

Interrogations of Consent: A Reply to Erika de Wet

Dino Kritsiotis*

Abstract

This article presents a critical engagement with the issue of force and intervention undertaken with the consent of the state in whose territory it ultimately occurs and offers a critical assessment of Erika de Wet's article 'The Modern Practice of Intervention by Invitation in Africa and Its Implication for the Prohibition of the Use of Force'. It considers the different interpretative approaches suggested for consent and the Charter of the United Nations' prohibition of force as well as the principle or principles that have come to govern the issuing of valid consent in international law. The contribution turns to some of the methodological positions taken in exploring the continuing validity of the so-called 'effective control principle' in modern African practice, and, as it does so, it probes the utility of questions for the jus ad bellum of 'other' international law (such as developments within the jus in bello and the law on self-determination).

In her article on the modern practice of intervention by invitation in Africa, Erika de Wet adopts a conceptual framework according to which we can explore and calibrate the consequences of this practice for the Charter of the United Nations (UN Charter) and its prohibition of force. The choice of paradigm is an interesting one given that, historically, the tendency has been to stack and analyse such practices against the prohibition of intervention in international law (as specifically found in international custom). Most notably in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* in June 1986, the International Court of Justice observed that 'it is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a State, were also allowed at the request of the opposition'.¹ The Court's finding is all the more poignant given the categorical pronouncement made by the UN General Assembly in Resolution 2625 (XXV) of October 1970 that '[n]o State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the

* Professor of Public International Law and Head of the International Humanitarian Law Unit, Human Rights Law Centre, University of Nottingham, Nottingham, United Kingdom. Email: Dino.Kritsiotis@Nottingham.ac.uk.

¹ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua case), 28 June 1986, ICJ Reports (1986) 14, at 126, para. 246.

internal or external affairs of any other State’,² and the Court remained amenable to considering ‘forms of action’ that are ‘wrongful’, as it said, ‘in the light of both the principle of non-use of force and that of non-intervention’.³

Although de Wet makes frequent reference to the notion of ‘intervention’ in her analysis – as in ‘military (forcible) intervention by invitation’ or ‘military intervention by invitation’ – and, indeed, in the title to her article, it is the UN Charter’s (and custom’s) prohibition of force that forms the operational premise and interest of what follows.⁴ One wonders, though, why the choice or positioning of this particular paradigm has been made in the first instance⁵ and whether any verdict reached pursuant to the prohibition of force will yield an equivalent result against the metric of the prohibition of intervention.⁶ These are not matters, though, that detain us for any prolonged period for we quickly become ensconced in asking whether the prohibition of force is engaged at all where there has been ‘the free expression of the will of the requesting State’.⁷ This is because the UN Charter’s prohibition is framed in terms of force threatened or used ‘against the territorial integrity of political independence of any state’⁸ and, after initially seeming to distance herself from those who find profit in parsing these very words of the Charter, de Wet sides with the view that the impact of force on the ‘territorial integrity’ or ‘political independence’ of a state is indeed integral to any examination undertaken of its lawfulness (‘unless it is certain that the request does not undermine the territorial integrity or political independence of the requesting state’;⁹

² In addition, the eighth preambular recitation of the Resolution: ‘[T]he practice of any form of intervention not only violates the spirit and the letter of the Charter.’ GA Res. 2625 (XXV), 24 October 1970, at 121. See, however, the International Court of Justice’s (ICJ) abbreviated formulation of this incantation. *Nicaragua*, *supra* note 1, at 108, para. 205.

³ *Ibid.*

⁴ See, in particular, de Wet, ‘The Modern Practice of Intervention by Invitation in Africa and Its Implications for the Prohibition of the Use of Force’, 26(4) *European Journal of International Law (EJIL)* (2015) 979, at 980. In the conclusion to the article, the more unusual formulations of ‘the customary right to non-intervention’ and ‘the right of non-intervention’ are used.

⁵ To similar effect, consider Deeks, ‘Consent to the Use of Force and International Law Supremacy’, 54 *Harvard International Law Journal* (2013) 1 and also L. Arimatsu and M. Schmitt, ‘The Legal Basis for the War against ISIS Remains Contentious’, *The Guardian* (London, 6 November 2014).

