Nonetheless, as mentioned above, the rights and powers of parties to internal armed conflicts did, in fact, concern states even before the prohibition on the use of force, for various reasons. As such, discovering the underlying rationale of their concerns – as we shall attempt to do – can assist in shedding light on the development of international law regarding internal armed conflicts, and the question of intervention and consent specifically.

Besides the coming into being of the prohibition on the use of force, there are other major, intertwining processes that should be taken into account when analyzing the development of the law on consensual intervention. Notable among these processes is the decline of the strict legal positivism that dominated international law in the 19\textsuperscript{th} century; the movement from a multi-polar, balance-of-power system into a system that relies more and more on collective institutions; the changing of the perception of the norm of non-

intervention from its Westphalian origins to one that connotes self-determination in one form or the other; and, importantly, the decline of the principle of *territorial effectiveness* (or effective control) as the sole source of sovereign rights – and the advent of substantive considerations such as the sovereign’s responsibility to protect the populations under its control. Accordingly, the approach of international law regarding internal armed conflicts has moved from external parties asking mainly “how does the conflict affect *us,*” to asking also “how does the conflict affect the *parties* and the *populations* under their control.” The emphasis of the law on internal armed conflict has thus moved from securing the commerce rights of external parties to the *political* and *humanitarian* rights of *internal* parties. These processes underlie the analysis throughout this work.

Indeed, the rights and powers of parties in internal armed conflicts were long determined by strict territorial effective control standards, reflected in traditional customary international law in the *belligerency* and *insurgency* doctrines. Territorial effectiveness as the sole determinant of sovereign power was viewed as a necessary corollary of the norm of non-intervention, which was perceived at the time as protecting the “internal affairs” of effective regimes, regardless of their merits. Leaders, diplomats, scholars, lawyers and judges of the time took pride in the seemingly amoral nature of these doctrines, as a manifestation of the progress of international law. It was especially viewed in stark contrast to the legitimism doctrine, espoused by the conservative Holy Alliance, which was *a priori* adverse to any revolutionary movement challenging the “divine right” of the ruler.

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7 For a similar observation see Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶96–97 (Int’l Crim. Trib. For the Former Yugoslavia Oct. 2, 1995).
However, through the decades of the 20th century, the concept of territorial effective control as the sole source of sovereign power was challenged by a set of other competing principles, raising difficult questions regarding the extent of a government’s capacity to consent to external forcible support. To argue that the prohibition on the use of force, as embodied in the U.N. Charter, provides an answer to these questions by enshrining a complete preference of governments, does not take us too far. This is because in itself, the prohibition does not serve to clarify the balance that should be struck between the relevant competing principles.

In essence, the root of the problem lies in the fact that Article 2(4) of the U.N. Charter prohibits the threat or use of force against states, but nowhere is it clarified who is entitled to speak for the state in extreme situations. The usual reply, according to which the “government” is entitled to do so, raises, in turn, a plethora of perplexing questions regarding the determination of the identity of the government; and even if this is clear, in specific circumstances – the question still arises regarding the limits of the government’s powers to receive forcible support in a given internal conflict. Another possible solution to these questions could be that it is only for the U.N. Security Council to determine the balance between the competing interests at hand. While such an approach could be prudent from the perspective of international policy, and can indeed solve the problem in specific instances, it by no means provides a comprehensive solution. This is because the Security Council, due to the veto power enjoyed by its permanent members, has not been historically quick to react in the face of catastrophes that occur in contemporary internal armed conflicts.
THE ROADMAP

This work aims to analyze and hopefully clarify the questions above. The first precondition for a clear discussion is an understanding of the terms we use. The first Part of the work, therefore, will seek to define and clarify the main concepts addressed in this study. Chapter 1 thus clarifies the use of the term “consensual intervention,” by exemplifying the modalities and dynamics of such interventions. Namely, the Chapter explores the wide spectrum of the term, the nature of the relationship between the intervener and the consenting party, and the interaction between consent and Security Council authorized interventions.

Chapter 2 addresses the concept of internal armed conflicts, both in terms of definition and in substance. It attempts to present a typology that will demonstrate the complexity of such conflicts. The definition of internal armed conflicts is of significance, as we shall see, since it potentially affects the legality of external forcible intervention.

Chapter 3 clarifies several distinctions relevant to the elusive term “intervention.” It addresses, inter alia, the use of the term across difference disciplines, and the shifting meaning of the norm of non-intervention in contemporary thought. Thereafter, Chapter 4 will attempt to explain what actions constitute, in practice, forcible interventions.

The second Part of this work will embark on an in-depth analysis of the law regarding the rights and powers of parties to internal armed conflicts in the pre-U.N. Charter era. The discussion serves three purposes. First, it will serve to clarify, to the extent possible, an area in traditional international law that has been notoriously vague. Second, this works argues that prior to the prohibition on the use of force, and at least before the 1928 Kellogg-Briand Pact, the question of intervention and consent was
largely irrelevant, since sovereigns enjoyed an unlimited war-prerogative. Third, the
discussion will demonstrate the generally amoral territorial effectiveness-based doctrines
which dominated the era. These can be contrasted with the substantive doctrines of later
decades, which – as I argue – have direct implication over the contemporary law
regarding consensual intervention.

Accordingly, Chapter 5 will address the general question of internal armed
conflicts and consent in the era of the “prerogative of war.” Chapter 6 will survey the
development of the effectiveness-based doctrines of belligerency and insurgency as
sources of rights and powers of parties to internal armed conflicts, focusing, *inter alia*, on
the American Civil War. Chapter 7 will address the question of consensual intervention
in the inter-war period, where nascent limitations on the use of force were already in
place, and the international system started to shift to collective decision making, as
exemplified in the Spanish Civil War. The latter conflict can also be seen as the point
where the old doctrines regarding internal armed conflict were, to a certain extent,
abandoned.

Part 3 of this study concerns the law of consensual intervention in the era of the
U.N. Charter. Indeed, since the prohibition on the use of force was firmly set in place, the
question of the scope of the *exception* to the prohibition embodied in the law of
consensual intervention has gained distinct importance. Chapter 8, thus, addresses the
doctrines of intervention as these developed in the first decades of the U.N., and
establishes the general principle of the presumption in favor of governments in the
context of consensual intervention. The Chapter juxtaposes between the traditional
notion of “strict-abstentionism” – asserting that when internal conflict erupts, external
actors should abstain from any intervention – and the competing approach of
government-preference. We argue and demonstrate that the former view is obsolete.

Chapter 9 inquires into the contemporary relevancy of the question of consensual
intervention, namely with regards to the struggle against transnational terrorism and the
need to protect civilians from mass atrocities. Thereafter, the Chapter analyzes the scope
of government consent power, by setting forth several thresholds. Notably, the chapter
proposes a reversal of some traditional doctrines that limit consent power when internal
armed conflicts take place, by suggesting that nowadays, the existence of an armed
conflict is a precondition for the capacity to consent to forcible support. The Chapter
further attempts to place the traditional doctrine of counter-intervention in the
contemporary context.

Chapter 10 sets forth the concept of protection of civilians as an emerging
fundamental principle of international law, which in turn spawns the doctrine of effective
protection – manifested in the Responsibility to Protect concept – as a chief source of
sovereign power. The notion of effective protection, it is argued, is and should be the
dominant factor in the assessment of the question consensual intervention in
contemporary international law.

Recognizing this conclusion, Chapter 11 discusses other substantive
considerations for the assessment of consent power, such as democracy and self-
determination. It attempts to places these key concepts within a modern framework, in
which effective protection is the immediate concern of the law of intervention and
therefore affects our understanding of the role of democracy and self-determination in
this context.
Chapter 12 ventures into the controversial field of consensual intervention and opposition movements, and will explore the potential role of the consent of such movements in the face of governmental atrocities. In essence, the Chapter analyzes the relations between external parties and opposition groups, as these can be placed on the spectrum between recognition as governments and humanitarian intervention. The Chapter demonstrates that although opposition consent cannot legalize intervention against recognized governments, it can perhaps play a part in traditional just-war considerations, which are widely accepted as ethical thresholds for unilateral humanitarian intervention.
PART 1: THE BUILDING BLOCKS OF CONSENSUAL INTERVENTION

CHAPTER 1

CONSENSUAL INTERVENTION: MODALITIES AND DYNAMICS

I. THE WIDE SPECTRUM OF CONSENSUAL INTERVENTION

I.1 THE INSUFFICIENCY OF THE INTERVENTION UPON INVITATION PARADIGM

The attempt to define “consensual” interventions as opposed to other types of interventions presents a significant challenge. On the one hand, one can envision the pure “intervention upon invitation” scenario, in which a government explicitly, ad hoc and in a written treaty – invites a previously uninvolved state to assist it in confronting an organized armed group that seeks to overthrow it. In this “pure” scenario, the intervener will have no independent interests in the intervention itself beyond the fact that it was requested to assist the inviting government. Furthermore, the intervener will have no interaction with other international actors, nor will it seek any authorization from the U.N. Security Council. This altruistic – perhaps “Kantian”¹ – intervener will therefore present no other justification for its actions other than its good-will and the invitation itself.

Indeed, the concept of “intervention by invitation,” while seemingly providing a clearly definable and identifiable categorization, does not reflect the reality of the

¹ IMMANUEL KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSIC OF MORALS sec. 1 (1875) (presenting the concept of “good will” as the only thing with intrinsic value).
contemporary international system, or the complexity of the question of intervention and consent in international law. Practically – needless to say – states will rarely display the Kantian virtues as reflected in the pure “intervention by invitation” paradigm. Legally, moreover, the term “invitation” lacks in precision, since it focuses on the narrow technical element of the question rather than on the substantive one: it merely refers to the instrument of the expression of consent. If we agree that the “active” legitimizing agent regarding a consensual intervention can be the consent itself, it makes little sense to ask whether an invitation, in the narrow sense, has been extended. Instead, by focusing on the substantive element of consent, we realize that the term consensual intervention, in practice, actually encompasses a much wider scope of instances than the ones the classic “intervention upon invitation” scenario refers to. When departing from the simple “intervention upon intervention” paradigm, and turning instead to focus on the element of consent itself, an abundance of complex scenarios become possible.

Thus, consent will not always be in the form of an invitation in advance. It can be expressed, on the time continuum, not only proactively but also on a retroactive basis, and can be conveyed, in both cases, explicitly or implicitly, so long as it is established and not simply presumed by the intervener. Moreover, consent can be ad hoc and specific, expressed in real-time in relation to a concrete instance of intervention; or, conversely, it can be granted in the form of a general, forward-looking intervention treaty, whether concluded on the bilateral or regional levels. In such cases, a perplexing case can occur

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when a government, party to a forward-looking intervention treaty, seeks to withdraw its consent in real-time in the face of an impending intervention.\(^3\) Theoretically – setting aside, for now, the issue of legality – consent can be expressed by governments or opposition groups, the latter situation challenges, of course, the prohibition on the use of force and the norm of non-intervention as classically understood.

Furthermore, consent can be addressed, in theory, to various types of external actors. It can be granted to states; to groups of states that act as a regional organization; but also to other actors such as non-state actors or multinational forces established by a U.N. Security Council resolution. When a state agrees that a non-state actor “intervene” on its behalf in an internal armed conflict, the intervening group may or may not be considered as having been integrated into the consenting state’s armed forces. Such a determination will be made in light of the application, in the specific circumstances, the relevant rules of international humanitarian law and state responsibility.\(^4\) In cases where consent is expressed in the context of a Security Council authorized intervention, the consent, as we shall see, interacts with a Chapter VII based mandate and supplements it.

Naturally, instances in which the consent is both proactive and explicit, and is extended \textit{ad hoc} by a state to another state, are relatively simple cases that correspond with the classic “intervention upon invitation” paradigm. Any other combination raises complex issues – in particular regarding the free nature of the putative consent,\(^5\) but also

\(^3\) On such treaties see Chapter 10, sec. III.

\(^4\) On the integration of organized armed groups into a state’s armed forces see NILS MELZER, INT’L COMM. RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 21–26 (2009). Regarding state attribution see Chapter 4, sec II.

concerning a plethora of other issues. Indeed, considering the diverse modalities of consensual intervention, it comes as no surprise that a wide variety of complex cases can be found. For instance, such a case occurs when consent is given to a foreign force which is already present in the state’s territory, with many independent interests of its own, perhaps operating in conjunction with international forces. Another complex case can be when consent is granted implicitly, in parallel with a transnational armed conflict between the intervening party and a non-state actor operating from within the consenting territorial state. This is arguably the case in some instances of the so-called “war on terror.” In such instances, as we shall exemplify shortly through the Kenyan intervention in Somalia – and as invoked by the US administration in the context of targeted killing operations – claims of self-defense can intertwine with the territorial state’s consent. Furthermore, the lawfulness of such consensual interventions can be conditioned on the question whether the consenting state itself is involved in an internal armed conflict with the non-state actor.

Since the term “consent” can allude to a wide variety of situations, this work takes an admittedly wide view of this issue. A consensual intervention, as the term is used in this work, refers to every forcible intervention – unilateral or multilateral – in an internal armed conflict, undertaken in practice, in part or in whole, for the benefit of one of the

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6 Such was the case regarding the American Enduring Freedom operation in Afghanistan. See infra sec. I.2.
8 See Chapter 9 sec. II.1.
parties, regarding which genuine consent can be inferred, whether explicitly or implicitly. In essence, then, a substantial element in the concept of consensual intervention is the partiality of the intervention. Indeed, every non-impartial intervention serves to further the interests of one party to the conflict over the other. Here lies the nexus between partiality and consent: it is reasonable to presume that the party which benefits from the intervention has consented, in some way or the other, to the operation. In this sense, we assume in this work that any de facto non-impartial intervention is consensual, in relation to a certain party, unless the intervention is publically and credibly rebuffed by all parties. For instance, every intervention in an internal armed conflict, in which opposition forces are attacked by the intervener, and is not denounced by the territorial government as an aggressive act is presumably conducted with the government’s consent. Likewise, when an intervention receives the support and cooperation of opposition groups, it is quite possible to deduce that the latter have consented to it. This realization, of course, does not prejudge the legality of the action – it merely allows us to establish that the intervention is consensual, and that the potential legal implications of the consent can be analyzed. However – our wide definition of consensual intervention notwithstanding – when the intervention is not authorized by the Security Council, the question is at its most acute, since it is precisely in these cases where consent might have a powerful legalizing role. Thus, this work will focus primarily on interventions conducted unilaterally.

1.2 Conensual Intervention and Multiple Justifications

In most scenarios of consensual interventions – and bearing in mind their complexity – the justification of consent will frequently be explicitly or implicitly advanced in
conjunction with other, substantive justifications for the intervention. In these instances, the relation between the different justifications should be analyzed.

Forcible interventions, in general, have been historically justified from two distinct points of view. The first view strictly reflects the interests of the intervening state. Such justifications may include interventions for the protection of nationals abroad; interventions as self-defense or counter-interventions aimed to restore a perceived balance of power. As we shall see in later chapters, this point of view was prevalent in the multi-polar era of the 19th and early-20th centuries, although not entirely absent from contemporary discourse. A second set of justifications, more prevalent in the present-day international system, concerns mainly the fulfillment of the rights of the people within the target state, sometimes linked also to the interests of the international community at large. Such justifications, for instance, are found in the core of concepts such as self-determination, humanitarian intervention, and the Responsibility to Protect.

At this stage, the legal validity of justifications according to both points of view is not of our concern. What is important, however, is to note that each one of them can be supplemented by consent. The question whether consent is a legal precondition, in any combination of justifications, is a complex question – some aspects of it will be explored later on in this work. However, as we shall see, the mere fact that consent constitutes but one of several justifications to one instant of intervention does not mean *ipso facto* that it is devoid of legal value of its own.9

Indeed, these justifications often overlap and are many times raised simultaneously. The examples, throughout the decades, are numerous. For instance,

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Britain has justified its 1957 forcible intervention in Muscat and Oman on three distinct grounds. First, it claimed, the intervention was conducted by “request of a friendly ruler” (consent); second, it claimed, “the dissidents have clearly received assistance from outside territories (counter-intervention); and third, it vaguely mentioned “direct British interests.”

France, intervening in Rwanda in 1990 in favor of the Rwandan Hutu regime, facing at the time an imminent defeat by the Tutsi Rwandan Patriotic Front, had justified its intervention both on counts of explicit invitation by Hutu Rwandan president Habyarimana, as well as on its duty to intervene for the protection of French nationals.

Russia, when intervening in the Georgian conflict of 2008 between the central government and the breakaway territories of South Ossetia and Abkhazia, justified its actions both on humanitarian grounds, and on claims of consent by the breakaway authorities – in addition to its immediate reliance on the fact that Russian peacekeepers were attacked by Georgian armed forces. However, this case is more complicated since Russia soon thereafter recognized the independence of these territories, which theoretically allowed it to invoke the doctrine of international collective-self defense between independent states as a justification for its intervention.

In other instances, an invitation to intervene by one party coincides with a self-defense claim by the intervening party. This is a common characteristic of modern transnational armed conflict. For instance, Rwanda’s involvement in the 1996–1997 internal conflict in Zaire/Congo was mainly a self defense action against cross-border incursions by Hutu militias supported by Zaire; but was also a consensual intervention in

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11 See Mel McNulty, From Intervened to Intervener: Rwanda and Military Intervention in Zaire/DRC, in AFRICAN INTERVENTIONIST STATES 173, 176–177 (Oliver Furley & Roy May eds., 2001).
12 See discussion in Chapter 12 sec. III.
favor of the Congolese warlord and president to be Laurent-Desiré Kabila. Likewise, the 2006 Ethiopian intervention in Somalia was justified by Ethiopia *inter alia* as self-defense against Islamist militias; however, their can be no doubt that Ethiopia operated with full consent and cooperation of the Somali Transitional Federal Government. Angola, intervening in support of the government of the Democratic Republic of Congo in 1998, justified its intervention on counts of an "explicit request" by President Joseph Kabila; "legitimate" national interests; and in order to "pre-empt" actions by the Angolan rebel movement UNITA.

An informative recent example for the interaction between consent and self-defense could be found in the 2011 Kenyan operation in Somalia. This case clearly reflects the contemporary tendency of states, when engaged in transnational armed conflicts against non-state actors, to rely on state-consent as an augmentation of other claims. On October 16th 2011, Kenyan forces invaded Somalia aiming to “inflict trauma and damage” on the Al-Shabaab militia, which controls much of south-west Somalia, including the border area with Kenya. Besides being locked in an ongoing armed conflict with the internationally supported Transitional Federal Government of Somalia, Al-Shabaab’s presence on its borders was also harming the interests of the relatively stable Kenyan state.

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14 See Chapter 9 sec. II.4.
17 On the situation in Somalia, see Chapter 9, sec. II.4.
The main motivation for the Kenyan operation thus seems to have been the instability on its borders. However – and perhaps since self-defense claims against decentralized acts by non-state actors can raise legal and political difficulties – Kenya has also justified its actions on counts of consent expressed by the Somali government. This claim was based on an October 18 joint communiqué between the countries, signed two days after the beginning of the Kenyan operation, which called for joint “decisive action” by Somalia and Kenya against Al-Shabaab. The countries pledged, in the communiqué, “to cooperate in undertaking security and military operations, and to undertake coordinated pre-emptive action, and pursuit of any armed elements that continue to threaten and attack both countries.”18 Simultaneously, and in reference to the communiqué, Kenya has notified the Security Council that –

with the concurrence of the Transitional Federal Government of Somalia, [Kenya] has been compelled to take robust, targeted measures to protect and preserve the integrity of Kenya and the efficacy of the national economy and to secure peace and security in the face of the Al-Shabaab terrorist militia attacks emanating from Somalia.19

Somalia’s international public reaction to the invasion was somewhat muffled and vague – a fact that highlights the blurry line between “partial” and “consensual” interventions – ranging from laconically acknowledging the presence of Kenyan troops; to welcoming Kenyan support to the extent that it was only “logistical;” and later to

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distancing itself from the intervention. In the course of these reactions, there have also been conflicting public statements toward the invasion issued by the Prime Minister of Somalia, initially supporting the action, and the President, later expressing objection to it. Thus, there is general confusion concerning the government’s genuine stance regarding the invasion. Nevertheless, the existence of the joint communiqué, the ambiguous initial reaction by Somalia, the potential benefit the Transitional Federal Government could reap from the invasion, and its failure to pursue action against Kenya in the Security Council establishes the reasonable assumption that the Kenyan operation received the consent of Somalia – although the latter attempted to maintain public ambiguity regarding the operation, perhaps for internal political purposes. The Kenyan intervention has accordingly been met by international acquiescence.

Indeed, multiple justifications can understandably lead to political and ethical skepticism, as they can imply that consent was used, in a specific instance, as a pretext for intervention. However, in the legal sphere, the mere fact that an action was justified on a number of different grounds does not necessarily implicate each claim’s separate legality – as long as the claims do not explicitly negate each other. For instance, different justifications can sometimes be mutually complementing, such as in the case of a

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counter-intervention conducted in favor of a beleaguered government facing a foreign-supported armed insurrection. In other cases, consent and other justifications can be raised as alternative claims, still retaining their power – as “fallback” justifications – in case one of the others is found baseless or otherwise exhausted. Such can be the case, as has arguably been with regards to Kenya’s 2011–2012 intervention in Somalia, when a state obtains consent to act forcibly against a hostile organized armed group operating from another state’s territory. Consent in such cases supplements the self-defense claim in at least two different aspects.

First, “pure” self-defense arguments in actions against non-state actors can be controversial or at least hard to prove. Second, obtaining the consent of the territorial state can counter claims that the intervener’s self-defense actions are in violation of the *jus ad bellum* concept of proportionality in self-defense, if the operation is significantly wider than the attack by the non-state actor. For instance, it is one thing to recognize the immediate right of self-defense of the U.S. to act against Afghanistan in light of the attacks of September 11; it is an entirely different thing to justify the decade long presence of American forces there merely on such counts. This is why the international community opted for the establishment of an international security force (ISAF), mandated by the Security Council pursuant to the Bonn Agreement, and concluded

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24 See Chapter 9, sec. III.
between various Afghan delegations.\textsuperscript{28} Granted, the Bonn Agreement was supplemented by a Security Council resolution; however, as was the case with the U.S.-Iraq SOFA of 2008,\textsuperscript{29} it is entirely possible that the agreement could have legitimized the presence of coalition forces in Afghanistan even \textit{absent} such resolution. Indeed, ISAF, which is commanded by NATO, operates in parallel – and generally independent from – the U.S.-led coalition of Operation Enduring Freedom, which too operates, albeit with different rules of engagement, in support of the Afghan government.\textsuperscript{30}

In light of all the above, the mere assertion that consensual interventions are usually justified also by other claims, does not, in itself, have effect over the legal status of such consent; the relation between the different justifications varies according to their combination in specific circumstances.

II. CONSENT: THE DISTINCTION BETWEEN EXTERNAL VALIDITY AND INTERNAL CONSENT POWER

II.1 VALID AND GENUINE CONSENT AS CONFEERING REVOCABLE AGENCY UPON THE EXTERNAL INTERVENER

The concept of consensual intervention is commonly addressed as one, organic term. However, in actuality it encompasses two distinct meanings. The first deals with the issue of the genuineness of consent expressed by a party in relation to an \textit{external} element. It

\begin{footnotesize}
\begin{enumerate}
\item See Chapter 9, sec. I.
\item Agreement on the Withdrawal of the United States Forces from Iraq and the Organization of their Activities during their Temporary Presence in Iraq, U.S.-Iraq, Nov. 17, 2008, S. EXEC. DOC. 09-6 (2009) [hereinafter \textit{SOFA}].
\end{enumerate}
\end{footnotesize}
does not concern itself with the internal legitimacy of the consent expressed, and thus sets aside the question of the consenting party's general legal power to do so. This meaning of the term “consent” encompasses questions such as whether, in a specific set of circumstances, a genuine expression of consent actually took place; or rather, the said expression was a product of external coercion or other consent- vitiating circumstances. For instance, such would be the question whether the presence of U.S. forces in Iraq since June 2004, or November 2008, received the genuine and free-willed consent of the Iraqi government (the latter officially, and repeatedly, invited the U.S. to stay and assist it in stabilizing the country)\(^\text{31}\) or, conversely, was a product of coercion.

Another interesting case, relating to the issue of genuineness of consent, can be found in the massive Syrian involvement and presence in Lebanon between 1976 and 2005. Although Syria claimed, inter alia, that its June 1976 intervention in Lebanon’s bloody Civil War was requested by the Lebanese government – a claim reaffirmed over the years in various treaties\(^\text{32}\) and Lebanese statements \(^\text{33}\) the Security Council, eventually, and following attempts by Syria to force constitutional changes in Lebanon, ceased to view Lebanon’s consent as genuine. This approach was reflected in the arguments\(^\text{34}\) in support of Security Council Resolution 1559, which called for the

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\(^\text{34}\) See id. at 3–4 (statements of the U.S. and France.)
withdrawal of all forces from Lebanon, despite the interesting fact that both Syria and Lebanon itself objected to the resolution.  

Since questions of the types mentioned above concern the relationship between the consenting party and the external actor, they do not address the complex substantive issues that relate to the recognition of rights and powers of parties during internal armed conflicts. Indeed, despite the difficulties in application in specific cases, solutions regarding many questions of this order can be found in widely accepted principles of international law governing the subjects of agreement, coercion and state representation, as these are manifested in the international law of treaties and the laws of state responsibility. Namely, intervention agreements, in this sense, are controlled by fundamental norms such as pacta sunt servanda and the invalidity of coerced acts.

Assuming that genuine consent exists, the law of consensual intervention is complicated by the virtually unlimited capacity of the host-state to withdraw its consent—a right that stems from the prohibition on the use of force and is augmented by article 3(e) of the Definition of Aggression. The almost ever-present right of withdrawal—

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36 See Military Intervention, Regional Organizations, and Host-State Consent, supra note 2, at 209.

37 Pacta sunt Servanda is viewed by some as the “categorical imperative” of international law. See Josef L. Kunz, The Meaning and the Range of the Norm Pacta sunt Servanda 39 AM. J. INT’L L. 180, 180–181 (1945).


39 See, Eliav Lieblich, Intervention and Consent: Consensual Forcible Interventions in Internal Armed Conflicts as International Agreements, 29 B.U. INT’L L. J. 338, 357–366 (presenting a detailed analysis of the law of treaties and the customary law of international agreements, in conjunction with the right of withdrawal); see also Chapter 10, sec. III.1; on article 3(e) of the Definition of Aggression see Chapter 8, sec. I
limited only in situations in which internal consent power, as defined in the next section, is lacking – characterizes consensual interventions as based on a hybrid between rights-creating agreements and instruments that confers authority to act within a host-state territory. As such, consent to forcible intervention can be understood as creating a revocable principal-agent relationship between the consenting party and the intervener.\textsuperscript{40}

This distinction is of substantive importance. It facilitates the realization that while the legality of forcible intervention is sometimes discussed in terms of whether a “right” of intervention exists or not,\textsuperscript{41} the prohibition on the use of force and the principle of sovereignty actually allude to the fact that such relationships, in their core, are closer to fiduciary relationships – in which the intervener acts as the trustee of the consenting party. This notion coincides with the emerging perception of the international community as bearing “responsibility,” rather than rights, concerning the protection of civilians in other states.\textsuperscript{42} Indeed, a “right” of forcible intervention can only be asserted if one adopts the controversial view that certain situations, if considered \textit{erga omnes} violations of international law, can give rise to such a right.\textsuperscript{43}

As an agent, the intervener cannot pursue interests that are contrary to those of the consenting party; although it is unrealistic to expect – in contrast to expectations from domestic administrative bodies – that in the international system the intervener will have absolutely no interests of its own. Furthermore, the intervening-agent is also bound by the

\textsuperscript{40} For a brief explanation of principal-agent relationships see ARNOLD J. GOLDSMITH, BUSINESS LAW: PRINCIPLES AND PRACTICES 401–402 (2010); see also RESTATEMENT (SECOND) OF AGENCY §1 (1958).


\textsuperscript{42} See Chapter 10, sec. II.2.

\textsuperscript{43} On \textit{erga omnes} violations see Case Concerning The Barcelona Traction (Belgium v. Spain), 1970 I.C.J. 3, ¶¶33–34 (Feb. 5); Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) 2004 I.C.J. 136, ¶155 (Jul. 9).
treaty obligations of the consenting party: powers that the consenting party itself does not possess cannot be conferred to it.44

II.2 INTERNAL CONSENT POWER: BETWEEN EFFECTIVE CONTROL AND LEGITIMISM

The second meaning of the concept of consent alludes to the substantive question of internal consent power – meaning, the material consent-capacity of the internal actors.45 Here, we assume that the consent is genuine, and turn to analyze the legal implications of the consenting party’s characteristics. Namely, we consider whether the consenting party represents the state, or whether it gained, in any other way, status that allows it to potentially speak for a certain community. Essentially, thus, questions of internal consent power are questions of recognition and legitimacy, in the wide sense of these terms. Perhaps as opposed to questions regarding genuineness of consent, analysis of the concept of internal consent power gives rise to many perplexing legal questions.

Logically, for legally valid consent to materialize – meaning, consent that can potentially serve to legitimize a forcible intervention – both elements of consent must exist. For instance, in a specific case, consent must not only be freely given, but also be expressed by an actor possessing internal consent power. In the latter context, international law’s centuries-old “pendulum swing” between considerations of de facto effectiveness and de jure legitimacy as generators of rights has decisive legal importance.

The struggle between effective control and forms of substantive legitimacy as determinants of sovereignty has deep historical roots within the philosophy of

44 See Hargrove, supra note 5, at 116–117; Military Intervention, Regional Organizations, and Host-State Consent, supra note 2, at 215.
45 Elsewhere, I have referred to the distinction between external genuineness and internal legitimacy as “procedural” versus “substantive” questions of consent. See Lieblich, supra note 39, at 344–346.
international law. Prior to the French Revolution of 1789, the prevalent theory of sovereignty was based on legitimism, according to which sovereignty was a corollary of a divine or historic right of the ruler, and not of *de facto* reality.\(^4\) Legitimism was closely linked to the centuries-old concept of the universal jurisdiction of the Pope and the Holy Roman Emperor, thought to extend well beyond the territories that were actually under their physical control.\(^4\)

However, already in the 17\(^{th}\) and 18\(^{th}\) centuries, the pioneers of international law have begun to explore a rival doctrine – in which sovereign power, as recognized on the international level, was attached to *de facto* control over territory. The emergence of this doctrine was a direct challenge to the ostensible universal jurisdiction of the Pope and Emperor, and correlated with the rise of states in Europe;\(^4\) it was related to the understanding that the “subjectivity of value” prevails over natural, religious or monarchic sources of authority.\(^4\) The most immediate result of the challenge to legitimism was the realization that revolutionary removal of monarchs can be legally possible under certain situations.\(^5\) According to Lauterpacht, international jurists such as Grotius, Pufendorf, Bynkershoek and Vattel were willing to recognize the effective sovereignty of revolutionaries, even if temporarily. They saw, at large, the principle of effective control as a practical necessity to maintain stability; Vattel viewed the principle, in addition, as an important aspect of the principle of non-intervention, as the term was

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\(^4\) **Anne Orford,** *International Authority and the Responsibility to Protect* 143–150 (2011).

\(^4\) *Id.* at 150.


classically understood. This link between effectiveness and non-intervention, connected, in later times, also to the principle of self-determination, has been a recurring feature of the debate regarding questions of recognition and intervention throughout the centuries.

Legitimism witnessed a doctrinal comeback in the beginning of the 19th century. The challenge posed by the French Revolution – in which the ancient monarchy was overthrown – and the subsequent Napoleonic Wars has motivated the conservative powers of Europe to rejuvenate the concept. The Holy Alliance – a coalition of the monarchies of Russia, Austria and Prussia, which lasted roughly from 1815 until 1848 – sought to solidify the achievements of Napoleon’s defeat and to curtail potential revolutionary movements, by promoting the principle of legitimism, inter alia through intervention on behalf of beleaguered rulers. This doctrine was in stark contrast to the general British policy of non-intervention, and thus declined with the rise of the latter’s power. Accordingly, legitimism has eroded through the decades of the 19th century, as the effective control doctrine regained ground in practice. Therefore, revolutionary governments, throughout the 19th century and the first half of the 20th century – and especially after the fall of the great monarchies in 1918 – were not categorically refused

51 See HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 99–102 (1948) (providing a summary of the approaches of the mentioned pioneers of international law); see also BRAD R. ROTH, GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW 136 –137 (2001).
52 See, e.g., ALEX J. BELLAMY, RESPONSIBILITY TO PROTECT 16 (2009) (regarding self-determination and non-intervention in the context of decolonization.)
53 See, e.g., MONTAGUE BERNARD, ON THE PRINCIPLE OF NON-INTERVENTION (1860).
54 See Roth, supra note 50, at 136, 142–144.
55 See GUGLIELMO FERRERO, PROBLEMS OF PEACE: FROM THE HOLY ALLIANCE TO THE LEAGUE OF NATIONS 34–35 (1919); see also GRANT, supra note 46, at 8 –9; 1 LASSA OPPENHEIM, INTERNATIONAL LAW, A TREATISE: PEACE §139 (2nd ed., 1912), available at http://books.google.com; AUGUSTUS GRANVILLE STAPLETON, INTERVENTION AND NON-INTERVENTION; OR, THE FOREIGN POLICY OF GREAT BRITAIN FROM 1790 TO 1865 27–37 (1866) (contrasting between the Holy Alliance and British policies).
56 GRANT, supra note 46, at 9.
recognition merely on counts of their revolutionary nature, or, on the other hand, their use of violence in their rise to power.\textsuperscript{57}

Thus, the effectiveness doctrine – a seemingly amoral perception concerning the recognition of the rights of entities in international law – was adopted by prominent legal philosophers of the first half of the 20\textsuperscript{th} Century, such as Hans Kelsen.\textsuperscript{58} Indeed, this preference corresponded to the roots of the modern international system: as realistically commented by Lauterpacht, legitimist tests for sovereignty have become “clearly illogical” in the new world, "in which all governments owe[d] their origin to a revolutionary event in a more or less distant past."\textsuperscript{59}

The principle of territorial effective control has thus trickled to virtually every field of international law that addressed the question of recognition rights and powers of entities, in internal armed conflicts or otherwise. For instance, the Montevideo Convention of 1933, which laid down the most authoritative pronunciation of the effective control standards for the recognition of states, reflected this dominant idea.\textsuperscript{60} The belligerency and insurgency doctrines, which served as the main prisms through which to analyze the status of entities during an internal armed conflict, were too based mainly on effectiveness criteria.\textsuperscript{61}

However, as pendulum-swings go, triumphs of effectiveness have constantly led to legitimist reactions and vice versa. These reactions and counter-reactions were by no means limited to the old debate regarding monarchic legitimism. Accordingly, Roth

\textsuperscript{57} See Lauterpacht, supra note 50, at 103–108.
\textsuperscript{58} Hans Kelsen, General Theory of Law and State 220–221 (1961); cited in Roth, supra note 50, at 137.
\textsuperscript{59} Lauterpacht, supra note 50, at 105.
\textsuperscript{60} Convention on the Rights and Duties of States (Montevideo Convention), Dec. 26, 1933, 165 L.N.T.S. 19.
\textsuperscript{61} See Chapters 5–6.
identified four historical challenges to effectiveness in the last two centuries: divine right legitimism (the Holy Alliance); constitutional legitimism (the Tobar Doctrine); cold-war ideological legitimism (Brezhnev and Reagan Doctrines); and the concept of democratic legitimism, based on the perception of democratic governance as a right—a “democratic entitlement,” as phrased famously by Thomas Franck. It is also possible to identify trends of non-recognition of governments set up by external aggression; as well as a growing tendency towards regionalism and multilateralism when assessing parties to internal armed conflicts. In our context, as we shall elaborate later on, a potential hybrid has emerged: one that does not neglect the importance of effectiveness on the one hand, but binds this concept with substantive considerations of civilian protection and human security. For now, it suffices to keep in mind that the rivalry between effectiveness and legitimacy has been, for centuries, a key driving force behind international law’s development. As such, this ever-present interaction affects our contemporary perception of the modalities of internal consent power.

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62 ROTH supra note 50, at 136–152.
63 See also Sean D. Murphy, Democratic Legitimacy and Recognition, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 123, 140 (Gregory H. Fox & Brad R. Roth eds., 2000).
64 The Tobar Doctrine of 1907, accepted by many American states (including the U.S.), denied recognition from governments seizing power unconstitutionally. See ROTH, supra note 50, at 144–145; Murphy, supra note 62, at 141.
65 See also, Chapter 8, sec. II.
67 See Murphy, supra note 62, at 151.
68 Regionalism means, in this context, the deference shown by the international community in recognition questions to decisions by regional or sub-regional bodies. See, for instance, the universal non-recognition of Somaliland, which follows the policy of the African Union. Benjamin Farley, Calling a State a State: Somaliland and International Recognition, 24 EMORY INT’L L. REV. 777, 809–815 (2011). Multilateralism refers to the general aversion from unilateral solutions to internal armed conflicts, as condoned, for instance, by the opponents of Kosovo’s 2008 unilateral declaration of independence. See the positions expressed in U.N. SCOR, 63rd Sess., 5839th mtg., U.N. Doc. S/PV.5839 (Feb. 18, 2008).

The tragic series of armed conflicts that have been taking place in the Democratic Republic of Congo (DRC) allows us to understand the different dynamics of intervention and consent in a complex contemporary setting where many interests converge, and ethnic identities transcend borders and perceptions of sovereignty. We shall not, for now, analyze the legality of the actions of the various parties; we shall only use this conflict as a factual exemplification for the dynamics of consensual interventions, thus facilitating the understanding of their different characteristics.


Mobutu Sésé Seko has ruled Zaire (today, the DRC) since 1965. In 1994, following the genocide committed by Hutu elements against the Tutsis in neighboring Rwanda, and the subsequent overthrow of the Hutu regime by Rwandan Tutsi warlord Paul Kagame, Hutu refugees fled to Zaire fearing retaliation by the new Tutsi government. Intermingled with the refugees were members of the extreme Hutu militias – the *interahamwe* – that have played a pivotal role in the Rwandan Genocide. The presence of genocidal elements in Eastern Zaire spawned a series of tragic conflicts which are yet to be resolved. These Hutu militias gained effective control over the refugee camps in east Zaire, and used them as bases to launch attacks against Tutsis in east Zaire and across the border into Rwanda. Doing so, they were supported to varying extents by Mobutu’s army.
In late 1996, some of Mobutu’s rivals formed the Alliance of Democratic Forces for the Liberation of Zaire (ADFL) – with encouragement and support from Rwanda, which became increasingly frustrated by the cross-border attacks launch against it from East Zaire.69 Laurent-Desiré Kabila, a long time foe of Mobutu, emerged as the ADFL’s leader. Thereafter, the ADFL, supplemented by Rwandan (RPA)70 and Ugandan forces, moved to weaken the *interahamwe* in East Zaire's refugee camps. 71

Capitalizing on their early successes in East Zaire, the opposition forces staged an assault westward toward Kinshasa – Zaire’s capital – defeating Mobutu’s government forces and the Rwandan Hutu militias supporting him, and sparking a full-scale struggle for control over the state apparatus. In subsequent months Angolan troops have also joined to aid the rebels, while Angolan dissidents (UNITA) joined to support Mobutu, as they enjoyed Mobutu’s acquiescence concerning their use of Zaire's territory to stage attacks against Angola.72 By mid 1997 Kabila’s forces were on the outskirts of Kinshasa.73 Mobutu fled the country and on May 17th, 1997, Kabila declared himself as president and established an authoritarian regime, renaming the state the Democratic Republic of Congo (DRC).

The first Congolese Conflict exemplifies some of the complex dynamics of consensual intervention. For instance, most of the interventions in this conflict involve retroactive consent – instances in which a party's consent was granted *ex post*, after the intervening power has already made forcible moves in the target state's territory. Such

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70 Rwandan Patriotic Army, an organ of Rwandan president Kagame’s political party, the Rwandan Patriotic Front. *See id.* at 177–179.
71 *See id.* at 180–181.
72 See Norrie McQueen, *Angola, in AFRICAN INTERVENTIONIST STATES*, *supra* note 11, at 93, 104–105.
73 *See Thom, supra* note 13.
cases, naturally, raise grave concerns of coercion or pretext. The retroactivity of the opposition's consent, in this stage of the Congolese conflict, is manifested in the fact that the intervening powers (except Angola) were actively involved in the formation of the ADFL – the same opposition body that they came later to support militarily. Obviously, this raises serious questions regarding the capacity of the ADFL to express independent consent (setting aside the issue of legality). Retroactive consent can be found also in the relations between the government and the Interahamwe and UNITA, since these elements were already present in Zaire by the time the conflict started. These relations are of course complicated by the fact that these parties are non-state actors. As aforementioned, consent can come in many forms and expressed proactively or retroactively, provided that it is genuine. Instances of retroactive consent will require a high threshold of proof that the consent was not coerced. It is therefore reasonable that retroactive consent establishes a strong presumption against the intervening party.


The end of the first Zaire/Congo conflict saw Laurent Kabila as president of the DRC, while many foreign forces were still present on its soil. On July 27th, 1998, Kabila ordered all foreign forces – and Rwandan forces in particular – to leave the country:

The Supreme Commander of the Congolese National Armed Forces, the Head of State of the Republic of the Congo and the Minister of National Defence, advises the Congolese people that he has just terminated, with effect from this Monday 27
July 1998, the Rwandan military presence which has assisted us during the period of the country’s liberation. … he would like to thank all of the Rwandan people for the solidarity they have demonstrated to date. He would also like to congratulate the democratic Congolese people on their generosity of spirit for having tolerated, provided shelter for and trained these friendly forces during their stay in our country. This marks the end of the presence of all foreign military forces in the Congo.74

However, Rwanda and Uganda were unwilling to withdraw their forces.75 Uganda claimed that Kabila did not actually withdraw his consent to the presence of its forces, *inter alia* because Uganda was not mentioned explicitly in his statement.76 The withdrawal of consent by Kabila was perceived by the ethnic Tutsis of East Congo as a threat, since they relied on support from Rwanda's Tutsi controlled government. This prompted them to form the Rally for Congolese Democracy (RCD) and a renewed internal and internationalized armed conflict erupted on August 1998.77 With the active participation of Rwanda and Uganda, the rebel forces – mainly the RCD, the newly formed and Uganda-supported Movement for the Liberation of Congo (MLC) and anti-Kabila elements from within the former ADFL – swiftly took over resource rich areas in Eastern Congo. The DRC, in retaliation, sought the support of Hutu militias (known as the FDLR since 2000) – the same elements that supported, in the first conflict, President Kabila’s arch-enemy Mobutu – and urged them to retaliate against Tutsis.

74 Armed Activities on the Territory of the Congo (DRC v. Uganda), 2005 I.C.J. 168 (December 19) ¶49 [hereinafter *DRC v. Uganda*].
76 Another claim by Uganda was that the DRC’s consent to its intervention was renewed in the Lusaka Agreement of 1999. See Congo v. Uganda, *supra* note 73, ¶¶92–105.
Thus, this stage of the Congo conflict involved a withdrawal of consent by the DRC’s government, which was all but ignored by the intervening powers; and, once again, retroactive consent to Ugandan and Rwandan intervention – by the new rebel groups. When Kabila’s government started to lose ground rapidly, it turned to invite Namibia, Zimbabwe, Angola and Chad to assist it.\textsuperscript{78} These circumstances led to the eruption of a multi-party war by September 1998.\textsuperscript{79}

The Zimbabwean and Namibian intervention in favor of Kabila was based on proactive consent, as neither of these state’s forces were forcibly on DRC territory beforehand;\textsuperscript{80} the same can be said of the intervention of Chad.\textsuperscript{81} Conversely, Angola’s intervention was arguably based on retroactive consent, as Angolan forces assisted Kabila previously in the overthrow of Mobutu’s regime.\textsuperscript{82} All of these forces were invited to intervene explicitly.\textsuperscript{83}

Uganda and Rwanda justified their actions on counts other than mere consent. The intervening powers (mainly Rwanda) also raised concerns of genocide against the Tutsis in DRC – essentially invoking the humanitarian intervention doctrine, even if not by name;\textsuperscript{84} and self defense against continuing cross border actions by various militias.\textsuperscript{85} Uganda has also raised the claim of counter-intervention, as it alleged that the DRC has invited Sudan – Uganda’s rival – to support it in various conspiracies with opposition

\textsuperscript{78} For a detailed survey of the various players in the Second Congolese Conflict and their interests, see Gary Cleaver & Simon Massey, \textit{DRC: Africa’s Scramble for Africa, in AFRICAN INTERVENTIONIST STATES}, supra note 11, at 193.


\textsuperscript{80} See id. at 20–22.

\textsuperscript{81} See id. at 25.

\textsuperscript{82} See id. at 22.

\textsuperscript{83} See id. at 20; see also McQueen, supra note 15, at 108.

\textsuperscript{84} See \textit{Congo at War}, supra note 78, at 6. This example highlights the relation between humanitarian intervention and consent; the former might be looked upon, essentially, as intervention with consent of the opposition forces, when they are subject to mass atrocities. We discuss this in Chapter 12, sec. IV.

\textsuperscript{85} See \textit{Congo at War}, supra note 78, at 14, 16; Congo v. Uganda, supra note 73. ¶¶ 106–109.
groups against Uganda. In this sense, the conflict is a clear example of the problem of multiple justifications, mentioned in Section II above.

The Lusaka Agreement, concluded in 1999 in an attempt to end the conflict did not hold. However, it called for the establishment of a U.N. peacekeeping mission (MONUC), which, upon its establishment, was not mandated to use force. In January 2001 Laurent Kabila was assassinated, to be replaced by his son Joseph. Throughout 2002 Joseph Kabila managed to solidify his rule over the DRC, much with the help of his foreign allies. In July and September 2002 Rwanda and Uganda respectively signed a peace treaty with the DRC. Subsequently, Rwanda withdrew its troops. On December 17th 2002 the various Congolese parties signed an agreement to form a transitional government, thus, de jure, bringing an end to this stage of the Congolese conflict. Uganda withdrew its troops on June 2, 2003. A transitional government was formed in the DRC on July 18th, 2003. However, as we shall see, parts of the state still remain in conflict, in varying intensities.

86 See Congo at War, supra note 78, at 17–19; Congo v. Uganda, supra note 73, ¶¶ 120–127.
87 MONUC was established in S.C. Res. 1279, U.N. Doc. S/RES/1279 (Nov. 30, 1999), pursuant to article 11(a) of the Lusaka Agreement, which provided that “The United Nations Security Council, acting under Chapter VII of the UN Charter and in collaboration with the OAU, shall be requested to constitute, facilitate and deploy an appropriate peacekeeping force in the DRC to ensure implementation of this Agreement.” Although the agreement asked for a Chapter VII resolution, peacekeeping forces are usually operating under Chapter VI, and this is indeed the chapter according to which MONUC was initially founded.
88 Int’l Crisis Group, From Kabila to Kabila, Prospects for Peace in the Congo 1 ICG Africa Report No. 27 (Mar. 16, 2001).
89 See McQueen, supra note 15, at 107.
III.3 The Conflict in the Kivus, 2004–2010: Pro-Government Intervention by Rwanda and Forcible MONUC Operations

The Conflict in the Kivus is a direct continuation of the Second Congolese Conflict, the end of which did not see a solution to the main root of the conflict: the ethnic tension between the Rwandan Hutu extremists of the FDLR present in Eastern Congo and Tutsi groups supported by Rwanda; and the economic interests supplementing the conflict.91

Laurent Nkunda was a commander in the Rwandan backed RCD during the Second Congolese Conflict. After that conflict ended de jure in 2003, and following a brief stint with the new transitional government’s forces, Nkunda broke with the government to form a new force in the Eastern Congo provinces of the Kivus – the National Congress for the Defense of the People (CNDP). The CNDP was based on former RCD troops.92 Nkunda’s newly formed organization, much like the RCD before it, received aid from Rwanda – albeit covertly.93

In 2004, after claiming that genocide against the Tutsis in Eastern Congo is taking place (an allegation dismissed by the U.N.), Nkunda’s forces took control over the city of Bukavu in South Kivu, to withdraw only after U.N. led negotiations and international pressure.94 In subsequent years, Nkunda continued to steadily build his forces, while occasionally clashing with the DRC’s army and calling for the overthrow of the Kabila government and the removal of Hutu FDLR forces from the DRC.

92 See id. at 4–6.
94 Crisis in the Kivus, supra note 90, at 6, 11–12, 19–20.
In 2007 the conflict intensified, as MONUC forces occasionally assisted DRC forces against the CNDP in Kivu. In 2008, clashes between the CNDP and the FDLR worsened. In the end of that year, when Nkunda’s forces took over a strategic area in North Kivu, MONUC forces attacked the CNDP with heavy weaponry, but were not successful in having significant impact over the situation.

MONUC’s operations in the DRC were conducted, at this stage, under a Chapter VII mandate for the protection of civilians, to be undertaken in “close cooperation” with the DRC’s government. The DRC, accordingly, has viewed MONUC's forcible intervention favorably and wholeheartedly consented to it. In the discussion leading to the adoption of Security Council resolution 1856, in which MONUC’s mandate was significantly expanded, the representative of the DRC expressed his government's consent to this move:

[T]he Government of the Democratic Republic of the Congo welcomes this new resolution. We are especially pleased that MONUC missions, in close cooperation with the Government, are being strengthened and consolidated in the protection of the civilian population . . . and support for security sector reform and for the territorial integrity and political independence of the Democratic Republic of the Congo. The Congolese Government and people therefore expect these new United Nations forces to be deployed rapidly…

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Thus, MONUC’s forcible intervention was a Chapter VII based intervention, supplemented by explicit consent on part of the DRC. As we shall elaborate shortly, the Security Council had the power to order such an intervention even without such consent – but this would have been far more difficult politically, and to some extent, also legally.

In parallel with the strengthening of MONUC, the DRC invited Rwanda on December 5, 2008 to intervene on in its behalf in the Kivu Conflict. The premise of the surprising deal (surprising, since merely five years before, the DRC fought a bitter war to oust Rwanda from its territory), was that Rwanda would be allowed to act against the Hutu FDLR in the DRC’s territory; in return, Rwanda would cease its support of Nkunda, and assist in removing him from influence. From that point on, the CNDP was effectively neutralized as an opposition force, as Nkunda was replaced, and CNDP troops started a process of integration into the army of the DRC.97 On January 20th, 2009, joint military operations by Rwanda and the DRC commenced, and two days later Nkunda was arrested in Rwanda when trying to flee.98 On February 25th the joint operations officially ended, and Rwandan troops subsequently withdrew.99 These joint operations by the DRC and Rwanda represent a relatively clear cut proactive and explicit consensual forcible intervention by a state, on behalf of a government.

On March 23 of that year, the CNDP signed a peace treaty with the government.100 However, the FDLR was only partially weakened by the joint

97 See A Comprehensive Strategy to Disarm the FDLR, supra note 92, at 2, 3–6.
98 Id. at 6.
99 Id. at 9.
operations. In May 2009 the FDLR launched deadly attacks against civilians, spawning military operations by the DRC and MONUC, which ended in December 2009. Joint military action by the DRC and MONUC continued in 2010.

However, in April 2010, Joseph Kabila's government has called for the termination of MONUC's mandate, and demanded the complete withdrawal of all foreign forces by mid-2011. Nonetheless, as of February 2010, MONUC's mandate (renamed MONUSCO) has been extended until June 2012. The interaction between the DRC and the Security Council mandated forces on its territory exemplify the relation between consent and Chapter VII interventions, which we will now turn to address.

IV. CONSENT AND SECURITY COUNCIL AUTHORIZED INTERVENTIONS: A COMPLEX INTERACTION

IV.1 CHAPTER VII RESOLUTIONS AND CONSENT

Arguably, forcible interventions authorized by Security Council resolutions, adopted in accordance with Chapter VII of the U.N. Charter, should not fall with the scope of this work – since these are legally based on the existence of a threat to international peace and security, and not on the expression of consent. However, closer analysis exposes that Chapter VII interventions are not entirely irrelevant to the analysis of the problem of consensual intervention.

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101 See A Comprehensive Strategy to Disarm the FDLR, supra note 92, at 9–13.
102 Id. at 12.
104 MONUC was renamed MONUSCO on May 28th, 2010, with the adoption of S.C. Res. 1925, U.N. Doc. SC/RES/1925 (May 28, 2010).
For instance, as we have seen, during the Kivus Conflict, the DRC has explicitly consented to the expansion of the mandate of MONUC on its territory. However, the Security Council, in the relevant resolutions, did not refer explicitly to the DRC’s consent as a legal basis for MONUC’s forcible intervention. Had the DRC expressed objection to the expansion of MONUC’s mandate, would the legal situation necessarily be different? The *prima facie* answer is a negative one. As aforementioned, Chapter VII, unsurprisingly, does not require consent as a *legal* precondition for enforcement measures, once a threat to peace, breach of peace or aggression has occurred.

Nevertheless, in practice, the Security Council virtually always seeks the consent of the “target” or “host” state when authorizing forcible enforcement measures in the context of internal conflicts. This tendency was especially evident in the debate on possible intervention in Darfur, where lack of governmental consent on part of Sudan seems to have played a significant part in Security Council decision making. Similarly, even the 1999 Australian-led intervention in East Timor, effectively leading to the...
territory’s independence from Indonesia, was conducted with Indonesia’s consent.\(^\text{111}\) In fact, the Security Council has not explicitly authorized a partial, forcible intervention in an internal armed conflict \textit{against} the will of an incumbent, functioning and recognized government, until the 2011 intervention in the Libyan conflict.\(^\text{112}\) Even in that exceptional case, the Security Council was careful, in practice, to tailor its resolution around the demand of the Libyan opposition and the Arab League that any forcible action will be conducted “with no boots on the ground,” meaning with no use of ground forces.\(^\text{113}\) Accordingly, resolution 1973 authorized all necessary measures to protect civilians, “while excluding a foreign occupation force of any form on any part of Libyan territory.”\(^\text{114}\)

With the impending final defeat of the forces loyal to Libyan ruler Qaddafi, and the widespread recognition of the opposing National Transitional Council as the lawful authority of Libya, the Security Council was quick to link the continuing mandate granted in resolution 1973 to the consent of the new authorities. It stressed, in resolution 2009, that the termination of the mandate would be possible, “as appropriate and when circumstances permit,” “in \textit{consultation} with the Libyan authorities.” [emphasis added]\(^\text{115}\) The mandate for forcible measures was finally terminated in October 2011, after the “Declaration of Liberation” by the Libyan National Transitional Council.\(^\text{116}\)


\(^\text{112}\) See \textit{Libya and the Responsibility to Protect: The Exception and the Norm, supra} note 108, at 1 –2.


The tendency of the Security Council to seek consent, even when authorizing a non-partial, Chapter VII based forcible intervention is hardly surprising. Consent naturally facilitates the operation; moreover, it can bolster the political legitimacy of the authorizing resolution. Indeed, Bowett, while acknowledging this tendency, explained it in terms of “political wisdom” rather than on “legal necessity.” However, upon closer look, consent can also fortify the legal merits of the action.

First, it can mitigate challenges arising from the potential obligations the Security Council owes to the principle of non-intervention, as entrenched in article 2(7) of the U.N. Charter. Indeed, if the Council can link its enforcement actions to the consent of an element within the target state that enjoys some legitimacy – setting aside, for now, the nature of such legitimacy – it would be hard to claim that the Council is in violation of the principle of non-intervention in its substantive sense. Conversely, if a legitimate entity within the target state explicitly objects to a Chapter VII intervention – although it would supposedly benefit it – it is hard to envision that the Council will proceed, or

117 Bowett, supra note 107, at 412.
118 Arguably, the presence of consent might answer a claim according to which the U.N. is violating the principle of non-intervention entrenched in Article 2(7) of the Charter. Granted, Article 2(7) provides that the principle of non-intervention “shall not prejudice” enforcement actions taken pursuant to a Chapter VII resolution. However, this does not mandate that the principle ceases to apply – as a whole – where Chapter VII is invoked. It is reasonable to interpret this reservation as stating that the principle of non-intervention cannot, in itself, preclude a Chapter VII intervention; however, this does not mean that the principle can be disregarded entirely by the Council when acting through Chapter VII. This interpretation is also reflected in Security Council practice: many Chapter VII resolutions affirm the “sovereignty” and “independence” of target states, notwithstanding the interventions authorized by these resolutions. This is true to non forcible interventions as well as forcible ones. See e.g., S.C. Res 1511, ¶13, U.N. Doc. S/RES/1511 (Oct. 16, 2003) (“authorizing” a multinational force in Iraq, while reaffirming “the sovereignty and territorial integrity of Iraq”); S.C. Res 1843, supra note 94 (expanding the mandate of MONUC and reaffirming “its commitment to respect the sovereignty, territorial integrity and political independence of the Democratic Republic of the Congo”). For a similar argument, see Đura Nincić, THE PROBLEM OF SOVEREIGNTY IN THE CHARTER AND IN THE PRACTICE OF THE UNITED NATIONS 175 –176 (1970) (exemplifying that in its resolutions regarding the Katanga affair in 1960, the Security Council did not claim an exemption from Article 2(7), but endeavored to show that it acts in accordance with that article); see also Bowett, supra note 107, at 423–424.
indeed be justified to do so,\textsuperscript{119} with its enforcement measures, unless an utter humanitarian catastrophe is taking place.

For instance, imagine that during the discussions regarding the 2011 Chapter VII intervention in Côte d’Ivoire,\textsuperscript{120} Alassane Ouattara – recognized internationally as the country’s lawful president – would have unequivocally proclaimed that his standoff with lingering ruler Laurent Gbagbo should be strictly resolved by Ivorians, without any international involvement. In such a case, and in the circumstances of the Ivorian crisis, it seems implausible that the Council would have authorized an action meant ultimately to reinstate Ouattara, since it would be not only viewed as a blunt intervention in the internal affairs of Côte d’Ivoire, but it would also be entirely counterproductive.\textsuperscript{121} Relying on a formally “impartial” mandate for the forcible protection of civilians, as was done in the Côte d’Ivoire case,\textsuperscript{122} would not have sufficed in our hypothetical: because of the fact that at that stage Gbagbo was considered the obvious culprit, the intervention would have still been perceived as conducted for the benefit of Ouattara.

In the same vein, one can analyze the 1994 Security Council authorized intervention in Haiti in light of the dynamics of consent, or its absence. After the democratically-elected president Jean Bertrand Aristide was ousted by a military junta in 1991, he was reluctant to receive any forcible external assistance.\textsuperscript{123} This disinclination might have accounted for the fact that a forcible intervention aimed to reinstate Aristide,

\textsuperscript{119} Compare Jeff McMahan, \textit{Humanitarian Intervention, Consent and Proportionality, in ETHICS AND HUMANITY: THEMES FROM THE PHILOSOPHY OF JONATHAN GLOVER} 44, 54 (N. Ann Davis et al. eds., 2010) (“whenever an external agent undertakes a humanitarian intervention in the absence of compelling evidence that it is welcomed by the intended beneficiaries, it takes a significant moral risk.”)


\textsuperscript{121} Compare \textit{Libya and the Responsibility to Protect: The Exception and the Norm}, supra note 108, at 6.

\textsuperscript{122} This issue is addressed in Chapter 11, sec. I.3.

\textsuperscript{123} David Wippman, \textit{Pro-democratic Intervention by Invitation, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW}, supra note 62, at 293, 301.
was prescribed by the Security Council only three years later – and two days after Aristide expressed his despair regarding the prospects of a political solution to the crisis, and requested that the international community take “prompt and decisive action” against the junta. Thus, it is hard to argue that Aristide’s consent was irrelevant to the Security Council’s decision to authorize forcible intervention.

Second, the role of consent in the legitimization of Security Council mandated interventions is somewhat contingent upon our understanding of the nature of that body. Indeed, the traditional perception views the Security Council as a body enjoying almost unfettered discretion to act once it determines the existence of a threat to international peace; and that also in the process of making such determination it has wide (but not unlimited) discretion. Should this be our understanding of the role of the Council, consent indeed seems to play a minor normative part, if at all, in its considerations.

However, it can also be argued that the Council is limited by proportionality and necessity requirements, potentially stemming from several sources: these can be constructed directly from the text of the U.N. Charter; deduced from the emerging idea of global administrative law, attributing to the Council executive characteristics that

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126 See Michael Byers & Simon Chesterman, “You, the People”: Pro-Democratic Intervention in International Law, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, supra note 62, at 259, 287 (“Resolution 940 was clearly adopted in response to that [Aristide’s] request, coming as it did only two days later.”)
128 Tzanakópoulos, supra note 126, at 64 –67 (identifying such requirements in the relations between Articles 39 and 41 of the U.N. Charter).
spawn administrative-legal limitations on its exercise of discretion;\textsuperscript{129} or, at least as a residual claim, traced to well established notions of just-war theory that arguably ought to guide the Council’s discretion.\textsuperscript{130} If we accept the latter approaches, consent by internal entities can, respectively, reflect the administrative-deliberation of the Council, as well as contribute to the action’s legitimacy from a just-war perspective. For instance, U.S. President Obama has highlighted several justifications for the 2011 military action in Libya, among them: (a) the prospect of violence on a horrific scale (just cause and last resort); (b) the unique ability to stop the atrocities (reasonable prospects of success); (c) the existence of an international mandate (right authority); and (d) the plea for help from the Libyan people (opposition consent as augmentation for other just-war justifications).\textsuperscript{131} We shall elaborate on consent and just-war, in a related context, in Chapter 12.

Third, in situations where the initial forcible action was not mandated by the UNSC, consent expressed by the target state can, in some cases, immune the Council from claims that in adopting a later resolution, it has legitimized an illegal situation \textit{ex post}. Such might be the case with Resolution 1546, in which the Council adopted a text arguably conditioning the presence of a multinational force (effectively – the coalition forces) in Iraq, on the consent of the Iraqi Interim Government:


\textsuperscript{130} See generally Michael W. Brough et al., \textit{Introduction, in Rethinking the Just War Tradition} 1, 1 –3 (Michael W. Brough et al. eds., 2007).

[The Security Council] notes that the presence of the multinational force in Iraq is at the request of the incoming Interim Government of Iraq and therefore reaffirms the authorization for the multinational force under unified command established under resolution 1511 (2003), having regard to the letters annexed to this resolution.\textsuperscript{132}

Fourth, receiving state consent can reconcile, to a certain extent, the need to forcibly intervene in internal armed conflicts with the principle of “sovereign equality,” as enshrined in Article 2(1) of the U.N. Charter, which applies also to the Security Council.\textsuperscript{133}

In light of the above, while lack of consent – in itself – is not sufficient to annul the Council’s authority to take such actions,\textsuperscript{134} consent might add to the political and legal legitimacy of Chapter VII interventions. Once we realize that consent does play a part in Security Council considerations, it is worthwhile to consider whose consent makes a difference and under what circumstances. In this sense, Chapter VII interventions – while not its main focus – are indeed relevant to this work.

IV.2 Chapter VII Resolutions and Withdrawal of Consent

As discussed in Section II.1, withdrawal of consent to a forcible intervention is all but an absolute right. Does the same rule apply when the intervening force is mandated by the Security Council? Returning to the Kivus Conflict, in April 2010, the DRC has called for the termination of MONUC, and asked for the complete withdrawal of all foreign forces

\textsuperscript{132} S.C. Res. 1546. supra note 31, ¶9 (emphasis added).
\textsuperscript{133} Jennifer Welsh, Civilian Protection in Libya: Putting Coercion and Controversy Back into RtoP, ETHICS & INT’L AFFAIRS 1, 4 (2011).
\textsuperscript{134} Bowett, supra at note 107, at 414–415.
by mid-2011. Can such actions alter the legal position of operations like MONUC? Recall, that the establishment a U.N. peacekeeping force in the DRC was requested explicitly by the parties to the Lusaka Agreement of 1999. Accordingly, Security Council resolution 1279 noted this request, and established MONUC, mainly mandating it to conduct missions of liaison, observation, and information gathering. Resolution 1279 was based on Chapter VI of the Charter, which authorizes the Council to make recommendations. Therefore, in this initial stage, since the resolution established a neutral peacekeeping force, the DRC’s consent – and in practice, the opposition’s consent as well – was indeed constitutive with regards to MONUC’s mandate.

However, since 2003, MONUC has been operating under a Chapter VII mandate, and since 2008 its mandate has been expanded to include forcible intervention, as resolution 1843 authorized “robust rules of engagement” and stressed MONUC’s role in the protection of civilians. From this point on, and since a threat to international peace and security was established, the DRC’s consent, as aforementioned, was not legally necessary, in the strict sense, to authorize the forcible operations by MONUC. Therefore, it must follow that a withdrawal of such consent could not preempt the authority of the Security Council, irrespective of the fact that the initial establishment of MONUC was done pursuant to the request of the parties to the Lusaka agreement.

136 See supra, note 86.
138 Chapter VI recommendations, by nature, require the consent of those to whom the recommendation is addressed. See infra n X.
139 MONUC’s mandate was revised to a Chapter VII one in S.C. Res. 1484, U.N. Doc. S/RES/1484 (May 30, 2003).
140 S.C. Res. 1843, supra note 94.
Nonetheless, the situation regarding the DRC’s consent – and the possible implications of its withdrawal – was further complicated by Security Council Resolution 1856.\footnote{SC Res. 1856, supra note 94.} Recall, that the resolution provided that MONUC’s expanded mandate will be exercised in “close cooperation” with the government of the DRC. Therefore, it seems that the Council has bound MONUC’s mandate with the consent of the DRC. The tendency of the Security Council to seek consent even when it is not legally necessary in the strict sense has been discussed above. When the resolution goes further and binds itself to the consent or “cooperation” of a party – a withdrawal of consent can indeed end the operation’s mandate.

In resolution 1925 of May 28, 2010 (and subsequently in resolution 1991 of 2011) the Security Council extended the mandate of MONUC, now renamed MONUSCO.\footnote{S.C. Res. 1925, supra note 103; S.C. Res. 1991, supra note 104.} The name change was explained on counts of the "new phase" in the DRC, which also prompted the Security Council to authorize the withdrawal of up to 2000 troops where "the security situation permits."\footnote{S.C. Res. 1925, supra note 103, ¶¶1–3.} Furthermore, the Council called for "enhanced dialogue and partnership" with the DRC, and decided "to keep under continuous review the strength of MONUSCO on the basis of assessments from the Secretary-General and the Government of the Democratic Republic of the Congo," while not narrowing the mandate of MONUSCO to use force.\footnote{Id. ¶7, ¶12.} Therefore, while Kabila's aspiration to have all foreign forces withdrawn until mid-2011 was not fulfilled, his threat to withdraw his government's consent brought some change – at least in rhetoric – to the operation of U.N. forces in the DRC.
In sum, and unlike the legal situation regarding instances of intervention by states, withdrawal of consent, in itself, does not negate the Security Council’s authority when conducting a forcible intervention under Chapter VII. However, in cases, where the Council itself binds the mandate of the U.N. forces with a requirement of cooperation or consent by the target state, a withdrawal of consent might require a new Security Council resolution.

Having clarified, hopefully, the modalities and dynamics of consensual forcible intervention, we shall now proceed to enquire further into the building blocks of the concept of consensual intervention in internal armed conflicts, by first exploring the notion of internal armed conflict, and thereafter clarifying the concept of forcible intervention.
CHAPTER 2

UNDERSTANDING INTERNAL ARMED CONFLICTS

I. GENERAL

The following chapter will present a “working definition” of the somewhat elusive concept of “civil wars” (or internal armed conflicts). The attempt to define this term serves a threefold objective. First, it allows for the clarification of the terms used in this work; second, it facilitates the understanding of the scope of this research, and, accordingly, to what factual situations any suggested normative conclusions would apply. Furthermore, as we shall see in Chapter 9, the determination of the existence of an internal armed conflict can affect also the legality of forcible intervention.

After suggesting a definition, we shall present a typology of common internal armed conflicts, elaborating – and building upon – past attempts to do so. In general, the conflicts will be typified according to the objective goals the parties wish to achieve – as far as these can be ascertained. Such an attempt can serve a third objective for this chapter – the demonstration of the complex nature of internal armed conflicts. Indeed, internal armed conflicts will constantly present the jurist with "hard cases," where rigid rules might have to be abandoned in favor of more elastic standards.

Furthermore, the treatment of all internal armed conflicts as a singular-body can result in the overlook of relevant legal differences. For instance, there is considerable difference, in the international legal sense, between struggles that challenge the principle of territorial integrity – such as struggles for secession – and those that do not, such as
struggles that aim to achieve regime change. The following chapter will allow us to make these distinctions.

II. A WORKING DEFINITION: FROM “CIVIL WAR” TO INTERNAL ARMED CONFLICT

The common term "civil war" will occasionally be used in this work to describe armed internal strife. However, such use will allude to the generic meaning of the term, since it is nowadays imprecise. A civil war, as defined by Merriam-Webster, is “a war between opposing groups of citizens of the same country.”\(^1\) This definition does not encompass the complexity of modern internal strife. For instance, its association of the term “civil war” strictly with the participation of “citizens” is problematic. Indeed, while many “civil wars” involve state actors and institutions, others include parties which are not necessarily comprised of citizens of the relevant state.\(^2\)

In the legal sphere, the term suffers from further limitations. The use of the legal term war— and in particular in the context of the belligerency doctrine, which will be explored later on— presupposes the existence of a factual condition which may (or may not) have implications on the rights of the parties involved. As such, its use can prejudge the situation and be therefore misleading.\(^3\) Moreover, the use of the term war to describe acts of hostility in a certain instances, which had definite legal implications in traditional international law, has given way, in the era of the U.N. Charter and the 1949 Geneva

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1. Available at http://www.merriam-webster.com/dictionary/civil%20war
2. For instance, in the Lebanese Civil War of 1975–1990, Palestinian refugees and P.L.O. militants (which were never granted Lebanese citizenship) played a central role. See Edgar O’Ballance, Civil War in Lebanon, 1975–1992 1–20 (1998). Another example could be the involvement of foreign fighters in the internal strife in Iraq following the invasion of 2003. See, e.g., Zaki Chehab, Iraq Ablaze, 33–69 (2006); or the involvement of the FDLR in the conflict in Congo. See Chapter 1, sec. III.
3. See Chapter 5 sec. I.
Conventions, to the factual terms of *use of force* and *armed conflict*. Accordingly, this work will use the more precise term *internal armed conflict* or *internal conflict*. The term *non-international armed conflict* will not be used, since it refers, in the context of international humanitarian law, also to instances which are not necessarily *internal*: it encompasses also the complex phenomenon of *transnational* armed conflict.

In practice, an internal armed conflict is thus, essentially, a violent political dispute, where armed violence takes place primarily within the boundaries of a single state. The acceptable contemporary legal definition of the term can be found in the ICTY’s famous *Tadic* case:

... an armed conflict exits whenever there is a resort to armed force between States or *protracted* armed violence between governmental authorities and *organized* armed groups or between such groups within a state.

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5 See Hamdan v. Rumsfeld, 548 U.S. 557, 630 (2006) (holding that the term non-international armed conflict, as it appears in Common Article 3 of the Geneva Conventions does not apply only to internal armed conflicts.) Another example for this complex phenomenon is the intense armed conflict between Israel and Hamas in Gaza, which erupted in December 2008. It is not a clear international armed conflict, since neither Hamas is not a “High Contracting Party” to the Geneva Conventions; however, since Gaza is not a territory of Israel, it cannot be labeled as an internal armed conflict. See HCJ 769/02 The Public Committee Against Torture in Israel v. The Government of Israel [2006] IsrSC 57(6) 285, ¶21 (holding that the Israeli-Palestinian conflict is closer to one of an international character); *but see* Eyal Benvenisti, *The Legal Battle to Define the Law on Transnational Asymmetric Warfare* 20 DUKE J. COMP. INT’L L. 339, 341–344, 350 (2010) (suggesting the term "transnational warfare" for conflicts between states and non-state actor operating across borders).

6 Michael E. Brown, *Introduction*, in *THE INTERNATIONAL DIMENSIONS OF INTERNAL CONFLICT* 1, 1 (Michael E. Brown ed., 1996). “Within the boundaries of a single state” includes conflicts that take place within the boundaries of a federal system. For the complexities of defining conflicts within a federal system, see infra at X.

The term *protracted* implies – and in contradistinction to conflicts between states that do not require such a condition – that internal armed conflicts have to be both *sustained* (along the time continuum) and *large-scale* (in terms of the friction between the parties). Importantly, for an internal armed conflict to materialize there must be at least one armed group of sufficient *organization* that challenges the government. Accordingly, as defined in Article 1(2) of Additional Protocol II, the term excludes “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of similar nature.”

The determination whether the conditions for an armed conflict exist is a question of fact, meaning, it should be entirely separated from our perception regarding the merits of the conflict. In general, it is possible to ascertain whether an internal armed conflict exists by analyzing the course of actions undertaken by the involved parties. For instance, it is helpful to ask whether the state has deployed its regular armed forces, or rather it is confronting the upheaval mainly through law enforcement measures employed by its police force and justice system. However, even if a state *does* deploy its armed forces, this is not sufficient, in itself, for the materialization of an internal armed conflict, since there must also be an organized armed group that confronts the government. If there

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11 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Jun. 8, 1977, 1125 U.N.T.S. 609 art. 1(2) [Hereinafter *Additional Protocol II*], [Hereinafter – APII] (regulating the conduct of parties to a non-international armed conflict); see also Falk, supra note 9, at 18.
12 Blanck, supra note 4, at 160–162; Prosecutor v. Tadic, Case No. IT-94-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (ICTY Oct. 2, 1995); cited in Blanck, supra note 4, at 162.
13 Blanck, supra note 4, at 163 and the many sources cited therein; Lubell, supra note 8, at 107.
are no such organized armed groups, and the violence between the state apparatus and civilians can be dealt with sufficiently through domestic criminal law, the situation is controlled, in turn, by international human rights law. In this context, it is worthwhile to note that in contrast to Additional Protocol II, the Tadic court did not refer to control over territory by opposition groups as a condition for the existence of internal armed conflict.  

However, control over territory can still serve as an indication for the existence of such conflict, since loss of control might imply that the government is unable to curtail the opposition’s activities through law enforcement mechanisms, as provided for in international human rights law, and must therefore result to military force to assert control over the state’s territory.

Notwithstanding the requirement that internal armed conflicts would be both sustained and large-scaled, it is reasonable that for an internal armed conflict to materialize there would be some inverse ratio between duration and intensity. For instance, a very short but extremely intense period of violence may be looked upon as an internal armed conflict; and conversely, a long and relatively low-intensity conflict may also qualify as one. It seems that both duration and scale serve as indicators for the conflict’s effect over the ability of the state to extinguish it through its justice system and by law enforcement measures. In this sense, prolonged low-intensity conflicts, as well as short high-intensity ones, can both be indications that such ability is hindered.

14 Additional Protocol II, supra note 11, art. 1(1).
16 Compare Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, ¶49 (Int’l Crim. Trib. For the Former Yugoslavia Apr. 3, 2008) (holding that the “term” protracted, in the context of internal armed conflicts, refers more to the intensity of the violence than to its duration), cited in LUBELL, supra note 8, at 105 –106.
In contemporary international law, the main corollary of the distinction whether an internal armed conflict exists or not concerns the question whether the application of international humanitarian law is triggered, or rather that the situation is controlled strictly by the more restrictive law enforcement paradigm, as entrenched in international human rights law.¹⁷ For instance, the gist of the requirement that the opposition be an organized armed group is that there must be, in fact, at least two real parties to the conflict, as opposed to a situation where the state is simply using armed violence against largely unarmed and unorganized civilians. Absent this requirement, states would be capable of diluting their obligations under international human rights law by claiming, as a pretext, that a fabricated internal armed conflict exists.

Indeed, the development of human rights law has shifted the discourse on the existence of armed conflicts at large. In the past, states were reluctant to acknowledge the existence of a “civil war” within their territories, both since such recognition entailed international status for the opposition,¹⁸ and because internal law enforcement was beyond the reach of international law, and was therefore less restrictive, on the international level, than the law of armed conflict. Nowadays, in contrast, the restrictions imposed by international human rights actually make the law of armed conflict more permissive – especially in the context of the use of lethal force – possibly incentivizing states to quickly claim that they are indeed involved in armed conflict. For instance, in the initial stages of the 2011–2012 crisis in Syria, the Assad regime was quick to claim or admit that it was facing an armed insurgency, as a principled justification for its use of

¹⁷ See Study on Targeted Killings, supra note 10, ¶¶31–33; see also NILS MELZER, INT’L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 24 (2009).
¹⁸ See chapter 5.
lethal force – a claim that has had some factual merits, at least since the formation of the Free Syrian Army by defecting Syrian soldiers. An especially vigorous debate has taken place, in a different but related context, regarding the methods employed in the so-called transnational “war on terror,” in which the U.S. was keen to describe its struggle with Al-Qa’ida as an armed conflict, while various commentators maintained that the struggle is in actuality a law-enforcement operation.

Although the indicative tests for the existence of internal armed conflict are used in order to determine whether *jus in bello* applies, they are relevant in our context too – for the purpose of definition, and, as we shall see, also regarding the legality of consensual interventions in specific instances. We shall address this question later on.

Last, an oft-made confusion is made between internal armed conflicts and revolutions – terms which are not synonymous. A revolution is a culmination, or a result, of a process aimed to overthrow a government and bring forth regime change, using methods that are outside of the regular constitutional framework of the state. It is a “[successful] effort to transform the political institutions and the justifications for political authority in a society, accompanied by formal or informal mass mobilization and non-institutionalized actions that undermine existing authorities.” As such, a revolution

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21 See Chapter 9, sec. II.1.
can be preceded, followed or accompanied by internal armed conflict;\(^{23}\) it can also involve limited and small scale violence or riots; it can also be more-or-less non-violent.\(^{24}\) Therefore, a revolution is not necessarily an internal armed conflict and vice-versa – internal use of force may be an instrument to prompt a revolution or a consequence of it.\(^{25}\)

### III. INTERNAL ARMED CONFLICTS: TYPOLOGY

#### III.1 THE COMPLEX THEORY OF INTERNAL ARMED CONFLICTS

Common internal armed conflicts may include attempts to overthrow an established government; secession struggles; ethnic conflicts; strife due to the disintegration of civil order; struggles over humanitarian relief efforts\(^{26}\) and a myriad of other circumstances which may lead to internal violence. This wide variety of conflicts can be typified by numerous methods of categorization found in political science literature.\(^{27}\) Beyond the categorization of the types of conflicts, vast research exists concerning the circumstances conducive to the eruption of internal armed conflicts, seeking, in general, to outline the

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\(^{23}\) For an example of an internal armed conflict that followed, rather than preceded a revolution, see the 1967 conflict of Nigeria, where conflict erupted following a coup and a subsequent counter-coup. See Godfrey Mwikikagile, Ethnic Politics in Kenya and Nigeria 3–17 (2001) (detailing the background for the eruption of the conflict).

\(^{24}\) Generally, non-violent revolutions can occur when the central governments degenerate (such as in many cases in Eastern Europe during the collapse of the Eastern Bloc); when the government acquiesces to the revolution due to non-violent pressure (for instance, as in South Africa or Egypt). On types of revolutions see Goldstone, supra note 22, at 142–144.

\(^{25}\) The distinction between revolutions and internal armed conflicts is an ancient one. Aristotle also distinguished between the “revolution” itself and “use of force,” noting that “[f]orce may be applied either at the time of making the revolution or afterwards.” He also contended that revolutions can come to be either by “force” or by “fraud.” See Aristotle, The Politics 111 (Benjamin Jowett trans., 2009).

\(^{26}\) Enforcing Restraint, supra note 3, at 5.

\(^{27}\) For instance, it is possible to classify conflicts by the nature of their participants, by their success or by their intensity. See, e.g., D.E.H. Russell, Rebellion, Revolution and Armed Force 60–62 (1974).
permissive conditions, proximate and ultimate causes and various sources of grievances that render a state vulnerable to plunge into conflict. 28

For instance, Brown suggests a categorization of such conditions as structural, political, economical-social and cultural-perceptual. 29 *Structural* factors include state weakness, in which power-vacuums are conducive to the creation and aggravation of power-struggles, and bare the potential to generate a “Hobbesian” state of fear, giving rise to a security dilemma in which various groups participate in an internal arms-race in anticipation of impending conflict. 30 *Political* factors include discriminatory political institutions; exclusionary national ideologies; contentious inter-group politics; and opportunistic and populist tactics used by politicians. 31 *Social-economic factors* include the existence of constant and widespread economic problems; 32 economical discrimination and resulting social gaps; 33 and tensions related to modernization and

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28 Regarding causes of internal armed conflict, as in causation in general, Brown distinguishes between “permissive” and “proximate” causes, see Brown, supra note 6, at 22 (on permissive and proximate factors).
29 Id. at 13–23.
30 According to this view, lack of political institutions which enforce the rule of law leads to anarchy, where a situation similar to a “state of nature” exists, compelling the different groups to fear other groups. The “security dilemma” is originally a term used in the context of inter-state relations in anarchy, “imported” into the realm of internal armed conflict, mainly regarding ethnic strife. See Barry R. Posen, *The Security Dilemma and Ethnic Conflict*, 35 SURVIVAL (1993) 27; David A. Lake & Donald Rotschild, *Containing Fear: The Origins and Management of Ethnic Conflict*, in *NATIONALISM AND ETHNIC CONFLICT* 126, 137 (Michael E. Brown et al. eds., 2001); Jack S. Levy, *International Sources of Interstate and Intrastate War*, in *LEASHING THE DOGS OF WAR: CONFLICT MANAGEMENT IN A DIVIDED WORLD* 17, 27 (Chester A. Crocker et al. eds., 2007).
31 Brown, supra note 6, at 16–18. Gurr argues that a greater risk for violence exists in states which are under authoritarian rule. According to Gurr, tendencies towards “collective violence” depend on the extent of the violations of “socially derived expectations about the means and ends of human action.” Such violations are more acute in “societies that rely on coercion.” However, if frustrated people have “constructive means to attain their social and material goals, few will resort to violence,” as violence is less likely when people are presented with effective nonviolent means for the attainment of their goals. See TED ROBERT GURR, *WHY MEN REBEL* 317 (1970).
32 Such as scarcity of resources, high unemployment or radical inflation.
development. Last, cultural and perceptual factors may include “mutually exclusive” narratives between groups within the state. All of these circumstances might lead to a self-perception of relative deprivation among groups, enhancing the chances for violence.

These are mainly questions of political science. Indeed, they may have legal implications in international human rights law, considering the growing focus on “root causes” of human rights violations. However, this is not the main focus of his work. Instead, we shall present a categorization of internal armed conflicts based on their objectives – meaning, the tangible legal outcome the parties involved seek to achieve. Building on a model suggested by Falk, the main types of such conflicts are struggles for control over the state apparatus; struggles for secession; and struggles for unification or reunion. Another category of goals can be found in struggles for the dismantlement of the state as part of a decentralized transnational movement.

Indeed, it can sometimes be extremely difficult to make a clean-cut distinction regarding the goals of a specific internal armed conflict. Many conflicts may be “caught” within more than one category; fall within different categories according to the narratives of different parties; or shift from one category to another over the course of the conflict.

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34 See Saul Newman, Does Modernization Breed Ethnic Conflict? 43 World Politics (1991) 451; see also D.G. Morrison & H.M. Stevenson, Cultural Pluralism, Modernization and Conflict, 5 CAN. J. POL. SCI (1972) 82, 83–84. In addition, research has found linkage between the extent of a state's economic reliance on basic commodities, and the likelihood of internal conflict erupting, since groups are prone to struggle for the control of these resources. See Paul Collier et. al The Collier-Hoeffler Model of Civil War and the Case Study Project Research Design, in THE WORLD BANK, UNDERSTANDING CIVIL WAR Vol. 1 (Paul Collier & Nicholas Sambanis, eds. 2005) 1, 16.

35 See Brown, supra note 6, at 21.

36 GURR, supra note 31, at 24, 29 –30. The concept of Relative Deprivation is not too far removed from the Aristotelian notion regarding motivations for revolution. For a survey of this approach and of other literature about subjective causes of strife see id, at 37–46.


38 There are numerous ways to classify objective goals which parties to internal armed conflict may seek to achieve The UCDP/PRIO Dataset, for instance, suggests a distinction between incompatibility concerning government and incompatibility concerning territory. See NILS PETTER GLEDITSCH ET AL. UCDP/PRIO ARMED CONFLICT DATASET CODEBOOK 2 (Version 4-2009).

39 FALK, supra note 9, at 18–19.
Moreover, the parties, within themselves, are not always monolithic; and frequently, "real" intentions are covered by propaganda, populist discourse and myths. This difficulty is enhanced by the ease that a party to a conflict – any conflict – may invoke high universalist claims while actually concerned with local power-wielding and, conversely, to raise narrow legalistic claims as a subtext for promoting fundamental, system-wide changes. Notwithstanding these difficulties, as we shall see, the objective goals of the parties can perhaps affect the legality of intervention in a specific instance.

III.2 STRUGGLE FOR CONTROL OVER THE STATE APPARATUS

A Struggle for Control over the State Apparatus is the classic – and supposedly simple – “civil war” situation where a government is challenged by the opposition over the control of the state, the objective goal of the parties being the eventual appropriation of control over the state apparatus, or bringing significant change to the structure of the state. The conflict may involve the government, as a unit, deploying its armed forces to curtail counter-governmental activities; it may involve an intra-governmental rift in which various institutions of the state confront each other; it may also be the case that the government becomes irrelevant and neutral, or ceases to exist in its entirety, while different groups fight to replace the government or wield more power over it. The conflict strictly takes place within the boundaries of the state, and foreign powers may become involved in the conflict through the support of one party or the other. Naturally, the position – or mere existence – of the government in such conflicts can have effect over

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40 See infra sec. III.2 (regarding the nature of the Lebanese crisis of 1958.)
the question of consensual intervention, if we assume that governmental consent can, in
general, legitimize forcible intervention.

A simplified example of such a conflict is the Spanish Civil War of 1936–1939\(^\text{41}\) where the opposing Nationalists rebelled against the Republican government in order to bring about regime-change,\(^\text{42}\) both sides, in various stages of the conflict, were supported by foreign intervention.\(^\text{43}\) When foreign powers intervene, a \textit{struggle for control} may transform to a \textit{conflict of hegemony},\(^\text{44}\) in which a foreign power wishes to support a dependent elite within the conflict-torn state, in order to retain (or achieve) hegemony or influence in the region.\(^\text{45}\)

A key question that arises principally in struggles for control is whether the conflict is aimed at altering the “basic norm” of the relevant political entity; or rather it is one which takes place within the confines of this norm, where none of the parties are interested in changing it.\(^\text{46}\) An obvious case in which a state’s basic-norm is challenged is, for instance, when an authoritarian government is challenged by a liberal or Marxist opposition, seeking to rearrange the basic fundamental ethos of the state, or vice-versa.