⁶ Another ‘overlap’ for the ICJ, aside from the conventional versus customary prohibition of force. De Wet, *supra* note 4, at 982. See also *Nicaragua*, *supra* note 1, at 108, para. 205.

⁷ De Wet, *supra* note 4, at 980. See also I. Brownlie, *International Law and the Use of Force by States* (1963), at 320. Consider also ‘the element of coercion’ relevant for the prohibition of intervention. *Nicaragua* case, *supra* note 1, at 108, para. 205 and, further, Jamnejad and Wood, ‘The Principle of Non-Intervention’, 22 *Leiden Journal of International Law (LJIL)* (2009) 345.

⁸ Art. 2(4).

⁹ De Wet, *supra* note 4, at 980. At another point, de Wet writes of ‘remain[ing] in accordance with the territorial integrity and political independence of a State’ (at 981). It is a curious fact that this approach exhibits the perennial appeal it does in the literature, which de Wet does recognize (the benchmark of territorial integrity and political independence ‘remains highly disputed amongst scholars’ (*ibid.*)). However, truth to tell, it is an approach that has not garnered anywhere near the same traction in the claims that states themselves make regarding threats or uses of force. The United Kingdom’s position before the ICJ in *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, 9 April 1949, ICJ Reports (1949) 4, is a rare instance in this regard (Operation Retail had ‘threatened neither the territorial integrity nor the political independence of Albania’), but the subsequent judgment of the Court suggests that the Court was ‘not in sympathy’ with it. D.J. Harris, *Cases and Materials on International Law* (6th edn, 2004), at 892.

‘the protection of the political independence of the state plays a central role [*vis-à-vis* the prohibition of force]’).¹⁰

We are thus invited to put precious purchase on the exact formulations of the Charter text¹¹ rather than to concentrate on ‘the subsequent conduct of the parties in applying the provisions of the treaty’ as might have emerged over time,¹² or, perhaps, to ask after any ‘requirements’ of intent or due diligence that, for example, might be ‘contained in the primary rule’ itself.¹³ And, as the analysis proceeds, we are struck by the multitude – the vast multitude – of sins coming within the compass of ‘force’, although it is quite evident from what is written here and from what we know more generally that ‘intervention’ carries within it an even greater multitude of sins.¹⁴ Be this as it may, once we have understood the scope of the prohibition of force, we can then move to determine the conditions for the giving of valid consent in international law – where the long-standing ‘effective control principle’¹⁵ is posited against, but also

¹⁰ De Wet, *supra* note 4, at 995–996 (also ‘[a] military intervention that violates the right to self-determination by preventing a state (and its peoples) from determining its political future independently, is bound to amount to the use of force against the political independence of a State’). See also De Wet, *infra* note 56.

¹¹ At least on this front. No mention is made, however, of the remaining 13 words of Art. 2(4) of the UN Charter – ‘or in any other manner inconsistent with the Purposes of the United Nations’ – and whether the same interpretative strategy can and should be invoked in this regard. Note, in particular, that the development of friendly relations among nations ‘based on respect for the principle of equal rights and self-determination of peoples’ is identified as one of the purposes of the organization in Art. 1(2) of the UN Charter. Harold Koh has recently argued that ‘[t]he use of the word “other” leaves open whether Article 2(4) [of the Charter] would permit a threat or use of force against the territorial integrity of a state, in a case where that threat or action was critical or essential to effectuate the U.N.’s purposes’. See H. Koh, ‘Syria and the Law of Humanitarian Intervention (Part II: International Law and the Way Forward)’, *Just Security* (2 October 2013), available at www.justsecurity.org/1506/koh-syria-part2/ (last visited 1 November 2015). De Wet’s concern is that ‘[i]f an exception to the rule (prohibition) is extensively applied, it necessarily reduces the scope of the prohibition’, but one could equally maintain this reasoning for the practice of qualifying which force is caught by the rule in question in view of the meaning awarded to ‘territorial integrity or political independence’ in Art. 2(4) of the Charter or, presumably, to the last 13 words of that provision.

¹² As it was put in Art. 19 of the 1935 Harvard Draft Convention on the Law of Treaties, reprinted in 29 *American Journal of International Law (AJIL)* (1935) Supp. 653, at 937 or, according to its modern variant, ‘[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’. See Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331, Art. 31(3)(b).