\(^{41}\) See Chapter 7 sec. IV.

\(^{42}\) See, \textit{e.g.}, ANTHONY BEEVOR, THE SPANISH CIVIL WAR 1936–1939 11 (2006) (Outlining the various interests and aspirations of the rival factions.)

\(^{43}\) Among others, Nazi Germany and fascist Italy intervened in favor of the Nationalists; the Soviet Union assisted, rather covertly, to the Republicans. \textit{See id.} at 113–114, 122–123, 145).

\(^{44}\) A term that Falk uses to describe a classification separate than “standard civil war.” However, since parties to a “war of hegemony” seek to take control over the state apparatus, I found it beneficial to include this category of internal strife within “struggle to control state-apparatus.”

\(^{45}\) But not to create a full-fledged “agent” government.

\(^{46}\) “Basic Norm” in the sense as described by Kelsen (grundnorm) as a “presupposition, establishing the objective validity of the norms of a moral or legal order” HANS KELSEN, PURE THEORY OF LAW 7–8 (5\textsuperscript{th} ed. 2008). It “furnishes the reason for the validity of this constitution and of the coercive order created in accordance with it.” \textit{Id.} at 201. Indeed, there is a jurisprudential argument regarding the existence or necessity of the concept of a “basic norm.” \textit{See} H.L.A. HART, THE CONCEPT OF LAW 293 (2\textsuperscript{nd} ed. 1997). This question was already addressed by Aristotle, who made a distinction between “revolutions” aimed at completely changing a state’s constitution from one to another, versus those that merely seek to modify the current constitution. \textit{See} ARISTOTLE, THE POLITICS 295 (T.A. Sinclair, trans., 1992).
Such a case is the aforementioned Spanish Civil War, in which a fascist coalition sought to create a new order.\textsuperscript{47}

Many times it is extremely hard to distinguish whether the conflict erupts over the validity of the basic-norm itself, or rather regarding its application in a specific circumstance. An example of such an ambiguous situation is the Lebanese crisis of 1958. While it is possible to frame this conflict as one which revolved around Lebanese president Chamoun’s attempt to amend the Lebanese Constitution to allow for his reelection after six years in office (hence, a conflict within the Lebanese basic-norm framework,) it can also be looked upon as a conflict between Lebanese Nationalists and pan-Arab, pro-Soviet groups over the independence of Lebanon against mounting pressure to join the newly formed United Arab Republic.\textsuperscript{48}

As we shall see later on, since struggles for control are usually do not aim to alter the state’s borders, they do not risk the external order and the corresponding principle of territorial integrity. In this strict sense, they represent less of a challenge to the existing international system than secession struggles. However, in the context of intervention, they raise the classic dilemmas, explored later in this work, of the principles of non-intervention and self-determination.

\textsuperscript{47} See BEEVOR, supra note 42, at 11.

\textsuperscript{48} President Eisenhower referred to the Lebanese case as one of “indirect aggression” which was perpetrated “under the cover of a fomented civil strife,” by the United Arab Republic – the unification of Egypt and Syria and a project of Egyptian president Nasser’s Pan-Arab Nationalist ideology. It seems then that Eisenhower adopted the mainly Lebanese Christian point of view that the conflict is indeed aimed at altering the basic-norm of an independent Lebanon. See Quincy Wright, United States Intervention in Lebanon, 53 AM. J. INT’L. L. 112, 113 (1959); for a detailed account of the 1958 Lebanese crisis see Malcolm Kerr, The Lebanese Civil War, in INTERNATIONAL REGULATION OF CIVIL WARS 65 (Evan Luard ed., 1972). Regarding the dispute whether the conflict in Lebanon was a product of pro-Soviet interference, see id. at 77–78.
III.3 STRUGGLES FOR SECESSION AND AUTONOMY

Struggles for secession are situations in which an ethnic, religious, ideological or social-economical segment of a state’s population demands to separate itself from the state and establish a new state. The challenging group does not contest the legitimacy of the government or the existence of the state per se, but only to the extent that it exercises its authority over a territory associated with the group. Thus, a struggle for secession is different from both of the preceding classes of conflicts: unlike in a struggle for control, the opposition does not seek to replace the government.

In general, demands for secession may be based on two different classes of claims. The first type involves claims according to which a central government oppresses or neglects a segment of its population, thereby prompting it to demand secession – this is the controversial doctrine of remedial secession. An illustrative way to look at such claims may be through the social compact metaphor. While recognizing that a compact was originally in place, the group would argue that its terms have been violated thus granting it the right, or obligation, to revolt against the central government, which would in turn spawn a right to be recognized as an independent state vis-à-vis the international community.

A classic example for such a case is the American Civil War. While the Confederate States never doubted the initial validity of the Union, they saw their struggle

49 It is important to distinguish, in this context, between secession and dissolution. When several groups struggle for separation simultaneously, the state itself can dissolve and then the complex question of succession arises. A classic example is Yugoslavia, the collapse of which was deemed to be a dissolution rather than secession. See Opinion 1, Arbitration Commission of the Peace Conference on the Former Yugoslavia (Badinter Commission) (Nov. 29, 1991). On the causes of the conflict in Yugoslavia and the state’s breakup, see Ivo H. Daalder, Fear and Loathing in the Former Yugoslavia, in The International Dimensions of Internal Conflict, supra note 6, at 35, 35–45.
50 See the discussion in Chapters 11–12.
51 See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT Ch. VII § 95 (1689).
52 See id. Ch. XVIV §243.
for secession as a result of the violation of the original social compact, a violation that
spawned their right to secede.53 This notion is revealed in the preface to Confederate
President Jefferson Davis’ account of the Civil War and the events that preceded it:

The object of this work has been from historical data to show
that the Southern States had rightfully the power to withdraw
from a Union into which they had, as sovereign communities,
volluntarily entered; that the denial of that right was a violation
of the letter and spirit of the compact between the States; and
that the war waged by the Federal Government against the
seceding States was in disregard of the limitations of the
Constitution, and destructive of the principles of the
Declaration of Independence.54

A second type of struggle for secession occurs in the situation where a
challenging party denies the very existence of a social compact between the group and
the central government, in which case there was never consent by the group to be ruled
by the challenged state. If such consent never existed, the claim goes, separation is
justified. An informative example for such a situation can be found in the conflict in
Chechnya. Chechnya, like many of the eighty-nine administrative territorial units that
comprise the Russian Federation, is ethnically distinct, and is one of the Federation’s

53 See Mark E. Brandon, Secession, Constitutionalism and American Experience, in SECESSION AND SELF-
DETERMINATION 272, 273 (Stephen Macedo & Allen Buchanan, eds., 2003) (providing a case study of the
American Civil War as an example for a claim for secession and its constitutional backdrop); Another case
of such a struggle is the Bengali (East Pakistan) struggle for independence from Pakistan in 1971, that was
based, inter alia on inequities between West and East Pakistan. See RICHARD SISSON & LEO R. ROSE, WAR
twenty-one “republics.” The basic Chechen claim against Russia is that Chechnya should be looked upon as a former republic under the Soviet Union, rather than under the Russian Federation. If such a claim would have been accepted, Chechnya would have become and independent state with the collapse of the Soviet Union, just like the Ukraine, Latvia and other ex-Soviet states. This was the backdrop for Chechnya’s unilateral declaration of independence from the U.S.S.R, in September 1991, which led to the catastrophic Russian invasion of 1994 and the more successful operation of 1999. Secession conflicts, as opposed to struggles for control, present additional dilemmas to the international system. First, they have the potential to become “international” once the seceding party receives widespread recognition. In addition, they challenge the basic principle of territorial integrity of states. These complexities, addressed later on, should be taken into consideration when assessing interventions in secession conflicts.

Secession struggles should be distinguished from struggles for autonomy. The latter occur when opposition forces seek to depose a government which is an agent of a foreign power, in an effort to establish political autonomy. Such efforts may invoke, for instance, the right to self-determination, and were a frequent feature of the colonial era. In struggles for autonomy, where agency relations exist between a local government and a foreign power, it can be difficult to draw the line as to when a struggle is a genuine internal conflict, and when it is actually a direct conflict between an indigenous population of a certain territory and a dominating foreign power.

58 For a clear timeline summarizing the events in Chechnya, see *Timeline: Chechnya*, available at http://news.bbc.co.uk/2/hi/asia-pacific/country_profiles/2357267.stm.
As we shall see in Part 2, “colonial” struggles were seen, in the age of empires, as regular internal armed conflicts. However, this rule was a product of an era in which colonialism was – at least in the eyes of the major powers – an accepted international phenomenon. It is clear that such a formalistic approach has become outdated in the post-colonial era, and that struggles for autonomy in the colonial contexts were categorized, in contemporary law, as closer to international armed conflicts.59

III.4 STRUGGLE FOR (RE)UNIFICATION (IRREDENTISM)

This category of internal conflicts encompasses situations in which a group, within a state, struggles for the purpose of achieving political unification or reunification of a territory with the territory of a (usually) neighboring state. Such conflicts are sometimes referred to as based on irredentism – claims for expansion or unification based on ethnic, national or historical rationales.60 As such, conflicts of this order challenge the principle of territorial integrity, and may involve active support by the government of the neighboring state.61 In such cases the neighboring state might admit that it, itself, seeks to acquire the disputed territory; conversely, it may only tacitly admit such aspirations while maintaining – on the formal level – that it supports a certain party for a different reason, other than its motivation to acquire the disputed territory.

Nevertheless, it is common for claims advocating (and opposing) unification to be based on historical narratives regarding the existence or inexistence of past political

59 See Chapter 11, §II.
60 See THOMAS AMBROSIO, IRREDENTISM 2 (2001).
61 FALK, supra note 9, at 19.
bodies under which the territories were unified. A simplified example for a struggle for reunification is the strife in Northern Ireland. In general, Irish Nationalists believe that Northern Ireland should be removed from British rule, and incorporated to Ireland. However, the Irish Republic itself does not explicitly claim to support, in practice, such unification – and holds the public position that the conflict should be settled by “democratic means,” as was agreed upon in the Good Friday Agreement.

The conflict between Georgia, Russia, and local elements over South Ossetia and Abkhazia, which culminated in the Georgian-Russian war of 2008, is informative in demonstrating the difficulty of classification when attempting to distinguish between struggles for secession and unification – especially where an external power is actively involved (in contrast to the situation in Northern Ireland, where the Irish Republic was not thoroughly active in the dispute). This conflict could be defined as a borderline case between a struggle for secession and a struggle for unification; or as a situation in which separation is championed with the encouragement of a neighboring power, as a pretext

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62 Such historical connections can be fortified by the different names used by parties to describe the disputed territory. For instance, the name Northern Ireland is preferred by nationalist elements in that territory, as it implies the historical association of the region with Ireland. The unionists, conversely, prefer the name Ulster (e.g., the Ulster Unionist Party; Ulster Freedom Fighters). See John McGarry & Brendan O’Leary, Explaining Northern Ireland 512 (1995).

63 “Simplified” since there are many differing views among the Nationalists of Northern Ireland in this regard. See id. at 17–21.

64 Id. at 22–49.

65 See Department of Foreign Affairs, Anglo-Irish Relations/The Peace Process, available at http://foreignaffairs.gov.ie/home/index.aspx?id=334. It should be noted that while an official, decades-old doctrine claiming that the 1921 Anglo-Irish Treaty partitioning Ireland was a product of British coercion still exists, it is doubtful whether it is “taken seriously” by the Irish government. See W. Harvey Cox, The Politics of Irish Unification In the Irish Republic, 38 Parl. & Aff. 437, 437 (1985) (explaining why the Irish Republic’s claims to Northern Ireland were not “serious”). For an account of the relations between Britain and Ireland until 1922 through the prism of the principle of self-determination see Ian S. Lustick, Self-Determination and State Contraction, in The Self-Determination of Peoples 201, 209–214 (Wolfgang Danspeckgruber ed., 2002).

66 For an in-depth investigation of the 2008 Georgia-Russia conflict see Report of the Independent International Fact-Finding Mission on the Conflict in Georgia (Sept. 30, 2009), available at http://www.ceig.ch/Report.html [hereinafter Georgia Report]. In short, the Mission found that the conflict was sparked by Georgia; however, it also found that South Ossetia has no right to secede under international law; and that the Russian counterattack in to Georgia was disproportionate.
for annexation and unification; or as a linear process in which separation precedes
unification, and where the act of unification is aimed to be achieved through the prior
realization of sovereignty.

Evidence of the *unification* nature of the conflict indeed exists: as in Northern
Ireland, justifications for unification can be based, in this conflict, on historical
narratives.\(^{67}\) Also, there is an ethnic linkage between the people of South Ossetia and the
population of Russia’s North Ossetia. Moreover, since 1992 and 1994, Russian troops are
deployed (as “peacekeepers”) in South Ossetia and Abkhazia respectively.\(^{68}\) In addition,
since 2002, Russia carries out a policy of “passportization,” in which Russian passports
are conferred *en masse* to residents of Abkhazia and South Ossetia. The acceptance of
these passports by the majority of the residents, although the validity of the passports is
dubious,\(^{69}\) is another indication for the conflict’s nature as one of unification.

Furthermore, some Russian officials claimed that South Ossetia will become a
part of Russia, in which the South Ossetians will be united with their North Ossetian
kin.\(^{70}\) However, the *ethos* of the conflict, from the point of view of the Abkhazians as
well as Ossetians, is grounded in the principle of self-determination and independence; it

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\(^{67}\) As Georgia was a part of the Russian Empire between the years 1881–1917. The Georgian national side,
however, stresses Georgian independence between the years 1918–1921. *See* Georgia Report, *supra* note
66, at 12.

\(^{68}\) *See* id. at 13–14.

\(^{69}\) As the validity of unilateral conferment of citizenship to residents of another country is contingent, in
international law, upon the existence of an adequate factual connection between the granting country and
the recipient; and that an explicit consent of the home country be given. Both terms were deemed
unfulfilled in the Russian-Georgian context. *See* id. at 18.

\(^{70}\) *See* Tony Halpin, *Kremlin Announces that South Ossetia will Join ‘One United Russian State’*, TIMES
ONLINE (Aug. 30, 2008), available at http://www.timesonline.co.uk/tol/news/world/europe/article4635843.ece. Such claims, when presented in
parallel to Russia’s recognition of South Ossetia and Abkhazia as independent, may suggest that Russia
sees the independence of these territories as a prelude to integration with the Russian Federation. *See*
is unclear to what extent their movement advocates unification with the Russian Federation, or rather seeks to achieve separation from Georgia without such unification.\(^71\)

The mixed and complex nature of the conflict was evident as the war of August 2008 was essentially a “combined inter-state and intra-state conflict,”\(^72\) where Georgian troops collided with intervening Russian troops on the external level, and also with South Ossetians and Abkhaz armed groups on the internal one – further blurring the line between the conflict's nature as a struggle for secession versus one for unification.

Another, even more complex scenario of a struggle for unification, occurs when a group is dispersed throughout a few states, none of which are under that group’s domination; and, accordingly, elements of this group – within these states – struggle for unification in the form of a new state which, as they aspire, will be comprised of territories seceded from the several states and united together. Such may be the case with the struggle of the Kurds. The Kurdish people – branded “the largest nation in the world without its own independent state”\(^73\) – are concentrated in a geographical area, parts of which are mainly within the borders of Syria, Turkey, Iran and Iraq.\(^74\)

Despite periods of violent conflicts among themselves,\(^75\) the idea of greater Kurdistan has been a symbol of much importance among militant groups within the Kurdish national movement. The original charter of the militant Kurdistan’s Workers Party (PKK) called for a “democratic and united Kurdistan” encompassing territories in Turkey,

\(^71\) See Georgia Report, supra note 66, at 17.
\(^72\) Id. at 10.
\(^74\) Smaller parts are within the borders of Armenia and Azerbaijan. These territories are collectively known as “Kurdistan.”
Iran, Iraq and Syria. Such claims, naturally, challenge not only the internal regime of the affected states, but also the international stability and territorial integrity of the involved surrounding states.

III.5 **Struggle for the Dismantlement of the State as Part of a Decentralized Transnational Movement**

This category of internal conflicts includes instances where an armed conflict is taking place within the boundaries of one state, when the opposition forces are a part of a decentralized – yet interconnected – transnational movement, which is not effectively controlled by any government, aiming to bring about a fundamental change to the global international structure. Such struggles include both intra-state and transnational elements. Their intra-state elements involve confrontations between the state and forces which operate from within it, whether comprised entirely of the states’ citizens or supplemented by foreigners. Their transnational elements are the opposition’s state-transcending aspirations and the cooperation it enjoys with similar actors outside of the state.

An example is the conflict between Jihadist movements and the Iraqi government. To the extent that the Jihadi groups were indeed “pursuing an objective – the establishment of a global caliphate – that is incompatible with a global system of human rights,” these conflicts constitute a struggle for the dismantlement of the state. Of course, like with regards to other categories, the distinction between such conflicts and

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76 See David L. Phillips, National Committee on American Foreign Policy, Disarming, Demobilizing and Reintegrating The Kurdistan Workers Party 11 (Oct. 15 2007) http://www.ncafp.org/. In recent years, however, it seems that the PKK is willing to accept a solution within Turkish borders, See Anthony Loyd, PKK Leader Offers Turkey an Olive Branch to End War TIMES ONLINE (May 26, 2009), available at http://www.timesonline.co.uk/tol/news/world/europe/article6360955.ece.

others is not always clear-cut. For instance, it is unclear whether Abu Mus’ab Al-Zarqawi, former leader of Al Qa’ida in Iraq, was genuinely aiming to promote the idea of an Islamic Caliphate, or whether he was more interested in igniting sectarian violence. Struggles of this type give rise to numerous questions regarding the responses of international law to terrorism, and their relations to traditional approaches towards internal armed conflict. Arguably, in the context of the question of consensual intervention, struggles for dismantlement represent “easy cases.” Indeed, when the internal conflict involves elements that do not accept the state-structure to begin with, arguments of self-determination and non-intervention – which are inherent to the discussion of intervention in the international system of states – are effectively quashed.

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CHAPTER 3

UNDERSTANDING INTERVENTION – KEY DISTINCTIONS AND THEORETICAL ISSUES

I. INTERVENTION ACROSS DISCIPLINES – THEORETICAL FAULT-LINES AND
Clarifications

I.1 The Multidisciplinary Discourse on Intervention

The term “intervention” is elusive on many levels. A few distinctions should be made prior to any discussion of it. The first concerns the understanding that intervention can mean different things across different disciplines. As James Rosenau argued, the discussion of intervention is usually addressed by three distinct disciplines – moral, legal and strategic. He suggested that these be complemented by a scientific approach. One can also argue that a distinct historic approach to intervention exists also.

The moral or ethical approach seeks answers to the question regarding the circumstances in which it is morally right to intervene. The strategic approach, conversely, studies the question of where, how and when do interventions succeed, in light of values we aspire to achieve; and why do such interventions take place, in terms of the interests of various parties. It can be generally argued that these questions are the primary concern of scholars of political science. The scientific approach can be looked

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1 See James N. Rosenau, Intervention as a Scientific Concept, 13 J. CONFLICT RESOLUTION 149 (1969).
3 See, e.g., THE INTERNATIONAL DIMENSIONS ON INTERNAL CONFLICT (Michael E. Brown, ed., 2001); PATRICK M. REGAN, CIVIL WARS AND FOREIGN POWERS: OUTSIDE INTERVENTION IN INTRASTATE CONFLICT;
upon as a branch – or method – of the strategic approach. It attempts to analyze cases of intervention in a manner which produces results “in such a way that findings derived from one case can be applied to and tested by other cases,” for the purpose of explaining “scientifically” the “dynamics of intervention.”\footnote{Rosenau, \textit{supra} note 1, at 150.} The historic point of view concerning intervention seeks to investigate the details of a specific intervention or of interventions at large, in order to build a coherent and credible factual basis.\footnote{See, \textit{e.g.}, \textit{Gary Jonathan Bass, Freedom’s Battle: The Origins of Humanitarian Intervention} (2008).} The legal approach, however, is concerned with the attempt to outline the circumstances, if at all, where states or organizations \textit{have the legal power, responsibility, right or duty to intervene}.\footnote{See, \textit{e.g.}, \textit{Simon Chesterman, Just War or Just Peace? Humanitarian Intervention in International Law} (2001).} It attempts to analyze the sources of international law to circumscribe a set of normative rules and principles.

Initially, these disciplines seem far apart; however, they are more intertwined than one would expect. Rosenau – albeit critically – addressed this interconnectivity, stating that

\begin{quote}
The \textit{moral} dimension . . . is plagued by a double-standard problem; the \textit{legal} dimension suffers from a definitional problem, and the \textit{strategic} dimension is beset by the problem of operationalizing the national interest . . . To the extent that the three dimensions are interdependent, so are the problems, thus further compounding the confusion.\footnote{Rosenau, \textit{supra} note 1, at 151 [emphasis added].}
\end{quote}
Thus, the legal dimension of intervention interacts with other dimensions—which interact also with each other.\textsuperscript{8} For instance, to the extent that we accept that ethics can play a part in the interpretation of ambiguous legal norms,\textsuperscript{9} the legal interpretation of international law concerning intervention can indeed interact with the ethical approach to intervention. Furthermore, concepts such as necessity and proportionality, which are, to some extent, strategic questions—are also an integral part of the classic Just War assessment of intervention, which might be a part not only of the ethical discussion of intervention, but also of the considerations that must be taken in the executive discretion exercised by international functions.\textsuperscript{10}

The fact that the different disciplines regarding the question of intervention are not mutually-excluding might create some confusion. Indeed, Rosenau’s assertion that the legal study of intervention suffers from a deficit of “definition,” might find its roots in the confusing differences in discourse between the different disciplines. For instance, when an international lawyer says \textit{intervention}, she does not necessarily attribute to the term the same meaning that a political scientist would; the same applies to the terms “use of force,” “civil war” and others. Lack of sensitivity to these subtleties might result

\textsuperscript{8} For instance, when adopting a \textit{utilitarian} standpoint, an intervention would only be \textit{moral} where it is \textit{strategically} effective. For instance, Mill, true to his utilitarian approach, outlines a \textit{moral} framework to intervention in which such would be justified, \textit{inter alia}, when it is likely to achieve the desired consequences. See \textsc{Mill, supra} note 2; see also \textsc{Michael W. Doyle, Ways of War and Peace} 395 (1997) (addressing Mill's view in the wider context of the liberal approach towards intervention and non-intervention).


\textsuperscript{10} See, e.g., the suggestion regarding the validity of the concepts of proportionality and “reasonable prospects” in the context of the Responsibility to Protect doctrine. \textsc{Report to the International Commission on Intervention and State Sovereignty, The Responsibility to Protect} 29 (2001) [hereinafter \textit{ICISS Report}].
in “incommensurability” in the study of intervention. For instance, if a strategic study defines intervention as only one which is only committed by a state’s regular forces, its findings might not be applicable to a legal study, which, as we shall see, potentially includes within the confines of the term also acts by non-state actors encouraged or tolerated by a state.

I.2 A LEGAL APPROACH TO INTERVENTION OR SETTING ASIDE REALISM

In the sphere of political science, it should come as no surprise that the discussion regarding intervention in internal armed conflicts is a sub-question of the longstanding debate between the realist approach to international relations and the liberal or legalistic approaches.

Realists – and particularly neorealists from the school of Kenneth Waltz – stress the anarchical characteristics of the international system, which result in inter-state relations that are subject strictly to power considerations. Accordingly, legal or moral norms, or the internal political structure of the state, are irrelevant as determinants of state action on the international level. Thus, since realists “tend to see all states as caught in a state of war in which the only source of security is self-help,” their analysis of forcible

Interventions will be mainly based on states’ “relative capabilities.”

It therefore only makes sense that realists see forcible intervention strictly as a tool utilized to achieve security, *inter alia*, through the maintenance of the balance of power. For realists, this is a *descriptive* claim regarding how states act; and given their perception of the international realm as one of anarchy, it is also a *normative* claim: this how states *should* act.

International liberals, on the other hand, agree that at least some of the forcible interventions undertaken by states are based on principles independent from pure power calculations. They argue that international institutions and economic interactions create interdependence that reduces conflicts and enhances cooperation. They identify the development of inter-governmental networks which modify state actions through socialization processes, and emphasize the role of fairness and legitimacy in the international system. They do not accept the neorealist separation between domestic politics and inter-state relations, and advance *liberal peace* arguments, drawing on

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13 **DOYLE**, *supra* note 8, at 390.
14 The mirror-claim to the realist view of intervention concerns the realist perception of *non-intervention*: non-intervention is a concept to be respected only when it corresponds with a state’s security needs. *See id.* 8 392.
15 States “should” act according to power considerations, because of they fail to do so, they will violate their basic duty (or interest) to defend one’s self. This mirrors the argument by Thomas Hobbes that in the anarchical “state of nature,” “covenants of mutual trust” are void, since they essentially entail one’s renunciation of the inalienable right to self defense. *See THOMAS HOBBES, LEVIATHAN* 92 (1651), available at [http://books.google.com](http://books.google.com).
16 What these principles *exactly* are (or should be), and when do they amount to a justification of intervention differs among different schools of liberals. The common trait among them is that they all recognize instances where intervention is justified based on considerations that are not entirely based on narrow state “interests.” *See DOYLE, supra* note 8, at 396–402.
Kantian principles to demonstrate that the internal structure of liberal states results in their reluctance to fight each other.\textsuperscript{20} Others argue for a concept of international morality which is independent from the realist view of inter-state relations as a Hobbesian anarchy.\textsuperscript{21}

In our context, it is plain to see that realists will not attribute major importance to the existence or absence of consent when a state contemplates intervention, at least as long as the consent does not affect its power calculations. Liberals, on the other hand, might view consent as a legitimizing factor – whether morally or legally – independent from the question of power-relations. This work does not purport to solve the debate between realism and liberalism regarding forcible intervention. The international lawyer is indeed in a bind; if she must always, \textit{a priori}, prove the mere existence of international law as a significant force in the relations between states, before embarking on any study of international law, she will inevitably find herself trapped in an endless cycle of apologetics, preventing her from developing law itself. This work, therefore, notes that international law is far from perfect. However, it must adopt the presupposition that international law indeed exists, that it is binding, and that it actually affects the behavior of states.

\textsuperscript{20} See, e.g., Michael W. Doyle, \textit{Kant, Liberal Legacies and Foreign Affairs} 12 PHIL. & PUB. AFF. 205, 206. (1983)

\textsuperscript{21} See \textsc{Charles R. Beitz}, \textsc{Political Theory and International Relations} (1979).
I.3 The Distinction Between Consensual Intervention in Internal Armed Conflicts and Intervention in Political Disputes

It could be argued, that the question of consensual intervention in internal armed conflict should be analyzed in a similar manner, regardless of the existence of an internal armed conflict. Indeed, the merits of a struggle are not solely contingent upon its “violent” or “nonviolent” character. Thus, one can argue, the power to consent to forcible intervention should be analyzed irrespective of any pre-existing internal armed conflict, and be assessed solely on the character of the regime involved. However, the existence of an internal armed conflict prompts a set of considerations – ethical and legal – that do not arise in its absence.

First, internal armed conflicts represent, in a visible and distinctive manner, a situation where “anarchy prevails” within a state. In such cases the general norm of non-intervention loses much of its theoretical appeal. In this sense, the existence of an internal armed conflict serves as a strong indication that the norm of non-intervention, regarding the conflict-torn state, should be interpreted in a qualifying manner.

Second, intervention for the sake of regime change, absent an internal armed conflict (or widespread atrocities,) and merely on counts of the regime’s “immoral”

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22 See Emanuel Kant, Perpetual Peace: A Philosophical Essay 112–113 (1759) (Mary Campbell Smith, Trans., 1903) (the Fifth Preliminary Article of Perpetual Peace), available at http://books.google.com/. Kant, however, distinguished between different levels of internal conflicts, according to which only when a state “has become split up through internal corruption into two parts, each of them representing by itself an individual state which lays claims to the whole” a state of anarchy “prevails,” in which foreign intervention does not constitute “interference.”
characteristics, can be seen as a case of \textit{preventive} use of force, with all the legal and ethical problems it entails.\textsuperscript{23}

Third, a democratic standpoint will always seek to see internal differences settled through deliberation. An eruption of an internal armed conflict represents a strong indication that (a) a democratic process in the state is completely absent; or (b) that democratic options have been exhausted. In any case, deliberation or other non-violent measures have been effectively \textit{abandoned}. This situation clearly distinguishes instances of internal armed conflicts from other political conflicts. When deliberation is abandoned, it is easier for one to justify an intervention as an action of “last resort,” in the classic just-war sense.\textsuperscript{24}

Fourth, Mill stressed the significance of the local population’s independent motivation to win its freedom and acts upon accordingly. It must be prepared to embark on an “arduous struggle to become free on their own efforts.” Such a struggle is more likely to bring long-term freedom as “[m]en become attach to that which they have fought long for, and made sacrifices for.”\textsuperscript{25} The eruption of armed conflict may serve as one indication that such a genuine motivation for change indeed exists, a fact that may or may not affect our understanding of the effects of intervention.

Fifth, importantly, internal armed conflicts inflict extensive humanitarian suffering. This, in itself, justifies placing them in a criteria different than regular political

\textsuperscript{23} See \textsc{Walzer, supra} note 2, at xiii. However, when dealing with regimes that are beyond doubt “capable of aggression and massacre,” Walzer argues for preventive “measures short-of-war” such as no-fly zones - although he does not condone “preventive war.” \textit{Id.} at xiv. However, since modern international law does, in general, distinguish between such measures in the application of \textit{jus ad bellum}, this distinction is not relevant in our context.

\textsuperscript{24} See, \textit{e.g.}, \textsc{ICISS Report, supra} note 10, at 36–37.

\textsuperscript{25} \textsc{Mill, supra} note 2, at 260; \textit{See also} \textsc{Walzer, supra} note 2, at 87–88; \textsc{Doyle, supra} note 8, at 395.
differences, unless these amount substantively to the same humanitarian suffering that would have been caused by an armed conflict.

Sixth, and here we return to the realm of positive law, internal armed conflicts change the normative environment of international law, as norms of international humanitarian law – inapplicable in absence of an armed conflict – begin to apply. As we shall see, this question affects both the legality of the use of force of the challenged government, and, consequently, also its ability to express valid consent to an intervention.\footnote{See Chapter 9, sec. II.1.}

These six considerations thus serve to distinguish between internal armed conflict and other manifestations of political turmoil, differences or dissent; they lay the grounds for the legal distinction between intervention in internal armed conflicts and intervention in other political disputes.

II. INTERVENTION IN INTERNATIONAL LAW: KEY DISTINCTIONS

II.1 PHYSICAL (DESCRIPTIVE) VERSUS NORMATIVE (PRESCRIPTIVE)

The term “intervention” is notoriously known to be one of an open-textured nature.\footnote{Rosenau, supra note 1, at 152–155.} Indeed, short of the adoption of a pure neutral stance – which in itself could be sometimes construed as a type of intervention –\footnote{See, in this context, the discussion of the non-intervention agreement in the Spanish Civil War in Chapter 7, sec. IV.} any action (or omission) by a state regarding events that take place within another state, ranging from utterances of officials to military invasions, can be considered as an intervention.

\footnote{See Chapter 9, sec. II.1.}
A possible starting point in the attempt to clarify the use of the term can be found in distinguishing between its *physical* and *normative* meanings. When we use the term intervention, we may refer to two different meanings. The first refers to the *physical*, or descriptive sense. Thus, whenever a state engages parties in an internal armed conflict – whether by invitation or consent of a certain party; whether by forcible or non-forcible measures; whether legally or illegally – it *intervenes physically* in the conflict. A *physical intervention* is thus a “finite and temporary” phenomena; its beginning can be identified as the moment when “conventional modes of conduct are abandoned;” and its ending as the instance when “the conventional modes are restored or the convention-breaking mode becomes conventional through persistent use.”

The second meaning of the term intervention is in the *normative*, or prescriptive sense: meaning, the potentially unlawful interference or encroachment upon the territorial integrity or internal political affairs of another state. This meaning refers to the centuries-old principle of non-intervention, which is entrenched in different customary rules and in many historical and contemporary documents, judgments and treaties.

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29 Rosenau, *supra* note 1, at 161.
Therefore, in essence, only engagements which violate the general norm of non-intervention are interventions in the *normative* sense. Thus, while every involvement – whether forcible or non-forcible; military, economic or political – of an external party in an internal armed conflict is *per se* a *physical* intervention, not all are *normative* interventions.  

II.2 TYPOLOGY OF INTERVENTION: NON-FORCIBLE VERSUS FORCIBLE; NEGATIVE VERSUS POSITIVE; AND UNILATERAL VERSUS MULTILATERAL

Intervention, as a physical concept, can take place in many different forms. *Inter alia*, it can consist of direct military intervention, economic intervention, or a combination of both; it could be in the form of diplomatic intervention – whether by concerted diplomatic activity or by granting or denying recognition; it can take the form of logistical or other support of armed groups within another state; It could be an amalgamation of all of these methods.

Each one of these methods encompasses an infinite variety of actions. In general, these methods can be classified as *non-forcible* versus *forcible* ones. Non-forcible intervention is, at large, controlled by the general principle of non-intervention, as well as

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32 Damrosch prefers the term “influence” to describe what I refer to as “physical” intervention – meaning, intervention which is not legally prejudged. I use the term “intervention” because the term “influence” seems to be weak in the context of military intervention. See Politics Across Borders, *supra* note 31, at 12–13. Moreover, the term “influence” is more apt to describe the outcome – or objective – of a particular intervention. See Rosenau, *supra* note 1, at 159.

33 See, e.g., REGAN, *supra* note 3, at 25.

by international human rights law.\textsuperscript{35} Forcible intervention – the main concern of this work, is controlled too by the norm of non-intervention, but also, first and foremost, by the international law regarding the use of force.

A related distinction is between \textit{negative} and \textit{positive} forms of intervention.\textsuperscript{36} The boundaries of these distinctions are admittedly rough. \textit{Negative} interventions are naturally non-forcible; they involve the complete withdrawal or partial reduction of existing interactions with a target state, or forward-looking bans or limitations on such interactions. Such activities include economic sanctions – ranging from withdrawals of various kinds of favorable treatments to comprehensive trade embargoes (including arms embargoes); as well as political and cultural sanctions. Negative intervention is regulated by a rather flexible legal framework. For instance, in the landmark Nicaragua case, the ICJ held that forms of unilateral negative economic intervention – such as withdrawal of aid or trade sanctions – are \textit{not} prohibited by customary international law, meaning, they do not constitute illegitimate \textit{normative} interventions.\textsuperscript{37} Indeed, economic sanctions – the


\textsuperscript{36} In the same vein, Damrosch makes a distinction between \textit{affirmative} and \textit{negative} techniques of economic leverage. See \textit{Politics Across Borders}, supra note 31 at 6, 31 (1989).

\textsuperscript{37} Nicaragua claimed, \textit{inter alia}, that the American cessation of economic aid, imposition of quota restrictions on sugar imports and trade embargo is contrary to international law. The ICJ rejected this claim
most common form of negative non-forcible intervention – are not considered, in general, as unlawful intervention unless they amount to extreme economic coercion.\textsuperscript{38} This notion is based on the idea that states are sovereign to conduct their economical policies – whether internal or external –\textsuperscript{39} and that as long as an action is not limited by treaties or customary international law, it is not prohibited.\textsuperscript{40}

\textit{Positive} interventions are actions that can be described as “affirmative” - meaning, all actions involving changes of the status-quo ante in inter-state interactions, which go beyond withdrawals or bans. These can be either non-forcible (e.g., the granting of economic or aid or recognizing the opposition as the state’s lawful government or as a seceding state) or forcible (the use of military force, directly or indirectly and some forms of military aid such as arms transfers). In general, positive non-forcible intervention in favor of opposition groups is severely limited in international law, through the holding briefly that “At this point, the Court has merely to say that it is unable to regard such action on the economic plane as is here complained of as a breach of the customary-law principle of non-intervention.” Nicaragua, supra note 31, ¶245 (Singh, J.); See also Politics Across Borders, supra note 31, at 34; Sarah H. Cleveland, \textit{Norm Internalization and U.S. Economic Sanctions}, 26 \textsc{Yale J. Int’l L.} 1, 53–55 (2001).


\textsuperscript{39} See, e.g., \textsc{Lassa Oppenheim, International Law} §129 (1992); \textit{see also} Laura Picchio Forlati, \textit{The Present State of Research Carried out by the English Speaking Section of the Centre for Studies and Research, in Economic Sanctions in International Law} 129, 131 (Centre for Studies and Research in International Law and International Relations, 2000); Cleveland, \textsc{supra} note 37, at 53. The claim that such unilateral economic sanctions indeed constitute a \textit{normative} intervention was usually invoked by developing countries, but rejected by developed countries, thereby negating the possibility that such a customary norm has emerged. \textit{See Politics Across Borders, supra} note 31, at 32–33. For a rebuke of many critiques regarding the use of unilateral sanctions by the U.S., see Cleveland, \textsc{supra} note 37, at 48.

\textsuperscript{40} See, in this context, the debate regarding the legality of the non-intervention agreement in the Spanish Civil War, see Chapter 7, sec. IV.
Declaration of Friendly Relations –providing that it is a violation of international law for a state to

[O]rganize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State. 41

The question regarding a party's power to consent to external forcible intervention also has positive and negative aspects. Should we claim that international law negates, in some circumstances, the power of consent, we are essentially arguing for a norm of negative non-forcible intervention. Similarly, if we claim that law recognizes, in some circumstances, the power of consent – we are arguing for a norm of positive forcible intervention. Therefore, the normative frameworks that relevant to both types of interventions (negative or positive) might also affect the question of consent.

The last important distinction, applicable to all types of interventions in internal armed conflicts – non-forcible or forcible; negative or positive - is between unilateral and multilateral interventions. The term unilateral intervention used in this work refers to any intervention which is conducted by a state, or a group of states (through an international organization or otherwise), not through the mechanism established in Chapter VII of the

41 Declaration on Friendly Relations, supra note 38. Such was also the attitude of the ICJ. See Nicaragua, supra note 31, ¶228. The same clause was included in the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and Protection of their Independence and Sovereignty, G.A. Res. 2131 (XX), U.N. Doc. A/RES/20/2131 (Dec. 21, 1965).
U.N. Charter. Actions taken pursuant to Chapter VII resolutions will be described as *multilateral interventions*.\(^{42}\)

In general, forcible intervention is governed by the U.N. Charter's law regarding the use of force – effectively separating the normative status of unilateral and multilateral forcible interventions. The law regarding non-forcible interventions, at large, places both unilateral and multilateral interventions under the same normative system. The main difference between them being, that multilateral non-forcible interventions are universally binding, while unilateral ones are not.

**III. The Shifting Meaning of the Norm of Non-Intervention and Its Interaction with the Law on the Use of Force**

**III.1 The Shifting Meaning of the Norm**

When discussing intervention and the use of force, some attention must be given to the shifting perception in the understanding of the norm of non-intervention. Indeed, while the norm is not challenged *per se* in existing international law, it certainly is not viewed as rigid or absolute.\(^{43}\) The norm of non-intervention is limited by various legal frameworks that may allow different types of interventions – sometimes justified, at least

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\(^{42}\) Some choose different definitions. In some works “multilateral” action is simply that which is conducted under auspices of international organizations or alliances, like the OAS or NATO – and not necessarily those which relate to Chapter VII. *See, e.g.*, REGAN, *supra* note 3, at 105; others use the term “collective intervention.” *See ENFORCING RESTRAINT, supra* note 30, at 2.

\(^{43}\) Leurdijk argues that the non-absolute character of the norm of non-intervention is a frequent feature of the norm throughout history. *See LEURDUK, supra* note 31, at 19.
in the context of non-forcible intervention – by reference to the intervening party’s own right to conduct its policy without external intervention.44

This ambiguous framework is a result of the many dilemmas the norm of non-intervention presents, especially – but not only – to liberal thinkers.45 The “liberal dilemma” regarding the norm arises from its dual and seemingly contradicting meanings, when explained and justified in liberal discourse. On one hand, liberal thought condones the norm of non-intervention, since it solidifies peoples’ right to freely determine their path, as part of the basic right to self-determination; this right can only be secured in political structures that are free from external interference.46 On the other hand, the same liberal principles can be invoked to justify intervention when the people of the target state are denied this choice.47 According to Doyle, the liberal dilemma can be reconciled if we agree that “[s]ometimes the national self-determination that non-intervention is designed to protect is so clearly undermined by the domestic oppression and suffering that the principle should simply be disregarded.”48 In such situations, the realization of the same principles that uphold the norm of non-intervention, may – themselves – call for

44 One explanation for the fluid nature of the norm of non-intervention is the fact that due to its wide application, states are often behind of a “veil of ignorance” as to their interests regarding the scope of the norm. Most states might find themselves on both ends of the norm in different times, and thus their interests are not clear. See Politics Across Borders, supra note 31, at 13.
45 The norm has also challenged socialist thinkers. In the context of the Brezhnev doctrine, see Chapter 8 sec. II.
46 This view is radically different, for instance, than the 19th century perception of non-intervention as solidifying the concept of legitimacy of authoritarian rulers, as promoted by the Holy Alliance. See Hersch Lauterpacht, Recognition in International Law 103 (1947).
47 See Michael W. Doyle, A Few Words on Mill, Walzer, and Non-intervention 23 ETHICS & INT’L AFF. 349 (2009) (addressing this dilemma and comparing the principles underlying non-intervention and intervention in the works of John Stuart Mill and Michael Walzer); see also DOYLE, supra note 8, at 394–402 (providing an overview of traditional liberal approaches towards intervention and non-intervention.)
48 See id., at 361.
intervention. Consequentially, the intervener’s actions will not be considered a violation of the norm to begin with.

Much of the contemporary legal understanding regarding the scope of the norm of non-intervention is traced to the 1986 International Court of Justice landmark ruling in the *Nicaragua* case. However, and as detailed later, while that ruling reaffirmed the classical – and broad – perception of the norm, the doctrine set forth in *Nicaragua* was too thin to be considered exhaustive. The *Nicaragua* ruling was a product of the last days of the cold war. The world has changed dramatically since, reflecting constant shifts in the perception of sovereignty and non-intervention. The human rights discourse has become a dominant voice in international law, supplemented by arguments for the recognition of an international “democratic entitlement.” The Responsibility to Protect (RtoP) concept has emerged, suggesting that the concept of sovereignty – the very intrinsic value non-intervention traditionally sought to guard – has arguably transformed from the *de facto* ability to exercise *effective control* over territory, to the ability to fulfill the *responsibility to protect* its population. In general, thus, the norm of non-

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49 *Nicaragua*, *supra* note 31; see also Armed Activities on the Territory of the Congo (DRC v. Uganda), 2005 I.C.J. 168 (December 19) ¶ 164.

50 Chapter 8 sec. IV.3.


53 See Francis M. Deng et al., SOVEREIGNTY AS RESPONSIBILITY 1–34 (1996); ICJIS Report, *supra* note 10, at 8–34 (discussing this process). The most dramatic of these challenges may be the interventionist attitude that is reflected in new defense treaties of African regional organizations. These will be addressed *infra*, Chapter 10 sec. III; see also Oliver Furley & Roy May, *Introduction*, in AFRICAN INTERVENTIONIST STATES 1, 4(Oliver Furley & Roy May eds., 2001); Jeremy Levitt, *African Interventionist States and International Law*, in AFRICAN INTERVENTIONIST STATES, id. at 15. In general, the official attitude of African regional organizations regarding the norm of non-intervention has been described as having shifted to “non-indifference”. See Paul D. Williams, *From Non-Intervention to Non-Indifference: the Origins and Development of the African Union's Security Culture*, 106 AFRICAN AFFAIRS 253 (2007).
intervention has arguably shifted its focus from seeking to ensure non-intervention in sovereign will, to the protection of other interests.

In this context, two main levels of challenge to the traditional understanding of non-intervention can be identified. The first – perhaps narrow challenge – considers non-intervention as contingent upon the sovereign’s physical protection of its population or civilians under its control. This is very much the approach of RtoP.

A wider challenge posits that non-intervention is set to entrench the substantive democratic will of peoples, meaning, not only their physical protection but also certain political values. The term “substantive” alludes to rights that go beyond the principle of majority rule, and extend also to the protection of human rights that are a precondition for any true democratic process.54 This challenge corresponds with the perception of democracy as a human right in itself – or, as Thomas Franck famously put it, democracy as an “entitlement” that has “trumped the principle of non-interference.”55 Damrosch thus defines this “reformulated” norm of non-intervention as only prohibiting “actions by one state that deny the people of another the opportunity to exercise free political choice.”56

Be it as it may, the mere existence of the principle of non-intervention is not seriously contested. Therefore, a precise way of expressing the relation between the norm of non-intervention and its substantive challenges, would not be that the latter has "trumped" the former, but rather that the former should be interpreted in light of the latter. The practical meaning of such a perception would be that states cannot invoke the norm

54 On “Substantive” democracy see AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 218 (2012).
55 Thomas M. Franck, Legitimacy and Democratic Entitlement, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 25, 46 (Gregory H. Fox & Brad R. Roth, eds. 2000).
56 Politics across Borders, supra note X, at 6, 18.
of non-intervention when they – themselves – are failing to protect populations under their control, or are otherwise denying basic political rights of their citizens.\textsuperscript{57}

However, it should be stressed that the redefinition of the norm of non-intervention does not always affect the question of forcible intervention. As we shall see later on, when the challenges to the norm are based on a government’s failure to protect civilians, they might affect its sovereign power, and thus result in implications on the issue forcible intervention. Conversely, while the norm of non-intervention might also be considerably weakened when democratic principles are violated, it is doubtful, in general, whether this in itself has bearing over the laws on the use of force. This is because of the fact the non-intervention and the laws on the use of force are two intertwining – but nevertheless distinct – normative frameworks.

III.2 THE “NORMATIVE DUALITY” OF FORCIBLE INTERVENTION

Forcible intervention is a form of positive intervention. Like any other intervention it is subject to the general norm of non-intervention. However, unlike non-forcible interventions, it is subject also to the international law on the use of force. It is worthwhile to briefly comment on the relation between the two sets of norms. It could thus be said that the former covers a wider spectrum of situations than the latter; and, conversely, that while the latter’s objectives include elements of the former, it also sets out to achieve objectives of a different kind.

\textsuperscript{57} See Cleveland, supra note 37, at 53–55.
Therefore, these two frameworks of norms – while sometimes protecting the same interests – are not entirely similar. This is a necessary corollary of the fact that the principle of non-intervention has preceded the prohibition on the use of force by three centuries, although the existence of the former without the latter raised a host of doctrinal problems.\(^5^8\) Nevertheless, the principle of non-intervention generally rejects the use of force because it almost always represents a form of *coercion* inflicted upon the target state.\(^5^9\) As phrased in the ICISS Report, in contrast to most cases of non-forcible intervention, forcible intervention “directly interferes with the capacity of a domestic authority to operate on its own territory. It effectively displaces the domestic authority.”\(^6^0\)

Indeed, the law on the use of force also serves to curtail coercion. However, it has further objectives – first and foremost, it is concerned with the prevention of the “scourge” of war in inter-state relations.\(^6^1\) Importantly, while the norm of non-intervention, because of its ambiguous nature, represents a flexible “standard,” the prohibition on the use of force is closer to an absolute “rule,” less amenable, in general, to teleological interpretation.\(^6^2\)

Therefore, both sets of norms seek to prevent the use of force – one on counts of its rejection of external coercion, and the other mainly by virtue of its objective to prevent violent settlement of disputes, with all their economic and humanitarian consequences.

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\(^5^8\) This problem is discussed in Chapter 5, sec. II.1

\(^5^9\) As the ICJ in Nicaragua held that a breach of the norm of non-intervention is “particularly obvious” where force is being used. *See Nicaragua, supra* note 31, ¶205; *see also* Dino Kritsiotis, *Topographies of Force, in INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES: ESSAYS IN HONOUR OF YORAM DINSTEIN* 29, 67 (Michael N. Schmitt & Jelena Pejic eds., 2007).

\(^6^0\) ICISS Report, *supra* note 10, at 29; *see also* Oscar Schachter, *The Right of States to Use Armed Force*, 82 Mich. L. Rev 1620, 1625 (1984) (“... article 2(4) remains the most explicit Charter rule against intervention through armed force.”)

\(^6^1\) U.N. Charter, pmbl.

Since these are different protected interests, it seems that the two sets of norms would apply in parallel – in a complementary manner – in every instance of forcible intervention. Accordingly, any such intervention must not be contrary to the law of the use of force; in addition, it cannot be in contravention of the general norm of non-intervention, according to its contemporary understanding.63

One effect of this normative-duality is that even when an instance of use of force is legal (for instance, in self-defense), it must also conform to the norm of non-intervention.64 An example may be found in the Hague law of occupation. Even where the occupation itself is legal (by standards of the law of the use of force), the occupying party is still obliged – “unless absolutely prevented” – to respect the laws “in force” in the occupied territory.65 The mirror image of this reasoning is more intuitive: even where the norm of non-intervention does not in theory prohibit an action (such as in intervention for the protection of nationals), the limitations on armed intervention imposed by the law on use of force are not necessarily negated.

The question of consensual intervention, thus, must be viewed according to this normative-duality. Party consent should be therefore analyzed in light of its effects over the laws on the use of force, but also on counts of its interaction with the norm of non-intervention. For instance, unilateral intervention upon the consent of a non-recognized opposition group, facing a government that commits mass atrocities, might not violate the

63 Such was also the conclusion of the ICJ in Nicaragua, as it ruled that supply of arms to opposition forces is a violation of the law of use of force (but does not constitute an armed attack) and also a violation of the norm of non-intervention. See Nicaragua, supra note 31, ¶247; see also Armed Activities on the Territory of the Congo (DRC v. Uganda), 2005 I.C.J. 168 (December 19) ¶164; Kritsiotis, supra note 59, at 64.
64 For similar reasoning see WALZER, supra note 2, at xi (“[e]ven when a humanitarian crisis has rightly triggered intervention, we can still hope to minimize the coercive imposition of foreign ideas and ideologies.”)
65 Hague Convention II: Laws and Customs of War on Land (1899), 32 Stat 1803, art. 43.
norm of non-intervention *per se* – considering the understanding of the norm as discussed in the previous section – however, it might still violate the prohibition on the use of force. Conversely, consent by a recognized non-democratic regime might – in a purely hypothetical situation – legalize a forcible intervention in terms of *jus ad bellum*; but one can imagine a situation – if we accept that the norm is indeed affected by notions of democratic entitlement – in which the action will still be deemed a violation of the norm of non-intervention.

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66 However, as discussed in Chapter 12, the opposition might be granted recognition on counts of consideration of protection of civilians, which might result also in consent power.

67 This theoretical scenario should be read in a qualified manner. As we shall see in Chapters 10 and 11, non-democratic regimes, when confronted by a pro-democratic opposition, will almost always commit atrocities, in which case their consent will be nullified, and thus cannot justify intervention whether in the realm of *jus ad bellum* or otherwise.
CHAPTER 4

DEFINING FORCIBLE INTERVENTION

I. DEFINING UNILATERAL FORCIBLE INTERVENTION—SCOPE, MEANS AND STATE ATTRIBUTION

It has been claimed that the occurrence of interventions, in their physical sense, is identified by their being “convention-breaking” – meaning, by their introduction of a situation which clearly departs from the status quo ante. Since “[m]ilitary interventions are perhaps the most dramatic and clear-cut departures from existing patterns,” forcible interventions in internal armed conflicts are supposedly easier to identify than non-forcible interventions, positive or negative.¹

However, when attempting to define exactly when an intervention is considered “forcible” – in the legal sense – the task may be more complicated than intuitively expected. The question of distinction between non-forcible and forcible interventions is crucial from a legal perspective, as these two categories of interventions are controlled by different sets of legal norms. As demonstrated in the previous Chapter, both types are controlled by the ambiguous principle of non-intervention; however, only the latter is also regulated by the more restrictive law on the use of force.

Since our analysis is concerned with consensual forcible interventions, the starting point for the definition of the term should be the interpretations suggested to the terms use of force and armed attack as these appear in the U.N. Charter. Once we understand which actions constitute “uses of force” or “armed attacks,” we can quite easily deduce that when such actions occur in the context of an intervention in an internal armed conflict, they will be considered as forcible interventions, and accordingly, when

¹ James N. Rosenau, Intervention as a Scientific Concept, 13 J. CONFLICT RESOLUTION 149, 163 (1969).
they are conducted with the consent of a party to the conflict, they will be considered 
consensual forcible interventions.

Article 2(4) of the U.N. Charter famously prohibits the use of force by states (and 
the threat of use of force). Complementing article 2(4) is article 51 – recognizing the 
right of self-defense as one which materializes when “an armed attack occurs.” Two 
immediate questions must be answered, before we can “translate” the definition of these 
terms into the context of forcible intervention. First, what actions, in terms of means, are 
considered forcible, and actions of what scope amount to a “use of force” or an “armed 
attack”? Second, when is a forcible act of intervention attributable to a state?

This chapter attempts to clarify these two questions. Doing so, we shall 
demonstrate that forcible interventions come in different forms; some of them short of 
direct intervention (“less-grave” forcible interventions). One such method of intervention 
is through the transfer of arms. In order to prevent the confusion between arms transfers 
and non-forcible intervention, we shall elaborate, in a non-exhaustive manner, on this 
question in this chapter.

I.1 SCOPE, MEANS AND METHODS OF FORCIBLE INTERVENTION

The interpretation of the term use of force sets forth several questions, in which the issues 
of scope (how “comprehensive,” in duration and intensity, does an action have to be) and 
means (what measures are considered forcible ones) intertwine.

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2 I will not address separately the issue of “threats” of forcible intervention. It suffices to say that in 
instances where an intervention would be considered illegal in itself, a threat of intervention would also 
be illegal. Therefore, conclusions in this work regarding legitimacy of intervention apply, mutatis 
mutandis, to the threat of such intervention. See Legality of the Threat of Use of Nuclear Weapons, 
Advisory Opinion, 1996 I.C.J. 226, ¶47 (Jul. 8); Dino Kritsiotis, Topographies of Force, in 
INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES : ESSAYS IN HONOUR OF 
YORAM DINSTEIN 29, 49 (Michael N. Schmitt & Jelena Pejic eds., 2007); For various interpretations on 
the prohibition on the threat of force see NICHOLAS STÜRCHLER, THE THREAT OF FORCE IN 
For an action to be sufficient in scope to constitute a “use of force” – and thereby considered as a “forcible intervention” – it needs not amount to a full-scale war in the classic, technical meaning of the term. Accordingly, forcible acts which are “short-of-war” may also be considered as “uses of force.” This conclusion coincides with the general process that occurred since the coming into being of the U.N. Charter, in which the term war, in the legal sense, has been marginalized: this is mainly due to the fact that the prohibition on force was never made contingent, in Charter law, upon the existence of a formal state of war.

Hence, according to Higgins, for an act to be controlled by Article 2(4) of the Charter, it does not make a difference “how brief, limited or transitory” it is; even a “simple aerial incursion” can forcefully violate the territorial integrity of a state. Thus, it suffices that the scope of actions, in order to be considered as forcible the purpose of Article 2(4), be brief and limited; and that the means employed include simple actions, such as aerial incursions, that do not necessarily involve the use of kinetic weapons.

This wide definition potentially encompasses grave instances of unorthodox use of deadly force – even if not “military” in the traditional sense – such as the methods used in the attacks against the September 11 attacks. The Security Council, in resolutions 1368 and 1373, as well as states and international organizations, found no difficulty to

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4 See Anthony C. Arend & Robert J. Beck, International Law and the Use of Force: Beyond the U.N. Charter Paradigm 30–31 (1993). The distinction between “war” and acts “short of war” is relevant, according to Dinstein, to circumscribe the scope of the right to self-defense arising in each case – and specifically, the meaning of the “necessity” and “proportionality” qualifications imposed by the Caroline doctrine in each case. See Dinstein, supra note 3, at 242–267; but see Kritsiotis, supra note 2, at 40–45 (analyzing and criticizing the implications of Dinstein’s distinction).

5 See id. at 34–37.

view such acts as giving rise to the right to self defense. This means that in certain grave situations, can be considered as forms of use of force rather then mere “criminal” actions by individuals. The same wide standard should be used when defining forcible intervention in internal armed conflict.

Of course, the 21st century brings about a plethora of questions regarding what constitutes an "incursion" and what means are "forceful." For instance, one especially perplexing question is the distinction of acts of information warfare ("cyber attacks;") and, in our case, whether such acts – carried independently from other forceful acts – can constitute forcible interventions. The resolve of this complex question is beyond this work; however, to the extent that acts of information warfare would be considered uses of force, our conclusions will naturally apply to them also.

Moreover, actual hostilities between the intervener and parties within the conflicting state do not have to occur: for instance, the U.S. Marines encountered no resistance during their landing in Beirut beach in 1958. This mere fact does not negate the forcible nature of the American intervention. In the same vein, unilateral imposition of “humanitarian corridors” by external states within the territory of a conflict-ridden state – such as those considered by some states during the 2011–2012 crisis in Syria – are also forcible acts even if not actively resisted by the territorial state.

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8 See id. at 41–46.
I.2 “GRAVE” AND “LESS-GRAVE” FORCIBLE INTERVENTIONS

By now we have a reasonably good idea of the scope and means of actions that amount to forcible interventions. However, for the sake of clarity, it is helpful also to consider the meaning of the term in light of the relations between the terms use of force (used in Article 2(4)) and armed attack (used in Article 51) as these appear in the U.N. Charter. Do forcible interventions, per se, fall under one term or the other? Indeed, the former term has been interpreted by the ICJ as one which is wider than the latter. The majority opinion in the Nicaragua ruling has distinguished between “grave” forms of the use of force – meaning, those that involve an armed attack – and “less-grave” forms, which usually do not constitute such an attack.12 The practical implication of the distinction between “armed attacks” and “less-grave” uses of force, according to the Nicaragua court, was that while every use of force is prohibited by the Charter, only “grave” forms of use of force constitute an “armed attack” that spawns the right to self-defense.13 “Grave” forms of use of force, or “armed attacks,” were defined in Nicaragua to as including actions, which are not merely frontier incidents – whether taken by a state’s regular armed forces, or by other forces sent by the state or on behalf of it – across an international border.14 “Less-grave” forms of the use of force were defined by the Court

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13 However, such acts may entitle the wronged states to take “proportionate countermeasures.” The Nicaragua ruling did not elaborate what actions constitute such countermeasures. See Nicaragua, supra note 12, ¶¶247–249; see also Kritsiotis, supra note 2, at 51–52. Judge Schwebel, in obiter dictum, rejected this approach. According to Judge Schwebel, Article 51 does not constitute a definition of the concept of self defense, which is grounded in customary law. Thus, he was of the opinion that Article 51 should not be read as an exhaustive provision. Nicaragua, supra note 12, ¶¶171–173 (Schwebel, J., dissenting.)

14 Nicaragua, supra note 12, ¶195. This definition leaves much to be desired nowadays, when one considers the complexities mentioned in the previous section, regarding the question of what means are to be considered forceful. Concerning “frontier incidents,” It seems reasonable, when reading Nicaragua, that the Court included “mere frontier incidents” in the category of “less-grave” uses of force, since it exempted these actions from the definition of “armed attack.”
as the actions prohibited by the Declaration on Friendly Relations. These activities include, among others, a state's acquiescence to or toleration of acts committed by non-state actors operating from that state’s territory, in the context of an internal armed conflict taking place in another state, as well as arming and training of opposition forces (indirect aggression). “Less-grave” uses of force would be considered, in the view of the Nicaragua majority, not as “armed attacks.” An example for such a situation may be found in Zaire’s acquiescence to the operation of UNITA forces from its territory, against the government of Angola.

It is important to note, however, the dissenting opinion of Judge Schwebel concerning this distinction, which underlines a significant rift in the understanding of international law among different actors. According to Judge Schwebel, arming, training and providing logistical support to groups in an internal armed conflict, as well as other forms of substantial involvement (as the term appears in article 3(g) of the Definition of Aggression) in the activities of such groups is tantamount to an armed attack and potentially to aggression.

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16 The Declaration of friendly relations declares: “Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force” and also, “no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.” (emphasis added in both quotes) These principles were reaffirmed in Article 6 of the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, G.A. Res. 42/22, U.N. Doc. A/Res/42/22 (Nov. 18, 1987), and repeated in Armed Activities on the Territory of the Congo (DRC v. Uganda), 2005 I.C.J. 168 (December 19) ¶276 –305; see also GRAY, supra note 12, at 79–80; compare Hague Convention V: Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (1907), U.S.T.S. 540, arts. 4, 6.

17 See Nicaragua, supra note 12, ¶191.

18 See Chapter 1, sec. III.1.

19 Judge Schwebel advanced this interpretation as vindicating of the American intervention in Nicaragua. According to him, Nicaragua’s alleged intervention in El Salvador amounted to an armed attack spawning El Salvador’s right to collective self-defense, which in turn justified the U.S. support to Nicaraguan rebels as an exercise of this right. See Nicaragua, supra note 12, ¶¶154–171, 176 (Schwebel, J., dissenting).
In our context – whether an action is an “armed attack” or not; constitutes a “grave” or “less-grave” form of use of force – the key importance is in the fact that all of the said actions are considered forcible. Thus, in sum, forcible interventions can include “grave” uses of force: meaning, armed interventions by a state's military forces, or by non-state actors operating under the state's control; and “less-grave” uses of force, such as acquiescence and toleration of actions taken by non-state actors operating from the state’s territory, and transfers of arms.

I.3 The Question of State Attribution: Forcible Intervention by Irregular Forces and Non-State Actors

When can a forcible intervention be attributable to a state? Naturally, this question does not pose major difficulties when a state makes overt use of its regular armed forces. However, when irregular forces enter the picture, the issue of attribution becomes paramount. The question of state responsibility for acts taken by irregular forces – or the attribution of these acts to a state – has been one of steadily increasing importance since the end of World War II, as the use of irregular forces has been a recurring and dominant feature of forcible interventions in internal conflicts. This has been a feature of the cold war’s proxy conflicts; of Africa’s disastrous internal conflicts since the 1990s; and of contemporary struggles involving religious extremists in the early 21st century.

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21 For instance, the relation between North Vietnam and the Pathet Lao insurgents in the Laotian internal conflict of the 1960s; the alleged connection between the Nasserite rebels and the United Arab Republic in the Lebanese conflict of 1958 (both prompted U.N. commissions to investigate these connections – both found no conclusive evidence). See John Main, *The Civil War in Laos, in International Regulation of Civil Wars* 91 (Evan Luard ed., 1972); Malcolm Kerr, *The Lebanese Civil War, in International Regulation of Civil Wars*, id., at 65, 66–67.
A relatively clear-cut example for the use of irregular forces can be found in the first stage of the Syrian intervention in the Lebanese conflict of 1975, in which Syria sent the "Palestinian Liberation Army" (PLA) – an officially Palestinian, but effectively Syrian force – to intervene in favor of the rebelling National Front in its struggle against the ruling, Maronite dominated elite. The PLA forces were directed from Damascus and utilized Syrian military hardware, which was hastily covered in PLA insignia. Another instance of forcible intervention through irregular forces is the involvement of the Rwandan Patriotic Army (RPA) in the 1996–1997 Zaire/Congo conflict, in which RPA forces, loyal to Rwandan president Kagame, were instrumental in the removal of Zaire’s dictator Mobuto Sésé Seko. Recently, Iranian officials reportedly admitted that units of Hizbullah, crossing from Lebanon, have participated in the defense of army bases in Syria, after these have allegedly come under attack by the Syrian opposition. The latter situation demonstrates the attribution problem in full force, and namely whether Hizbullah’s intervention can be attributed to Lebanon, Iran, both or neither.

Regarding irregular forces, article 3(g) of the Definition of Aggression augmented by a similar provision in the 2010 Kampala definition of the crime of aggression provides that the term aggression includes

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22 This was a feature of the 1990s conflicts in Rwanda, Burundi, Sierra Leone and Sudan. See William G. Thom, Congo-Zaire’s 1996-1997 Civil War in the Context of Evolving Patterns of Military Conflict in Africa in the Era of Independence, 19 J. CONFLICT STUDIES (1999).


24 See NAOMI JOY WEINBERGER, SYRIAN INTERVENTION IN LEBANON: THE 1975-1976 CIVIL WAR 142 (1986). Syria has made use of the “Palestinian Liberation Army” banner also in 1970, during the Black September events in Jordan, where Syrian tanks were camouflaged under PLA insignia. See id. at 130.

25 The Rwandan president admitted that RPA troops were heavily involved, and even took leadership, of the rebel forces in Zaire. Thom, supra note 22. This admission was retroactive, as during the conflict Rwanda repeatedly denied its involvement. See 1997 U.N.Y.B. 73–74.


28 The Crime of Aggression, art. 8bis(g), Resolution RC/Res.6, RC/11 (Jun. 11, 2010).
[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

In the Nicaragua case, the ICJ reaffirmed this article as reflecting customary international law, holding that the court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces.29

Thus, the ICJ has recognized the possibility of attribution between a state and irregular forces actively sent by it. Regarding the level of state control required such attribution, the Nicaragua court held that the state must exercise “effective control” over the specific operation.30 The ICTY, conversely, in the famous Tadic case, required a more lax standard of “overall control.”31 Article 8 of the Articles on State Responsibility requires, in this context, that “the person or group of persons is in fact acting on the instructions of, or under the direction or control” of the state.32 The Commentary to Article 8 addressed the different standards established in Nicaragua and Tadic, and summarized that “. . . it is a matter for appreciation in each case whether particular

29 Nicaragua, supra note 12 ¶195 (emphasis added).
30 Id. ¶¶115 –116.
32 ILC Draft & Commentaries, supra note 20, at 31.
conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it.\textsuperscript{33} In the 2007 Bosnia Genocide Case, the ICJ once again advanced the "effective control" test as established in \textit{Nicaragua}, critiquing the ruling in \textit{Tadic} and holding that the effective-control standard is also compatible with the aforementioned Article 8 of the ILC Draft, which it saw as reflecting customary international law.\textsuperscript{34}

The additional recognition by the ICJ – based on the Declaration on Friendly Relations – that a state’s \textit{toleration} of or \textit{acquiescence} to forcible acts by non-state actors operating from its territory can also amount to a forcible act \textit{by} that state (albeit a “less-grave” form in the eyes of the Court),\textsuperscript{35} also raises the question of attribution between the tolerated or acquiesced acts and the state. Of course, the \textit{level} of toleration or acquiescence required to create a linkage between the state and the non-state actors is a complex question; it is also a relevant factor to consider whether the state has at all the \textit{capacity} to control these actors. We shall not address this question widely in this work; suffice it to say that since the attacks of September 11\textsuperscript{th}, 2001, and the ensuing (and widely accepted) forcible response, some have argued that a positive duty of “due diligence” to prevent acts by non-state actors has emerged.\textsuperscript{36} Such a positive duty to prevent actions can perhaps justify – in our context – viewing attacks launched from a state’s territory, in specific situations, as forcible interventions attributable to the latter.

\textsuperscript{33} Id. at 48.

\textsuperscript{34} Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. ¶398, ¶¶405–406 (February 26\textsuperscript{th}); see also Antonio Cassese, \textit{The Nicaragua and the Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia}, 18 EUR. J. INT’L L. 649 (2007) (surveying the rulings in the aforementioned cases regarding the "effective" or "overall" control standards, and critiquing the court's reasoning in the Bosnia Genocide Case).

\textsuperscript{35} See sec. 1.2.

Some have read the “due diligence” concept into the “overall control” standard, as imposing “protective duties” on the territorial state vis-à-vis other states. However, it is unclear to what extent, if at all, they see this duty as creating an attribution sufficient to implicate the territorial state itself, beyond allowing the attack of the non-state actor in its territory.\(^\text{37}\) In this context, it has been claimed – and this indeed seems reasonable and fair – that the question whether a state is genuinely “unable” to reign in the activities of non-state actors operating from its territory, or is rather is merely “unwilling” to do so, can affect the scope of the right to self-defense of the attacked state.\(^\text{38}\) Such a distinction can also be understood as affecting the attribution of actions of non-state actors to territorial states. However, the exact ramifications of the concept of “due diligence” are beyond the scope of this work.

In sum, forcible intervention by a state encompasses also forcible actions conducted through irregular forces controlled by that state – whether according to the "effective" or "overall" control tests – either by active encouragement, toleration or acquiescence –the latter are possibly affected by a duty of “due diligence,” however it is defined.

II. MULTILATERAL FORCIBLE INTERVENTION BY U.N. MANDATED FORCES

The aforementioned modalities of forcible intervention apply also to cases in which the intervening powers are mandated to use force by U.N. Security Council resolutions adopted under Chapter VII of the U.N. Charter (“enforcement measures”) – notwithstanding the different legal status of such forces. This distinction is important

\(^\text{37}\) For a discussion see, e.g., Stahn, supra note 7, at 47–48, 50–51.

when seeking to analyze the role of party consent in such operations. Thus, When U.N. authorized forces forcefully engage a party to an internal conflict, these forces may be looked upon as forcible interveners. This is the case, for instance, of the U.N. Mission in the Democratic Republic of Congo’s (MONUC) involvement in the government offensive against rebel forces in East Congo between 2008 and 2010;\(^\text{39}\) or the bombing campaign against forces loyal to Libya’s Al-Qadhafi, in favor – even if tacitly –of rebel groups, as authorized by the Security Council in March 2011.\(^\text{40}\)

It is important to distinguish between the situations mentioned above, which represent robust U.N. operations characteristic of the post-cold war era, and classic, formally impartial peacekeeping missions. The latter consist of the consensual deployment of neutral humanitarian or peacekeeping forces across a state’s border. As such, they are excluded from the definition of forcible intervention.\(^\text{41}\) These operations will usually be conducted by U.N. or regional organizations’ authorized peace-keeping forces, which (at least \textit{de jure}) are not mandated to actively assist – whether directly or indirectly – either party to the conflict.

The difference between non-forcible and forcible Security Council authorized operations can be exemplified when comparing two resolutions adopted with regards to MONUC’s mandate. Resolution 1279 of 1999,\(^\text{42}\) establishing MONUC, primarily designated the operation as an impartial ceasefire observation force, established in the context of the Lusaka Agreement between the parties to the Second Congolese Conflict.

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\(^\text{39}\) See Chapter 1, sec. III.3.  
\(^\text{41}\) This is irrespective of the question whether these forces are deployed pursuant to Chapter VI of the U.N. Charter, or Chapter VII. The intervention would be deemed “forcible” once the mandate of the U.N. force includes forcible engagement, and would be deemed “non-forcible” when the mandate does not include forcible actions beyond the use of unit self-defense. For a similar distinction see Terry D. Gill & Dieter Fleck, \textit{Concept and Sources of the International Law of Military Operations}, in \textit{The Handbook of the International Law of Military Operations} 3, 4 (Terry D. Gill & Dieter Fleck eds., 2010).  
It had no mandate to use force. Resolution 1856 of 2008,\(^{43}\) conversely, mandated MONUC to use of force in “close cooperation” with the Congolese government.\(^{44}\)

### III. “LESS-GRAVE” FORCIBLE INTERVENTION – THE QUESTION OF ARMS TRANSFER TO PARTIES IN INTERNAL ARMED CONFLICTS

A common type of forcible intervention, considered, as aforementioned, a type of “less-grave” use of force, is the grant of direct support for the purpose of enhancing a party’s military capabilities, short of the direct forcible invasion in support of that party. Such actions are positive interventions, the most extreme of which include the transfer (whether by trade or aid) of military hardware to one of the parties, accompanied by the transfer of title or control over the equipment.\(^{45}\)

In the context of *jus ad bellum* – excluding perhaps the question of self-defense – the question of arms transfers to parties in internal strife can be regulated by the same normative framework that governs “grave” forcible intervention, and, in general, should not be treated differently. However, the problem of arms transfer raises some unique questions, which call for some separate treatment. The main difference between direct invasion and provision of arms – as methods of intervention – is that the latter is of dual-character: it is viewed not only as a form of use of force, but also as an act of international trade. As a form of trade, arms transfers are more readily undertaken by private firms, which historically allowed for more flexibility in the provision of arms, even during internal strife. This feature of arms trade accounted for great controversy, for instance, during the American Civil War, when private British shipyards supplied

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44 Id. ¶3.
warships to the Confederacy – spawning the famous Alabama Arbitration. Moreover, arms transfers raise unique problems – especially with regards to small arms – of illicit trade.

An easy case is thus when a state directly transfers arms to parties in an internal armed conflict. A more challenging legal situation arises when private entities do so. In a sense, this problem reflects dilemmas related to the question of attribution, as discussed in Section I.3 above. Without exhausting all aspects of this complex issue, we shall briefly delineate the main features of this confusing element of intervention, in order to clarify our later discussion.

In practice (and reserving for now the question of legality,) unilateral forcible interventions in the form of transfer of arms to parties in internal armed conflicts – whether to governments or to opposition forces, has been a recurring phenomenon in the international system. In the cold war era, for instance, internal armed conflicts were frequently used as proxy-wars between the rival powers; accordingly, arms transfers, by multiple parties, were a common tactic – each power intervening according to its interests in a specific case. The U.S.S.R, for instance, transferred weapons to opposition forces in Namibia (1961), Angola (1964) and others. In the secession struggle between Nigeria and the breakaway republic of Biafra, for example, interests were more complex than “east versus west,” as France (indirectly) provided arms to Biafra; the U.S.S.R., Czechoslovakia, Britain (albeit in a limited manner) and some Arab states chose to transfer arms to Nigeria. The practice of arms transfers in the context of internal armed conflicts has not ceased in the post cold war era. For instance, NATO provided arms to

the Kosovo Liberation Army in its secession struggle against Serbia prior to 1999; and
the U.S. supplied arms to opposition forces in Iraq during the mid 1990s.\footnote{49}

Theoretically, arms transfers can also be part of a multilateral forcible intervention
authorized by the U.N. Security Council. For instance, while resolution 1973 of March
2011 authorized states to take “all necessary measures” to protect civilians in
the Libyan armed conflict, it excluded the deployment of an “occupation force.”\footnote{50}
When it became clear that aerial attacks were insufficient to bring a swift end to the actions
by loyalists to Libyan leader Al-Qadhafi, the option of transferring arms to the Libyan rebels
surfaced. U.S. Secretary of State Clinton emphasized that the term “all necessary
measures” indeed encompasses also arms transfers to the Libyan opposition.\footnote{51}

III.1 ARMS TRANSFERS BY PRIVATE ENTITIES

A distinction must be made between by arms transfers undertaken by a government in
relation to an internal armed conflict in another state, and such acts committed by private
entities from within the former state’s territory. Regarding the former, and as we shall see
later in this work, traditional international law has been clear that prior to recognition of
the conflicting parties as belligerents, transfer of arms to opposition groups was an
unfriendly act that could lead to war. After belligerency recognition, if they wished to
remain neutral, the widely accepted view asserted that states were required to refrain
from arming either party.\footnote{52}

\footnote{49} See Mathiak & Lumpe, supra note 47, at 66 –70.
\footnote{50} S.C. Res. 1973, supra note 40, ¶4.
\footnote{51} Mark Landler et al., Washington in Fierce Debate on Arming Libyan Rebels, N.Y. TIMES, Mar. 29,
\footnote{52} See Hague Convention XIII: concerning the Rights and Duties of Neutral Powers in Naval War
(1907), art. 6; interestingly, such a categorical prohibition is not found in Hague Convention V, supra
note 16 (concerning neutrality on land). However, Dinstein holds that it is “incontestable” that the same
rule also concerns neutrality on land. See DINSTEIN, supra note 3, at 28.
However, even in such cases – when belligerency was recognized – states were not obliged to prevent arms sales by private entities, and could choose whether to allow it or prohibit it, as long as the policy would apply equally to the conflicting belligerents.\textsuperscript{53} The only positive duty incurred by the neutral state was to prevent, within its jurisdiction, the fitting out or arming of warships (or aircraft) intended to engage in hostilities against a belligerent, even if the warships were built by a private entity. This exception is historically traced to the post-Civil War Alabama Claims arbitration between the U.S. and Great Britain.\textsuperscript{54}

Restrictions on arms transfers by individuals have been debated over the decades, and can be found in the non-intervention agreement of the Spanish Civil War and in domestic Neutrality Acts, notably of the U.S. and Britain.\textsuperscript{55} However, although attempts to do so were made, such restrictions were never codified as comprehensive international norms.\textsuperscript{56}

A 1925 convention to regulate arms transfers by private entities, in which states undertook “not to export or permit the export” of arms unless in “direct supply to the Government” never went into force.\textsuperscript{57} This rule possibly applied also in internal strife, allowing private arms transfers only to governments. However, when the conflict amounted to “war” – meaning, when belligerency was recognized – the convention would be trumped by the laws of neutrality, and the problem of arms transfers by private entities would again arise.\textsuperscript{58}

\textsuperscript{53} See id.
\textsuperscript{54} See Hague Convention XIII: concerning the Rights and Duties of Neutral Powers in Naval War (1907), art. 8; art. The Hague Rules of Air Warfare (1923), art. 46; DINSTEIN, supra note 3, at 29.
\textsuperscript{55} See Chapter 7 sec. IV.
\textsuperscript{57} Convention on Supervision of International Trade in Arms and Ammunition and in Implements of War (Jun. 17, 1925), League of Nations Doc. A.16.1925.IX,art. 2(1) (1925) (emphasis added); Anderson, supra note 56, at 761–762.
\textsuperscript{58} Convention on Supervision of International Trade in Arms, supra note 57, art. 33.
This approach was repeated in the Convention on Duties and Rights of States in the Event of Civil Strife, adopted at the International Conference of American States in 1928.\textsuperscript{59} The signatory states took upon themselves, \textit{inter alia}, that in the event of “civil strife,” they shall “forbid traffic in arms and war material, except when intended for the Government, while the belligerency of the rebels has not been recognized, in which the latter case the rules of neutrality shall be applied.”\textsuperscript{60} Essentially, the said provision meant that in internal strife, only transfer of arms to governments was allowed, unless \textit{belligerency} of the parties was declared – and then states shall remain \textit{neutral}. The latter obligation, as aforementioned, entailed the abstention from transfer of arms by governments to \textit{either} party, but did not, in general, address private arms trade.

Modern international law has not been clear on this issue. It seems intuitive that, at large, in the era of the U.N. Charter, transfers of arms to \textit{governments} involved in internal armed conflicts are not contradictory to international law, subject to the limitations we shall address later on, while arms transfers to opposition groups – whether by governments of private entities – will in general be unlawful.\textsuperscript{61}

This notion was reaffirmed in the \textit{Nicaragua} ruling. There, the ICJ refused to recognize a customary international norm “whereby the level of armaments of a sovereign State can be limited;”\textsuperscript{62} while holding, conversely, that arms transfers by the U.S. to the Contras were in breach of the norm of non-intervention – thereby clearly favoring governments over opposition groups. Moreover, the Court held that although the supply of arms to opposition forces does not constitute an “armed attack” against the

\textsuperscript{60} Id. art. 1(3).
\textsuperscript{61} Chapters 8–12. Some claim, however, that transfer of arms to a state for the purpose of a violation of the prohibition on the use of force, as entrenched – regarding inter-state conflicts – in Article 2(4) of the U.N. Charter, may be prohibited. Also, transfer of arms can constitute “aid or assistance in the commission of an internationally wrongful act” as prohibited in article 27 of the ILC Draft on State Responsibility. See Emanuela Chiara-Gillard, \textit{What’s Legal? What’s Illegal?}, in \textit{RUNNING GUNS}, supra note 47, at 27, 30, 36.
\textsuperscript{62} Nicaragua, \textit{supra} note 12, ¶269; \textit{See also} Brehm, \textit{supra} note 45, at 25.
government, it may still constitute a “less-grave” breach, as aforementioned, of the “principle of non-use of force.”\textsuperscript{63}

Since the Court relied extensively on the Declaration on Friendly Relations,\textsuperscript{64} it is reasonable to extend this principle – also to arms transfers by private entities: accordingly, a state that tolerates or acquiesces to arms transfers to opposition groups might thereby conduct a “less-grave” violation of Article 2(4) of the Charter and violate its “due-diligence” requirements.\textsuperscript{65}

III.2 ARMS TRANSFERS TO GOVERNMENTS AND THE MOVEMENT TO SUBSTANTIVE ANALYSIS

Like our analysis of consensual forcible interventions at large, arms transfers to governments can also be controlled by emerging doctrines, purporting to limit the legality transfers on counts of substantive considerations. However, since arms transfers, as aforementioned, have unique aspects, there are ongoing attempts to regulate this issue separately from general questions of the use of force.

Arms transfers have been all but non-regulated throughout the 20\textsuperscript{th} century,\textsuperscript{66} excluding a limited number of treaties prohibiting the transfer of specific kinds of weapons due to concerns – based on principles of international humanitarian law – emanating from the effects of their use.\textsuperscript{67}

In recent years, the U.N. has begun to address this issue in a substantive sense. General Assembly resolution 61/89 of 2006 recognized that international standards on arms transfer are absent, and accordingly called upon the Secretary General to establish a

\textsuperscript{63} Nicaragua, supra note 12, ¶ 238, 247.

\textsuperscript{64} Supra, note 15.

\textsuperscript{65} See sec. I.2–I.3.

\textsuperscript{66} Except, of course, mandatory arms embargos imposed by the U.N. Security Council, as detailed supra. See also Brehm, supra note 45, at 27.

\textsuperscript{67} See Brehm, supra note 45, at 28–30.
group of experts to examine the drafting of a binding legal instrument to establish such standards.\textsuperscript{68} The resolution also acknowledged “the right of all States to manufacture, import, export, transfer and retain conventional arms for self-defence and security needs” – while balancing this right with its reaffirmation of respect “for international law, including international human rights law and international humanitarian law, and the [U.N.] Charter.”\textsuperscript{69} Thus, the resolution alluded to concerns raised by arms transfer in the realms of human rights law, \textit{jus in bello} and \textit{jus ad bellum}.

The following expert report, which was endorsed by the General Assembly,\textsuperscript{70} noted that any treaty should consider the issue of “transfers to non-State actors,” and should also “reflect respect for the sovereignty of every State, without interfering in the internal affairs of States.” In addition to the issue of non-intervention and arms transfers, the report noted that international human rights and humanitarian law may also have effect over the question of arms transfers.\textsuperscript{71} In consideration of this report, and subsequent discussions, the General Assembly decided that a four-week U.N. conference will convene in July 2012 in order to “elaborate a legally binding treaty” concerning arms transfers.\textsuperscript{72}

Simultaneously, humanitarian concerns pertaining to the use of weapons have given rise to various potential doctrines, discussed in different forums, suggesting that arms transfers – even by private individuals – can be limited by existing due-diligence

\textsuperscript{69} Id. pmbl.
\textsuperscript{71} \textit{Arms Trade Report}, supra note 70, ¶¶17–18, 24.
requirements enshrined in international humanitarian law or international human rights law, or by general principles such as the principle of protection of civilians.

Such doctrines, if codified within an upcoming arms trade treaty, may substantially affect and further clarify the legality of arms transfers as a form of forcible intervention. It remains to be seen what balance, if at all, will a future treaty strike between the issues of non-intervention, sovereignty, *jus ad bellum*, humanitarian law and human rights, and how it will treat arms transfers in the context of internal armed conflicts. It is clear, however, that the approach of international law towards this question, like the issue of intervention at large, is moving towards a substantive approach. Nonetheless, until such a binding instrument comes into force, the issue of arms transfers to parties in internal armed conflicts can be assessed according to the general principles governing forcible intervention, as outlined in the following chapters.

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74 See Chapter 10.
Table 1: Summary of the Definition of Forcible Intervention

<table>
<thead>
<tr>
<th>Scope</th>
<th>Means</th>
<th>“Gravity”</th>
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<tbody>
<tr>
<td>Wars</td>
<td>* All cross-border means, ranging from simple aerial incursions (Higgins) and minesweeping activities (Corfu Channel) to use of deadly military force and weaponry. * Might includes terrorist attacks through non-traditional means (SC Res 1368, 1373). * May potentially include “unorthodox” forceful acts such as cyber-attacks.</td>
<td>“Grave” Uses of Force Armed Attacks: forceful acts across an international border; whether by states’ regular forces or irregular forces sent by it (Nicaragua).</td>
</tr>
<tr>
<td>Acts “Short of War”</td>
<td></td>
<td>“Less-grave” Uses of Force Including, <em>inter alia</em>, acquiescence, toleration and encouragement of forceful actions taken by non-state actors from within a state’s territory. (“indirect aggression”) (Nicaragua; Corfu Channel; DRC v. Uganda); Arms transfers (Nicaragua).</td>
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<tr>
<th>Actors</th>
<th>Level of State Control (Attribution)</th>
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<tbody>
<tr>
<td>Actions by states; actions through irregular forces and by non-state actors (including arms traders); regional organizations or U.N. mandated forces</td>
<td>“Effective control” (Nicaragua) or “overall control” (Tadic); might be reviewed on a case by case basis (Commentaries to Article 8 ILC Draft); possible requirement of due diligence.</td>
</tr>
</tbody>
</table>
PART 2: Intervention as Choice: The Rights of Parties to Internal Armed Conflicts in the Pre-Charter Era

This part will inquire, in depth, the sources, roots and implications of the main doctrines that governed internal armed conflicts in the pre-U.N. Charter era – the doctrines of belligerency and insurgency and their interaction with the nascent laws on the use of force which came into being in the era of the League of Nations. As we shall see, these doctrines did not directly concern the question of consensual intervention, since there was virtually no limitation on state’s prerogative to use force prior to the U.N. Charter – or at least before the 1928 Kellogg-Briand Pact (hereinafter, this era would be referred to as the war prerogative era). The main effects of these doctrines therefore concerned neutral maritime trade, rather than the question of forcible intervention. Indeed, they reflected an international system that was explicitly preoccupied with the interests of external parties, and less with the political rights of the parties to the conflict.

However, this by no means implies that the understanding of these doctrines, as they developed prior to the prohibition on the use of force, is irrelevant in our context – for several reasons. For instance, some scholars have made connections between the belligerency doctrine and the law of consensual intervention, and these are worthy of exploration and clarification. As we shall demonstrate, the question of intervention and consent has had substantial legal validity only after the prohibition on the use of force has been set forth. Moreover, whether having implications on the law of consensual intervention or not, the belligerency and insurgency doctrines were the main tools in traditional international law utilized to assess the rights and duties of parties to internal
armed conflicts – and as such they are of interest to us. Although they did not directly confer or negate any rights regarding external parties’ legal capacity to use force (which was always a viable option), it did affect substantive rights in the narrower realm of neutrality – which, to an extent, can also be looked upon as passing judgment on the merits of the conflict.1 A clearer understanding of these doctrines can therefore assist us in realizing the concerns of the international system in the war-prerogative era, allowing us to better perceive the differences between that era and today.

Furthermore, surveying the law of that time, can demonstrate the seemingly amoral nature by which law operated in an era when territorial effective control was the main criteria for the assessment of the rights of parties in internal conflicts. Juxtaposing these approaches with the more substantive concerns of contemporary international law – as these will be addressed later on – can assist in contextualizing the development of international law regarding internal armed conflicts.

This, of course, does not imply that the question of consensual intervention was not debated morally by the great thinkers of the time. For instance, John Stuart Mill was much concerned with the 1849 Russian pro-government intervention upon the invitation of the Austrian Emperor, to assist it in quashing Hungary’s struggle for secession. Mill was so much against the Russian intervention that he argued that a counter-intervention by Britain would be justified.2 Conversely, as we shall see, Mill’s vehement condemnation of the Confederate States of America, on ethical grounds, led him to

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completely negate the possibility of forcible intervention by Britain to assist the South’s behalf.\textsuperscript{3} However, such considerations remained on the ethical levels, far removed from the legal realm.

Two important – perhaps intertwined – processes, which can allow us to better grasp the present state of international law, are revealed when assessing the traditional doctrines regarding the status of parties to internal armed conflicts. First, the movement from rigid frameworks such as the belligerency doctrine, most notably applied in the American Civil War, to more elastic norms as represented in the insurgency doctrine, as it was manifested in the Spanish Civil War. This approach, in general, reflects the relatively flexible, \textit{ad hoc}, nature of international law’s contemporary approach to internal armed conflicts, and the diminishing importance of the term “war” in its technical-legal sense, which was replaced with the material concept of “armed conflict.”

The second process is the movement from the largely amoral criterion of effective control – again, exemplified in the general obliviousness of states towards the issue of slavery in the American Civil War – into a more value-inclusive system of substantive considerations, which was advocated by certain states already during the Spanish Civil War, and is prevalent also today.

\textsuperscript{3} Chapter 7. sec. II.4.2.
CHAPTER 5
INTERNAL ARMED CONFLICTS AND CONSENT IN THE ERA OF THE
PREROGATIVE OF WAR: A GENERAL VIEW

I. AN INITIAL OVERVIEW THE BELLIGERENCY DOCTRINE

I.1 THE RATIONALE OF THE BELLIGERENCY STATUS

Before we turn to the in depth discussion of the law of internal armed conflict in the pre-Charter era, and its interaction with the law of consensual intervention, we shall, first, lay down the basic characteristics of the belligerency doctrine – the dominant traditional doctrine of international law regarding internal strife.

The doctrine of belligerency developed through several major internal armed conflicts of the 19th century. The term “recognition of belligerency”, as a cognizable doctrine, was galvanized in the context of the American Civil War. Its early appearances as a distinctly defined and coherent legal doctrine can be traced to Richard Dana’s edition of Wheaton’s Elements of International Law in the edition of 1866.

As defined by Lauterpacht, the recognition of belligerency was a “declaration, express or implied, that hostilities waged between two communities … are of such character and scope as to entitle the parties to be treated as belligerents engaged in a war in the sense ordinarily attached to that term by international law.” Accordingly, upon recognition of belligerency, the “civil war” – traditionally outside the reach of

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4 See ROSCOE R. OGLESBY, INTERNAL WAR AND THE SEARCH FOR NORMATIVE ORDER 18–32 (1971) (highlighting pre-1861 cases in which questions regarding the status of parties to an internal armed conflict were prevalent).
5 Id. at 33; WHEATON’S ELEMENTS OF INTERNATIONAL LAW §23 n, 15 (Richard Henry Dana, ed., 1866)
6 HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 175 (1948).
international law – became a “war” in the international sense, generating effects on the international level.\textsuperscript{7}

The recognition of belligerency, in essence, was an “interim” status, frequently recognized through a proclamation of neutrality, in which opposition forces would gain the rights and obligations attributable to governments in the course of warfare, \textit{without} being recognized formally as governments or as independent states. As phrased by Bernard, the recognition of such status fell short of state or government recognition proper, as it merely constituted recognition of the “precarious power which it [the belligerent] possesses in fact.”\textsuperscript{8} It was merely an acknowledgment that the belligerent “claims to be a state and is \textit{de facto} making war as such.”\textsuperscript{9}

Oppenheim clarified the intermediate nature of the status of belligerency, positing that there was no doubt that “in every case of civil war a foreign State can recognize the insurgents as a belligerent Power if they succeed in keeping a part of the country in their hands and set up a Government of their own.” However, he qualified this status, asserting that “there is a broad and deep gulf” between such recognition and the recognition of a new state.\textsuperscript{10} Therefore, belligerency only meant that the opposition possessed a limited or “apparent” international legal personality.\textsuperscript{11}

An example for the phrasing of the intermediate position of belligerency could be found in the declaration of neutrality proclaimed by the French Emperor in June 10, 1861, in the context of the American Civil War:

\textsuperscript{7} \textsc{Lassa Oppenheim}, \textit{2 International Law} §59 (2\textsuperscript{nd} ed., 1912); \textit{see also} Padelford, \textit{supra} note 1, at 228.
\textsuperscript{8} \textsc{Montague Bernard}, \textit{A Historical Account of the Neutrality of Great Britain During the American Civil War} 115 (1870).
\textsuperscript{10} \textsc{Lassa Oppenheim}, \textit{1 International Law} §74 (2\textsuperscript{nd} ed., 1912).
\textsuperscript{11} \textit{Id.} §63.
His Majesty the Emperor of the French, considering the state of peace between France and the United States of America, has resolve to maintained strict neutrality in the struggle between the union government and the states which claim to form a separate confederation.\textsuperscript{12}

Besides its intermediate nature, the status of belligerency was also temporary. For instance, if the recognized opposition group was defeated, its status as a belligerent elapsed, negating any belligerent rights it might have accrued by recognition.\textsuperscript{13}

The doctrine of belligerency relied heavily on the principle of effective control. As such, it developed in stark contrast to the Holy Alliance’s doctrine of legitimism, which rejected any recognition of the rights of revolutionary movements, regardless of any achievements they might have achieved on the ground.\textsuperscript{14} As such, the doctrine was, in general, amoral, except – perhaps – for its demand that opposition forces act according to the laws of war. However, even this requirement was thin, as the laws of war were themselves not immensely developed, and was mainly concerned with the application of the laws of war as these related to treatment of maritime prize.

The belligerency doctrine developed out of practical necessity. As described by Bernard, International law, being a system of states, was viewed has having “no place in

\textsuperscript{12} Reprinted in BERNARD, supra note 8, at 144 (emphasis added).
\textsuperscript{13} OPPENHEIM, supra note 7, §59. An application of this rule can be exemplified in the practice of Britain after the defeat of the Confederacy. In May 1865, Britain ceased to permit access of Confederate warships to British ports, and also withdrew other belligerent privileges Confederate vessels enjoyed during the Civil War. See BERNARD, supra note 8, at 143.
\textsuperscript{14} OGLESBY, supra note 4, at 8, 13, 16 –17; AUGUSTUS GRANVILLE STAPLETON, INTERVENTION AND NON-INTERVENTION; OR, THE FOREIGN POLICY OF GREAT BRITAIN FROM 1790 TO 1865 27 –28 (1866).
a struggle between a Sovereign Government and its rebellious subjects.”15 However, Bernard rightly noted that rebels will not be concerned by this distinction, as they will not “admit that they are subjects.” Thus, they will inevitably employ the same military means that governments use – and will consequently face similar actions. Denial of belligerent rights would therefore be useless, since the opposition will certainly disregard this denial; ultimately, such denial could draw third parties into conflict with the rebels. Recognition of the belligerency of both sides was thus a “simple practical solution,” entitling them, vis-à-vis neutral states, “to all those exceptional rights or powers with which Sovereign States at war with one another are clothed by International Law.”16

The practical need for the doctrine – as well as its “amoral” connection to the principle of effective control – was summarized in the British explanation to the Ottoman Empire, as recorded later by Lord Russell, following Britain’s recognition of Greek belligerency in the 1825 rebellion:

the character of belligerency was not so much a principle as a fact; that a certain degree of force and consistency acquired by any mass of population engaged in war entitled that population to be treated as a belligerent, and even if their title were questionable, rendered it the interest well understood of all civilized nations so to treat them; for what was the alternative? A power or a community (call it which you will) which was at war with another, and which

15 BERNARD, supra note 8, at 113 – 114.
16 Id. at 114.
covered the sea with its cruisers, must either be acknowledged as a belligerent or dealt with as a pirate."\textsuperscript{17}

II.2 The Conditions for Recognition of Belligerency as Widely Understood

Initially, as reflected in Bernard’s writings, the recognition of belligerency was to be granted “as soon as it exists,” a situation that did not “admit of precise definition.”\textsuperscript{18} Bernard’s American contemporary, Dana, suggested a more principled view of the doctrine. He saw the recognition of belligerency as due when the internal hostilities amounted to war; when the opposition adhered to laws of war; and could, if allowed to govern, constitute a state reasonably capable to discharge its duties. Furthermore, a practical necessity on the part of third parties was required for such determination to be made. Such necessity, according to Dana, would be the strongest when maritime questions were involved.\textsuperscript{19}

Over the decades – and certainly by the end of the 19\textsuperscript{th} century – scholars consolidated this doctrine, drawing from state practice, to formulate several preconditions for belligerency recognition.\textsuperscript{20} In the absence of such conditions, the recognition of belligerency was considered an infringement of the government’s rights,\textsuperscript{21} namely the norm of non-intervention, and could be construed as an unfriendly act.\textsuperscript{22}

\begin{flushright}
\textsuperscript{17}Cited in Beale, \textit{supra} note 9, at 412 (emphasis added). As we shall see, this dichotomy between “belligerent” and “pirate” was challenged by the later “insurgency” doctrine.
\textsuperscript{18}BERNARD, \textit{supra} note 8, at 116 –117.
\textsuperscript{19}WHEATON’S, \textit{supra} note 5; W.E. HALL, A TREATISE ON INTERNATIONAL LAW 39 (1924).
\textsuperscript{20}See, e.g., Institut de Droit International, Annuaire 18, 229 (1900).
\textsuperscript{21}OPPENHEIM 2, \textit{supra} note 7, §298.
\end{flushright}
The customary conditions for the recognition of belligerency (a duty to according to Lauterpacht and others, and a discretionary freedom according to many, such as Oppenheim, or the Institut De Droit International) were four, bearing in mind certain nuances between different authorities:

(a) the existence of an armed conflict of a general character;
(b) effective control by a government set by the opposition over a substantial (or certain) part of the territory;
(c) adherence by the opposition to the laws of war, through organized armed forces under a responsible authority;
(d) the existence of circumstances that make it necessary for outside states to define their attitude towards the conflict through the recognition of belligerency.

The recognition of belligerency was not, in general, granted by formal declarations; as we shall see, it usually took the form of a declaration of neutrality or acquiescence to belligerent measures imposed by the parties.

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24 See Institut de Droit International, supra note 20 (asserting that third parties can withdraw recognition of belligerency notwithstanding the situation on the ground); see also O’Rourke, supra note 23, at 401–402; H.A. Smith, Some Problems of the Spanish Civil War, 18 Brit. Y’bk Int’l L. 22–23 (1937); for a concise summary of the debate regarding the obligation to recognize belligerency see Oglesby, supra note 4, at 62–69.
25 Lauterpacht, supra note 6, at 176; see also Beale, supra note 9 at 407; Annual Message of President Grant (Dec. 7, 1875); Annual Message of President McKinley (Dec. 6, 1897). Oppenheim did not include the fourth condition in his analysis; see Oppenheim, supra note 7, §74; see also Wheaton’s, supra note 5 (explaining at length the rationale of such a condition); see also Theodore S. Woolsey, The Consequences of Cuban Belligerency, 5 Yale L. J. 182 (1896).
26 Lauterpacht, supra note 6, at 177–181.
II.3 The Results of Recognition of Belligerency in Traditional International Law

In general, prior to the recognition of belligerency, governments enjoyed certain privileges over the opposition. Significantly, states *at peace* with the beleaguered government were required not transfer arms or funds to the opposition, nor to allow “hostile expeditions” to leave their territory in support the rebels, or to interfere, in general, in the governments efforts to quell the uprising. After recognition of belligerency, the government lost some of these privileges, as third states could assume a neutral disposition *without* it being considered a violation of the peaceful relations with the challenged government. However, a major qualification was that before the prohibition on the use of force, these were only conditions required to maintain *peace*, in the legal sense; a third state could thus exercise its war prerogative and intervene forcefully *regardless* of belligerency recognition or its absence. It is thus clear that in any case, consent could be an important tactical asset for the intervener; however, it was not needed as a legal precondition for intervention.

As aforementioned, belligerency was an intermediate status, the acquirement of which led to a complex structure of rights and obligations. In the political sense, logic dictates that the existence of a war must also imply a limited recognition of an independent authority that conducts it. Therefore, recognition of belligerency must have meant also a limited recognition of rebelling government, for the purpose of warfare. Accordingly, for instance, a belligerent power would not enjoy the consular and diplomatic rights – the right of “legation” – of a recognized government or state;

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27 Lauterpacht, supra note 6, at 230 (citing the 1900 resolution by the Institute of International Law.)
28 Smith, supra note 24, at 18, 21.
however, its representatives – or political agents – could be party to “informal” negotiations, and enjoy certain immunities.\textsuperscript{29}

In the era of the dominance of naval warfare, and as elaborated shortly, much of the preoccupation regarding the question of belligerency concerned the rights of belligerents at sea.\textsuperscript{30} In this context, a belligerent power was entitled to issue letters of marque and to deploy privateers,\textsuperscript{31} and to have its men-of-war enjoy the immunities guaranteed for warships under international law. Further rights at sea included the right to visit and search neutral merchant vessels, on the high seas, for contraband; to impose a third-party binding blockade on the government’s coasts;\textsuperscript{32} and even to establish prize courts for condemnation of captured neutral vessels carrying contraband or running a blockade, without being considered as pirates.\textsuperscript{33} As such, the recognition of belligerency had the potential to significantly disturb neutral commerce.\textsuperscript{34}

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\bibitem{29} 1 \textsc{Oppenheim}, \textit{supra note 10}, §362, 453; \textit{see also} \textsc{Woolsey. supra note 25, at 182}; this question rose in the famous “Trent Affair” of 1861, in which a Union vessel intercepted a British vessel carrying Confederate agents en route to Britain and France. Britain, which recognized the Confederacy as a belligerent, claimed that these individuals enjoyed immunity. The affair almost sparked a war between Britain and the U.S., the latter eventually released the Confederate agent, apologized and paid reparations to Britain. \textsc{See Charles Francis Adams, The Trent Affair: An Historical Retrospect} (1912). \textit{See also} 2 \textsc{Oppenheim, supra note 7}, §408 ff3; \textsc{Quincy Wright, The American Civil War, in The International Law of Civil War, supra note 22, at 30, 90–93, 97–98.}
\bibitem{30} \textit{See, e.g., Wheaton’s supra note 5.}
\bibitem{31} Privateers were private merchant vessels authorized by letters of marque to capture enemy vessels during war. Letters of marque were issued by belligerents to private ships, thereby authorizing them to carry naval hostilities, mainly the capture of enemy merchant ships as prize. \textsc{See Natalino Ronzitti, The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries} 66 (1988). Privateering declined over the centuries as the technological gap between private and military vessels increased. \textsc{See Theodore D. Woolsey, Introduction to the Study of International Law} 80–81 (1879); Privateering was abolished, between signatory states, in the Declaration of Paris of 1856.
\bibitem{32} \textsc{See Institut de Droit International, supra note 20; 1 \textsc{Oppenheim, supra note 10, §273; 2 \textsc{Oppenheim, supra note 7, §298; see also Padelford, supra note 1, at 231–232 (arguing that the General Franco’s forces attempt to blockade Spanish ports during the Spanish Civil War were ignored because of non-recognition of belligerency). For a relatively recent statement of customary international law regarding rights and obligations of belligerents in naval warfare see the San Remo Manual on International Law Applicable to Armed Conflicts at Sea (Jun. 12, 1994).}
\bibitem{33} \textsc{See Edwin D. Dickinson, The Closure of Ports in Control of Insurgents, 24 Am. J. Int’l L.} 70, 70 (1930); \textsc{Woolsey, supra note 25, at 183–184. For a succinct summary of the logic of traditional prize law and neutrality, see the opinion of the Lord Chancellor in Ex Parte Chavasse, 46 E.R. 1072 (1865) (Gr. Brit.).}
\bibitem{34} \textit{See e.g., Annual Message by President Grant, supra note 25.}
Moreover, transfers of arms by third parties governments to opposition groups were considered wrongful, prior to the recognition of belligerency, while such actions vis-à-vis recognized governments were not. After recognition of belligerency, if the third state wished to remain neutral, government transfer of arms to both parties was prohibited. There was also a view, prevalent in the opinions of some commentators on the Spanish Civil War, that prior to such recognition it was illegal to impose an arms embargo (negative intervention), thereby prohibiting also private parties from selling arms to the recognized government involved in an internal conflict. Only after such recognition, this position argued, an embargo on both parties was considered legitimate, provided it was impartial. This view, however, did not gain hold.

Furthermore, prior to recognition of belligerency, if states chose to remain on friendly terms with a government involved in an internal strife, they were required to prevent the organization, in their territories, of private armed expeditions against the government. This term can be compared, perhaps, to the contemporary requirement that states exercise due diligence regarding non-state actors operating from their territories. Upon recognition of belligerency, if states wished to maintain neutrality, they were required to prevent such actions on behalf of both parties. However, they were not held responsible for acts of unorganized individuals that crossed the borders to assist either belligerent.

35 O’Rourke, supra note 23, at 409; Lauterpacht, supra note 6, at 231–233. See discussion in Chapter 4, sec. III.
36 See Thomas, supra note 22, at 143.
37 Id. 144.
38 Lauterpacht, supra note 6, at 243 n. 1.
It could be argued, as we shall see, that after the renouncement of war enshrined in the 1928 Kellogg Briand Pact, recognition of belligerency resulted in mandatory neutrality since for the first time, force was no longer a sovereign prerogative, and thus neutrality was no more a matter of unfettered discretion.

A belligerent would incur responsibility for wrongful acts committed in the territory under its control and thus, naturally, would release the government from liability for the same acts. It would be capable, in some cases, to create contract and property rights enforceable after the end of the conflict. Although prevalent authorities, for centuries, opined that the laws of war apply to every party to internal strife, even if the opposition was not recognized as a belligerent, the position of most jurists, traditionally, was that prior to recognition of belligerency such law does not bind legally, in the strict sense, but ought to be applied on counts of considerations of humanity. However, after belligerency was recognized it was understood that contending parties were bound to observe the laws of war regarding their enemies as well as concerning neutrals, on land and on sea. Consequently, belligerents’ troops captured were generally entitled to the status of prisoners of war.

40 This is true if we adopt the notion of strict-abstentionism – meaning, the perception that states were prohibited from intervening on part of any party once a significant internal armed conflict erupted. For more on this approach see Chapter 8, sec. III.
41 Thomas, supra note 22, at 165.
42 OPPENHEIM 1, supra note 10, §167.
43 Woolsey, supra note 25, at 184; see also O’Rourke, supra note 23, at 399–401.
44 The Confederacy’s currency was also recognized de facto. See Wright, supra note 29, at 67.
46 See Instructions for the Government of Armies of the United States in the Field (Lieber Code), art. 152 (Apr. 24, 1863); Wright, supra note 29, at 55; see also Padelford, supra note 1, at 229.
47 Smith, supra note 24, at 22.
II. CLARIFYING MODERN COMMENTARIES ON THE RELATION BETWEEN RECOGNITION OF BELLIGERENCY AND CONSENSUAL INTERVENTION

II.1 UNDERSTANDING THE NORMATIVE FRAMEWORK: THE USE OF FORCE IN THE ERA OF THE WAR PREROGATIVE

By the late 18th century, just war theory has lost much of its appeal, and thus had meager influence over emerging norms of the law of war. Rooted in the philosophy of ancient Rome and adopted by Catholic Christian theology – notably by Thomas Aquinas – the just war doctrine purported to assess the “justness” of war according to various procedural and substantive criteria, namely, the “just cause” of the war and the “right intention” to promote it. The just war doctrine has found its way, in numerous variations, into the writings of the 16th and 17th centuries’ naturalistic era pioneers of international law.48

However, the “secularization” of the doctrine, with the rise of separation between church and state, also led to its declining influence: when the Catholic Church could not anymore pronounce authoritatively whether in a certain situation war is indeed “just” – and in absent of alternative binding organizations –49 inevitably, both parties would claim the justness of their cause, and both would be indeed entitled to do so.50 This situation must have had implications over the question of intervention in internal conflicts: thus,

48 On the “just war” doctrine see Yoram Dinstein, War, Aggression and Self-Defense 65 –69 (5th ed. 2011); see also Robert D. Sloane, The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War, 34 Yale J. Int’l L. 48, 57–63 (2009). For a classic source see, e.g., Hugo Grotius, The Rights of War and Peace, Book 1, Ch. 2 (laying down the naturalist-era view that war has to be substantively just).
49 See, e.g., John Bassett Moore, International Law: Its Present and Future, 1 Am. J. Int’l L. 11 (1907) (arguing briefly that the main shortcoming of international law of the time was the absence of international organizations).
50 Dinstein, supra note 48, at 68 –69.
Vattel, the quintessential international jurist of the 18th century, set forth the logic of effectiveness which will later be in the background of the belligerency doctrine. He recognized that when a nation is completely divided, “the war between the two parties stands on the same ground, in every respect, as a public war between two different nations,” and, consequently, third powers could assist any party “which they shall judge to have right on its side.”

In the 19th and early 20th centuries two important features of the international system were instrumental in the development of the international norms of the time. The first was legal positivism, espoused, in the Anglo-American world, by John Austin, which dominated the contemporary domestic jurisprudence. In the realm of international law, positivism meant, in general, that there exists no law beyond the explicit consent of sovereigns. The second feature was the decentralized and multi-polar nature of the 19th century’s international system, which led to the development of norms that conformed to a classic balance of power system.

Accordingly, the question of war was removed, at the time, from the realm of “justice” and in to the realm of “consequence.” Justness of cause could be used as rhetoric – perhaps to appease internal public opinion – but was not a factor in the legal

51 Vattel’s thinking was complex regarding the idea of just war. See Simone Zurbuchen, Vattel’s Law of Nations and Just War Theory, 35 HIST. OF EUROPEAN IDEAS 408 (2009). While denouncing unjust wars, he denied the practical applicability of such a rule absent an international judge. See Sloane, supra note 48, at 62.

52 EMMERICH DE VATTEL, supra note 45, §§295–296. Note, however, that Vattel argued that such intervention should be in support of the “right” party, which could be deemed as a just-war requirement. For a critique of Vattel in this context, see MONTAGUE BERNARD, ON THE PRINCIPLE OF NON-INTERVENTION 20–21 (1860).


55 On the administration of international law absent organized international institutions during the 19th century, see Wright, supra note 22, at 94; see also MICHAEL W. DOYLE, WAYS OF WAR AND PEACE 161–194 (1997).
States would not ask whether their cause for war is just – or legal – but rather, if they are willing to pay the price that war entailed, in the anarchic 19th century system. Law was structured, then, for the purpose of ascertaining when “war” exists between two states, so as to enable third parties to calculate their steps in order to stay neutral, thereby avoiding the consequences of being dragged into the conflict against their will. This was the background for the development of the law of neutrality.

In order to control their relation with belligerent parties, inter alia by enforcing the requirements of international neutrality law upon their citizens, states enacted domestic statutes such as the American Neutrality Act of 1794 and the British Foreign Enlistment Act of 1819. Domestic neutrality laws were aimed, in practice, to regulate the actions of private persons within the jurisdiction of the neutral state, and usually prohibited, in general, private expeditions against states with which legislating state is at peace, as well as providing belligerent states with warships. However, they have been of key significance to international law – and in particular when internal armed conflicts erupted – since, effectively, even if indirectly, they conferred rights to foreign entities, at an era in which “international legislation” was scarce.

Therefore, from the end of “just war” era, through the 19th century, and prior to the prohibition on the use of force imposed by article 2(4) of the U.N. Charter – and to a more limited extent, the founding of the League of Nations – the question of intervention in internal armed conflicts was governed, mainly, by the laws of neutrality,

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56 Dinstein, supra note 48, at 69; 2 Oppenheim, supra note 7, §64.
and to some ambiguous extent, by the norm of non-intervention. The concept of non-intervention, although much revered at the time, was especially vague in light of the dominant idea of the era, asserting that waging war was the pinnacle of the sovereign’s prerogative. Accordingly, war could be declared as a remedy for an international wrong, as well as for strictly political reasons.\footnote{2 OPPENHEIM, supra note 7, §54.} As a matter of fact, states could “resort to war for a good reason, a bad reason, or no reason at all” –\footnote{H.W. BRIGGS, THE LAW OF NATIONS 976 (1952); cited in DINSTEIN, supra note 48, at 78.} a right limited, perhaps, only by the “lip-service” requirement of engaging in previous negotiations.\footnote{2 OPPENHEIM, supra note 7, §93.} Indeed, as commonly phrased, international law in the war-prerogative era did not prohibit war, but merely attempted to regulate the way it was carried out through \textit{jus in bello}.\footnote{See, e.g., 2 OPPENHEIM, supra note 7, §53; Arnold D. McNair, \textit{Collective Security}, 17 \textit{Brit. Y’bk Int’l L.} 150, 150–152 (1936).}

Therefore, and as noted by Dinstein, the concept of war-prerogative resulted in a grave anomaly: on the one hand, international law sought to protect the sovereignty of states; however, on the other hand, any sovereign could subjugate the sovereignty of another by wantonly waging war. It is fair to ask then, what was the value, if at all, of the norm of non-intervention absent a prohibition on the use of force. Nevertheless, most international lawyers of that era did not perceive this inconsistency as detrimental to the existence of international law, or simply disregarded this problem;\footnote{DINSTEIN, supra note 48, at 78–79, and the sources cited therein. Compare STAPLETON, supra note 14, at 13–14 (1866) (claiming that forcible intervention must be justified with a \textit{casus belli}, i.e. “external injury” to the intervener).} a fascinating example can be found in Bernard’s classic 1860 defense of the principle of non-intervention, in which he sets forth an almost absolute perception of the principle, with virtually no attempt to reconcile it with the dominance of the war-prerogative.\footnote{BERNARD, supra note 52.}
In absence of a prohibition on the use of force, then, a violation in times of war of the terms of neutrality by a third party could result – in grave circumstances – in the loss of neutrality status and the accruement of the status of a belligerent.\textsuperscript{66} It is imperative to understand, however, that in absence of a special treaty,\textsuperscript{67} a violation of neutrality, when amounting to an act of hostility in the eyes of the belligerent state, was not an unlawful act \textit{per se}, but simply on that signified the \textit{end of neutrality}, thus triggering the set of consequences a state of war entailed.\textsuperscript{68}

Last, in the war-prerogative era, for the purpose of ascertaining when “war” exists, a rigid distinction between “wars” and means “short-of-war” developed. For instance, reprisals – including forcible ones – undertaken in order to compel a state to cease unlawful action or make reparation, could be pursued without actually being considered \textit{war}, and thus without altering the otherwise peaceful relations, in the legal sense, between the involved states.\textsuperscript{69} War, on the other hand, required actual “fighting” between armed forces, or, at least, a declaration of war or a declaration by a state that another state’s actions are acts of war.\textsuperscript{70} This distinction, too, led to the preoccupation of the international system with the question whether war, in the technical-legal sense, existed.

\textsuperscript{66} In 19\textsuperscript{th} century international law, there was a binary distinction between “neutrality” and “war.” The earlier concept of “benevolent neutrality” was no longer relevant due to the regulation of this issue in the Hague Conventions on neutrality, and the later – controversial – doctrine of “non-belligerency” was yet to emerge. See Wolff Heintschel von Heinegg, “Benevolent Third States in International Armed Conflicts: The Myth of the Irrelevance of the Law of Neutrality, in INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES 543, 544–545 (Michael N. Schmitt et al. eds., 2007). On the relations between the law of neutrality and the modern law on the use of force, see, e.g., Andrea Gioia, \textit{Neutrality and Non-Belligerency, in INTERNATIONAL ECONOMIC LAW AND ARMED CONFLICT ECONOMIC WARFARE} 51 (Harry H.G. Post ed., 1994).

\textsuperscript{67} DINSTEIN, supra note 48, at 79–81.

\textsuperscript{68} 2 OPPENHEIM, supra note 7, §§358–359.

\textsuperscript{69} Id. §37, 42.

\textsuperscript{70} Id. §55, 93.
II.2 The Disconnection between Belligerency, Obligations of Neutrality and Consensual Intervention in the War-Prerogative Era

Notably missing from our survey regarding the consequences of belligerency recognition was the issue of consensual intervention. This is not coincidental.

Some modern commentators have identified two “opposing” approaches regarding the traditional law on internal strife and consensual intervention. Presumably, one approach posits that upon recognition of belligerency, third states acquired a duty of neutrality. If such duty was assumed, intervention on behalf of both parties was a violation of international law. The other approach asserts that upon such recognition – and only upon it – states incurred the power to intervene on behalf of either party. The first approach, as shall be elaborated upon shortly, presents a logical problem, which can be solved – if at all – if we apply it only since the prohibition on the use of force. The second, while is indeed present in some literature – most notably in the works of Oppenheim – is rather foreign to the general landscape of law prevalent when the belligerency doctrine has developed, and therefore it must be taken with, at least, with a grain of salt.

In a 1985 article, Louise Doswald-Beck linked between the question of consensual intervention and “traditional international law.”


[t]here is a widespread view that the traditional law favours intervention by invitation of the government but not by invitation of the rebels. The only situation where traditional
texts require neutrality on the part of third States is on recognition of belligerency.”\textsuperscript{72}

In a footnote to this assertion, Doswald-Beck referred to Oppenheim, in qualification of this statement, noting that “there is also a view that recognition of belligerency turns a civil war into a real war and thus a third state can join either side or choose to remain neutral.”\textsuperscript{73}

Perhaps following the same logic, Roth argued that recognition of belligerency imposed on third parties “an obligation of neutrality, and thereby, in theory, render[s] it unlawful for foreign states to provide war materiel to either side of the civil conflict, notwithstanding the requests of the recognized governments for assistance.”\textsuperscript{74} Like Doswald-Beck, Roth notes that while this is the “usual view,” there is an “alternative view,” according to which upon recognition of belligerency foreign states acquire the choice of “joining either side or remaining neutral.”\textsuperscript{75}

These modern interpretations of traditional law raise some challenges, as they do not clearly distinguish between the law before the prohibition on the use of force – during the war-prerogative era – and the law after it. Thus, they assume that there was a discrepancy between the “neutrality” that recognition of belligerency entailed, and an “alternative” view, that upon recognition of belligerency, a third party could intervene on behalf of either side of the conflict. A precise analysis of traditional law makes it clear, however, that these competing views as such were not substantively possible, and that in

\textsuperscript{72} \textit{Id.} 196 (1985) (emphasis added).
\textsuperscript{73} \textit{Id.} n. 40.
\textsuperscript{74} \textsc{Brad R. Roth}, \textsc{Governmental Illegitimacy in International Law} 177 (1999).
\textsuperscript{75} \textit{Id.} n. 149.
actuality neutrality and intervention were simply two alternative *choices*, a fact which of course drained the principle of non-intervention from most of its substance.

The root of the problem of the argument lies in the perception according to which recognition of belligerency required or obligated third parties to assume neutrality. However, as aforementioned, in the war-prerogative era, neutrality was not perceived as an obligation; it was simply a *status* that if states chose to adhere to, they could avoid being dragged into the conflict. In Hohfeldian terms, neutrality was a *privilege*, or a *liberty*, but not a duty.\(^76\)

Indeed, radical non-interventionists such as Bernard\(^77\) opined that intervention in internal strife will be virtually universally prohibited, whether it was justified on state interest (and here Bernard distinguished between “intervention” and self-defense) or upon consent of the government or the rebels.\(^78\) It seems that Bernard had drawn an implicit line between wars between states and internal wars, the latter imposing a restriction on the war-right of sovereigns that was non-existent in the former.\(^79\) However, in hindsight, this approach can only be view as *de lege ferenda*, as we do not know of any general applying legal norms at the time that could substantively restrict the war-prerogative.

Thus, there could be no obligation of neutrality regarding internal strife, since there was no law that prohibited states from ending their neutrality, if they were willing to face the consequences. As put by Oppenheim, “[d]uties of neutrality exist *so long only as a State remains neutral.*”\(^80\) A recognition of belligerency, then, would result in

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\(^77\) Bernard, *supra* note 52. We will return to Bernard’s argument when we shall discuss strict-abstentionism in Chapter 8.

\(^78\) Bernard, *supra* note 52, at 10–23.

\(^79\) *Id.* at 21–22.

\(^80\) 2 Oppenheim, *supra* note 7, at §312.
neutrality or in fact be prompted by a declaration of neutrality,\textsuperscript{81} which states were required to observe in order not to be drawn in to the conflict; but this did not in fact mean that states could not intervene at will, as in the war-prerogative era there was no legal prohibition on the use of force.\textsuperscript{82}

Another modern commentator claimed that in “pre-Charter international law,” the question of invited intervention was governed by the “determination of the degree of control exerted by the government and the insurgent forces.”\textsuperscript{83} Thus, he argued, forcible intervention in favor of either side was prohibited when the conflict was prescribed as an “insurgency;” but “once a state of belligerency was recognized, an invitation to intervene or to offer assistance was legally valid, regardless of whether the inviting party was the previously-recognized government or the anti-government forces.”\textsuperscript{84}

This position too reflects an intractable discrepancy. First, it also assumes the existence of a “duty” of neutrality when “insurgency” was recognized, disregarding the fact that neutrality was viewed as a choice; second, it accepts as obvious the position that recognition or non-recognition of belligerency had effect over the legality of forcible consensual intervention. However, as aforementioned, in the war-prerogative era, it made little sense to condition forcible intervention on any recognition of status, not least on consent.

\textsuperscript{81} See Smith, supra note 24, at 21.
\textsuperscript{82} Compare WALZER, supra note 2, at 96–97. Walzer argues that although neutrality was always a choice regarding wars between states, in internal armed conflicts, when belligerency was recognized, there were good ethical reasons to make neutrality obligatory so as to fulfill the principle of self-determination. However, it is doubtful, as I argue, that this notion is in accordance with the law of the time, at least until the 1928 Kellogg-Briand pact.
\textsuperscript{84} Id. at 747–748.
Indeed, and as noted by Doswald-Beck, 19th century writers such as Woolsey held the position that “no state is authorized to render assistance to provinces or colonies which are in revolt against the established government,” as it violates the norm of non-interference;\textsuperscript{85} and conversely – and here Woolsey contradicted his contemporary Bernard – that “there is nothing in the law of nations which forbids one nation to render assistance to the established government,” as “[t]his aid is no interference.”\textsuperscript{86} Nevertheless, Woolsey too recognized, albeit with visible dissatisfaction, that this rule can be challenged by “the exercise of the war-right” of a sovereign state, and on justifications that “are more or less vague and under the influence of subjective opinion.”\textsuperscript{87} Positions such as Woolsey’s, then, did little to bridge the gap between the principle of non-intervention and the sovereign right to wage war.

The same inconsistency can be found in the writings of Oppenheim – perhaps the foremost source that connected the issue of recognition of belligerency and consensual intervention. While acknowledging that assisting governments, in general, is lawful “co-operation,” Oppenheim argued that –

\[\text{[t]here is no doubt that a foreign State commits an international delinquency by assisting insurgents in spite of its being at peace with the legitimate Government. But matters are different after recognition. The insurgents are now a belligerent power, and the civil war is now real war. Foreign States can either become a party to the war or}\]

\textsuperscript{85} Woolsey, supra note 31, §42.  
\textsuperscript{86} Id.  
\textsuperscript{87} Id. §43.
remain neutral, and in the latter case all duties and rights of neutrality devolve upon them.  

However, and rather similarly to Woolsey, Oppenheim did not explicitly reconcile the existence of an alleged “international delinquency” of assisting rebels in spite of being at “peace” with the government, with the fact that he, himself, stated that the claim that international law prohibits war was one made by “impatient pacifists.” As he powerfully argued, international law, at that time, could not and did not object “to States which are in conflict waging war upon each other instead of peaceably settling their difference.” International law, he repeated the widely accepted view, merely regulated the conduct of hostilities.  

If we attempt to read Oppenheim’s opinion regarding the aforesaid “international delinquency” in light of his position that war in itself was not prohibited, the conclusion must be that the delinquency of intervention prior to recognition of belligerency materialized only when the intervention was conducted through means historically considered as “short of war,” such as by transfer of arms; and if the actions in fact amounted to war, then they resulted in the termination of peace. The same consequence would occur when an intervention would be pursued following recognition of belligerency – here too, peace would be terminated. Therefore, the merits of Oppenheim’s distinction between forcible intervention prior to belligerency and after it are unclear.

88 2 OPPENHEIM, supra note 7, §298. Regarding forcible assistance to governments as “co-operation” see 1 OPPENHEIM, supra note 10, §134,
89 2 OPPENHEIM, supra note 7, §53.
A precise understanding of recognition of belligerency and the question of intervention was presented by Tom Farer – clarifying that upon recognition of belligerency, “states which did not wish to be treated as active participants in a war were obliged to assume the legal posture of neutrality.”\textsuperscript{90} The logical (and unsurprising) conclusion is that intervention on behalf of rebels was an “unfriendly” act towards the government; while intervention in support of the government was not. The former was, in effect, a declaration of war against the government, which resulted in the consequences of war but not in \textit{illegality}.

II.3 Consensual Intervention as Choice

Indeed, the “default” consequence – or perhaps, the \textit{generator} –of the recognition of belligerency was the assumption of the status of neutrality on part of the recognizing power.\textsuperscript{91} However, as the prohibition on the use of force did not yet come to be, the result of neutrality did not mean that states were bound to non-interference in the conflict, should they choose to waive their neutrality.\textsuperscript{92} Furthermore, the choice of neutrality versus belligerency was – in accordance with the general approach of the time – was, at large, unaffected by the substantive merits of the belligerents.\textsuperscript{93}

It is revealing that when states and scholars grappled with the question of belligerency, the notion that intervention is somehow contingent upon such recognition was notably absent. The treatment of this question, for instance, is completely absent in

\textsuperscript{91} \textit{See} Institut de Droit International, \textit{supra} note 20; 2 OPPENHEIM, \textit{supra} note 7, §308.
\textsuperscript{92} On the free choice between neutrality and belligerency see Von Heinigg, \textit{supra} note 66, at 544.
\textsuperscript{93} \textit{See} Von-Heinigg, \textit{supra} note 66, at 546 (quoting classic sources that point towards this conclusion and contrasting it with the U.S. practice during WWII).
one of the most authoritative statements on the meaning of recognition of belligerency in 19th century law, as formulated in Dana’s edition of Wheaton’s International Law.94

There are indeed many indications which point to the conclusion that recognition of belligerency was but simply one course of action available to third-party states in face of an internal conflict, rather than a precondition for intervention. Nor was it a precondition of recognition of the rebels as a government (in a struggle for control over the state apparatus); or as an independent state (in case of a struggle for secession.)95

This was evident already in decisions by the U.S. Supreme Court in the context of the Spanish Colonial Wars of 1810–1823. In U.S. v. Palmer,96 Chief Justice Marshall has ruled that “[i]n such contests [internal conflicts] a nation may engage itself with the one party or the other – may observe absolute neutrality – may recognize the new state absolutely–or may make a limited recognition of it.”97 Limited recognition must have meant an intermediate position, such as recognition of belligerency or insurgency; however, it was not a precondition for intervention. The same logic echoed in the contemporaneous Supreme Court decision in the case of the Santissima Trinidad, which dealt with the consequences of the recognition of the belligerency of the Spanish colonies:

Each party is, therefore, deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war, and entitled to be respected in the exercise of those rights.

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94 Wheaton’s supra note 5.
95 Theodore S. Woolsey, Lecture on International Law 8 Yale L. J. 387, 394 (1899) (“The topics here to be studied are called recognition of belligerency and of independence, the first a usual, though not a necessary, step to the second.”)
96 16 U.S. 610 (1818).
97 Id. at 634.
We cannot interfere to the prejudice of either belligerent without making ourselves a party to the contest, and departing from the posture of neutrality.\textsuperscript{98}

In both of these decisions it is evident that the “limited” recognition of belligerency was an alternative to intervention, but not a necessary condition. As stated in the Santissima Trinidad decision, the consequence of intervention was merely departing “from the posture of neutrality,” but not illegality.

In 1843, when opining on the long-running dispute between the U.S. and Denmark regarding the latter’s treatment of British prize caught by the Americans during the American Revolution, Henry Wheaton – one of the important international lawyers of the time – expressed this position clearly. Thus, he posited that a third party had three legal options in its dealings with an internal conflict: either to remain “passive” while extending to both parties the rights of sovereign states during war; or to recognize the opposition party as an independent state, and maintain neutrality; or, rather, to join in alliance with one party, thus becoming the other’s enemy.\textsuperscript{99} Wheaton stressed the amoral element of choice of the third party, and argued again, in 1846, that in case a state decides to forcefully intervene, “the law of nations makes no distinction, in this respect, between a just and an unjust war, the intervening State becomes entitled to all the rights of war against the opposite party.”\textsuperscript{100}

The wide spectrum of possibilities enjoyed by states, even without recognition of belligerency, was reflected in the approach of the U.S. towards the Cuban wars of the

\textsuperscript{98} The Santissima Trinidad, 20 U.S. 283, 337 (1822) (emphasis added).
\textsuperscript{99} Cited in Oglesby, supra note 4, at 4–5.
\textsuperscript{100} Wheaton’s, supra note 5, at §23.
1870s and 1890s, where Cuban opposition groups revolted against Spain. As President Grant stated in 1875:

The recognition of independence or of belligerency being thus, in my judgment, equally inadmissible, it remains to consider what course shall be adopted should the conflict not soon be brought to an end by acts of the parties themselves, and should the evils which result therefrom, affecting all nations, and particularly the United States, continue. In such event I am of opinion that other nations will be compelled to assume the responsibility which devolves upon them, and to seriously consider the only remaining measures possible – mediation and intervention.\(^{101}\)

Likewise, regarding the Cuban conflict of 1895, President McKinley justified the American refrain from recognition of belligerency and laid down the available courses of options:

[o]f the untried measures there remain only: Recognition of the insurgents as belligerents; recognition of the independence of Cuba; neutral intervention to end the war by imposing a rational compromise between the contestants, and intervention in favor of one or the other party. I speak not of forcible annexation, for that can not be thought of. That, by our code of morality, would be criminal aggression.\(^{102}\)

\(^{101}\) Annual Message of President Grant, supra note 25 (emphasis added).

\(^{102}\) Annual Message of President McKinley, supra note 25.
Note, that President McKinley understood the different courses of actions available to the U.S. as equal alternatives; thus, forcible intervention in favor of the opposition was viewed as a legal possibility – one which was actually *independent* of any previous recognition of belligerency, or of independence.

Beale, addressing the concept of Cuban belligerency, has also stressed the element of choice in this context:

> It is necessary at the outset to distinguish three similar things: intervention, recognition of independence, and recognition of belligerency. Intervention is an actual interference in the affairs of a friendly nation, sometimes thought to be justifiable, but not usually consistent with our national policy of neutrality.\(^\text{103}\)

Recognition of belligerency could not be seen as a legal precondition for intervention; for intervention could take place even without it. Belligerency recognition was thus looked upon as an alternative to harsher actions:

> Intervention in Cuba would mean taking part in the contest there on one side or the other; recognition of Cuban independence would mean recognition of her separation from Spain as an accomplished fact. The latter course is impossible; no one advocates the former. Recognition of the belligerency of the insurgents is the only course urged.\(^\text{104}\)

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\(^{103}\) Beale, *supra* note 9, at 406.

\(^{104}\) *Id.* at 407.
Although Beale thought that intervention was not advocated, intervention by the U.S. indeed took place in 1898 – in what became the Spanish-American War – without the recognition of the belligerency of the Cubans or of their independence. As a matter of fact, President Mckinley stated explicitly that he will pursue the intervention without recognition of belligerency, which he saw as adding nothing in this context. However, the intervention was presented by Mckinley as a neutral action to “stop the war,” justified by humanitarian language and by reference to American interests. He specifically refrained from expressing any preference towards the Cuban rebels, although the rebels previously requested an American intervention. Nevertheless, of importance was the invalidity of belligerency recognition to the American decision to go to war.

In other cases, if a state was ready to actively and expressly support a party to an internal conflict, and was willing to pay the costs of war with the other party, it seems illogical that it would limit itself to the mere recognition of belligerency of the party it supports. Instead, it could grant its ally staunch moral support by recognizing it as the lawful government or independent state. For instance, France recognized the United States in 1778, before intervening on its behalf in the American Revolution. Likewise, the United States intervened in the internal conflict in Colombia, in 1903, after recognition of Panama’s independence without recognizing its belligerency. In a later era, in the Spanish Civil War, Germany and Italy recognized the Franco regime, which

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105 Message to the Congress, April 11, 1898.
106 Id.; see also WALZER, supra note 2, at 102 –104 (critiquing the humanitarian claims by the Americans, claiming that the intervention was solely for the benefit of the U.S.)
107 Chapter 6, sec. I.1.
108 Padelford, supra note 1, at 236.
they were forcibly assisting, as the “lawful” government, without previously recognizing its belligerency.\textsuperscript{109}

II.4 The Main Consequence of Recognition of Belligerency: Effects on Neutral Commerce

If not the question of forcible intervention, what was the focus of the law of internal armed conflicts in the war-prerogative era? Indeed, the set of consequences of war, in the legal sphere, that so concerned the powers of the era, was quite different from the dominant concerns of contemporary international law. The main interest of the powers was to mitigate, or at least control, of the effects of war over neutral commerce – as opposed to today’s stated preoccupation with human rights, self determination and the protection of civilians. Accordingly, when an internal armed conflict erupted, the main concern was the economic rights of neutral powers, and not the political rights of the parties to the conflict, which were at best secondary. As demonstrated in an 1869 opinion of the U.S. Attorney General, regarding the recognition of belligerency of rebelling Cuba:

The question of belligerency between organized communities is a question of fact, and may be one of the gravest facts upon which a nation is called to decide and act. The concession of belligerent rights … necessarily involves serious restrictions upon the ordinary rights of the people of this country to carry on branches of manufacture and trade which are unrestricted in time of peace. To prevent our mechanics and merchants from building ships of war and selling them in the markets of the world, is an

\textsuperscript{109} Id.
interference with their private rights which can only be justified on the ground of a paramount duty in our international relations; and however much we may sympathize with the efforts of any portion of the people of another country to resist what they consider oppression or to achieve independence, our duties are necessarily dependent upon the actual progress which they have made in reaching these objects.\textsuperscript{110}

The secondary, if at all, importance of the rights of the parties to the conflict can explain the condition, set forth by prominent authorities, that recognition of belligerent rights was contingent upon the recognizing power’s substantial interest in doing so. As summarized in Dana’s edition of \textit{Elements of International Law}:

The reason which requires and can alone justify this step [recognition of belligerency] … is, that its [the recognizing state’s] own rights and interests are so far affected as to require a definition of its own relations to the parties … As to the relation of the foreign State to the contest, if it is solely on land, and the foreign State is not contiguous, it is difficult to imagine a call for the recognition.\textsuperscript{111}

War indeed entailed consequences on neutral commerce. Mainly, the existence of \textit{war} was a precondition for the application of maritime prize law, which, as explained shortly, had immense effects over the trade interests of the great naval powers. Thus, the


\textsuperscript{111} \textit{Wheaton’s}, \textit{supra} note 5; see also Beale, \textit{supra} note 9, at 407.
distinction whether a state of war – or belligerency – existed, was one of great urgency to the trading naval powers. When major rebellions began to take place in the European colonies – for instance, the late 18th century American Revolution or the early 19th century Spanish Colonial Wars – a question of utmost importance was whether such conflicts amounted to wars, entailing all the maritime law consequences of that status; and whether the parties should be treated as belligerents for the purpose of such law.\(^{112}\)

In traditional prize law, for instance, a belligerent vessel could legitimately visit-and-search a neutral vessel on the high seas, and – if caught carrying contraband (and prior to the Declaration of Paris of 1856, enemy property at large) destined to enemy territory, to capture it. If a neutral vessel would breach or attempt to breach a blockade, it would suffer the same consequences. In any case, capture would not transfer the title to the vessel or goods, until they were condemned following in rem adjudication in front of a prize court, established by the belligerent. Furthermore, if the neutral would violate the terms of neutrality in a magnitude sufficient to render it an enemy belligerent by the “victim” state, vessels flying its flag could be captured on the high seas as enemy vessels, and condemned in front of prize courts, regardless of their destiny or cargo (however, if the cargo belonged to a neutral, only the vessel itself could be condemned and the cargo was released.)\(^{113}\)

The British High Court of Admiralty summarized both the concerns of neutrals, and the logic of prize law, in its 1865 decision in the case of The Helen:

\(^{112}\) It is of interest that early colonial wars were considered internal conflicts. This is in stark contrast to colonial struggles of the modern era, which are considered as international conflicts. This in itself, as we shall discuss later in Chapter 11, demonstrates international law’s shift to substantive considerations.

\(^{113}\) Perhaps with the exception of coast fishing vessels. See The Paquete Habana, 175 U.S. 677 (1900); for general prize law see Ex Parte Chavasse, supra note 33; and the High Court of Admiralty in The Helen, (1865–67) L.R. 1 (1865); The Santissima Trinidad, supra note 98; see also C. JOHN COLOMBOS, INTERNATIONAL LAW OF THE SEA, 687 (6TH ed., 1967).
A neutral country has a right to trade with all other countries in time of peace. One of these countries becomes a belligerent, and is blockaded. Why should the right of the neutral be affected by the acts of the other belligerent? The answer of the blockading power is: “Mine is a just and necessary war,” a matter which, in ordinary cases, the neutral cannot question, “I must seize contraband, I must enforce blockade, to carry on the war.” In this state of things there has been a long and admitted usage on the part of all civilized states—a concession by both parties, the belligerent and the neutral—a universal usage which constitutes the law of nations. It is only with reference to this usage that the belligerent can interfere with the neutral.

Suppose no question of blockade or contraband, no belligerent could claim a right of seizure on the high seas of a neutral vessel going to the port of another belligerent, however essential to his interest it might be so to do.

... When all the necessary conditions are satisfied, then, by the usage of nations, the belligerent is allowed to capture and condemn neutral vessels without remonstrance from the neutral state.114

However, the rights of belligerents to capture and condemn neutral vessels running a blockade or carrying contraband did not render the act of such vessels illegal; nor did it require third states to prevent such actions. Capture and condemnation was the only penalty incurred, and was viewed as no more of a calculated risk taken by the vessel’s owner:

114 The Helen, supra note 113, at 3–4.
It never has been a part of admitted common usage that such voyages should be deemed illegal by the neutral state, still less that the neutral state should be bound to prevent them; the belligerent has not a shadow of right to require more than universal usage has given him, and has no pretence to say to the neutral: “You shall help me to enforce my belligerent right by curtailing your own freedom of commerce, and making that illegal by your own law which was not so before.” … [T]he law of nations has never declared that a neutral state is bound to impede or diminish its own trade by municipal restriction.\textsuperscript{115}

It is in this context where the concept of belligerency recognition developed, and not in the context of forcible intervention. The doctrine of recognition of belligerency, and – to a certain extent – the later doctrine of insurgency, were mainly concerned with determining when an internal conflict amounts to war, spawning the aforementioned effects over neutral commerce. The issue of consensual forcible intervention, conversely, was virtually non-existent in the discussion of the status of parties to an internal armed conflict, since, as aforementioned, use of force was a sovereign prerogative. Only since the “creation” of modern day \textit{jus ad bellum} did the law on the use of force came to substantially affect the question of these rights, and thus – of consensual intervention.

In sum, although belligerency recognition had implications over the rights and obligations of opposition forces, these implications were limited – mostly – to the law of neutrality, and did not affect substantively the question of forcible intervention. However, since the status of parties to internal armed conflicts was indeed affected by this doctrine,

\textsuperscript{115}\textit{Id.} at 4.
it is of much importance to analyze the *considerations* that governed it. As we shall see in the next chapter, these were largely amoral.
CHAPTER 6

TERRITORIAL EFFECTIVE CONTROL AS A SOURCE OF RIGHTS: THE

BELIGIERENCY AND INSURGENCY DOCTRINES

I. THE BELIGIERENCY DOCTRINE: EARLY CASES

Having understood, in the previous chapter, the general normative framework regarding the traditional law of internal armed conflict, we shall now survey its application in key conflicts of the war-prerogative era, in order to exemplify the amoral dynamics of the era, in relation to the determination of the rights and powers of parties to internal armed conflicts. This understanding can help us grasp the processes effecting the development of international law, and thus to better understand international law today.

I.1 THE AMERICAN REVOLUTION

The concept of belligerency recognition developed gradually from the American Revolution, throughout a number of conflicts in the early-mid 19th century, until it was galvanized in the American Civil War.¹ Perhaps ironically, while the belligerency status granted to the South was at large deemed by the Union, during the Civil War, as adverse to its interest – the need for such doctrine was rooted in the days of the American Revolution. During that conflict, the nascent-U.S. commissioned privateers and established prize courts for the purpose of capture and condemnation of British ships.²

² For early U.S. prize decisions see, e.g., Rice v. Taylor, 20 F. Cas. 668 (1779); The Hope, 8 F. Cas. 975 (1779); Pray v. the Recover, 19 F. Cas. 1266 (1780); Mahoon v. the Glocester, 16 F. Cas. 499 (1780); The Two Friends, 10 F. Cas. 302 (1781); Hainey v. The Tristram Shandy, 11 F. Cas. 171 (1781); The Resolution, 2 U.S. 1 (1781); The Erstern, 2 U.S. 34 (1782).
When Denmark refused, in 1778, to recognize, as legitimate prize, three British ships captured by the Americans and therefore returned them to Britain, a decades-long diplomatic dispute ensued, in which the U.S. demanded reparations for what can be described as non-recognition of its belligerent rights.3

As in later conflicts, notably in the American Civil War, the opposition party – here, the Americans – claimed independence, and thus saw itself as entitled to the same rights in prize law as the government; the latter – here, the British – rejected the recognition of such rights, while invoking the same rights for itself. Third parties – here, Denmark – were caught in between. In 1843, Henry Wheaton, an American diplomat and preeminent expert in international law, was of the opinion that Denmark had acted wrongfully, since, in his view, by not treating the American privateers as pirates, it adopted, de facto, a neutral stance and therefore could not ignore their prize rights.4 Furthermore, Wheaton argued that since Britain itself granted the Americans some belligerent rights – such as prisoner exchanges – it cannot be argued that Denmark could ignore these rights.5

As opposed to Denmark, Netherlands, it seems, acted according to what will be later on labeled as “recognition of belligerency:” when the Americans brought captured British merchant vessels into a Dutch port, the latter ordered the Americans to leave, without returning the ships to Britain, thus conforming, more or less, to the practice of neutrality.6

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3 This was the affair of The Union, The Betsy and The Charming Polly. See Oglesby, supra note 1, at 1–3. 
4 Id. at 5. 
5 Id. at 4, 7. 
6 Id. at 5–7. The Dutch only became involved in the war when Britain declared war upon them, on counts of their trade policy. ANDREW STOCKLEY, BRITAIN AND FRANCE AT THE BIRTH OF AMERICA 24–26 (2001).
The American Revolution saw a case of consensual intervention by France. When it became obvious that Britain will act forcibly against American independence, foreign support became a key interest of American diplomacy, and emissaries were sent to the courts of the main European powers.\(^7\) The Americans found an ally in France. The Bourbons were eager to weaken Britain, and among the French public, revolutionary notions have already taken hold. For these reasons France was sympathetic towards the American cause.\(^8\) At first, aiding the Americans covertly, by mid-1778 France was involved in a full blown conflict with Britain, an important factor in the eventual American victory.\(^9\) The French intervention followed a treaty of alliance between France and the nascent U.S., signed on February 6\(^{th}\), 1778, in which France effectively recognized the latter’s independence. Among other issues, the treaty formed an alliance in the war against Britain, the purpose of which was securing American independence.\(^10\)

The international response to the American Revolution could be summarized in the following terms: most powers, in general, opposed the American struggle on counts their aversion towards revolutions and their adherence to the monarchic legitimacy principle.\(^11\) Denmark, as we saw, adopted a peculiar position. Netherland assumed neutrality, perhaps foreseeing the belligerency doctrine; this position eventually has drawn it into war against Britain, which disapproved of the Dutch insistence that neutrality grants immunity from capture to non-contraband enemy goods shipped in

\(^8\) See James Breck Perkins, France in the American Revolution, xi–xiii (1911).
\(^10\) Perkins, supra note 8, at ix–x; Alden, supra note 9, at 381. The treaty is available at http://avalon.law.yale.edu/18th_century/fr1788-2.asp.
neutral merchant vessels.\textsuperscript{12} France recognized American independence, \textit{prior} to its consensual intervention in favor of the United States.

All in all, the American Revolution serves as an example for the different concerns which major civil wars invoked in third parties at the end of the 18\textsuperscript{th} century. When revisiting the problems that concerned states during that struggle, it is striking how these were different from contemporary concerns.

II.2 \textbf{EARLY 19\textsuperscript{TH} CENTURY CASES: THE SPANISH COLONIAL WARS}

The Spanish Colonial Wars of 1810–1823 served to clarify, doctrinally, the recognition of belligerency as an intermediate status between non-recognition and complete recognition of a government or a state. This is true, although in the discourse of the time, the terms “belligerents,” “governments” or “nations” were used sometimes interchangeably. The positions adopted regarding the rebelling colonies by the United States, and later on by Britain, served as precedents to the doctrine that developed throughout the 19\textsuperscript{th} century.\textsuperscript{13}

In September 1, 1815, President Madison proclaimed the neutrality of the United States towards the parties in the Colonial Wars (without, actually, using the term “neutrality”, but merely highlighting the obligations of U.S. citizens, presumably under the Neutrality Act of 1794.)\textsuperscript{14} This attitude was reaffirmed by President Monroe, who

\textsuperscript{12} See id. at 113–129. The Dutch insisted on the principle of “free ships, free goods” – meaning, that enemy property, as long as it is not contraband, cannot be captured on board neutral vessels. \textit{Id.} at 131–132. The reluctance of Britain to adhere to the principle prompted some neutral powers, headed by Russia, to proclaim “armed neutrality” in 1780, in order to enforce the aforesaid principle. \textit{See id.} at 149–171. The principle of “free ships, free goods” was enshrined in 1856, in the Declaration of Paris.


\textsuperscript{14} See Proclamation 21 - Warning Against Unauthorized Military Expedition Against the Dominions of Spain (Sept 1, 1815). Britain too recognized the belligerency of the colonies, through an official
was the first to officially address the conflict as a *civil war*, and such was the American policy until full statehood of the Spanish Colonies was attained in 1822. Ironically, the American approach served as precedent for the British recognition of the Confederacy's belligerency in the American Civil War, decades later.

U.S. courts understood these statements by the executive as recognition of the belligerency status of the colonies. Accordingly, this approach was firmly applied by the Supreme Court in *U.S. v. Palmer*, and subsequently, in the case of the *Divina Pastora*, where the Court held that –

the government of the United States having recognised the existence of a civil war between Spain and her colonies, but remaining neutral, the courts of the Union are bound to consider as lawful, those acts which war authorizes, and which the new governments in South America may direct against their enemy.

The Court, once again, grappled with the question of the rights of the rebelling colonies in the *Santissima Trinidad* prize case. There, goods carried by two merchant ships of the Spanish Empire were captured on the high seas by rebelling armed vessels—and brought to storage in the U.S. custom house in Norfolk. Of interest to us was the claim that the capturing vessels could not have received the immunities and privileges of

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15 In his message to Congress in November 17th, 1818. See Beale, *supra* note 13, at 409.
16 OGLESBY, *supra* note 1, at 8–13. On the confused British policy towards the Spanish colonies, until the grant of belligerency rights in 1822, see *id.*, at 13–17.
18 16 U.S. 610 (1818).
19 17 U.S. 52, 63–64 (1819).
20 The Santissima Trinidad, 20 U.S. 283 (1822).
a “public ship” by the U.S., since the rebelling United Provinces were not recognized as a “sovereign independent government.” To that claim, the Court replied that –

The government of the United States has recognized the existence of a civil war between Spain and her colonies, and has avowed a determination to remain neutral between the parties, and to allow to each the same rights of asylum and hospitality and intercourse. Each party is, therefore, deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war, and entitled to be respected in the exercise of those rights. We cannot interfere to the prejudice of either belligerent without making ourselves a party to the contest, and departing from the posture of neutrality. All captures made by each must be considered as having the same validity, and all the immunities which may be claimed by public ships in our ports under the law of nations must be considered as equally the right of each.

The Court went on to uphold the ruling of the lower courts, restituting the prize to its owners, since the neutrality of the U.S. was compromised as there was an “augmentation of the force” of the capturing vessels while they were docked in American ports, previous to the capture of the Spanish ships.

While the logic of the belligerency doctrine is definitely present in the reasoning of both in the Divina Pastora and Santissima Trinidad cases, it should be noted that the loose use of the terms “nations” and “governments” in reference to the rebelling forces is

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21 Id. at 337.
22 Id.
23 Id. at 344–346. Had restitution not been decreed, the U.S. could have been deemed as no-longer neutral.
somewhat confusing, when considering the intermediate status of belligerency. Nonetheless, these cases were unquestionably seen as precedents for belligerency recognition.\textsuperscript{24}

I.3 Mid 19\textsuperscript{th} Century Cases: Texas, Canada and Others

Texas declared independence from Mexico in December 1835, after a year of conflict. Following prolonged hesitation, the U.S. recognized Texan independence in 1837, followed by Britain and France in 1840.\textsuperscript{25} Nevertheless, the U.S. granted belligerent status to the Texans from the outset of the conflict, as clarified in an 1836 diplomatic correspondence between the Mexican ambassador and Secretary of State Forsyth.\textsuperscript{26} Perhaps adopting the language of the Supreme Court in the Santissima Trinidad, the Attorney General expressly opined, in May 1836, that an intermediate position of belligerency exists, and that such was recognized regarding the Texan conflict:

\begin{quote}
Where a civil war breaks out in a foreign nation, and part of such nation erects a distinct and separate government, and the United States though they do not acknowledge the independence of the new government, do yet recognize the existence of a civil war, our courts have uniformly regarded each party as a belligerent nation, in regard to acts done \textit{jure belli} \ldots The existence of a civil war between the people of Texas and the authorities and people of the other Mexican States, was recognised by the President of the
\end{quote}

\textsuperscript{24} See, e.g., The Hornet, 12 F.Cas. 529, 531 (1870).
\textsuperscript{25} Wheaton’s Elements of International Law 44–45 n. 16 (Richard Henry Dana, ed., 1866)
\textsuperscript{26} Id. at 38, n. 15.
United States at an early day in the month of November last.27

Accordingly, American courts applied the belligerent status of Texas by recognizing the immunity of its warships, and saw it as “entitled to all the sovereign rights of war.”28

The U.S. has declared its neutrality vis-à-vis an internal conflict, once more, in the conflict in Canada in 1837. The conflict erupted when insurgents proclaimed an independent government in Upper Canada, occupied Navy Island (in the Canadian Niagara River) and appealed for foreign aid. This conflict spawned the famous Caroline incident, which is considered the root of the customary international law doctrine of the right to self-defense.29 The Caroline, a private American steamboat, was deemed by the British as aiding the opposition forces that have concentrated in Navy Island. Thus, on December 29, 1837 British forces crossed the Niagara River, captured the Caroline in the territorial waters of New York, destroyed it, and returned to Canada. Following this controversy, on January 5, 1838, President Van Buren proclaimed (perhaps hastily) that “civil war begun in Canada,” and that all persons that compromise the “neutrality of this government” by interfering in the Canadian conflict will be arrested and punished.30

The intermediate status of belligerency, even if not explicitly labeled as such, has played a factor in several other conflicts of the 19th century. We shall not elaborate on

27 United States Attorney General, Piracy upon the High Seas, 3 U.S. Op. Atty. Gen. 120 –122 (May 17, 1836); see also Oglesby, supra note 1, at 26; see also Wheaton’s, supra note 25, at 38, n. 15.
28 Walley v. Schooner Liberty, 12 La. 98 (1838).
30 Id. See Proclamation of the President of the United States for the Prevention of Unlawful Interference in the Civil War in Canada (Jan. 5, 1838); Bernard, however, thought that the situation in Canada did not amount to a civil war in fact: “it was a rising of discontented persons who had taken arms against the Government without any pretence to civil or military organization.” Montague Bernard, A Historical Account of The Neutrality of Great Britain During the American Civil War 117 –118 n. 2 (1870).
these. To briefly mention, Britain respected the blockade proclaimed in 1828 by Dom Miguel, pretender to the throne of Portugal against the child Quean Dona Maria, who was recognized at the time by Britain.\textsuperscript{31} In 1848, Britain recognized the blockade imposed on Trieste by Italian insurgents, justifying it on counts of an existence of a \textit{de facto} war.\textsuperscript{32} In 1860, Britain recognized the blockade and prize law rights of the Garibaldi forces in Italy.\textsuperscript{33} All of these proclamation and actions were undertaken without making a moral judgment concerning the conflicting parties.

\section*{II. The Consolidation of the Belligerency Doctrine: The American Civil War}

\subsection*{II.1 General}

The conflicts discussed in the previous section have generally outlined the belligerency doctrine. However, it took a massive conflict such as the American Civil War to consolidate it. The American Civil War, as there is no need to elaborate, was prompted by the secession of the Southern States – organized as the Confederate States of America – mainly over the controversy between the parties over the institution of slavery.\textsuperscript{34} Full blown conflict erupted in the battle for Fort Sumter of April 12, 1861, and when a blockade was proclaimed against Confederate ports by U.S. President Lincoln a week later, the conflict immediately raised international concerns. As we shall see, the Confederacy was considered by the Union (albeit grudgingly), as well as by European


\textsuperscript{32} \textit{Id.}

\textsuperscript{33} \textit{Id.} at 19–20.

\textsuperscript{34} For a factual summary and an extensive overview, see Quincy Wright, \textit{The American Civil War}, in \textit{The International Law of Civil Wars} 30 (Richard A. Falk ed., 1971).
powers, as a belligerent; the Confederate saw itself as a state involved in an international war.\textsuperscript{35}

Indeed, the American Civil War constitutes the quintessential example of the recognition of belligerency as a mean to regulate the relations between parties to an internal conflict and external powers – and also illustrates the discrepancies of the doctrine with contemporary law. Mainly, it is serves a uniquely clear example of the amoral perception of states at the time, as the issue of slavery – already seen by many as morally wrong – did not play a part in the decision by world powers to remain neutral in the conflict.

II.2 \textsc{Internal Approaches}

From the outset of the conflict, the U.S. was caught in somewhat of a legal bind. Simply put, the U.S. aspired to exercise belligerent powers against the South, without recognizing, sweepingly, the South’s capacity to do the same. Thus, on one hand, the U.S. saw utmost importance in the prevention of the grant of any legal status to the South by foreign states; on the other, it had an interest in recognizing that the conflict was indeed a “war”, mainly in order to impose a third-party binding blockade and to trigger the application of prize law vis-à-vis Confederate vessels and neutral vessels carrying contraband.\textsuperscript{36} This approach seems to have been advocated by Secretary of State Seward, as demonstrated in a blistering Dispatch 10 of May 21, 1861, to Charles Francis Adams,

\textsuperscript{35} Wright, \textit{supra} note 34, at 30–31.

\textsuperscript{36} \textit{Id.}, at 75; see also BERNARD, \textit{supra} note 30, at 159; HERSCH LAUTERPACHT, \textsc{Recognition in International Law} 243–244 (1948).
U.S. ambassador to Britain. As we shall see, Britain and prominent British jurists of the time, such as Bernard, adopted a different view.

Wright labeled the U.S. approach, in general, as a “half-hearted” acceptance that the conflict amounted to belligerency. This explains, perhaps, the discrepancy between President Lincoln’s words in his blockade proclamation – according to which the Confederacy was merely “a combination of persons” engaged in insurrection, that have issued “pretended letters of marque;” and therefore, harassment of U.S. ships by their vessels or privateers would be considered piracy – and subsequent Supreme Court decisions that addressed the belligerency status of the South. However, as we shall shortly see, the U.S. Courts too were not entirely consistent in their reasoning, as there was some tendency to recognize belligerency only in so far as it spawned rights for the U.S. rather than the Confederacy. Be it as it may, it is striking that Union courts, even when at large hostile to Confederacy belligerent rights, were careful to base their decisions on reasons of effectiveness and sovereignty, rather on any substantive judgment of the parties.

The belligerency doctrine was expounded by the U.S. Supreme Court in the Prize Cases of 1862. There, the Court had to grapple in detail with the question whether the Civil War constituted a war in the sense of international law, triggering the application of

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38 Bernard, supra note 30, at 116 (“On this assumed right the Government of the United states acted, when … it declared a blockade … The Confederate Government acted on the same assumed right in proposing to issue letters of marquee … if the right existed on one side, it existed also on the other.”)
39 Wright, supra note 34, at 93–94.
40 Privateering was abolished in the Declaration of Paris of 1856; the U.S., however, was not a party to the convention. See The Paris Declaration Respecting Maritime Law of 16 April 1856. On the shifting attitudes of the U.S. regarding privateering and the Declaration of Paris see Wright, supra note 34, at 94–97.
42 The Prize Cases, 67 U.S. 635 (1862); see also Ford V. Surget, 97 U.S. 594, 613–614 (1878) Wright, supra note 34, at 43–45; Smith, supra note 31, at 20.
prize law. In the Prize Cases, the Court ruled on an appeal by four merchant vessels – two Confederate, one British and one Mexican – that were captured by Union ships, to be condemned in a District Court sitting as a prize court. The claimants argued, *inter alia*, that the Union could not impose a blockade on the South with consequences in prize law, since the conflict was an insurrection rather than a war in the international or municipal sense. The Court, in a majority ruling (5-4), rejected these claims, setting forth a clearly *de facto* doctrine for the understanding of belligerent rights in civil wars. It ruled that prize law is triggered by the existence of a *de facto* war; and that internal conflicts can indeed constitute such “wars,” in which a clear intermediate status of belligerency exists:

The parties belligerent in a public war are independent nations. But it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents, claims sovereign rights as against the other . . . When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war.

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43 It seems that nowadays, while it is reasonable that prize law is still relevant, to some degree, the existence of a state of *war stricto sensu* is not a condition for its application, as the concept of armed conflict substituted the term *war* in the classical sense. See Wolff Heintschel von Heinegg, *The Current State of International Prize Law*, in *INTERNATIONAL ECONOMIC LAW AND ARMED CONFLICT* 33 (Harry H.G. Post ed., 1994).


45 Justice Nelson, supported by Justices Catron and Clifford and Chief Justice Taney, opined in his dissenting opinion that “war” exists only after Congress recognizes it as such. Since this was not done until July 13, 1861, the Union’s blockade, according to Justice Nelson, could not bind neutral vessels.

The Court vehemently rejected the notion that there is something inherent in internal armed conflicts which prevents them from being “wars,” and the parties from being “enemies:”

The law of nations is also called the law of nature; it is founded on the common consent as well as the common sense of the world. It contains no such anomalous doctrine as that which this Court are now for the first time desired to pronounce, to wit: That insurgents who have risen in rebellion against their sovereign, expelled her Courts, established a revolutionary government, organized armies, and commenced hostilities, are not enemies because they are traitors; and a war levied on the Government by traitors, in order to dismember and destroy it, is not a war because it is an ‘insurrection.’

Furthermore, and citing Vattel, the Court held that parties to a civil war ought to adhere to laws of war, on counts of reason and reciprocity (stopping short of imposing a clear-cut legal obligation to do so); and that the existence of a civil war is a question of fact, notwithstanding formal declarations or the lack thereof, or the negative perception of one side regarding the other.

The Court ruled that the acknowledgment of an internal conflict as a war by third parties, which spawns the opposition’s belligerent rights, is done through a declaration of neutrality. Thus, it concluded that the Union blockade was legal under international and

47 Id. at 670.
48 Id. at 667–669.
49 Id. at 669.
municipal law, and that third parties must respect in order to maintain their neutral status.\textsuperscript{50} This conclusion was reaffirmed in further Supreme Court prize decisions throughout the Civil War.\textsuperscript{51}

However, the Court in the Prize Cases stopped short from specifying the belligerent rights of the Confederacy, since what was discussed there, to a large extent, was the belligerent rights of the Union. As aforementioned, the U.S. judiciary – as U.S. policy at large – was not consistent in its equal recognition of Union and Confederate belligerent rights. This was evident in the case of the \textit{Lilla}. There, the District Court of Massachusetts, sitting as a prize court, was required to rule on the validity of prize decisions of Confederate courts.\textsuperscript{52} The Court labeled South Carolina prize proceedings as taking place under “assumed authority,” and held that such proceedings cannot divest the title of the original owner.\textsuperscript{53} The Court adopted a narrow interpretation of the Prize Cases, ruling that –

\begin{quote}
  treating the Confederates in some respects as belligerents was not an abandonment of sovereign rights, and by no means precluded us from treating them in other respects as rebels. Most assuredly I shall not recognize the Southern Confederates as a nation, or as having a government competent to establish prize courts.\textsuperscript{54}
\end{quote}

\begin{flushleft}
\textsuperscript{50} The Prize Cases, \textit{supra} note 42, at 671.  \\
\textsuperscript{51} \textit{See, e.g.}, The Circassian, 69 U.S. 135 (1864); The Admiral, 70 U.S. 603 (1865); The Thompson, 70 U.S. 155 (1865); The Bermuda, 70 U.S. 514 (1865). For cases regarding the belligerency in the split-state of Kentucky see Com. V. Holland, 1 Duv. 182 (1864); Martin v. Hortin 1 Bush 629 (1865).  \\
\textsuperscript{52} The Lilla, 15 F. Cas. 525 (1862); affirmed in U.S. v .The Lilla, 26 F. Cas. 938 (1863).  \\
\textsuperscript{53} The Lilla, \textit{supra} note 52, at 526, 529.  \\
\textsuperscript{54} \textit{Id.} at 529.
\end{flushleft}
This reasoning was criticized by the Law Officers of the British Crown. Much like the British courts,\textsuperscript{55} they adopted the view that the Confederacy possesses the same belligerent rights as the Union, among them the right to adjudicate prize.\textsuperscript{56}

The question of belligerency, unsurprisingly, did not surface in the state courts of the Confederacy. The Confederacy declared war on May 6\textsuperscript{th}, 1861, passing an act “Recognizing the Existence of War between the United States and the Confederate States; and Concerning Letters of Marque, Prizes and Prize Goods.”\textsuperscript{57} As the Confederate judiciary recognized the Confederate government as a national government, subject to the law of nations,\textsuperscript{58} the question of any intermediate status of belligerency was quashed.

II.3 \textsc{External Approaches}

The prime concern of the Union was to prevent any recognition of the status of the Confederacy by foreign powers or any other type of intervention on its behalf. However, when the Union blockade was imposed, the conflict immediately produced international effects – mainly on naval commerce – requiring maritime powers to take a stand.\textsuperscript{59} On April 30, 1861, British Foreign Secretary Lord Russell learned that Fort Sumter fell into the hands of the Confederacy, and that President Lincoln called out the national militia. Six days later, Lord Russell announced in Parliament that the Government came to the conclusion that the Confederacy must be treated as a belligerent.\textsuperscript{60}

\textsuperscript{55} \textit{See} sec. II.3.
\textsuperscript{56} \textit{See} Wright, \textit{supra} note 34, at 92–93.
\textsuperscript{57} \textit{BERNARD, supra} note 30, at 79, 100–105.
\textsuperscript{58} \textit{See}, \textit{e.g.}, In the Matter of Finley, 60 N.C. 191 (1863); Russ v. Mitchell, 11 Fla. 80 (1864); \textit{see also} Wright, \textit{supra} note 34, at 30 – 31.
\textsuperscript{59} \textit{See} BERNARD, \textit{supra} note 30, at 130.
\textsuperscript{60} OGLESBY, \textit{supra} note 1, at 34–35; \textit{BERNARD, supra} note 30, at 131.
President Jefferson Davis invited private vessel owners to apply for letters of marque, and President Lincoln proclaimed a naval blockade of the South, the Queen proclaimed neutrality on May 13. Notably, the proclamation warned British subjects from breaching neutrality laws – enforced domestically through the Foreign Enlistment Act of 1819 – *inter alia* by a warning against fitting out, arming, or equipping any ship or vessel to be employed as a ship of war or privateer or transport, by either of the said contending parties; or by breaking, or endeavouring to break, any blockade lawfully and actually established by or on behalf of either of the said contending parties; or by carrying officers, soldiers, despatches, arms, military stores, or materials, or any article or articles considered and deemed to be contraband of war according to the law or modern usage of nations, for the use or service of either of the said contending parties … .

The declaration spawned an intense debate, in which British foreign minister Russell, in his discussion with John Francis Adams, U.S. ambassador to Britain, attempted to downplay the meaning of the British declaration, denying that it was a prelude to recognition of independence, and labeling it as a mere technical “necessity,”

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61 Oglesby, supra note 1, at 35; see also Wright, supra note 34, at 46. President Davis invited “all those who may desire by service in private armed vessels on the high seas, to aid this Government in resisting so wanton and wicked an aggression.” See Important from Montgomery: Proposal to Issue Letters of Marque and Reprisal, N.Y. TIMES, Apr. 18, 1861; available at http://www.nytimes.com/1861/04/18/news/important-from-montgomery-proposal-to-issue-letters-of-marque-and-reprisal.html; see also Bernard, supra note 30, at 78–79.

62 Oglesby, supra note 1, at 35.

63 See LASSA OPPENHEIM, 2 INTERNATIONAL LAW §311 (2nd ed., 1912).

64 Royal Proclamation of May 13, 1861; see also Bernard, supra note 30, at 132. For an application of the Foreign Enlistment Act by British courts see, e.g., Attorney-General v Sillim and Others Claiming the Alexandra, 176 E.R. 295(1863).
based upon a determination of a “fact.” It was only designed to “explain to British subjects their liabilities.” Adams replied that, in principle, he agrees to this view (meaning, presumably, the concept of belligerency); however, he thought that it was premature, as the recognition took place “before they [the South] had ever shown their capacity to maintain any kind of warfare whatever, except within one of their own harbours … It [Britain] considered them a marine power before they had every exhibited a single privateer.”

If framed in a normative way, it seems that the doctrinal dispute between the parties concerned the question whether a state could impose a third-party binding blockade and still claim, at the same time, that belligerency does not exist. It is clear that – contrary to the American view– Britain was prepared to recognize all belligerent rights of the Confederacy, including rights in maritime prize law. The belligerency status of the Confederacy and questions regarding the application of British neutrality were addressed by British courts in various instances, in which the belligerency of the South was not doubted. By the time the war ended, both Adams and Russell were in agreement on the general concept of belligerency recognition, and indeed seem to differ solely on the question of timing – the Americans still of the opinion that Britain’s recognition was premature.

65 Report of the meeting between of May 18th 1861 between Adams and U.S. Secretary of State. Reprinted in BERNARD, supra note 30, at 152 –153, 155; for more on the Russell-Adams discussion, see Beale, supra note 13, at 413 – 414.
66 BERNARD, supra note 30, at 154.
67 See, e.g., Ionides v. Universal Marine Insurance, 143 E.R. 445 (1863); In re Tivnan, 122 E.R. 971 (1864); Hobbs v. Henning, 144 E.R. 317 (1864); Ex Parte Chavasse, 46 E.R. 1072 (1865); The Helen, (1865–67) L.R. 1 (1865)
68 See the 1865 correspondence between Adams and Russell, reprinted in WHEATON’S, supra note 25, at 37 –38 n. 15.
France declared neutrality soon after the British declaration, on June 10, 1861; the majority of other states with interests in maritime trade followed suit in the following months.\textsuperscript{69} The conservative powers of Europe, namely Russia, Germany and the Austro-Hungarian Empire denied any status to the South, due to particular interests and their general disapproval of revolutionary movements, reminiscent of the Holy Alliance’s legitimism doctrine.\textsuperscript{70}

II.4 The Amoral Application of the Belligerency Doctrine

From our analysis until now, it is clear that the recognition of the rights of parties to internal armed conflicts were at large disconnected from any substantive or moral analysis – beyond the frequently stated condition that both parties must adhere to the laws of war, which were based on the concept of reciprocity between parties, and not concerned, at large, regarding a party’s treatment of its own population. The American Civil War was one of the rare cases in which it was definitely possible to identify a glaring immorality – the institution of slavery –\textsuperscript{71} and therefore, in its context, the amoral approach of the belligerency doctrine and the effectiveness-based approach towards the recognition of rights and powers of parties to internal armed conflicts, is most starkly emphasized.

II.4.1 The Slavery X-Factor

Since Britain was, in general, very hostile to the idea of slavery, it felt comfortable with its relatively supportive policy towards South only as long as slavery was not viewed as

\textsuperscript{69} Wright, \textit{supra} note 34, at 82.
\textsuperscript{70} See Chapter 1, sec. II.2 See also Wright, \textit{supra} note 34, at 82–83; Beale, \textit{supra} note 13, at 414 –417.
the main issue at stake. Indeed, when Lincoln issued the preliminary Emancipation Proclamation in September 1862, British liberals were overwhelmingly supportive of the Union. Nonetheless, such support did not manifest itself in clear-cut policy deviating from neutrality towards the parties to the conflict. Throughout the war, Britain considered, from time to time, the recognition of the Confederacy as a state, but ultimately decided not to do so and to remain in the intermediate position of belligerency recognition. It is reasonable that the competing principles in British policy – favoring self-determination of the South on the one hand, versus disapproval of slavery on the other – were behind the fact that independence was never recognized and belligerency-induced neutrality was opted for.

Although slavery was abhorred in Britain of the 19th century, the issue of slavery did not affect its decision to adopt a neutral stance regarding the Civil War. So detached was the question of slavery from the question of belligerency recognition, that the U.S. Congress had to remind European powers what was at stake. When France proposed to mediate between the parties – perhaps having in mind eventual Southern independence – the offer was rejected “promptly” by Lincoln; Congress, in a joint resolution of March 3, 1863, emphasized that slavery was at the core of the conflict. Congress resolved that while the U.S. could understand foreign powers’ interests to bring an end to internal conflicts, any offer of foreign “interference” in the struggle with the South would be “so

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72 For a prominent British liberal’s view of this issue in 1862 – albeit before the emancipation proclamation – See John Stuart Mill, The Contest in America, in III DISSERTATIONS AND DISCUSSIONS 179 –205 (1867).
73 Wright, supra note 34, at 80–81.
74 Id. at 50–51, n.24, 84.
75 Notwithstanding the violation of neutrality laws by allowing the 1862 fitting out of the CSS Alabama and other vessels in Britain. Britain was held liable for these acts and was required to compensate the U.S. by a decision of the Geneva Arbitral Tribunal established by the Treaty of Washington. See Id. at 88.
far unreasonable and inadmissible that its only explanation will be found in a misunderstanding of the true state of question, and of the real character of the war.” The real character, as resolved by the Congress, was one in which the South was aspiring to “build a new Power whose corner-stone … shall be slavery;” and the Union, conversely, was waging a battle to prevent the establishment of such a power. Thus, any foreign effort of mediation was viewed as “an encouragement to the rebellion and to its declared pretensions,” meaning, slavery.77

The Congress went so far as to resolve that further international attempts at mediation would be considered as “unfriendly” acts; and regretted that the foreign powers have not told the leaders of the rebellion that their endeavor, being based on slavery, “is so far shocking to civilization and the moral sense of mankind that it must not expect welcome or recognition in the commonwealth of nations.” The Congress asserted the universal morality of the Union’s cause, labeling its effort as one representing “good government and of human rights everywhere among men.”78

This reminder was no doubt due. In order to understand the amoral approach of the powers to the American Civil War, it suffices to examine some of their declarations of neutrality. Like Britain’s, other neutrality declarations were extremely technical, most very laconic, and addressed almost exclusively to the relevant state’s citizenry by clarifying the adverse ramifications of breaches of neutrality laws by merchant vessels. Some declarations notified that, in conformity with the Declaration of Paris, privateers of neither party would be admitted to their ports. None of the declarations referred to the issue of slavery or to other substantive questions, such as conformity to the laws of war.

77 Id.
78 Id. For more about the resolution, see Wright, supra note 34, at 101–102.
France addressed the fact that the Confederacy “claims” to be independent, without mentioning the merits, and proceeded to enumerate the neutrality provisions it will enforce. Spain “resolved to maintain strict neutrality in the contest begun between the Federal States of the Union and the States confederated at the South.” Prussia laconically notified its merchants that “during the continuance of the conflict that has broken out among the North American States, the mercantile classes must abstain from all enterprises which are forbidden by the general principles of international law.” Belgium simply stressed its adherence to the Declaration of Paris. The Netherlands followed the same route, and warned its merchants of losses due to “any violation of the obligations imposed on neutral Powers” in maritime law.

II.4.2 John Stuart Mill and the Idea of Consensual Intervention in the Civil War

The hypothetic question of consensual intervention in the face of the South’s slavery policies bothered John Stuart Mill, albeit from an ethical rather than legal point of view. After the Trent Affair of November 1861 – concerning the interception of a British vessel and removal of Confederate officials – there was serious concern that Britain will intervene forcibly in favor of the Confederacy. When risk of war faded, Mill lauded the easing of the tensions in an article published in Fraser’s Magazine in February 1862, vehemently denouncing, on ethical counts, any potential intervention on behalf of the Confederacy. Indeed, Mill was not comfortable even with the recognition of the South’s
belligerency. He acknowledged the amoral aspect of the belligerency recognition of the South, mildly criticizing it, but viewing it nonetheless as a result of “political” necessity:

There is no denying that our attitude towards the contending parties (I mean our moral attitude, for politically there was no other course open to us than neutrality) has not been that which becomes a people who are as sincere enemies of slavery as the English really are…

Indeed, he saw the Union actions in the Trent Affair as “an indignity, and something more than an indignity, which not to have resented, would have been to invite a constant succession of insults and injuries.” However, his position negated any prospects that belligerency recognition might lead to eventual forcible intervention. Mill strongly argued that it was inconceivable that Britain, which has long been active against slavery, “should have lent a hand to setting up … a powerful republic, devoted not only to slavery, but to pro-slavery propagandism.” Thus, argued Mill, while Britain had the right to respond to the wrong inflicted upon it, the consequences would soon overshadow the initial objective:

When the new Confederate States, made an independent Power by English help, had begun their crusade to carry negro slavery from the Potomac to Cape Horn, who would then have remembered that England raised up this scourge

\[86 \text{ Id.}\]
\[87 \text{ Id.}\]
to humanity not for the evil’s sake, but because somebody had offered an insult to her flag?\textsuperscript{88}

Accordingly, Mill defended the policies of President Lincoln, which he saw as just in their essence. On counts of the wrongfulness of its cause – the perpetuation of slavery, he deduced that the South had no right to pursue secession:

Secession may be laudable, and so may any other kind of insurrection; but it may also be an enormous crime. It is the one or the other, according to the object and the provocation. And if there ever was an object which, by its bare announcement, stamped rebels against a particular community as enemies of mankind, it is the one professed by the South.\textsuperscript{89}

It was thus obvious that although he was willing to justify Britain’s neutrality, Mill would not espouse any forcible support of the South – on \textit{substantive} grounds. It is doubtful, however, that Mill’s ethical position had any ground in international law of the time, which was controlled by the war prerogative and rooted in considerations of effective control. Nevertheless, his reluctant acceptance, as a “necessary evil,” of the neutral status induced by the recognition of the South’s belligerency, highlighted the amoral characteristics of this doctrine in rather unambiguous moral circumstances.