¹³ J. Crawford, *The International Law Commission’s on State Responsibility: Introduction, Text and Commentaries* (2002), at 12.

¹⁴ Hence, the suggestion that the recognition of the National Transitional Council of Libya might have been ‘premature and illegal interference in the affairs of another State’. De Wet, *supra* note 4, at 987. The notion of ‘interference’ in the context of the prohibition of intervention is not new, as the UN General Assembly itself made use of it in the articulation of the prohibition of intervention (‘armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law’). GA Res. 2625, *supra* note 2. Note also that in the *Nicaragua* case, *supra* note 1, at 119, para. 28, the ICJ concluded that ‘the mere supply of funds to the *contras*, while undoubtedly an act of intervention in the internal affairs of Nicaragua ... does not in itself amount to a use of force’. The advent of the prohibition of force has been regarded as ‘conferring on the principle of non-intervention a less precarious existence’. A. Cassese, *International Law in a Divided World* (1986), at 144.

¹⁵ De Wet, *supra* note 4, at 984.

in addition to ('and/or'),¹⁶ the need for the democratic *bona fides* of the authority issuing that consent and of any limitation (or 'threshold')¹⁷ attaching thereto (the 'vexing question' of whether this 'may be extended during a civil war').¹⁸

With the facts that preceded the USA's intervention in Panama in December 1989 – where '[t]he electoral victors were crushed' and General Manuel Noriega 'had', or held onto, 'the power' following his nullification of the election of May 1989¹⁹ – one can more assuredly appreciate how these considerations might strike opposing chords and inform our representation, or weighting, of the 'facts' differently. Yet, while the two powerful examples or 'incidents'²⁰ on offer here – namely the interventions in Haiti (1994) and Sierra Leone (1997) – derive from the identical factual premise of the ousting of governments brought to power via the ballot box,²¹ they evidently do not share the same juridical categorization for the actions that then ensued: UN Security Council authorization predated the force in one instance (Haiti), but it did not do so with respect to the other (Sierra Leone).²² This suggests that, for each and every incident before us, it is imperative to identify the actual legal justification invoked by the intervening state (or states) for a given action as well as to demonstrate which part of the 'facts' of an incident – including the presence of 'any consent'²³ – are relevant or have been transposed into that justification. That consent is forthcoming as a matter of fact does not mean to say that it is, or will be, posited either in whole or in part as the justification for that force as a matter of law.²⁴ And the identification of the justification becomes instructive, in turn, in letting us

¹⁶ *Ibid.*, at 981. The notion that a lack of effective control might be 'compensated or even outweighed by the incumbent government's (lack of) democratic legitimacy' is also entertained by de Wet (at 981).

¹⁷ *Ibid.*, at 982, 992–993 and 996–998.

¹⁸ Or, as it is put elsewhere in the article, 'the type of hostilities within which military intervention by invitation is permitted'. *Ibid.*, at 981. See further de Wet, *infra* note 51.

¹⁹ As one commentator phrased it at that time. D'Amato, 'The Invasion of Panama Was a Lawful Response to Tyranny', 84 *AJIL* (1990) 516, at 517. And, further, Nanda, 'The Validity of United States Intervention in Panama under International Law', 84 *AJIL* (1990) 494, at 498 (General Noriega 'nullified the election of the U.S.-supported opposition candidate as Panama's next President') and Farer, 'Panama: Beyond the Charter Paradigm', 84 *AJIL* (1990) 503, at 506 ('Manuel Noriega as commander of Panama's armed forces and *de facto* head of state'). On the similarities and differences of this episode with the US intervention in Grenada in October 1983, consider C. Gray, *International Law and the Use of Force* (3rd edn, 2008), at 158. See also Weiler, 'Armed Intervention in a Dichotomized World: The Case of Grenada', in A. Cassese (ed.), *The Current Legal Regulation of the Use of Force* (1986) 241, at 253–256.

²⁰ De Wet, *supra* note 4, at 985. See further W.M. Reisman and A.R. Willard, *International Incidents: The Law That Counts in World Politics* (1988).

²¹ As agreed by de Wet, *supra* note 4, at 985.

²² Gray, *supra* note 19, at 58. De Wet, *supra* note 4, at 985, seems to leave the matter somewhat open: the intervention was 'subsequently praised by [UN Security Council] resolutions, without explicitly authorizing the use of force'.