\textsuperscript{88} \textit{Id.}  
\textsuperscript{89} \textit{Id.}
III. THE INSURGENCY DOCTRINE

III.1 INSURGENCY: THE STATUS OF REBELS WITHOUT BELLIGERENCY RECOGNITION

The recognition of belligerency was not without costs to third parties. On the one hand, it disturbed their relations with the recognized government; on the other hand, it exposed their merchant fleets to interruptions by the belligerents. However, non-recognition of belligerency left the situation unclear; and awkward situations, in which rebel vessels could be considered pirates, would take place. Soon enough, states had to grapple with the question of the status of opposition forces that were not recognized as belligerents, for one reason or the other. When faced with such situations, states realized that in order to apply domestic neutrality laws to persons within their jurisdictions, recognition of belligerency was not needed, and thus they could avoid the diplomatic and economic pitfalls that such recognition entailed. This was especially true when there were no maritime hostilities sufficient to gravely endanger the interests of third states.

These dilemmas were at the core of the development of the “elastic device” of recognition of insurgency (or insurrection) which was, in general, a flexible instrument aimed to deal with internal armed conflicts that required the attention of third parties, although belligerency was not recognized. As such, this status has gradually developed throughout the 19th century, in parallel to the belligerency doctrine, and was considered, by the beginning of the 20th century, as a distinct status “accepted in the international

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90 OGLESBY, supra note 1 at 22.
91 Beale, supra note 13, at 417 –418.
92 OGLESBY, supra note 1, at 103–104.
93 For instance, in the Cuban context, Beale thought that recognition of belligerency was not warranted since there was no factual ability to determine that the conditions of belligerency existed in Cuba, and since maritime hostilities did not exist. See Beale, supra note 13, at 417 – 418.
94 LAUTERPACHT, supra note 36, at 236, 270 –271.
practice,”95 at least by Britain and the United States.96 Indeed, the approach of the insurgency doctrine, allowing for much flexibility when addressing internal strife, is reflected, to some extent, in contemporary international practice.

The insurgency doctrine, while a significant step forward in comparison to the rigid and inflexible belligerency doctrine in terms of its response to the unpredictable questions that internal conflicts give rise to, was still generally devoid of substantive considerations. Like the belligerency doctrine, it was also based on the concept of effective control as source for rights and powers. The insurgency doctrine was premised on the logic that a “contest of armed forces” or “war in the material sense,” can take place de facto even without recognition of belligerency.97 As summarized by Beale:

insurgency (distinguished from belligerency), is not usually recognized by writers on international law; but it seems to be a possible thing. In case of an insurrection there may be actual hostilities, but no belligerency, because there is no political organization on the part of the insurgents; or belligerency may in fact exist, but a state may not wish or need to recognize it. It may nevertheless be necessary to recognize the existence of hostilities, either to avoid dealing with an insurgent as a pirate, or to warn citizens against taking part in the contest. Such a recognition is of insurgency, not of belligerency.98

95 George Grafton Wilson, Insurgency and International Maritime Law, 1 AM. J. INT’L L. 46, 46, 59 (1907).
98 Beale, supra note 13, at 419.
The need to address internal conflicts that did not amount to “wars” has arisen, even before the American Civil War. Oglesby identified such cases during, *inter alia*, the first stage of the Greek revolt against the Ottoman Empire in 1821, when Britain adopted a neutral position, *prior* to the proclamation of a blockade by the Greeks in 1822, which resulted in the recognition of belligerency;\(^9^9\) the Polish uprising in 1830–1831, in which belligerency was denied ostensibly because lack of maritime operations, although the rebels seemingly possessed the qualifications to be considered as belligerents;\(^1^0^0\) the Hungarian war of independence of 1848, in which the U.S. did not recognize the belligerency of Hungary, although it was otherwise merited, since the former was not directly affected by the land-locked conflict;\(^1^0^1\) and the 1856–1858 insurrection in Peru, where the question of governmental power to close by decree ports under the effective control of insurgents has arisen.\(^1^0^2\)

If belligerency was an intermediate status between non-recognition and full recognition, insurgency was a status that could be looked upon, generally, in several ways. One way is to view it as entailing a few rights for the insurgents, but mostly obligations taken by third states in accordance with their domestic neutrality laws; another possible view would consider the status as a liability, as it serves to limit only insurgents, but not governments, by applying domestic neutrality law only regarding actions that support the former. Still another way was to consider insurgency as a status similar in essence to that of belligerency, but without a formal recognition as such; or as a status similar to belligerency, that applies, however, only to actions taking place in the

\(^9^9\) Oglesby, *supra* note 1, at 18–22.  
\(^1^0^0\) Id. at 24–25.  
\(^1^0^1\) Wheaton’s, *supra* note 25, at 45–47 n.16. This question was rendered moot when Russia intervened in favor of its Holy Alliance partner, the Austrian Empire, in 1849, leading to the defeat of Hungary.  
\(^1^0^2\) Oglesby, *supra* note 1, at 27–32.
state’s territorial waters. The latter views correlate with the declaratory theory of recognition, professing that rights of entities are accumulated through facts on the ground rather than through formal acts of recognition. Yet another approach, notably adopted by Lauterpacht, could view insurgency as an extremely flexible intermediate status between non-recognition and belligerency, conferring ad hoc rights and obligations to the parties as circumstances necessitated.

The insurgency doctrine was thus elusive in two substantial aspects. First, as opposed to belligerency recognition, there are no comprehensive authoritative statements regarding the implications of such doctrine; second, it is often difficult, in absent of an explicit statement, to circumscribe the thin line between recognition of insurgency and belligerency, as both were made, to some degree, by declarations of neutrality.

III.2 INSURGENCY AS LIABILITY: DOMESTIC NEUTRALITY ACTS

The seeds of the insurgency doctrine can be traced back to an 1817 amendment to the American Neutrality Act of 1794. The original Neutrality Act was generally considered the first domestic legislation enacted to enforce international neutrality

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103 As opposed to belligerent maritime actions that can interrupt commerce in the high seas. See Oglesby, supra note 1, at 103–104.
105 Lauterpacht, supra note 36, at 270, 276–278.
106 See, e.g., the proclamation of January 5, 1838, by President Van Buren regarding the uprising in Canada. Oglesby was of the opinion that since it called into attention domestic neutrality laws, it “foreshadowed” the manner that “recognition of insurgency” was granted later on. Oglesby, supra note 1, at 25. Bernard, however, seemed to have seen the Van Buren proclamation a recognition of belligerency, albeit premature. Bernard, supra note 30, at 117–118 n. 2.
107 June 5, 1794.
In Section 3, it prohibited any person under the jurisdiction of the United States from fitting out or arming

… any ship or vessel with intent that such ship or vessel shall be employed in the service of any foreign prince or state to cruise or commit hostilities upon the subjects, citizens or property of another foreign prince or state with whom the United States are at peace…

It also prohibited persons to

set on foot or provide or prepare the means for any military expedition or enterprise...against the territory or dominions of any foreign prince or state of whom the United States was at peace … .

Therefore, the law was concerned only with wars between states, or those between states and rebels recognized as belligerents. This situation was detrimental to the interests of colonial powers in the proximity of the United States. In 1816, in the midst of the Colonial Wars of South America, colonial Spain and Portugal were concerned that some rebelling colonies might be able to procure vessels and privateers in the U.S., since unrecognized entities were not covered by the Neutrality Act, for better or for worst.

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109 Neutrality Act of 1794, §3 (emphasis added).
110 Id. §5.
111 See The Estrella, 17 U.S. 298 (1819) (holding that the recognition of the belligerency of Bolivarian Venezuela has made it a belligerent state for the purpose of the U.S. Neutrality Act of 1794).
Responding to this pressure, President Madison admitted that existing laws were ineffective. Accordingly, an amendment of March 13, 1817, extended the prohibitions of the Neutrality Act to extend beyond “princes” or “states,” also to the provision of

… any such ship or vessel, with intent that such ship or vessel shall be employed in the service of any foreign prince or state, or of any colony, district or people to cruise or commit hostilities, or to aid or co-operate in any warlike measure whatever, against the subjects, citizens, or property, of any prince or state, or of any colony, district or people with whom the United States are at peace …

Thereby, the potential entities that could benefit from – and indeed be limited by – the Neutrality Act were extended beyond the traditional bodies. Chief Justice Marshall referred to the amendment as one that “adapts the previous laws to the actual situation of the world,” ostensibly, since it does not require formal acts of recognition of parties in order for neutrality laws to apply were de facto warfare exists.

The British Foreign Enlistment Act of 1819 was modeled after the American law, as section 7 applied neutrality requirements to a wide variety of bodies. The British law, for instance, prohibited to fit out and arm vessels for the service, during hostilities,

112 The Three Friends, supra note 108, at 499.
113 Neutrality Act of 1817, §3.
115 For a similar understanding, see the opinion of Chief Justice Fuller in Underhill v. Hernandez, 168 U.S. 250 (1897), cited in Wilson, supra note 95, at 51.
of any foreign prince, state or potentate, or of any foreign
colony, province or part of any province or people, or of
any person or persons exercising or assuming to exercise
any powers of government in or over any foreign state,
colony, province or part of any province or people [against
any other such body with which Britain was not in war.]\textsuperscript{117}

Indeed, it could be argued that the decision to apply domestic neutrality acts did
not grant, \textit{de jure}, any international status, as their effects are mainly internal;\textsuperscript{118}
however, it had practical implications over the status of insurgents, especially in an era in
which international regulation of issues relating to war, in the form of treaties, was
virtually non-existent. Thus, the recognition of insurgency was accorded by affected
neutral states, usually, in the form of an expression by the executive that notices the facts
and warns its citizens to obey neutrality laws.\textsuperscript{119} These executive declarations would
thereafter be interpreted by courts.\textsuperscript{120}

The application of neutrality laws to insurgencies was a prominent feature of the
American approach to the conflict in Cuba (The Ten Years’ War), between 1868 and
1878. While not rebuking the validity of the belligerency doctrine, in the Cuban conflict
the U.S. found that the circumstances did not call for such recognition. From the outset of
the conflict, in 1869, President Grant argued that the rebels in Cuba did not establish a

\textsuperscript{117} Foreign Enlistment Act, 1819.
\textsuperscript{118} Theodore Woolsey, \textit{Our Duty to Spain}, \textit{Yale L. J.} 101, 103–104 (1897).
\textsuperscript{119} Id. at 104.
\textsuperscript{120} See, e.g., O’Neill v. Central Leather Co., 87 N.J.L. 552, 553–554 (1915) (interpreting the declarations
by President Wilson regarding the 1913–1914 strife in Mexico as inferring that the parties were in “actual
war,” albeit not recognized officially as belligerents; reversed in 246 U.S. 297 (1918), since the U.S.
already recognized the Carranza government as Mexico’s government).
“de facto political organization” sufficient to justify belligerency recognition.\textsuperscript{121} Moreover, Grant stressed the amoral nature of the doctrine, emphasizing in 1870 that “[t]he question of belligerency is one of fact, not to be decided by sympathies for or prejudices against either party.”\textsuperscript{122}

Five years later, in a statement that became a classic representation of the belligerency and insurgency doctrines, President Grant still held that position:

Applying to the existing condition of affairs in Cuba the tests recognized by publicists and writers on international law, and which have been observed by nations … I fail to find in the insurrection the existence of such a substantial political organization … such organization of force … such occupation of territory, as to take the contest out of the category of a mere rebellious insurrection … and place it on the terrible footing of war, to which a recognition of belligerency would aim to elevate it.\textsuperscript{123}

President Grant, importantly, made a connection between the need to regulate maritime commerce and the approach of foreign states to internal armed conflicts:

The contest, moreover, is solely on land; the insurrection has not possessed itself of a single seaport whence it may send forth its flag, nor has it any means of communication with foreign powers except through the military lines of its adversaries. No apprehension of any of those sudden and

\textsuperscript{121} Annual Message of December 6, 1869, cited in Wilson, supra note 95, at 47.
\textsuperscript{122} Message to Congress on June 13, 1870, cited in O’Rourke, supra note 97, at 400.
\textsuperscript{123} Annual Message of December 7, 1875, cited in Wilson, supra note 95, at 47.
difficult complications which a war upon the ocean is apt to precipitate upon the vessels, both commercial and national, and upon the consular officers of other powers calls for the definition of their relations to the parties to the contest.\textsuperscript{124}

Accordingly, for instance, American courts refused to recognize the standing of agents claiming to represent the rebelling Republic of Cuba.\textsuperscript{125}

However, the recognition of insurgency was not without consequences: it prompted the application of the American Neutrality Act, \textit{at least} with regards to acts committed in favor of the insurgents.\textsuperscript{126} The latter point is an important one, as it clarifies that the insurgency doctrine was used, at that stage, mainly to prevent disputes with the Spanish government, and thus resulted mostly in a liability for the recognized insurgents. Although the Neutrality Act was framed in a symmetrical manner, applied equally to governments as well as a “colony, district, or people,” the statute was creatively interpreted by U.S. authorities as to apply only to acts that would potentially benefit the insurgents. In 1869, the Attorney General was requested to provide an opinion, regarding the question whether the U.S. should act, under the law, against gun-boats built in New York for the Spanish government, engaged in the Cuban conflict, an inquiry to which he provided a negative answer.\textsuperscript{127} The Attorney General rejected the claim according to which the recognition of the Cuban rebels as a “colony, district or people” for the sake of the condemnation of armed vessels intended to serve them, entails also the opposite:

\textsuperscript{124} \textit{Id.} (not reprinted in Wilson).
\textsuperscript{125} \textit{See, e.g.}, The Hornet, 12 F. Cas. 529 (1870).
\textsuperscript{126} The Florida, 9 f. Cas. 321 (1871).
it is argued that this involves what is claimed to be the converse of the proposition, that, as we assert in those libels that Cuba is a ‘colony, district, or people,’ capable of committing hostilities against Spain, the law equally applies to an armament procured or fitted out by Spain for the purpose of hostilities against Cuba, and that the Executive Government, by filing those libels, have virtually recognized the ‘colony, district, or people’ of Cuba as belligerents. This argument seems to me to involve an erroneous legal notion.  

This “erroneous” notion, the Attorney General opined, was that the Neutrality Act could only be applied where the parties were entitled to equal rights. Such “equal treatment,” can be expected only when the conflict is between two states, or in the case of an internal conflict – when the parties are recognized as belligerents. In any case of insurgency where belligerency was not recognized, the actions of insurgents seeking the procurement of vessels could indeed be considered hostilities against the government – acts that the neutrality act purported to prevent. However, the same course of action pursued by governments “does not involve a design to commit hostilities against anybody,” but merely to enforce governmental authority. While the legal reasoning of the AG could be disputed in light of the Neutrality Act’s text, his opinion, no doubt, clarified a main difference between the insurgency and belligerency doctrines, as understood at the time, and reflected the perception of governments as entitled to some “preferential treatment” when insurgency was recognized.

128 Id. at 179.
129 Id.
130 Id. at 180.
The same logic could be read into the U.S. Supreme Court decision in the case of *The Three Friends*.\(^\text{131}\) In this case, a steamer, The Three Friends, was seized in November 1896 by U.S. custom officials in Florida, and was forfeited to the state for violation of the Neutrality Act, on counts that it was fitted out and armed for the intent of serving the Cuban rebels. One of the claims of the vessel’s owners was that it was not intended to “be employed in the service of any body politic recognized by or known to the United States as a body politic,” and thus could not be deemed to have violated neutrality laws.\(^\text{132}\) Referring to the provisions of section 5283 of the Neutrality Act, as amended in 1817, the majority of the Court confirmed that “The statute was undoubtedly designed in general to secure neutrality in wars between two other nations, or between contending parties recognized as belligerents, but its operation is not necessarily dependent on the existence of such state of belligerency.”\(^\text{133}\) This interpretation was possible because, as aforementioned, the Neutrality Act did not prohibit violations of neutrality only vis-à-vis struggles between foreign princes or states, but since its amendment in 1817, also those involving “any colony, district, or people.”\(^\text{134}\)

\(^{131}\) *The Three Friends*, *supra* note 108.
\(^{132}\) *Id.* at 495–497.
\(^{133}\) *Id.* at 497.
\(^{134}\) *Id.* at 498–499.
embraced … instead of being limited to a political community which has been recognized as a belligerent, [the words] must necessarily be held applicable to a body of insurgents associated together in a common political enterprise, and carrying on hostilities against the parent country, in the effort to achieve independence, although recognition of belligerency has not been accorded.  

Thus, the court ruled, the recognition of belligerency was immaterial to the application of American neutrality laws. The Court furthermore stressed the amoral nature of the law, as it endorsed the argument that “the words were ‘doubtless originally inserted with the view of enumerating all possible forms of government, monarchical, aristocratical, and democratic.”  

However, recall that in the case at hand, the Court ruled that the Neutrality Act prohibited assisting rebels, although they were not recognized as belligerents. Thus, notwithstanding the symmetrical language of the Neutrality Act, and in conformity with view if the Attorney General expressed three decades earlier, it is doubtful whether the Court, in The Three Friends, was willing to recognize the positive rights of insurgents before their recognition as belligerents. It seems that the Court saw the insurgency doctrine as one that allows the U.S. to avoid conflict with Spain, rather one that confers material rights to insurgents:  

Any other conclusion rests on the unreasonable assumption that the [neutrality] act is to remain ineffectual unless the

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135 Id. at 499 –500.  
136 Id. at 501 (emphasis added).  
137 See the opinion of the Attorney General, supra note 127.
government incurs the restraints and liabilities incident to an acknowledgment of belligerency. On the one hand, pecuniary demands, reprisals, or even war may be the consequence of failure in the performance of obligations towards a friendly power, while on the other the recognition of belligerency involves the rights of blockade, visitation, search, and seizure of contraband articles on the high seas, and abandonment of claims for reparation on account of damages suffered by our citizens from the prevalence of warfare. No intention to circumscribe the means of avoiding the one by imposing as a condition the acceptance of the contingencies of the other can be imputed.\textsuperscript{138}

III.3 INSURGENCY AS PRIVILEGE: CLOSURE OF PORTS, NON-PIRACY AND POTENTIAL RECOGNITION OF INSURGENTS AS \textit{DE FACTO} GOVERNMENTS

In a 1907 article, \textit{Wilson} attempted to clarify the negative and positive aspects of the insurgency status. Citing numerous authorities, he was of the opinion that absent recognition of belligerency, substantial limitations apply to both parties in their relations to third states – not just to the insurgents. Thus, neither the government nor the insurgents could exercise the right to visit-and-search vessels of third states on the high seas, as this disruption of neutral trade was contingent upon the existence of war, which required the recognition of belligerency.\textsuperscript{139} Furthermore, insurgents could not proclaim a blockade, as they lacked “responsible” prize courts.\textsuperscript{140} Nevertheless, the same logic that was adopted

\begin{footnotesize}
\textsuperscript{138} The Three Friends, 502, note 32.
\textsuperscript{139} Wilson, \textit{supra} note 95, at 54; Dickinson, \textit{supra} note 96.
\textsuperscript{140} Wilson, \textit{supra} note 95, at 56–58.
\end{footnotesize}
in the Prize Cases regarding recognized belligerents – that of reciprocity and reason –
required the observation of laws of war between both parties in case of insurgency.\textsuperscript{141}

However, and notwithstanding the “liability” incurred by insurgents due to the
negative effects of domestic neutrality laws, recognition of insurgency did in fact confer
– even if indirectly – some status upon them, spawning rights (and obligations) usually
associated with war. Thus, it conferred upon the rebels the right not to be considered
pirates,\textsuperscript{142} at least when acting within the territorial waters under their control.\textsuperscript{143} Perhaps
echoing an early departure from the strictly amoral approach of the effectiveness-
centered belligerency doctrine, the immunity of insurgents from being labeled as piracy
was justified, sometimes, by “humanitarian” considerations, a “compromise principle
which would elevate a political rebel to a plane higher than a pirate.”\textsuperscript{144} In addition, they
acquired, in practice, a right according to which ports under their effective control could
not be closed merely by decree of the recognized government, if not enforced by an
effective blockade.\textsuperscript{145} These effects of the recognition of insurgency, although not
universally accepted,\textsuperscript{146} were exemplified in the practice of the U.S. and Britain, as well
as of other European powers.\textsuperscript{147}

For instance, simultaneously with its recognition of the belligerency of the
Confederacy in the American Civil War, Britain refused to recognize the belligerency of

\textsuperscript{141} Id. at 54.
\textsuperscript{142} President Cleveland, Annual Message of December 8, 1885.
\textsuperscript{143} O’Rourke, supra note 97, at 403; Smith, supra note 31, at 25.
\textsuperscript{144} O’Rourke, supra note 97, at 403–404.
\textsuperscript{145} Wilson, supra note 95, at 57–58; O’Rourke, supra note 97, at 403–404.
\textsuperscript{146} For instance, Latin American states, in general, did not accept this position. See Dickinson, supra note 96, at 70, 74–75. This is perhaps not surprising as the governments of these states, many times, were challenged by rebels. See for instance, the claim by Peru, during the insurrection of 1856–1858, according to which absent recognition of belligerency, U.S. merchant vessels were obliged to abide to its closure of ports in control of the rebels. See Oglesby, supra note 1, at 27–32.
\textsuperscript{147} The recognition of closure by decree evoked the old idea of “paper blockades,” and thus was rejected in different instances by the U.S., European states and certain Arbitration panels. See Wilson, supra note 95, at 54–55, 58; Dickinson, supra note 96, at 74; Wheaton’s, supra note 25, at 34 n.15; 688 n.239.
the rebels in the 1860–1862 conflict in New Grenada (modern Colombia and Panama). Nonetheless, Britain asserted that the government could not decree the closure of the ports that were in the hands of the rebels, although their belligerency was not recognized. Lord Russell, British Secretary for Foreign Affairs, stated in June 1861 that if it wished to prevent neutral commerce, the government would have to impose an effective blockade:

The Government of New Grenada has announced, not a blockade, but that certain ports of New Grenada are to be closed … in the event of insurrection or civil war in that country, it is not competent for its government to close the parts that are de facto in the hands of the insurgents, as that would be a violation of international law with regard to blockades.

Recall, that this statement by Russell was given merely six weeks after the Queen’s proclamation of neutrality in the American Civil War. It seems, then, that a status of insurgency – meaning, the recognition of some de facto effects of insurgent control – was already in existence, at the same time Adams and Russell discussed the British recognition of the Confederate’s belligerency.

The U.S. adopted a similar position regarding the 1885 conflict in the United States of Colombia. When the Colombian government requested that the U.S. respect the

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148 The conflict in New Grenada raged between 1860 –1862 between the newly formed Grenadine Confederation and the seceding state of Cauca. The conflict ended in rebel victory and the formation of the United States of Colombia. See A POLITICAL CHRONOLOGY OF THE AMERICAS 75–76 (David Lea et al. eds., 2001)
149 Statement in the House of Commons, June 27, 1861, cited in Oriental Navigation Company, infra note 160, at 437; see also WHEATON’S, supra note 25, at 687–688, n. 239; but see Dickinson, supra note 96, at 72–73 (maintaining that perhaps Lord Russell’s statement failed to distinguish between insurgency and belligerency).
closure of Colombia’s ports by decree, and treat opposition vessels as pirates, President Cleveland responded that these requests were inconsistent with international law:

An effective closure of ports not in the possession of the Government, but held by hostile partisans, could not be recognized; neither could the vessels of insurgents against the legitimate sovereignty be deemed *hostes humani generis* within the precepts of international law, whatever might be the definition and penalty of their acts under the municipal law of the State against whose authority they were in revolt.\(^{150}\)

Cleveland added, however, that this did not “imply the admission of a belligerent status on part of the insurgents.”\(^{151}\)

The insurgency doctrine recurred in practice in the following decades. When conflict erupted in Cuba again, in 1895, the U.S. – once more – refrained from the recognition of the belligerency of the Cuban rebels. However, President Cleveland, by proclamation, recognized “the existence of insurrectionary warfare” in Cuba.\(^{152}\) he informed that Cuba was “the seat of serious civil disturbances, accompanied by armed resistance to the authority of the established government of Spain, a power with which the United States are and desire to remain on terms of peace and amity.”\(^{153}\) Doing so, he declared that U.S. neutrality law prohibits the assistance to the rebels.\(^{154}\)

\(^{150}\) Annual Message of December 8, 1885.

\(^{151}\) *Id.* cited in Beale, *supra* note 13, at 411; *see also* Dickinson, *supra* note 96, at 74.


\(^{153}\) *Id.*

\(^{154}\) *Id.*, at 502–503; *see also* Annual Message of December 2, 1895 *cited in* Wilson, *supra* note 95, at 48.
In his annual message of 1897, President McKinley vehemently criticized Spain’s policy and its means of repression against the Cuban rebels, exclaiming that “[i]t was not civilized warfare. It was extermination.” Nevertheless, McKinley followed Cleveland, and the reasoning expressed by President Grant in the previous Cuban conflict, in order to justify the American abstention from the recognition of belligerency.155 This decision by the U.S. highlighted, once again, the amoral character of the insurgency doctrine.

Several logical conclusions could follow, from the negation of the government’s power to close ports by decree: most prevalent in practice, at least of the U.S. and Britain, was the notion that states were indeed entitled to impose an effective blockade in times of an insurrection that did not amount to war, and that the blockade in itself would not result necessarily in the conclusion that belligerency was recognized;156 another option, as perhaps evident from practice in the American Civil War, that the mere declaration of blockade by the government transformed the conflict into de facto belligerency, both in the view of the government and of third states.157 These complex questions were never thoroughly clarified.158

Last, and as will be elaborated upon in our discussion of the Spanish Civil War, Lauterpacht argued that the recognition of insurgency could result in the recognition of the insurgents as de facto governments, regarding internal governing powers such as

155 Annual Message of President McKinley (Dec. 6, 1897). For the analysis of American interests concerning the recognition of Cuban belligerency, see The Consequences of Cuban Belligerency, supra note X, at 184; on President McKinley’s approach see also Smith, supra note 31, at 20.
156 See, e.g., Dickinson, supra note 96, at 70–71.
157 For an exploration of this perplexing question see generally the analysis in Dickenson, Id.; see also Theodore S. Woolsey, The United States and the Declaration of Paris, 3 Yale L. J. 77, 78 (1894) (arguing that by imposing a blockade on the South the North has itself recognized its belligerency); see also Theodore S. Woolsey, The Consequences of Cuban Belligerency, 5 Yale L. J. 182, 184 (1896) (making the same argument).
158 Dickinson, supra note 96, at 76.
legislation (but not with regards to belligerent rights vis-à-vis third parties). This far-reaching feature of the doctrine can be viewed as one which, in essence, signified its demise rather than its potency, as it was inflated to include any possible policy decision opted for by external parties.

III.4 INSURRENCY AS UNRECOGNIZED BELLIGERENCY? THE CASE OF THE ORIENTAL NAVIGATION COMPANY

A further development of the insurgency concept can be found in the 1928 case of the Oriental Navigation Company, arbitrated in front of the U.S.-Mexico Claims Commission, established to settle claims resulting from the long running Mexican Civil War. This instance has taken place in the era of the League of Nations, which will be addressed in the next chapter, but on counts of its importance regarding the insurgency doctrine, we shall nevertheless explore it in this section.

In April 1924, the American merchant vessel Gaston sailed from New Orleans to the Mexican port of Frontera. However, the Frontera port, along with other Mexican ports, was – at large – controlled by insurgents. During the Gaston’s unloading, a Mexican government gunboat appeared, and ordered the Gaston to leave the port. After warning shots were fired, the Gaston fled, leaving its cargo behind. The U.S. claimed that the action by Mexico was unlawful, and that the Oriental Navigation Company – the operator of the Gaston – should be indemnified for its loss.

The issue at hand was, again, the closure of the rebel-held ports by decree of the Mexican government. Since the belligerency of the insurgents was not recognized by any

159 See Chapter 7, sec. IV.4; LAUTERPACHT, supra note 36, at 279–294.
state, Mexico claimed that it had full power to decree the ports closed according to its
municipal law, and that the U.S. was obliged to respect its sovereignty. The U.S.
responded that when a port was in the hands of insurgents, the government could only
close it through an effective blockade, and not by merely decreeing its closure. The
Commission upheld, in principle, the view of the U.S.:

[1]n time of civil war, when the control of a port has passed
into the hands of insurgents, it is held, nearly unanimously,
by a long series of authorities, that international law will
apply, and that neutral trade is protected by rules similar to
those obtaining in the case of war. It is clear also, that if
this principle be not adopted, the conditions of neutral
commerce will be worse in case of civil war than in case of
war.

The Commission, thus, ignored the fact that belligerency was not recognized – in
fact, it did not even mention this issue beyond in its summary of the Mexican claims –
adopting a reasoning that can be construed as suggesting that such recognition has no
constitutive power; and that the driving power behind the rights of the insurgents,
therefore, is the de facto existence of a civil war and effective control of the insurgents
over the ports. Accordingly, in absence of an effective Mexican blockade, the disregard
of the Mexican decrees by the U.S. was deemed lawful by the Commission.

The Commission ruled, however – and being novel at that – that the mere
presence of the Mexican gunship near the port during the unloading of the Gaston,

\[161 \text{Id. at 434 –435. For a summary of the facts see also Dickinson, supra note 96, at 69.}
\[162 \text{Oriental Navigation Company, supra note 160, at 435.} \]
represented a challenge to the insurgents’ control over the port during that moment; and hence, Mexico was not in the wrong by acting against the Gaston, *notwithstanding* the absence of an effective blockade.¹⁶³

This opinion was challenged by the dissenting opinion of Commissioner Nielsen. Nielsen opined that in absence of an effective blockade, Mexico had absolutely no legal grounds to interfere in neutral commerce, regardless of the incidental presence of a Mexican gunship close to the rebellious port.¹⁶⁴ Of interest to us, was the link made by Nielsen between the recognition of belligerency and the declaratory theory of recognition, which might account for the decline in the status of the former doctrine.¹⁶⁵

Nielsen specifically addressed the question whether there was a difference between ports controlled by insurgents recognized as belligerents and those under the hands of unrecognized insurgents. In his analysis of the issue, Nielsen opined that practice revealed that no distinction has been made between ports of controlled by recognized versus ports held unrecognized insurgents.¹⁶⁶ Citing authorities, he enumerated the conditions that justified the recognition of belligerency. However, he argued that is doubtful whether an affirmative act of recognition of belligerency was required in order for the rebels – indirectly – to attain some legal status. Just as states did not begin to exist strictly upon recognition, he asserted, so did the status of insurgents – although the recognition of belligerency does “entail important consequences.”¹⁶⁷

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¹⁶³ *Id.* at 436; *see also* Dickinson, *supra* note 96, at 77–78.
¹⁶⁷ *Id.* at 440–441.
Therefore, Nielsen concluded, when a port is held by unrecognized insurgents, the implications vis-à-vis third parties are the same as if they were recognized belligerents. However, he dismissed the majority’s view that the mere and brief presence of the Mexican gunship near the Frontera port negated the effective control of the port by the rebels opposition, and in the absence of an effective blockade,\textsuperscript{168} ruled in favor of the United States. While Nielsen did not say so explicitly, a necessary expansion of the logic of his argument – binding the status of insurgents with the declarative view of recognition – must result, in general, in the view that belligerency recognition had no substantial constitutive effects.\textsuperscript{169}

\textsuperscript{168} Id. at 442.

\textsuperscript{169} Lauterpacht, perhaps loyal to the constitutive theory of recognition (albeit in a qualified sense), claimed that “[s]tates may go very far in imposing upon themselves restraints indistinguishable in substance from duties of neutrality and in conceding to the contesting parties rights usually associated with belligerency proper. In that sense, but in no other, recognition of insurgency may be reared as a de facto recognition of belligerency … .” \textsc{Lauterpacht, supra} note 36, at 277.
CHAPTER 7

INTERVENTION AND CONSENT IN THE INTER-WAR PERIOD

I. THE LEAGUE OF NATIONS SYSTEM AND THE USE OF FORCE – FROM THE BALANCE OF POWER TO THE POWER OF PROCEDURE

Following the trauma of World War I, popular public opinion in Europe and elsewhere was determined to limit the 19th century’s balance-of-power approach towards the use of force. War, as a phenomenon, has come to be perceived as a product of misunderstandings between unaccountable leaders.1 This approach was reflected in the Covenant of the League of Nations, adopted in 1919. A revolutionary document at the time, the Covenant sought, for the first time, to prevent wars through a system of pacific settlement of disputes, augmented by a collective security mechanism.2

The Covenant indeed presented new legal restrictions on the hitherto unfettered war-power of states. It was novel in the sense that it created a distinction between “legal and illegal wars.”3 Moreover, it declared, in Article 11, that war is no more merely a concern of the parties involved; it would be per se a concern of the whole League, which will take, accordingly, any action to safeguard peace. States conducting wars that were illegal, according to the covenant, would face collective action. The distinction between legal and illegal wars sparked a long-standing debate regarding the traditional freedom of states to assume neutral status. It was claimed, for instance, that where aggression occurs,

1 ALEX J. BELLAMY ET AL. UNDERSTANDING PEACEKEEPING 76 (2010).
the previous perception of neutrality could no longer be relevant, and that some intermediate status between neutrality and participation in war must be recognized.\(^4\)

However, the Covenant did not prohibit war in its entirety, nor did it confine it only to cases of self-defense. It merely sought to prevent it through restrictions, and to inhibit it through the imposition of procedural requirements, reducing it to a measure to be taken only when other means of enforcement were exhausted.\(^5\) As such, and as we shall see, the Covenant system had significant “gaps” that allowed states to legally resort to war,\(^6\) and could theoretically be utilized to justify forcible interventions in internal strife, even against governments.

I.1 PACIFIC SETTLEMENT OF DISPUTES

The theory behind the pacific settlement of disputes system saw war as an often irrational act, a product of miscalculations and ignorance. As such, it could be avoided by imposing a mandatory “cooling off” period, applied through complex bureaucratic procedures, and overseen by external actors. During this period, states would have the chance to regain rationality and reconsider their choices. Supposedly, the cool-headed, rational consideration of the situation would avert war.\(^7\) Should states act in contravention to this mechanism, they would have been, ideally, confronted by a collective security system – where a violation of one state’s security is a concern of all others, to be met with swift

\(^4\) For such a debate and a critique of the “non-belligerency” concept see, e.g., Edwin Borchard, *War, Neutrality and Non-Belligerency*, 35 Am. J. Int’l L. 618 (1941).


\(^6\) YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 83–84 (5th ed. 2011).

\(^7\) On this theory, see INIS L. CLAUDE, *SWORDS INTO PLOWSHARES: THE PROBLEMS AND PROGRESS OF INTERNATIONAL ORGANIZATION* 219 –293 (1971).
and decisive collective action. The pacific settlement approach was laid down in the complex system circumscribed in Articles 12, 13 and 15 of the Covenant.

The first basic distinction made by the Covenant system, albeit implicitly, was between disputes “likely to lead to a rupture” (“serious disputes”) and other disputes (“regular disputes”). According to Article 12, in case of serious disputes, states were required to submit the issue either to arbitration, judicial settlement or to an enquiry by the Council of the League of Nations. These mechanisms were obliged to render a decision in “reasonable time” (arbitration or judicial proceeding) or within six months (the Council). After a decision, states were required to wait for an additional three months before they chose to “resort to war.”

Regular disputes were not under the jurisdiction of the Council, and were to be submitted, if recognized by the parties as suitable for such action, to arbitration or judicial settlement, the latter to be adjudicated in front of the new Permanent Court of International Justice (Article 13). Reading Articles 12, 13 and 15 together, clarifies that serious disputes could be submitted – only if all parties involved deemed them suitable – to arbitration or adjudication. When choosing this path of “litigation,” states agreed to comply with the decision rendered; not to resort to war against a member that complies with a decision; and to refer cases of non-compliance to the Council.

In an event that a serious dispute occurred, and the parties did not find it fitting for arbitration or adjudication, Article 15 provided that the issue had to be referred to the Council; in contrast to arbitration or adjudication, such submission could be made by any party to the dispute, and could be seen as an obligatory path if the parties did not choose

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8 See Bellamy, supra note 1, at 78 –79; Claude, supra note 7, at 255 –269.
9 See, generally, Manley O. Hudson, The Permanent Court of International Justice, 35 Harv. L. Rev. 245 (1922).
arbitration or adjudication.\textsuperscript{10} In such a case, the Council initially would attempt to achieve an agreeable settlement. If the attempts failed, the Council could decide to publish a report. If the Council adopted the report by consensus (not including the involved states), states agreed not go to war with a party that complies with the report’s recommendations.\textsuperscript{11} If, however, consensus could not be reached, members reserved to themselves “the right to take such action as they shall consider necessary for the maintenance of right and justice.” Importantly, if the Council found that a dispute has arisen from an issue “solely within the domestic jurisdiction” of a state, the Council would not make recommendations – supposedly leaving the solution of the issue to the states themselves.

When attempting to reconcile Articles 12, 13, and 15, it seems that the right to go to war, in the era of Covenant of the League of Nation, could be summarized as follows: if the parties chose arbitration or adjudication (Article 13), the party complying with the decision could go to war against the non-complying party, and \textit{not vice-versa}, but only three months after the decision was rendered. It is not entirely clear what would be the Council’s role in such an instance – it could be argued that in case of non-compliance the issue must have been dealt with in accordance with Article 15.

If, however, the parties chose to submit the matter to the Council – the question of war-rights would be determined by the outcome of the process. Should a consensus be achieved, the complying party was immune from war; however, war could be declared against the non-complying party, after the three-months cooling period. In case consensus


\textsuperscript{11} A dispute successfully resolved through the Article 15 mechanism was the question of the Aaland Islands, between Finland and Sweden, settled by the Council in 1921. \textit{See} Reginald Berkeley, \textit{The Work of the League of Nations}, 2 B\textsc{rit. Y’bk Int’l L.} 150. 159 (1921–1922).
was beyond reach, both parties could resort to war; presumably, again, after the cooling period stipulated in Article 12. This, undoubtedly, was the most significant "gap" in the Covenant’s restriction on the use of force.¹²

Dinstein points out further "gaps" in the covenant: since the Council was not competent to make recommendations in cases within the domestic jurisdiction of a party (Article 15), in such instances the parties retained their freedom of action, including the right to go to war; if the arbitration or adjudication, or the Council, would not decide on the issue within reasonable time or six months, respectively, states could go to war; and significantly, the Covenant only applied between the member states. The right of war regarding non-members remained unaltered.¹³ In this sense, the limitation on the war-prerogative enshrined in the Covenant was not constitutional in its essence.

Therefore, in the era of the League of Nations, consensual intervention in internal conflicts – even against governments – could be still legal, as long as it conformed to the procedure outlined in the Covenant. However, it could be argued that interventions in favor of governments were completely uninhibited, assuming that these would be viewed as within the “domestic jurisdiction” of a party. Here, for the first time, a substantial legally-grounded argument could be set forth in favor of the principle of governmental preference in the context of forcible consensual intervention.

I.2 COLLECTIVE SECURITY

In case any state would resort to war in contravention to Articles 12, 13 or 15, the Covenant’s collective security mechanism, set up in article 10 and 16, would come into

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¹² See ALEXANDROV, supra note 3, at 33, and the sources cited therein; DINSTEIN, supra note 6, at 83.
¹³ Id. at 84.
play. Article 10 provided, generally, that states undertake to “preserve” each other against “external” aggression, in which case the Council shall advise upon the means of action. This provision was heavily debated, as its additional value was unclear, in light of the more detailed subsequent clauses. A committee of jurists appointed by the League concluded that “although Article 10 lays down no general rule of procedure and contains no obligation which cannot be found elsewhere in the Covenant, it nevertheless possesses a certain value of its own.”

Article 16, the more operative collective security clause, provided that the violation would be considered an act of war against all member states; a complete boycott would be imposed, and the Council would be obligated to recommend forcible assistance to the victim states. However, such “recommendation” – like most Council actions – would have to be reached by consensus.

The League of Nations system, as history teaches us, failed in the prevention of wars. The study of the reasons for this failure is beyond the scope of this work. Shortly put, the Covenant’s complex provisions left too much space for manipulation and very little clarity. The emerging superpower – the U.S. – was not a member, along with Germany and Japan. Moreover, the general rule, entrenched in Article 5, according to

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15 On sanctions in the Covenant system, see John Fischer Williams, Sanctions under the Covenant, 17 Brit. Y’bk Int’l L. 130 (1936).
16 On the connection between article 16 and the concept of aggression see L. Kopelmanas, The Problem of Aggression and the Prevention of War, 31 Am. J. Int’l L. 244, 246 (1937).
17 See generally id.
18 McNair, supra note 10, at 156.
which all decisions of the Council and Assembly had to be unanimous,\(^{19}\) rendered its work close to impossible.\(^ {20}\)

II. THE KELLOGG-BRIAND PACT: TOWARDS A UNIVERSAL PROHIBITION ON WAR

An abolishment of the right of war, *per se*, was introduced in international law only with the conclusion of the General Treaty for Renunciation of War as an Instrument of National Policy of 1928 (the Kellogg-Briand Pact),\(^ {21}\) which purported to mend the “gaps” in the Covenant system.\(^ {22}\) The three-articled pact renounced war as an instrument of “national policy,”\(^ {23}\) and required that the settlement of all disputes would only be pursued by pacific means.\(^ {24}\)

By the Second World War, the Pact had a record-setting membership of 63 states.\(^ {25}\) However, and notwithstanding its novelty, the Pact was not unflawed. First, it did not directly address the right of self-defense, although it was never doubted that it does not negate such a right. Second, it left open for interpretation the question of what constitutes “national policy,” as some claimed that the term did not include war as a sanction for violations of arbitration or judicial decisions (war as “international policy.”)

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\(^{22}\) McNair, *supra* note 10, at 156 –157.

\(^{23}\) Kellogg-Briand Pact, *supra* note 21, art. I.

\(^{24}\) *Id.* art. II.

\(^{25}\) DINSTEIN, *supra* note 6, at 85.
Third, the Pact was not universal (although close to it);\textsuperscript{26} and fourth, it did not address forcible actions that did not amount to formal war, in its traditional sense. In the era in which the distinction between acts of war and forcible acts short-of-war was of much importance, this was a substantial issue.\textsuperscript{27} Thus, it is perhaps not surprising that in the 1930s, states often conducted hostilities without declaring war or referring to their actions as such.\textsuperscript{28} It is reasonable that this practice, a “lamented and unforeseen consequence of the Kellogg Pact,”\textsuperscript{29} has resulted in the eventual omission of the term “war” from the prohibition on the use of force set forth in the U.N. Charter.

The Kellogg-Briand Pact did not replace the Covenant of the League of Nations. It essentially caused states to lose their “residuary liberty to use war … as an instrument of national policy,”\textsuperscript{30} which was, as aforementioned, reserved to them in the Covenant. Attempts to amend the latter in order to harmonize the two instruments – so as to sanction wars that previously were not unlawful – were made, but did not materialize.\textsuperscript{31}

\textbf{III. The Use of Force in Inter-War Period and Consensual Intervention: a Departure From Intervention as Choice}

By 1936, following the League of Nations’ restriction on war and the Kellogg-Briand Pact’s nascent prohibition on war, it was already safe to say that the old attitude towards war, which saw it as a valid method of self-help – perhaps a necessary evil – that

\textsuperscript{26} McNair, supra note 10, at 157.

\textsuperscript{27} For these flaws see Dinstein, supra note 6, at 85 –87 and the sources cited therein. For a more extensive analysis of the Pact, mainly in the context of the right to self defense, see Alexandrov, supra note 3, at 51–76.


\textsuperscript{29} \textit{Id.} at 540.


\textsuperscript{31} For the text of the proposed amendments see \textit{id.} at 170 –171.
international law merely attempted to regulate, has given way to a new approach. This change was reflected, in practice, in the Italy-Ethiopia war of 1935–1936 in which Italy was deemed to be in violation of the Covenant and was subjected to (eventually ineffective) economic sanctions. This new attitude has also challenged, to its core, traditional notions of the law of neutrality, which hitherto dominated the legal discourse regarding wars and their effects on third parties. States could now be – vis-à-vis an aggressor – in a status which was neither belligerent nor strictly impartial, as opposed to the dichotomy of traditional neutrality law.\footnote{McNair, supra note 10, at 150–154.}

Indeed, once a prohibition on war was put in place, it became valid to ask whether, and under what circumstances, an exception to this prohibition – through the expression of consent – was legitimate. It is at this point that the major set of questions regarding this issue was given real legal substance: if war, presumably between states, was no longer a legitimate “policy,” does that mean that war conducted on behalf of a state, against opposition forces, is always a legitimate policy? Moreover, assuming the answer was positive, was the government of the state always presumed to be speaking in the name of the state, in a matter sufficient to allow it to consent to external intervention? Furthermore, it became relevant to ask whether the answers to these questions were determined by the effectiveness doctrine, or rather that another, alternative set of considerations emerged, perhaps spawning from the developing doctrine of self-determination.

Among these questions, the traditional belligerency doctrine could also be assessed in light of the new legal environment. This potential change can be exemplified, for instance, in the Convention on Duties and Rights of States in the Event of Civil Strife,
adopted at the International Conference of American States of 1928, which must be read in light of the Kellogg Briand Pact, concluded in the same year. Although the Civil Strife Convention was by no means universal, it allows us to draw a clearer picture of the understanding of the law of consensual intervention of the time. At large, the Convention enshrined the principle of “preferential treatment” for governments, at least until belligerency was recognized. While this distinction had debatable consequences in the war-prerogative era, after the Kellogg-Briand Pact it seems that it could indeed have substantive implications.

The five-articled Convention obliged states to prevent the inhabitants of their territory from starting or promoting or participating in civil strife in another state; to disarm and intern every rebel force crossing their boundaries; and to “forbid traffic in arms and war material, except when intended for the Government, while the belligerency of the rebels has not been recognized, in which the latter case the rules of neutrality shall be applied.” Recall, that before the Kellogg-Briand Pact – and to a lesser extent before the Covenant of the League of Nations – neutrality was always a choice; recognition of belligerency was a method to express this choice, but it could always be departed from by sovereign decision to enter into war. However, by the time Civil Strife Convention was adopted, the war-prerogative of sovereigns was limited. Therefore, it is reasonable that by that time, the recognition of belligerency and the resulting neutrality was the farthest a state could go if seeking to favor the opposition; any forcible intervention on behalf of

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34 HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 231 (1948).
35 Civil Strife Convention, supra note 33, art. 1 (emphasis added).
the opposition would violate the nascent-limitations on the use of force *as long as* the government was still recognized.\footnote{Compare Michael Walzer, *Just and Unjust Wars: A Moral Argument With Historical Illustrations* 96 –97 (4th ed., 2006).}

The question, then, would remain whether the right to consent to forcible intervention in favor of the government still remained, or was also limited. Presumably, the answer seems that the preferential treatment of governments entailed also that they enjoyed unlimited powers to consent to external intervention. Another possible answer was that the preference of governments would be limited when loss of territorial effective control. This approach will be addressed in the next chapter. However, a different opinion emerged also, reflecting a movement towards a *substantive* approach towards the rights of parties to internal armed conflicts. In the inter-war period, self-determination – however vague an idea – became a dominant concept in international discourse, through the powerful advocacy of U.S. President Woodrow Wilson.\footnote{See Joshua Castellino, *International Law and Self-Determination* 13 –19 (2000).}

Self-determination enhanced the discussion of the norm of non-intervention, leading to substantive ideas regarding intervention in internal armed conflicts – *beyond* the developing law on the use of force. Lauterpacht, for instance, echoed the views expressed by Montague Bernard from almost a century before,\footnote{Montague Bernard, *On the Principle of Non-Intervention* (1860).} seeing every intervention in internal armed conflicts as interference. He saw it as a “denial of the right of the nation to decide for itself – by a physical contest, if necessary, between rival forces – the nature and the form of its government.”\footnote{Lauterpacht, *supra* note 34, at 233.} Therefore, he perceived the “preferential treatment” of governments as very limited, whether belligerency was recognized or not.
Essentially, he argued for almost complete non-intervention, even without recognition of belligerency. However, Lauterpacht departed from the effectiveness doctrine, making a case for *substantive analysis* of parties –

There must be definite limits to presumptions in favour of established governments so long as the international community has no such control over them as to secure effectively the fundamental rights of the individual and decent administration of the law.\(^{41}\)

Lauterpacht’s position can thus be seen as an early substantive argument for a general qualification of the “preferential treatment” of governments, in the era of the limitation on the use of force. These qualifications, in their different developments, will be addressed later on in this work.

**IV. The Spanish Civil War and the Crisis of the Traditional Law of Internal Armed Conflict**

The inter-war era, notwithstanding its *de jure* achievements in the realm of the limitation of the use of force, was also an era of crisis for international law and the international system at large. The advent of ideologies with global aspirations such as communism and fascism fundamentally challenged the traditional perceptions of inter-state relations.\(^{42}\)

The Spanish Civil War represented this ideological clash both internally and internationally, spawning reactions by third parties that reflected the ideological chasm of

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\(^{40}\) *Id.*

\(^{41}\) Lauterpacht, *supra* note 34, at 234.

the time. Indeed, the conflict was seen as one that could not have been considered an isolated civil war, but – and as history soon proved, quite correctly – as one which involved forces that threatened the entire international order. Once the stakes were so high, it was not surprising that the traditional, effectiveness-based doctrines of international law regarding internal armed conflicts gave way to other approaches.43

The Spanish conflict was eclipsed by the subsequent events of World War II, after which the world was fundamentally different, politically and legally. In this sense, the Spanish Civil War can be seen as the last major internal armed conflict taking place before the coming to being of the United Nations, and thus an event signifying the closure of an era. However, the responses to the Spanish Civil War did foresee a major development in international law: the emergence of collective reactions to internal armed conflicts. It was novel at being virtually the first internal armed conflict in which international institutions – whether ad hoc or permanent – played a role, although these had a limited effect in practice.44

The Spanish Civil War erupted in July 1936, after the assassination of right wing leader Jose Sotelo, and the subsequent seizure of a government radio station in Valencia by rebelling military forces. By July 17th widespread conflict spread. Soon enough, the rebels controlled half of the country.45 The root of the conflict was the Republican government’s determination to pursue reforms, thereby aggravating a coalition of conservative forces – ranging from monarchists to fascists, led by Spanish Army general

43 Id. at 31.
Francisco Franco and supported by most of the Spanish army, the industrialists, the middle class, landowners and aristocrats (The Nationalists).

Soon after the beginning of the conflict, in October 1936, Franco appropriated for himself the title of chief of the Spanish state. The Republicans, in an effort to counter the military might of the Nationalists, turned to arm peasants and workers, leading to full blown chaos in which each group fought for its own interests. The Nationalists adopted a narrative according to which they were engaged in a fight against communism; the Republicans, conversely, saw themselves – quite correctly – as confronting a dangerous fascist threat.

The international community’s reactions to the Spanish Civil War were diverse and novel. More than anything, they reflected a system in transition, in which traditional doctrines for the international regulation of internal conflicts, such as the belligerency doctrine, were set aside. In general, and as we shall see, in the discussion of the Spanish conflict one could identify several views that underlie the inherent dilemmas regarding the law on consensual intervention. One approach, as suggested by Lauterpacht, espoused an obligation amounting to mandatory neutrality, a concept that was now logically possible as a prohibition on the use of force was in place, and was based on a stringent perception of the principle of self-determination; another, as was unsurprisingly set forth

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46 Thomas, supra note 44, at 111–112.
47 Id. at 112–113.
48 While the belligerency doctrine was “weakened” after the American Civil War, as recognition was not granted since then, it was still prevalent in the debate, as we saw, surrounding the Cuban conflict of the late 1890s. It was also prevalent in the scholarly debate regarding the Spanish Civil War. Thus, it is hard to say that it was completely abandoned, although recognition was denied. In essence, a decision that a certain situation does not merit the application of a legal doctrine does not necessarily mean that the doctrine was abandoned itself, as long as the situation was evaluated in light of the doctrine. This appears to have changed to some extent in the Spanish Civil War and thereafter. Compare Roscoe R. Oglesby, Internal War and the Search for Normative Order 102–106 (1971).
by the Spanish government and its few allies, argued for a mandatory preferential treatment of recognized governments, a claim augmented by the nascent laws on the use of force; yet another view, as presented by Mexico, argued for a substantive preference for the Spanish government, based on its democratic credentials.

The inconsistencies of the international reaction, in comparison to the previous known practice, led frustrated commentators to argue that the time has arrived for the abandonment of old doctrines and the establishment of mechanisms that allowed for collective action and decision-making regarding internal armed conflicts. For instance, it was definitely demonstrated that the application of the belligerency doctrine was prone to opportunism, since it imposed on third parties inconveniences while barely benefitting them.49 Others heralded traditional international law, and claimed that the approach of many states to the Spanish conflict was illogical, and highly contradictory to previous practice. Smith lamented this “anomaly” of practice, warning – with ample clairvoyance – that this deviation will be regarded, in the future, as a precedent, and will ultimately bring about what he saw as destruction of the centuries-developed law regarding civil wars.50

IV.1 Consensual Intervention in the Spanish Civil War

During the course of the war, the Nationalists requested the support of the fascist nations of Europe – Italy and Germany. By the end of July 1936, both powers were involved in the conflict, by transfer of arms as well as by direct participation of their fighting units,

which were concealed as “volunteers.”” 51 Authoritarian Portugal too supported the Nationalists with “volunteers” and arms, and allowed them to use Portuguese ports, *inter alia*, for the transport of German aid. 52 The Republicans’ calls for aid, however, fell on deaf ears. France refused to a July 1936 request for aid, since Britain did not approve of the idea; instead, it consoled its left-leaning constituency by emphasizing that neutrality law does not prohibit private dealers to provide arms to the Spanish government. Britain, too, refrained from transferring arms to either side, but initially did not prohibit private parties from doing so. 53 As we shall see, this policy soon changed further to the detriment of the Spanish Government.

The U.S.S.R. covertly assembled international brigades to assist the Republicans through the Communist International (Comintern). However, no citizens of the U.S.S.R. were allowed to participate. Comintern also used its network to provide military equipment. Moreover, The U.S.S.R. directly sent heavy military equipment to the Republicans, but not on a large scale. 54 The Soviet support did not amount, however, to the direct involvement of Germany and Italy. By mid-1938, Stalin realized that absent full Soviet commitment, the cause was hopeless. Deciding to concentrate on protecting his front against the impending German and Japanese danger, Communist aid to the Republicans all but ceased. By early 1939 the Republicans were on the brink of defeat. France and Britain recognized the Franco government on February 27th, 1939, 55 and the

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51 *Thomas, supra* note 44, at 113.
52 *Id.* at 114.
53 *Id.* at 114–115. Recall that international neutrality law, in general, did not restrict private parties in their dealing with belligerents, but only states. Thus, states were not obliged to prevent individuals from transferring arms to belligerents. *See* Chapter 4, sec. III.1.
54 *Thomas, supra* note 44, at 118–119.
55 *Thomas, supra* note 44, at 160.
Republican forces finally capitulated on March 31, 1939.\textsuperscript{56} Since the Spanish Civil War took place in an era in which aggression was already deemed illegal, it was possible at this stage to speak of the illegality of the German and Italian intervention, \textit{assuming} their recognition of the Franco regime, which was awarded in late 1936, was premature and invalid.

A salient feature of the Spanish Civil War was the use of “volunteers” as a mean utilized by states to circumvent the adverse consequences they might have otherwise suffered, if intervening directly in the conflict. As we shall see, a Non-Intervention Agreement, concluded by the European powers, did not initially oblige states to prevent their citizens from volunteering in the Spanish conflict. Indeed, the duty of neutrals to prevent volunteering, as understood at the time, required the prevention of “organized expeditions” from the neutral’s territory, but did not concern actions by individuals. This loophole was used by all intervening parties, and most notably by Germany and Italy, to conceal their direct intervention,\textsuperscript{57} and was only addressed by the Non-Intervention Agreement later on.\textsuperscript{58}

IV.2 The Non-Intervention Agreement: Collective Non-Intervention

The Spanish Civil War was unique in the fact that a Non-Intervention Agreement between numerous states was formed, prohibiting states to intervene in favor of both parties to the conflict – opposition \textit{and} government. The agreement was unprecedented in two main aspects: institutional and legal. From an institutional standpoint, it set up a collective framework to govern the relations of external parties regarding an internal

\textsuperscript{56} Id. at 118\textsuperscript{\textendash}119.
\textsuperscript{57} Id. at 154\textsuperscript{\textendash}156, 164\textsuperscript{\textendash}166.
\textsuperscript{58} Id. at 154\textsuperscript{\textendash}156.
conflict, perhaps signifying the general movement towards the collectivization of the international system.\(^{59}\) For instance, a Non-Intervention Committee was established in London to inquire violations of the agreement, upon receipt of complaints by participating governments.\(^{60}\) From a legal point of view, the agreement was novel, as we shall see, in its approach towards the law of internal armed conflict as previously understood. As such, its legality was heavily debated at the time.\(^{61}\) Although the agreement was thoroughly defied, notably by Portugal, Italy, Germany and the Soviet Union, it represented, *de jure*, a novel approach regarding international law of internal conflicts, and consensual intervention at that.

In August 1936, Britain and France initiated the Non-Intervention Agreement, which was, in fact, comprised of declarations and exchanges of notes between states that wished to participate. The agreement included a preamble, in which the states pledged to abstain from all interference, direct or indirect, in the conflict, and three articles, in which they declared that they will prohibit all exportation of “arms, munitions and materials of war, as well as all airplanes … and all ships of war” to Spanish territories. Furthermore, they agreed that governments participating in the agreement will inform each other on steps taken to enforce the prohibitions.\(^{62}\)

27 governments made similar declarations. However, the declarations varied from each other. Some states, Italy and Germany notably among them, joined the agreement, but omitted from their declarations the preamble which prohibited *all* interference, thus

\(^{59}\) Lauterpacht, *supra* note 34, at 254.

\(^{60}\) However, there was no provision for sanctions in case of violation. Norman J. Padelford, *The Non-Intervention Agreement and the Spanish Civil War*, 31 AM. J. INT’L L. 578, 586–587 (1937).

\(^{61}\) For a summary of the claims against the agreement see Thomas, *supra* note 44, at 175–176.

allowing them to undertake all forms of intervention not specifically prohibited.\textsuperscript{63} Both states promptly violated their declarations nonetheless; the U.S.S.R. also eventually violated its declaration.\textsuperscript{64} Portugal, seeking too to intervene in the Spanish conflict, set forth a heavily qualified declaration. It set conditions in which what it described as “the thought of non-intervention” could be realized. Moreover, it declared that the recognition of belligerency of the parties or recognition of a new government do not constitute intervention.\textsuperscript{65}

The wide variety of interpretations of the agreement caused it to be described as less of an “agreement” in the formal sense, and more of a “concert of policy.” Indeed, it lacked a coherent binding interpretation or enforcement mechanism, its application effectively becoming contingent upon the good-will and initiative of each state.\textsuperscript{66} Moreover, a key legal weakness of the Non-Intervention Agreement was in the fact that it did not explicitly prohibit withdrawal, and it is unclear to what extent it was legally binding, as it was based, in general, on unilateral declarations by states.\textsuperscript{67} Nevertheless, 15 of the declarations were similar enough to form a common basis,\textsuperscript{68} essentially, by imposing an arms embargo on both sides, amounting to an instrument of negative non-forceful intervention.

As aforementioned, one of the main loopholes of the agreement could be found in the fact that it did not explicitly address the question of foreign volunteering on behalf of

\textsuperscript{63} These states, and others, attached interpretations, qualifications and reservations to their declarations. See \textit{id.} at 580–581.

\textsuperscript{64} See Thomas, \textit{supra} note 44, at 115–117.

\textsuperscript{65} \textit{Id.} at 581–582; Thomas, \textit{supra} note 44, at 116.

\textsuperscript{66} Padelford, \textit{supra} note 60, at 580.

\textsuperscript{67} \textit{Id.} at 598. It should be noted, however, the in unilateral declarations may have binding powers in international law. See Krzysztof Skubiszewski, \textit{Unilateral Acts of States, in INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS} 221, 224–226 (Mohammed Bedjaoui ed., 1991).

\textsuperscript{68} Padelford, \textit{supra} note 60, at 580.
the parties. By the end of 1936, Britain and France became alarmed at the influx of
volunteers crossing into Spain. In January 1937 Britain called for national prohibitions on
volunteer recruitment, and on January 10th Britain invoked the Foreign Enlistment Act for
that purpose. France followed suit by enacting its first act dealing sufficiently with this
issue. In mid-February, all the powers in the Non-Intervention Committee agreed to
widen the Non-Intervention Agreement to include an explicit ban on volunteering and
pledged, to some extent, to station observers in the territories bordering Spain to
supervise the agreement.69 The new understanding was consolidated in a March 8
resolution by the Non-Intervention Committee that set up an Observation Scheme,
consisting of eight international agencies augmented, inter alia, by an international naval
patrol, authorized to inspect merchant vessels of participating states.70

In general, and notwithstanding its novelty, the agreement did not succeed in
preventing aid to be rendered to either side, not least because the definition of the term
indirect interference was not agreed upon; the Committee dropped virtually all charges of
violations brought in front of it; the Observation Scheme could be easily circumvented
through ports of non-participating states; and at large, the Observation Scheme – as the
agreement in general – relied heavily on good will and cooperation of states, which were
not, by way of understatement, well meaning partners.71 More than anything, the Non-
Intervention Agreement was made a travesty, as Italy and Germany relentlessly continued

69 O’Rourke, supra note 49, at 410–411.
70 International Committee for the Application of the Agreement Regarding Non-Intervention in Spain,
Resolution Relating to the Scheme of Observation of the Spanish Frontiers by Land and Sea (Mar. 8, 1937)
31 AM. J. INT’L L. SUPP. 163 (1937); Padelford, supra note 60, at 588–594. However, the patrol did not
have an enforcement mandate – its vessels could not capture contraband. See id. at 595.
71 Padelford, supra note 60, at 578, 581, 587–588, 596–598, 603(1937) (referring to the weaknesses of the
agreement); see also O’Rourke, supra note 49, at 409.
to send troops to aid the Nationalists, at the same time that they participated in the naval patrol ostensibly charged to prevent such actions.\textsuperscript{72}

From a purely legal point of view, the Non-Intervention Agreement could be seen as an undertaking by states to adopt an “enhanced” status of neutrality \textit{without} recognizing the positive belligerent rights of the conflicting parties, including those of the incumbent government.\textsuperscript{73} This attitude was indeed novel, as the understanding of prior practice pointed out that a declaration of neutrality amounted to recognition of belligerency.\textsuperscript{74} Therefore, the agreement was not well received by many commentators of the time. Smith labeled the Non-Intervention Agreement as recognition of an “existence of a war,” but disregarding its “logical consequences.”\textsuperscript{75} He saw the agreement as a “collective declaration of neutrality” that amounted to recognition of belligerency, \textit{without} granting the parties belligerent rights, something which he found legally “difficult to understand.”\textsuperscript{76} Moreover, the Non-Intervention Agreement went further of what neutrality required, in that besides its requirement that states adopt a neutral stance vis-à-vis the parties, it called for the prevention of actions of \textit{private} individuals – both regarding arms transfers and volunteering – while international neutrality laws, at large, applied only to government action.\textsuperscript{77}

However, the major legal controversy spawned by the agreement concerned the fact that it did not distinguish between the recognized government and the opposition. Indeed, some states, and as we shall see, also commentators, were uncomfortable by this

\textsuperscript{72} Thomas, \textit{supra} note 44, at 156. For a succinct summary of the weaknesses of the agreement see \textit{id.} at 175–178.
\textsuperscript{73} \textit{Compare} Padelford, \textit{supra} note 45, at 234–235.
\textsuperscript{74} O’Rourke, \textit{supra} note 49, at 409.
\textsuperscript{75} Smith, \textit{supra} note 42, at 26.
\textsuperscript{76} Smith, \textit{supra} note 42, at 28–29; \textit{see also} Thomas, \textit{supra} note 44, at 144–145.
\textsuperscript{77} O’Rourke, \textit{supra} note 49, at 409; Thomas, \textit{supra} note 44, at 176; Lauterpacht, \textit{supra} note 34, at 234.
approach. Therefore, for instance, Turkey and Yugoslavia emphasized that in their view, the Non-Intervention Agreement will “not constitute a precedent, or result in even the implicit recognition of a principle that a government can not render to a legal government ... aid in the struggle against rebellion.” 78 The Spanish government’s main legal argument against the Non-Intervention Agreement concerned this issue, as it claimed that the agreement was *in itself* an act of intervention. It lamented the agreement’s equal treatment of the rebels and the government, and its denial of lawful aid from an established government. The U.S.S.R., despite being a party to the agreement, partly joined this view, peculiarly arguing that it is a “breach of the principles of international law.” 79 The same argument could be made, in principle, against the unilateral neutrality policy of the United States. 80

A prevalent view among the commentators of the time was that the agreement was indeed a deviation from international law, as it prohibited exports of arms to a state which was at peace with the participating parties, absent recognition of the conflict’s belligerency. Padelford, for instance, argued that a distinction must be made between neutrality and non-intervention in the context of internal and international conflicts, when the internal conflict is an unrecognized insurgency. As he argued, “[t]o apply to *unrecognized* and irresponsible rebels the same principles that are applicable to sovereign states and established governments is to encourage rebellion and disorder and to weaken public law and authority.” 81

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78 Padelford, *supra* note 60, at 581.
80 Thomas, *supra* note 44, at 146.
81 Padelford, *supra* note 60, at 586 (emphasis added).
O’Rourke concurred, referring to the Convention on Civil Strife, which supposedly allowed transfer of arms only to governments, prior to the recognition of belligerency.82 Smith presented a similar view, arguing that in absence of recognition of belligerency, if the states saw the Spanish conflict as “no more than an internal disorder,” then the Non-Intervention Agreement was a “grave act of intervention” against the Spanish government, being at peace with the parties to the agreement, and thus a “highly unfriendly act.”83

It seems that these positions were imprecise, since they did not distinguish sufficiently between international law’s approach towards negative and positive interventions.84 As noted by Lauterpacht, in an absence of a specific treaty, there was never an obligation on states to freely trade with others, whether they were involved in an internal armed conflict or not. Therefore, it is difficult to consider the Non-Intervention Agreement, being a case of negative intervention, as a violation of international law.85 This is a conclusion that is relevant also today: there is no general rule of international law that prohibits states from preventing aid to beleaguered governments.

More controversially, and perhaps loyal to his general dislike of the “preferential treatment” of governments and support of the concept of self-determination, Lauterpacht saw the Non-Intervention Agreement as an evolvement towards a “workable rule of international law,” that requires neutrality towards both parties to an internal armed conflict, regardless of recognition of belligerency or lack thereof.86 This position too, on

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82 O’Rourke, supra note 49, at 409 –410.
83 Smith, supra note 42, at 27 –28.
84 See Chapter 3, sec. II.2.
85 Thomas, supra note 44, at 143; see also LAUTERPACHT, supra note 34, at 232 (note) 234 fn 1.
86 LAUTERPACHT, supra note 34, at 233 –234.
its face, and as we shall see, did not take hold in modern international law as it was formed in the U.N. Charter.

The debate regarding the Non-Intervention Agreement represented the ubiquitous dilemmas that arise in the modern law regarding consensual intervention. Notably, it highlighted the question whether governments should always receive preferential treatment; and how is the question of the rights of parties in internal armed conflict affected by substantive considerations such as the principle of self-determination.

IV.3 U.S. Neutrality: Unilateral Non-Intervention

The American approach towards the Spanish Civil War was not different, in essence, from the one reflected in the Non-Intervention Agreement, although the U.S. was not party to it. American public opinion of the 1930s was dominated by pacifist sentiment, and isolationism was a key feature of American foreign policy. Therefore, the support of either party to the conflict was not looked upon positively. However, the 1817 Neutrality Act, potentially applicable in the case of the Spanish Civil War, was narrow in its scope: it did not cover the transfer of arms by private entities. The Neutrality Act of 1935 expanded the prohibition to private “export of arms, ammunition and implements of war,” by thus going further than what was required by international neutrality law. However, the Act explicitly applied only to “belligerent countries,” and thus did not prohibit export of arms to states involved in internal armed conflict, at least absent

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87 22 U.S.C. 441.
88 Id. §1.
recognition of belligerency. In January 1937, this “loophole” was closed by the Neutrality Act of 1937, which provided that -

Whenever the President shall find that a state of civil strife exists in a foreign state and that such civil strife is of a magnitude or is being conducted under such conditions that the export of arms … would threaten or endanger the peace of the United States, the President shall proclaim such fact, and it shall thereafter be unlawful to export, or attempt to export, or cause to be exported, arms, ammunition, or implements of war from any place in the United States to such foreign state ….

Unlike the opinion of the U.S. Attorney General many decades before, and in a manner similar to the requirements of the Non-Intervention Agreement, the act of 1937 prohibited interactions not only with the opposition but also with the government. Furthermore, it implied the assumption of a neutral status, without recognition of active belligerent rights on part of the parties.

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91 1937 Neutrality Act, §1(c).
92 See Chapter 6, sec. III.2.
93 Padelford, supra note 45, at 234. The 1937 Act was criticized as incompatible with the Covenant of the League of Nations and the Kellog-Briand Pact (the latter to which the U.S. was a party of), as these agreements required a distinction between an aggressor and a victim. See Garner, supra note 90, at 390 –391.
IV.4 The Spanish Civil War: Belligerency, Insurgency and Governmental Recognition

Soon after the eruption of the conflict, the Spanish Government declared that Nationalist prisoners will be treated as prisoners of war, and that areas under control of the opposition were “zones of war;” it accordingly declared that these areas were under blockade.\footnote{Padelford, supra note 45, at 227. In practice, the blockade proclamation was an attempt to close the rebels’ ports by decree, rather than a blockade. \textit{Id.} at 231.} Padelford argued that although the Spanish Government failed, in practice, to treat Nationalist prisoners as prisoners of war, its declarations nevertheless amounted to recognition of the opposition’s belligerency.\footnote{\textit{Id.} at 229–230; \textit{see also} Thomas, supra note 44, at 122.} O’Rourke agreed, recalling the fact that Lincoln’s proclamation of blockade of the Confederate ports in 1861 was understood by powers as recognition of the latter’s belligerency.\footnote{O’Rourke, supra note 49, at 412; \textit{see also} Thomas, supra note 44, at 152.} Smith held a similar position, in general, but pointed out that neither of the parties set up prize courts, published contraband lists or attempted seriously to establish a blockade in conformity to international law.\footnote{Smith, \textit{supra} note 42, at 25, 27, 29.} Moreover, neither party respected the laws of war, as atrocities of many kinds were widespread.\footnote{Thomas, \textit{supra} note 44, at 124–140.} Intervening parties, notably Nazi Germany, also frequently violated the laws of war. For instance, the German air force was involved in a deadly raid on April 26, 1937, destroying the town of Guernica and killing 1,654 people.\footnote{\textit{Id.} at 137–138.} On November 17, General Franco declared that the “National Government” was determined to end shipping of arms to the Republican port of Barcelona, in what was understood as a an attempted proclamation of blockade by the Nationalists.\footnote{Padelford, \textit{supra} note 45, at 232; Thomas, \textit{supra} note 44, at 153.}
In any case, despite the conflict’s magnitude, recognition of belligerency was not extended by third parties, although the question was much debated in the literature as well as in diplomatic efforts.\(^{101}\) Britain claimed that neither party was a lawful belligerent,\(^{102}\) advancing, perhaps inconsistently, the claim that recognition of belligerency was strictly a matter of discretion,\(^{103}\) along with the argument that the government’s blockade is not effective and therefore was to be ignored.\(^{104}\) The U.S. held similar positions.\(^{105}\) The same approach was adopted regarding the blockade presumably declared by the Nationalists.\(^{106}\)

The denial of belligerent rights did not prevent Britain, however, from concluding a commercial agreement with the Franco regime in February 1937;\(^ {107}\) or from dealing with Franco’s representatives, without granting them diplomatic status (a usual trait of belligerency).\(^ {108}\) Moreover, British courts ruled that the British government accorded de facto recognition to Franco (while maintaining the de jure status of the Spanish Government).\(^ {109}\) This de facto status resulted, inter alia, in recognition of Nationalist legislation, and – conversely – the nullification of Republican legislation in territories

\(^{101}\) O’Rourke, supra note 49, 404–405. The question of belligerency recognition surfaced in the negotiations between the parties to the Non-Intervention Agreement. For instance, following claims that their patrol warships, commissioned by the Observation Scheme, were attacked by Spanish forces, Germany withdrew on June 1937 from the naval patrol, followed by Italy. Germany and Italy subsequently proposed to recognize the belligerency of the parties; they argued that this will strengthen the policy of non-intervention by triggering the application of international neutrality law, and the enforcement of maritime belligerent rights by the Spanish parties. This proposal was rejected. Britain, however, proposed that a new form of “qualified” belligerency of the parties will be recognized, if both parties to the conflict agree. These proposals never materialized. See Padelford, supra note 60, at 599–600.

\(^{102}\) The denial of belligerent rights from a government that itself employs belligerent means such as a blockade – thereby admitting the existence of a “war” – was contradictory to previous state practice. See LAUTERPACHT, supra note 34, at 193–199.

\(^{103}\) O’Rourke, supra note 49, at 401–402; Thomas, supra note 44, at 153.

\(^{104}\) Smith, supra note 42, at 27; LAUTERPACHT, supra note 34, at 250.

\(^{105}\) LAUTERPACHT, supra note 34, at 250.

\(^{106}\) Padelford, supra note 45, at 232; Thomas, supra note 44, at 153.

\(^{107}\) Smith, supra note 42, at 28.


\(^{109}\) Id. at 47; Thomas, supra note 44, at 158–159.
beyond their *de facto* control.\(^{110}\) Regardless of the absence of belligerency recognition, Franco’s regime was addressed by third states for protests, appeals and requests for guarantee of property.\(^{111}\)

The Nationalists enjoyed privileges also in the realm of maritime actions. When confronted with harassment of its merchant fleet, the U.S. claimed – perhaps loyal to the insurgency doctrine – that the Spanish Government could not decree ports under Nationalist control close, absent an effective blockade, notwithstanding the lack of belligerency recognition on part of the rebels.\(^{112}\) By November 1936, states recognized the *de facto* power of the Nationalists over neutral merchant vessels *within* the territorial water of Spain,\(^{113}\) while rejecting such powers on the high seas.\(^{114}\)

All in all, it was convincingly argued that, in essence, Franco’s forces were recognized by most powers as *insurgents*.\(^{115}\) Indeed, the aggregation of the characteristics of the approaches relating to the Spanish Civil War could be interpreted as recognition of insurgency, if one subscribes to a flexible perception of the doctrine.\(^{116}\)

Germany and Italy, on their part, avoided these dilemmas. On November 19\(^{\text{th}}\), 1936, they recognized the opposition as the lawful government of Spain, “skipping” the intermediate status of belligerency or insurgency,\(^{117}\) and negating any belligerent rights of the Republicans. For instance, Germany did not recognize as legal the December 1936

\(^{110}\) For a concise summary of these cases see Lauterpacht, *supra* note 34, at 273.

\(^{111}\) Thomas, *supra* note 44, at 142–143.

\(^{112}\) International Law and the Spanish Civil War, *supra* note 45, at 230–233.

\(^{113}\) Lauterpacht, *supra* note 34, at 272–273.

\(^{114}\) International Law and the Spanish Civil War, *supra* note 45, at 237.

\(^{115}\) O’Rourke, *supra* note 49, at 404.

\(^{116}\) See Lauterpacht, *supra* note 34, at 272–274 (claiming that the Spanish Civil War represents an instance of recognition of insurgency).

\(^{117}\) International Law and the Spanish Civil War, *supra* note 45, at 236–237. Portugal, El Salvador and Albania also recognized the Nationalists as the lawful government of Spain. See O’Rourke, *supra* note 49, at 411–412. It is argued that Germany and Italy were premature in doing so, and by thus committed an international wrong against the Spanish government. Guatemala also recognized the Franco regime, as well as the Vatican. See Thomas, *supra* note 44, at 160–161.
capture by a Republican vessel of a German ship, allegedly for carrying contraband and Spanish insurgents, labeling these acts as “piracy.”

Lauterpacht held a distinctive position, in an effort to explain the non-recognition of belligerency in the context of the Spanish conflict. He claimed, essentially, that once an external forcible intervention has taken place, the doctrine of belligerency was no longer relevant since the conflict was no longer a civil war, but an international one. However, he did not elaborate upon the consequences of such distinction, beyond noting his aforementioned view that the recognition of belligerency required strict neutral conduct, which was blatantly violated by Germany and Italy.

In sum, the issue of the recognition of belligerency in the Spanish Civil War has to be read in light of the unique approach formulated in the Non-Intervention Agreement. It reflected a movement from the old, stringent approach regarding the regulation of internal armed conflicts towards the adoption of flexible and collective ad hoc responses. This trend highlighted the fact that the old doctrines have become, at large, irrelevant.

IV. CONSENSUAL INTERVENTION IN THE SPANISH CIVIL WAR AS AN ILLEGAL USE OF FORCE AND THE CALLS FOR SUBSTANTIVE ANALYSIS OF PARTIES

Throughout the conflict, the Spanish government repeatedly appealed, largely to no avail, to the Council of the League of Nations, requesting it to act in the face of the German and Italian forcible intervention. On November 27, 1936, Spain appealed to the

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118 Padelford, supra note 45, at 237–239; O’Rourke, supra note 49, at 398. It must be said, that it is quite awkward to analyze the practice of Nazi Germany as indicative of any kind of international law, not least considering the fact that Nazi Germany’s theories of international law were intermingled with its racial and social-Darwinist theories. See Virginia L. Gott, The National Socialist Theory of International Law, 32 Am. J. Int’l L. 704, 704–709 (1938).

119 LAUTERPACHT, supra note 34, at 251 –252.

120 Id. at 252–253.
Council, invoking Article 11 of the Covenant, labeling the German and Italian actions a “new form of aggression,” whereby a state engaged in “war to all intents and purposes, but without declaring war, by … giving military assistance to the rebels.” Reflecting the general notion of the time, in which internal conflicts were not per se the interest of the international community, the Spanish representative went to great lengths to convince the members that the war in Spain is indeed a threat to international peace, beyond the destruction suffered in Spain itself. The League, however, failed to take significant action besides adopting a resolution supporting the Non-Intervention Agreement.

Other Attempts to invoke article 11 were made by Spain in May and August 1937, in which Spain presented evidence for forcible action by Germany and Italy on its soil. Again, the Council refused to take significant action. In September 1937, Spain managed to convince a majority of the Council to vote for a resolution recognizing that foreign forces were operating in Spain in violation of international law and calling for their withdrawal, but lack of unanimity curtailed its adoption. Further attempts by Spain to address the Council in 1938 failed to bring significant progress regarding this issue.

All in all, it is clear that the League of Nations had no serious legal ground to abstain from triggering the mechanism enshrined in Articles 10 and 11 of the Covenant.

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122 Official Journal, supra note 121, at 8 –9.
123 Id; O’Rourke, supra note 49, at 410; Official Journal, supra note 121, at 18–19.
125 Id. at 174.
126 Id. at 175.
However, political considerations, namely the preference of Britain and France to deal with issue in the framework of the Non-Intervention Agreement, took precedent.\textsuperscript{127}

After the war ended, most states recognized the Franco regime. Mexico was one of the few exceptions.\textsuperscript{128} From the outset of the conflict, Mexico maintained that a substantive view of the principle of non-intervention actually condones providing support for the Spanish government, since it was \textit{democratically elected}. Therefore, it claimed that the European non-intervention pact was in itself a violation of the principle of non-intervention: in its denial of the rights of the Spanish government, it constituted an indirect support for the Nationalists. Mexico’s approach differed from that of other aforementioned opinions that condemned the Non-Intervention Agreement, by emphasizing the democratic nature of the Spanish government as a justification for its preferential treatment.

Mexico furthermore argued that since the intervention by Germany and Italy constituted an aggression,\textsuperscript{129} and also violated the principle of self-determination, the Franco regime could not be recognized – since it came to be by means contrary to the Covenant of the League of Nations and the Kellogg-Briand Pact. China, the U.S.S.R. and New Zealand supported the Mexican view.\textsuperscript{130} It could be said that the Mexican point of view was a harbinger of a new, substantive approach towards the law of internal armed conflicts and the law of consensual intervention in particular. Having this in mind, we shall now turn to examine these issues in the era of article 2(4) of the U.N. Charter.

\textsuperscript{127} Germany was not a member of the League by the time the conflict erupted. Italy withdrew its membership in December 1937. \textit{See id.} at 178.
\textsuperscript{128} \textit{Id.} at 161.
\textsuperscript{129} \textit{Id.} at 118.
\textsuperscript{130} \textit{Id.} at 161 –163.
Table 2 – Summary of Rights and Powers of Parties to Internal Armed Conflicts in the War-Prerogative Era: The Belligerency Doctrine

<table>
<thead>
<tr>
<th>Prior to Recognition of Belligerency</th>
<th>Forcible Intervention</th>
<th>Arms Transfer by States</th>
<th>Arms Transfer by individuals</th>
<th>Fitting out of vessels by individuals</th>
<th>Expeditions of private individuals from territories</th>
<th>Volunteering of Individuals</th>
</tr>
</thead>
<tbody>
<tr>
<td>On behalf of government</td>
<td>V (peaceful relations with state remain)</td>
<td>V</td>
<td>V</td>
<td>V</td>
<td>V</td>
<td>V</td>
</tr>
<tr>
<td>On behalf of opposition</td>
<td>V (War Prerogative)</td>
<td>X (it the state wishes to maintain peace)</td>
<td>X (if the state wishes to maintain peace)</td>
<td>V</td>
<td>X (if the state wishes to maintain peace)</td>
<td>X (if the state wishes to maintain peace)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>After Recognition of Belligerency (neutrality)</th>
<th>Forcible Intervention</th>
<th>Arms Transfer by States</th>
<th>Arms Transfer by individuals</th>
<th>Fitting out of vessels by individuals</th>
<th>Expeditions of private individuals from territories</th>
<th>Volunteering of Individuals</th>
</tr>
</thead>
<tbody>
<tr>
<td>On behalf of government</td>
<td>V (War Prerogative)</td>
<td>X (if the state wishes to maintain neutrality)</td>
<td>X (if the state wishes to maintain neutrality)</td>
<td>V</td>
<td>X (if the state wishes to maintain neutrality)</td>
<td>X (if the state wishes to maintain neutrality)</td>
</tr>
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<td>On behalf of opposition</td>
<td>V (War Prerogative)</td>
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<td>V</td>
<td>X (if the state wishes to maintain neutrality)</td>
<td>X (if the state wishes to maintain neutrality)</td>
</tr>
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</table>
I. ENTER THE U.N. CHARTER: STATE CONSENT AS AN EXCEPTION TO THE PROHIBITION ON THE USE OF FORCE

After the Spanish Civil War, the belligerency doctrine has virtually disappeared from the international-legal discourse, leading some scholars to maintain that it has fallen into desuetude.\(^1\) The subsequent catastrophe of World War II has further – and dramatically – changed the international system. Significantly, the tragedy led to the abolition of the war prerogative. Accordingly, Article 2(4) of the U.N. Charter famously states that

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

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Once a prohibition on the use of force was firmly set forth, the question of consensual intervention has gained substantive legal importance: if the use of force is prohibited in general, does consent provide for an exception to this rule? When addressing this question, is it imperative to recall that the prohibition on the use of force serves two mutually-enforcing interests. It serves to minimize the catastrophes of war; but also to enforce the norm of non-intervention and to protect sovereignty, however we interpret the contents of these principles.\textsuperscript{2}

Article 2(4), thus, prohibits the use of force “against the territorial integrity or political independence” of the state. Therefore, in theory, when an external actor uses force in the territory of another state in circumstances in which it is not acting against the latter’s territorial integrity or political independence, it is not, in general, in violation of article 2(4).\textsuperscript{3} Consensual intervention in favor of the “state” can thus be a rare case in which use of force is not against its territorial integrity or political independence, and as such can serve as an exception to the prohibition on the use of force.\textsuperscript{4}

The construction of the Charter’s text as providing for such an exception can be deduced, nowadays, from four main sources: the General Assembly’s Definition of Aggression; the Kampala Definition of the Crime of Aggression; the Articles on State Responsibility; and the Draft Articles on Responsibility of International Organizations (DARIO).

\textsuperscript{2} See Chapter 3, sec. III.2.


\textsuperscript{4} The same interpretation was used by some to justify unilateral humanitarian, \textit{absent} state consent. However, this view is generally rejected. See Chapter 12, sec. IV.2.
Article 3(e) of the Definition of Aggression, which quite possibly reflects customary international law\(^5\) – and in particular considering the fact that it was adopted as part of the Kampala Definition of the Crime of Aggression \(^6\) – excludes from the term “aggression” the following actions:

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

Thus, the article recognizes, albeit indirectly, the *jus ad bellum* legality of forcible actions undertaken *in accordance* with the agreement of the “receiving” state – and could thereby exclude – from the term “aggression” and arguably also from being an unlawful violation of Article 2(4) of the Charter – also instances of consensual interventions in internal conflicts.

Article 20 of the Articles on State Responsibility complements the Definition of Aggression, by precluding, in general, the wrongfulness of acts conducted with state consent:

\[
\text{Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in}
\]

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\(^5\) Definition of Aggression, G.A. Res. 3314 (XXIX), ¶3(e), U.N. Doc A/9631 (Dec. 14, 1974). Article 3(g) of the Definition, which is addressed in Chapter 4, sec. I.3, was deemed by the ICJ as reflecting customary international law. can serve as an indication for the customary nature of the other sub-articles of the Definition.

\(^6\) The Crime of Aggression, art. 8bis(g), Resolution RC/Res.6, RC/11 (Jun. 11, 2010).
relation to the former State to the extent that the act remains within the limits of that consent.\textsuperscript{7}

A similar provision is included in article 20 of the 2011 Articles on Responsibility of International Organizations,\textsuperscript{8} stipulating that valid consent by a state to an act committed by an international organization precludes the wrongfulness of that act in relation to the consenting state. This provision might apply to interventions by regional organizations with “internal collective security” arrangements – or forward-looking intervention treaties – as these will be discussed later on.\textsuperscript{9}

The term \textit{valid} consent connotes two different meanings.\textsuperscript{10} The first refers to free and genuine consent – meaning, that the consent is not coerced.\textsuperscript{11} The second requires that the consent be expressed by a competent entity. Thus, a fundamental question concerns the determination of the entity speaking for the state in extreme situations, where a consensual forcible intervention is sought. Essentially, it asks whether intervention upon the consent of a beleaguered government is not actually \textit{per se} conducted against the political independence of the state – under the assumption that the state is a “black box,” the character of which must be determined only by its internal parties.\textsuperscript{12} It is here where the normative duality of forcible interventions – meaning, their

\begin{footnotes}
\item[9] \textit{See} Chapter 10.
\item[10] One these two meanings we will elaborate later on in this chapter.
\item[11] \textit{See} Chapter 1, Sec. II.1.
\end{footnotes}
regulation by both the laws on the use of force and the principle of non-intervention – is at its most prevalence.

Two main approaches to this problem can be identified. The first, which is dominant mainly in the literature – and reflects a genuine will to limit the international use of force –\(^\text{13}\) interprets the norm of non-intervention, and the related principle of self-determination, as entailing complete abstention from any intervention in internal strife, without much elaboration regarding the threshold of conflict required for such an obligation to apply. We shall call this view \textit{strict-abstentionism}.\(^\text{14}\) In fact, some strict-abstentionists set forth a very simple argument: they maintain that a mere request for assistance, on its part, is sufficient to indicate that a government can no longer speak for the state.

The other approach, prevalent in practice and in international jurisprudence, identifies a \textit{government preference}, recognizing, in principle, the power of governments to consent to forcible interventions, and delegitimizes opposition consent. However, some of the proponents of the latter approach limit the government preference, in practice, in such a manner that it virtually merges with strict-abstentionism.

In this chapter, instead of subscribing to a dichotomist abstention/preference distinction, we will revisit the approach suggested by \textit{Lauterpacht}, identifying a rebuttable “presumption” in favor of governments.\(^\text{15}\) This seems to be the conceptually clearest prism through which to evaluate the question of consensual intervention. Indeed,

\(^{13}\) See, \textit{e.g.}, Quincy Wright, \textit{Editorial Comment: United States Intervention in the Lebanon}, 53 \textit{Am. J. Int’l L.} 112, 122 (1959) (opining that “[t]he expediency of this rule is manifest not only to preserve the independence of states but also to prevent civil war from spreading into international war.”)

\(^{14}\) I do not label this approach as “non-interventionist” since even supporters of intervention, in the physical sense, will not claim that intervention in favor of governments is an intervention in the normative sense.

\(^{15}\) According to Lauterpacht, as we shall see, this presumption is very narrow. \textit{See also} Schachter, \textit{supra} note 3, at 1642.
the mechanism of a “presumption” provides a framework that is not only doctrinally clearer, but practically more flexible – and thus more workable in the real world – than stringent formalistic ones.

However, we will not yet address here the circumstances that lead to the rebuttal of this presumption, whether based on tests relating to effective control or otherwise. We will only demonstrate, in this chapter, that such presumption is indeed reasonable, and is recognized in contemporary international law. The scope of this presumption will be addressed in subsequent chapters.

However, in order to understand the approach towards the abstentionist/preference debate in the U.N. Charter era, it is helpful to first survey, rather briefly, the zero-sum cold-war dynamics that shaped the discourse on intervention throughout the first four decades of the Charter. The aspiration to “tame” these dynamics – and especially their often malicious nature – has greatly influenced the motivations of both the proponents of strict-abstentionism and of the government preference.

II. CONTAINMENT, DÉTENTE, ROLL-BACK: COLD-WAR DOCTRINES OF INTERVENTION

Since World War II, the principle of effective control has been constantly challenged by competing, substantive doctrines for the evaluation of internal armed conflicts. For instance, in the context of decolonization, substantive analysis of conflicts – based on the principle of self-determination – led to the qualification of colonial struggles as closer to international conflicts, in contrast to the approach towards colonial wars of the 19th
century, which were treated, as we saw in previous chapters, as internal conflicts controlled by the belligerency and insurgency doctrines.  

At the same time, owing to the cold-war dynamics, the general concern regarding the issue of intervention related to the attempts, by both sides, to minimize their adversary’s influence. Indeed, even before the dust settled from World War II, the international community faced a bloc-related conflict in Iran (1946), in which the Soviet Union intervened in favor of Kurdish nationalists, a complex conflict in French Indochina between multiple armed groups, states and interveners, which lasted from 1946 until 1954, and sowed the seeds for the Vietnam War; and a dramatic conflict in China, in which the nationalist government of the Republic of China (ROC) was ousted by communists revolutionaries, in 1949, to settle in the Island of Taiwan (the birth of the “Two China Problem.”)  

In the latter struggle the U.S. favored the ROC, and maintained its recognition as the lawful government of all of China; concluded a mutual defense treaty with it in 1954; and conducted joint training with its armed forces. The U.S. has withdrawn its  

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16 See Chapter 11, Sec. II.1.  
19 However, it seems that the U.S. has recognized, at least initially, the insurgency status of the communists (The People’s Republic of China), as it denied the 1949 attempt by the ROC to impose a “paper-blockade” by decreeing all Chinese ports closed. See L.H. Woolsey, Editorial Comment: Closure of Ports by the Chinese Nationalist Government, 44 AM. J. INT’L L. 350 (1950).  
recognition of the ROC only in 1979, and the legal status of the Republic of China/Taiwan remains controversial and ambiguous to this day.\(^\text{21}\)

The advent of cold-war related conflicts has clarified that the zero-sum reality of the post-war system, and the overwhelming bloc-interests at stake, could not be sufficiently addressed by traditional frameworks of neutrality, whether pursued through individual state choice, or by collective arrangements such as the Spanish Civil War’s non-intervention agreement.\(^\text{22}\) Accordingly, in the subsequent decades, American policy regarding the Soviet Union swung between containment, détente and roll-back, each influencing the U.S. doctrines of intervention in their respective periods. These strategies were mirrored, at large, by like doctrines adopted by the Soviet Union. The practice of these doctrines, by both parties, frequently took the form of interventions and counter-interventions for the purpose of support or subversion of allied or opposing governments. In turn, the parties crafted – often \textit{ex post} – legal arguments to justify their actions. As such, the cold-war ushered an era of international law in which the line between legality and narrow bloc-interests was notoriously blurry.

The containment strategy, which endured, on-and-off, for decades, involved the support of \textit{governments} allegedly challenged by pro-Soviet movements.\(^\text{23}\) It can be best exemplified in the Truman Doctrine, designed, as phrased by President Truman himself, to “support free peoples who are resisting attempted subjugation by armed minorities or


\(^{22}\) See Chapter 7, sec. IV.

by outside pressures.”

Containment was constantly rivaled by the détente and roll-back strategies, urging, respectively, the easing of tensions on the one hand versus positive, proactive support to anti-communist insurgents on the other. The roll-back strategy was radical, in its explicit embrace of granting forcible aid to opposition groups, based on ideological considerations.

The roll-back approach, although it had earlier manifestations, is famously associated with the Reagan Doctrine of the 1980s. Never formalized as a comprehensive doctrine, the Reagan Doctrine was mainly articulated by commentators, based on President Reagan’s pledge that the U.S. will “stand by” its democratic allies to “defy Soviet supported aggression,” while asserting that “support for freedom fighters is self-defense.” It was summarized, by Jeane Kirkpatrick – one of its chief ideologues – as condoning support for insurgencies, including by military means, under certain circumstances:

... where there are indigenous opponents to a government that is maintained by force, rather than popular consent; where such a government depends on arms supplied by ...
foreign sources; and where people are denied a choice regarding their affiliations and future.\textsuperscript{30}

Understood as such, the Reagan Doctrine was essentially one of consensual, ostensibly pro-democratic counter-intervention in internal armed conflicts, \textit{in favor of opposition groups}. It was consensual, in the sense that it was partial: which means, that an intervention, \textit{a priori}, must have received some consent of an indigenous party. As such, the Reagan Doctrine went further than the traditional counter-intervention doctrine – which we address later on – which seems to have been to justify intervention in favor of governments. The Reagan Doctrine was thus, seemingly, behind the U.S. military aid to the mujahedeen in Afghanistan, to UNITA in Angola and the invasion of Grenada (to the extent that it was not conducted with governmental consent).\textsuperscript{31} Perhaps the quintessential case of the Doctrine was the U.S. aid to the Contras in Nicaragua.\textsuperscript{32}

The American containment and roll-back approaches were paralleled, at large, by the Soviet Brezhnev Doctrine, which justified intervention to protect socialist regimes from internal challenges, and was sometimes extended to support for “national liberation movements” confronting non-socialist regimes.\textsuperscript{33} In essence, like the Reagan Doctrine, it


\textsuperscript{31} Kirkpatrick & Gerson, \textit{supra} note 30, at 19–20.

\textsuperscript{32} On these cases and others see JAMES M. SCOTT, \textit{Deciding to Intervene: The Reagan Doctrine and American Foreign Policy} (1996). On the Reagan Doctrine, its neo-realist underpinnings and international law see David J. Scheffer, \textit{Introduction, in Right v. Might, supra} note 30, at 1, 11. It should be noted, that Jeane Kirkpatrick, a member of the Reagan cabinet and a chief ideologue of the Reagan Doctrine, saw the Doctrine as not applying to the Grenada context since it was an intervention with the consent of what the U.S. saw as a legitimate authority. See Kirkpatrick & Gerson, \textit{supra} note 30, at 19.

was a substantive approach towards internal strife, concerned not with democracy but with the promotion of the Soviet-style socialism, which Brezhnev also linked to the principle of self-determination.\(^{34}\) Soviet containment doctrine was employed in several instances until the early 1980s.\(^{35}\)

These cold-war doctrines reflected a significant departure from traditional law, since by relying on substantive justifications – such as the promotion of democracy or socialism – they were contrary to the effectiveness principle and closer to legitimist approaches. However, considering the zero-sum character of the international system of the time, it comes as no surprise that rather than being conducted on a principled level, the contemporaneous legal debate regarding this issue was often merely a hollow pretext meant to justify these doctrines in specific instances.\(^{36}\)

Accordingly, at different times, different legal justifications were tailored to match cold-war interventions. Containment interventions, such as the 1958 Lebanon intervention, and perhaps the 1983 Grenada invasion, were justified by the U.S. on counts of government consent, enhanced by claims of counter-intervention. The latter was also justified on counts of the need to protect American nationals.\(^{37}\) The Soviet Union explicitly cited government in order to justify its 1968 invasion of Czechoslovakia; it went even further by arguing, along with its allies, that interventions upon request are not at all an issue to be discussed in the Security Council.\(^{38}\)

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\(^{37}\) See sec. IV.2.

and namely the American roll-back intervention in Nicaragua, was justified on counts of a wide interpretation of the right of individual and collective self-defense (recall President Reagan’s assertion that “support to freedom fighters is self-defense.”) Such interventions were also vindicated, by American commentators, through a narrow construction of the prohibition on the use of force set forth in Article 2(4) of the U.N. Charter. We shall address the concepts of counter-intervention and collective self-defense later on.

Interestingly, with regards to the intervention in Nicaragua, a split can be identified between the high-discourse of the Reagan Doctrine, in its support to “freedom fighters,” and the actual legal justifications presented in front of ICJ in the Nicaragua case. As we shall see, the U.S. did not rely there on opposition consent or on democratic legitimism, but rather chose to set forth a less controversial claim: it advanced, mainly, a wide interpretation of the right to collective-self-defense in favor of neighboring El-Salvador, rather than invoking a novel theory of intervention. This raises doubt as to the extent the U.S. itself saw the Reagan Doctrine – at its most extreme understanding – as compatible with positive international law. Indeed, as we shall demonstrate later, the Reagan Doctrine was deemed unlawful by the ICJ, whether it was based on opposition consent or on a wide interpretation on the right of collective self-defense.

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39 Supra, n. 29.
41 See Sec. IV.3.
The Brezhnev doctrine, on the face of it, was also rejected by the international community, in light of the general condemnation of the Czechoslovakia invasion of 1968.\textsuperscript{43} A Security Council Resolution condemning the invasion was rejected only on counts of a Soviet veto.\textsuperscript{44}

While the collapse of the Eastern Bloc necessarily brought an end to the Brezhnev doctrine, the Reagan Doctrine can be linked to contemporary views supporting forcible unilateral pro-democratic intervention based on a “democratic entitlement,” a concept which we discuss later.\textsuperscript{45} The difference being that in the contemporary system, arguably, there is more space for principled application of international norms. Nonetheless, during the cold-war, international lawyers had to struggle – perhaps in a “fighting retreat” – in their attempts to breathe order and principle into the blatantly self-interested dynamics of the time.

\section*{III. The Strict Abstentionist Approach}

\subsection*{III.1 Strict-Abstentionism}

Article 3(e) of the Definition of Aggression as well as Article 20 of both the Articles on State Responsibility and on the Responsibility of International Organizations, refer to the consent of \textit{states} as precluding aggression or wrongfulness. In the same vein, Article 2(4) of the U.N. Charter prohibits the use of force against \textit{states}. This is not surprising, as the state is the basic legal personality in international law. However, it is not specified who is entitled to \textit{speak} for the state and thus express \textit{valid} consent to a forcible intervention, in

\begin{footnotesize}
\begin{enumerate}
\item 1968 Y’BOOK U.N. 301–302.
\item HENKIN, supra note 34, at 118 –119; Winer, supra note 26, at 186 –188.
\end{enumerate}
\end{footnotesize}
a certain instance. As we shall see, the state is usually represented, in the international realm, by a government.\textsuperscript{46}

However, a state and its government are not synonymous.\textsuperscript{47} For this reason, it is equally unsurprising that in parallel to the understanding of Article 2(4) of the Charter as allowing for a “government preference,” there has been a longstanding and persistent view suggesting that the norm of non-intervention requires \textit{strict abstention} in cases of \textit{purely} internal armed conflicts (as opposed to conflicts fomented and assisted by external “subversive intervention,” in which counter-intervention was looked favorably also by strict-asbtentionists).\textsuperscript{48}

Strict-abstention was viewed as necessary both to ensure that the conflicting community will determine its own fate without external interference, and in order to minimize international use of force. The connection (or its absence) between this idea and the belligerency doctrine has been addressed thoroughly in Chapter 5, where we discussed the concept of the recognition of belligerency and mandatory neutrality; we have also discussed at length why such a perception, in the era of the war-prerogative, was very difficult to justify. Nevertheless, strict-asbtentionism stresses, when evaluating internal armed conflicts, the \textit{uncertainty of the outcome} of the conflict as the driving force of abstentionism, rather than relying on formal distinctions such as the belligerency doctrine.\textsuperscript{49} Indeed, once a prohibition on the use of force was set forth, a logical legal claim could be that in times of internal armed conflict, neither the government nor the opposition fully represent the state; and therefore forcible intervention on behalf of \textit{either}

\textsuperscript{46} See Settlers of German Origin in Poland, Advisory Opinion, 1923 P.C.I.J. 22 (ser. B) No. 6 (sept. 10); \textit{cited in} Doswald-Beck, \textit{supra} note 1, at 190.
\textsuperscript{47} \textit{LASSA OPPENHEIM, 1 INTERNATIONAL LAW} \textsection 75. 77 (2\textsuperscript{nd} ed., 1912).
\textsuperscript{48} Wright, \textit{supra} note 13, at 124.
\textsuperscript{49} \textit{Id.} at 122.
party constitutes a “use of force against the territorial integrity or political independence” of the state, as well as a violation of the norm of non-intervention.\footnote{See, e.g., ANTONIO CASSESE, INTERNATIONAL LAW 371 (2005).}

If one subscribes to strict-asbtentionism, the question of threshold immediately arises: its is necessary to identify the circumstances in which such a duty of abstention materializes. Some strict-abstentionists provide a simple answer – the mere \textit{request} for assistance establishes an irreversible presumption that the government is no longer effective, and therefore does not possess the sovereign power to express valid consent.

The allure of strict-asbtentionism to international lawyers in the cold-war zero-sum system was clear. However, it should be noted that the theoretical background of the approach is an orthodox – perhaps almost Darwinist – understanding of the concepts of non-intervention and self-determination, very much rooted in the idea of effective control over territory the prime source of sovereignty.\footnote{For a summary of strict-abstentionist and close approaches see John A. Perkins, \textit{The Right of Counterintervention}, 17 GA. J. INT’L & COMP. L. 171, 183–195 (1987).} As such, it derives from the works of classic theoreticians of the latter concept. One of the most eloquent manifestations of this approach could be found in an 1860 work by Montague Bernard.\footnote{MONTAGUE BERNARD, \textit{ON THE PRINCIPLE OF NON-INTERVENTION} (1860).} It is worthwhile to examine it in some detail, as it provides a clear rationalization for a robust approach of strict-abstentionism.\footnote{The theoretical argument underlying Bernard’s work is of contemporary interest, although, as discussed in Chapter 5, Bernard did not substantially explain the \textit{legal} discrepancy between his rigid perception of non-intervention and the war-prerogative.} Bernard’s argument retains its relevance, as his core claims have remained virtually unaltered in later works of strict-abstentionists.

Thus, Bernard saw non-intervention as a cardinal condition for the existence of a system of states,\footnote{\textit{Id.} at 5–8.} and also as a utilitarian requirement:

\begin{itemize}
\item[50] See, e.g., ANTONIO CASSESE, INTERNATIONAL LAW 371 (2005).
\item[52] MONTAGUE BERNARD, \textit{ON THE PRINCIPLE OF NON-INTERVENTION} (1860). The theoretical argument underlying Bernard’s work is of contemporary interest, although, as discussed in Chapter 5, Bernard did not substantially explain the \textit{legal} discrepancy between his rigid perception of non-intervention and the war-prerogative.
\item[53] \textit{Id.} at 5–8.
\item[54] \textit{Id.} at 9.
\end{itemize}
... it [intervention] has a direct tendency to produce mischiefs worse than it removes. It encourages a proneness to resort to violent measures ... It destroys national self-respect and self-reliance. It interrupts the natural process by which political institutions are matured through the ripening of political ideas and habits. What it plants does not take root; what it establishes does not endure.\footnote{Id. at 9–10.}

Much of Bernard’s reasoning dealt with the rejection of consent, in its various forms, as a justification for intervention. First, he rejected the legality of forward-looking intervention treaties – not a rare occurrence throughout history – which are concluded in advance for the “maintenance of a particular dynasty or of particular institutions.”\footnote{Bernard gives the examples of “ancient treaties” between Britain and Portugal, that were invoked in 1828 by Brazil (perhaps by a claim of succession), to secure British intervention in an internal struggle against Don Miguel; another example was the 1815 treaty between Austria and The King of the Two Sicilies. \textit{Id.} at 14.} Loyal to the understanding of governments as separate entities from states, he concluded that “no Government is authorized to degrade by compact the country it rules into a condition of real vassalage,” unless it agrees, essentially, to waive its independence altogether.\footnote{Id. at 11.} He then proceeded to address the question of \textit{ad hoc} intervention requested by a “legitimate” sovereign. Such cases, according to Bernard, could not exist since there was no such thing, in international law, as a “legitimate” sovereign.\footnote{Id. at 14 –15.} Furthermore, since he perceived sovereignty as a corollary of territorial effective control, the \textit{mere request} for assistance indicated, in his eyes, the lack of effectiveness:

\footnote{Id. at 15. The term “legitimate,” used here by Bernard, should be read in the context of the 19\textsuperscript{th} century debate between the legitimism doctrine and the effectiveness approach to sovereignty. \textit{See supra}, at p. X.}
[w]hat rights does he thus to act as sovereign who admits that he has ceased to be so, or that his sovereignty is (to say the least) in abeyance? How can he impersonate his people[,] who is begging the assistance of a foreign Power in order to reduce them to obedience?\(^{60}\)

If intervention by sovereign consent was unlawful, does the right of consent belong to the “people” of the state? Here Bernard takes up an argument with Grotius, who argued, from a classical just war perspective, that a \textit{manifest} tyrant, committing atrocities against his own people, can be overthrown with the assistance of foreigners, but not in case of doubt.\(^{61}\) Bernard rejected this position, claiming that it is based on “morality” rather than law, contending that it can never be objectively ascertained when a sovereign is beyond doubt a “manifest” tyrant.\(^{62}\) He further rebuked the claim that this problem can be solved by relying on the decision of the people, since it is never clear who the “people” are. Bernard’s cold logic deduced that if by “people” we mean the “majority,” the intervention would essentially be in favor of “a majority that is not strong enough to have its way” by imposing its will on the minority, a fact that contravened the principle of effectiveness.\(^{63}\) Bernard thus directly challenged the majoritarian-democratic principle, first by pointing out the difficulty of ascertaining the majority’s view, and even questioning whether a majority is entitled to “control the destiny of a nation” to begin

\(^{60}\)\textsc{Bernard, supra} note 52, at 16.
\(^{61}\)1 \textsc{Hugo Grotius, The Rights of War and Peace}, Book 2, Ch. 25, §8 (William Whewell, trans. 1853) (“But the case [regarding intervention] is different if the wrong is manifest. If a tyrant like Busiris, Phalaris, Diomede of Thrace, practices atrocities towards his subjects, which no just man can approve, the right of human social connexion is not cut off … in such cases, what is not lawful to one person [the subject] may be lawful to another for him [the intervening power], if it be a case in which one can help another.”)
\(^{62}\)\textsc{Bernard, supra} note 52, at 17.
\(^{63}\)\textit{Id}. at 17.
with, again maintaining that governing power should be based strictly on effective control.\textsuperscript{64}

Lastly, Bernard confronted the possible position that in the case of “civil war” states are free to intervene in favor of \textit{both} parties, and specifically the position endorsed by \textit{Vattel}, according to which the intervention must be conducted in favor of the \textit{just} party.\textsuperscript{65} To this approach Bernard responded by adopting a highly abstract view of the state, emphasizing that a state undergoing a “civil war” does not cease to be an integral state; and that the fact that it has no functioning sovereign does not mean that it is no longer “independent” in relation to other states. He thus concluded that foreign intervention, on counts of either side, “gives superiority to the side which would not have been uppermost without it, and establishes a sovereign, or a form of government, which the nation, if left to itself, would not have chosen.”\textsuperscript{66}

Bernard’s approach was clearly echoed in the works of later scholars. \textit{Hall} and \textit{Wilson} followed Bernard’s logic – the former arguing that the mere fact “that it has been necessary to call in foreign help is enough to show that the issue of the conflict without it be uncertain,”\textsuperscript{67} and the latter adding that in such cases the government is not the \textit{de facto} power in the state.\textsuperscript{68}

\begin{itemize}
\item \textsuperscript{64} \textit{Id.} at 17–18. Bernard seems to parallelize effectiveness with “success achieved by unassisted effort.”
\item \textsuperscript{65} \textit{Id.} at 20–21; \textsc{Emmerich de Vattel} \textsc{The Law of Nations} §§294–296 (1797), \textit{available at} http://books.google.com/.
\item \textsuperscript{66} \textit{Bernard}, \textit{supra} note 52, at 21. According to Bernard, one possible exception to this reasoning occurs when succession occurs – effectively creating two states – and thus the intervention ceases to be in the internal affairs of a state. \textit{Id} at 22.
\item \textsuperscript{67} \textsc{W.E. Hall}, \textsc{A Treaties on International Law} 347 (8\textsuperscript{th} ed. 1924); \textit{cited in} Doswald-Beck, \textit{supra} note 1, at 196; Wright, \textit{supra} note 13, at 121–122.
\item \textsuperscript{68} \textsc{George Grafton Wilson}, \textsc{International Law} 93–94 (8\textsuperscript{th} ed. 1922) (“The principle may now be regarded as established by both theory and practice that the invitation of neither party to a domestic strife gives a right to a foreign state to intervene, and that no state has a right to judge as to the merits of the contest …”) 
\end{itemize}
Almost a century after Bernard, Lauterpacht presented a developed – and indeed sophisticated – version of the strict-abstentionist principle, based on the principle of self-determination. Lauterpacht accepted, in general, the principle of government-preference, which he saw as applying “so long as the lawful sovereign authority has not been definitely supplanted,” and manifested through a “presumption in favour of established governments,” which applied so long as the conflict was in progress.

However, as he saw the practical effects of the presumption in favor of the government as very limited, and in any case not extending beyond the duty of states not to prematurely recognize the opposition as a government, and the obligation not to permit hostile operations against the government from their territories. Lauterpacht viewed any intervention beyond this narrow preference as a “denial of the right of the nation to decide for itself – by a physical contest, if necessary, between rival forces – the nature and the form of its government.”

Of particular interest to us is the fact that Lauterpacht injected substantive considerations into his limited, effectiveness based view of the government-preference principle, arguing that limitations on consent power of governments are due “so long as the international community has no such control over them as to secure effectively the fundamental rights of the individual and decent administration of the law.” This position can be understood as willing to recognize a more robust presumption in favor of governments, contingent upon the development of international human rights institutions.

69 HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 233 (1948).
70 Id. at 93 –94.
71 Id. at 233.
72 Id.
73 Id. at 234.
The reliance on the idea of self-determination as a rationale for strict-abstentionism has understandably found its way into the works of predominant scholars of the cold-war and decolonization era. Brownlie, Bowett, and Wright saw every external intervention in civil strife as contradicting the right to self-determination.74 Wright went as far as arguing that if intervention on part of any party be allowed, the “‘right of revolution’ implicit in the concepts of sovereignty and self-determination would be denied,” and that therefore, “[a] government beset by civil strife is not in a position to invite assistance in the name of the state.”75

An approach similar to Lauterpacht’s, endorsing strict-abstentionism while hinting to a substantive analysis of the parties, was reflected in a 1975 resolution by the Institut de Droit International.76 In its resolution, the Institute opined that in any case of internal armed conflict, “[t]hird States shall refrain from giving assistance” to the parties,77 and enumerated the actions that constituted such assistance.78 However, two significant qualifications have been made to this resolution, perhaps challenging its distinction as strict-abstentionist.

First, the resolution excluded from the definition of civil wars “conflicts arising from decolonization.”79 The exclusion of colonial wars from the internal sphere is a generally accepted approach in international law, but this exclusion, in itself, was a

74 Ian Brownlie, International Law and the Use of Force by States 327 (1963); Derek Bowett, The Interrelation of Theories of Intervention and Self-Defense, in Law and Civil War in the Modern World 38 (John Norton Moore ed. 1974); Quincy Wright, The Role of International Law in the Elimination of War 61 (1961); all cited in Doswald-Beck, supra note 1, at 200; see also Wright, supra note 13, at 120–121.
75 Wright, supra note 74, at 61, quoted in Doswald-Beck, supra note 1, at 200.
77 Id. art. 2(1).
78 Id art. 2(2). Dinstein viewed this resolution as inconsistent with the understanding of international law and with state practice. Yoram Dinstein, War, Aggression and Self-Defense 119–120 (5th ed. 2011)
79 The Principle of Non-Intervention in Civil Wars Art, supra note 76, art. 1(2)(c).
development of the U.N. era – nowadays taken for granted – that reflected a movement away from effectiveness based views of the international system. Second, the resolution seems to have restricted its application to certain internal armed conflicts only, alluding to the need for a substantive analysis of conflicts. This was reflected in the preamble, stating that the Institute was “[r]eserving the study of issues arising from the danger of extermination of ethnic, religious or social groups or from other severe infringements of human rights during civil war.”

Cassese also adopted a rather complex approach. On the one hand, he conceded that “[s]tate practice makes extensive use of the consent exception;” on the other, he saw this practice as “hardly” conforming to present day international law. He accepted that there are situations in which a government can authorize the deployment of forces on its territory, but qualified that “a State may not authorize another State to use force on its territory with a view to establishing control over the population of the consenting State.” Whether or not Cassese’s approach can be described as strict-abstentionist depends on our interpretation of the phrase “establishing control.” To the extent that Cassese meant any loss of control, he alluded to a strict-abstentionist approach. However, if by “establishing control” he implied, for instance, to extreme circumstances of state-failure, then he indeed accepted a qualified principle of government-preference.

Strict-abstentionism has resurfaced, rather recently, in the report of the Independent Fact-Finding Mission on the 2008 Conflict in Georgia. Here, among its other claims, Russia argued that it had intervened in Georgia by invitation of South Ossetia –

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80 As discussed in Chapters –6, colonial wars of the 19th century were viewed as internal armed conflicts.
81 Id. prmb. For an analysis of the resolution, see Schachter, supra note 3, at 1643. For an updated resolution by the institute see Institut de Droit International, Military Assistance on Request (Sept. 8, 2011).
82 ANTONIO CASSESE, supra note 50, at 370.
83 Id. at 371.
the secession seeking party. The report noted that in “traditional writing,” only the established and internationally recognized government could consent to forcible intervention. It argued, however, that the government-preference approach was problematic, since it could lead to the “undesirable” result of states recognizing governments wantonly, as pretext for forcible intervention. The report then proceeded to present a “new doctrine” – that as we seen, is hardly a novel one – according to which:

... in a state of civil war, none of the competing fractions can be said to be effective, stable and legitimate. Therefore, it is argued that the principle of non-intervention and respect of the international right to self-determination renders inadmissible any type of foreign intervention, be it upon invitation of the previous “old” government or of the rebels.

The report based this claim on the principle of self-determination, which it saw as “incumbent on peoples, and not on governments or on competing factions.” It then concluded that this approach is “prudent from a policy perspective” and that it is confirmed by state practice (without exemplifying,) and accordingly, that South Ossetia’s invitation could not have legalized the Russian intervention. Nevertheless, it is important to note that the report was careful not to unequivocally legally endorse either of the competing positions, since both the position of government preference and of strict-

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85 Id. at 277.
86 Id.
87 Id. n. 180.
88 Id. at 279.
abstentionism deny, in general, forcible intervention in favor opposition parties. Thus, the report could avoid making a clear decision favoring one of the approaches over the other.

III.2 A CRITIQUE OF STRICT-ABSTENTIONISM

While the strict-abstentionist position might seem initially compelling, it does not remain sound after a closer analysis. Barring the reference in the Report on Georgia, most of the positions expressly favoring this approach are products of the era of decolonization and the cold-war. As such, these opinions must be understood in light of their historical context. At the time, the international discourse was especially sensitive to attempts of colonial or ex-colonial powers to prop-up illegitimate governments in their present or former colonies, or to the manipulations of the rivaling blocs competing for global influence. With the end of the cold-war, and considering the transformation of the principle of self-determination in the decolonized world – from one primarily concerned with achieving the independence of colonies to one which connotes some form of democratic deliberation or political participation – it is doubtful whether strict-abstentionist positions, as such, can remain unaltered.

Furthermore, even if one still subscribes to the effectiveness doctrine as the main source of sovereign power, the mere request for assistance is not an absolute proof that the government does not exercise effective control. For instance, one can imagine a situation in which a government requests the aid of a neighboring state, perhaps because the latter possesses capabilities that can help it quash the insurgency faster, or with less

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casualties; there are a myriad other possibilities in which a request for assistance will not necessarily connote that the government is no longer the *de facto* power. Perhaps, in legal terms, the mere request for assistance can serve as *evidence* for lack of effectiveness, but not more.

Strict-abstentionism seems to have also envisioned, in general, a simplistic understanding of internal armed conflicts, corresponding mainly to the classic scenario of a struggle for control over the state apparatus. In such cases, presumably, a coherent case can be made for non-intervention for the sake of fulfillment of the right to self-determination. However, as we saw in Chapter 2, the sheer complexity of contemporary internal conflicts rarely coincides with such simple models. Indeed, beyond the classic recognition of a counter-intervention exception,\(^{91}\) strict-abstentionism does not address other complex scenarios.

For instance, strict-asbtentionism does not provide a satisfactory answer to struggles of secession, which challenge interests of the international system, such as the principle of territorial integrity, that clash with strict-abstentionism’s simplistic model of non-intervention. Moreover, it does not clarify the theoretical basis for abstention in instances where the conflict contains an element of irredentism. It further fails to lay down a rational position regarding situations in which opposition groups are comprised of non-citizens whose actions cannot be imputed to external states – for instance, such as the PLO in Lebanon during the Lebanese Civil War or the FDLR militias in Eastern DRC – cases in which the principles of non-intervention and self-determination lose much allure, being that some of the involved parties are external to the state’s citizenry. It certainly cannot justify abstentionism in cases in which the opposition itself seeks to deconstruct

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\(^{91}\) *See* Chapter 9 sec. III.
the international order of states, such as when it is a part of a transnational network seeking to dismantle the state altogether (such as in the context of struggles against Al-Qaeda and comparable groups).

Moreover, the concept of strict-abstentionism is questionable also in terms of its inner logic: while hailing its supposed neutrality, strict-abstentionism does not amount to non-intervention in the true sense. On the contrary, it is tantamount to the complete preference of the party which is militarily stronger, which is not a less of a moral judgment than positive forcible intervention. In an era in which the international community is preoccupied with the protection of civilians, as discussed in Chapter 10, strict-abstentionism amounts to indifference, not to non-intervention. As such, strict-abstentionism is directly contradictory to emerging practice of the international system. For instance, the Responsibility to Protect concept, which is addressed later on, is built on the exact opposite premise – according to which the international community should be encouraged to assist a state that requests help in the face of mass atrocities, in order to allow it to exercise its responsibilities.⁹²

Thus, and most importantly, the strict-abstentionist principle reflects a harsh interpretation of the right of self-determination and the norm of non-intervention, which perhaps was reasonable in the era of decolonization, but seems unfitting in contemporary international law. In particular, this is evident considering the disastrous consequences of the ostensible “neutrality and impartiality” assumed by the international community in the face of the mass atrocities in Rwanda (1994) and Srebrenica (1995).⁹³ In essence, therefore, strict-abstentionism condones the view that the fulfillment of self-

⁹² Under the “RtoP pillar” of “international assistance and capacity building. See Chapter 10, sec. II.
⁹³ See ANNE ORFORD, INTERNATIONAL AUTHORITY AND THE RESPONSIBILITY TO PROTECT 8 (2011).
determination is a corollary of a party’s capability to effectively use violence, while the principle is conversely understood, nowadays, to connote political participation. In this context, strict-abstentionism can lead to undesirable results in instances where atrocities are committed and the Security Council fails to act, or when it acts insufficiently.

In light of all of the above, it is safe to say that the contemporary international system, with its various instruments that regulate intra-state conduct, is one in which “the impossibility of neutrality” prevails, possibly rendering obsolete the concept of strict-abstentionism.

IV. THE REBUTTABLE PRESUMPTION IN FAVOR OF GOVERNMENTS

IV.1 THE GOVERNMENT AS THE REPRESENTATIVE OF THE STATE

While the strict-abstentionist approach has been adopted by prominent scholars of international law, it is strikingly scarce in the opinio juris of states. This fact has been true, of course, in the pre-Charter era, when the discourse of belligerency emphasized the element of choice; as we shall see, this is also the case in contemporary practice. This is perhaps unsurprising, as the opinio juris of states is conveyed primarily by governments; accordingly, any government that would advocate strict-abstentionism would thereby negate also its own ability to request external support, in time of need, and all this without any visible reciprocal advantage. This notion is reflected in the fact that U.N. General Assembly declarations that have addressed the issue of intervention, have expressly

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96 See ORFORD, supra note 93, at 192–199.
referred to the prohibition on supporting opposition groups, while leaving the question of aiding governments, at most, vague. Indeed, while governments, and in particular the non-aligned bloc of the cold-war era, frequently referred to the principle of non-intervention – for instance, as we shall see, in the case of Grenada – they did not develop this principle so far as to negate the principle of government preference altogether.

The strict-abstentionist approach, thus, is usually countered through the recognition of a “qualified” principle of government preference. Following Lauterpacht, I refer to this preference as a *presumption*, since virtually no contemporary source of international law condones an unlimited preference of governments in the context of external forcible assistance. We shall elaborate on the scope of the preference of governments – or the grounds for the rebuttal of the presumption – in later chapters.

The presumption in favor of governments is thus structured around the basic premise of international law that the entity that speaks for the state is the recognized and established government. The government is but the “human agent” of the abstract juridical personality which is the “state,” and as such, it represents the latter in the international sphere. When reading this principle in light of article 2(4) of the U.N. Charter, Article 3(e) of the Definition of Aggression and article 20 of the ILC Drafts, it

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99 Lauterpacht, *supra* note 69, at 87.
merits at least the *prima facie* presumption that a government speaks for the state when expressing consent to forcible intervention.  

Indeed, the International Law Commission understood Article 20 of the ILC Draft precisely in this way. In its deliberations regarding the potential of consent as precluding the wrongfulness of an act, the Commission analyzed state practice regarding consensual intervention in favor of governments, and concluded that such consent has "nearly always" been invoked as justification for interventions, and that in the ensuing U.N. discussions, "no State contested the validity of the principle that the consent of the territorial State precluded – as a general rule – the wrongfulness of the sending of foreign troops into its territory." Rather, the disagreement usually revolved around the application of the principle in the specific circumstances.  

It is therefore well established that beleaguered governments can, in principle, consent to an external forcible intervention, whether it amounts to a full-sized...
invasion such as the case was in the DRC,\textsuperscript{104} as well as when it is limited to relatively narrow operations such as cross-border drone attacks.\textsuperscript{105}

IV.2 THE PRESUMPTION IN FAVOR OF GOVERNMENTS IN PRACTICE

When analyzing the practice of states regarding consensual intervention in the U.N. Charter era, it is helpful to distinguish between the period of the cold-war era and the subsequent decades. During the cold-war, states did not object to the government preference principle, precisely because members of both blocs utilized it for their own benefit. After the cold-war – and \textit{a fortiori} after decolonization – the eradication, at large, of the bloc-rivalry, as well as the contemporary scarcity of “national liberation” struggles, significantly reduced the motivation of states to oppose consensual interventions to begin with.

Furthermore, the proliferation of internal conflicts in ex-Yugoslavia and Africa, and the accompanying mass atrocities, shifted the international attention to the pursuit of stability. Attempts to mitigate the catastrophic results of internal strife were undertaken, many times, through active regional and international cooperation with beleaguered or transitional governments, or by international acquiescence to such actions when conducted by individual states. In a sense, in the post cold-war world, the preference of governments has virtually come to be taken for granted.

\textsuperscript{104} See Christine D. Gray, \textit{International Law and the Use of Force} 70–71 (2008) (demonstrating that in general, in its approach towards the Second Congolese Conflict, the Security Council “took a clear position: aid to the government was permissible, intervention or force to overthrow the government was not.”) \textit{See also id.} at 73–74.

Indeed, the understanding of international law as generally permitting consensual intervention in favor of governments, has been prevalent in state practice in the first decades of the U.N. system, although – and especially in the era of decolonization and in the height of the cold-war – frequently abused. However, interestingly, even in the most controversial cases of intervention, the grounds for objection by other states did not focus on the principle of government preference. In 1957 the U.K. justified its intervention in Muscat and Oman, in favor of the ruling Sultan and against the seceding Imamate, as being "at the request of a friendly ruler." The Arab states requested that the Security Council consider the British intervention, but not on counts of their rejection of the principle of government consent. They claimed, rather, that the secession seeking Imamate of Oman was an independent state, and therefore the British intervention constituted a threat to international peace and security. The U.K. argued that the Sultan of Muscat was sovereign over Muscat as well Oman, and therefore was entitled to support in an “internal” issue. The Security Council refused to place the issue on the agenda. Similar justification was made by the U.K. in relation to its 1958 intervention in Jordan.

The 1958 American intervention in Lebanon was justified on counts of the explicit consent of Lebanese President Chamoun, ostensibly in his struggle against pro-Nasserite elements in Lebanon. As such, this intervention was supplemented with the common cold-war era claim of “counter-intervention” as a supporting justification for

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107 ANTONIO TANCA, FOREIGN ARMED INTERVENTION IN INTERNAL CONFLICT 150 –151 (1993); ILC Report, supra note 101, at 31 n. 132.
109 ILC Report, supra note 101, at n. 133.
government consent. This justification was controversially bound, in this case, to the invocation of “collective self-defense” arguments. Nonetheless, in an emergency meeting of the Security Council, the American and Lebanese representatives clarified that the U.S. forces were invited by Lebanon. Two conflicting draft resolutions by the U.S. and U.S.S.R were rejected by mutual veto; however the U.S. resolution enjoyed a large majority of supporters.

Further cold-war and colonialism-related examples of interventions justified, *inter alia*, on counts of government consent, are abundant. Such was the 1962 Egyptian intervention in Yemen; the 1956 Soviet intervention in Hungary and the 1964 interventions of Belgium in Congo and of France in Gabon; France also invoked the consent justification in its 1958 Chad intervention, and in its 1979 operation in the Central African Republic. The later cases were part of a general French policy of consensual interventions in former colonies, usually in favor of challenged governments. France’s interventions were, in general, based on forward-looking intervention treaties concluded with ex-colonies. Even the recent French participation in the 2011 operation in Côte D’Ivoire can be traced to such an agreement, in addition to a Security Council authorization. The same principle can be found also in the Security Council’s reaction

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111 See Wright, *supra* note 13, at, 113, 120. The U.S. claimed that the 1958 Lebanon affair was an indirect-aggression, related to “communist” policies in Greece (1947), Czechoslovakia (1948), China (1949), and Korea and Indochina (1950). See id. As we saw in Chapter 4, indirect aggression has been rejected by the ICJ, in the Nicaragua case, as a justification for collective self-defense, since it was not viewed by the majority as an “armed attack”. See also CASSESE, *supra* note 50, at 364–365, 370.
115 GRAY, *supra* note 104, at 85.
116 Id. at 85–86.
118 See Chapter 11, sec. I.3.
to the multiple mid-1970s interventions in Angola, where a clear and explicit preference was given to the consensual (counter) interventions in favor of the MPLA government.\textsuperscript{119}

The consent justification could be found also in the context of operations undertaken by regional powerbrokers. Syria, for instance, justified its 1976 intervention in Lebanon on counts of an invitation by the Lebanese president.\textsuperscript{120} India’s massive 1987–1990 intervention in Sri Lanka, ostensibly to assist the government against the Tamil Tigers, was justified on counts of consent, “in response to a specific request from the Government of Sri Lanka, and in full conformity with international law,”\textsuperscript{121} to the general acquiescence of the international community.\textsuperscript{122}

Indeed, some interventions were widely condemned. However, the condemnations did not explicitly negate the notion of government preference, but rather focused on the specific circumstances. In April 1965, American forces intervened in the Dominican Republic, following heavy fighting between two contending governments. The American operation was endorsed by states party to the Organization of American States (OAS,) but explicitly supported in the Security Council only by the United Kingdom.\textsuperscript{123} The U.S. justified its intervention mainly on counts of protection of nationals, but also argued that it had been “informed by the military authorities” that its

\begin{footnotes}
\item[122] GRAY, supra note 104, at 86–87.
\item[123] Id. at 91; 1965 Y’BOOK U.N. 140–155.
\end{footnotes}
military assistance was required.\textsuperscript{124} It further stressed the need to prevent the emergence of a communist government.\textsuperscript{125}

In the discussions of the matter in the Security Council, the U.S.S.R. – supported by its allies – argued that the intervention was, in essence, an attempt “to keep in power a dictatorship” which aimed to suppress a national liberation movement.\textsuperscript{126} Other condemning states, it seems, denied the existence of consent, alleging that the U.S. acted upon its “own assessment of the situation.”\textsuperscript{127} To conclude, the colliding American, Soviet and non-aligned positions, as they were presented, were based on the nature of the ostensibly consenting party, or on the question of existence of valid consent, but not on a principled negation of the presumption in favor of governments. The resulting resolutions 203 and 205, laconically called for a “strict cease-fire” without clarifying this matter.\textsuperscript{128}

Similar positions were advanced regarding the 1968 Soviet invasion of Czechoslovakia, although it was not an intervention in an internal armed conflict \textit{per se}. Among other claims, the U.S.S.R. has justified its actions on counts of government consent. While the invasion was condemned by many states, the positions of the U.S., Canada, China, Denmark, Ethiopia and the U.K. involved the claim that the U.S.S.R. has failed to “document” the Czechoslovak consent.\textsuperscript{129} The Czechoslovak representative also denied the existence of consent.\textsuperscript{130} A draft resolution submitted by Denmark expressed

\textsuperscript{125} \textit{See} \textit{Id}.
\textsuperscript{126} \textit{Id.} at 140–141.
\textsuperscript{127} \textit{See}, \textit{e.g.}, the statement of Jordan, \textit{id.} at 143.
\textsuperscript{129} 1968 \textsc{Y’Book} U.N. 300.
\textsuperscript{130} \textit{Id.} at 298–299.
“grave concern” that the Warsaw Pact troops entered Czechoslovakia “without the knowledge and against the wishes of the Czechoslovak Government.”

The 1983 American-led, post-coup intervention in Grenada—which was justified, *inter alia*, on counts of an invitation by the island’s head-of-state, the Governor General—was again widely condemned. However, once more, the condemnation did not expressly involve a negation the general principle of government-preference. This might be explained, to some extent, by the fact that the eastern bloc, which led the condemnation of the invasion, could not seriously deny that Cuban troops were also present on Grenadian soil, themselves with the consent of the ousted government of Grenada.

Thus, France, for instance, argued that intervention was allowed “in response to a request from the legitimate authorities,” but that such justification was not admissible in

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131 1968 Y’BOOK U.N. 300.
132 1983 Y’BOOK U.N. 213. It was doubtful whether the Governor General, formally the viceroy of the Queen of England, was actually capable of speaking for the state. See Byers & Chesterman, *supra* note 40, at 271–272. There was also doubt whether the invitation was genuine, see Schachter, *supra* note 3, at 1644–1645; or whether it had any effect on the American decision to intervene to begin with. See Robert J. Beck, *International Law and the Decision to Invade Grenada: A Ten-Year Retrospective* 33 VA. J. INT’L L. 765, 789–790 (1993).
134 The American operation in Grenada raises an interesting question regarding the relations between regional organizations and external parties. The U.S. justified its intervention, besides on counts of Grenadian invitation, *inter alia* on a request by the Organization of Eastern Caribbean States (OECS). See 1983 Y’BOOK U.N. 213. Assuming *arguendo* that the OECS had authority to forcefully intervene in a member state (which was heavily debated,) it is still questionable whether such authority allowed the regional organization to request assistance from an *external* party (here, the U.S.). On the authority of the OECS see Byers & Chesterman, *supra* note 40, at 271–272; for the position of Mexico and an interesting statement by Nicaragua, see U.N. SCOR, 38th Sess., 2487th mtg. at 1–5, U.N. Doc. S/PV. 2487 (Oct. 25, 1983); for the position of Grenada see *id.*, at 10. For the U.S. position see *id.*, 19–20; Letter Dated 25 Oct. 1983 from the Permanent Representative of the U.S. to the U.N. Addressed to the President of the Security Council, U.N. Doc. S/16076 (Oct. 25, 1983).
the specific case. Seychelles recognized the “unquestionable right of any country to call on partners of its own choice for assistance” but emphasized that external states cannot intervene “if not requested to do so.” Grenada itself agreed that “intervention can come only if there is a request from a [OESC treaty] member Government.” Even Cuba, in an attempt to justify its own activities in Grenada, admitted – thus reinforcing the principle of government preference – that there was a presence of a “small military mission advising the Grenadian defense forces and giving assistance to the country.” To this claim, Jamaica answered that Cuban troops were not “properly there at the request of a legitimate government.” Indeed, many states invoked the general principles of non-use of force, non-intervention and self-determination in their statements regarding the Grenada issue, but it is impossible to isolate these positions from the fact that the U.S.-led intervention took place after a coup d’état was effectively completed – and against the will of the self-appointed junta – the consent of the Governor General notwithstanding.

As aforementioned, when the cold-war ended, the discussion of intervention was largely freed from traditional bloc-influences, and the idea of government preference seems to have become taken for granted – subject to limitations that will be explored in Chapter 9. Indeed, when ECOWAS decided to intervene in Liberia in 1990, it cannot be

136 Id. at 8.
137 S/PV.2487, supra note 134, at 10.
138 Id. at 13.
139 S/PV.2489, supra note 135, at 5.
141 See, e.g., the position of Guyana, that opposed the invasion, arguing that “when States arrogate to themselves the right to seek help to destroy the Governments of those States whose policies they find disagreeable, then who among us can feel safe?” [Emphasis added]. S/PV.2487, supra note 134, at 9. See also the position of Grenada, id. at 9–11; compare the position of Saint Lucia, the emphasized the consent of the Governor General. U.N. SCOR, 38th Sess., 2491st mtg. at 3, U.N. Doc. S/2491 (Oct. 27, 1983).
disregarded that consent was expressed by the beleaguered (but still recognized) president, Samuel Doe. Similarly, the ECOWAS 1997 intervention in Sierra Leone was, essentially, a unilateral intervention on behalf of what was perceived by the international community as a consenting government. The ECOWAS operation was authorized, *ex post* by the Security Council. Similarly, Senegal intervened in favor of the government of Guinea-Bissau in 1998, and was subsequently replaced by an ECOWAS force.

In the year 2000, the presumption in favor of governments has been enshrined in the Constitutive Act of the African Union. Article 4(j) entrenches, as a principle of the African Union, “the right of Member States to request intervention from the Union in order to restore peace and security.” This, indubitably, serves as powerful *opinio juris* regarding the principle of government-preference, or, at least, a firm denial of the strict-abstentionist approach.

Examples of the presumption in favor of governments can also be found in the recent decade. Thus, the U.K. justified its 2000 intervention in Sierra Leone, *inter alia*, on its support of a “democratically elected government” against rebel forces. The justification of government consent, in this context, was viewed favorably in a 2009

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143 The Sierra Leone case is complex, as the consenting government was overthrown before the ECOWAS intervention, but it claimed strong democratic credentials — thereby raising the question whether democratically elected governments maintain their international status when deposed by *coup d’états*. See Byers & Chesterman, *supra* note 40, at 288–290. We discuss this issue in Chapter 11. It is worthwhile to note that I am not referring here to the 1994 Haiti intervention, since it was, from the outset, a multilateral Chapter VII action. See Wippman, *supra* note 103 at 293–294, 303–311 (addressing the cases of Haiti and Sierra Leone).
144 Gray, *supra* note 104, at 86.
146 The other justifications were protection of British nationals, and to provide support for the U.N. peacekeeping force. See Gray, *supra* note 104, at 90–91.
report by the U.N. Secretary General, which also implied that the consent justification is indeed a legitimate alternative to Security Council authorization.\textsuperscript{147} Similarly, the Security Council welcomed the 2002 intervention by France in Côte D’Ivoire, to the extent that it was conducted in favor of the government.\textsuperscript{148} Moreover, as we shall demonstrate in Chapter 9, the international community clearly afforded preferred treatment to Ethiopia’s 2006 intervention in favor of the Transitional Federal Government in Somalia, versus the negative approach towards Eritrea’s involvement on behalf of the opposing Islamic Courts Union.\textsuperscript{149}

In the multi-party conflict in DRC, the Security Council distinguished, at least most of the time, between the interventions on behalf of the government and those conducted, notably by Rwanda and Uganda, in support of the rebels.\textsuperscript{150} For instance, in January-February 2009, Rwanda received the consent of the DRC to act against Hutu militias (FDLR) in East Congo, in a deal in which Rwanda was to cease supporting the Laurent Nkunda of the CNDP. The joint operations resulted in Nkunda’s arrest and the neutralization of the CNDP as a fighting force.\textsuperscript{151} U.N. officials saw these actions positively: the Under-Secretary General for Humanitarian Affairs viewed the joint operations as creating “created a new dynamic, which could have a significant and favourable impact.”\textsuperscript{152} The Special Representative of the Secretary General celebrated the “remarkable turnaround” in the DRC, commending the governments of the DRC and

\begin{footnotes}
\item[148] GRAY, \textit{supra} note 104, at 86.
\item[149] See Chapter 9, sec. II.4.
\item[150] See GRAY, \textit{supra} note 104, at 68–73.
\item[151] See Chapter 1, sec. III.3.
\item[152] U.N. SCOR, 64\textsuperscript{th} Sess., 6083\textsuperscript{nd} mtg. at 2, U.N. Doc. S/PV.6083 (Feb. 17, 2009).
\end{footnotes}
Rwanda for their “courageous decision to overcome their previous distrust and to focus on common interests of the future.”\textsuperscript{153} There is no doubt that this generally supportive view of the operations was affected by the fact that they were conducted, \textit{inter alia} against “ex-génocidaires.”\textsuperscript{154} However, this alone does not negate the acceptance of the presumption in favor of governments, but rather hints at its substantive application, as we discuss later on. It is worthwhile to mention, in this context, that the forcible Chapter VII operations of the U.N. mission in Congo, MONUC, were conducted with the consent of the DRC’s government and in “close cooperation” with it, suggesting that governmental consent plays a certain role even in extreme situations of state-failure.\textsuperscript{155} In this context, it is worthwhile to mention also the 2011 intervention by Kenya in Somalia – discussed in detail in Chapter 1 – arguably conducted pursuant to a joint communiqué between the two countries.\textsuperscript{156}

The principle of government preference is also a key premise of American counterinsurgency operations (COIN) in Iraq and Afghanistan. After the 2003 invasion of Iraq, the Security Council recognized the Coalition Provisional Authority as the temporary \textit{de facto} administrator of Iraq,\textsuperscript{157} until a representative Iraqi government assumed responsibility.\textsuperscript{158} The Security Council saw the establishment of an interim Iraqi government on June 30, 2004 as “the end of the occupation” and therefore the end of the administrative powers of the Coalition Authority.\textsuperscript{159} On June 5\textsuperscript{th} 2004, the prime minister of the interim government delivered a letter to the Security Council requesting the

\textsuperscript{153} U.N. SCOR, 64\textsuperscript{th} Sess., 6104\textsuperscript{th} mtg. at 3, U.N. Doc. S/PV.6104 (Apr. 9, 2009).
\textsuperscript{154} S/PV.6083, \textit{supra} note 152, at 2.
\textsuperscript{155} Chapter 1, Sec. III.3.
\textsuperscript{156} Chapter 1, Sec. I.2.
multinational force to stay in Iraq, thereby inviting coalition forces to support the Iraqi government in the face of the various insurgent groups. Accordingly, the Security Council authorized the presence of the coalition forces on Iraqi soil.\footnote{Letter annexed to resolution 1546, supra note 159. Further Iraqi requests for the extension of the multinational forces’ mandate were authorized in S.C. Res. 1637, U.N. Doc. S/RES/1637 (Nov. 8, 2005); S.C. Res. 1723, U.N. Doc. S/RES/1723 (Nov. 28, 2006); S.C. Res. 1790, U.N. Doc. S/RES/1790 (Dec. 18, 2007); See also M. Cherif Bassiouni, Legal Status of U.S. Forces in Iraq From 2003-2008, 11 Chi. J. Int’l L. 1, 7 (2010-2011) (“The Council adopted these resolutions, however, on the basis of the Iraqi government’s successive requests, which U.S. Secretaries of State Colin Powell and Condoleezza Rice responded to in letters. The fact that the Council acted pursuant to a request by a member-state meant the foreign occupying forces became forces invited by a host state, thus giving their presence legitimacy under international law.”)}

In December 2008, a Status of Forces Agreement was concluded between Iraq and the U.S., Article 4 of which provided that “[t]he Government of Iraq requests 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.”\footnote{Agreement between the United States of America and the Republic of Iraq on the Withdrawal of the United States Forces from Iraq and the Organization of their Activities during their Temporary Presence in Iraq, U.S.-Iraq, Dec. 14 2008; on the negotiation and content of the SOFA see Bassiouni, supra note 160, at 9–20.} In essence, the agreement changed the status of U.S. forces in Iraq from operating under U.N. auspices to forces invited bilaterally to assist Iraq in its internal conflict.\footnote{See letter dated 7 December 2008 from the Prime Minister of Iraq addressed to the President of the Security Council, annexed to S.C. Res. 1859, U.N. Doc. S/RES/1859 (Dec. 22, 2008).}

Furthermore, consent has been cited as a lawful potential justification for the American intervention in Afghanistan, even by those who are generally reluctant to grant a carte-blanche for forcible operations within the context of the so-called “war on terror.”\footnote{See, e.g., Rise of the Drones II: Examining the Legality of Unmanned Targeting: Hearings Before the Subcomm. On Nat’l Sec. & Foreign Aff., 111th Cong. (2010) (Statement of Mary Elen O’Connell) at 19.} It could be said, thus, that the recognition of the principle of government-preference plays a key role in the legal justification for COIN operations, a central
operational pillar of which is the consent of local authorities. It is in the context of all of the above, it is hardly surprising that a 2010 U.N. report on the legality of “targeted killings,” unequivocally stated that “[t]he proposition that a State may consent to the use of force in its territory by another State is not legally controversial.”

IV.3 The Presumption in Favor of Governments in ICJ Decisions: A Thin Doctrine of Government-Preference

The presumption in favor of governments has also resonated in the rulings of the ICJ. However, the treatment of this question has been rather thin and in no way reflects a comprehensive doctrine of consensual intervention. In the Nicaragua case, the Court rejected the Reagan Doctrine by denying the possibility that aid to opposition groups could be justified on counts of the consent of the latter. Accordingly, it ruled that the customary principle of non-intervention did not prescribe a general right for states to “intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another State, whose cause appeared particularly worthy by reason of the political and moral values with which it was identified.” Conversely, the Court held laconically that such intervention on behalf of governments was permissible:

- it is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a

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164 See, e.g., U.S. ARMY, COUNTERINSURGENCY ¶1-147, 2-36 (2006) (“U.S. forces committed to a COIN effort are there to assist a HN [host nation] government. The long-term goal is to leave a government able to stand by itself.”)
165 See, e.g., Study on Targeted Killings, supra note 105, ¶35, 37.
State, were also to be allowed at the request of the opposition. This would permit any State to intervene at any moment in the internal affairs of another State, whether at the request of the government or at the request of its opposition. Such a situation does not in the Court's view correspond to the present state of international law.\textsuperscript{167}

This position was expressed while the Court was entirely aware that an internal armed conflict “has continued and is continuing” in Nicaragua,\textsuperscript{168} thereby clearly rejecting strict-abstentionism. However, while this treatment of the question sufficed to express the Court’s recognition of the presumption in favor of governments, it cannot be understood as recognizing that consent power is \textit{limitless}. In order to understand this fact, it is helpful to grasp the wider context of the ruling.

Nicaragua brought charges against the U.S. for supporting, since late 1981, Nicaraguan rebel groups known collectively as the \textit{Contras}. The Contras were involved in an armed campaign against the Sandinista Government – which took power after the 1979 ousting of the Somoza Government. Nicaragua alleged that the U.S. supported the Nicaraguan opposition by various positive and negative means of intervention,\textsuperscript{169} including by direct military intervention,\textsuperscript{170} and thus violated, namely, the prohibition on the use of force and the norm of non-intervention.\textsuperscript{171} It should be noted, that the U.S. decided not to participate in the proceedings after its jurisdictional objections were

\textsuperscript{167} \textit{Id. ¶246}.. For an analysis of the ruling see \textit{GRAY, supra} note 104, at 75–78.
\textsuperscript{168} Nicaragua, \textit{supra} note 166, ¶58.
\textsuperscript{169} \textit{Id. ¶¶20–22}.
\textsuperscript{170} \textit{Id. ¶¶75-76, 81}.
\textsuperscript{171} \textit{Id. ¶23}.
rejected.\textsuperscript{172} The Court thus referred to the American position only as it was expressed in the preliminary hearings.

The main American claim was that to the extent it intervened in Nicaragua, it did so in collective self-defense in response to Nicaragua’s actions in El-Salvador, Honduras and Costa Rica.\textsuperscript{173} In particular, the U.S. focused on the alleged support given by the Sandinistas to guerillas in neighboring El Salvador.\textsuperscript{174} It did not directly rely on the consent of the Contras, although such consent was a definite condition for the American actions, at least in the practical sense.

The Court held that the U.S. has been directly involved in attacks in Nicaragua, ruling that “agents of the United States participated in the planning, direction, support and execution” of such operations;\textsuperscript{175} and that American aircraft conducted reconnaissance flights over Nicaragua and caused “sonic booms” in its airspace.\textsuperscript{176} It also found that the U.S. provided financial aid to the Contras;\textsuperscript{177} as well as military aid in various forms.\textsuperscript{178} However, it rejected the claim by Nicaragua that the Contras, as a whole, were nothing more than an organ of the U.S., by setting forth a narrow test of state-attribution, requiring effective control over specific operations for attribution to materialize.\textsuperscript{179}

The Court conceded that, for a short time, certain Nicaraguan support was given to rebels in El Salvador, but saw most of it as either insignificant, or not attributable to

\textsuperscript{172} Id. ¶¶9–10.
\textsuperscript{173} Id. ¶24, 74, 126.
\textsuperscript{174} Id. ¶18, 128, 130.
\textsuperscript{175} Id. ¶84–86.
\textsuperscript{176} Id. ¶91.
\textsuperscript{177} Id. ¶95–99, 107.
\textsuperscript{178} Id. ¶101, 104, 106.
\textsuperscript{179} Id. ¶109–116.
the government of Nicaragua. In any case, it ruled that such actions did not amount to an “armed attack” that could justify forcible collective self-defense measures by the U.S, on behalf of El Salvador, Honduras or Costa Rica. It further emphasized that collective self-defense requires, as a precondition, a request by the attacked state, which did not exist in this case. Having reached this conclusion, the Court held that the U.S. has violated namely the prohibition on the use of force, the norm of non-intervention and the principle of territorial sovereignty.

However, the Court was careful not to craft a comprehensive doctrine of intervention. For instance, it noted that regarding the contents of the principle of non-intervention, it would only “define” the aspects that were relevant to the specific dispute. It furthermore noted that the case did not concern “the process of decolonization,” alluding, as emphasized critically in the dissenting opinion of Judge Schwebel, that certain situations might be subject to different norms. It moreover noted that in addition to the fact that it did not find in state practice a “new” exception to the principle of non-intervention, it was the parties themselves that did not argue for a new interpretation of the concept, but chose to focus on “classic” concepts such as “self-defense.” Thus, the court in Nicaragua was bound, to a large extent, by the limitations of the adversarial process – especially limited in this case, since the U.S. did not participate in the main proceedings.

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180 Id. ¶152 –160.
181 Id. ¶195, 23(On this issue see Chapter 4, Sec. I.2)
182 Id. ¶199, 232 –234.
183 Id. ¶238.
184 Id. ¶242.
185 Id. ¶251.
186 Id. ¶205.
187 Id. ¶206.
188 Id. ¶178–181 (Schwebel, J., dissenting).
189 Id. ¶207–209.
Accordingly, the Court’s address of the question of consensual intervention, as an issue independent from collective self-defense, was a one-paragraphed treatment concealed in a ruling of 292 paragraphs.\textsuperscript{190} It is worthwhile to note, in this context, that the Court did not have to deal with the substantive question of the identification of the government capable of expressing consent, since this question was not in dispute. Therefore, the Court could not, and did not intend to, lay down a comprehensive doctrine of consensual intervention. It merely set forth the \textit{prima facie} law of government preference. The ruling cannot be seen as condoning the unlimited consent power of governments, nor as laying down a general theory of sovereignty or recognition.

If there could be any doubt that in the post cold-war world, consensual intervention in favor of a government can, in principle, serve as an exception to the prohibition on the use of force – and even one that is taken for granted – it must be resolved by the 2005 decision of the ICJ in the DRC v. Uganda case.\textsuperscript{191} There, the DRC argued that Uganda has violated the laws on the use of force and the norm of non-intervention in its operations in the DRC, in the course of the Second Congolese Conflict. In short, Uganda claimed that it was operating on Congolese soil since May 1997 with the consent of the DRC’s government, while the latter claimed, conversely, that its consent was withdrawn in July 1998.\textsuperscript{192}

The Court accepted, in general, that the DRC has withdrawn its consent to the presence of Ugandan forces, and thus held that Uganda violated international law by not removing its forces from the DRC’s territory.\textsuperscript{193} In its consideration of this issue, the

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{190} \textit{Id.} ¶246.
  \item \textsuperscript{191} Armed Activities on the Territory of the Congo (DRC v. Uganda), 2005 I.C.J. 168 (December 19).
  \item \textsuperscript{192} \textit{Id.} ¶43.
  \item \textsuperscript{193} \textit{Id.} ¶¶51–54.
\end{itemize}
\end{footnotesize}
Court must have, even if implicitly, accepted the perception that consensual forcible intervention in favor of governments, in the course of an internal armed conflict, is not generally unlawful.\textsuperscript{194} Arguably, had the Court subscribed to a strict-abstentionist approach, it would have had to treat any intervention by Uganda as a violation of \textit{jus cogens}, which it would then have to consider as one which is based on invalid consent.\textsuperscript{195} Indeed, the treatment of this issue in this ruling reflects the notion that government-preference has become an almost trivial principle in the contemporary international system.

\textsuperscript{194} Id. ¶¶42–54. It should be noted, to complete the picture, that the fact that the DRC could consent to foreign intervention was not challenged by any party in this case; but from the language of the case it seems that it is a given that such intervention would not have been deemed illegal by the Court.

CHAPTER 9

THE SCOPE OF GOVERNMENT CONSENT POWER: GENERAL THRESHOLDS

I. INTERVENTION AND CONSENT IN THE 21ST CENTURY: TERRITORIAL EFFECTIVENESS IN LIGHT OF MASS ATROCITIES AND TRANSNATIONAL TERRORISM

Having established that a presumption in favor of governments exists, we shall now turn to discuss the scope of this presumption, and accordingly, the principles that strengthen it or lead to its rebuttal. Recall, that the debate regarding the non-intervention agreement of the Spanish Civil War has clarified that the refusal by states to assist to a beleaguered government does not in itself constitute a violation of the norm of non-intervention.\(^1\) A further question is under what circumstances states are obliged not to assist such a government. In the era of the prohibition on the use of force, an intervention, in such cases, becomes both an illegal use of force and, in general, an unlawful intervention in internal affairs. While a possible approach to the limitations on government consent power would be to read the traditional considerations of territorial effectiveness into the contemporary prohibition on the use of force, it seems that this has not been entirely the case.

Qualifications of the presumption in favor of governments, based on territorial effectiveness considerations, have been justified, throughout the 20th century, on counts of the challenged regime’s incapacity to represent the state, and on the principles of self-determination and of non-intervention.\(^2\) In terms of the government’s ability to represent

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\(^1\) Chapter 7, sec. IV.2.
the state, some equated the tests for the validity of consent with the classic, territorial effectiveness-based tests for government recognition, asserting that “a regime may only be legally entitled to invite outside military help if it’s a ‘government’ within the meaning of international law, and must therefore be in *de facto* control.” The scope of loss of territorial effectiveness that supposedly merits the loss of consent power is a complex threshold question, which seems to have remained largely unsolved. The problem is further exacerbated since, traditionally, loss of control over a significant part of a state’s territory has not resulted in the withdrawal of recognition from beleaguered governments, as the latter, at least in the past, have normally retained recognition until a new regime, which has gained control over the territory, has emerged.

However, it should be noted that the relation between the scope of consent power and the question of government recognition is rather complex. While loss of recognition necessarily entails also the loss of consent power, the same is not true vice versa. When a government is in violation of international law, and for the purpose of maintaining that violation it requests external assistance, its request can be powerless *although* the government retains recognition for other purposes. Loss of recognition, however, might result in graver consequences for the previous government, as in such case it does not only lose consent power (negative result) but such power might be transferred to other groups (positive result). In the following chapter, as well as in Chapters 10 and 11, attention will be largely given to the former situation, while the latter will be addressed in Chapter 12.

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3 *Id.* at 195 –196.
4 *Id.* at 197 –200.
Recent practice casts doubts regarding the centrality of loss of territorial effectiveness in the assessment of consent power. This is process corresponds with two major intertwining – but distinct – processes that characterize the contemporary international system. The first concerns the increasing preoccupation of the international community with the protection of civilians, in light of the tragic internal conflicts of the past two decades. This notion will be extensively discussed in Chapter 10. The second concerns the struggle against transnational terrorist entities, which dominated the first decade of the millennium. The latter’s relation to consent power is manifested in contemporary counterinsurgency operations, and in cases where transitional governments are formed following international, internal or mixed armed conflicts.

For instance, the Bonn Agreement, concluded under U.N. auspices in order to set up an interim authority after the fall of the Taliban, included a request by the Afghan delegations for an establishment of an international security force. The Security Council endorsed the Bonn Agreement as a whole, and specifically noted the Afghan request in Resolution 1386, establishing the International Security Assistance Force, which was mandated to work in “close consultation” with the Afghan authorities. Similarly, Coalition forces have received the consent of the interim Iraqi government with regards to their operations against various opposition groups in June 2004. Iraq’s consent was granted once again, with the conclusion of a bilateral Status of Forces Agreement in 2008 with the U.S.

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8 See Chapter 8, sec. IV.2.
were coerced, or that they did not exercise territorial effectiveness, the matter passed with general international acquiescence.

In the same vein, arguably, loss of significant territorial control does not hinder the apparent tacit consent, although currently not publicly admitted, given by Pakistan to intensifying U.S. drone attacks conducted on its territory since 2008 in the context of Pakistan’s conflict with the Tehrik-e-Taliban Pakistan and the American struggle against Al-Qa’ida. Furthermore, it seems that Yemen has retained in its consent power, vis-à-vis Saudi Arabia, in 2009’s “Scorched Earth” campaign against Houthi rebels, although the former have gained control over territory in Northern Yemen. In sum, in the context of the international struggle against terrorism, government consent power seems to have become taken for granted. In other contexts, we saw – for instance – in the conflicts in Congo, that territorially ineffective regimes have not only consented to interventions, but have also emerged victorious in litigation conducted on the basis of alleged breaches of such consent.

In light of the above, it seems that another set of considerations constitute the “active agents” that circumscribe the limitation of government consent power. Whatever these may be, an underlying notion of our analysis is that any such rule should not, in general, aspire to predetermine the regime of the target state, nor, a fortiori, to set up a utopian society. Rather, a workable, relatively objective and agreed upon standard to assess consent power – as discussed in Chapter 10 – could be principle of protection of

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11 See Chapter 8, Sec. IV.3.
civilians. Any further goal, such as the establishment of a democratic system, can and should be the concern of the post-conflict construction process.

II. Threshold Questions

II.1 The Existence of Internal Armed Conflict as a General Precondition for Forcible Intervention: Internal *Jus ad Bellum*

For the presumption in favor of governments to materialize, there is a general threshold question that first has to be answered. Simply put, the question is whether the *internal* resort to force by the territorial government is legal. Indeed, the term *jus ad bellum* has been traditionally understood to connote the legality of the resort to force in the *international* realm. Hence, article 2(4) of the U.N. Charter applies to the use of force between *states*. Internal armed conflicts, on the other hand, were traditionally viewed as actions controlled by a state’s domestic legislation.\(^{12}\) Thus, a state’s resort to force against its nationals – in contradistinction, to some extent, to the *jus in bello* of internal armed conflicts –\(^ {13}\) was not considered a subject of international law. Accordingly, it was impossible to suggest that there was an international law of *jus ad bellum* governing the internal resort to force.

However, since the conclusion of the main instruments of the international law of human rights – namely the International Covenant on Civil and Political Rights (ICCPR)


\(^{13}\) The traditional view of the *jus in bello* of internal conflicts, as we saw, was based on “reciprocity and reason” rather than on law. *See* Chapter 6, Sec. II.2. However, contemporary International Humanitarian Law binds also parties to internal conflicts. *See* Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction ¶¶ 100–127 (Int’l Crim. Trib. For the Former Yugoslavia Oct. 2, 1995).
—14 the relations between the state and individuals under its control, in all aspects, has become a concern of international law. Significantly, the ICCPR enshrines the inherent and non-derogable right to life, which prohibits the arbitrary deprivation of life;15 in addition, it prescribes various “due process” conditions for the administration of criminal law,16 which are derogable, “to the extent strictly required,” only “[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed.”17

International human rights law thus regulates the use of state violence against those within the state’s territory or subject to its jurisdiction.18 As such, it can be viewed as establishing an international law of jus ad bellum – or perhaps, jus contra bellum – within the boundaries of the state. However, since human rights law does not pinpoint the “vanishing point” in which a state’s resort to internal force is permissible, the logical conclusion is that states cannot resort to extrajudicial military force against members of their populations absent circumstances that amount to internal armed conflicts, as these were discussed in Chapter 2. In instances that do not amount to internal armed conflicts, the conduct of the state is regulated by the law of human rights alone, in which lethal use of force is regulated by rules of engagement applicable in the context of law enforcement.19 When an internal armed conflict exists, “internal” jus in bello applies,20

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15 Id. arts. 4(2), 6(1).
16 Id. arts. 9, 14.
17 Id. art. 4(1).
18 Id. 2(1).
20 This conclusion applies in any case, without prejudice to the question of the application of international human rights law during armed conflicts. See generally INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW: TOWARDS A NEW MERGER IN INTERNATIONAL LAW (Roberta Arnold & Noëlle Quénivet eds.,
allowing the government to use lethal force against members of organized armed groups and civilians directly participating in hostilities, while accepting proportional incidental harm inflicted on non-participating civilians. In essence, thus, only in the context of an internal armed conflict, could article 6(1) of the ICCPR’s prohibition on arbitrary deprivation of life be interpreted in reference to norms of international humanitarian law.

The determination of the circumstances in which non-international armed conflict exists, has been an exceptionally controversial issue in the recent years, especially in the context of the American “global war on terror.” In this context, for instance, an extremely difficult question is whether – or when – a mere “first strike” by a state, in the context of an internal armed conflict (as opposed to in international armed conflict), transforms the situation from one which is regulated by human rights law to one regulated also by international humanitarian law.

Of special significance to the analysis of the question of consensual intervention is that the legality of the resort to force by a government necessarily affects the legality of

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22 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (Jul. 8), ¶25; see also Schmitt, supra note 20, at 53.


24 Compare id. at 88, 106 –107.
forcible actions conducted by an external, consensual intervener. It is a fundamental principle of law, and therefore of the regulation of consensual intervention, that a state cannot abrogate its international obligations by inviting a third-party to act in its territory;\(^2\) and, accordingly, that an external intervener cannot conduct activities that the territorial state is prohibited from undertaking itself.\(^3\) In cases where human rights law prohibits the internal use of force – for instance, in absence of an internal armed conflict between at least two organized armed parties – then, it necessarily follows that consensual forcible intervention is also prohibited. This is a necessary corollary of the understanding of consent as creating a principal-agency relationship between the parties.

This distinction is especially evident in instances, such as have taken place in the events of the Arab Spring, in which some states resorted to military force against largely unarmed and non-violent protesters, in gross violation of international human rights law.\(^4\) In at least one case, a forcible consensual intervention took place. In February 2011, protests erupted in the Gulf state of Bahrain, immediately facing harsh repression, including by the Bahraini military.\(^5\) Since it is obvious that the Bahraini situation did not amount to internal armed conflict, it is reasonable that according to international human rights law, the use of force by Bahrain – to the extent that it exceeded law enforcement

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\(^2\) This assertion is also valid inversely: if the territorial state is party to human rights conventions, the intervening state is also bound to them automatically, since it acts as its agent. If not, the intervening party will still be bound by the convention through extra-territorial application, even if operating through the “consent invitation or acquiescence” of the host state. See Al-Skeini v. United Kingdom, Eur. Ct. H.R. (2011) ¶135.


operations – was unlawful. On March 15, after a request by the Bahraini government, the Gulf Cooperation Council (GCC) sent forces into Bahrain, comprised predominantly of Saudi troops.\(^\text{29}\) Assuming that the resort to force by Bahrain was illegal, any support rendered by GCC troops to Bahraini operations was unlawful as well.\(^\text{30}\) Perhaps, without exhausting the argument on this specific case, the most that the GCC could do is assist the Bahraini government in law enforcement operations, subject to international human rights law.

Therefore, when assessing the legality of consensual interventions, it must be determined \textit{a priori} that an internal armed conflict exists in the state to begin with, and that an “armed conflict” is not proclaimed by the territorial state as pretext to abrogate its obligations under human rights law and to suppress non-violent dissent. The linkage between the existence of internal armed conflict and consent power was summarized succinctly by \textit{Mary Ellen O’connell}, in a 2010 statement in front of the House of Representatives:

\begin{quote}
Even in places like Yemen and Pakistan, where there is armed conflict going on, the United States would only have the right to use combat drones in the armed conflicts that those governments are participating in, and not in some rogue operation of our own that has nothing to do with what those governments are trying to accomplish.\(^\text{31}\)
\end{quote}


And elsewhere, in a similar vein:

There is a very key and often overlooked distinction. The invitation has to be to participate in the armed conflict that the government of the country is participating in. So Yemen right now is facing insurgencies … If they had asked us, the United States, to be also involved, we could use military force there, on their invitation, in their armed conflict. But what we have done [in 2002] … this attack was not part of any armed conflict that the Yemeni authorities were involved in. It was six individuals in a vehicle in a remote area, and we killed all six persons, including a U.S. citizen. That is not an armed conflict that Yemen is engaged in. So even having consent in that case is not sufficient.32

This position is of course without prejudice to the question whether a state, not involved itself in an internal armed conflict, can consent to external attacks conducted against elements in its territory, as part of some paradigm of self-defense exercised by the attacking state – provided that we are willing to view such instances as lawful self-defense to begin with. This justification – of self-defense actions enhanced by host-state consent – has been cited by the Obama administration as a legal basis for transnational drone attacks against individuals.33 In practice, however, it seems that in many of these

32 Id. at 51; see also id. at 63.
cases, when the non-state actor operates from within the target-state’s territory against the latter’s will, it is reasonable that the latter will find itself, at some stage, itself involved in an internal armed conflict against the targeted entity. This has been the dynamic concerning American drone strikes in Yemen and Somalia, and also in Pakistan – to the extent that it consented to such strikes.

Indeed, the claim that the existence of an internal armed conflict is a precondition for the legality of consensual intervention seems to be in exact opposite to some traditional writing according to which intervention was prohibited when strife amounted to a “civil war.” However, closer scrutiny reveals that these claims are actually on different levels. While the precondition of the existence of an internal armed conflict is based on considerations of human rights, the “civil war” limitation, as we shall see, was actually concerned with lack of the government’s territorial effectiveness, and therefore its lack of sovereign power. This shift in focus can be explained by the fact that in contemporary law, human rights and the protection of civilians have moved to the center stage, shifting the understanding of sovereignty from territorial effectiveness in favor of other, substantive considerations. If we interpret the concept of effectiveness in light of the principle of protection of civilians, this incompatibility, to some extent, is reconciled. We shall elaborate more on this in our discussion of the concept of effective protection in Chapter 10.

II.2 The Legal Irrelevance of the Term “Civil War” as Negating Consent Power

The most common restriction, in the literature, on government consent power relies on some ambiguous notion of loss of territorial effectiveness. A common approach towards the issue of consensual intervention is thus to accept the “theoretical” right of governments to consent to forcible intervention, but to immediately qualify this right in light of considerations of territorial effectiveness. This approach is sometimes expressed through the use of the term “civil war,” to connote situations in which consent power is negated, as opposed to situations of “local unrest,” in which consent power stands. Gray, for instance, concedes that government consent power exists, and has been “taken for granted” since 1945. However, she restricts this power only to instances of “domestic unrest,” arguing that the norm of non-intervention negates such power in instances of “civil wars.”

The position expressed by Gray was based, inter alia, on a 1984 U.K. Foreign Policy Document, in which the same position was taken, which denied government consent power in instances of civil war in which control over the state’s territory is divided between the parties. A similar position was adopted by Thomas and Thomas; and elsewhere by Schachter, who distinguished between civil wars and situations “in absence” of civil wars, in which governments are entitled to receive military aid.

It is possible that the term “civil war” is used, in these instances, strictly in the generic sense. However, since it had, at least in the past, significant legal meaning (as expressed in the belligerency doctrine), the use of the term can lead to confusion.

34 Gray, supra note 12, at 80, 85.
Furthermore, it seems incompatible with modern law. Indeed, the preconditioning of
government consent power on the absence of “civil war” seems to contradict the
approach of the *Nicaragua* court, where the preference of governments was manifest –
although it was clear that the Nicaraguan situation was definitely beyond the threshold of
“domestic unrest.” The Contras operated an armed force of 30,000; the conflict in
Nicaragua has resulted, between 1980 and 1989, in over 40,000 casualties; it had major
internal and external effects.\(^{38}\) And still, the Court did not at all imply that consent power
was annulled only on counts of the scale of the conflict.

Indeed, Gray concedes that the “civil war” threshold is a difficult test to apply,
since states – involved and uninvolved alike – are reluctant to admit that the “legal”
threshold of “civil war” has been crossed.\(^{39}\) As we saw in Part II, this has been a constant
feature of the treatment of internal strife since the 19th century. Thus, in essence, relying
on the distinction between “domestic unrest” and “civil war,” reverts international law to
the largely unhelpful discourse of the belligerency doctrine. Just as recognition of
belligerency was an extremely rare occurrence, so it is expected that a positive
recognition that a “civil war” exists, in its traditional legal sense, will rarely be made.\(^{40}\)

Furthermore, the distinction between situations of “war” and those that do not
amount to war seems foreign to contemporary law, which emphasizes the factual terms
*use of force* and *armed conflict* rather than the technical-legal term of “war.”\(^{41}\) This is a

\(^{38}\) See KARL R. DEROUEN & HEO UK, CIVIL WARS OF THE WORLD: MAJOR CONFLICTS SINCE WORLD WAR
II 552 –553 (2007).
\(^{39}\) GRAY, *supra* note 12, at 82.
\(^{40}\) Compare Chapter 2, Sec. II (as opposed to the incentive of states to admit that a factual situation of an
armed conflict exists).
\(^{41}\) *Id.*
prominent feature in both the spheres of *jus ad bellum* and of *jus in bello*. It is a product of the attempt to prevent the circumvention of legal obligations through the denial that a state of war exists. In light of this development, it is unreasonable that “war” remains a dominant legal term only when assessing the question of consensual intervention.

However, it is possible to reconcile this anomaly, with a slight adjustment of the terms. It seems that when commentators use the term “civil war” as a limitation for consent power, they actually allude to the loss of effective control that “civil war” supposedly entails, rather than to the term “war” in the technical sense. For instance, Schachter uses the term “civil war” interchangeably with terms alluding to territorial effectiveness. Thus, while sometimes using the “civil war” threshold, he also suggests a clearer contention, asserting that when conflict occurs “on a large scale involving a substantial number of people or control over significance of the country” the preference of government should be revoked. Therefore, in essence, the “active agent” in the negation of consent power, according to this approach, is the loss of territorial control. Thus, limitations on government consent power of this kind should be framed as limitations based on *territorial effectiveness*, rather than limitations based on the confusing classification of a conflict as a “civil war.”

In this sense, the position of Wright, according to which “a government, even if generally recognized, cannot speak for the state if it is not in firm possession of the state’s

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42 As article 2(4) of the U.N. Charter refers to *use of force* and not to *wars*. See Schachter, *supra* note 37, at 1624.
43 As Common Article 2 to the Geneva Conventions applies in war as well as in “any other armed conflict.”
45 Schachter, *supra* note 37, at 1642.
territory,\textsuperscript{46} represents a doctrinally clearer phrasing, since it highlights territorial effectiveness rather than the technical definition of the conflict as a “war.” This is not to say that the territorial effectiveness test is in itself coherent. On the contrary: it can prove quite paradoxical. For instance, as aforementioned, under the territorial effectiveness tests governments could request assistance in the face of “unrest.” However, it is unclear why a state, which cannot even deal alone with mere unrest, would be deemed more effective, in the territorial sense, than a state that requires assistance in the face of a major insurrection.

II.3 THE FAILED STATE THRESHOLD: NO GOVERNMENT – NO PREFERENCE

A possibly workable threshold – related but distinct from traditional territorial effectiveness tests – is the “failed state” standard. Such a test, at least, provides relatively tangible parameters – although these too suffer from ambiguity, as there is no formal legal definition of the term “failed state.” However, at least for the purpose of the assessment of consent power, a failed-state can be identified as one in which there is a total or near total breakdown of the institutions guaranteeing law and order, even within territories controlled by different factions; moreover, a failed state does not have a body capable of representing it internationally in terms of any form of legitimacy, be it based on territorial effectiveness, democratic representation or otherwise.\textsuperscript{47} In this sense, a failed state is different than the traditional case of “civil war” in which some territorial effectiveness is lost in favor of opposition groups.

\textsuperscript{46} Quincy Wright, \textit{United States Intervention in Lebanon}, 53 Am. J. Int’l L. 112 (1959), cited in Doswald-Beck, \textit{supra} note 2, at 196. (emphasis added)

\textsuperscript{47} See, e.g., Daniel Thürer, \textit{The “Failed State” and International Law} 81 INT’L REV. RED CROSS 731 (1999).
Indeed, in a situation where it is obvious that there is simply no functioning government at all – which is *at least* capable of expressing a coherent position regarding the conflict – and the state is torn by fluid and unstable warring factions, it is a necessary logical and legal consequence that – absent unique circumstances – there will be no government preference. If there is no entity that is even physically capable of representing the state internationally, there is no entity that can conclude agreements that form the basis for consensual interventions (or to withdraw from such agreements).

Note, that this approach does not attribute significant *normative* value to territorial effectiveness: it merely argues that in a “true” failed-state scenario there is absolutely no party that can physically express coherent will. In such cases, it is reasonable that the question of intervention be resolved by the U.N. or regional organizations, either with Security Council authorization in accordance with article 53 of the Charter, or in, absence of Security Council authorization, by relying on forward-looking intervention treaties, assuming that these are generally valid. A failed state, in this sense, can be roughly analogized to an unconscious patient undergoing an operation: she has previously authorized the encroachment of her personal autonomy manifested in the operation, but does not possess, in real-time, the physical capacity to withdraw her consent.

Interventions in failed state scenario – whether based on Security Council authorization or forward-looking treaties – should aim immediately to provide protection to civilians. In parallel to achieving this goal – as might be deduced from state practice – the interveners, in such cases, seek to identify the parties that are capable of concluding

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48 Wippman, *supra* note 5, at 231.
49 See Chapter 10, Sec. III.2.
50 We shall elaborate on the principle of protection in Chapter 10.
an agreement that would reasonably reflect the collective will of the state,\textsuperscript{51} thereby, at least \textit{de jure}, rescuing the state from its “failed” status and initializing a transitional period. This is not merely a descriptive analysis of practice: it also seems to best promote the norm of non-intervention. An example for such a role played by a regional organization, in relation to a failed-state situation, could be the actions undertaken by ECOWAS in Liberia, after the assassination of President Samuel Doe.\textsuperscript{52}

A different but related situation can take place when there are, in principle, functioning institutions, but the various functions of government are split between warring factions, resulting in a conflict between the state institutions themselves. An example for this scenario could be when a President and a Prime Minister head different factions (for instance, the 1960 Kasavubu-Lumumba conflict in Congo, and to an extent, the Lebanese Civil War of 1975–1976).\textsuperscript{53} Such situations result, much like in the failed-state scenario, in the default of the \textit{de jure} entity of government and thus require a flexible, case-by-case approach by the international community,\textsuperscript{54} in which some analysis of the internal-constitutional order of the state cannot be avoided.

In any case, it should be taken into account that – whether pursuing an intervention or not – the contemporary international system does not in practice permit, for long, the \textit{de jure} situation of “failed states;” instead, it prefers to grant recognition to transitional governments, even if – as we shall see – the latter do not exercise territorial


\textsuperscript{54} This was indeed the approach undertaken by the U.N. in the context of the 1960 situation in Congo. \textit{See ORFORD, supra} note 53, at 82 –84.
effectiveness. It seems that the international legitimacy of such entities rests on the fact that they are products of multilateral reconciliation processes, or otherwise have future prospects to end the conflict and thus promote the protection of civilians. Especially relevant for us is the fact that such governments have also been recognized as possessing consent power. We shall demonstrate this notion in the context of the quintessential failed state – Somalia.

II.4 BEYOND THE FAILED STATE THRESHOLD: RECOGNITION, INTERVENTION, AND THE ROLE OF THE SECURITY COUNCIL IN SOMALIA

After the 1991 ousting of Somalia’s longstanding autocrat Siad Barre, Somalia has descended into total anarchy. The fractioning of the various militias led, by 1992, to mass killings, starvation and other atrocities.\(^{55}\) After failing to secure peace and having suffered heavy losses, U.N. forces withdrew from Somalia in March 1995, in a rare admission of defeat.\(^{56}\) Somalia remained in chaos. Ceasefires and transitional governments did not hold. A regionally sponsored effort, the National Reconciliation Process, resulted in the October 2004 establishment of the Transitional Federal Government (TFG). Exercising no control over Somali territory, but supported by regional powers Ethiopia, Kenya and Uganda, the TFG was initially based in Kenya.

The TFG was controversial from its inception, as the transitional parliament elected a warlord, Abdillahi Yusuf Ahmed, as interim president. Yusuf established a loyalist cabinet, marginalizing and alienating other power wielders – especially those


related to Islamist movements shunned by Ethiopia. Soon after his election, while his government was still in Kenya, Yusuf appealed for forcible intervention by the African Union and the United Nations in order to allow him to enter and gain control over the territory of Somalia. The international community, at that stage, was reluctant. In the subsequent months, however, the international community gradually and cautiously recognized the TFG.

The TFG entered Somalia in June 2005, amidst a rift along its members, between President Yusuf and representatives of local Mogadishu groups, themselves very loosely aligned, and united only in their rejection of Ethiopian involvement. Because of this split, the TFG could not enter Mogadishu – the traditional capital of Somalia – and had to settle in the city of Jowhar. One of the disputes between the parties related to Yusuf’s appeal to the African Union (A.U.) and the Horn of Africa’s regional organization, the Intergovernmental Authority on Development (IGAD), for assistance. Needless to say, the TFG was completely ineffective at the time. Nevertheless, Yusuf’s request was endorsed by all IGAD members, except Eritrea, and also by the African Union’s Peace and Security Council.

However, any intervention in Somalia required U.N. authorization, because of the long-standing comprehensive arms embargo imposed on the country by the Security Council. Accordingly, in July 2005 the A.U. requested the Security Council to grant an

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58 Continuation of War by Other Means? supra note 57, at 10–11.
59 Id. at 18–19. See also S.C. Res. 1587, U.N. Doc. S/RES/1587 (Mar. 15, 2005) (commending the support given to the TFG; expecting further steps by it to establish effective governance in Somalia).
60 Can The Somali Crisis be Contained, supra note 57, at 4.
61 Id.
exemption from sanctions regime, a request that was, at that stage, denied. This demonstrates that consensual intervention can be thwarted by a pre-existing U.N. sanctions regime, however ineffective, and reflects a significant limitation on the presumption in favor of governments, as enshrined also in Article 2(5) of the U.N. Charter.

From the ranks of the Mogadishu groups emerged the major threat to the TFG, the union of Islamist movements known as the Islamic Courts Union (ICU), and the radical jihadist elements within them. The ICU has emerged in 2005 as a reaction to the Somali governance vacuum, and was comprised of a union of local clan-based Shari’a mechanisms that represented the major source of power in South Somalia since the state’s collapse in the early 1990s. In June 2006, following heavy fighting in Mogadishu – and while the ranks of the TFG were split – the ICU took control over most of the capital and its surroundings, defeating the U.S.-backed and short-lived Alliance for Restoration of Peace and Counter Terrorism (ARPCT), which was composed, *inter alia*, of non-Islamist elements of the Mogadishu groups. The ICU’s victory has placed Mogadishu, for the first time since 1991, under a unified authority.

At the time of the ARPCT defeat, the TFG controlled virtually no territory in the state, and barely had any reasonable prospects to attain such control by itself. By this time more and more calls were made by the international community to lift the sanctions regime, in order to allow assistance to the TFG and the deployment of international

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63 *Can the Somali Crisis be Contained*, *supra* note 57, at 4–5, 21–22.
64 Providing that Member States “shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.”
65 On the Jihadi elements within the ICU see *Can The Somali Crisis be Contained*, *supra* note 57, at 10–11.
66 *Id.* at i, 1, 9–14.
67 *Id.* at 8–9.
forces – disregarding the fact that it was rather the ICU that was the most powerful and effective force in South Somalia. In parallel, Ethiopian troops were starting to be seen in the Baidoa area (then seat of the TFG), and more were amassed on the border.\(^{68}\)

As the TFG and its Ethiopian allies were poised for a decisive battle against the ICU, the Security Council authorized international intervention by IGAD (IGASOM), while urging dialogue between the TFG and the ICU, and stressing that the Traditional Federal Institutions offer the only route to achieve peace and stability in Somalia. While attempting to maintain a neutral language, IGASOM was mandated to protect the seat of the TFG and to train its security forces. Strictly for that end, the Security Council lifted the arms embargo.\(^{69}\) It did not explicitly call for the withdrawal of Ethiopian forces.

In December 2006, the Ethiopian army, acting without Security Council authorization and claiming \textit{inter alia} that it is acting in self-defense against “terrorists,”\(^{70}\) scored a dramatic military victory over the ICU, with the consent of the TFG and in cooperation with its forces, leading to the ICU’s dissolve and to the entrance of the TFG to Mogadishu. However, the victory resulted in the ICU’s splintering into several groups, including Al-Shabaab, a radical group allegedly associated with Al-Qa’ida.

The TFG thus achieved a limited victory with the support of Ethiopia. However; it did not have the capacity to substitute the ICU in terms of effective control.\(^{71}\) In February 2007, the Security Council authorized the African Union to deploy troops in Somalia (AMISOM), instead of IGASOM, with a similar mandate – essentially, to support the

\(^{68}\) \textit{Id.} at 22.


\(^{71}\) Int’l Crisis Group, \textit{Somalia: The Tough Part is Ahead} 1–2, ICG Africa Briefing No. 45 (Jan. 26, 2009).
TFG. Soon enough, the Somali situation deteriorated, as a decentralized Islamist insurgency spread against the TFG and the intervening Ethiopian troops. By 2009, the TFG had control only over Baidoa and certain parts of Mogadishu – and that too depended on strong Ethiopian support. The Islamist splinter groups gradually returned to control almost as much territory as they did prior to the Ethiopian intervention. Under these circumstances, Ethiopia withdrew in 2009, leaving the TFG to rely only on the limited capacity of AMISOM for support. 

The international response to the intervention by Ethiopia was largely one of acquiescence. During the height of the fighting, in the end of December 2006, the Security Council issued a Presidential Statement urging dialogue, in which Ethiopia was not condemned nor even mentioned. Furthermore, the Security Council’s December 2006 decision (in Resolution 1725) to lift the arms embargo on Somalia in order to enable IGASOM – in which Ethiopia is a dominant member – to operate in the country can be seen as a tacit encouragement for Ethiopia’s actions. The first action by the Security Council regarding Somalia, after the major battles of late 2006, was two months later: in resolution 1744, the Council mandated AMISOM, “welcomed” Ethiopia’s decision to withdraw its troops, and “underlined” that AMISOM will create the conditions for a full withdrawal. It seems reasonable to assume that Ethiopian forces, to a large extent, paved the way for the deployment of the A.U.s forces that still, as of March 2012, uphold the existence of the TFG.

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75 S.C. Res. 1725, supra note 69.
76 S.C. Res. 1744, supra note 72.
Eritrea, which supported the TFG’s opponents, received a wholly different treatment. A traditional enemy of Ethiopia, Eritrea sought to curb the latter’s ambitions in Somalia by supporting the ICU, and after its dissolution – the Islamist factions. For instance, during 2005 and 2006, Eritrea delivered arms shipments to the TFG’s rivals.\textsuperscript{77} Recall, that in international law, arms transfers to opposition groups can amount to forcible intervention (while not necessarily to an armed attack, at least in the eyes of the Nicaragua Court), and thus it is possible to label the Eritrean actions as a forcible consensual intervention in favor of an opposition group.\textsuperscript{78} The Security Council, in Resolution 1907, demanded that “Eritrea cease all efforts to destabilize or overthrow, directly or indirectly, the TFG” and imposed sanctions on it.\textsuperscript{79}

Despite its lack of control, the TFG continues to entrench its position vis-à-vis the international community as the only viable and recognizable government of Somalia. As the TFG’s foreign minister remarked earnestly, while expressing his support for the bolstering of AMISOM, “It can be argued that the very existence of the TFG, under the circumstances, is a clear plus.”\textsuperscript{80} It is doubtful that the “very existence” standard is suitable, in all cases, to replace the territorial effectiveness test in the context of recognition and consensual intervention. What is clear, however, is that territorial effectiveness was entirely absent from the discourse of government recognition in the Somali context, nor in the analysis of the capacity of the rival forces to request, consent or acquiesce to external forcible support.\textsuperscript{81} It follows that simple territorial effectiveness

\textsuperscript{77} Can the Somali Crisis be Contained? supra note 57, at 20.
\textsuperscript{78} See Military Aid and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27), ¶238, 247.
\textsuperscript{79} S.C. Res. 1907, S/RES/1907 (Dec. 23, 2009).
\textsuperscript{81} See also, in this context, the 2012 Kenyan intervention in Somalia, undertake, inter alia with reference to the TFG’s consent, as discussed in Chapter 1, section I.2.
thresholds are not sufficient to explain the modern international practice regarding government consent power, and that other considerations come into play.

III. COUNTER-INTERVENTION: A DEFENSE CLAIM FOR LOSS OF TERRITORIAL EFFECTIVENESS

Even those that limit consent power to situations that do not amount to “civil wars,” or otherwise base such limitation on territorial effectiveness standards, usually concede that when a civil war, or loss of territorial effectiveness, is fomented by external intervention, the government too is entitled to receive assistance.82 This is the well-established doctrine of “counter-intervention” which, as noted in Chapter 8, has been frequently invoked (and abused) in the cold-war era.83 Indeed, even when one subscribes to the very strict understanding of the concept of consensual intervention – meaning, to strict-abstentionism – there is merit in the idea of counter-intervention. This is because when the opposition receives external assistance, it could be said that the first interveners – and the opposition, should it gain control over the state – are estopped from invoking the principle of non-intervention against other intervening powers. In addition, from the internal standpoint, the political independence of the peoples in the conflicting state has already been compromised by the first intervention, and therefore the counter-intervention cannot be seen, in itself, as a violation of the norm of non-intervention.

The counter-intervention doctrine is usually understood as permitting intervention in favor of governments. However, approaches such as the 1980’s Reagan Doctrine, as

82 See Gray, supra note 12, at 92–98; see generally Wright, supra note 4.
discussed in Chapter 8, sought to expand it to justify counter-intervention on behalf of opposition groups.\textsuperscript{84} As aforementioned, this idea is in direct contravention to the prohibition on the use of force, and was rejected in the Nicaragua ruling.\textsuperscript{85}

While the counter-intervention doctrine certainly maintains its theoretical vigor, in practice, it was particularly important in the colonial and cold-war eras, in which many internal armed conflicts were actually proxy wars in the struggle between the main powers, or concealed attempts to preserve colonial rule.\textsuperscript{86} Nevertheless, in legal terms, the claim of counter-intervention can still be raised both by beleaguered governments and intervening powers as a defense-claim, when confronted with effectiveness-based rebuttals of the presumption in favor of governments.\textsuperscript{87}

It should be added here, that a formalistic reading of the counter-intervention principle might lead to the conclusion that any such action must be proportional to the original intervention.\textsuperscript{88} On the ethical level, as suggested by Walzer, counter-intervention aims at “preserving the balance, restoring some degree of integrity to the local struggle.”\textsuperscript{89} For instance, according to this logic, if the first intervention included a non-forcible act such as transfers of funds, so must the counter-intervention be limited to such acts. The Nicaragua Court alluded to this principle.\textsuperscript{90} However, it did so in the context of cross-border counter-interventions – instances in which a state, or its ally, claims the right to intervene in another state, in response to an intervention by the latter in another

\textsuperscript{84} See also Perkins, supra note 83, at 221–224 (supporting counter-intervention in favor of insurgents).
\textsuperscript{85} Chapter 8, Sec. IV.3.
\textsuperscript{86} On the cold-war “proxy-war” phenomenon see Ann Hironaka, Neverending Wars: The International Community, Weak States and the Perpetuation of Civil War 104–130 (2005). A classic case for an attempt to preserve colonial domination through “internal” conflicts is the Katanga affair of 1960. See Orford, supra note 53, at 69–79.
\textsuperscript{87} But see Schachter, supra note 37, at 1642.
\textsuperscript{88} See Perkins, supra note 83, at 178–180.
\textsuperscript{89} Michael Walzer, Just and Unjust Wars 97 (4th ed, 2006).
\textsuperscript{90} Nicaragua, supra note 78, at ¶210
state’s internal affairs. This differs from situations in which a counter-intervention is pursued strictly within the territory of the victim state.

In instances where the first intervention amounts to a “less-grave” use of force, such as arms transfers, the Court took an even narrower approach, ruling that “less-grave” forcible interventions, which are not “armed attacks,” do not justify a collective response consisting of “less grave” forcible interventions by the victim state or its allies into the territory of the first intervening state; the rationale for this ruling being that any use of force, grave or less grave, is conditioned upon the occurrence of an “armed attack.” 91 In essence, such understanding of the counter-intervention doctrine results in its complete merger with the idea of collective-self defense, since it allows for forcible cross-border counter-intervention only when the first intervention amounts to an armed attack by the intervening state.

It is doubtful, however, whether the rationale requiring strict proportionality in counter-intervention can unequivocally apply also to counter-interventions that take place strictly within the territory of the victim state. This is so, since such a limitation will essentially terminate the presumption in favor of governments, by effectively equalizing its position to the externally-supported opposition. Furthermore, there is also no conclusive evidence in state practice that counter-interventions have been required to mirror the scope of the first intervention. 92

The territorial-limitation on counter-intervention, set forth by the Nicaragua majority, was heavily challenged in the dissenting opinion of Judge Schwebel, not only

91 Nicaragua, supra note 78, at ¶¶211, 247 –249. For a similar view see Schachter, supra note 37, at 1643; but see John Norton Moore, The Secret War in Central America and the Future of World Order, 80 Am. J. Int’l L. 43, 105 –106 (1986). For the distinction between “grave” and “less-grave” uses of force see Chapter 4.
92 Schachter, supra note 37, at 1644.
on counts of his objection to the characterization of “indirect aggression” as an act not amounting to an “armed attack,” but also by his understanding of state practice as allowing counter-interventions to “spill” over to the territory of the first intervener. The gist of this controversy is rooted in the understanding of the distinction between the related – but different – claims of counter-intervention and collective self-defense.

The right of collective self-defense, as enshrined in Article 51 of the U.N. Charter, is usually understood as the right of a state to request assistance against an external armed attack, whether it is committed by a state or, possibly, by a non-state actor. The counter-intervention doctrine, conversely, connotes a situation in which a government requests external intervention to suppress an internal element supported by an external party, perhaps through “less grave” uses of force. To the extent, however, that the involvement of the external party in the actions of the internal element amounts to an armed attack, and is of such character that it creates state-attribution, then the claim of counter-intervention merges with the claim of collective self-defense. In such cases, it is both logical and reasonable, that the assisting state, as part of the collective self-defense operations, can attack the territory of the external state. It is plain that such operations, legally based on self-defense, must adhere to the proportionality and necessity limitations

93 Nicaragua, supra note 78, at ¶¶174–176.
94 Id. at ¶¶217–220 (Scwebel, J., dissenting).
95 The question of the right to self-defense, as enshrined in Article 51, against armed attacks by non-state actors in the course of a transnational armed conflict, is controversial. The majority opinion of the ICJ, in the Wall advisory opinion, was that such right against non-state actors does not exist. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 ¶139 (Jul. 9) (Koroma, J.) Judge Higgins, in her separate opinion, rejected this interpretation. Id. ¶¶33–34 (Higgins, J.) For a critique of the reasoning of the majority see Sean D. Murphy, Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ? 99 AM. J. INT’L L. 62 (2005).
97 See Perkins, supra note 83, at 207 –209.
on the exercise of self-defense enshrined in customary international law. Thus, the legality of a counter-intervention that “spills” to the first intervening state’s territory is influenced by our perception of what constitutes an armed attack.

Another parallel that can be drawn from the proximity of collective self-defense and counter-intervention is the requirement of consent. Just as collective self-defense, as held in Nicaragua, requires consent by the attacked state, the question of counter-intervention must be analyzed in the framework of consent: a state that embarks on a counter-intervention must also have the genuine consent of the “victim” government. Indeed, this notion runs contrary to the perception of counter-intervention as a “right” or “entitlement” of third states. However, such reasoning belongs to an era in which internal conflicts were analyzed mainly according to their effects over external parties, or on counts of some vague normative meaning attributed to the “global balance of power.” Nowadays, in the era of the prohibition on the use of force, intervention can be judged only in terms of conferral of authorization, or, as will shall see, on counts of “responsibility” – and not in terms of a “right” of an intervener. Since the legality of intervention, almost always, must be a corollary of the rights of the internal entities, a “right” of counter-intervention cannot be asserted in a paternalistic fashion, independent from the consent of the internal actors. As such, intervention should always be

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98 On these principles see Yoram Dinstein, War, Aggression and Self-Defense 242 –278 (5th ed. 2011).
100 Compare id. at 180–183, 195.
101 A possible exception is the right to intervene for the protection of nationals abroad, which is based on the interests of the intervener rather than on those of the territorial state; and the right of self-defense against non-state actors.
102 Compare Wippman, supra note 5, at 220–221. Moreover, a violation of the balance of power cannot be viewed, in itself, as a breach of an erga omnes obligation entitling external parties to intervene when not requested to do so. Compare Perkins, supra note 83, at 211–212.
analyzed in terms of principal-agency relationship, rather than as a relationship between two (or more) parties bearing equal contractual “rights.”

Last – and importantly – the traditional doctrine of counter-intervention cannot be used as a valid defense claim when the challenges to the government preference are based on substantive issues, as opposed to claims based on the technical loss of territorial effectiveness. For instance, if a government commits mass atrocities, it would not be able to rely strictly on the doctrine of counter-intervention as a source of consent power. This conclusion is augmented, of course, when the first intervention was authorized by a Chapter VII resolution – as was in the case of Libya in 2011.

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103 See Chapter 1, Sec. II.1.
104 See Chapter 12.
CHAPTER 10

FROM EFFECTIVE CONTROL OVER TERRITORY TO EFFECTIVE

PROTECTION OF CIVILIANS

I. THE EMERGENCE OF PROTECTION OF CIVILIANS AS A FUNDAMENTAL PRINCIPLE OF INTERNATIONAL LAW

With the collapse of the iron-curtain, and the initial embrace of liberal-democracy by the ex-eastern bloc states, the promotion of “democracy” has become the predominant theme of the international discourse on intervention.¹ Gradually, however, the mass atrocities of the 1990s forced a robust preoccupation with the protection of civilians, a concept more basic and primordial than democracy.² The question of democracy and intervention shall be mainly addressed within our debate of the “democratic entitlement” in Chapter 11. However, we will do so in light of the realization explored in this section: that the principle of protection of civilians (hereinafter – the principle of protection) has been elevated, in the last two decades, to a paramount principle of international law.

The rise of the principle of protection is mainly a product of recent decades. For instance, a striking aspect of the early instruments of international humanitarian law (IHL), such as those adopted in the Hague conferences of 1899 and 1907, is the absence of explicit reference to the protection of civilians in armed conflicts. However, the reality

² This is of course reflected also in legal scholarship: the term “protection of civilians” appeared in 237 articles before 1999, in all law reviews available in Westlaw.com; it appeared in 791 articles since (as of April 2012).
of warfare throughout the 20th century has changed radically. The percentage of civilian deaths in armed conflicts – and particularly in internal armed conflicts – steadily climbed up to an overwhelming majority by the 1990s.3 The increasing practical need for protecting civilians in armed conflict has been supplemented by changes in the understanding of different international norms. These changes have been labeled as the “humanization” of law – a process in which humanitarian considerations have gained more and more prominence within the balance of the competing interests protected in various legal arrangements.4

Over the course of the 20th century, and in particular in the last decades, this process can be exemplified in several milestones. First, the principle of protection has been enshrined in the fourth Geneva Convention of 1949, and significantly in the additional protocols of 1977,5 the latter solidifying the basic principles of distinction and proportionality.6

Second, the binding nature of IHL in the context of all internal armed conflicts has been clearly established. Traditionally, the application of the “laws of war” in internal armed conflict has been seen as voluntary, to be applicable only on counts of “reciprocity and reason,”7 or as binding only in cases of belligerency recognition.8 Common Article 3 of the Geneva Conventions, supplemented by (the narrowly applying) Additional Protocol II, have entrenched the binding application of at least the basic norms of IHL to

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5 See Karma Nabulsi, Evolving Conceptions of Civilians and Belligerents: One Hundred Years After the Hague Peace Conferences, in CIVILIANS IN WAR, supra note 3, at 9.
8 See supra, Chapter 5, Sec. I.3.
all internal armed conflicts. In this context, although Common Article 3 and Additional Protocol II are thin instruments in comparison to those regulating international armed conflicts, there is growing convergence between the customary norms covering all kinds of conflicts – international, transnational or internal. This convergence is evident, for instance, in the ongoing study of the International Committee of the Red Cross on customary IHL, where many of the customary rules have been found, in essence, equally applicable to international as well internal armed conflicts.

Third, since the 1948 Universal Declaration of Human Rights and, more significantly, since the coming into force of major human rights conventions (the ICCPR and ICESCR), the binding obligation to protect human rights has for the first time enshrined the protection of individuals – rather than sovereigns – in the international realm. In this context, and supplementing the convergence between the *jus in bello* applicable to international and internal conflicts, another normative convergence has emerged: the drawing closer of IHL and international human rights law (IHRL). In the *Nuclear Weapons* advisory opinion, the ICJ has ruled that IHL and IHRL are not mutually exclusive, and that international human rights law, as the *lex generalis*, also

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10 On the convergence between regimes regulating international and internal armed conflicts see Tadic, *supra* note 9, ¶¶100–127; on transnational armed conflicts, see NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 131–134 (2010).

11 See, generally, JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT’L COMM. RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2007); see also Meron, *supra* note 4, at 261–263.


13 For an in depth analysis of this process see Meron, *supra* note 4, at 244–247, 266–273.
during armed conflict. The same notion was expressed, in the context of occupation, in the *Wall* advisory opinion and the case of *DRC v. Uganda*.

Recent literature points out the difficulties in the application of the *lex generalis/lex specialis* distinction, and suggests that IHRL be seen instead as *complementary* to IHL, either by filling gaps in IHL; through the use of IHRL’s enforcement mechanisms in cases of IHL violations; or through the interpretational realization that both bodies of law seek to advance the same goals. However we see the specific nature of the relation between IHL and IHRL, it is clear that the dual-application of these bodies of law reflects that the protection of individuals has become an integral, predominant part of the law of armed conflict at large; and accordingly – and perhaps more obviously – also to the law of internal armed conflict.

Fourth, the preoccupation with the protection of civilians is expressed in the development of international criminal law, through the establishment of *ad hoc* international tribunals in the former Yugoslavia (ICTY) and Rwanda (ICTR), and the permanent International Criminal Court, all mandated to adjudicate crimes against individuals.

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17 On the International Criminal Court, see generally WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT (2011).
Fifth, since the 1990s, U.N. Security Council practice has reflected a wide interpretation of the Council’s mandate – authorizing the imposition of enforcement measures in cases that threat international peace and security – as extending to situations that are largely confined to the borders of a single state, such as internal armed conflicts.\(^{18}\)

Sixth, in the last decade, African regional organizations – that operate in the most strife-torn parts of the world – have increasingly stressed the concept of “non-indifference” to mass atrocities, as supplementing the norm of non-intervention. For instance, as discussed in Section III.3, Article 4(h) of the Constitutive Act of the African Union, and its subsequent protocol, authorize the Union to intervene in member states in cases of mass atrocities.\(^{19}\)

By the late 1990s, thus, the principle of protection has broken the boundaries of IHL, and began to emerge as a general principle of the international system. The atrocities in Iraq (1991), Rwanda (1994), Bosnia (Srebrenica, 1995) and Kosovo (1998)\(^{20}\) – the latter resulting in NATO’s controversial unilateral intervention – have brought the concept of protection, and its means of implementation, to the forefront of international concern. Indeed, NATO’s bombing campaign in Kosovo has been a watershed moment


\(^{19}\) See also U.N. Secretary General, Implementing the Responsibility to Protect: Rep. of the Secretary General, ¶8 U.N. Doc. A/63/677 (Jan. 12, 2009).

regarding the principle of protection. After Kosovo, it became obvious, in light of the previous failures of the international system, that a robust international consideration of the question of civilian protection must take place; and that otherwise, the entire order of the U.N. Charter would be put at risk. This development was the backdrop to the intense debate regarding the concept of unilateral humanitarian intervention, which will be addressed in Chapter 12. Significantly, the atrocities committed in the 1990s have compelled the international community – now largely free from zero-sum Cold-War considerations – to distance itself from the idea that “impartiality” towards internal crises was an absolute value, and to recognize that there are indeed instances in which local parties are not moral equals, but can be identified as aggressors and victims. The decline of the notion of impartiality has intertwined with the gradual shift in the international function of collective bodies, taking place since the 1960s, from serving mainly as treaty-making forums to resembling, to some extent, an international executive or administrative system. In recent years, literature has taken this process a step further: identifying the emergence of similar transnational “administrative” relations between states themselves and between states and citizens of other states.

In light of the processes outlined above, the U.N. Security Council has considered, since 1999, the protection of civilians in armed conflicts as a thematic issue,

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23 See ORFORD, supra note 18, at 8; see also THE KOSOVO REPORT, supra note 12, at 189 –190; Jennifer Welsh, Civilian Protection in Libya: Putting Coercion and Controversy Back into RtoP, 25 ETHICS & INT’L AFFAIRS 1, 4 –6 (2011).

24 For a detailed account of this process see generally ORFORD, supra note 18.

25 As part of the idea of Global Administrative Law See Sec. II.2.
calling for a “comprehensive and coordinated approach by Member States and international organizations and agencies” in order to address the problem of the protection of civilians.\textsuperscript{26} Reports by the U.N. Secretary General (UNSG), submitted as part of the thematic discussions, have identified the principle of protection as a main tenet of international peace and security, and recommended various measures to be taken by the Security Council to promote this principle, including, in certain situations, forcible enforcement measures.\textsuperscript{27}

The Secretary General’s reports have thus urged the promotion of a “culture of protection,” focused on the individual rather than the state, whose “primary function” is to ensure the security of the civilian population.\textsuperscript{28} They presented a “roadmap” for the promotion of protection,\textsuperscript{29} and have recognized that the principle of protection emerges from a wide body of positive international law, comprising of IHL, international criminal law, IHRL and refugee law.\textsuperscript{30} All in all, the UNSG’s reports contain over a hundred recommendations for the promotion of protection,\textsuperscript{31} which are categorized according to “five core challenges” required to be met in order to ensure the effective protection of civilians.\textsuperscript{32}

Some of the UNSG’s recommendations were reflected in general and forward-looking Security Council resolutions such as resolutions 1265 (1999), 1296 (2000), 1674 (2006), 1738 (2006) and 1894 (2009). Significantly, resolution 1296 affirmed that peacekeeping forces should be granted mandates to actively protect civilians in danger.\textsuperscript{33} Accordingly, mandates of numerous peacekeeping operations were broadened to include such activities.\textsuperscript{34} Resolution 1674 reaffirmed the principle of protection, the broadening of mandates of U.N. missions, and for the first time, endorsed the “responsibility to protect” (RtoP) doctrine – which we shall discuss later on.\textsuperscript{35}

Since the principle of protection itself is largely free from “political” pretext (as it is not necessarily connected to a specific system of government), it enjoys relatively wide credibility across states with different political cultures and systems.\textsuperscript{36} Accordingly, the “primary” legal validity of the principle of protection – in distinction from the “secondary” methods to implement it, which remain controversial – has emerged as a rare normative consensus in the international community, notwithstanding the dire reality on the ground, in which violations of the principle are frequent.\textsuperscript{37} Indeed, there is wide agreement regarding the validity of the principle of protection in the Security Council’s discussions. The major disagreement does not concern the significance of the principle itself, but is reflected, for instance, in China and Russia’s persistent positions that the principle should not, in general, be promoted through forcible intervention.\textsuperscript{38}

\textsuperscript{36} Compare ALEX J. BELLAMY, RESPONSIBILITY TO PROTECT 26–57 (2009).
In light of all of the above, it seems that collective *opinio juris* has elevated, in the last two decades, the principle of protection of civilians to the same plateau of basic principles of international law such as sovereignty, territorial integrity, non-intervention and the prohibition on the use of force, effectively complementing and redefining them.

Indeed, the principle of protection has affected Security Council authorized interventions conducted, in practice, in favor of beleaguered governments. As such, it has direct bearing on our understanding of the law of consensual intervention. For instance, in 2009, forcible support given to the DRC by U.N. Forces (MONUC) was heavily criticized, due to the Congolese military’s alleged involvement in serious IHL violations. In response, the UNSG instructed MONUC not to support DRC forces in operations where there are grounds to believe that IHL and IHRL violations will take place. MONUC was further required to support the DRC only in operations that were jointly planned, and to suspend support during operations if violations occurred.\(^{39}\) A subsequent Security Council resolution urged the DRC to “effectively protect” the civilian population,\(^{40}\) and mandated MONUC, in cooperation with the DRC, to ensure such effective protection, strictly conditioning MONUC’s support of the government on the latter’s compliance with international law.\(^{41}\)

In addition, the U.N. is undertaking a process to outline general “conditionality policies” regarding forcible support of governments by U.N. forces, in order to ensure the protection of civilians.\(^{42}\) This process implies that intervention, in contemporary international law, is intertwined with the concept of effective protection of civilians. This

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\(^{41}\) *Id.* ¶22.

is indeed a positive development: beyond the obvious moral virtues of the principle, it is also a relatively definable, objective and tangible threshold for the assessment of internal armed conflicts.

II. FROM EFFECTIVE CONTROL TO EFFECTIVE PROTECTION: PROTECTION AS A COMPONENT OF SOVEREIGNTY

II.1 THE EMERGENCE OF THE RESPONSIBILITY TO PROTECT

Until now, we have mainly demonstrated the international preoccupation with the principle of protection, and its resulting normative significance it. In parallel, however, a no-less important development has been taking place – effective protection has come to be viewed as an integral component of sovereignty, through the concept of the Responsibility to Protect (RtoP).43

The 1999 NATO intervention in Kosovo has not only invigorated the international consideration of civilian protection as a concept, but also the debate regarding the means for the principle’s enforcement – namely, concerning the legitimacy of unilateral humanitarian intervention. In response to pleas by UNSG Kofi Annan, the government of Canada established an International Commission on Intervention and State Sovereignty (ICISS), mandated to further the understanding of the connection between intervention, civilian protection and sovereignty.44 ICISS published its landmark report in 2001, calling for the endorsement of the concept of RtoP.45 Echoing the influential ideas of Francis Deng, the report’s main premise was its reading of the U.N. Charter, and its

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43 On the nuances in the U.N. discourse between Protection of Civilians (PoC) and RtoP see Welsh, supra note 23, at 2–3.
44 For the background on ICISS and its discussions, see RESPONSIBILITY TO PROTECT, supra note 36, at 35–51.
45 ICISS REPORT, supra note 18, at 1–3.
understanding of emerging state practice, as connoting a shift in the perception of sovereignty: “from sovereignty as control to sovereignty as responsibility.”

This “responsibility,” according to the ICISS report, is to “protect” human security; it lies first and foremost with the territorial state, but when the latter is unable or unwilling to fulfill it, or is itself perpetrating atrocities against individuals under its control, the responsibility shifts to the international community. The responsibility, according to ICISS, is comprised of three elements: the responsibility to prevent; the responsibility to react; and the responsibility to rebuild. These responsibilities, and in particular the responsibility to react, override the norm of non-intervention, in the strict understanding of the term, in cases of violence that “shock the conscience of mankind.” Accordingly, the report laid down six criteria for military intervention, which correspond, at large, to classic just-war theory conditions.

Under the “just-cause” condition for intervention, the report referred to cases of large scale loss of life or ethnic cleansing, actual or apprehended. Significantly, such cases include, inter alia, “state collapse” that leads to starvation or “civil war,” and overwhelming natural or environmental catastrophes. Moreover, the ICISS Report stressed that causes for intervention do not distinguish between state action, deliberate inaction, or failure. However, the report excluded, as grounds for military intervention,

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47 ICISS REPORT, supra note 18, at ¶¶2.29–2.33.
48 Id. ¶4.13.
49 Id. ¶4.16 et seq. These criteria are right authority; just cause; right intention; last resort; proportional means and reasonable prospects.
50 Id. ¶4.19.
51 Id. ¶4.20.
52 Id. ¶4.22.
violations of human rights falling short of “outright killing or ethnic cleansing,” such as systematic racial discrimination, or the overthrow of democratic regimes.\textsuperscript{53}

The report acknowledged that forcible intervention as part of the RtoP concept must be authorized by a Chapter VII U.N. Security Council resolution.\textsuperscript{54} However, it recognized the problematic “capricious use” of the Permanent Five’s veto power as a major potential inhibition to international action.\textsuperscript{55} The report then proceeded to suggest modes of action “when the Security Council fails to act.” These included General Assembly actions under the “Uniting for Peace” procedures,\textsuperscript{56} which could add “a high degree of legitimacy” (in distinction from legal authorization) to military intervention;\textsuperscript{57} and actions by regional organizations, that receive \textit{ex post} authorization by the Security Council, such as was the case regarding the 1990s ECOWAS interventions in Liberia and Sierra Leone.\textsuperscript{58}

The Commission then issued two “important messages” to the Security Council:\textsuperscript{59} first, that if it fails to discharge of its responsibility, it is inevitable that concerned states will act unilaterally, a process which will potentially lead to adverse results; and second, that if such interventions would be successful, the credibility of the U.N. as a collective system will be seriously damaged.\textsuperscript{60}

\textsuperscript{53} \textit{Id. ¶¶4.25–4.26.} Interestingly, regarding cases of coup d’états against democratic government, the Report recognizes that in such cases the overthrown government may request forcible intervention. This situation is discussed in Chapter 11.
\textsuperscript{54} \textit{Id. ¶¶6.14–6.15.}
\textsuperscript{55} \textit{Id. ¶6.20.}
\textsuperscript{56} \textit{Id.; Uniting for Peace, G.A. Res. 377(V), U.N. Doc. A/377 (Nov. 30, 1950).}
\textsuperscript{57} ICISS REPORT, \textit{supra} note 18, ¶6.30.
\textsuperscript{58} \textit{Id. ¶¶6.31–6.35.} It should be noted that nowadays, actions by regional organizations can be viewed as consensual interventions based on forward-looking intervention treaties, in regions where such are concluded. \textit{See} sections III.3 –III.4.
\textsuperscript{59} ICISS REPORT, \textit{supra} note 18, ¶6.38.
\textsuperscript{60} \textit{Id. ¶¶6.39–6.40.}
Some of the ICISS Report’s recommendations were included in the conclusions of the U.N.’s High Panel on Threats, Challenges and Change of 2004. In particular, the Panel endorsed “the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort,” in cases of mass atrocities.\footnote{Note by the Secretary General ¶203, U.N. Doc. A/59/565; see also U.N. Secretary General, In Larger Freedom: Towards Development, Security and Human Rights for All ¶135, U.N. Doc. A/59/2005 (Mar. 21, 2005).} The general idea of the RtoP concept has been endorsed unanimously in Paragraphs 138–139 of the 2005 World Summit Outcome Document (WSO Document), adopted by the General Assembl.\footnote{2005 World Summit Outcome, G.A. Res. 60/1, U.N. Doc. A/60/L.1 (Sept. 15 2005).} Paragraph 138 refers to the responsibility of the individual state, and Paragraph 139 refers to situations in which a state fails to fulfill its responsibilities, and these shift to the international community, acting through the U.N.

Paragraph 138 thus recognizes that each state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity ("the four crimes"); and that the international community should “encourage and help States to exercise this responsibility.” By focusing strictly on the four crimes, and excluding, for instance, “natural or environmental catastrophes,” the WSO Document has narrowed the concept as it was presented first in the ICISS report. Paragraph 139 acknowledges that when states manifestly fail to protect their populations from the four crimes, this responsibility extends to the international community, acting through the U.N., including – as a last resort – by forcible measures authorized by the Security Council. As opposed to the ICISS Report, it seems that paragraph 139 excluded an explicit reference to\textit{ apprehended} failure to protect as a potential cause for intervention,
although it includes a pledge to assist “those which are under stress before crises and conflicts break out.” Notably, paragraph 139 lacks any reference to the Security Council’s “capricious veto” problem, and thus reaffirms the Council’s monopoly over the authorization of forcible intervention.63

Its limitations notwithstanding, the adoption of the WSO Document constituted a significant step towards the consolidation of the principle of protection through the RtoP concept, and solidified the understanding of sovereignty as the responsibility to effectively protect civilians.64 It is for this reason that it was heralded by the UNSG as a “cardinal achievement” of particular significance.65 However, this process was not uncontroversial. For instance, it was only after six months of intense debate in which reluctant states, such as China and Russia, expressed discomfort with the concept, that paragraphs 138–139 of the WSO Document were endorsed in Security Council Resolution 1674 of 2006.66 Moreover, in 2006–2007, the RtoP concept has been heavily questioned in U.N. forums, namely by some Arab and Asian states, in the context of the debated regarding the international reaction to events in Sudan.67 Nevertheless, the principle was reaffirmed in Security Council resolution 1706 concerning Darfur;68 and in subsequent years it seems that the door has opened, to the extent possible in the

63 This reflects the concerns of many states that RtoP would be used to disguise the controversial claim that a “right” of extra-charter humanitarian intervention be recognized. See ORFORD, supra note 18, at 24–25.
64 Implementing RtoP, supra note 19, at ¶10.
66 S.C. Res. 1674, supra note 36.
international system, for renewed consensus regarding RtoP. In 2008, the UNSG created a new position – Special Adviser to the Secretary General on the Responsibility to Protect – to promote the implementation of the concept. In parallel, many states – both developed and developing, and in particular African states – began to refer to RtoP in their statements in front of various forums. In 2009, in resolution 1894 concerning the protection of civilians, the Security Council once again reaffirmed paragraphs 138–139 of the WSO Document.

In the same year, the General Assembly debated the RtoP concept and called for its continuing consideration. The implementation of the concept was further discussed in “informal dialogues” in August 2010 and July 2011. As part of this process, the UNSG issued reports regarding the implementation of the RtoP concept. In his 2009 report, UNSG Ban Ki-moon phrased RtoP as encompassing three pillars: (1) the protection responsibilities of the state; (2) international assistance and capacity building (which, of course, augments the concept of government consent power); and (3) the issue of timely and decisive response, which encompasses both non-forcible to forcible measures. A 2011 report further discussed the implementation of RtoP and the role of regional organizations in it promotion.

In 2011 RtoP has been first incorporated into significant, operational Security Council resolutions. Thus, RtoP has been referred to by the Security Council in its

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69 GLOBAL POLITICS, supra note 67, at 31 –36.
70 See ORFORD, supra note 18, at 17.
71 Id. at 17–19.
75 Implementing RtoP, supra note 19, ¶11.
76 The Role of Regional and Subregional Arrangements, supra note 74.
resolutions concerning the 2011 crisis in Libya, \textit{inter alia} authorizing forcible intervention,\textsuperscript{77} as well as in its resolution reiterating the mandate for forcible actions in Côte d'Ivoire.\textsuperscript{78} These will be discussed later in this work. For now, suffice it to say that in both cases, the mandates granted for the protection of civilians were interpreted widely – too widely in the eyes of some –\textsuperscript{79} resulting eventually in the removal of an unrecognized leader (in Côte d'Ivoire),\textsuperscript{80} and the widespread withdrawal of recognition from a targeted regime, eventually leading to its ouster (in Libya).\textsuperscript{81} It is also of special significance that Resolution 1973, authorizing intervention in Libya, was the first time that forcible intervention in an internal armed conflict, for the sake of civilian protection, was authorized \textit{against} the will of a functioning government.\textsuperscript{82}

II.2 \textsc{The Normative Significance of RtoP: Affecting Effectiveness}

The RtoP concept undoubtedly presents a rather thin legal framework, surrounded by an environment of robust policy considerations. As noted by the UNSG, paragraphs 138–139 of the WSO document reflect \textit{already existing} principles and obligations of


\textsuperscript{82}\textit{See} Alex J. Bellamy, \textit{Libya and the Responsibility to Protect: The Exception and the Norm}, 25 ETHICS & INT’L AFFAIRS 1, 1 (2011).
international law regarding protection of civilians.\textsuperscript{83} Moreover, the paragraphs do not challenge the monopoly or the wide discretion of the Security Council regarding the authorization of forcible action. As such, there is significant disagreement whether RtoP has any novel legal-normative significance.\textsuperscript{84} For instance, the responsibility of third parties to “prevent and to punish” genocide is already well established in international law;\textsuperscript{85} similarly, states are also already obliged to “ensure respect” for the laws of the Geneva Conventions.\textsuperscript{86} Thus, some commentators went as far as concluding that RtoP is merely “political rhetoric.”\textsuperscript{87}

Furthermore, RtoP has been criticized substantively from various angles. On the one hand, it has been labeled as ambiguous lip-service that will not serve to promote substantial international efforts against atrocities; on the other, it was attacked as a new cover for imperialist interventionism.\textsuperscript{88} Some have even blamed the concept for promoting genocide by creating a moral hazard.\textsuperscript{89} However, these critiques are not particularly well-based. The “lip-service” claim seems to contradict emerging international practice, such as in the case of Libya, and perhaps also in Kenya;\textsuperscript{90} the

\textsuperscript{83} Implementing RtoP, \textit{supra} note 19, \S\S 2–3.

\textsuperscript{84} See Carlo Focarelli, \textit{The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine}, 13 J. CON. & SEC. L 191 (2008); Amrita Kapur, \textit{Humanity as the A and Ω of Sovereignty: Four Replies to Anne Peters}, 20 EU. J. INT’L L. 560 (2009); for a summary of these claims see ORFORD, \textit{supra} note 18, at 22–24.


\textsuperscript{87} ORFORD, \textit{supra} note 18, at 22–23 (addressing such arguments); See generally RAMESH THAKUR, \textit{THE RESPONSIBILITY TO PROTECT: NORMS, LAWS AND THE USE OF FORCE IN INTERNATIONAL POLITICS} ch. 10 (2010).

\textsuperscript{88} For a critical response to the “moral hazard” claim see GLOBAL POLITICS, \textit{supra} note 67, at 71–73.

acculations of “imperialism” seem contradictory to the fact that African states – hardly the usual suspects for neo-imperialism – have been major supporters of RtoP;\footnote{The African Union adopted a common position endorsing the RtoP concept. See \textit{African Union, The Common African Position on the Proposed Reform of the United Nations: The Ezulwini Consensus} (Mar. 7–8, 2005) ; cited in \textit{OFORD, supra note 18, at 19; see also Ademola Abass, \textit{The African Union and the Responsibility to Protect: Principles and Limitations, in The Responsibility to Protect: From Principle to Practice}, supra note 90, at 132.}} it also cannot serve to explain the Arab League’s support of the 2011 RtoP intervention in Libya;\footnote{\textit{GLOBAL POLITICS, supra note 67, at 73–74.}} last, the moral hazard argument can serve to negate any form of international order which deviates from a \textit{laissez faire} approach towards mass atrocities, and in any case has not been empirically validated.\footnote{\textit{Weiss, supra note 37, at 5.}}

Although novel legal obligations, in the strict sense, are not explicitly set forth in the various “official” RtoP documents, the concept still has potential for legal significance.\footnote{For a detailed discussion of the various aspects of this question, see generally \textit{The Responsibility to Protect and International Law} (Alex J. Bellamy et al. eds., 2010); \textit{Cristina G. Badescu, Humanitarian Intervention and the Responsibility to Protect} 130–135 (2010); \textit{The Responsibility to Protect: From Principle to Practice, supra note 90, chs. 6–10.}} First, it serves as a clear-cut statement by the international community that internal situations, even when lacking any tangible cross-border effects, are indeed of international interest, and are also within the mandate of the Security Council.\footnote{Previously, there was a tendency by some commentators to justify Security Council action with regards of internal situations on counts of cross-border flow of refugees. See J.L. Holzgrefe, \textit{The Humanitarian Intervention Debate, in Humanitarian Intervention: Ethical, Legal and Political Dilemmas, supra note 1, at 15, 42–43.}} As such, RtoP, although expressed in a non-binding General Assembly resolution, reflects an interpretation of the U.N. Charter that arguably ends the longstanding debate regarding the relations between Security Council authority, which extends to issues of \textit{international} peace and security, and \textit{internal} crises such as internal armed conflicts; and between enforcement measures and the norm of non-intervention, as enshrined in article 2(7) of
the U.N. Charter. In this sense, RtoP can be seen as a more practical response to emerging questions of international law – opting for interpretation rather than U.N. Charter amendment.

Second, RtoP can serve to aggregate and consolidate the various existing international norms of civilian protection, under a common theoretical wing – where the concept of sovereignty as responsibility can be looked upon as a basic principle to which major interpretational value should be attributed. This interpretational value can serve, for instance, to advance the equal and like application of the principle of protection to all types of armed conflicts: international, internal or transnational.

Third, RtoP explicitly shifts the debate from the permissive “rights” of external parties – namely, the “right to intervene” – to responsibilities accrued towards the civilian population of the target state. Thus, in contradistinction to the doctrine of “humanitarian intervention,” discussed in Chapter 12, RtoP focuses the attention on the rights of internal parties, and places these considerations in the forefront of the international system’s approach to internal crises. This is indeed an important development: even the proponents of the “right of humanitarian intervention” define it as an “imperfect right” possessed by the intervener, which is closer, in legal theory, to a “freedom” – since it is

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96 Orford, borrowing from H.L.A. Hart, labels this aspect of RtoP as a “power-conferring” form of law, which allocates jurisdiction or power – in the administrative sense – to an international actor, as distinct from a “duty imposing” form of law. See ORFORD, supra note 18, at 25–27; for the traditional approach, compare Lori Fisler Damrosch, Commentary on Collective Military Intervention to Enforce Human Rights, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 219 (Lori Fisler Damrosch & David Scheffer eds., 1991); compare also Doyle, The Folly of Protection, supra note 77.

97 Compare THE KOSOVO REPORT, supra note 12, at 196 –197.

98 Compare ORFORD, supra note 18, at 42–108.


100 See Holzgrefe, supra note 95, at 24 n. 40.
not accompanied by parallel and tangible obligation owed by anyone.\textsuperscript{101} This definition of humanitarian intervention, as a “freedom” to intervene, seems inconsistent with the principled approach that should be the basis of any doctrine of intervention.\textsuperscript{102}

Therefore, although not imposing a legal obligation to intervene \textit{per se}, RtoP’s emphasis on the term “responsibility” potentially provides a more principled framework, less responsive to the whims or self- arrogated “rights” of external parties.\textsuperscript{103} In essence, the use of the concept of “responsibility” reflects a transition from the perception of the international community as comprised of self-interested unitary actors, acting to fulfil their “rights” – perhaps in a manner similar to individuals acting in the realm of private law – to a system in which actors on the international level play a role which is closer to that of an administrative, or “executive” function, perhaps acting as public-global trustees.\textsuperscript{105}

Fourth, and most significantly in our context, RtoP solidifies the understanding by the international community that sovereignty means \textit{responsibility} rather than the ability to exercise territorial effective control. As such, it can alter our understanding of the concept of recognition in international law, as well as other concepts of law that


\textsuperscript{102} On the need to adopt a principled approach in this context see The Kosovo Report, \textit{supra} note 12, at 190–192; see also Libya and the Responsibility to Protect: The Exception and the Norm, \textit{supra} note 82, at 3–5.


\textsuperscript{104} A notion classically expressed in the famous Louts case. S.S. Lotus (Fr. v. Turk) 1927 P.C.I.J. Ser. A-No. 10.

traditionally attribute much importance to territorial effectiveness. Accordingly, it can explain and justify substantive preference given to one side over the other in an internal armed conflict.\textsuperscript{106} We shall explore this notion in the next sections.

In short – RtoP, in its legal sense, is a concept that represents the aggregation of all the existing normative and institutional obligations stemming from the basic principle of protection of civilians, and serves to bridge between these obligations and the understanding of sovereignty, its traditional corollary of non-intervention, and the emerging “administrative” role of international bodies.

II.3 Absence of Effective Protection and Negation of Government Consent Power

Once our perception of sovereignty transforms – from a term connoting effective physical “control” over territory, which generates, in and of itself, a right to exercise further control, into a source of a responsibility to protect civilians – change must also follow in our view towards what constitutes normative effectiveness: meaning, control of the type that positively affects the recognition of rights and powers of entities engaged in internal armed conflicts.\textsuperscript{107} However, since effectiveness, as a technical term, is necessary for any entity’s mere physical capacity to protect civilians during armed conflict, the concept of sovereignty as responsibility compels us to reformulate the doctrine of effectiveness rather than to abandon it. Thus, the perception of effectiveness can be shifted from its

\textsuperscript{106} ORFORD, \textit{supra} note 18, at 9–10.

\textsuperscript{107} Interestingly, this notion has been experienced at the grassroots level by external forces operating in internal conflicts. As noted in the U.S. Army counterinsurgency manual, “In the eyes of some, a government that cannot protect its people forfeits the right to rule. Legitimacy is accorded to the element that can provide security, as citizens seek to ally with groups that can guarantee their safety.” U.S. ARMY, \textsc{Counterinsurgency} ¶1-43 (2006).
traditional understanding as connoting effective control over territory, to one which refers to the effective protection of civilians. In this sense, the effective control and effective protection principles share one characteristic: both focus chiefly on the way power is used rather on the way it was initially appropriated.\textsuperscript{108}

However, it should be emphasized, that the concept of effective protection does not substitute the consent of the governed as a source of sovereign legitimacy; as discussed in Section II.5, it is merely a key consideration at the moment when assessing the question of intervention in specific circumstances. For instance, while autocracy was indeed a longstanding feature of the Assad regime in Syria, its international legitimacy, in the strict sense, was never substantially challenged. Only after its military crackdown in the context of the uprising of 2011-2012 – allegedly amounting to a violation of the protection principle –\textsuperscript{109} did the U.S., Canada and major E.U. powers assert that the regime has “lost its legitimacy,” and that Assad “can no longer claim to lead the country.”\textsuperscript{110} Turkey – previously a staunch ally of Assad – went further by issuing a stern warning to the latter, threatening that “[i]f these operations do not stop there will be nothing left to say about the steps that would be taken.”\textsuperscript{111} Here, we see that the attitude


towards the Syrian regime was shaped, in general, by the way it has exercised its power rather than on counts of its longstanding autocratic nature.

The same dynamic was prevalent also regarding the autocratic Qadhafi regime in Libya. Only during the 2011 internal armed conflict, and following the atrocities committed against civilians, Russia, the U.S. and the U.K. claimed that the Qadhafi regime has “lost legitimacy.” While these declarations did not amount, at the time, to a formal withdrawal of recognition – they nevertheless highlighted the role of effective protection as a main component of legitimacy.

Thus, effective protection can be a major factor considered when assessing the rights and powers of parties to internal armed conflicts; among these powers, the absence of effective protection can adversely affect the government’s legal capacity to express consent to external intervention. The perception of sovereignty as responsibility challenges therefore the traditional doctrines, discussed in previous Chapters, which limit government consent power strictly on counts of territorial effective control, while providing a relatively tangible standard for the analysis of governmental behavior. Territorial effective control, conversely, can affect consent power only to the extent that it reflects the actual or potential exercise of effective protection of the civilian population.


113 On the distinction between longstanding autocracies such as Syria or Libya, and revolutionary autocracies see Chapter 11, Sec. I.2.

114 For a comparable analysis, grounding the rights of parties in internal armed conflicts on counts of protection, see ORFORD, supra note 18, at 109–139 (linking this concept to works by Thomas Hobbes and Carl Schmitt).
II.4 Effective Protection and Augmentation of Government Consent Power

The notions of effective protection and RtoP, it should be emphasized, do not serve only to limit governmental consent power. Pillar 2 of the RtoP concept ("international assistance and capacity building"), as suggested by the UNSG and reflected in paragraph 138 of the WSO Document, revolves around the premise that states should assist other states in fulfilling their duties under RtoP.\textsuperscript{[115]} This notion was already implied in the 2000 Kosovo Report, which viewed humanitarian intervention, when conducted with government consent, as raising "no legal problem."\textsuperscript{[116]}

It is not hard to imagine a situation, for instance, in which a government that exercises, in general, effective protection – or at least shows reasonable prospects and motivation to do so – is confronted by an opposition group that is regularly engaged in atrocities, and has also caused the government to lose some territorial effective control.\textsuperscript{[117]} In such cases, should a government request forcible support, the international community – separately and together – might acquire some responsibility to assist it.\textsuperscript{[118]} Some have even gone as far as arguing that the state itself has the responsibility to request assistance in such circumstances.\textsuperscript{[119]}

Significantly, such responsibilities to assist may arise even before Security Council action. This is since Paragraph 138 deals with state responsibilities before U.N.

\textsuperscript{[115]} See GLOBAL POLITICS, supra note 67, at 37–38. As stated in ¶138 of the WSO Document, supra note 62: "[t]he international community should, as appropriate, encourage and help States to exercise this responsibility."

\textsuperscript{[116]} THE KOSOVO REPORT, supra note 12, at 193.


\textsuperscript{[118]} BELLAMY, supra note 36, at 23, 147–149; GLOBAL POLITICS, supra note 67, at 37–38.

\textsuperscript{[119]} See BELLAMY, supra note 36, at 150 (citing U.N. officials that have expressed this idea.)
involvement. This conclusion is fortified by the fact that in the global consultations preceding the ICISS report, it was widely recognized that when the Security Council fails to act in the face of atrocities, host-state consent – and in particular when given to regional organizations – provides an alternative legal justification for intervention.\textsuperscript{120}

For the existence of such a consent-augmenting situation, in which external parties may accrue the responsibility to assist, the consenting government need not be a perfect democracy. It suffices that it protects civilians in the specific context. This is evident in contemporary dilemmas. For instance, in July 2011, the U.N. has declared that a famine exists in Somalia.\textsuperscript{121} However, since 2009, an opposition group – Al-Shabaab – has banned food aid from areas under its control.\textsuperscript{122} In these circumstances, and although Somalia is a failed state, ruled, \textit{de jure}, by a territorially ineffective government, should the latter request help to secure the delivery of aid, it is reasonable that a claim regarding its territorial ineffectiveness will not be heard, since the issue of protection of civilians is at stake. This situation can be a prime example in which effective protection trumps territorial ineffectiveness.

This notion constitutes, therefore, a complete reversal of the traditional territorial effective-control doctrine: if, in the past, lack of such effective-control was seen as a liability, in the contemporary system, in some cases, it might be understood as generating

\textsuperscript{120} \textsc{Responsible to Protect, supra} note 36, at 47–48. The consultations involved academics, government representatives and NGOs. \textsc{Id.} at 38.


an entitlement for assistance. It all rests upon the question whether the government requests assistance for the purpose of fulfilling its protection responsibilities.

II.5 EFFECTIVE PROTECTION, HUMAN RIGHTS AND DEMOCRACY: PROTECTION NOW, DEMOCRACY LATER

In essence, the reliance on the principle of protection as a determinant of consent power is closely related to human rights and “democracy” thresholds. However, it remains significantly different. Indeed, human rights are indivisible, but most of them are not absolute. Some can be derogated from in times of emergency, providing that the derogation is proportional and non-discriminatory. Others are subject to intricate internal balancing with other rights and public interests. Because of their complex nature, it is almost certain that all states can be deemed, in certain aspects, violators of human rights. It is thus doubtful whether the general concept of “human rights,” as such, can affect the laws on the use of force. As noted by Henkin, in another context, “if it were permissible to remedy them [violations of human rights] by external use of force, there would be no law to forbid the use of force by almost any state against almost any other.” For similar reasons, the implementation of a human right in a specific instance

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123 Whether such entitlement creates a “perfect” or “imperfect” obligation, or, in legal terms, a right that creates a legal claim vis-à-vis a specific actor, is a complex question that will not be addressed here. Suffice it to realize that loss of effectiveness is no longer considered a liability for the sake of consent power. On perfect and imperfect duties see Holzgrefe, supra note 95, at 26 n. 40.


125 See, e.g., id. art. 19, protecting the right to freedom of expression, which contains both the entrenchment of the right, and its lawful limitations.

126 LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 145 (1979); cited in Holzgrefe, supra note 95, at 24.
necessarily draws us into extensive debates about cultural and political context, whether we like it or not.\(^\text{127}\)

The principle of protection, conversely, focuses on the core values that law sets out to protect during armed conflict. In this sense, it is minimalist.\(^\text{128}\) In contrast to human rights law, it does not aspire to create an ideal society, or even an entirely decent society; it aspires to put an expedient end to atrocities. This should in no way be understood as a claim according to which protection trumps the consent of the governed as the main source of sovereignty. Indeed, effective protection, in the narrow sense, cannot and should not be viewed as the ultimate sought-after end result for the relevant internal order. It does not aim to establish an absolutist Hobbesian Leviathan designed to protect the lives of otherwise rightless subjects.\(^\text{129}\) It is merely the minimum result sought during an internal armed conflict, when the protection of civilians is the primary objective of the international community. Indeed, as phrased already in the 18\(^{\text{th}}\) century by Vattel, “the flames of discord and civil war are not favourable to the proceedings of pure and sacred justice: more quiet times are to be waited for.”\(^\text{130}\)

It is in this context that we should understand also the role of democracy and the question of consensual intervention, as opposed to the role of protection of civilians.

\(^{127}\) See generally NEGOTIATING CULTURE AND HUMAN RIGHTS (Lynda S. Bell et al. eds., 2001); Allen Buchanan The Legitimacy of International Law, in THE PHILOSOPHY OF INTERNATIONAL LAW 79, 94–96 (Samantha Besson & John Tasioulas eds., 2010).

\(^{128}\) Compare Michael Walzer, The Argument about Humanitarian Intervention 49(1) DISSERT (2002) (arguing that humanitarian interventions are best serve by a “minimalist version of human rights,” regarding which there is sufficient understanding across the globe). It might be interesting to compare between the notion of effective protection as a condition for consent power and the Rawlsian idea of “decent peoples.” See JOHN RAWLS, THE LAW OF PEOPLES 59–78 (1999); a comparable type of a minimalist approach to questions of international law and universal values has been labeled as “moderate skepticism.” See Samantha Besson & John Tasioulas, Introduction, in THE PHILOSOPHY OF INTERNATIONAL LAW, supra note 127, at 1, 14.

\(^{129}\) On the relation between Hobbesian theory and the principle of protection see ORFORD, supra note 18, at 109–125.

\(^{130}\) EMMERICH DE VATELL THE LAW OF NATIONS ¶295 (1758, 1797).
While the establishment of substantive democracy must be a main element of post-conflict rebuilding, at the time of intervention, effective protection should be the main guiding principle.\(^{131}\) Indeed, effective protection can be also rationalized on the premise that those who protect civilians during conflict are more likely to establish or maintain a democratic, human rights protecting government afterwards. We shall elaborate more on the connection between these values in Chapter 11.

The two-tiered, “protection now, democracy later,” approach of the international community can be clearly exemplified in the practice of the Security Council regarding the 2011 intervention in Libya. It is revealing, in this context, to compare between Resolution 1973, authorizing forcible intervention during the Libyan armed conflict, and Resolution 2009, adopted after the fall of the Qadhafi regime, which mainly dealt with the post-conflict period.\(^{132}\) Resolution 1973, while authorizing the use of all necessary measures to protect civilians (excluding occupation)\(^{133}\) did not bind – beyond vaguely referring to the need to respond “to the legitimate demands of the Libyan people”– the objectives of subsequent military operations with the enforcement of electoral democracy.\(^{134}\) Resolution 2009, conversely, greatly emphasized the promotion of democracy and human rights. It reaffirmed that the U.N. should “lead the effort of the international community in supporting the Libyan-led transition and rebuilding process aimed at establishing a democratic, independent and united Libya,” and further stressed

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\(^{131}\) In the RtoP discourse, promotion of democracy can be perhaps considered a part of the international community’s “responsibility to rebuild”. See RESPONSIBILITY TO PROTECT, supra note 36, at 59. On related questions of transitional strategies see, e.g., MICHAEL W. DOYLE & NICHOLAS SAMBANIS, MAKING WAR AND BUILDING PEACE: UNITED NATIONS PEACE OPERATIONS 303–334 (2006); see also JUS POST BELLUM: TOWARDS A LAW OF TRANSITION FROM CONFLICT TO PEACE (Carsten Stahn & Jann K. Kleffner eds., 2008).


\(^{134}\) Id. ¶2.
the need for “a commitment to democracy, good governance, rule of law and respect for human rights.”

Similarly, the 32-state Contact Group on Libya, in a July 2011 statement recognizing the opposition as the government of Libya, arguably granted its recognition on counts of considerations of civilian protection, while reserving the development of representative government to a later stage. It is thus clear that the Council, and the international community, saw the protection of civilians as the key factor in the moment of intervention, while leaving the question of democracy to the post-conflict environment, where deliberation and other non-forcible processes prevail.

III. EFFECTIVE PROTECTION AND WITHDRAWAL OF CONSENT

III.1 WITHDRAWAL OF CONSENT AS A NEAR-ABSOLUTE RIGHT

The question of the scope of consent power necessarily entails also the analysis of the capacity to withdraw such consent. This issue is relevant when consent is given ad hoc, but is more acute in situations in which consent was given through a general, forward-looking intervention treaty. As we shall see, the concept of effective protection – besides affecting consent-capacity – can also play a role in the assessment of withdrawal-capacity.

Recall, that Article 3(e) of the Definition of Aggression provides that the term aggression includes “[t]he use of armed forces of one State which are within the territory

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136 Republic of Turkey, Ministry of Foreign Affairs, Fourth Meeting of the Libya Contact Group Chair’s Statement, 15 July 2011, Istanbul, available at http://www.mfa.gov.tr/fourth-meeting-of-the-libya-contact-group-chair_s-statement__15-july-2011__istanbul.en.mfa (“Henceforth and until an interim authority is in place, participants agreed to deal with National Transitional Council (NTC) as the legitimate governing authority in Libya. The Group welcomed the role of the NTC in leading the transition process in Libya and expressed support for its efforts to broaden its popular base to embrace all Libyan people.”)
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.”

Thus, when consent is withdrawn, and absent other justifications such as self-defense, the principal-agent relation between the parties lapses, and the intervention becomes an act of aggression.

An illustrative example of such an instance can be found in the events that unfolded in the Second Congolese Conflict in 1998. As discussed in Chapter 1, on July 27th 1998, President Kabila “terminated” the consensual presence of Rwandan forces in the DRC, proclaiming that “[t]his marks the end of the presence of all foreign military forces in the Congo.”

Rwanda and Uganda, present in the DRC since the First Congolese Conflict, refused to withdraw their forces, leading to the eruption of major hostilities. On these counts, the DRC sued Uganda in the ICJ, and claimed, *inter alia*, that Uganda’s actions constituted aggression.

It was not contested that Kabila, first as the leader of the rebelling ADFL and since May 1997 the President, consented to the Rwandan and Ugandan intervention. However, the parties were at odds regarding the existence of consent following Kabila’s July 27th declaration. Uganda claimed that Kabila’s statement did not mention the withdrawal of Ugandan forces explicitly, but was only addressed only to Rwandan forces, and thus was not sufficient to constitute a withdrawal of the DRC’s consent. The ICJ, at large, rejected this claim, holding that absent any specific terms, “no particular

138 See Chapter 1, Sec. III.2.
139 Armed Activities on the Territory of the Congo (DRC v. Uganda), 2005 I.C.J. 168 (December 19) ¶49.
140 Id. ¶43, 45..  
141 See id. ¶43.
142 See id. ¶50.
formalities” are required for a withdrawal of consent to forcible intervention.\(^\text{143}\) The Court also stressed that the original consent given to Uganda was not “open ended” and was given regarding restricted actions. Lastly concerning this issue, the Court held that “at the latest” the DRC’s consent was withdrawn by August 8, 1998 (two weeks after Kabila’s somewhat ambiguous declaration), when the DRC openly accused Uganda of invading its territory.\(^\text{144}\)

When reading the Court’s treatment of the issue of consent in *DRC v. Uganda*, the question arises whether a case exists, in which consent can indeed be “open ended.” The answer seems to be negative. *Dinstein*, for instance, argues that consent can always be withdrawn, even in breach of a previous treaty – as long as the state still has an effective government capable of withdrawing the consent (as opposed to the “failed state” scenario, discussed in Chapter 9). His conclusion is based on the peremptory *jus cogens* status of the prohibition on the use of force. Once the consent is withdrawn, the argument goes, a violation of Article 2(4) occurs *notwithstanding* any treaty, since treaty provisions cannot contravene *jus cogens*.\(^\text{145}\) A comparable claim was made, for instance, by Cyprus, when Turkey invoked the 1960 Treaty of Guarantee to justify its 1974 invasion of Cyprus.\(^\text{146}\)

*Wippman* follows a similar route, arguing that authorizations of forcible intervention are agreements of a special type: they concern the core of a state’s sovereignty and independence, and since they deal with the use of force, they also affect the interests of the international community as a whole. Thus, he concludes that in

\(^{143}\) *Id.* ¶51.

\(^{144}\) *Id.* ¶¶52–53.


general, an implicit “right of revocation” should be read into any intervention agreement.\textsuperscript{147} Indeed, these analyses are correspondent with the view expressed in Chapter 1, according to which intervention treaties, in essence, create a revocable principal-agent relationship.\textsuperscript{148} However, as we shall see in Section III.5, the principle of effective protection, just as it affects consent power, can also have bearing on withdrawal power.

III.2 CONSENT AND FORWARD-LOOKING INTERVENTION TREATIES

The question of withdrawal of consent is especially challenging in the context of forward-looking intervention treaties. Such agreements are ones in which states, whether acting bilaterally or within the framework of a regional organization, grant external parties a forward-looking permission to intervene forcefully in their territories, in the event that certain internal circumstances occur. It is important to distinguish between such agreements and collective self-defense agreements, such as NATO, which deal strictly with mutual defense in the face of external threats to a member state.\textsuperscript{149}

Forward-looking intervention treaties have been common since the 18\textsuperscript{th} century, shifting forms with the changes in the international system.\textsuperscript{150} Nowadays, the internal circumstances addressed by such treaties may refer, namely, to instances where a government commits mass atrocities; when a democratic regime is overthrown; when state-failure occurs; or, in rather rare cases, when parties seek an external guarantor for an

\textsuperscript{147} See David Wippman, Pro-democratic Intervention by Invitation, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, supra note 1, at 293, 315.
\textsuperscript{148} Chapter 1, Sec. II.1.
\textsuperscript{149} See, e.g., North Atlantic Treaty art. 5, Apr. 4, 1949, 34 U.N.T.S. 243.
\textsuperscript{150} See Treaty-Based Intervention, supra note 146, at 613–615.
internal settlement.\textsuperscript{151} In general, the rationale of such treaties is to allow the invocation of past-consent, in times of crisis, to justify forcible intervention – usually by a regional organization – \textit{absent} Security Council authorization.

Forward-looking intervention treaties differ from instances in which \textit{ad hoc} consent to an intervention is given. They are special in the sense that as opposed to the latter, they are not concluded in relation to a specific event in real-time. They are potentially applicable to future, hypothetical events. As such, they purport to bind the will of current as well as \textit{future} governments. Granted, this phenomenon is a common occurrence in treaties in general – indeed, the basic rule regarding the continuity of international obligations is founded on this premise \textsuperscript{152} – however, it raises unique problems in the context of agreements that address the use of force.

To be sure, there is considerable debate regarding the legal validity of forward-looking intervention treaties, and in particular concerning the question whether they are void \textit{ab initio} as violations of \textit{jus cogens} norms.\textsuperscript{153} The debate recognizes that states have the power to limit their sovereignty by treaty – and can even agree to cease to exist as separate entities by merging with other states. However, the critics ask, does it follow that states can also limit their sovereignty by granting a forward-looking permit for

\textsuperscript{151} The famous example being the 1960 Cyprus Treaty of Guarantee. \textit{See Treaty-Based Intervention, supra} note 146, at 633.


\textsuperscript{153} \textit{See Treaty-Based Intervention, supra} note 146, at 610–611.
intervention, *irrespective* of the will of a later government in real-time?\textsuperscript{154} Indeed, by utilizing *past* consent to intervene forcibly against the ostensible will of the state in real-time, such agreements can be criticized as condoning, in advance, a breach of Article 2(4) of the U.N. Charter, and by thus they are contrary to the law on the use of force. Any past consent notwithstanding, these treaties envision a situation in which a forcible intervention will take place absent *real-time* consent.\textsuperscript{155} Hence, the argument goes, the treaty *itself* is null and void, as a contravention of *jus cogens*.\textsuperscript{156} Furthermore, the critics claim, complete subordination of the future “political destiny” of the state to foreign powers is in direct conflict with the principle of self-determination – and it therefore must follow that “past consent is no consent.”\textsuperscript{157}

Notwithstanding the theoretical complexity of the question of the *ab initio* validity of forward-looking intervention treaties, the practical problem regarding the latter can arise mainly in real time, when a government seeks to withdraw its consent in light of an impending intervention, and not in the moment of the conclusion of the treaty. Thus, focusing on the capacity of withdrawal in certain circumstances, rather than on the theoretical question of the *ab initio* legality of intervention treaties, allows us to better center the discussion on the core issues of practical importance.\textsuperscript{158}

Withdrawal of consent can occur, in practice, in two main situations. In the first, a government might withdraw its past consent in the face of an impending treaty-based intervention. In such cases, the question is confined to the capacity of governments – in

\textsuperscript{154} See Brad R. Roth, *The Illegality of “Pro-Democratic” Invasion Pacts*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW*, supra note 1, at 312–313; see also *Treaty-Based Intervention*, supra note 146, at 616–620.


\textsuperscript{156} See *Pro-democratic Intervention by Invitation*, supra note 147, at 313.

\textsuperscript{157} See *The Illegality of “Pro-Democratic” Invasion Pacts*, supra note 154, at 329, 342.

\textsuperscript{158} Compare *Treaty-Based Intervention*, supra note 146, at 623.
general and specifically – to do so. This remains the sole question until, for some reason, the government ceases to be recognized, after which it obviously loses its capacity of withdrawal. A prime example for the latter situation is when a government refuses to step down following democratic elections, in which case the international community might withdraw its recognition and transfer it to the elected individual or party.\textsuperscript{159} A second situation arises when a government is overthrown, and the \textit{de facto} junta now claims to have withdrawn the consent of the previous regime. Here, it has to be first determined whether the \textit{junta} is recognized as the new government. If it is not, then the question of withdrawal-capacity is quashed.

The question of intervention treaties and real-time withdrawal of consent raises seemingly intractable dilemmas. On the one hand, as aforementioned, withdrawal of consent is virtually an absolute right, and thus, an implicit right of revocation should be read into such treaties. On the other hand, the main objective of such agreements is precisely to negate such power in certain situations,\textsuperscript{160} a fact that cannot be taken lightly considering that arrangements of this type have been concluded in recent years – as is demonstrated in the next Section – by major regional and sub-regional organizations. Nonetheless, at least in a pure “failed state” scenario, in which no entity would be otherwise capable of expressing \textit{ad hoc} consent, the case is theoretically simpler: since when there is no government physically capable of withdrawing previous consent, the past-consent remains as it stands.\textsuperscript{161} Indeed, if one assumes that in a failed-state situation valid consent is impossible, one must reach the same conclusion regarding the power to

\textsuperscript{159} See the discussion regarding Côte d’Ivoire, in Chapter 11, Sec. I.3.
\textsuperscript{160} See text accompanying n. 151.
\textsuperscript{161} See the “unconscious patient” analogy in Chapter 9, p. X,
withdraw previous consent. In these instances, the intervening party may be looked upon as acting in trusteeship for the state, until a representative government emerges.

In sum, forward-looking intervention treaties remain controversial. As will be suggested later on, however, the concept of effective protection can play a clarifying part in the analysis of the question.

III.3 FORWARD-LOOKING INTERVENTION TREATIES IN AFRICA

Significant practice of forward-looking intervention treaties can be found, nowadays, in Africa. In the past two decades, such agreements were concluded on the bilateral as well as regional African levels. The Nigerian intervention in Sierra Leone in 1997, in favor of the ousted (and democratically elected) President Ahmed Kabbah, is a prime example of an intervention based on a bilateral forward-looking agreement. In 1997, Sierra Leone and Nigeria signed a Status of Forces Agreement, granting Nigeria the "right" to use force to assist Sierra Leone against "internal or external threats." On May 26th 1997, one day after a junta forced him to flee to Guinea, President Kabbah requested Nigeria to intervene in his favor. Nigerian forces responded, but retreated after confronted with stiff resistance by the junta. Eventually, ECOWAS forces intervened also, by ad hoc request of Kabbah, and expelled the junta.

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162 See Dinstein, supra note 145, at 122–124; see also Chapter 9, Sec. II.3.
163 Other examples of bilateral forward-looking intervention agreements are those between Senegal, Guinea and Guinea-Bissau, which lead to the former's intervention in the latter in 1998. See Jeremy Levitt, African Interventionist States and International Law, in AFRICAN INTERVENTIONIST STATES 15, 28 (Oliver Furley & Roy May eds., 2001).
165 See id. at 23.
166 See id., at 23, 25–26. The intervention of ECOWAS was based on "real time" consent by the de jure government, rather than on a forward-looking intervention treaty. It was conducted before the adoption of
The Nigerian intervention in Sierra Leone represents the classic dilemma of forward-looking intervention treaties, being a seemingly pro-democratic intervention against the will of a de facto junta – a “revolutionary autocracy,” as we shall label such regimes later on.\(^{167}\) It sheds light, as we shall see in Chapter 11, on the dynamics of forward-looking treaties and recognition, since President Kabbah was still the internationally recognized ruler of the state during the intervention, although he was ousted from the state’s territory.\(^{168}\)

In the first decade of the 21\(^{st}\) century, forward-looking intervention treaties have become a central pillar of African regional security arrangements. Article 4(j) if the Constitutive Act of the African Union, adopted in 2001, entrenches the right of Member States to request intervention from the Union. In addition, Article 4(h) famously establishes, as a basic principle of the Union, “[t]he right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity.”\(^{169}\) Note, that excluding “ethnic cleansing,” the acts enumerated in article 4(h) are similar to those referred to in paragraph 138 of the WSO Document.\(^{170}\)
Article 4(j) of The Protocol Relating to the Establishment of the Peace and Security of the African Union, adopted in 2002 (The A.U. Protocol),\textsuperscript{171} reflects the arrangement set forth article 4(h) of the Constitutive Act. Accordingly, the Peace and Security Council has the power to recommend to the Assembly of the Union to undertake intervention, in the enumerated cases.\textsuperscript{172} In such circumstances, the Peace and Security Council can make decisions without the consent of the target state, as the affected state is not allowed to vote – hence the Protocol's forward-looking nature.\textsuperscript{173} The Council is mandated to “take initiatives and action” regarding potential or “full blown” conflicts,\textsuperscript{174} and for that purpose, the Protocol establishes an “African Standby Force.”\textsuperscript{175} Interestingly, forcible intervention strictly on pro-democratic grounds (when a coup d’état occurs), in absence of other “grave circumstances,” is not mandated by the Protocol. In such cases, resort will be to non-forcible intervention.\textsuperscript{176} This distinction reflects the process outlined above, in which in the moment of intervention, considerations of protection might trump those of electoral democracy.\textsuperscript{177}

Intervention treaties can be found also on the African sub-regional level: The 1999 ECOWAS (Economic Community of West African States) Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeper and Security (Lomé Protocol) sets forth such an arrangement.\textsuperscript{178} Articles 21 and 22

\textsuperscript{172} Id. art. 7(1)(c).
\textsuperscript{173} Id. art. 8(9).
\textsuperscript{174} Id. arts. 9, 15.
\textsuperscript{175} Id. art. 13(1).
\textsuperscript{176} Id. art. 7(1)(g). However, in such cases, since the ousted government might retain its recognition, its consent can legitimize such intervention.
\textsuperscript{177} See Section II.5 supra and discussion in Chapter 11.
permanently establish ECOMOG – The ECOWAS Cease-Fire Monitoring Group – a standing intervention force available for immediate deployment. Article 25 stipulates the conditions in which the intervention “mechanism” will apply; among them are instances of “internal conflict” that “threatens to trigger a humanitarian disaster” or that “poses serious threat to peace and security in the sub-region;” and – significantly – “an overthrow or attempted overthrow of a democratically elected government.” Importantly, the authority to “initiate” “all forms” of intervention is delegated, in Articles 10 and 26, to various ECOWAS organs, even against the will of the target state or *de facto* regime.\(^{179}\)

### III.4 FORWARD-LOOKING INTERVENTION TREATIES AS ALTERNATIVES TO SECURITY COUNCIL ACTION

Both protocols discussed above (ECOWAS and A.U.) challenge the U.N. Security Council’s monopoly on the authorization of forcible intervention. This is since the protocols can be reasonably interpreted as mandating that in the event of withdrawal of

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\(^{179}\) In contrast to the Lomé Protocol, which is relatively clear in its provisions, the 2003 South African Development Community’s (SADC) Defense Pact does not include an explicit “forward-looking” intervention mechanism in cases of internal armed conflict, and is very ambiguous. Instead, the SADC Defense Pact’s “Collective Action” mechanism is triggered by an “armed attack,” which is defined, Article 2, as “the use of military force in violation of the sovereignty, territorial integrity and independence of a State Party.” It is not clear whether this article also encompasses such use of force from within the State’s territory. Internal armed conflict seems to be included in the pact’s definition of “destabilization” (Article 2), which does not seem to mandate collective action. Destabilization is not addressed through the collective action mechanism of the Defense Pact (although its brought under the SADC’s jurisdiction in Article 11(2) of the SADC Protocol on Politics, Defence and Security Co-operation (The SADC Protocol)), but only through a prohibition on assistance to any body which “destabilizes” a State Party (Article 8). Furthermore, Article 7(2) provides that any assistance to a State Party be at its own “request” or “consent”, except where the SADC Summit decides otherwise; however, the Summit can only decide on such measures with Security Council authorization (Article 11(3)(d) of the Protocol). The bottom line is that even if the Pact authorizes collective action in cases of internal armed conflict, if such action would be against a State Party’s wish, Security Council authorization would be needed. For brief analyses of the SADC Defense Pact, see Benjamin Sirota, *Sovereignty and the South African Development Community*, 5 CHI. J. INT’L L. 343 (2004).
consent by a *de facto* ruling government, ECOWAS and the A.U. would still have the power to intervene forcibly, even without Security Council authorization. As such, the African protocols demonstrate that consensual intervention can serve as an alternative to Security Council action in extreme cases, namely when the protection of civilians is required.

Accordingly, while the Lomé Protocol is “mindful” to the U.N. Charter and namely to Chapters V, VI and VII,\(^\text{180}\) reaffirms the commitment of ECOWAS members to the “principles” of the Charter,\(^\text{181}\) and pledges to “cooperate” with the U.N.,\(^\text{182}\) it does not explicitly precondition action upon prior Security Council authorization. It merely requires a “report” to be submitted to the United Nations in case of intervention.\(^\text{183}\) Elsewhere, in Article 52, it provides that “[i]n accordance with Chapters VII and VIII of the United Nations Charter, ECOWAS shall *inform* [inform, rather than condition its action on Security Council authorization] the United Nations of any military intervention undertaken in pursuit of the objectives of this Mechanism,”\(^\text{184}\) perhaps alluding to the obligation set forth in Article 54 of the U.N. Charter. The latter requires that regional organizations inform the Security Council of their activities for the maintenance of international peace and security. However, Article 54 of the Charter does not refer to forcible measures, which *ipso facto* can only be prescribed by the Security Council. Arguably, thus, the Lomé Protocol seeks to “reverse” the presumption of invalidity of the use of force embodied in the U.N. Charter: while Chapter VII is understood to require an

\(^{180}\) Lomé Protocol, *supra* note 178, prmbl.

\(^{181}\) *Id.* art. 2.

\(^{182}\) *Id.* art. 52.

\(^{183}\) *Id.* art. 27.

explicit Security Council authorization prior to the use of force, the Lomé Protocol’s Article 52 suggests that by default, ECOWAS will be authorized to intervene forcibly; it will only inform the Security Council, which in turn will choose whether to condone or condemn the intervention. The Protocol does not, however, explicitly state what will be the reaction of ECOWAS in a case where the Security Council will demand it to halt its intervention.

This approach is echoed also in the A.U. Protocol. Much like the Lomé Protocol, it acknowledges that the U.N. Security Council “has the primary responsibility for the maintenance of international peace and security,” but does not explicitly subject A.U. interventions to Security Council authorization. It merely stipulates that the A.U. Peace and Security Council shall “cooperate and work closely” with the U.N. Security Council. Essentially, this can only be understood as a mechanism utilized by the A.U. to retain for itself the authority to intervene in “grave circumstances,” where the Security Council fails to do so. As is the case with the similar mechanism in the Lomé Protocol, these provisions can place the A.U. in direct conflict with the U.N. Charter, in cases where A.U. intervention is pursued against the will of the targeted government — meaning, where the government withdraws its forward-looking consent — and Security Council authorization to intervene is absent.

Over the years, various attempts have been made to justify unilateral forcible actions by regional organizations by noting, for instance, that such actions have been, at

186 A.U. Protocol, supra note 171, Art. 17(1).
times, approved ex post by the Security Council, as was arguably the case in Liberia in 1992-1993 and Sierra Leone in 1997-1999.\footnote{187} Furthermore, some have claimed that unilateral regional actions do not amount to “enforcement actions” under Article 53 of the U.N. Charter, which require Security Council authorization even when conducted by regional organizations – but rather that they are actions “relating to the maintenance of international peace and security as are appropriate for regional action” as prescribed in Article 52.\footnote{188} However, Article 52 qualifies that such actions be “consistent with the Purposes and Principles of the United Nations.” This qualification, reasonably read in light of the purposes of the Charter, clearly subjects Article 52 actions to the prohibition on the use of force.

It is high time for a principled treatment of this question, going beyond ex post justification or ad hoc attempts of creative interpretation of the U.N. Charter. In this context, the African challenges to the Security Council can be reconciled, as we shall see in the next Section, if we adopt an approach according to which when a government fails to exercise effective protection, it suffers the loss of sovereign power to withdraw previous consent given in the context of forward-looking intervention treaties.

\footnote{187} See, e.g., ICISS Report, supra note 18, ¶6.5, 6.35; Farer, supra note 1, at 69. Note that the Sierra Leone operation was conducted in favor of a democratically elected, and thus recognized government. See the discussion in Chapter 11, Sec. I.2; see also Thomas M. Franck, Interpretation and Change in the Law of Humanitarian Intervention, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS, supra note 1, at 204, 221–224.

\footnote{188} See Farer, supra note 1, at 72 –74, referring to an argument presented by Sean D. Murphy.
III.5 RtoP, Effective Protection and Withdrawal of Consent

As with consent power at large, there are several prisms through which the power to withdraw consent can be analyzed. Of course, a traditional approach can precondition this capacity on considerations of effective control, or to bind withdrawal power to the related but distinct failed state threshold. Other prisms through which to assess this question can be substantive. One, which is analyzed in Chapter 11, is through the principles of democratic legitimacy. Here, the argument will be that a junta that overthrows a democratically elected government will be devoid of power to withdraw its consent from an intervention treaty. Such a construction can be based on two justifications: One is to simply rely on the plain language of a treaty that explicitly allows for pro-democratic intervention, assuming that we are willing to accept the general legality of such agreements. Such a clause is found, for instance, in Article 25 of ECOWAS Lomé Protocol, but is absent from the A.U. Charter and its Peace and Security Protocol. The latter limits interventions in such cases only to non-forcible measures (assuming an anti-democratic coup does not amount to “grave circumstances” in itself).

A second justification can be based on the acknowledgment of a customary “democratic entitlement,” which couples sovereignty with electoral democracy, in a manner strong enough to negate a regime’s power to withdraw the state’s consent, or, perhaps, to negate the regime’s recognition. A robust version of this approach might argue for the negation of withdrawal power even in absence of the overthrow of an elected government – and merely on counts of the regime’s autocratic nature. In this

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189 Chapter 9, Sec. II.3, supra Section III.2.
190 See, e.g., Treaty-Based Intervention, supra note 146, at 608; David Wippman, Military Intervention, Regional Organizations, and Host-State Consent, 7 DUKE J. COMP. & INT’L L. 209, 218 –220 (1996);
sense, the discussion merges with our analysis of democracy and consent power, and the distinction between “established” and “revolutionary” autocracies, as presented in Chapter 11.192

Yet another view analyzes the background of the specific intervention-treaty. Wippman, for instance, proposes a model of “concurrent consent,” that takes into consideration the political divisions within state,193 in light of the fact that in many states, the population is so divided that it cannot be looked upon as a single political community.194 Thus, he concludes that in cases when intervention treaties are a part of an agreed settlement of a severe inter-communal conflict, consent can only be withdrawn through joint-action of the relevant communities.195 However, such a standard naturally applies only in specific cases, and does not resolve cases of intervention treaties that are not part of an inter-communal settlement. Moreover, and importantly, while the concurrent consent model seems to be fair, it does not itself prejudge important substantive questions, namely, whether the analysis changes if one of the parties to the communal settlement is engaged in mass atrocities or other grave violations of international law.

The protection principle, and the understanding of sovereignty as responsibility, can assist us in laying down a workable doctrine in this context. Just as lack of effective protection results in the negation of government consent power, it can also be viewed as negating withdrawal power. The underlying principle is simple: in cases where a government cannot express consent, meaning, as discussed in Section II.4, when it fails

192 See I.2.
193 Treaty-Based Intervention, supra note 146, at 611.
194 Id. at 612.
195 Id. at 612, 623–632, 646–653.
to exercise effective protection – it will also lack the sovereign power to withdraw previous consent. As phrased by Bellamy – “[a]lthough military deployments for R2P [RtoP] purposes benefit from host state consent, once they are in place they should prioritise civilian protection over the need to maintain host government support in cases where one cannot be established except at the expense of the other.”\(^\text{196}\)

Indeed, the act of withdrawal, in itself, is an act of sovereignty. Therefore, in situations in which sovereign power is lost due to failure to effectively protect civilians, the capacity to withdraw previous consent is diminished. Conversely, the capacity of withdrawal would only exist in those cases in which a government exercises effective protection: meaning, where it fulfils its responsibility to protect. This analysis, beyond providing conceptual clarity, also serves to reconcile between intervention treaties and the \textit{jus cogens} prohibition on the use of force: since the target government would not have the sovereign power to withdraw consent, the previous consent remains, and the intervention will therefore not be considered as conducted against the will of the state.

This approach can also assist us in the assessment of the withdrawal power of a \textit{de facto} junta that has overthrown a democratically elected government, as further discussed in Chapter 11. Since, in the majority of the cases – even if otherwise recognized – the junta would have to resort to grave human rights violations in order to secure its power, it is reasonable to presume that in many cases, the junta will lack the power to withdraw its consent.

\(^{196}\) \textit{Compare} BELLAMY, \textit{supra} note 36, at 148.
IV. FAILURE TO EXERCISE EFFECTIVE PROTECTION: THE THRESHOLD QUESTION

As in many questions of law, the concept of effective protection presents a threshold question: what scale of a violation triggers the loss of consent (or withdrawal) power. The question might be formulated as such: while it is true that a state must abide by all of its obligations, it is obvious that not any violation of international law automatically results in loss of consent power. For instance, even a generally law abiding military can violate international law, at some point, during an armed conflict. While there is no doubt that even small-scale and non-recurring violations must be addressed, the question is what level of violations entails a degree of loss of sovereign-power that negates a government’s consent capacity altogether.

The answer is found within the ICISS Report, the WSO Document, as well as in the inherent characteristics of the crimes enumerated in the RtoP doctrine. Thus, the ICISS report expressly refers to “large scale” loss of life or ethnic cleansing as failures in the fulfilment of sovereign responsibility, noting that in most cases there will be no major disagreement regarding the existence of such circumstances.197 Similarly, Paragraph 139 of the WSO Document mentions the “manifest” failure of protection as a cause for forcible enforcement measures – which must mean acts that are either large-scale or systematic enough to usher the conclusion that a government is generally failing its obligations.198

198 WSO Document, supra note 62, at ¶139. The “manifest” threshold, as a cause for the rebuttal of the presumption in favor of governments, can be traced back to the 17th century writings of Grotius. 1 HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE, Book 2, Ch. 25, §8 (William Whewell, trans. 1853)
This threshold can also be deduced from the components of the crimes enumerated in the WSO Document, as these can be found in the ICC Statute.\(^{199}\) Regarding “war crimes,” while even a single act of wilful killing, for instance, constitutes a war crime, the Statute stipulates that the ICC shall have jurisdiction “in particular,” when war crimes are “committed as part of a plan or policy or as part of a large-scale commission of such crimes.”\(^{200}\) Regarding “crimes against humanity” – ethnic cleansing, functionally, falling within this category of crimes – these are per se “widespread or systematic.”\(^{201}\) The same is true for genocide, which is by nature widespread and systematic as it is committed against a national, ethnical, racial or religious group.\(^{202}\)

This conclusion is augmented when analyzing consent power in light of international human rights law. Since, as aforementioned, human rights are inherently complex, it would be inconceivable that a single case or minor cases of infringement of human rights would suffice to negate consent power. Thus, when analyzing the international effects of human rights violations, the threshold of “gross and large-scale” violations has emerged as a parameter for international action.\(^{203}\) Such violations, unsurprisingly, correspond to a large extent to actions that violate the protection principle.\(^{204}\)

Last, the problem of identifying the situations in which gross, grave, widespread or systemic breaches of the principle of protection occur, and the longstanding question of “who decides,” are inherent in the international system in the absence of a collective,

\(^{200}\) Id. art. 8(1).
\(^{201}\) Id. art. 7(1).
\(^{202}\) Id. art. 6.
\(^{204}\) Id. at 50.
objective and universally binding adjudication mechanism. International law is constantly struggling to find the balance between its (still) decentralized, auto-interpretive nature on the one hand, and its growing preoccupation with universal ideas on the other. This problem is persistent in all aspects of international law, and cannot be exhausted in this work. However, the proliferation of mass media, including through ubiquitous availability of new-media online instruments; the institutionalization of international fact-finding missions conducted by the U.N. and other international organizations; and the increasing role played by regional organizations, can account for increased transparency in the international system, that potentially allows for sounder judgments as to the existence of gross, grave, widespread or systemic breaches of the principle of protection. As noted in the ICISS Report, while disagreements on the existent of large-scale violations of the principle of protection can occur in “marginal cases,” most cases will not – hopefully – generate major disagreement.

Thus, it can be concluded, that consent power of governments will be negated when these are in gross, grave, widespread or systemic breach of the protection principle, and that such loss of consent capacity is affected by – at least – loss of a degree of sovereignty.

205 See, e.g., HERSH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 234 (1948); ORFORD, supra note 18, Ch. 4.
208 Compare Libya and the Responsibility to Protect: The Exception and the Norm, supra note 82, at 4.
209 ICISS Report, supra note 18, ¶4.22.
V. OTHER POSITIVE LEGAL MECHANISMS FOR THE NEGATION OF CONSENT IN CASES OF LACK OF EFFECTIVE PROTECTION: JUS COGENS, IHL AND IHRL

In previous sections, we have discussed the general principle of protection of civilians and its normative expression in the RtoP doctrine. As aforementioned, a part of RtoP’s significance is in its incorporation under a unified normative umbrella of various existing legal instruments; the interpretational value of the concept of sovereignty as responsibility when analyzing these instruments; and the concept of “responsibility” as reflecting a transition to an “administrative,” rather than “rights”-based, outlook regarding the question of intervention. However, even if one rejects the view that RtoP has any significant normative value, and accordingly that it elevates the principle of protection to the level of an integral component of sovereignty, violation of the principle of protection can still lead to the invalidation of consent power. If forced to categorize these different mechanisms, the argument from RtoP is based on “public law” principles, stemming from the limitations of sovereign power in international law. The following mechanisms, conversely, are rooted in more traditional notions, perceiving the relations between states as parallel to those between private individuals, and are therefore reflective of private, treaty-law based doctrines of invalidation.

As we have seen, the RtoP doctrine, as formulated in the WSO Document, concerns the protection of civilians threatened by four types of atrocities: genocide, war crimes, ethnic cleansing and crimes against humanity. Unsurprisingly, the prohibitions on such acts also constitute peremptory norms of international law, or jus cogens. It is a well-established principle that acts that are contrary to jus cogens are invalid: thus,

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211 See ANTONIO CASSESE, INTERNATIONAL LAW 202–203 (2005); see also Articles on State Responsibility with Commentaries, supra note 152, art. 40, ¶¶3–4.
Article 53 of the Vienna Convention invalidates treaties conflicting with such norms.\footnote{212} This provision is complemented by Article 41(2) of the Articles on State Responsibility, providing that no state shall recognize situations created by serious breaches of peremptory norms, nor assist in maintaining that situation. Significantly, a similar article is found in the Articles on Responsibility of International Organizations.\footnote{213} Therefore, when a government that fails to exercise effective protection, as formulated in the WSO document and entrenched in \textit{jus cogens}, invites a state or a regional organization to intervene on its behalf, whether through a treaty, in the strict sense, or through any type of other agreement,\footnote{214} the invitation is invalid. Importantly, this is true even absent a U.N. Security Council resolution to that effect.

A state that acts upon such consent, notwithstanding its invalidity, and chooses to intervene in favor of the perpetrating government, is itself in violation of international law, as it violates the obligation not to render assistance to violations of \textit{jus cogens}. Thus, it can be subjected to various non-forcible sanctions imposed unilaterally or by regional organizations. States indeed have a right to sanction other states that assist in violations of \textit{jus cogens}, since such violations are considered to be \textit{erga omnes}, meaning, owed to the entire international community.\footnote{215} Furthermore, according to Article 41(1) of the

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Articles on State Responsibility, states are *obliged* to cooperate, through lawful means, to bring an end to violations of peremptory norms of international law. Imposition of non-forceable sanctions does not require Security Council authorization, and therefore they undoubtedly constitute lawful means to confront the violation.\footnote{216}{See Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs* 83 AM. J. INT’L L 1 (1989); Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions* 26 YALE J. INT’L L. 1 (2001).}

The notion of *jus cogens* has also implications on the capacity to withdraw consent, in the context of forward-looking intervention treaties, when a government commits mass atrocities. Indeed, where a government withdraws its consent in order to enable it to commit actions in violations of the *jus cogens* norms that are reflected in the principle of protection, the instrument of withdrawal itself constitutes an action designed to breach *jus cogens*. In such cases, third parties – states and international organizations alike – are obliged not to recognize the withdrawal.\footnote{217}{Articles on State Responsibility with Commentaries, *supra* note 152, art. 41(2); Articles on Responsibility of International Organizations, *supra* note 213, art. 42(2).} Indeed, not only is the instrument of withdrawal itself considered a violation of *jus cogens*, it is arguable – without exhausting this issue – that the mere acceptance of such instrument can be viewed as rendering aid or assistance in maintaining that situation, as prohibited in the Articles on State Responsibility. This conclusion applies, naturally, also to the regional organization empowered to authorize a forcible intervention in a forward-looking intervention treaty. In sum, in cases in which a government violates its responsibility to protect, it will not possess the sovereign power to withdraw from a forward-looking intervention treaty – since its act of withdrawal itself will be invalidated.

Violations of the protection principle during internal armed conflicts are necessarily violations of IHL. While considerations of *jus in bello* are traditionally – and
rightfully so—separated from those of *jus ad bellum*, violation of the protection principle might raise the curtain between these separate spheres, at least with regard to the question of consent power. This result can be affected through Common Article 1 of the Geneva Conventions, obliging states “to respect and to ensure respect” for the conventions, in all circumstances. Common Article 3, which applies to internal armed conflicts, is among those provisions which the respect of must be ensured. The ICJ, in the *Wall Advisory Opinion*, interpreted Common Article 1 as not only requiring states to act positively in the face of violations committed by their armed forces, but as applying also in the relations between the conflicting state and external states. Meaning, IHL imposes an independent *erga omnes* obligation on uninvolved parties to ensure compliance by the conflicting states, *inter alia* by withholding any aid or assistance to violators of IHL.

A further instrument that can delegitimize instances of consensual intervention can be found also in Article 2 of the ICCPR, requiring member states to “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.” A state that embarks on an intervention pursuant to consent by a state that fails to exercise effective protection, and crossing the threshold discussed above, will necessarily be in violation of its obligations under international human rights law, either through extra-territorial application of the latter, or by serving as

220 Wall Opinion, supra note 14, ¶¶158–159.
221 ICCPR, supra note 124.
an agent of the consenting state, thereby acquiring all of the latter’s human rights obligations.\footnote{222}{On the extraterritorial application of human rights law see, \textit{e.g.}, Wall Opinion, \textit{supra} note 14, at ¶¶109–112. On its application during armed conflict see Chapter 9, Sec. II.1.}
CHAPTER 11

CONSENT POWER, DEMOCRACY, HUMAN RIGHTS AND SELF-DETERMINATION

I. CONSENT BY NON-DEMOCRATIC REGIMES: DEMOCRACY AS PROTECTION

I.1 THE PRESUMPTION IN FAVOR OF GOVERNMENTS IN DEMOCRATIC AND NON-DEMOCRATIC REGIMES

It is beyond doubt that genuine democratic governments enjoy a strong presumption in their favor during internal strife, since substantive democracies necessarily exercise effective protection of their civilians, through their internal mechanisms for the protection of human rights. It can be said, that just as substantive democracies have proven to better maintain peace between each other, they are more likely to maintain peace between their citizens.\(^1\) Therefore, to deny a democratic government’s consent power will require a very high evidentiary threshold pointing that it does not fulfill its protection responsibilities.

Considering this assumption, do non-democratic, regimes enjoy, at all, the presumption in favor of governments in the context of consensual intervention? All other things equal, it seems that the answer is positive. It cannot be denied that non-democratic regimes are participators in the international system, including in bodies such as the Security Council, that they enjoy the principle of sovereign equality,\(^2\) and that states do not withdraw previously granted recognition from long-established non-democratic

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\(^1\) See, generally, Michael W. Doyle, Liberal Peace: Selected Essays (2011).

\(^2\) U.N. Charter, art. 1(2).
governments.\(^3\) Therefore, it would be an exercise in wishful thinking to argue that under international law, such regimes \textit{a priori} lack consent power. Instead, a more nuanced approach is required.

For instance, it is helpful to look at the case of Yemen. The authoritarian regime of Ali Abdullah Saleh has been challenged by mass protests in the Arab Spring of 2011, to which the former responded with a deadly crackdown. Eventually, Saleh has resigned as part a regional transitional plan.\(^4\) Simultaneously, Yemen has been involved in a conflict with elements allegedly tied to Al-Qaeda.\(^5\) It is fairly reasonable that Saleh’s unlawful response to the Arab Spring protests – regarding which he did not possess consent power – does not also entail that the regime lost its consent power with regards to actions against Al-Qaeda, to the extent that it is genuinely involved in an armed conflict with jihadist elements. Thus, the position of non-democratic regimes vis-à-vis the question of consensual intervention is more complex. Any attempt at its articulation requires a further inquiry into the different aspects of such regimes.


Any discussion of the role of democracy in the context of intervention merits the clarification of the general components of democracy. The first relates to the procedural, electoral aspect of democracy. The other connotes the protection of human rights, which are a precondition for the existence of substantive democracy. Regarding the “electoral” aspect, when analyzing the conduct of the international community, it seems that a clear-cut distinction is drawn between longtime “existing” non-elected regimes (“established autocracies”) on the one hand, versus regimes that have overthrown an elected government or otherwise fail to respect the ballot (“revolutionary autocracies”). This is true in particular when the elections have been internationally supervised. While established autocracies are not per se excluded from the international system—at least until a significant rebellion takes place—revolutionary autocracies are ostracized and sometimes face a forcible intervention.6

Indeed, even the proponents of the general legal right to democratic governance—the “democratic entitlement”—demonstrate their arguments while referring to revolutionary autocracies, rather than to situations in which the regime has long been

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unelected to begin with. Thus, the 1964 British intervention upon the request of ousted President Nyerere of Tanganyika is an early case of an intervention against a revolutionary autocracy. The 1994 international intervention in Haiti, the 1996 French intervention in the Central African Republic, and the 1997 ECOWAS operation in Sierra Leone in 1997–1998 are paradigmatic post-cold war examples. The refusal of Laurent Gbagbo to step down following elections in Côte d’Ivoire, and the forcible international reaction of 2011 constitutes a recent case. Furthermore, upon the March 2012 coup in Mali, in which elected president Toure was ousted by a military junta, ECOWAS and the African Union (A.U.) imposed sanctions on the junta, while the former discussed the deployment of its regional Standby Force in the country. Soon thereafter, however, the parties reached an agreement according to which Toure will resign and the junta will hand over control to interim institutions. As of the writing of this chapter, it remains to be seen how the Malian crisis be ultimately resolved. Nonetheless, in all of these cases, clear preference was given to largely ineffective, democratically elected governments, over revolutionary autocracies that exercised at least some *de facto* power.

It is possible to justify the distinction between established and revolutionary autocracies on both practical-political and legal-theoretical levels. Practically, the

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7 See Murphy, *supra* note 3, at 146–151 (critiquing the notion of the democratic criterion for recognition).
8 See David Wippman, *Pro-Democratic Intervention by Invitation, in Democratic Governance in International Law*, *supra* note 3, at 293, 300.
international community will simply descend into chaos if all non-elected regimes be suddenly stripped of their sovereignty, not to mention, of course, that it is politically impossible in the existing international power structure. Legally, such distinction is reasonable, since when an elected government has been ousted, we can positively claim that the people have been forcibly deprived of their system of choice – since there is no democracy without the consent of the governed – while this claim can be at least doubtful where no electoral-democracy was ever established. In this sense, the removal of an elected government can be viewed as an outrage on the principle of self-determination, according to its contemporary understanding as connoting political participation.\footnote{See Sec. II.2.}

Moreover, in cases of revolutionary autocracies it is rather easy to distinguish between the “democratic” and “non-democratic” party, which, as we argue, is rather difficult in other situations.

Revolutionary autocracies can be broken down into two categories: the first concerns situations where an autocrat appropriates power through a coup d’état against an elected government (The Haiti and Sierra Leone scenarios). The second refers to rulers who refuse to \textit{step down} following elections (The Côte d’Ivoire scenario). While both situations raise the same theoretical questions regarding the relations between \textit{de facto} and \textit{de jure} regimes, the latter poses, at least from a classic effective-control point of view, a more significant challenge. This is because in such cases, intervention would be undertaken in favor of a ruler that has \textit{never} exercised effective control over the state, which perhaps amounts to a more dramatic external involvement.

Furthermore, both scenarios pose the same perplexing problem of categorization, requiring an answer to the question whether, theoretically, consent expressed by
ineffective elected governments is considered “governmental,” or rather, it counts as consent by the opposition. Here the question of consensual intervention merges with the question of recognition of revolutionary autocracies. A model strictly based on territorial effective control would have to result in the contention that pro-democratic interventions, as these were conducted, were undertaken in the support of the opposition. Such a contention is, ironically, a more revolutionary idea than the assertion that revolutionary autocracies were not recognized to begin with and, thus, the interventions were in support of governments.

For these and other reasons, it seems that the international community prefers the second contention, by withholding recognition from revolutionary autocracies and maintaining the recognition of the de jure elected regime. The 2011 intervention in Côte d’Ivoire illuminates this trend.

I.3 CÔTE D’IVOIRE 2011 – COUPLING SUBSTANTIVE DEMOCRACY WITH CIVILIAN PROTECTION

In November 2010, Côte d’Ivoire held its first presidential elections since 2000, when Laurent Gbagbo came to power through questionable elections. The 2010 elections, monitored by the U.N. as part of the long peace-process in the country, resulted in the victory of Alassane Ouattara. However, the state’s Constitutional Council, controlled by Gbagbo loyalists, invalidated hundreds of thousands of votes, to proclaim Gbagbo as the

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13 For a detailed analysis of practice in this context see Jean d’Aspremont, Responsibility for Coups D’état in International Law, 18 Tul. J. Int’l & Comp. L. 451, 455–468 (2010); see also Gregory H. Fox, The Right to Political Participation in International Law, 17 Yale J. Int’l L. 539 (1992). The manifestation of this idea in the cases of Haiti and Sierra Leone, and its relation to the question of consensual intervention, were discussed extensively elsewhere. See, e.g., Pro-democratic Intervention by Invitation, supra note 8, at 301–311.
winner of the elections with 51.4% of the vote. Grave political violence ensued as Gbagbo resorted violent measures to stay in power.\textsuperscript{14}

Regardless of the fact that Gbagbo has not given up power and was in firm control of the state’s elite security units as well as various militias, Ouattara has been widely recognized as the \textit{de jure} president by regional and international actors. For instance, the U.N. General Assembly accepted the credentials of his ambassador on December 23, 2010.\textsuperscript{15} Likewise, ECOWAS has quickly recognized Ouattara and suspended Côte d’Ivoire from the decision making bodies in the organization until Gbagbo stepped down. The A.U., while recognizing the elections’ result, took a rather ambiguous stance towards the means to resolve the standoff – however, it too suspended the participation of Côte d’Ivoire in the organization.\textsuperscript{16}

These international reactions have taken place regardless of the fact that, at the time, Ouattara took refuge in a hotel in Abidjan under the protection of U.N. peacekeeping forces (UNOCI,) completely unable to exercise control over the country.\textsuperscript{17} Ouattara has managed, however, to strike an alliance with a former rebel group, the Forces Nouvelles (F.N.), by appointing its leader as prime minister and minister of defense. F.N. forces were located, however, in a geographically distanced area in the north of the country and were thus physically separated from the president-elect.\textsuperscript{18}

On December 20\textsuperscript{th} 2010, the U.N. Security Council condemned the attempt to “usurp the will of the people” and welcomed the non-forcible measures adopted by

\textsuperscript{16}\textit{Is War the Only Option?}, supra note 14, at 12 –14; Decision of the African Union Peace and Security Council (Dec. 9, 2010).
\textsuperscript{17}\textit{Is War the Only Option?}, supra note 14, at 10.
\textsuperscript{18}Id.
ECOWAS and the African Union.\textsuperscript{19} It recalled the previous authorization given to UNOCI to use all necessary means to carry out its mandate, including for the protection of civilians, and requested UNOCI to support, \textit{in coordination} with Ivorian authorities, the provision of security for the government and “key political stakeholders.” It furthermore extended the longstanding authorization given to the French Forces already present in the country, to support UNOCI.\textsuperscript{20} The French Forces, it should be noted, have intervened in the conflict in Côte d’Ivoire in September 2002, on the basis of a 1961 mutual defense pact and apparently for the purpose of protection of French nationals.\textsuperscript{21} Thus, in essence, the first presence of the French Forces in the country was a consensual intervention based on a forward-looking intervention treaty. Since their 2002 intervention, the French Forces have remained in Côte d’Ivoire and have been involved in robust peacekeeping operations. The Security Council, at the time, welcomed the French operation and authorized the presence of French troops, in support of ECOWAS troops, in February 2003.\textsuperscript{22} The mandate of the French Forces was since modified to complement and support the U.N. peacekeeping forces, and extended periodically thereafter.\textsuperscript{23}

Thus, when the events of 2011 unfolded, a significant presence of foreign forces was already on the ground in Côte d’Ivoire. Therefore, Security Council Resolution 1975 of March 30, 2011, which used explicit RtoP language, served mainly as a blunt identification of the culprit – Laurent Gbagbo. The Resolution identified Ouattara as the president of Côte d’Ivoire, “as recognized by ECOWAS, the A.U., and the rest of the

\textsuperscript{20} Id. ¶14, 15, 17.
international community;” specifically condemned Gbagbo for not stepping down; called upon all of the Ivorian institutions to yield to Ouattara’s authority; and demanded that Gbagbo immediately lift the siege of the Golf Hotel, where the president-elect took refuge.24 It furthermore condemned all atrocities committed in the course of the turmoil.25 However, when recalling the forcible mandate of UNOCI, the resolution alluded to UNOCI’s “impartial” mandate to protect civilians, perhaps implying, that in terms of forcible enforcement, it remained “neutral” between the parties’ conflicting claims regarding the elections, reserving any forcible actions only to the extent needed to protect civilians.26

Resolution 1975 was adopted two days after Ouattara launched a wide scale attack against Gbagbo, utilizing the forces of his northern F.N. allies.27 Since Resolution 1975 authorized UNOCI “to prevent the use of heavy weapons against the civilian population,”28 there was significant interpretive room to construct the resolution as mandating a proactive military campaign against Gbagbo. Accordingly, for instance, the U.N. and French forces deployed attack helicopters against Gbagbo’s forces. The foreign forces were instrumental in the FN’s assault on Abidjan, and on April 11th, 2011, Gbagbo was arrested by forces supporting Ouattara.29

The most significant lessons that can be learned from the Gbagbo affair are two. First, that revolutionary autocracies, even those that do not engage in a positive coup d’état, but simply refuse to step down following elections, are not likely to be recognized

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25 Id. ¶5.
26 Id. ¶6.
as governments, including for the purpose of consent (or withdrawal) power. Since the ousted elected government will typically retain recognition – as was in the cases of Haiti, Sierra Leone,30 and recently in Côte d’Ivoire – it is safe to say that such “pro-democratic” interventions against revolutionary autocracies are essentially interventions in favor of governments, and are thus firmly positioned within the theoretical sphere of the preference of governments. This is true both when the intervention was pursued absent Security Council authorization (Sierra Leone),31 and in cases where such authorization was granted (Haiti,32 Côte d’Ivoire). It should be noted however, that the Sierra Leone intervention was conducted by a regional organization, and not by a single state, which might account for the operation’s implied ex post endorsement by the Security Council.33

The second lesson is that regardless of the consequentially pro-democratic nature of the intervention and the wide condemnation of Gbagbo’s actions, the forcible acts that led to the latter’s arrest were actually conducted primarily under the banner of “civilian protection,” and not under a mandate to enforce electoral democracy. This fact demonstrates the coupling of the principle of civilian protection and substantive democracy, as illustrated in the next section, and correlates with the prevalence of the protection principle over other considerations.

It seems thus, that contemporary international law can be summarized in the following terms: revolutionary autocracies are denied recognition, and therefore do not enjoy consent power; ousted elected governments, conversely, retain recognition and

30 Pro-Democratic Intervention by Invitation, supra note 8, at 301, 304.
31 Michael Byers & Simon Chesterman, “You, the People”: Pro-Democratic Intervention in International Law, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, supra note 3, at 259, 288–290; Pro-Democratic Intervention by Invitation, supra note 8, at 304–306.
33 Pro-Democratic Intervention by Invitation, supra note 8, at 311.
therefore might possess, in theory, consent power,\footnote{Compare ICISS REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT ¶4.26 (2001).} at least for the immediate period following their loss of control.\footnote{Pro-Democratic Intervention by Invitation, supra note 8, at 302–303.} However, the Sierra Leone intervention, which is a paradigmatic case in which consent power, \textit{inter alia}, has been used as a justification for pro-democratic unilateral intervention,\footnote{Id. at 308–309.} involved a regional organization. While there is no inherent differentiation in the \textit{jus ad bellum} applicable to regional organizations as opposed to single states, the former enjoy wider credibility as collective decision making instruments.\footnote{See, e.g. ICISS REPORT, supra note 34, ¶¶6.31–6.32; THE INDEPENDENT INT’L COMM’N ON KOSOVO, THE KOSOVO REPORT 195 (2000).} Therefore, accordingly, consensual interventions pursued by regional organizations, in such scenarios, are likely to be more widely accepted.

I.4 \textsc{Established Autocracies Facing a Genuine Pro-Democratic Insurrection: Deconstructing the “Democratic Entitlement”}

What is the law in instances in which a longstanding and established autocracy is challenged by a democratic opposition? Any answer would require making the difficult preliminary determination that an opposition group that raises the flag of “democracy” is genuinely willing or able to “deliver” its promise – a key condition for any attempt to justify the encouragement of such groups at the expense of incumbent regimes by negating the latter’s consent power.\footnote{See, e.g., the actions of Laurent Kabila after ousting Mobutu Sese Seko and establishing the Democratic Republic of Congo; Murphy, supra note 3, at 146.} Mere claims by an armed opposition that it is “democratic” are certainly not enough. Indeed, it seems that there is almost no contemporary organized armed group, even guilty of mass atrocities, which does not include the word “democracy,” in some form, in its name. Moreover, since internal
armed conflict is essentially a non-democratic phenomenon, being that it substitutes political deliberation with violence, it is extremely difficult, in most cases, to identify genuine democratic tendencies among the conflicting parties (in contradistinction to cases of revolutionary autocracies, where a genuine democratic government previously existed). This dilemma is ever present when assessing external intervention in armed strife: it was prevalent, for instance, in the debate surrounding U.S. support of the Contras, as well as the nature of the rebelling forces during the Arab Spring, for instance, in the internal armed conflict in Libya.

In a hypothetical case in which we can clearly establish that a non-democratic regime is challenged by a genuinely pro-democratic opposition, the question whether a regime’s non-democratic nature affects its consent power, can be viewed as intrinsically woven with the debate whether, and to what extent, “democracy,” as a system of governance, is a right under international law, perhaps granting a collective right to oust a non-elected leadership with some measure of international support. This notion has been famously suggested by Thomas Franck, upon his analysis of the development of the customary principle of self-determination, state practice, and various multilateral documents and treaties.

However, while the concept of the democratic entitlement has certainly affected the understanding of international law in the last two decades, there is no consensus that

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41 Fox & Roth, supra note 9, at 10–11.
it has galvanized, as such, as an unequivocal rule of customary international law,\textsuperscript{43} \textit{a fortiori} in a manner that can affect the laws on the use of force.\textsuperscript{44} As some argue, this is especially true since the concept of democracy itself is not authoritatively defined, as such, in international law and discourse.\textsuperscript{45} With the multitude of political systems and their intricacies, it is sometimes difficult to objectively pinpoint which government represents is a “true” democracy, and to what extent.\textsuperscript{46}

Indeed, if we limit the “democratic entitlement” to the narrow, \textit{procedural} requirement of “free and fair elections” and majority rule, it loses much of its appeal – since free and fair elections are not sufficient, in themselves, to secure human rights; however, if we understand the entitlement as connoting also \textit{substantive} democracy, we must recognize that such a system of governance is built on numerous rights and interests that are not absolute, and are therefore subject to unique balancing in different societies, in accordance with their cultures and circumstances.\textsuperscript{47} It is in this context that there is constant tension – whether justified or not – between the idea of democratic entitlement and those that suspect that the concept is yet another method to perpetuate an alleged “western” hegemony, which is at odds with the concept of non-intervention, as it is sometimes understood in the developing world.\textsuperscript{48}

\textsuperscript{43} Steven Wheatley, \textit{Democracy in International Law: a European Perspective}, 51 INT’L & COMPARATIVE L. Q. 225 (2002); Gregory H. Fox, \textit{The Right to Political Participation in International Law, in Democratic Governance and International Law supra} note 3, at 48. 69; \textit{see also} Marks, \textit{supra} note 42, at 511 –513 (and the sources cited therein).

\textsuperscript{44} Although a regime’s non-democratic nature might suffer reduced consent power due to the norm of non-intervention. \textit{See} Chapter III, sec. III.2.

\textsuperscript{45} Fox, \textit{supra} note 43, at 48–49; \textit{see also} Marks, \textit{supra} note 42, at 511 –512, 522; \textit{see also} 2005 World Summit Outcome, G.A. Res. 60/1 ¶135, U.N. Doc. A/60/L.1 (Sept. 15 2005).


\textsuperscript{47} On substantive democracy, see Gregory H. Fox & Georg Nolte, \textit{Intolerant Democracies, in Democratic Governance and International Law, supra} note 3, at 389, 401 –405.

\textsuperscript{48} See Franck, \textit{supra} note 9, at 78, 82; Koskenniemi, \textit{supra} note 46, at 231 –232.
Some, while admitting that the “democratic entitlement” has indeed taken form in the last two decades, argue that the ongoing economic crisis in the western world, the growing global security concerns and the rise of authoritarian superpowers could undermine the establishment of the democratic entitlement in the near future. They identify a process in which the overarching idea of “democracy,” in its procedural sense, is marginalized in favor of a pragmatic analysis of a government’s adherence to basic human rights standards.\(^{49}\) According to this view, in certain situations – among them when consensual intervention is sought – the question whether a government has been democratically elected (“legitimacy of origin”), is secondary to the question of how the government exercises its powers (“legitimacy of exercise.”) According to this approach, the lack of the latter, but not necessarily of the former, can result in the “disqualification” of consent.\(^{50}\)

It is beyond this work to add to the robust literature debating whether a democratic entitlement exists, whether it has achieved the status of customary international law, and if so, what is its scope. Instead, we can constructively focus on the rights constituting the “compounds” of democracy. Indeed, rather than stressing the concept of “democracy” as such, it is helpful to focus on the various rights that comprise it – thereby “returning” the elusive concept of “democracy” to the realm of positive international human rights law.\(^{51}\) From here, it is only a short theoretical distance to reach

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\(^{51}\) See Cerna, *supra* note 42, at 328; *see also* d’Aspremont, *supra* note 49. at 559–560.
the conclusion that substantive democracy and the concept of effective protection are merging together.

Setting aside the complexities of the right to free and fair elections as enshrined in article 25 of the ICCPR, the truth remains that autocratic regimes are virtually always violators of other well-founded norms of international human rights law. Indeed, repression is a precondition needed to secure and protect autocracy. It is here that the “democratic entitlement” can receive significant legal augmentation: as aforementioned, democracy, in its substantive sense, does not only connote (procedural) electoral rights and majority rule – but is comprised also of a bundle of (substantive) rights that must supplement it, the chief of them being the right to life. While “democracy” in itself is controversial as a “right” in international law, many of these rights are enshrined in positive international law; some of these rights – though not all – are integral to the concept of effective protection as a source of sovereign power. Therefore, when assessing the consent power of established autocracies, in the context of an internal armed conflict, the focus should not be solely on their autocratic, non-elected nature, but rather on the gross violations of legally protected human rights, and namely those amounting also to a breach of the principle of protection, that such regimes almost always commit when attempting to preserve their rule. This tendency has been clearly demonstrated in the events of the Arab Spring.

53 See Marks, supra note 42, at 511–512.
55 ICCPR, supra note 52, art. 5.
56 In this sense, it is theoretically possible that an autocracy will exercise effective protection over its populations. This perhaps correlates with Rawls’ idea of “decent hierarchical peoples.” See JOHN RAWLS, THE LAW OF PEOPLES, §8 (1999). However, it is hard to imagine a situation in which an autocracy would
This legal approach to assess consent power seems prudent. Since at issue is the lawfulness of forcible intervention, with all of its political and humanitarian consequences, it makes sense – at least in the moment when assessing a possible intervention – to shy away from sweeping ideological terms and to focus on the way the consenting government exercises its power, rather on that power’s origins. Namely, as discussed at length in Chapter 10, this exercise of power will be judged according to the notion of protection of civilians, which offers a widely accepted standard, at least in principle, for the assessment of parties to an internal armed conflict.\footnote{d’Aspremont, supra note 49, at 559–560.} It is highly reasonable, as aforementioned, that autocratic regimes will rarely exercise their power in accordance with the principles of effective protection – but this fact has to be ascertained in the given instance nonetheless. This approach is fitting since the ultimate concern of the international system, during internal conflict, should be to swiftly respond to the suffering on the ground rather than to secure a complex democratic system, which requires a lengthy process of post-conflict institution building. This approach seems to correlate with the contemporary “protection now, democracy later” practice of the U.N. Security Council.\footnote{Chapter 10, Sec. II.5.}

deal with mass protests against it without breaching the protection principle, and still be considered an autocracy.
II. DEPRIVATION OF SELF-DETERMINATION AND CONSENT POWER

II.1 SELF-DETERMINATION IN THE COLONIAL CONTEXT AND BEYOND

Self-determination is universally accepted as a basic principle of international law, its promotion entrenched in Article 1(2) of the U.N. Charter as one of the organization’s purposes. Nonetheless, the meaning of the principle of self-determination has not been constant. On the contrary, it has evolved and changed significantly throughout the 20th century. It has developed from the Wilsonian model of the norm, based on the protection and self-governance of minorities in post WWI Europe; to a strong preoccupation with decolonization in Africa and Asia in the post WWII world; and, in its latest form, to the contemporary concept of internal self-determination, as discussed in Section II.2. A longstanding, inherent tension exists between the concept of self-determination, and the principle of territorial integrity, which is manifested chiefly regarding the legal debate on the existence or scope of the right of secession. This tension, as well as the general theory and scope of the principle of self-determination, have been robustly addressed in the literature, and will not be extensively analyzed in this work. We shall only discuss it here in the context of its possible effects over consent power and forcible intervention.

As aforementioned, much of the consideration of the principle of self-determination, in the first decades of the U.N., took place in relation to the process of

59 See Franck, supra note 9, at 52–56.
decolonization.\textsuperscript{61} It is interesting to note, in this context, that the normative treatment of colonial wars in the U.N. era constituted, in itself, a significant departure from the traditional perception of sovereignty as a corollary of effective control. Recall, that in the 19\textsuperscript{th} century, colonial wars have been looked upon as internal armed conflicts, where the colonized party was perceived as seeking secession by force from an empire that exercised effective control over its territory.\textsuperscript{62} This has changed remarkably in the post-War era.

Indeed, during the era of decolonization, latter-day colonial powers such as Portugal sought to maintain the traditional distinction of colonial wars as internal struggles for secession. However, the international community unequivocally rejected this stance, making it clear that colonial struggles were no longer considered as internal armed conflicts.\textsuperscript{63} In the U.N. era, thus, colonial struggles have been excluded from the internal realm, and were therefore no longer analyzed according to the law of secession. Instead, such conflicts were treated as belonging to a separate category of struggles for self-determination, which were closer, in their nature, to international armed conflicts. Whether such struggles, sometimes labeled as “wars of national liberation,” spawned also the right to receive forcible support from third parties – perhaps comparable to collective self-defense rights of states – remained controversial throughout the years.\textsuperscript{64} This controversy has led, perhaps, to the implied \textit{dictum} by the Court in \textit{Nicaragua}, according to which situations of colonialism might be analyzed under a paradigm of intervention


\textsuperscript{62} Chapter 6, Sec. I.

\textsuperscript{63} CASTELLINO, supra note 60, at 27–31.

differing from that relating to “pure” internal armed conflicts— a possibility vehemently rejected in the dissenting opinion of Judge Schwebel.65

Nonetheless, in its 1960 Declaration on the Granting of Independence to Colonial Countries and People, the U.N. General Assembly called for the cessation of “all armed action or repressive measures” directed against dependent peoples, while still reaffirming that any disruption of a state’s territorial integrity is incompatible with the U.N. Charter.66 In this sense, the latter Declaration, and subsequent resolutions,67 clearly established that in the context of decolonization, the question of self-determination is distinct from the issue of secession, and that colonial wars, thus, do not challenged the principle of territorial integrity. The 1970 Declaration on Friendly Relations explicitly reaffirmed this notion, by declaring that territories under colonial rule have a “separate and distinct status” from the administering state.68 By thus, the Declaration clarified that the issue of secession, in the internal sense, is irrelevant to the question of decolonization. This determination corresponds with the approach expressed in the (controversial) article 1(4) of Additional Protocol I, which provides that struggles against colonial domination and racist regimes, in the exercise of the right of self-determination, are to be considered international armed conflicts in the context of IHL.69

The exclusion of colonial wars from the internal sphere and their transfer to the realm of external jus ad bellum, necessarily removed them also, in the context of

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consensual intervention, from the paradigm of government preference – resulting therefore in the negation of colonial powers’ capacity to request and receive assistance from third parties.\textsuperscript{70} This conclusion is expressed in the Declaration on Friendly Relations, which proclaims that states have a duty to refrain from any forcible action which deprives peoples of their right to self-determination.\textsuperscript{71} The Declaration goes, however, a step further, stating that “such peoples” “are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.”\textsuperscript{72} This vague phrasing – as we shall discuss in Chapter 12 –\textsuperscript{73} raised questions regarding the lawfulness of forcible support to peoples struggling for self-determination. Indeed, despite its clear wording on the scope of the application of the principle – when attempting to circumscribe the means for the principle’s implementation, the Declaration plunged into nearly unworkable incoherence, characteristic of cold-war era compromises.\textsuperscript{74}

Thus, the Declaration enumerated the possible routes for the implementation of self-determination, as consisting of the establishment of an independent state; association or integration with an independent state; or any other political status chosen by the people.\textsuperscript{75} However, considering that the Declaration stipulates that self-determination is not strictly limited to instances of colonialism – by acknowledging that the principle applied to “all peoples” –\textsuperscript{76} it remains unclear whether the methods of implementation, as set forth in the Declaration, refer only to situations of decolonization or otherwise.

\textsuperscript{71} Declaration on Friendly Relations, \textit{supra} note 68, Principle 5\textsuperscript{5}.5.
\textsuperscript{72} Id.
\textsuperscript{73} Sec. II.3.
\textsuperscript{74} See Georgia Report, \textit{supra} note 60, at 138.
\textsuperscript{75} Declaration on Friendly Relations, \textit{supra} note 68, Principle 5\textsuperscript{4}.4.
\textsuperscript{76} Id. Principle 5\textsuperscript{1}.1.
The situation is further complicated by Principle 5¶7 of the Declaration, providing that the Declaration should not be construed as authorizing any actions to dismember the territorial integrity of independent states that comply with the principles of equal rights and self-determination.\(^77\) It can be inferred from this statement, by way of negation, that the territorial integrity of states that do not comply with the principles of equal rights and self-determination is not an absolute value. Furthermore, Principle 5¶7 can hardly be understood as applying strictly to colonized peoples, since its reference to “equal rights” alludes to a wider spectrum of situations. In particular, the qualification of the principle of territorial integrity, implied in Principle 5¶7, could be relevant to racist regimes which are not per se colonialist – Apartheid South Africa the most clear-cut example.\(^78\) This notion is augmented by the fact that similar paragraphs have been included in other U.N. documents, even as late as in 1995 – long after the colonial era ended – in parallel and shortly following the collapse of the Apartheid regime in South Africa.\(^79\)

The Declaration’s putative qualification of the principle of territorial integrity, also in some non-colonial situations, could arguably be construed as opening the door for the possibility of remedial secession, as the term is discussed in the next Section. However, the Declaration quickly contradicts this thought, in Principle 5¶8, proclaiming unequivocally that states shall refrain from any action aimed to disrupt the territorial integrity of any other state.\(^80\) This last Principle, however, can be interpreted as applying to any instance not covered by previous paragraphs, ostensibly allowing support to

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\(^77\) Id. Principle 5¶7.
\(^80\) Declaration on Friendly Relations, supra note 68, Principle 5¶8.
secessionist groups in certain circumstances. Therefore, the ambiguity regarding the question of secession and the Declaration on Friendly relations nevertheless remains.\(^{81}\)

**II.2 RELEVANCE IN THE DECOLONIZED WORLD: INTERNAL SELF-DETERMINATION, REMEDIAL SECESSION, CIVILIAN PROTECTION AND CONSENT POWER**

The principle of self-determination, although prevalent in the discourse on decolonization, is not limited only to this specific context. It is entrenched, in addition, as an internationally protected human right. Accordingly, Common Article 1 of the ICCPR and the ICESCR provides that the principle applies to all peoples, whether or not under foreign domination. However, there is significant difference in the application of the principle in the colonial versus the non-colonial contexts. While peoples under colonial rule would have a right to establish independent states, in already established and independent states, conversely, self-determination is limited to internal application. In practice, the immediate meaning of this qualification, as we shall see, is that in the decolonized world, the principle of self-determination does not in general spawn a positive right of secession, even if not prohibiting it \textit{per se}.\(^{82}\)

Thus, in the decolonized world, in which the vast majority of peoples are no longer under foreign rule, the discussion of the principle of self-determination has become somewhat narrower. The principle is now commonly analyzed under the concept of internal self-determination, meaning, the application of the right within an existing

\(^{81}\) See \textit{Georgia Report, supra} note 60, at 137 –138.

\(^{82}\) Franck, \textit{supra} note 9, at 58–59; \textit{CASTELLINO, supra} note 60, at 31–34. Arguably, international law does not prohibit secession; \textit{see} Request for an Advisory Opinion of the International Court of Justice on the Question “Is the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo in Accordance with International Law?” \textit{Written Statement of the United Kingdom (Apr. 17, 2009) 87–93, available at} \url{http://www.icj-cij.org/docket/files/141/15638.pdf}. In any case, in absence of a positive right of secession external support to the seceding party is a violation of international law.
independent state, manifested in the relation between the state and its civilians. The concept of internal self-determination derives from the practical understanding that the international system could not withstand the perpetual fragmentation created by infinite claims for secession, and that the principles of territorial integrity and uti possidetis – meaning, the respect of colonial borders as they were in the time of independence – must counterbalance the right to self-determination.

The notion of internal self-determination has been viewed by some, in the past, as synonymous with non-intervention. Indeed, self-determination as been cited as a key justification for the strict-abstentionist approach to the question of consensual intervention. However, the rationale of internal self-determination has been underscored, by most contemporary scholars, as being based on some form of a right to political participation. When equating internal self-determination with a notion of political participation, the discussion of self-determination merges, to a large extent, with the debate surrounding the question of democratic entitlement and its effect on government consent power. In this sense, our conclusions regarding the relations between democracy and consensual intervention are applicable also in the context of the interaction between internal self-determination and intervention: both should be analyzed according to the substantive human rights violations that usually accompany their deprivation; when such violations amount to a breach of the principle of effective

protection by the government, the latter loses its sovereign power to request assistance during an internal armed conflict.

However, the question of internal self-determination spawns another dilemma, concerning the positive consequences of its breach. Due to the prevalence of the principle of territorial integrity, as aforementioned, self-determination in the decolonized world is to be fulfilled within the framework of the state. It is thus clear that a right of forcible, unilateral, non-consensual secession cannot be an inherent component of the right of internal self-determination.\(^\text{86}\) This conclusion is merited both in light of the substantive meaning of the principle of internal self-determination,\(^\text{87}\) and on counts of the dangerous practical implications of the recognition of a right to secede.\(^\text{88}\) Accordingly, and at least since the early 1960s, when the international community adopted a strong anti-secessionist in the context of the Katanga affair,\(^\text{89}\) it can be definitely said that state practice has not recognized a right of secession based strictly on the notion of internal self-determination.\(^\text{90}\)

In the context of consensual intervention, the implication must be that – other things equal – a claim cannot be made for the negation of government consent power when the government is facing an armed secessionist movement, when the secessionists’

\(^{86}\) Internationally recognized secession can be, undoubtedly, a product of an agreement between the state and the opposition. This agreement can be the result of an internal armed conflict or not; the key issue is that the secession is validated, in relation to the international community, by consent of the rump state. A recent example is the secession and recognition of South Sudan in July 2011, following a referendum that was conducted after a longstanding internal armed conflict. Compare Dapo Akande, *The Newly Independent State of South Sudan – Should We Rethink the Right to Secession* EJIL: TALK (Jul. 15, 2011), http://www.ejiltalk.org/the-newly-independent-state-of-south-sudan/.


\(^{88}\) Tomuschat, *supra* note 60, at 24–25.


\(^{90}\) For a summary of practice, see Tomuschat, *supra* note 60, at 27–34.
claims are based *solely* on an alleged deprivation of internal self-determination. It could be further prescribed that, all other things equal, any loss of territorial effective control resulting from such actions cannot be used as a claim against the government’s consent power. If, however, the conflict is not one of secession, but for control over the state apparatus, any limitation of consent power justified on counts of a violation of internal self-determination should be analyzed according to the same principles outlined in the discussion regarding the democratic entitlement.

It is in this context that the unresolved issue of “remedial secession” has to be analyzed. Until now, we have generally discussed the effects of “regular” violations of internal self-determination over government consent power. However, the idea of remedial secession, a term first used by Buchheit, suggests that in exceptional circumstances a group might be entitled – in accordance with international law – to be considered as a “people” possessing a right to secede, as a *remedy* for grave and massive violations of human rights directed against it in a discriminatory fashion. Thus, while for the purpose of consent power internal self-determination merges with the question of substantive democracy, the question of remedial secession is related to the notion of effective protection of civilians. Importantly, this supposed right will apply also in the non-colonial context, meaning, where the notion of internal self-determination usually prevails. In any case, on counts of the danger it presents international stability, it must be invoked “last resort” remedy; the *ultimate* remedy for the affected group.

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92 Tomuschat, supra note 60, at 35; see also BUCHANAN, supra note 60, at 247–248 (on the meaning of the remedial aspect of the right).
93 On the high threshold of violations required for remedial secession see Cismas, supra note 77, at 544–546 (and the sources cited therein).
94 BUCHEIT, supra note 91, at 223. Buchanan argues, however, that a revocation of intrastate autonomy agreements, such as was the case in Kosovo, can also be seen as a cause for remedial secession. See Allen
Frequently referred to as based on Principle 5\[7 of the Declaration on Friendly Relations,\[5 the doctrine of remedial secession has received much support in legal literature, in contradistinction to scant support, if at all, in state practice.\[6 In recent times, the question of remedial secession has been most heavily debated in the context of Kosovo’s struggle to secede from Serbia.

In response to the mass atrocities conducted by the Serbian army in 1998–1999, NATO launched a unilateral bombing campaign against Serbia, which led to the establishment of a U.N. Interim Administration Mission in Kosovo (UNMIK), supplemented by a NATO-dominated security presence (KFOR), mandated in Security Council resolution 1244.\[7 In practice, the international civil and military presence in Kosovo amounted to a complete transfer of the control over Kosovo to the international community.\[8 Following a long stalemate in the final-status negotiation between representatives of Kosovo and Serbia,\[9 Kosovo declared independence on February 17th, 2008,\[10 to be recognized, as of April 2012, by 89 states.\[11

The debate regarding remedial secession in the case of Kosovo revolves around the question whether such right exists in international law to begin with; and if not, whether the Kosovo case sets any legal precedent for such a right; or rather, as commonly

\[\text{Buchanan, Uncoupling Secession from Nationalism and Intrastate Autonomy from Secession, in Negotiating Self-Determination 81, 84 (Hurst Hannum & Eileen Babbitt eds., 2006).}
\[\text{See supra, text accompanying nn. 77–81.}
\[\text{Cismas, supra note 77, at 577–578.}
\[\text{For an updated list of states that have recognized Kosovo, including the texts of the recognitions, see http://www.kosovothanksyou.com/.}
claimed by states that have recognized Kosovo, the recognition of Kosovo is merely a sui generis case, its unique circumstances negating any potential precedential, norm-creating value.\textsuperscript{102}

The sui generis argument is best exemplified in the positions expressed in the dramatic Security Council discussion taking place a day after Kosovo’s unilateral declaration of independence.\textsuperscript{103} There, the U.K. recalled that the Council, in resolution 1244, took an “unprecedented step” by depriving Serbia of its control over Kosovo, in response to its attempt to expel the Albanian population from Kosovo in 1999. It argued that these events “shape” the current situation.\textsuperscript{104} It blamed Serbia for the collapse of the negotiations, and repeated the claim that the situation is sui generis.\textsuperscript{105} The U.S. presented similar reasoning, claiming that the declaration of independence was a “logical, legitimate and legal response” considering the historical backdrop and the ongoing failure of the negotiations between Kosovo and the Serbian government. However, it too stressed that the unique Kosovar situation negates any precedential value.\textsuperscript{106} Croatia followed the same route,\textsuperscript{107} and so did France.\textsuperscript{108}

The sui generis argument regarding Kosovo, thus, bases itself on a three-pronged set of justifications. First, it refers to the “unprecedented step” taken by the Security Council in resolution 1244, in its decision to de facto remove Kosovo from Serbian control; second, it relies on the Serbian attempts to expel the Albanian population; and third, it points out the ongoing failure of the negotiations between the parties.

\textsuperscript{102} Cismas, \textit{supra} note 77, at 581–586; For an overview of the sui generis debate see \textit{Georgia Report}, \textit{supra} note 60, at 139–140.

\textsuperscript{103} U.N. SCOR, 63\textsuperscript{rd} Sess., 5839\textsuperscript{th} mtg. U.N. Doc. S/PV.5839 (Feb. 18, 2008).

\textsuperscript{104} \textit{Id.} at 12.

\textsuperscript{105} \textit{Id.} at 13–14.

\textsuperscript{106} \textit{Id.} at 18 –19.

\textsuperscript{107} \textit{Id.} at 16.

\textsuperscript{108} \textit{Id.} at 19–20.
However, an analysis of the argument reveals that it does not convincingly set-forth a rational basis for a *sui generis* claim. The reliance on past “unprecedented” actions by the Security Council as connoting the situation’s uniqueness is somewhat of an *ipse dixit*, due to its circular reasoning (requiring us to accept a false statement, according to which since the international community acted unprecedentedly, the situation does not constitute a precedent for future actions by the international community.) Furthermore, the argument does not explain why it is inconceivable that similar circumstances might take place again, in the face of mass atrocities elsewhere; or in other places where negotiations fail to achieve a political solution.  

Indonesia, for instance, rejected the *sui generis* argument, rightly asserting “that all issues that are on the agenda of the Council have their own unique character,” and called for the continuance of negotiations.  

Similarly, other states, namely Russia and China, were not convinced by the *sui generis* argument and warned against the future implications. The 2010 ICJ advisory opinion regarding Kosovo’s declaration did not clarify these issues, as it rendered a very narrow opinion legalizing merely the *act* of Kosovo’s declaration of independence, without grappling with the substantive question of remedial secession.  

Even if we are willing to accept the notion that a positive right of “unilateral” remedial secession exists, it is obvious that any such putative right does not materialize under “regular” circumstances of deprivation of internal self-determination, in the form of denial of political participation. Such an extreme result would be problematic when

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109 For similar critique, see Cismas, *supra* note 77, at 585–586.  
111 Id. at 6–8.  
113 See Tomuschat, *supra* note 60, at 38–44.
offered as a remedy for a violation of such an ambiguous norm. Indeed, even the unilateral NATO intervention in Kosovo was based on the atrocities committed by Serbia, and not the right to self-determination, in its narrow sense, of Kosovo.\footnote{Farer, supra note 96, at 57.}

Accordingly, in its report on the 2008 Russia-Georgia conflict, the International Fact-Finding Mission concluded that although Georgia has violated, for a time, the internal right of self-determination of the people of South Ossetia and Abkhazia, the latter were not entitled to secede.\footnote{Georgia Report, supra note 60, at 145–146, 147.}

Struggles for secession, could be, however, affected by the principle of protection of civilians, even if one does not recognize the doctrine of remedial secession as such. Indeed, if secession is sought as a response to mass atrocities, as was the case in Kosovo, or in instances of other “grave and massive” human rights violations,\footnote{Tomuschat, supra note 60, at 35.} government consent power can be negated – a fact that can indirectly assist the seceding party. Here, our analysis merges, to a large extent, with the discussion in Chapter 10 regarding the principle of protection of civilians, and its implementation through the RtoP doctrine.\footnote{Compare id. at 41–42 (paralleling the question of remedial secession and humanitarian intervention).}

Whether secessionist forces are entitled – should the idea of remedial secession be accepted – also to a positive right of \textit{remedial forcible intervention} in the form of the power to request external assistance – is a complex question, on the seam between the concept of humanitarian intervention and recognition, which will be addressed in the next Chapter. What is clear, however, is that a government that actively disregards the principle of protection of civilians will lose its consent power when facing a secessionist movement, whether we accept the concept of remedial secession or not.
I. FRAMING THE DISCUSSION: BETWEEN RECOGNITION, HUMANITARIAN INTERVENTION AND SELF-DEFENSE

In previous chapters, we have analyzed the scope of the principle of government preference. However, the negation of government consent power does not necessarily entail the positive transfer of consent power to opposition groups. Indeed, external forcible support of opposition groups during internal strife has been a longstanding and controversial question of international law. During the cold-war, this issue underlined the controversial Brezhnev and Reagan doctrines; it was also a prevalent question in the context of decolonization, and specifically, regarding the support of peoples struggling for self-determination.¹

An analysis of state practice in terms of support to opposition groups is a problematic exercise. Because of their prima facie illegality and reasons of political prudence, states will rarely admit, in specific cases, that they are substantially engaged in such activities –² even when it is otherwise a matter of declared policy.³ Instead, a more helpful way to address the question is through a three tiered, principled approach. First, we must ascertain whether an intervention is in fact in favor of the opposition, or rather it

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¹ Chapter 8, Sec. II.
³ For instance, it is interesting to compare between the legal justifications given by the U.S. to its actions in Nicaragua (collective self-defense), and the various expressions of the Reagan Doctrine, which ostensibly condoned the support of opposition “freedom fighters.” See Chapter 8 Sec II.
is a “regular” case of intervention in support of a government. In this context, if the intervention was undertaken following the recognition of the benefited group as a government or a state, it is potentially not at all a question of intervention in favor of the opposition. Second, and conversely, if the benefitted group is unrecognized to begin with, or recognized unlawfully only as a pretext for the intervention, any unilateral forcible support given to it – unless can be separately justified as an act of self-defense – is a prima facie violation of the laws on the use of force and the norm of non-intervention. Third, in such cases, if humanitarian justifications are invoked, we may inquire as to the potential role of consent in the legitimization\(^4\) of such an intervention within the paradigm of unilateral humanitarian intervention.

As in cases of government consent, international self-defense actions by third-party states can amount, in practice, to interventions in support of opposition groups involved in a separate armed conflict against the aggressor government. An example can be found in the 2001 U.S. invasion of Afghanistan, undertaken as self-defense following the September 11\(^{th}\) attacks.\(^5\) In the initial stages of operation Enduring Freedom, coalition forces de facto supported the Northern Alliance in its armed struggle against the Taliban

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\(^4\) The term “legitimate,” as opposed to “legal,” is used here in the generic form, meaning an act that is not legal per se but is rather perceived as justified or excused on some other basis. For a theoretical discussion of the term “legitimacy” in various context of international law see BRAD R. ROTH, GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW Ch. 2 (2001); THOMAS FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990).

regime, assuming that the latter was indeed the government of Afghanistan, considering that it was not recognized by the vast majority of states.

However, as opposed to government consent, that – as we saw in Chapter 1 – can augment controversial self-defense claims against non-state actors, it seems that support granted to opposition groups in the context of self-defense operations does not produce the same effect. On the contrary, it can potentially transform an otherwise legal self-defense action into an unlawful intervention. This is because regime change, assuming it is sought by the opposition and supported by the attacking state, is not necessarily a valid objective of self-defense actions in light of the *jus ad bellum* principles of necessity and proportionality.

Nevertheless, the assessment of the relations between self-defense, opposition consent and regime change can only be conducted on a case-by-case basis, upon analysis of the gravity of the threat posed to the intervener by the attacked regime. Since this is primarily a question of the law of self-defense, we shall not analyze it further here. Nonetheless, it should be added that there is potential merit in the claim that like in the context of self-defense, not every case of humanitarian intervention – as we shall discuss the context later on – warrants regime change. However, in light of the understanding of

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8 Sec. 1.2.
the concept of sovereignty as entailing responsibility, it seems intuitively right that contributing to regime change – inter alia through support of the opposition – can be, in certain circumstances, more reasonable in cases of internal mass atrocities, than in most instances of “pure” inter-state self-defense.

II. GOVERNMENT AND OPPOSITION: DISTINCTION, INTERACTION AND THE BASIC RULE AGAINST THE FORCIBLE SUPPORT OF OPPOSITION GROUPS

II.1 THE DISTINCTION BETWEEN GOVERNMENT AND OPPOSITION

The legality of any act of consensual forcible support granted to a party recognized by the intervener as a government or as an independent state raises an immediate question in the field of the law of recognition. If the act of recognition itself is lawful, then the question is not one of support to opposition groups – but rather to governments, and should thereafter be analyzed according to the presumption in favor of governments. If the conflict is one of secession, and the opposition is lawfully recognized as a separate state, then the question ceases to be one of internal armed conflict.

Of course, the problem of government or state recognition is one of the perpetual questions of international law. Not less complex is the question of “who decides,” in a particular instance, whether a party is indeed the government or is an independent a state.12 Indeed, absent binding collective mechanisms, recognition is highly prone – as we

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12 It is in this context where the long-standing argument between the declarative and constitutive doctrines of recognition takes place. This work will not add to the abundance of scholarship regarding this question. For a survey of the constitutive and declaratory doctrines of recognition see See HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 2–3, 38–42 (1948); JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL 1–17, 22–26 (2006); THOMAS D. GRANT, THE RECOGNITION OF STATES 2–12 (1999). We shall instead adopt, as a given, when using the term “recognition,” the contemporary view that recognition has having both declarative and constitutive elements. See, e.g., CRAWFORD, supra note 12, at 23; GRANT, supra note 12, at 19, 71–73. The dual nature of recognition seems especially true considering the recent debates on questions of recognition, both in the context of the recognition of Palestine, and in the
shall see – to abuse. However, the primary distinction between recognized and non-recognized entities, in the context of the law on the use of force, remains theoretically sound nonetheless. While this postulation merits a study of its own, we will simply assume that nowadays, recognition is more likely to be internationally accepted – and in particularly in the context of intervention – when conducted through universal or regional bodies. For instance, U.N. membership or acceptance of credentials, can serve as acts of recognition of enhanced legitimacy;\textsuperscript{13} positions by regional organizations, as we saw in the context of the 2011 Gbagbo affair, can also play a substantial role.\textsuperscript{14}

Conversely, any intervention on behalf of a group not fully and completely recognized at the time as the lawful government or as a separate state is an intervention on behalf of an opposition group. Indeed, this definition provides some conceptual clarity. However, as a mirror image of the question of recognition of governments, it presents the same practical difficulties. Here, too, the absence of a collective mechanism for recognition can result in anomalous situations where recognition is granted to opposition groups by certain states but not by others –\textsuperscript{15} as is the case today regarding Kosovo, Abkhazia and South Ossetia.\textsuperscript{16} In other instances, such as in the 2011 Libyan Arab Spring. \textit{See} JOHN QUIGLEY, \textsc{THE STATEHOOD OF PALESTINE: INTERNATIONAL LAW IN THE MIDDLE EAST CONFLICT} (2010) (making the case that Palestine is a state); \textit{but see} The Office of the Prosecutor, Int’l Crim. Court, Situation in Palestine (Apr. 3, 2012) (asserting that the Prosecutor cannot decide that Palestine is a state absent full U.N. membership, or a determination by the Court’s Assembly of State Parties). On recognition in the context of the Arab Spring, see next Sections.

\textsuperscript{13} ROTH, \textit{supra} note 4, at 126.
\textsuperscript{14} Chapter 11, Sec. 1.3.
\textsuperscript{15} Compare., ANTONIO CASSESE, \textsc{INTERNATIONAL LAW} 74 (2005); GRANT, \textit{supra} note 12, at 19–22.
\textit{Compare} LAUTERPACHT, \textit{supra} note 12, at 53–54
conflict, recognition can be a “rolling” affair, some states being quicker to recognize the opposition as the government than others.\textsuperscript{17}

Since we define the “opposition” negatively – meaning, as the party not recognized as a government – it is worthwhile to ask whether there are also positive criteria for the identification of opposition groups. Essentially, the mere occurrence of an internal armed conflict, as defined in Chapter 2, presupposes the existence of “organized armed groups.”\textsuperscript{18} The same threshold of “organization” that is used to ascertain whether an internal armed conflict exists could thus be used also for the identification of the opposition in a certain instance. Of course, the opposition can often consist of fragmented groups, constantly shifting alliances and splintering into smaller groups, thereby making it impossible to treat it as a unified body capable of expressing any kind of collective will. However, in certain instances, loosely aligned opposition groups were relatively quick to form quasi-representative bodies, such as the Libyan National Transitional Council;\textsuperscript{19} the Syrian National Council, established in September 2011 attempted to play the same role, to a lesser degree of success on the ground, at least as of April 2012.\textsuperscript{20} For instance, the latter concluded a National Covenant in March 2012, where it laid a vision for a free and democratic Syria.\textsuperscript{21} Thus, such bodies purport to represent the general

\textsuperscript{17}See Section II.2.
\textsuperscript{18}Sec. II.
interest of the opposition – many times consisting of many groups with different agendas – in front of the international community.\textsuperscript{22} As we shall see, if they exercise or seek to exercise effective protection of civilians, or are confronting government forces that do not do so, the international community might be more willing to engage such opposition groups – and perhaps even to recognize them.

\section*{II.2 Effective Protection and Non-Forcible Interaction with Opposition Groups}

Consistent with our analysis in Chapter 10, the concept of effective protection can trump considerations of territorial effective control also in the context of the international community’s will to \textit{engage} with opposition groups prior to official recognition. Here, we do not address as of yet the question of forcible intervention on behalf of such groups, but merely the interaction with such groups by external parties.

In a manner reminiscent of – yet differing from – the traditional insurgency doctrine,\textsuperscript{23} intermediate situations in which external parties engage opposition groups, on different levels, occur also in contemporary practice. For instance, Turkey has maintained contact with Syrian opposition groups during the 2011–2012 Syrian uprising\textsuperscript{24} prior to official recognition; it moreover cooperated to a certain extent with armed Syrian groups, namely the Free Syrian Army.\textsuperscript{25} A similar position was taken by France, admitting that it

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\textsuperscript{23} Chapter 6, Sec. III.
\textsuperscript{24} \textit{See} Peter Harling & Sarah Birke, \textit{Beyond the Fall of the Syrian Regime}, \textit{Middle East Research and Information} (Feb. 24, 2012), \texttt{available at} http://www.merip.org/mero/mero022412.
was “helping” the opposition and “encouraging them to get organized.” Britain sent a special envoy to the Syrian opposition, and other countries urged various Syrian groups to cooperate with each other. U.S. Secretary of State Hillary Clinton has also met the Syrian opposition, calling it a “leading and legitimate representative of Syrians seeking a peaceful democratic transition”–a statement short of full recognition but is undoubtedly one of support. The Syrian opposition was also a party to failed Arab League reconciliation processes, and was considered in the 2012 Six-Point peace plan outlined by Kofi Annan, acting as a joint envoy of the U.N. and the Arab League.

All of these interactions were met with general international acquiescence. Indeed, following vetoes exercised by China and Russia in relation to any condemnation of the Syrian regime in the Security Council, many dozens of states participated in anti-regime summits under the auspices of the “Friends of the Syrian People” framework, where the Syrian National Council presented reports regarding the situation on the ground, and received recognition “as a legitimate representative of all Syrians.”

32 See infra, n. 143.
Friends’ Group further pledged to set up a Sanctions Working Group to monitor sanctions against the regime and, importantly, to grant financial support “to meet the needs of the Syrian people,”\(^3\) which reasonably will be channeled through the Syrian opposition. A comparable international reaction took place, as we shall shortly see, during the 2011 Libyan conflict.

In the past – as we have discussed in detail in Part 2 – the rigid belligerency doctrine, and to a large extent also the flexible insurgency doctrine, made the interaction with opposition groups contingent mainly upon their attainment of a degree of territorial effective control. Furthermore, the point of departure underlying these doctrines was, in general, one of neutrality between the conflicting parties. However, it seems that nowadays the interaction is influenced – once the uprising becomes substantial – primarily by considerations of effective protection, shedding the pretense of neutrality or “impartiality.” Accordingly, the more that opposition groups are deemed as violators of the protection principle, the more the international community might be willing to rely on territorially ineffective governments. Conversely, the more a government violates the principle of protection, the international community might be more willing to give credit to relatively ineffective opposition groups as potential fulfillers of the responsibility to protect. In other cases, any substantial positive interaction with opposition groups might amount to a violation of the norm of non-intervention.\(^3\)

In order to exemplify this notion it is revealing to juxtapose the treatment, in recent times, of opposition groups in Somalia versus their treatment in Libya. As detailed

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\(^3\) Id. ¶¶17–18.

\(^3\) Chapter 3, Sec. II.2.
in Chapter 9, the Transitional Federal Government of Somalia has retained its international recognition, including in the context of consent power, although it barely controls any territory. It has received the forcible support of Ethiopia 2006, and again in late 2011, when it also received the support of Kenya;\footnote{Chapter 1, Sec. I.2; Jeffery Gettleman, \textit{Ethiopian Troops Said to Enter Somalia, Opening New Front Against Militants}, N.Y. TIMES, Nov. 20, 2011, available at http://www.nytimes.com/2011/11/21/world/africa/ethiopian-troops-enter-somalia-witnesses-say.html.} likewise, the Security Council has emphasized it support to the Transitional Government in many resolutions. Conversely, the opposing Al-Shabaab militia, accused of links with Al-Qa’ida and of obstructing humanitarian aid, has not, in general, received any intermediate recognition by the international community – despite controlling vast parts of Somalia. Furthermore, Eritrea was punished for supporting the group and its predecessor, the Islamic Courts Union.\footnote{On these dynamics regarding Somalia see Chapter 9, section II.4; Chapter 10, section II.4; Chapter 1, section I.2.}

Regarding the 2011 Libyan conflict, the reaction has been the exact opposite. First, many states have engaged the Libyan opposition, prior to full recognition, as legitimate “political interlocutors” with which dialogue can be conducted.\footnote{See Stefan Talmon, \textit{Recognition of the Libyan Transitional Council}, 15 AM. SOC. INT’L L. INSIGHTS (Jun. 16, 2011), http://www.asil.org/insights110616.cfm.} For instance, in March 2011, the U.S. appointed a Liaison to the Libyan rebels, in order to “determine how the United States could help them.”\footnote{Helene Cooper, U.S. to Name a Liaison to Libyan Rebels, N.Y. TIMES, Mar. 11, 2011, available at http://www.nytimes.com/2011/03/12/world/africa/12policy.html?_r=3&hpw.} This approach is reminiscent of the flexible insurgency doctrine, except for the significant fact that it reflects a blunt preference of the opposition, on substantive grounds rather than on counts of territorial effectiveness.

Second, the intermediate status of the Libyan opposition can be demonstrated in the extremely unusual circumstances of the Security Council debate of February 26,
2011, which surprisingly were not heavily discussed.\(^40\) In mid-February 2011, protests against the Al-Qadhafi regime erupted, spreading to the west of the country from the eastern city of Benghazi.\(^41\) As the regime responded forcefully, key Libyan diplomats resigned or sided with the opposition. On February 21\(^{st}\), Libya’s deputy ambassador to the U.N. called for Al-Qadhafi’s resignation, proclaiming that the delegation serves the Libyan people, and not the regime.\(^42\) So did Libya’s delegations to the U.N. Human Rights Council and the Arab League.\(^43\) On February 25, the same “former” representative of Libya, appearing in the Security Council, appealed for support, calling for a “swift, decisive and courageous resolution.”\(^44\) A day later, the Security Council adopted Resolution 1970, recalling “the Libyan authorities’ responsibility to protect its population,” imposing sanctions and referring the situation to the Prosecutor of the International Criminal Court.\(^45\) As the resolution imposed an arms embargo on Libya, it \textit{a fortiori} prohibited any forcible support of the regime, thereby unequivocally negating the government preference.\(^46\)

Significantly, the resolution – and the circumstances of its adoption – exemplifies the international readiness to interact with opposition groups, in instances where the government violates the principle of protection. Accordingly, although the Libyan

\(^{40}\) See, in this context, Eliav Lieblich, \textit{Consensual Intervention and the Responsibility to Protect, in THE RESPONSIBILITY TO PROTECT: FROM THEORY TO PRACTICE} 141, 149–150 (Andre Nollkaemper & Julia Hoffman eds., 2012).
\(^{46}\) See U.N. Charter art. 2(5).
delegation ceased to represent the Al-Qadhafi regime, the Resolution noted the letter of the Permanent Representative of Libya, in which he expressed support for Security Council action.\footnote{S.C. Res. 1970, supra note 44, pmbl; Letter Dated 21 February, U.N. Doc. S/2011/102 (Feb. 22, 2011).} In his statements, the representative of Libya thanked the Council for the resolution and commended it as a “sincere attempt to protect civilians.” He expressed confidence that it will bring “a definite end to the fascist regime that is still in place in Tripoli;” he also called on the Libyan armed forces to abandon Al-Qadhafi.\footnote{U.N. SCOR, 66\textsuperscript{th} Sess., 6491\textsuperscript{st} mtg. at 7, U.N. Doc. S/PV/6491 (Feb. 26, 2011).}

Although resolution 1970 did not yet authorise a forcible intervention – this happened in resolution 1973, adopted a few weeks later, which led, in practice, to Al-Qadhafi’s ouster –\footnote{S.C. Res. 1973 ¶4, U.N. Doc. S/RES/1973 (Mar. 17, 2011); see also Chapter 1, Section IV.1.} it demonstrates that in cases of loss of effective protection, support by those opposing the regime can affect the decision-making process in the Council. This notion was reflected in statements by several Council members. While China referred laconically to the “special situation in Libya” as grounds for its support for the resolution,\footnote{S/PV/6491, supra note 46, at 4.} other states were less ambiguous. India stated that the position of the Libyan delegation “strengthened” its support for the resolution.\footnote{Id. at 2.} Nigeria declared that the Libyan delegation’s stance and the “cries of help of the Libyan people” persuaded it to vote positively.\footnote{Id. at 3.} Brazil stated that it gave “due regard” to the requests by the delegation.\footnote{Id. at 7.} South Africa and France went further. The former declared that the Council “responded swiftly and resolutely” to the call of the Libyan delegation.\footnote{Id. at 3.} France welcomed the fact that the Council has “unanimously and forcefully responded” to the
appeal by the Libyan representative.\textsuperscript{55} It is inconceivable that the members of the Council were not fully aware of the peculiar situation. It is equally implausible that they were willingly engaged in a joint violation of international law, in such a public international forum. There can thus be little doubt that the failure of the Al-Qadhafi regime to effectively protect its civilians resulted in some \textit{de facto} status granted to the opposition in front of the Council; this was true although the Al-Qadhafi regime was still considered by the Council as the “authority” in Libya, and the credentials of the Libyan National Transitional Council were accepted by the General Assembly only months later.\textsuperscript{56}

Indeed, the decision of the international community to interact with opposition groups, without recognizing them as governments, cannot in itself grant them the power to consent to forcible intervention. However, from the case of Libya we can learn two main things: first, that opposition consent can play a role in Security Council considerations; and second, that protection of civilians plays a prominent role in the will of states to deal with the opposition in specific instances.

II.3 \textbf{The Basic Rule: Forcible Intervention in Favor of Opposition Groups as an Unlawful Use of Force}

As evident from the prohibition on the use of force as entrenched in Article 2(4) of the U.N. Charter, and as was ruled in the Nicaragua case,\textsuperscript{57} any unilateral intervention in an internal armed conflict justified strictly on counts of opposition consent – and absent a credible self-defense claim by the intervener – is a \textit{prima facie} violation of the norm of

\textsuperscript{55} \textit{Id.} 5.
\textsuperscript{57} See Chapter 8, Sec. IV.3.
non-intervention and the prohibition on the use of force. Accordingly, The Declaration on Friendly Relations proclaims that –

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.\footnote{Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, Principle 1¶9, G.A. Res. 2625 (XXV), U.N. Doc. A/2625 (Oct. 24, 1970).}

The Declaration further declares that “no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.”\footnote{Id. Principle 3¶2.} Additionally, Article 3(g) of the 1974 Definition of Aggression – reflecting customary international law – defines as aggression indirect forcible intervention in the form of “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.”\footnote{Definition of Aggression, G.A. Res. 3314 (XXIX), U.N. Doc A/9631 (Dec. 14, 1974). Article 3(g) of the definition was considered by the ICJ, in the Nicaragua case, as a customary norm. Military Aid and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27), ¶195.} The same formula has been adopted in the 2010 Kampala definition of the crime of aggression.\footnote{The Crime of Aggression, art. 8bis(g), Resolution RC/Res.6, RC/11 (Jun. 11, 2010).}

However, the nature of the prohibition on support to opposition groups has not always been entirely clear. As we saw in Chapter 11, the era of decolonization ushered a robust debate regarding the scope and implications of the principle of self-determination,
and its relation to the law on the use of force. A product of this era, Article 7 of the
Definition of Aggression created a rather complex normative situation:

Nothing in this Definition … could in any way prejudice
the right to self-determination, freedom and independence,
as derived from the Charter, of peoples forcibly deprived of
that right and referred to in the Declaration on Principles of
International Law concerning Friendly Relations and
Cooperation among States in accordance with the Charter
of the United Nations, particularly peoples under colonial
and racist regimes or other forms of alien domination: nor
the right of these peoples to struggle to that end and to seek
and receive support, in accordance with the principles of
the Charter and in conformity with the above-mentioned
Declaration. 62

Presumably, then, the Definition allows for the provision of positive support to
opposition groups, in the circumstances enumerated. An analysis of the Article reveals
that these circumstances encompass struggles against three distinct (but potentially
overlapping) forms of oppression: colonial regimes, racist regimes, and “other forms” of
alien domination. 63 Two of these scenarios refer to instances which are expressly matters
of international conflict, and therefore not of our concern; the third, conversely, could
theoretically extend also to certain internal situations. Indeed, as we saw have seen, anti-
colonial struggles have been excluded from the realm of internal strife, and in any case of

62 Definition of Aggression, supra note 60, art. 7.
63 See the comparable provision in Protocol Additional to the Geneva Conventions of 12 August 1949, and
Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Jun. 8, 1977, art. 1(4),
1125 U.N.T.S. 3.
are of less contemporary significance.\textsuperscript{64} Cases of “alien domination,” by their nature, also cannot be considered as internal issues.\textsuperscript{65} The third instance, however, refers to “racist regimes,” a term that can include regimes that are not colonialist or alien, but are still “racist” – the main relevant example being Apartheid South Africa. In essence, then, of the three scenarios mentioned in Article 7, struggles against “racist regimes” could theoretically fall within the paradigm of internal armed conflicts. In such instances, Article 7 can be construed as recognizing that opposition forces, in internal conflicts against racist regimes, are entitled to seek and receive support. In this sense, the Article represents a move towards substantive analysis of opposition groups, permitting their support on counts of the nature of their struggle.

However, much like the Declaration of Friendly relations, the Definition of Aggression is an ambiguous document. A typical document of the cold-war era U.N., its adoption by consensus required a high degree of normative vagueness that accommodated the conflicting interpretations of the rivaling blocs.\textsuperscript{66} Accordingly, Article 7 does not explicitly refer to the right of peoples to use force, but rather to their “struggles,” thereby alleviating the concerns of some states that it would be perceived as recognizing a positive right to engage in armed resistance.\textsuperscript{67} Moreover, as the Definition of Aggression subjects itself both to the Declaration of Friendly Relations and to the principles of the U.N. Charter, the scope of any putative right of peoples to “seek” and “receive” support is rather unclear, and in particular with regards to the power to request

\textsuperscript{64} Chapter 11, at Section II.1.

\textsuperscript{65} For instance, situations of occupation are considered to be regulated under the law of “international armed conflicts.” \textit{See} Common Article 2 of the Geneva Conventions of 1949.


\textsuperscript{67} \textit{Id.} at 233–234.
forcible intervention. In light of the supremacy of the jus cogens prohibition on the use of force, the correct interpretation of the Article would be that at least to the extent that it encompasses situations that could be qualified as “internal” – i.e., racist regimes – any right to seek and receive support would have been limited to non-forcible measures.\textsuperscript{68}

In the circumstances of the post-colonial international system, the significance and controversy surrounding Article 7 is of less importance.\textsuperscript{69} Notably, the Article does not at all refer to one of the most burning issues of the contemporary system – the protection of civilians, and whether mass atrocities are could affect, in anyway, the power to consent to and receive forcible assistance.

III. CONSENSUAL INTERVENTION AND RECOGNITION

III.1 STATE RECOGNITION, REMEDIAL SECESSION AND REMEDIAL INTERVENTION

As discussed in Chapter 11, the question of remedial secession remains controversial in international law. Naturally, if we do not accept the existence of such right to begin with, it is obvious that a mere claim for secession cannot alter the opposition’s lack of capacity to request and receive support from third parties. However, if we do accept the plausibility of remedial secession, does it follow that the seceded-seeking party also attains the right of “remedial forcible intervention”?

The answer is rather simple, at least in legal-theoretical terms. It involves a two-stepped approach, requiring first to address the issue as a question of state-recognition;

\textsuperscript{68} See Yoram Dinstein, War, Aggression and Self-Defense 72–73 (5\textsuperscript{th} ed. 2011); Nicaragua, supra note 60, ¶¶178 –181 (Schwebel J., dissenting). It is important to note that the ICISS Report expressly referred to situations of “racist regimes” as not justifying forcible intervention. See REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT ¶4.25 (2001).

\textsuperscript{69} See e.g., Mary Ellen O’Connell, Regulating the Use of Force in the 21\textsuperscript{st} Century: The Continuing Importance of State Autonomy, 36 COLUM. J. TRANSNAT’L L. 473, 476 (1997).
and in the second stage, as a case of collective self-defense. Indeed, the remedy offered by the doctrine of remedial secession is the recognition of the seceding party as a state, and not unilateral forcible intervention on its behalf. After such recognition is granted, however, the conflict is no longer one between a “government” and “opposition” groups, but rather one between two states. In this stage, it can be looked upon as an international armed conflict, in which the seceding state, if attacked by the rump-state, can invoke the right of collective-self defense as enshrined in Article 51 of the U.N. Charter. In such cases, the right of the seceding state to request forcible support is not controlled by the principle of government preference, but rather by the jus ad bellum law of self-defense.

This analysis naturally raises acute questions regarding the law of state recognition. Of course, as in questions of recognition at large, the absence of a collective recognition mechanism is prone to abuse, during secession struggles, by interested external parties. For instance, on August 26, 2008, Russia has unilaterally recognized secession-seeking Abkhazia and South Ossetia’s as states independent from Georgia, shortly after Russian forces invaded the breakaway territories. In addition to justifying its initial operations in Georgia as self-defense actions – a claim partially vindicated by a fact-finding mission – Russia based its recognition of the breakaway territories on counts of remedial-secession. Thus, it argued that –

70 See Chapter 11, Section II.2.
73 Id. at 189.
Constantly trying to use brutal military force against the very ethnic groups whom he purportedly wanted to see as a part of his state, [Georgian President] Mr. Saakashvili left them with no other choice but to seek ways to ensure their security and the right to self-determination as independent nations. In this respect the Decrees issued by President Dmitry Medvedev of the Russian Federation recognising Abkhazia’s and South Ossetia’s independence offered the only opportunity to save the lives of people and prevent further bloodshed in the Transcaucasian region.\(^74\)

After its recognition of the breakaway territories, Russia has proceeded to justify its operations on counts of the right of collective self-defense.\(^75\) Whatever the legal merits of the Russian position in this context – and considering these were rejected by the fact-finding mission –\(^76\) the dynamics of the Russia-Georgia conflict clearly represent the dangers of unilateral state-recognition granted as a pretext for intervention justified thereafter on counts of collective self-defense. However, these “secondary” concerns in themselves do not challenge the “primary” theoretical soundness of such claims, should we accept the doctrine of remedial secession. Recent practice, in particular the robust involvement of regional organizations in internal conflicts and the general international deference to their views, can potentially alleviate these concerns.\(^77\)

\(^{74}\) Id. at 190.

\(^{75}\) Id. at 280.

\(^{76}\) See id. at 141; 281–282.

In any case, as regarding government and belligerency recognition, the traditional law of state recognition is based on standards of effective control, as provided for in Article I of the Montevideo Convention of 1933. In order to be considered a state – the controversy regarding the constitutive versus declarative approaches notwithstanding – the entity had to possess a permanent population; a defined territory; a government; and the capacity to enter into relations with other states.  

However, the mere idea of remedial secession presupposes the possibility of a substantive analysis of the parties, since it connotes a right of secession independent from considerations of effective control, namely the protection of civilians. For instance, if we consider the Kosovo case as an example of remedial secession, we must agree that the existence or inexistence of territorial effective control in the hands of the Kosovar authorities was not a dominant consideration in the eyes of the international community. In fact, neither the opponents nor the proponents of Kosovo’s statehood, regardless of their stance regarding its precedential value, referred explicitly to territorial effectiveness as a justification for their positions.  

In a similar vein, the principle of territorial integrity – which in general serves to curtail the possibility of secession – must presuppose that secession does not connote automatic recognition even in cases where the seceding party fulfills the Montevideo criteria. Otherwise, the principle of territorial integrity would be rendered utterly meaningless. We can see this tendency in the case of Somaliland: while that breakaway

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78 See supra, n. 12.
territory of Somalia generally fulfills the traditional Montevideo conditions for statehood,\(^8^1\) as of April 2012 Somaliland was not officially and fully recognized by any state. Instead, the international community has opted to continue the recognition of Somalia in its previous borders, administered through completely ineffective transitional governments. Western powers, in general, are reluctant to extend recognition to Somaliland before the African Union takes such a step; the latter has neither accepted nor rejected a formal request of recognition by Somaliland, submitted in December 2005, despite an overall favorable report by its fact-finding mission regarding this matter.\(^8^2\)

It is obvious, then, that the Montevideo criteria do not reflect the complex balancing of interests required to address the question of secession: in regular struggles for secession, the principle of territorial integrity seems to trump the Montevideo effectiveness criteria; if, conversely, one adopts the doctrine of remedial secession, then the guiding principle for recognition \textit{must} be the protection of civilians – since that principle forms the basis of the doctrine to begin with.

Nevertheless, even if we do accept the doctrine of remedial secession in principle, when states intervene in favor of a secession-seeking party \textit{prior} to full and official state recognition, as was the case in Kosovo, or when recognition is merely a pretext for intervention – as was in the Russia-Georgia conflict – then the intervention is a \textit{prima facie} violation of the prohibition on the use of force. If justified on humanitarian grounds, then the discussion falls within the ambit of the humanitarian intervention question, which we will address in section IV.

\footnotesize{\(^8^1\) Farley, \textit{supra} note 77.\(^8^2\) \textit{Id.} at 809 –815; Hum. Rgts. Watch, \textit{Hostages to Peace: Threats to Human Rights and Democracy in Somaliland} 51–55 (Jul. 13, 2009).}
III.2 RECOGNITION OF THE OPPOSITION AS THE GOVERNMENT

As discussed in Section II.1, once opposition groups are recognized as governments, any consent they grant must be analyzed according to the presumption in favor of governments. The question of government recognition differs from state recognition in secession struggles, since the former does not challenge directly the principle of territorial integrity, as does the latter. However, despite this difference and others, the two are similar in two main aspects: both spheres of recognition traditionally rely on criteria of territorial effectiveness;\(^{83}\) and regarding both there is an inherent potential for abuse emanating from the absence of collective recognition mechanisms. This danger has been consistent throughout the decades, as government recognition was granted or otherwise manipulated as pretext for forcible interventions. This was definitely the case of the 1936 recognition of the Franco regime as the government of Spain by Nazi Germany and Fascist Italy;\(^{84}\) possibly with regards to the 1962 Egyptian recognition granted to the ineffective Yemen Arab Republic;\(^{85}\) and arguably in the case of the 1983 American reliance on the invitation of Grenada’s Governor General as one justification for its intervention there.\(^{86}\) This potential for abuse persists also in present times.

In any case, traditionally, opposition groups that managed to wield “effective power, with a reasonable prospect of permanency, over the whole – or practically the whole – territory of the State” were seen as entitled to recognition.\(^{87}\) Thus, as long as the conflict was in progress, their recognition as governments was perceived as contrary to

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\(^{83}\) Ian Brownlie, Principles of Public International Law 90 (2008). On the complex relations between the recognition of states and the recognition of governments see Roth, supra note 4, at 130–132.

\(^{84}\) See Chapter 7, at Section IV.4.


\(^{86}\) See Chapter 8, at Section IV.2.

\(^{87}\) Lauterpacht, supra note 12, at 98; M.J. Peterson, Recognition of Governments 35–39 (1997) (surveying the positions of scholars and states regarding this question in the 19\(^{th}\) and 20\(^{th}\) centuries).
international law.\textsuperscript{88} Like in the context of state recognition, this test was not concerned with the level or type of violence used by the entity in order to achieve and secure its control.\textsuperscript{89} Nor, in general, was the consent of the governed a necessary condition for recognition – although some, such as Lauterpacht, viewed such consent as an indication that effective control indeed exists.\textsuperscript{90}

Indeed, the question of recognition of insurgents as governments has troubled international lawyers for centuries. Lauterpacht, for instance, perhaps seeking to reconcile between the general principle of non-recognition, state practice and the jurisprudence of British Courts in the context of the Spanish Civil War, set forth an intricate theory of \textit{de facto} versus \textit{de jure} recognition. According to this theory, opposition groups could be granted \textit{de facto} recognition as the governments of the territories they control, but as long as the conflict continued, they could not be recognized as the \textit{de jure} government.\textsuperscript{91}

Whatever the surviving merits of this distinction – \textsuperscript{92} and without embarking on an attempt to apply it in the contemporary international system – it is obvious that for recognition of opposition groups to result in the materialization of consent power, it must be full and complete; any act short of recognizing the opposition as the sole entity that speaks for the \textit{state}, accepting thereby all legal and political consequences that such recognition entails,\textsuperscript{93} will render any forcible support given to it – whether through direct

\begin{itemize}
\item \textsuperscript{88} Lauterpacht, supra note 12, at 279.
\item \textsuperscript{89} Id. at 106–108.
\item \textsuperscript{90} Id. at 115–136 (outlining the practice of Britain and the United States in this context); compare Roth, supra note 4, at 139–141.
\item \textsuperscript{91} Lauterpacht, supra note 12, at 279, 284–294.
\item \textsuperscript{92} see Malcolm N. Shaw, International Law 382 –383 (5th ed., 2003).
\item \textsuperscript{93} See Talmon, supra note 37.
\end{itemize}
use of military force or by provision of arms – a violation of Article 2(4) of the U.N. Charter.\footnote{See Chapter 4, sec. 1.2.}

In any case, the movement away from strict territorial effectiveness approaches in the context of \textit{state} recognition must also inform the debate about the recognition of governments. We have discussed above the competing principles of territorial integrity and remedial secession as two \textit{non}-effectiveness based notions relating to the question of secession. Likewise, with regards to recognition of \textit{new} states – most notably during the dissolution of Yugoslavia and the U.S.S.R. – a host of substantive criteria for recognition has emerged. For instance, the European Communities’ Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union\footnote{E.C. Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union (Dec.16, 1991).} provided a substantive framework for the recognition of new states. By demonstrating a movement away from a formal, effectiveness based process of recognition to a value-based assessment, the Guidelines reflected a significant reform in traditional recognition law.\footnote{See Rich, \textit{supra} note 77, at 42, 56; on the E.C. Guidelines in the context of democracy as a recognition criterion see Murphy, \textit{supra} note 79, at 132–139.} The Guidelines maintained that the E.C. will adhere to “normal standards of international practice” concerning recognition, but set forth additional conditions – relating to the principles of self-determination; democracy; respect for the U.N. Charter; minority rights; territorial integrity; and non-aggression.

Taking this development into consideration, it is unreasonable that the decline in the status of effectiveness as the sole criteria for recognition in the context of new states does not also trickle to the recognition of new governments, emerging from internal
This is true although several states have adopted, in recent times, a formal – and quite unrealistic – policy of not positively recognizing governments at all, but only states.\textsuperscript{98}

Indeed, the question of recognition of governments emerging from internal armed conflicts merits an entire study for itself. Notably, some scholars identify a recent tendency to shy away from robust ideological criteria, as these were presented, for instance, in the E.C. Guidelines. However, this trend does not connote a return to strict criteria of territorial effectiveness, but rather the predominance of narrow substantive criteria that correlate more or less with the principle of protection.\textsuperscript{99}

In this context, we shall only point out two general directions. The first is the widespread recognition of ineffective transitional governments established pursuant to multilateral reconciliation or reconstruction processes – the continuing recognition of the Transitional Federal Government of Somalia being the quintessential example.\textsuperscript{100} Such governments receive credit on counts of their perceived potential to reconcile internal differences – in a multilateral way and through engagement with the international community – in order to bring stability and to end mass atrocities.

The second direction spawns from the perception of effective protection as a key determinant of sovereignty. Whether it will ultimately result in a wide transformation of


\textsuperscript{100} See Chapter 9, at Section II.4.
the international law of government recognition during internal strife remains to be seen; however, it is undoubtedly a logical corollary of the idea of RtoP. Namely, the concept of effective protection can challenge the traditional, effective-control based perception, according to which the opposition cannot be recognized as long as the conflict endures. Recent events in Libya demonstrate this notion. In contrast to Somalia, Libya was by no means a failed-state when the uprising against the Al-Qadhafi regime erupted. However, the regime’s violations of the protection principle have rather swiftly resulted in the gradual recognition of the Libyan opposition.

Thus, the opposing National Transitional Council (NTC) has been recognized by several states as the “legitimate representative” of Libya or the Libyan people, long before it even showed minimal prospects of defeating the regime in battle. France became the first state to recognize the NTC as the “legitimate representative of the Libyan people” on March 10, 2011, only weeks after the conflict erupted, and more than seven months before the conflict’s conclusion. Italy went further, in April 2011, by recognizing the NTC “as the country’s only legitimate interlocutor on bilateral relations;” Qatar and Kuwait issued similar statements. Whether these statements amounted to full de jure recognition is highly doubtful. However, they clearly reflected a movement towards the assessment of the rights of opposition parties according to the concept of protection of civilians.

103 Talmon, supra note 37.
105 See Talmon, supra note 37.
Soon enough, the intentions of key members of the international community became clearer. In June 7, 2011, France “upgraded” the status of the NTC by labeling it as “the only holder of governmental authority in the contacts between France and Libya and its related entities;” The United Arab Emirates did the same.\footnote{Id.} On July 15, following a meeting in Istanbul, 32 Western and Arab States (the Libya Contact Group) granted the NTC full recognition as the government of Libya, thus allowing it, in principle, to access the frozen assets of the regime.\footnote{William Wan & William Booth, United States Recognizes Libyan Rebels as Legitimate Government, THE WASHINGTON POST, Jul. 15, 2011, available at http://www.washingtonpost.com/world/middle-east/western-arab-leaders-meet-in-turkey-on-libyas-future/2011/07/15/gIQAZLbjFI_story.html.} In its statement, the Contact Group asserted that “the Al-Qadhafi regime no longer has any legitimate authority in Libya … Henceforth and until an interim authority is in place, participants agreed to deal with the National Transitional Council (NTC) as the legitimate governing authority in Libya.”\footnote{Republic of Turkey, Ministry of Foreign Affairs, Fourth Meeting of the Libya Contact Group Chair’s Statement, 15 July 2011, Istanbul, available at http://www.mfa.gov.tr/fourth-meeting-of-the-libya-contact-group-chair_s-statement_-15-july-2011_-_istanbul.en.mfa.} Significantly, the recognition was granted over three months before the NTC would establish a reasonable measure of effective authority over the state’s territory – and by thereby presents a clear challenge to the traditional perception of government recognition.\footnote{Dapo Akande, Recognition of Libyan National Transitional Council as Government of Libya, supra note 98.}

The dynamics of recognition in the Libyan conflict, as reflected in the Contact Group’s statement concerning the regime’s loss of “legitimate authority” – and the subsequent recognition of the yet ineffective NTC – arguably represent an application of
the principle of effective protection in the context of government recognition.\textsuperscript{110} This can indeed be a significant development in the law of recognition; the coming years will tell whether it will solidify as a leading doctrine.

In any case, it is important to emphasize that in the Libyan crisis forcible intervention was mandated by a Security Council resolution.\textsuperscript{111} Notwithstanding our claim that in such cases opposition consent can play a role in the Council’s considerations,\textsuperscript{112} it is still yet to be seen whether the unilateral recognition of opposition groups as governments, on counts of considerations of civilian protection, will be accepted as legitimate justifications for consensual interventions on their behalf, \textit{absent} Council authorization. Considering the potential of abuse inherent in such dynamics, as discussed above, it should at least be required that such recognition will be granted through credible multilateral mechanisms and by a substantial number of states. In other cases, the recognition and subsequent intervention might be deemed unlawful, and will therefore be analyzed through the prism of unilateral humanitarian intervention – which we will now turn to consider.

IV. CONSENSUAL INTERVENTION AND UNILATERAL HUMANITARIAN INTERVENTION

IV.1 UNILATERAL HUMANITARIAN INTERVENTION AND RTOP: THE UNRESOLVED DEBATE

The debate over the problem of forcible intervention in internal strife has been dominated, in the past two decades – and most notably before the events of September

\textsuperscript{110} Compare, however, the positions of the states that opposed the acceptance of credentials of the NTC as Libya’s representative in the U.N. (Venezuela, Cuba and others). \textit{See} U.N. GAOR, 66\textsuperscript{th} Sess., 28\textsuperscript{th} plen. Mtg. at 7–3, U.N. Doc. A/66/PV.2 (Sep. 16, 2011).

\textsuperscript{111} \textit{See} Chapter 1, Section IV.1.

\textsuperscript{112} \textit{See id.}
11th, 2001 – by the dilemma of unilateral humanitarian intervention. The term “humanitarian intervention,” as suggested by Holzgrefe, connotes “the threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of fundamental human rights of individuals” without the consent of the target-state. Furthermore, when the term is used in this work, it refers specifically to situations in which the intervention has been conducted unilaterally, meaning, without Security Council authorization.

As such, our use of the term is rather narrow, since it does not encompass every intervention conducted for humanitarian purposes, but only those unauthorized by the Security Council and conducted against the will of the target-state’s government. Our definition thus refers to the scenarios such as the famous 1999 Kosovo intervention, and excludes, for instance, the 2011 intervention in Libya. Other frequently cited cases of unilateral humanitarian interventions are India’s 1971 intervention in East Pakistan (Bangladesh); Vietnam’s actions against the Khmer Rouge regime in Cambodia (1978); Tanzania’s ousting of Idi Amin in Uganda (1979); or the 1991 allied operations in Northern Iraq following the regime’s repression of the Kurds.

Since we have elaborated, in previous chapters, on the principle of protection and RtoP, some conceptual clarification is merited. Humanitarian intervention and RtoP, ideally, set out to defend the same values – namely, the protection of civilians facing

115 Keohane and Holzgrefe refer to such intervention as “unauthorized” humanitarian intervention. See Robert O. Keohane, Introduction, in id. at 1, 1.
116 See Allen Buchanan, Reforming the International Law of Humanitarian Intervention, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL AND POLITICAL DILEMMAS, supra note 71, at 130, 130; see also Thomas M. Franck, Interpretation and Change in the Law of Humanitarian Intervention, in id. at 204, 216–226 (discussing these cases and others); Jane Stromseth, Rethinking Humanitarian Intervention: The Case for Incremental Change, in id. at 232, 248–252.
mass atrocities. However, RtoP has developed in the backdrop of the massive controversy spawned by the NATO operation in Kosovo, which was justified by some as a case of humanitarian intervention.\footnote{See Chapter 10, Sec. I; ANNE ORFORD, INTERNATIONAL AUTHORITY AND THE RESPONSIBILITY TO PROTECT 27–28 (2011).}

The ICISS Report sought to diffuse this controversy both on the terminological and the substantive levels. On the former level, the Report candidly admitted that it deliberately avoided the use of the term “humanitarian intervention,” although some aspects of RtoP, as reflected in the Report, are not far removed from the concept.\footnote{ICISS REPORT, supra note 68, ¶¶1.39–1.41 (2001); ALEX J. BELLAMY, RESPONSIBILITY TO PROTECT 42 (2009).} On the substantive level, by extending RtoP also to the responsibility to prevent and rebuild,\footnote{Indeed, as emphasized in the ICISS Report, “prevention is the single most important dimension of the responsibility to protect.” See ICISS REPORT, supra note 68, at XI.} ICISS successfully diluted the idea’s forcible component, thereby presenting a more holistic approach than commonly attributed to the concept of humanitarian intervention.\footnote{CRISTINA G. BADESCU, HUMANITARIAN Intervention AND THE RESPONSIBILITY TO PROTECT 10 (2010); Thomas G. Weiss, RtoP Alive and Well after Libya, 25 ETHICS & INT’L AFF. 1, 1–2 (2011). U.N. Secretary General Ban Ki-moon followed this “dilution” strategy between 2007 and 2009. See, Jennifer Welsh, Civilian Protection in Libya: Putting Coercion and Controversy Back into RtoP, 25 ETHICS & INT’L AFFAIRS 1, 6 (2011).}

Furthermore, RtoP shifted the discussion from the “right” of humanitarian intervention to the more executive-leaning, principled concept of “responsibility,” which better addresses, at least in theoretical terms, the concerns of small states fearing that the concept will be exploited by great powers.\footnote{Chapter 10, Sec. II.2.} Doing so, ICISS rephrased and developed the controversial concept of unilateral humanitarian intervention, accommodating it within a wider framework.\footnote{See id.} These terminological and substantive developments made it
easier, in turn, for ICISS to issue an implied challenge the Security Council’s monopoly over the use of force, as detailed elsewhere in this work. ¹²³

However, it soon became evident that RtoP will not be accepted worldwide if it would imply – even indirectly – that unilateral humanitarian intervention can be acceptable. This accounts for the transformation of RtoP from its initial form, as found in the ICISS report, to the narrower concept reflected in the 2005 WSO document. As opposed to the ICISS report, the WSO document unequivocally reaffirmed the Security Council’s monopoly over the authorization of forcible interventions. ¹²⁴ Thus, while resolving, to a large extent, the longstanding question whether the Security Council is mandated to act with regards to strictly internal situations, ¹²⁵ the WSO document did not address the consequences of a failure to act by the Council. Therefore, the old debate regarding unilateral humanitarian intervention is very much kept alive, even in the RtoP era. This realization compels us to revisit some of the well-recognized dilemmas of unilateral humanitarian intervention, and – in our context – their relation to the question of consent.

IV.2 Intra-Charter Justifications for Humanitarian Intervention and the Question of Consent

Humanitarian intervention cannot – ipso facto – be a consensual intervention in favor of governments; ¹²⁶ theoretically, thus, it can be considered an intervention pursued with

¹²³ See id. Sec. II.1.
¹²⁴ Id.; see also Welsh, supra note 20, at 2; 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶138–139, U.N. Doc. A/60/L.1 (Sept. 15 2005).
¹²⁵ See id. Sec. II.2; see also the discussion in Holzgrefe, supra note 114, at 40–43.
opposition consent. The nexus between humanitarian and consensual intervention is a rather uncharted area of international law. Indeed, our approach towards this question is necessarily informed by our perception regarding unilateral humanitarian intervention at large. If we categorically reject – whether on legal or ethical terms – any extra-Charter forcible intervention conducted without government consent, then, of course, consent by opposition groups cannot play any legalizing or legitimizing role in the assessment of an intervention. If, however, we do accept that unilateral humanitarian intervention can be permissible in extreme situations, then our approach towards the effects of opposition consent depends on the legal or ethical basis upon which we ground our justification for humanitarian intervention. In particular, the answer depends on whether we base our justification on intra or extra-Charter sources.

Humanitarian intervention raises numerous ethical questions. It can be justified or rejected on utilitarian grounds, as classically reflected in the works of Mill or Bernard.\textsuperscript{127} It can be based on cosmopolitan claims – whether founded on natural law or on principles of social-contractarianism – that might spawn a “right” or “duty” of humanitarian intervention in extreme circumstances.\textsuperscript{128} Legally, the concept of unilateral humanitarian intervention challenges the plain language of the prohibition on the use of force as entrenched in Article 2(4) of the U.N. Charter. However, attempts have been made to counter this challenge in two main ways. The first recognizes intra-Charter justifications for unilateral humanitarian intervention, by interpreting the Charter as accommodating  

\textsuperscript{128} Id. at 25–33.
such actions.\textsuperscript{129} The second set of justifications concedes that the U.N. Charter prohibits unilateral humanitarian intervention, and therefore seeks extra-Charter or extra-legal sources for justification.

Simply put, the intra-Charter approach posits that Article 2(4), by prohibiting the use of force against the “territorial integrity and political independence of states,” is actually meant to permit other types of forcible actions, meaning – those not conducted against the territorial integrity or independence of states.\textsuperscript{130} Moreover, this approach constructs the Article’s phrasing – “or in any other manner inconsistent with the Purposes of the United Nations” – as allowing interventions which are supposedly consistent with the purposes of the organization, such as those aimed to halt atrocities and promote human rights.\textsuperscript{131} Another intra-Charter justification presents a hybrid claim: arguing that even if Article 2(4) cannot be construed to allow humanitarian intervention in itself, once the Security Council has recognized, in general, that a certain situation constitutes a threat to international peace – there is no need for another resolution specifically authorizing the use of force.\textsuperscript{132}

Nonetheless, attempts to find intra-Charter justifications for unilateral humanitarian intervention are not convincing, and indeed, most international lawyers –

\begin{footnotes}
\item For a concise summary of these attempts see Farer, supra note 113, at 61–69.
\item Holzgrefe, supra note 114, at 37.
\item Id. at 39; compare, e.g. THE KOSOVO REPORT, supra note 126, at 167–169. This type of reasoning is reminiscent of the narrow interpretations given in the 1930s to the Kellogg Briand Pact, as prohibiting war only when used a tool of “national policy.” See Chapter 6, at X.
\item See THE KOSOVO REPORT, supra note 126, at 171–172 (labeling this contention as “the most convincing” legal ground for NATO’s Kosovo intervention). The same justification was invoked in the context of the 1991 allied action in Northern Iraq for the protection of the Kurds. See Stromseth, supra note 116, at 251. All of the above intra-Charter constructions, for instance, were advanced by Belgium in justification of the NATO intervention in Kosovo. See Argument of Belgium before the International Court of Justice, at 11–12, (May 10, 1999), available at http://www.icj-cij.org/docket/files/105/4513.pdf.
\end{footnotes}
and indeed many states – object to such constructions.\textsuperscript{133} The U.N. Charter, as any treaty, is to be interpreted in light of its “object and purpose,” supplemented, \textit{inter alia}, by the circumstances of its conclusion.\textsuperscript{134} It suffices to say that the stated purpose of the U.N. to “maintain international peace and security, \textit{and to that end:} to take effective \textit{collective} measures”\textsuperscript{135} places an extremely heavy onus on those who argue for the Charter’s interpretation as condoning unilateral forcible intervention. In addition, the context of the drafting of the Charter, in particular in light of the failed earlier attempts to restrict the war power of states,\textsuperscript{136} establishes a strong interpretive presumption against any unilateral use of force.\textsuperscript{137} This must be true also with regards to the interpretation of Security Council resolutions. For this reason, Charter law cannot be interpreted as recognizing an implicit authorization for the use of force, merely upon the general recognition by the Security Council that a situation amounts to a threat to international peace.\textsuperscript{138} However, such previous determination by the Council might still assist the intervener if invoking a claim of \textit{necessity} – as the concept will be discussed shortly.

The objections above notwithstanding, if one does accept the intra-Charter justifications – opposition consent could augment the legality of an intervention in


\textsuperscript{135} U.N. Charter art. 1(1) [emphasis added].

\textsuperscript{136} Recall the various loopholes of the Charter of the League of Nations and the Kellogg Briand Pact, as discussed in Chapter 7.

\textsuperscript{137} U.N. Charter, prinb; \textit{see also} \textit{The Kosovo Report}, \textit{supra} note 126, at 167–168.

\textsuperscript{138} \textit{See id.} at 173; \textit{see also} Byers & Chesterman, \textit{supra} note 71, at 181–182.
specific instances. Thus, consent by forces opposing atrocities – in particular in cases in which they have formed relatively credible transitional entities – could indicate that the intervention is in fact not aimed against the territorial integrity or independence of the target state, nor contrary to the purposes of the United Nations. In particular, consent from a credible internal entity – which seeks to fulfill the responsibility to protect – can fortify a claim that the intervention seeks to promote the U.N.’s purpose to encourage respect for human rights and fundamental freedoms, rather than strictly to promote self-interest.  

In a similar vein, as the discussion of humanitarian intervention has shifted from a “rights” based discourse to notions of executive “responsibility,” deliberation with groups representing the victimized population, prior to the intervention, can carry some weight – perhaps comparable to a process of “fair hearing” – in placing the intervention within the (widely interpreted) Charter paradigm. As in any case of unilateral forcible intervention, these assumptions would be fortified when the intervention is conducted within the framework of a regional organization – assuming that the collective decision-making process, coupled with the deeper understanding of the conflict by neighboring states, inherently reduces the potential for abuse.

IV.3 EXTRA-CHARTER JUSTIFICATIONS FOR HUMANITARIAN INTERVENTION: NECESSITY, JUST WAR THEORY AND CONSENT

Although the purposes of the U.N. Charter seem to preclude unilateral humanitarian interventions, the same purposes can hardly be reconciled with the capricious use of the

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139 U.N. Charter, art. 1(3).
140 See ICISS REPORT, supra note 68, ¶¶6.31 –6.35.
veto power enjoyed by permanent Council members, which can block any collective action envisioned in Article 1 of the Charter. This problem still remains, although the deadlock days of the cold-war are long gone. A recent example could be found in the failure of the Security Council, as of April 2012, to adopt a binding resolution condemning the Syrian regime in the context of its violent suppression of Arab Spring protests, let alone to impose sanctions on it. Instead, the Council played “second-fiddle” to other bodies, by resorting to rather non-committal, non-binding presidential statements endorsing their actions.

The “capricious veto” problem leads to an unbearable tension between the Charter’s stated purposes and the procedures set forth for their implementation. Indeed, even those that generally do not accept the legality of unilateral humanitarian intervention recognize this deficiency, and sometimes argue for necessary revisions of the U.N. Charter. This tension underlines much of the discussion of humanitarian intervention and the U.N. Charter, and has accordingly given rise to the second set of justifications for humanitarian intervention – extra-Charter ones.

As suggested by Buchanan, extra-Charter justifications for unilateral humanitarian intervention can be classified under three distinct categories: one relies on fundamental legal principles beyond the Charter’s provisions (the “Lawfulness Justification.”) A second approach views humanitarian interventions as illegal actions.

141 The “capricious veto” problem refers to the self-interested exercise of the veto-power by permanent members of the Security Council. ICISS Report, supra note 68, ¶6.20; see also Farer, supra note 113, at 64.
144 Supra n. 31.
undertaken in order to reform positive international law (the “Illegal Legal Reform Justification.”) This can be potentially done in two ways. One is the establishment, through conclusion of new treaties, of an alternative collective intervention mechanism. Proponents of this idea envision some version of a benevolent “league of democracies,” acting in parallel to the U.N. system in order to halt mass atrocities. Arguably, the member states of the African Union have done just that – albeit in a regional context, and not based on “democracy” per se – when adopting Article 4(h) of the Constitutive Act of the African Union. Another suggested way to push for legal reform would be through contrary state practice designed to create new customary international law, more amenable to humanitarian intervention.

Both the “Lawfulness” and the “Illegal Legal Reform” justifications are fraught with difficulties. In general, their focus on “general principles” or on state practice as potentially affecting the application of the prohibition on the use of force does not attribute sufficient weight to the jus cogens nature of the norm. Whether peremptory jus cogens norms are special cases of customary international law or manifestations of “natural” law, it is clear that in contemporary law, such norms – and specifically those entrenched in the U.N. Charter – cannot be circumvented simply by reference to other

146 Buchanan, supra note 116, at 138–139.
147 Id. at 138; see also THE KOSOVO REPORT, supra note 126, at 173–174; For a critical view of the idea see BRUCE JONES ET AL, POWER & RESPONSIBILITY: BUILDING INTERNATIONAL ORDER IN AN ERA OF TRANSNATIONAL THREATS 307–311 (2009).
148 See Chapter 10, Sec. III.3.
149 Buchanan, supra note 116, at 132–133, 140–141; see also Mohamed, supra note 133, at 1287–1288; Stromseth, supra note 116, at 246
150 Remember – here we are operating under the assumption that humanitarian intervention cannot be reconciled with the prohibition on the use of force as expressed in the U.N. Charter. See, e.g., Ulf Linderfalk, The Effect of Jus Cogens Norms: Whoever Opened Pandora’s Box, Did You Ever Think About the Consequences? 18 EUR. J. INT’L L. 853, 859 (2008) (arguing, although generally critical about jus cogens, that the principle of non-use of force is the least controversial example for jus cogens).
basic principles. Nor can they be altered merely through the regular creation of new customary law.\textsuperscript{152} This “normative pyramid” correlates with the process of “constitutionalization” of international law at large – and of the U.N. Charter, namely through Article 103 –\textsuperscript{153} and the related decline of the perception of international law as a product of state consent only.\textsuperscript{154} Indeed, any argument condoning the modification of the prohibition on the use of force through contrary practice – even for humanitarian purposes – might open the door to additional “customary” challenges to the mere prohibition itself.

Regarding the possibility of legal reform through alternative collective mechanisms, we have already addressed, in Chapter 10, the potential challenge to the U.N. system manifested in regional (or other) forward-looking intervention treaties. We have suggested that in cases of mass atrocities, in which a government ceases to exercise effective protection, it will lose the sovereign power to withdraw the state’s previously given consent. In this sense, we have reconciled, to an extent, between such treaties and Charter law, since our construction mitigates the conflict between these arrangements and Article 103 of the Charter, as well as with peremptory norms of \textit{jus cogens}.\textsuperscript{155} However, our analysis of forward-looking intervention treaties relies on the existence of an initial expression of consent by the target state. As such, our attempt at reconciliation cannot serve to justify intervention – reminiscent, perhaps, of the NATO operation in Kosovo –


\textsuperscript{154} Buchanan, \textit{supra} note 116, at 148–154.

\textsuperscript{155} See Chapter 10, Sec. III.5.
conducted by a hypothetical “league of democracies” against a state which was never a member in the alternative arrangement to begin with.

The third set of justifications suggested by Buchanan is based on the concept of “necessity:” accepting the prima facie illegality of unilateral humanitarian intervention, but asserting nevertheless that in extreme situations, basic ethical values can legitimize the violation of the prohibition on the use of force. This notion correlates with the “illegal, yet legitimate” paradigm, as famously advanced by the International Commission on Kosovo.\(^{156}\) Necessity claims can be either “soft” or “hard.” “Soft” claims point to necessity exceptions found in positive law, and therefore do not challenge the rule from a meta-legal point of view.\(^{157}\) Without exhausting the possible theoretical debate on this comparison, such claims may reflect an internationalized version of the domestic criminal law defense of “necessity” – commonly understood as justifying an otherwise unlawful act –\(^{158}\) or allude to like norms from within the international law of state-responsibility. “Hard” necessity claims, conversely, are based

\(^{156}\) The Kosovo Report, supra note 126, at 186; for a similar view see Oscar Schachter, International Law in Theory and in Practice 126 (1991).

\(^{157}\) See, e.g., Franck, supra note 116, 212–214; see also Mohamed, supra note 133, at 1291–1293 (explaining this notion as suggested by Thomas Franck).

on ethical principles, independent from any legal instrument recognizing or excluding such exceptions.

Considering the difficulties with other categories of extra-Charter justifications, it seems that the “necessity” paradigm is the most coherent manner to discuss extra-Charter humanitarian intervention. However, this by no means implies that the necessity exception is without its own difficulties. For one, in positive international law, “soft” doctrines of necessity are an extremely shaky ground upon which to base unilateral non-defensive uses of force.\footnote{Compare Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶40 (July 9).} While the Articles on State Responsibility, in Article 25, recognize situations of “necessity” as precluding the wrongfulness of an act, the doctrine is manifestly narrow. It requires that the act be the “only way” to safeguard an “essential interest against a grave and imminent peril” and that it will not “seriously impair” an essential interest of the target state or the “international community as a whole.”\footnote{Articles on State Responsibility with Commentaries, supra note 158, art. 25(1); see also Mohamed, supra note 133, at 1304–1305. Articles on State Responsibility with Commentaries, supra note 158, art. 25(2)(a). On the narrow nature of the doctrine see id. at 83–84.} The doctrine is further qualified by the condition that necessity cannot be invoked if the specific international obligation excludes that possibility.\footnote{Id. art. 26.}

Last, Article 26 expressly provides that necessity cannot justify acts that are contrary to peremptory norms of \textit{jus cogens}.\footnote{Id. art. 26.} Since the prohibition on the unilateral use of force is widely accepted as such a norm, it seems that recourse to the necessity doctrine cannot \textit{legally} justify unilateral humanitarian intervention. Indeed, the Commentaries on the Articles on State Responsibility concede that the question of unilateral humanitarian intervention cannot find its solution under Article 25, and while
“necessity” considerations might still “have a role” regarding this problem in general, the required balance is already “taken into account” within the primary obligations of the law on the use of force.\textsuperscript{163}

However, the “illegal but legitimate” paradigm is situated on the seam between questions of law and morality.\textsuperscript{164} Recognizing that law and morality are not one,\textsuperscript{165} we must also evaluate the question through the prism of “hard” necessity. Indeed, the question of moral necessity is first and foremost a subject for the political philosopher – and thus, its detailed analysis is beyond the scope of this work. Nonetheless, the fundamental criteria of traditional Just War theory will surely dominate any ethical discussion of humanitarian intervention.\textsuperscript{166} As widely accepted, these criteria are comprised of \textit{just cause}, meaning, in the context of humanitarian intervention, halting large scale atrocities of the type referred to, for instance, in the WSO Document; \textit{right authority}, meaning, that the use of force be authorized by a sovereign political entity; \textit{right intention}, meaning, that the action be conducted in accordance with the just cause, and not merely based on self-interest; \textit{proportionality}, meaning, that the overall good achieved by the use of force be greater than the harm done; \textit{last resort}, meaning, that no other means will achieve the justified ends; and that the act has \textit{reasonable prospects of success} in fulfilling the just cause that prompted it.\textsuperscript{167}

Indeed, if one generally accepts the moral plausibility of unilateral humanitarian intervention, it could be said that opposition consent, in general, is redundant, since the

\begin{footnotesize}
\footnote{163 Id. at 84; see also Mohamed, supra note 133, at 1304–1305.}
\footnote{164 See The Kosovo Report, supra note 126, at 164.}
\footnote{165 See H.L.A. Hart, The Concept of Law 185–212 (2\textsuperscript{nd} ed., 1994).}
\footnote{166 See also Chapter 1, at Section IV.1.}
\footnote{167 Some include also the \textit{aim of peace}, meaning, that the ultimate end of the action is to establish international stability, security and peaceful interaction. See James Turner Johnson, Morality and Contemporary Warfare 28–29 (1999); compare ICISS Report, supra note 68, at XII –XIII.}
\end{footnotesize}
humanitarian catastrophe is the main legitimizing agent – and that in any case consent is not a prerequisite for intervention according to just-war theory. However, closer analysis reveals that opposition consent can still affect the application of the just-war tests. The following exercise – by no means an exhaustive one – can lay down some directions for further thinking.

For the purpose of our exercise, we shall assume the existence of a government that commits grave atrocities, faced with an opposition that generally seeks to protect the civilian population, and has formed a reasonably representative transitional entity. In such cases, it is rather intuitive that genuine consent by the representative opposition group can serve as an indication that just-war criteria are fulfilled; and, in the same vein, that lack of consent might increase the culpability of the intervener if the intervention proves, ex post, to have been unjustified. Indeed, as suggested by McMahan, the ethical role of consent in the question of humanitarian intervention can be paralleled to the requirement of state-consent in the context of the right of collective self-defense: just as it seems morally right that states can refuse third-party assistance when confronting an aggression, it seems just that victims of atrocities – assuming they have a representative voice – can reject an external intervention, in a manner that would derogate from its legitimacy.

Thus – returning to just-war criteria – regarding right authority, it seems that opposition consent would not be of acute importance, since we presuppose that the

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168 For an in depth discussion, inter alia of whether an intervention must be “welcomed” by the victims see James Pattison, Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene 17, 69–89 (2010); see also Jeff McMahan, Humanitarian Intervention, Consent and Proportionality, in Ethics and Humanity: Themes from the Philosophy of Jonathan Glover 44, 48 (N. Ann Davis et al. eds., 2010) (suggesting that “it is in general a condition of the moral permissibility of humanitarian intervention that the ostensible beneficiaries should clearly welcome it.”)

169 See id. at 54.

170 See id. at 54–55; on consent and collective self-defense see Chapter 9 sec. III.
intervention is conducted by a sovereign or a regional organization. However, it could be argued that when opposition identifies and requests assistance from a specific actor, that actor would be the most suitable one to act, since the mere request adds to the legitimacy of the intervener, and creates at least some moral proximity between the intervener and the internal party.

*Just cause* can also be augmented by opposition consent. It is a reasonable assumption – although a clearly reversible one – that in most cases, credible opposition groups would not be quick to request forcible intervention unless the condition of the affected public is genuinely dire. This is because superfluous reliance on external forces will surely harm the opposition’s internal credibility. Imagine, conversely, that major opposition groups are *against* a proposed humanitarian intervention. Intuitively, the reluctance of the opposition seems to adversely affect the just cause aspect of the intervention. If this is so, we must also accept the inverse claim: that *consent* by the same forces produces some legitimizing effect. In light of the above, if the intervening party can demonstrate that a credible opposition group that opposes atrocities consents to its intervention, it would be harder to challenge the operation on grounds of lack of just cause.\footnote{Compare McMahan, *supra* note 168, at 53 (“While potential interveners may believe that the risks to which intervention would expose the intended beneficiaries are ones the latter should be willing to accept in exchange for the benefits, the beneficiaries themselves may disagree … To the greatest extent possible, the potential intervener must allow the people themselves to decide whether to accept the risks.”)}

The existence of *right intention* can also be significantly bolstered by the consent of reasonably representative opposition groups. It is obvious, in this context, that genuine opposition consent can greatly reduce the concerns that the intervener is acting only for *selfish* reasons. Of course, this notion is fortified when the intervener is operating
pursuant to a decision of a regional organization, in which such concerns are lesser to begin with. As noted in the ICISS Report, right intention is “better assured” in “multilateral operations, clearly supported by regional opinion and the victims concerned.”\textsuperscript{172}

The reasonable prospects principle is also one which could be affected by the existence of consent, for obvious reasons. For instance, as demonstrated in Chapter 1, the Security Council, in virtually all of its operations, seeks some degree of consent by at least one party to the conflict, and, conversely, can be reluctant to act when consent is not acquired. This tendency, as we have shown, is partially based on the practical advantages of consent – meaning, its contribution to the prospects of the operation’s success.\textsuperscript{173}

A closely related effect of opposition consent can be on the question of proportionality. Cooperation of the intervening forces with at least some internal parties will necessarily lead to an operation of a smaller scale, duration and intensity, since the intervener will be forced to enter into conflict only with some internal elements and not against all of them. Furthermore, for reasons of internal credibility, it is reasonable that the request or consent by the opposition will not go beyond what is actually required to tip the scale against the perpetrating regime. For instance, in the Libyan context, the opposition – probably in order to bolster its legitimacy – firmly asserted that no foreign ground troops shall be used, thereby delineating, even if unofficially, the scope of the intervention.\textsuperscript{174}

\textit{Tel Aviv, April 9th, 2012}

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\textsuperscript{172}ICISS Report, \textit{supra} note 68, at XII (emphasis added).
\textsuperscript{173}See Chapter 1, at Section IV.1.
\textsuperscript{174}See Chapter 1, at Section IV.1.
\end{flushleft}
CONCLUSION AND DETAILED SUMMARY

In part I of this work, we sought to define and clarify the main concepts addressed in this study. Chapter 1 clarified our use of the term “consensual intervention.” It began by demonstrating the wide spectrum of the term, as encompassing situations beyond the traditional “intervention upon invitation” paradigm. We posited that the potential agent of legalization in such interventions is the “consent” itself, and that “invitation” is merely one possible vehicle for the expression of such consent. We have thus offered a wide definition of the term, arguing, in essence, that since every partial intervention serves to further the interests of one party to the conflict over the other, it is reasonable to presume that the party which benefits from the intervention has consented, in some way or the other, to the operation. Therefore, we considered any non-impartial intervention as consensual, in relation to a certain party, unless the intervention is publically and credibly rebuffed by all parties.

The Chapter then noted that consent often interacts with various other justifications for intervention, such as self-defense, and exemplified that the mere fact that consent constitutes but one of several justifications does not mean that it is ipso facto devoid of legal value of its own. Thereafter, it explored the distinction between “external” validity and “internal” consent power: the first aspect refers to the relations between the consenting party and the intervener – a relation which we define as a “revocable agency.” The second aspect refers to the internal legitimacy of the consenting party. In the latter context, the Chapter outlined the general debate between “effective-control” and “legitimism” as sources of sovereign power. We then proceeded to
exemplify the dynamics of intervention and consent in the complex environment of the Congolese conflicts in the years 1996 – 2010.

Building on that scenario and others, we inquired into the relations between consent and interventions authorized by the U.N. Security Council. While consent in itself is not a legal precondition for such interventions, we argued that party consent plays a significant role in Security Council considerations. This is indeed mostly a matter of policy; however, as we have demonstrated, it might also have some secondary legal effects – in particular, if we attribute to the Council “administrative” characteristics. Chapter 1 concluded with a brief analysis of the effects of the withdrawal of consent given to Security Council authorized interventions, asserting that such withdrawal is usually powerless – unless the relevant resolution binds its application to the consent of the party.

Chapter 2 presented a “working definition” of internal armed conflicts, as well as their basic typology. The determination of whether an internal armed conflict exists is of much importance, since it can potentially affect the legality of forcible actions by external parties. In general, our definition follows the ICTY’s Tadic case, which defines internal armed conflict as “protracted armed violence between governmental authorities and organized armed groups or between such groups within a state.” Our discussion highlights the fact that the development of human rights law has shifted the discourse on the existence of armed conflicts: if in the past, states were reluctant to recognize that an internal armed conflict exists within their territories, nowadays they might be quicker to do so; this is because human rights law imposes stricter obligations on state violence than international humanitarian law.
Thereafter, the Chapter presented a categorization of internal armed conflicts, has served as the basis for some of our later discussion. In general, we typified conflicts according to the objective goals the parties wish to achieve – as far as these can be ascertained. The typology of such conflicts is important since there is considerable difference, in the international legal sense, between struggles that challenge the principle of *territorial integrity* – such as struggles for secession – and those that do not, such as struggles that aim to achieve regime change. Likewise, there is a difference – at least in the context of the application of the norm of non-intervention – between regular struggles for control over the state apparatus, and struggles between a government and an entity, such as Al-Qa’ida, that does not accept the international system of states to begin with.

Chapter 3 addressed key distinctions and theoretical issues relating to the concept of “intervention” at large. It began by surveying theoretical clarifications that are relevant to the question of intervention across different disciplines. In this context, we highlighted the perceptions of the term across several disciplines and how they interact, and briefly touched upon the differences between “legal” and “realist” approaches towards intervention in general, and consensual intervention specifically. Thereafter, we briefly offered six possible theoretical grounds for a distinction between intervention in internal armed conflicts and intervention in pure “political” conflicts. These grounds stem from utilitarian, democratic, humanitarian and legal standpoints.

The Chapter then turned to key distinctions relevant to the question of intervention in international law. We first laid down the crucial distinction between “physical” intervention – meaning, the physical act of intervention itself, without prejudice to the question of its legality – and “normative” intervention, meaning, actions
that might violate the principle of non-intervention. We thereafter presented a typology of intervention: non-forcible versus forcible, negative versus positive, and unilateral versus multilateral, and the general normative frameworks that govern them. Last, the Chapter dealt with an issue that underlies the entire study: the (shifting) meaning of the norm of non-intervention. We demonstrated the dilemma that this centuries-old norm poses to liberal thinkers: on one hand, liberals justify the norm of non-intervention since it is a necessary corollary of the right to self-determination. On the other hand, the same liberal principles can be used to justify intervention, when people are denied this right. We argue that in light of the developments in international law in recent decades – and namely, the predominance of the human rights discourse, the emergence of the concept of “democratic entitlement” and the birth of the Responsibility to Protect doctrine – the norm of non-intervention has arguably shifted its focus ensuring non-intervention in sovereign will, to non-intervention in the substantive democratic will of peoples. However, the Chapter clarifies the any redefinition of non-intervention as relating to notions of democracy does not have automatic bearing on the question of forcible intervention. This complex question is thoroughly dealt with in later chapters.

Chapter 4 delineates the actions that constitute forcible interventions. At large, we argue that all forms of the use of force as these are legally defined, whether amounting to an armed attack or not, are forcible actions, and therefore can also be considered forcible interventions. We thus adopt a rather wide definition of the term, encompassing actions from the provision of arms, through aerial incursions, and up to large-scale invasions. Such acts can include terrorist attacks, as well as – potentially – acts of cyber warfare. We thus conclude that forcible interventions can include “grave” uses of force: meaning, armed
interventions by a state's military forces, or by non-state actors sent by the state; and “less-
grave” uses of force, such as acquiescence and toleration of actions taken by non-state actors
operating from the state’s territory or transfers of arms. The Chapter then discusses the
attribution of forcible acts to states – a question of increasing importance, due to the growing
involvement of non-state actors in transnational warfare. It posits that attribution depends on
whether we adopt the “overall” or “effective” control standards in determining state
responsibility; and that attribution in cases of inaction (meaning – failure to stop actions by
organized armed groups) requires the recognition of a positive duty of “due diligence” to
prevent acts by non-state actors. Furthermore, the Chapter distinguishes between forcible
interventions by U.N. forces, in which the use force is mandated, and classic, supposedly
“neutral” peacekeeping operations, which do not constitute forcible interventions.

The second Part of the study embarked on an in-depth historical and legal analysis
of the law regarding internal armed conflicts in the pre-U.N. Charter era. The discussion
served three purposes. First, to clarify, to the extent possible, an area in traditional
international law that has been notoriously vague. Second, we argued, and by this challenged
some contemporary commentators, that prior to the prohibition on the use of force – at least
before the 1928 Kellogg-Briand Pact – the question of intervention and consent was largely
irrelevant, since sovereigns enjoyed an unlimited war-prerogative. Third, it demonstrated the
generally amoral, effective-control based doctrines, which have dominated the era. These can
be contrasted with the substantive doctrines of later decades, which have direct implication
over the contemporary law regarding consensual intervention.

Accordingly, Chapter 5 addressed the general question of intervention and
consent in the era of the “prerogative of war.” It started with an overview of the
belligerency doctrine – the traditional doctrine of international law regarding internal strife, which assessed the rights and powers of parties almost strictly according to their effective control over territory. The belligerency doctrine, developed through the 19th century and galvanized in the American Civil War, circumscribed the conditions for the recognition of parties to internal conflict as belligerents – meaning, as engaged in a war in the legal sense. These conditions included the existence of an armed conflict; exercise of effective control by the opposition over parts of the state’s territory; adherence of the opposition to the laws of war; and the existence of circumstances that made it necessary for outside states to define their attitude towards the conflict.

Belligerency recognition, albeit short of full recognition of the parties as separate states or governments, was generally granted through a proclamation of neutrality by third-party states. It would thus deliver the strife from the strictly internal context into the international level, thereby granting the opposition a limited, temporary, international personality. Prior to such recognition, governments enjoyed various privileges over the opposition. Significantly, states at peace with the government were required not to transfer arms or funds to the opposition, nor to allow “hostile expeditions” to leave their territory in support the rebels, or to interfere, in general, in the government’s efforts to quell the uprising. After recognition of belligerency, some of these privileges were lost, as third states could assume a neutral disposition towards the parties without it being considered a violation of the peaceful relations with the challenged government. Significantly, belligerency recognition affected maritime trade, as it allowed rebels to exercise war-time rights on the high seas – such as blockade, visit-and-search and capture of neutral vessels carrying contraband.
After surveying the implications of belligerency recognition, we proceeded to clarify some modern commentaries on the belligerency doctrine and its relation to the question of consensual intervention. Indeed, some modern literature connects between these issues. One approach posits that upon recognition of belligerency, third states acquired a duty of neutrality. The other approach asserts that upon such recognition – and only upon it – states gained the power to intervene on behalf of either party. However, we argue that these approaches are imprecise, since prior to the prohibition on the use of force, states could wantonly intervene – irrespective of recognition of belligerency – by exercising their sovereign war prerogative. Accordingly, there could be no obligation of neutrality regarding internal armed conflicts, since there was no law that prohibited states from ending their neutrality as they wished – if they were willing to accept the consequences of war. Therefore, the Chapter demonstrated – by referring to historical examples and statements by officials – that intervention in the war-prerogative era was a matter of choice; and that the belligerency doctrine was only one available course of action, to be chosen by external parties in accordance with their interests.

Chapter 6 again addressed the pre-Charter law of internal strife, demonstrating its emphasis on territorial effective-control as a source of rights. In particular, the Chapter focused on the amoral dynamics of the era with regards to the determination of rights and powers of parties to internal armed conflicts. We thus surveyed the development of the belligerency doctrine through early cases such as the American Revolution, the Spanish Colonial Wars of the early 19th century and others. Our analysis exemplified the centrality of maritime trade to the considerations of the parties, and in particular, the effects recognition of belligerency has had over maritime prize law.
We then turned to focus on a pivotal case in the development of international law regarding internal conflicts: the American Civil War. The Chapter demonstrated that the debate regarding the Confederacy’s international status was largely amoral, although the conflict was centered on the issue of slavery – which was already recognized at the time as a glaring immorality. It is in this context where the amoral approach of the belligerency doctrine was most starkly emphasized.

Since the recognition of belligerency inflicted economic and diplomatic costs on third parties, it is unsurprising that states were reluctant to grant it. Therefore, states had to determine the status of opposition forces that, for one reason or another, were not recognized as belligerents. This need prompted the development of the “insurgency” doctrine – an elastic legal instrument aimed to deal with internal armed conflicts in the absence of belligerency recognition. The insurgency approach is of contemporary importance since it reflects, to some extent, today’s flexible approach of the international community towards internal armed conflicts. In general, insurgency, as a status, could be understood in several ways: as entailing a few rights for the insurgents, but mostly obligations taken by third states in accordance with their domestic neutrality laws; or as a liability, as it serves to limit only insurgents, but not governments; still another view attributes to insurgency consequences similar in essence to that of belligerency, disposing of the need to make any positive acts of recognition to begin with. The Chapter analyzed in depth the development and possible implications of this status, and demonstrated that like the belligerency doctrine, it was also based largely on amoral considerations of effective control.
Chapter 7 addressed the question of consensual intervention in the inter-war period, when nascent prohibitions on the use of force were first set forth, and the international system started to shift towards collective decision making regarding problems of international peace and security. The Chapter first explains the intricate system of the Covenant of the League of Nations regarding the use of force, and its heavy reliance on procedure as a tool for the pacific settlement of disputes. As such, the Chapter demonstrates that the Covenant system had significant “gaps” that allowed states to legally resort to war, and could theoretically be utilized to justify forcible interventions even against governments.

We then move on to discuss the Kellogg-Briand Pact, which was the first international attempt at the per se abolishment of the right of war, however imperfect. After the Kellogg-Briand Pact, it was safe to say that intervention in internal armed conflicts could no longer be viewed as the choice of the intervener, and therefore, it became valid to ask whether, and under what circumstances, the expression of consent could legalize intervention. It is at this point that the major questions concerning this issue, such as whether consent power could be limited on counts of territorial effectiveness or on other, substantive criteria, were given real legal substance. We then discuss the changing nature of the international system and of international law at the time, through an analysis of international reactions to the Spanish Civil War.

Indeed, the emergence of global ideologies such as communism and fascism fundamentally challenged the nature of inter-state relations. Since the stakes became high, traditional, effectiveness-based doctrines of international law regarding internal armed conflicts were not sufficient to address the concerns of external parties. Thus, the
international community’s reactions to the Spanish Civil War were novel. More than anything, they reflected a system in transition, in which traditional approaches such as the belligerency doctrine were abandoned. In essence, three approaches could be identified towards the question of consensual intervention in the debate regarding the Spanish Civil War. One approach argued for an obligation amounting to mandatory neutrality, based on the right of the parties to self-determination. Another argued for a mandatory preferential treatment of the Spanish government. Still another argued for a substantive preference for the Spanish government, based on its democratic credentials.

The Chapter discusses the consensual interventions in the Spanish Civil War in favor of both sides, and the novel non-intervention agreement concluded in relation to the conflict, prohibiting states to intervene in favor of both parties to the conflict. The agreement was unprecedented both on counts of its collective nature and in its imposition of legal obligations of neutrality, without any recognition of belligerency of the parties. The fact that the agreement did not distinguish between the government and the opposition spawned significant controversy – signifying the demise of the stringent belligerency doctrine as a central doctrine of international law, and the triumph of more flexible approaches, such as the insurgency doctrine.

The third Part of the study concerns the law of consensual intervention in the era of the U.N. Charter. Thus, In Chapter 8 we established the general principle of the presumption in favor of governments. The Chapter identified two distinct approaches towards the question whether consent can serve as an exception to the prohibition on the use of force as enshrined in the U.N. Charter: the first approach is strict abstentionism, which advocates for the complete abstention from any intervention in internal strife, and
is chiefly found in the literature; the second approach is the notion of government preference, recognizing, in principle, the power of governments to consent to forcible interventions – which is dominant in state practice. We explored the background for the development of these approaches during the Cold-War era, in which the aspiration to “tame” the malicious interests of the blocs – manifested, for instance, in the Reagan and Brezhnev doctrines – has influenced the consolidation of both approaches.

Thereafter, the Chapter analyzes the rationales of strict abstentionism. In essence, these rationales revolve around a rather orthodox understanding of the concepts of non-intervention and self-determination, very much rooted in the idea of effective-control over territory as the chief source of sovereignty. After discussing these ideas, we offer a critique of strict-abstentionism, claiming that this position has been possibly rendered obsolete. We argue that strict-abstentionism was mainly compelling in the eras of decolonization and the cold-war, when the main concern of the international community was to suppress the attempts of colonial powers to support subordinate local governments, and to quash the frequent manipulative actions taken by the rivaling blocs. The concerns of the contemporary system are significantly different. For instance, strict-abstentionism does not take into account the problem of mass atrocities; nor does it take into consideration the legal differences between various types of internal strife.

Bearing this in mind, the Chapter explored the concept of the rebuttable presumption in favor of governments, which is structured around the basic principle that the entity that speaks for the state is the recognized and established government. We emphasize that while strict-abstentionism has been endorsed by prominent scholars of international law, it is virtually non-existent in the opinio juris of states. The Chapter
notes that during the cold-war, states did not object to the principle of government preference, mainly because members of both blocs utilized it for their own benefit; and that after the cold-war, the end of the bloc-struggle significantly reduced the motivation of states to oppose consensual interventions to begin with. Accordingly, we exemplify the vast reliance in state practice on the principle of government preference, from the 1957 British intervention in Muscat and Oman and up to present day counterinsurgency operations. Last, the Chapter addressed the principle of government preference as expressed in ICJ decisions.

Chapter 9 inquired into general questions, traditionally raised, regarding the scope of the consent power of governments. It first places the discussion in contemporary context, asserting that the current preoccupation of the international community with the protection of civilians and the struggle against transnational terrorism informs the discussion on intervention, moving it away from its focus on territorial effectiveness and on to other considerations.

Thereafter, we analyzed the scope of governmental consent power, by setting forth several thresholds. First, we propose a reversal of some traditional doctrines that negate government consent power when “civil wars” take place, by suggesting that nowadays, the existence of an armed conflict is a precondition for the power to consent to forcible intervention. This is because international human rights law prohibits states to resort to extrajudicial military force against civilians, absent circumstances that amount to internal armed conflicts. Thus, in cases where human rights law prohibits the internal use of force – for instance, in absence of an internal armed conflict between at least two organized armed parties – it necessarily follows that consensual forcible intervention in
favor of the government is also prohibited. Therefore, we concluded that the legality of consensual interventions depends, as a threshold, on the determination that an internal armed conflict exists in the state to begin with; and that the existence of an “armed conflict” is not invoked by the territorial state merely as a pretext to circumvent its obligations under human rights law.

We then move to challenge the use of the term “civil war” to connote situations in which consent power is negated, as opposed to situations of “local unrest,” where consent power ostensibly remains. We argued that when commentators use the term “civil war” they actually allude to the loss of territorial effectiveness that “civil war” entails and therefore, for the sake of clarity, the term should be abandoned. We also point out that the terms “use of force” and “armed conflict” have replaced the term “war” in the context of *jus ad bellum* and *jus in bello* respectively, and that it thus makes no sense to retain the term “civil war” as a threshold only in the context of consensual intervention.

We then discuss the “failed state” threshold as a credible effective-control based standard for consent power. Indeed, in a situation where it is obvious that there is no functioning government at all, and the state is torn by fluid and unstable warring factions, it is logical that there will be no government preference. However, we emphasize that such situations are rare, and that nowadays, the international community prefers to grant recognition to transitional governments that do not exercise territorial effectiveness, rather than to permit the *de jure* failed state scenario. The Chapter proceeds to exemplify these dynamics in the situation in Somalia, since the 2004 formation of the ineffective Transitional Federal Government.
Finally, the Chapter attempts to update the old doctrine of counter-intervention, traditionally used by governments as a “defense claim,” when losing effective control, to justify their power to request foreign intervention. The doctrine asserted that when loss of territorial effectiveness is fomented by external intervention, the government too is entitled to receive assistance. We argue that while the counter-intervention doctrine is still theoretically sound, it was particularly important in the colonial and cold-war eras, in which bloc-related proxy-wars were common. Nevertheless, the Chapter seeks to clarify some aspects of counter-intervention, and in particular its interaction with the doctrine of collective self-defense. We argue that like collective self-defense, a state that embarks on a counter-intervention must also have the genuine consent of the “victim” government. Moreover, the Chapter posits that counter-intervention cannot be used as a valid claim when challenges to governmental consent power are based on substantive issues, rather than on technical loss of effective control. For instance, if a government commits mass atrocities, it would not be able to rely only on the doctrine of counter-intervention as a source of consent power.

In Chapter 10 we set forth the concept of protection of civilians as an emerging fundamental principle of international law, which also affects our perception of sovereignty, and thus also of consent power. As the mass atrocities of the 1990s unfolded, the international community was forced to turn away from its initial post-cold war preoccupation with democracy, to the more primordial issue of civilian protection. The Chapter presents several milestones that exemplify the growing emphasis of international law on the protection of civilians, and proceeds to describe how the unilateral NATO operation in Kosovo forced the international community – in order to
salvage the collective security arrangement of the U.N. Charter – to robustly address the principle of civilian protection in various forums.

These discussions spawned numerous reports by the U.N. Secretary General, in which calls were made for the promotion of a “culture of protection,” focused on the individual rather than the state, whose “primary function” is to secure the civilian population. The discussions further resulted in general, forward-looking Security Council resolutions expressing the paramount importance of the principle of protection. We argue that since the principle of protection is not necessarily connected to a certain system of government, it enjoys wide credibility across states with different political cultures and systems. Accordingly, the “primary” legal validity of the principle of protection – in distinction from the methods to implement it in specific instances – has emerged as a normative consensus in the international community. The Chapter thus concludes that collective *opinio juris* has arguably elevated, in the last two decades, the principle of protection of civilians to the level of a basic principle of international law, complementing and redefining our understanding of other basic principles.

Having discussed the emergence of protection of civilians as a general fundamental principle, we turned to argue that the principle has become also a component of sovereignty, manifested through the Responsibility to Protect (RtoP) concept; and that through RtoP, the notion of “effective protection” has come to challenge the threshold of “effective control” as a key determinant of sovereign power. To that effect, we trace the development of RtoP from its roots in a 2001 report by a group of experts, through its unanimous endorsement by the U.N. General Assembly in the 2005 World Summit, and
up to its recent application by the Security Council in the conflicts in Côte d’Ivoire and Libya.

The Chapter outlines the critiques of RtoP, including the claim that it has no normative significance. We counter this claim, arguing that much of the idea’s significance is found in its effect over our understanding of traditional, effective-control based doctrines for the assessment of parties engaged in internal armed conflicts. In sum, we claim that RtoP, in its legal sense, is an aggregation of all the existing normative and institutional obligations stemming from the basic principle of protection of civilians, which bridges between these obligations and our understanding of sovereignty, non-intervention, and the emerging “administrative” role of international bodies.

We then turn to analyze the effects of the principle of protection, manifested through the RtoP concept, on the question of consensual intervention. In essence, the study argues that the idea of “effective control” as a primary determinant of sovereignty, is being replaced by the standard of “effective protection,” at least when assessing the question of intervention. We thus demonstrate that the concept of effective protection, being a source of sovereignty, can both negate and augment the power of governments to consent to forcible intervention in specific instances.

The Chapter then briefly addresses the distinction between the concepts of effective protection, human rights and democracy. We concede that these standards are closely related, but should still be distinguished from one another. The complex nature of human rights frequently makes them a problematic measure for the assessment of consent power, in contrast to the minimalist principle of protection, which focuses on the core values that law sets out to protect during armed conflict. In contrast to human rights law,
the principle does not aspire to create an ideal society; it aspires to end atrocities as soon as possible. This notion also informs our understanding of the role of democracy and the question of consensual intervention: while the establishment of substantive democracy is a main element of post-conflict rebuilding, at the time of intervention, effective protection should be the main guiding principle. We call this approach “protection now, democracy later,” and exemplify it through the international response to the Libyan conflict of 2011.

The Chapter then takes on the question of effective protection and the capacity to withdraw consent. The question of withdrawal of consent is of particular importance and complexity when consent is given through general, forward-looking intervention treaties. We analyzed the different scenarios in which withdrawal of consent, in the context of such treaties, can occur; and demonstrated the mechanisms of such treaties as they are found in contemporary regional arrangements in Africa. We claim that forward-looking intervention agreements pose a direct challenge to the Security Council’s monopoly over the authorization of the use of force. However, we suggest that these challenges can be reconciled by adopting the position that when a government fails to exercise effective protection, it suffers the loss of sovereign power to withdraw consent previously given. Just as lack of effective protection results in the negation of government consent power, it can also negate withdrawal power, since withdrawal is also an act of sovereignty. Conversely, the capacity of withdrawal would only exist when a government exercises effective protection: meaning, where it fulfils its responsibility to protect.

After briefly establishing that the level of failure to protect that causes loss of sovereign consent (or withdrawal) power must amount to a grave, widespread or systemic
breach of the protection principle, we proceed to analyze additional legal mechanisms, beyond the concept of effective protection, which can lead to the invalidation of consent power. Such mechanisms are namely found in international treaty law and the law of state responsibility, and relate to the notion of peremptory norms of *jus cogens* – norms that cannot be contravened by any consent-establishing agreement.

Chapter 11 explored further substantive criteria for the analysis of parties to an internal armed conflict. Particularly, it addressed the relation between consent power, democracy, human rights and self-determination. In essence, we argue that nowadays all of these criteria, when it comes to the question of intervention, boil down to the protection of civilians. We start by addressing the question of the presumption in favor of governments in democratic and non-democratic regimes. Regarding the former, we argue that democratic governments enjoy a strong presumption in their favor during internal conflict, since substantive democracies, by nature, exercise effective protection of their civilians. However, we concede that all other things equal, in the current international system, non-democratic regimes also enjoy a presumption in their favor; and that, accordingly, evaluation of democracy and consensual intervention requires a more nuanced approach.

The Chapter then makes a distinction between the “electoral” and “substantive” aspects of democracy. Regarding the first aspect, we identify and explain the clear-cut distinction, in international practice, between longtime “existing” non-elected regimes (labeled as “established autocracies”), which are generally accepted participants in the international system; and *de facto* regimes that have *overthrown* an elected government or otherwise fail to respect the ballot (“revolutionary autocracies.”) In contrast to the
former, the latter are ostracized and sometimes face intervention. We further found that when interventions against revolutionary autocracies take place, the international community, in general, withholds recognition from the *de facto* junta, and maintains the recognition of the *de jure* elected regime. Thus, intervention in favor of such regimes falls within the normative framework of the governmental preference. Thereafter, the Chapter exemplifies these dynamics as they were unfolded in 2011 forcible intervention in Côte d’Ivoire.

The Chapter then focuses on the complex scenario of *established* autocracies facing a genuinely pro-democratic insurrection. It debates the notion of the “democratic entitlement,” and argues that since there is no consensus that it has galvanized, as such, as a rule of customary international law, it is problematic to judge consent-power strictly on counts of the inexistence of electoral democracy. Instead, we offer to break down the concept of “democracy” to its substantive components, and asserted that these are similar to those enshrined in the principle of protection of civilians. Since non-democratic regimes, when facing a pro-democratic insurrection, virtually always violate the principle of protection, the question of their consent-power, essentially, merges with the analysis undertaken in Chapter 10.

We then turn to inquire into the effects of the principle of self-determination on consent power. We begin by outlining the principle of self-determination and its shifting meaning throughout the 20th century. We then note the inherent tension that exists between the concept of self-determination and the principle of territorial integrity, and demonstrate that during the process of decolonization, this tension was resolved by the position taken by the international community – to the chagrin of colonial powers –
according to which colonial struggles were no longer considered as *internal* armed conflicts; and that therefore they could not be considered as internal struggles for secession.

The Chapter discusses thereafter the question whether colonial struggles for self-determination spawned also the right to receive forcible support by third parties – a question that was never resolved. However, what was indeed clear is that the exclusion of colonial wars from the internal sphere necessarily removed them also, in the context of consensual intervention, from the paradigm of governmental preference – resulting therefore in the negation of colonial powers’ capacity to request assistance from third parties.

We then address the concept of self-determination *outside* the colonial context, through international human rights law. The Chapter stresses that while peoples under colonialist rule would have a right to establish independent states, in already independent states, conversely, self-determination is limited strictly to *internal* application. Internal self-determination has been understood, by most contemporary scholars, as connoting a right to political participation. In general, when equating internal self-determination with a notion of political participation, the discussion of governmental consent power essentially merges with our analysis of the question of the democratic entitlement. In this sense, our conclusions regarding the relations between democracy and consensual intervention are applicable also in the context of the interaction between internal self-determination and intervention: both should be analyzed according to the violations of the protection principle that usually accompany their deprivation. When these violations
amount to a breach of the principle of effective protection by the government, the latter
loses its sovereign power to request assistance during an internal armed conflict.

Nonetheless, the Chapter emphasizes that on counts of the principle of territorial
integrity, it is clear that a \textit{positive} right of forcible, unilateral secession cannot be an
inherent component of the right of internal self-determination in the decolonized world.
This conclusion is a product both of the substance of the principle of \textit{internal} self-
determination, and of the realization that recognition of a right to secede entails
dangerous consequences for the international system. In the context of consensual
intervention, thus, a claim cannot be made for the negation of governmental consent
power in a struggle against a secessionist movement, when the secessionists’ claims are
based only on an alleged deprivation of internal self-determination.

We then address the controversial question of “remedial secession” – a doctrine
which suggests that in exceptional circumstances, a group might be entitled to be
considered as a “people” possessing a right to secede, as a \textit{remedy} for grave and massive
violations of human rights directed against it. We note that while the doctrine of remedial
secession has received much support in legal literature, it receives little support, if at all,
in state practice. Accordingly, we discussed the debate regarding Kosovo’s 2008
unilateral declaration of independence, and the various justifications given for it.

The controversy on remedial secession notwithstanding, the Chapter concludes
that struggles for secession could in any case be affected by the principle of protection of
civilians: it is clear that a government that actively disregards the principle of protection
of civilians will lose its consent power when facing a secessionist movement, whether we
accept the concept of remedial secession or not. In this context, the analysis merges to a
large extent, with the discussion in Chapter 10 regarding the principle of protection of civilians, and its implementation through the RtoP doctrine. The question whether secessionist forces are entitled, in the context of remedial secession, also to a positive right of *remedial forcible intervention*, beyond the negation of governmental consent power, is addressed in Chapter 12.

Chapter 12, thus, addressed the controversial question of consent by opposition forces. The Chapter analyzes this question through a principled approach – first, by asserting that any forcible support granted to opposition groups is a *prima facie* violation of the laws on the use of force; and second, by analyzing the question on the spectrum between *recognition* and *humanitarian intervention*. In this sense, any support granted to a party recognized as a government or as an independent state, is *per se* not a consensual intervention in favor of the opposition, but rather in favor of a government. Such cases should be analyzed under our previous discussion of government consent power. Conversely, any intervention on behalf of an unrecognized opposition group should be discussed within the debate regarding unilateral humanitarian intervention.

Thus, the Chapter begins by noting that the negation of governmental consent power in a specific instance does not necessarily entail the *positive* transfer of consent power to opposition groups. Consensual intervention in favor of the opposition, if cannot be justified independently by the intervener as an act of self-defense, is *prima facie* contrary to international law. The Chapter then discusses the identification of opposition groups, and offers a rather simple test: the opposition is every party which at the time of intervention is not recognized by the international community as the state’s government, or as representing a separate state in struggles for secession.
We acknowledge that this definition presents practical difficulties, since a binding, collective international mechanism for government or state recognition is still absent. Notwithstanding this negative definition, we still offer some positive attributions for the identification of such groups. First, the mere existence of an internal armed conflict, as defined in Chapter 2, presupposes the existence of “organized armed groups;” thus, opposition groups must be organized. Second, in recent internal uprisings, loosely aligned opposition groups were relatively quick to form quasi-representative bodies, such as the Libyan National Transitional Council, that have interacted with the international community.

The Chapter then suggests that nowadays, the international community’s will to interact with opposition groups is influenced primarily by considerations of effective protection. Essentially, the more a government violates the principle of protection, the more the international community would be willing to give credit to relatively ineffective opposition groups as potential fulfillers of the responsibility to protect. We demonstrate this hypothesis by juxtaposing the negative treatment of the Al-Shabaab forces in Somalia, versus the positive interaction with the Libyan opposition to the Al-Qadhafi regime.

We thereafter consider the question of remedial secession and remedial intervention. If we accept the doctrine of remedial secession, then the question of consensual-remedial intervention involves a two-stepped process, comprised first of state-recognition, and in the second stage, of the exercise of the right of collective self-defense in the context of an international armed conflict between the newly recognized state and the rump-state. The Chapter concedes that this approach is prone to abuse by
third-parties through arbitrary recognition of the opposition. However, we argue that it still maintains its theoretical vigor. We furthermore claim that this danger can be mitigated through the contemporary dominance of regional organizations in resolving questions of recognition.

The analysis then turns to discuss the question of opposition consent in relation to the doctrine of humanitarian intervention. We begin by maintaining that the RtoP doctrine, as endorsed by the General Assembly, does not resolve the debate regarding humanitarian intervention – meaning, interventions absent government consent or Security Council authorization. We then move to explore the relatively uncharted nexus between humanitarian and consensual interventions in light of the different legal and extra-legal justifications given to the doctrine of humanitarian intervention. Without expressly accepting these justifications, we argue and demonstrate that if we do accept them, opposition consent can indeed play a legitimizing role for forcible interventions.

We arrive at this conclusion both by analyzing the provisions of the U.N. Charter regarding the use of force, and through an inquiry into the possible effects of the existence of opposition consent on the analysis of classic, just-war conditions for intervention.
KEY BIBLIOGRAPHY

1. Books and other Unitary Works


ADAMS, CHARLES FRANCIS, THE TRENT AFFAIR: AN HISTORICAL RETROSPECT (1912)

ALEXANDROV, STANIMIR A., SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW (1996)

AMBROSIO, THOMAS, IRREDENTISM (2001)


AUST, ANTHONY, MODERN TREATY LAW AND PRACTICE (2007)

AFRICAN INTERVENTIONIST STATES (Oliver Furley & Roy May eds., 2001)

BADESCUI, CRISTINA G., HUMANITARIAN INTERVENTION AND THE RESPONSIBILITY TO PROTECT (2010)

BARAK, AHARON, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (2012)


BELLAMY, ALEX J., RESPONSIBILITY TO PROTECT (2009)

BELLAMY, ALEX J. ET AL. UNDERSTANDING PEACEKEEPING (2010)

BELLAMY, ALEX J., GLOBAL POLITICS AND THE RESPONSIBILITY TO PROTECT (2011)

BERNARD, MONTAGUE ON THE PRINCIPLE OF NON-INTERVENTION (1860)

BOBBITT, PHILIP, TERROR AND CONSENT (2008)

BOWETT, D.W., UNITED NATIONS FORCES: A LEGAL STUDY (1964)

BROWNLE, IAN, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES (1963)


BUCCHEIT, LEE, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION (1978)


CASSESE, ANTONIO, INTERNATIONAL LAW (2005)

CASTELLINO, JOSHUA, INTERNATIONAL LAW AND SELF-DETERMINATION (2000)
CHESTERMAN, SIMON, JUST-WAR OR JUST PEACE? HUMANITARIAN INTERVENTION IN INTERNATIONAL LAW (2001)

CIVILIANS IN WAR (Simon Chesterman ed., 2001)

CLAUDE, INIS L., SWORDS INTO PLOWSHARES: THE PROBLEMS AND PROGRESS OF INTERNATIONAL ORGANIZATION (1971)


CRAWFORD, JAMES, THE CREATION OF STATES IN INTERNATIONAL (2006)

CULLEN, ANTHONY, THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW (2010)

DAVIS, JEFFERSON, THE RISE AND FALL OF THE CONFEDERATE GOVERNMENT (1881)

DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW (Gregory H. Fox & Brad R. Roth eds., 2000)

DENG, FRANCIS M. ET AL., SOVEREIGNTY AS RESPONSIBILITY (1996)


DINSTEIN, YORAM, WAR, AGGRESSION AND SELF-DEFENSE (5TH ed., 2011)


DOYLE, MICHAEL W., WAYS OF WAR AND PEACE (1997)

DOYLE, MICHAEL W., LIBERAL PEACE: SELECTED ESSAYS (2011)

ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS (Lori Fisler Damrosch, ed., 1989)


FERRERO, GUGLIELMO, PROBLEMS OF PEACE: FROM THE HOLY ALLIANCE TO THE LEAGUE OF NATIONS (1919)

FLETCHER, GEORGE P. & OHLIN, JENS DAVID, DEFENDING HUMANITY: WHEN FORCE IS JUSTIFIED AND WHY (2008)

FRANCK, THOMAS, THE POWER OF LEGITIMACY AMONG NATIONS (1990)

GARTHOF, RAYMOND L., DÉTENTE AND CONFRONTATION: AMERICAN-SOVIET RELATIONS FROM NIXON TO REAGAN (1994)

Grotius, Hugo The Rights of War and Peace (William Whewell trans., 1853)

Hall, W.E., A Treaties on International Law (8th ed. 1924)


Henkin, Louis, How Nations Behave: Law and Foreign Policy (1979)


Higgins, Rosalyn, Problems and Process: International Law and How We Use It (1995)

Hironaka, Ann, Neverending Wars: The International Community, Weak States and the Perpetuation of Civil War (2005)

Hohfeld, Wesley, Fundamental Legal Conceptions (Arthur Corbin ed., 1978)

Hufbauer, Gary Clyde et al., Economic Sanctions Reconsidered (3rd ed. 2007)


Jus Post Bellum: Towards a Law of Transition from Conflict to Peace (Carsten Stahn & Jann K. Kleffner eds., 2008)


International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law (Roberta Arnold & Noëlle Quévivet eds., 2008)

Jones, Bruce et al, Power & Responsibility: Building International Order in an Era of Transnational Threats (2009)

Johnson, James Turner, Morality and Contemporary Warfare (1999)

Kant, Immanuel, Fundamental Principles of the Metaphysic of Morals (1875)

Kant, Immanuel, Perpetual Peace: A Philosophical Essay (1759)


Klabbers, Jan et al., Constitutionalization of International Law (2009)

Knop, Karen, Diversity and Self-Determination in International Law (2002)
KOSKENIEMI, MARTTI, THE POLITICS OF INTERNATIONAL LAW (2011)
LALONDE, SUZANNE, DETERMINING BOUNDARIES IN A CONFLICTED WORLD: THE ROLE OF *uti possidetis* (2002)
LAW AND FORCE IN THE NEW INTERNATIONAL ORDER (Lori Fisler Damrosch & David J. Scheffer eds., 1991)
LAUTERPACHT, HERSCH, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY (1933)
LAUTERPACHT, HERSCH, RECOGNITION IN INTERNATIONAL LAW (1948)
LUARD, EVAN, CONFLICT AND PEACE IN THE MODERN INTERNATIONAL SYSTEM (1968)
LUBELL, NOAM, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS (2010)
MELZER, NILS, INT’L COMM. RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009)
NEGOTIATING CULTURE AND HUMAN RIGHTS (Lynda S. Bell et al. eds., 2001)
NOLTE, GEORG, EINGREIFEN AUF EINLADUNG (1999)
OGLESBY, ROSCOE R., INTERNAL WAR AND THE SEARCH FOR NORMATIVE ORDER (1971)
OPPENHEIM, LASA, INTERNATIONAL LAW, A TREATISE (2nd ed., 1912)
ORFORD, ANNE, INTERNATIONAL AUTHORITY AND THE RESPONSIBILITY TO PROTECT (2011)
PATTISON, JAMES, HUMANITARIAN INTERVENTION AND THE RESPONSIBILITY TO PROTECT: WHO SHOULD INTERVENE (2010)
PEACEMAKING AND PEACEKEEPING FOR THE NEW CENTURY (Olara A. Otunu & Michael W. Doyle eds., 1998)
PETERTSON, M.J., RECOGNITION OF GOVERNMENTS (1997)
POLLOCK, FREDERICK, THE LEAGUE OF NATIONS (1920)
RAWLS, JOHN, THE LAW OF PEOPLES (2001)
RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 1 (Louis Henkin et al. eds., 1991)
ROTH, BRAD R., GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW (2001)
SCHABAS, WILLIAM A., AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT (2011)
SCHACHTER, OSCAR, INTERNATIONAL LAW IN THEORY AND PRACTICE (1991)
SCOTT, JAMES M., DECIDING TO INTERVENE: THE REAGAN DOCTRINE AND AMERICAN FOREIGN POLICY (1996)
SECESSION: INTERNATIONAL LAW PERSPECTIVES 23 (Marcelo G. Kohen ed., 2006)
SLAUGHTER, ANNE-MARIE, A NEW WORLD ORDER (2004)
STAPLETON, AUGUSTUS GRANVILLE, INTERVENTION AND NON-INTERVENTION; OR, THE FOREIGN POLICY OF GREAT BRITAIN FROM 1790 TO 1865 (1866)
STÜRCHLER, NICHOLAS, THE THREAT OF FORCE IN INTERNATIONAL LAW (2009)
TANCA, ANTONIO FOREIGN ARMED INTERVENTION IN INTERNAL CONFLICT (1993)
TEITEL, RUTI G., HUMANITY’S LAW (2011)
THE PHILOSOPHY OF INTERNATIONAL LAW (Samantha Besson & John Tasioulas eds., 2010)
THE RESPONSIBILITY TO PROTECT AND INTERNATIONAL LAW (Alex J. Bellamy et al. eds., 2010)
THE RESPONSIBILITY TO PROTECT: FROM PRINCIPLE TO PRACTICE 27 (Andre Nollkaemper & Julia Hoffman eds., 2012)
THOMAS, ANN VAN WYEN & THOMAS, AARON JOSHUA, NON-INTERVENTION: THE LAW AND ITS IMPORT IN THE AMERICAS (1956)
TZANAKOPOULOS, ANTÔNIO, DISOBEYING THE SECURITY COUNCIL: COUNTERMEASURES AGAINST WRONGFUL SANCTIONS (2011)
WALTZ, KENNETH, THEORY OF INTERNATIONAL POLITICS (1979)
Walzer, Michael, Just and Unjust-Wars (4th ed. 2006)
Wheatley, Steven, DEMOCRACY, MINORITIES AND INTERNATIONAL LAW (2005)
Wheaton’s Elements of International Law (Richard Henry Dana ed., 1866)
Wilson, George Grafton, International Law (8th ed. 1922)
Wright, Quincy, THE ROLE OF INTERNATIONAL LAW IN THE ELIMINATION OF WAR (1961)
Vatell, Emmerich De, THE LAW OF NATIONS (1797)

2. Articles and Chapters in Books


Baty, Thomas, *So-Called “De Facto” Recognition*, 31 YALE L. J. 469 (1922)


Berti, Benedetta, *Armed Groups as Political Parties and Their Role in Electoral Politics: The Case of Hizballah*, 34 STUDIES IN CONFLICT AND TERRORISM 942 (2011)


Buchanan, Allen *Uncoupling Secession from Nationalism and Intrastate Autonomy from Secession*, in *NEGOTIATING SELF-DETERMINATION* 81 (Hurst Hannum & Eileen Babbitt eds., 2006)

Buchanan, Allen, *The Legitimacy of International Law*, in *THE PHILOSOPHY OF INTERNATIONAL LAW* 79 (Samantha Besson & John Tasioulas eds., 2010)


Byers, Michael & Chesterman, Simon, “*You, the People*”: Pro-Democratic *Intervention in International Law*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* 259 (Gregory H. Fox & Brad R. Roth eds., 2000)


Chesterman, Simon, “*Leading from Behind: The Responsibility to Protect, the Obama Doctrine and Humanitarian Intervention after Libya*”, *ETHICS & INT’L AFFAIRS* (2011)


D’Amato, Anthony, *The Invasion of Panama was a Lawful Response to Tyranny*, 84 AM. J. INT’L L. 520 (1990)


Doyle, Michael W., *Kant, Liberal Legacies and Foreign Affairs*, 12 PHIL. & PUB. AFF. 205 (1983)


Doyle, Michael W., *The Folly of Protection* FOREIGN AFFAIRS (Mar. 20. 2011)


Franck, Thomas M., *Legitimacy and Democratic Entitlement*, in *Democratic Governance and International Law* 25 (Gregory H. Fox & Brad R. Roth, eds. 2000)


Harling, Peter & Birke, Sarah, *Beyond the Fall of the Syrian Regime*, Middle East Research and Information (Feb. 24, 2012)


Hudson, Manley O., The Permanent Court of International Justice, 35 HARV. L. REV. 245 (1922);

Hudson, Manley O., Amendment of the Covenant of the League of Nations, 28 HARV. L. REV. 903 (1925)


Kingsbury, Benedict et al., The Emergence of Global Administrative Law, 68 L. & CONT. PROB. 15 (2005)


Kerr, Malcolm, The Lebanese Civil War, in INTERNATIONAL REGULATION OF CIVIL WARS 65 (Evan Luard ed., 1972)


Laitin, David D., Somalia: Civil War, and International Intervention, in CIVIL WARS, INSECURITY AND INTERVENTION 146 (Barbara F. Walter et al. eds., 1999)


Lieblich, Eliav *Consensual Intervention and the Responsibility to Protect*, in *The Responsibility to Protect: From Theory to Practice* 141 (Andre Nollkaemper & Julia Hoffman eds., 2012)


Main, John, *The Civil War in Laos*, in *International Regulation of Civil Wars* 91 (Evan Luard ed., 1972)


McMahan, Jeff, *Humanitarian Intervention, Consent and Proportionality*, in *Ethics and Humanity: Themes from the Philosophy of Jonathan Glover* 44 (N. Ann Davis et al. eds., 2010)


McNulty, Mel, *From Intervened to Intervener: Rwanda and Military Intervention in Zaire/DRC*, in *African Interventionist States* 173 (Oliver Furley & Roy May eds., 2001)

McQueen, Norrie, *Angola*, in *African Interventionist States* 93(Oliver Furley & Roy May eds., 2001)


Mill, John Stuart, *The Contest in America*, in *Dissertations and Discussions* 179 (1867)


Murphy, Sean D., *Democratic Legitimacy and Recognition*, in *Democratic Governance and International Law* 123 (Gregory H. Fox & Brad R. Roth eds., 2000)


Welsh, Jennifer *Civilian Protection in Libya: Putting Coercion and Controversy Back into RtoP*, ETHICS & INT’L AFFAIRS (2011)

Williams, John Fischer, *Sanctions under the Covenant*, 17 BRIT. Y’BK INT’L L. 130 (1936)

Wilson, George Grafton, *Insurgency and International Maritime Law*, 1 AM. J. INT’L L. 46 (1907)


Wippman, David *Pro-democratic Intervention by Invitation, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* 293 (Gregory H. Fox & Brad R. Roth eds., 2000)


Woolsey, Theodore S., *The United States and the Declaration of Paris*, 3 YALE L. J. 77 (1894)


Wright, Quincy, *The American Civil War, in THE INTERNATIONAL LAW OF CIVIL WAR* 30 (Richard A. Falk ed., 1972)

3. Reports and other International Documents


Institut de Droit International, Annuaire 18, 229 (1900)


Int’l Crisis Group, From Kabila to Kabila, Prospects for Peace in the Congo, ICG Africa Report No. 27 (Mar. 16, 2001)


Int’l Crisis Group, Somalia: The Tough Part is Ahead, ICG Africa Briefing No. 45 (Jan. 26, 2009)


Int’l Crisis Group, Congo: A Comprehensive Strategy to Disarm the FDLR, ICG Africa Report No. 151 (Jul. 9, 2009)


INT’L COMM’N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 29 (2001)**


Ministerial Declaration on the South Summit, Adopted at the 23rd Annual Meeting of the Ministers of Foreign Affairs of the Group of 77, held at U.N. Headquarters on 24 September 1999, annx.1, U.N. Doc. A/54/432 (Oct. 6, 1999);


U.N. Secretary General, Report of the Secretary General Pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica, U.N. Doc. A/54/549 (Nov. 15, 1999)


U.N. Secretary General, Implementing the Responsibility to Protect: Rep. of the Secretary General U.N. Doc. A/63/677 (Jan. 12, 2009)


4. Selected Media Reports

*Arrest Warrant Shows Gaddafi Lost Legitimacy*, REUTERS, Jun. 27, 2011

*Arsu, Sebnem & Erlanger, Steven, Libya Rebels Get Formal Backing, and $30 Billion*, N.Y. TIMES, Jul. 15, 2011


*Bar’el, Zvi & Reuters, Turkey FM Issues “Final Words” Calling on Syria to Halt Violent Crackdowns*, HAARETZ, Aug. 15, 2011

*Batty, David, Syrian Opposition Groups Unite to Chart Roadmap to Democracy*, THE GUARDIAN, Dec. 31, 2011

*Bronner, Ethan & Sanger, David E., Arab League Endorses No-Flight Zone Over Libya*, N.Y. TIMES, Mar. 12, 2011

*Chivers, C.J. & Kirkpatrick, David D., Libyan Rebels Complain of Deadly Delays Under NATO’s Command*, N.Y. TIMES, Apr. 4, 2011

*Chulov, Martin, & Weaver, Matthew, Saudi Arabia Backs Arming Syrian Opposition*, THE GUARDIAN, Feb. 24, 2012

*Cooper, Helene, U.S. to Name a Liaison to Libyan Rebels*, N.Y. TIMES, Mar. 11, 2011

*Dombey, Daniel & Daragahi, Borzou U.S. Signals Support for Arming Syria Rebels*, FINANCIAL TIMES, Apr. 1, 2012


*Libyan Delegation to U.N. Rights Council Resigns* HAARETZ, Feb. 25, 2011,

*Mali Leader Resigns Ahead of Power Transfer* AL-JAZEERA, Apr. 8, 2012


Meter, Henry, *Russia Says Qaddafi Has Lost Legitimacy to Govern, Joining Support of NATO*, BLOOMBERG, May 27, 2011


*Opposition Urges Arab League to Refer Syria to U.N.* REUTERS, Jan. 21, 2012

Oweis, Khaled Yacoub, *Russia Stands by Assad as Pressure Mounts on Syria*, REUTERS, Nov. 17, 2011

Rice, Xan & Watt, Nicholas, *Ivory Coast’s Laurent Gbagbo Arrested*, THE GUARDIAN, Apr. 11, 2011


*Saudi Soldiers Sent into Bahrain*, ALJAZEERA ENGLISH, Mar. 15, 2011


Stack, Liam, *In Slap at Syria, Turkey Shelters Anti-Assad Fighters*, N.Y. TIMES, Oct. 27, 2011


*The United Nations and Congo: Unloved for Trying to Keep the Peace*, THE ECONOMIST, Apr. 17, 2010

*Turkey Urges ‘Immediate’ Opening of Syria Aid Corridor after Bombing of Refugee Bridge*, AL-ARABIYA NEWS, Mar. 6, 2012

*Yemenite Troops Target Al-Qaeda*, AL-JAZEERA, Jan. 5, 2010

5. Others


Argument of Belgium before the I.C.J. (May 10, 1999)


Annual Message of President Grant (Dec. 6, 1869)

Annual Message of President Grant (Dec. 7, 1875)

Annual Message of President Cleveland (Dec. 1895)

Annual Message of President McKinley (Dec. 6, 1897)


Decision of the African Union Peace and Security Council (Dec. 9, 2010) (Côte d’Ivoire)


Full Text of the Chairman’s Conclusions of the International Conference of the Group of Friends of the Syrian People (Apr. 1, 2012)

Holder, Eric *Speech at Northwestern University School of Law* (Mar. 5, 2012)


President’s Address Before a Joint Session of Congress on the State of the Union, 1985 Pub. Papers 135 (Feb. 6, 1985)

Press Release, EU Naval Force Delivers Blow Against Somali Pirates On Shoreline (May 15, 2012)

Republic of Turkey, Ministry of Foreign Affairs, *Fourth Meeting of the Libya Contact Group Chair’s Statement, 15 July 2011, Istanbul*
Request for an Advisory Opinion of the ICJ on the Question “Is the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo in Accordance with International Law?” Written Statement of the United Kingdom (Apr. 17, 2009)

Royal Proclamation of May 13, 1861 (Britain)

Rogin, Josh, *State Dept.: Russia and Iran Still Arming Bashar Al-Assad*, FOREIGN POLICY, Feb. 15, 2012


Special Message to the Congress on Greece and Turkey: The Truman Doctrine (Mar. 12, 1947)