²³ As in the case of Haiti: '[T]he consent-based, nonviolent, hostilities-free entry of U.S. forces and their peaceful deployment'. See Meron, 'Extraterritoriality of Human Rights Treaties', 89 *AJIL* (1995) 78.

²⁴ On 'legal facts' and 'legal norms', consider Weiler, *supra* note 19, at 247 as well as the interpretation of the intervention in Liberia (1990). De Wet, *supra* note 4, at 990–991. Cf. S.D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (1996), at 159 and, further, Kritsiotis, 'Security Council Resolution 1101 (1997) and the Multinational Protection Force of Operation Alba in Albania', 12 *IJIL* (1999) 511. I do, however, understand 'rationale' to be separate to the notion of 'justification'. Cf. Glennon, 'Sovereignty and Community after Haiti: Rethinking the Collective Use of Force', 89 *AJIL*

know what demands are to be made of 'consent' by virtue of the law – how 'consent' is understood and applied for 'intervention by invitation', for example, is quite different to how it is understood and applied for the right of collective self-defence.²⁵

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This being so, the thought does occur from time to time of what work the idiom of regionalism can be said to be doing in a context where the 'international community' seems to be so relentlessly present and is so confidently summoned in the analysis,²⁶ resembling as it does some kind of 'quasi-jury' in the overall narrative.²⁷ Granted, there is much scope to enquire after regional inventions or iterations (especially given the record of the Organization of American States and the African Union);²⁸ to pursue the rich pickings spared by comparative regionalism ('intervention by invitation in other regions'; '[a]s far as other regions are concerned'); or to pry apart the assumptions that belie the concept of 'region' itself (or any of its derivatives, such as the 'regional arrangements or agencies' of Chapter VIII of the UN Charter).²⁹ not to mention anything of the allure (or otherwise) of regional custom.³⁰ In 'this flight into

(1995) 70, at 72. De Wet would appear to accept this with her reference to the law upon which force has been argued or is 'based'. De Wet, *supra* note 4, at 980, 985. Note, though, an earlier reference to how the Dutch government 'politically justified the supply of military equipment to the [Syrian Opposition Council]' (at 984) and the important discussion of the French intervention in Mali (at 996–997).

²⁵ Hence, in the *Nicaragua* case, *supra* note 1, at 105, para. 109, 'there is no rule permitting the exercise of collective self-defence in the absence of a request by the State which regards itself as the victim of an armed attack'. See further Friedmann, 'Intervention, Civil War, and the Role of International Law', 59 *Proceedings ASIL* (1965) 67, at 71. There is therefore no insistence in this context on the need for effective control or the democratic credentials of the (displaced) government that issues that consent. Sheik Jabir al-Ahmed al-Sabbar, the Emir of Kuwait, for instance, had made his request for outside assistance against Iraq's invasion of August 1990 from exile in Saudi Arabia. See, e.g., letter dated 12 August 1990 from the Representative of Kuwait, UN Doc. S/21498, 13 August 1990. The Emir remained, however, part of the constitutional government of the country. Note also that, in invading Kuwait, Iraq had 'made much of a claim that it has intervened at the request of elements in Kuwait opposed to the rule of the Emir and which subsequently formed the Provisional Government of Free Kuwait'. Greenwood, 'New World Order or Old? The Invasion of Kuwait and the Rule of Law', 55 *Modern Law Review* (1992) 153, at 155: 'International law gives no State a right to intervene by force in another country in order to replace its government, no matter how authoritarian that government or how impressive the democratic credentials of those installed in its place.' See further C. Kreß, 'The Fine Line between Collective Self-Defense and Intervention by Invitation: Reflection on the Use of Force against "IS" in Syria', *Just Security* (17 February 2015), available at www.justsecurity.org/2011/8/klus-kreb-force-isil-syria/ (last visited 1 November 2015).

²⁶ As is done for the periods of the Cold War and post-Cold War. De Wet, *supra* note 4, at 990 and 985, respectively; see also 989, 992.

²⁷ The phrase popularized by T.M. Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (2002), at 134.

²⁸ As is done, e.g., with the African Charter on Democracy, Elections and Governance 2007, available at www.ipu.org/idd-E/afr_charter.pdf (last visited 1 November 2015). De Wet, *supra* note 4, at 986. See further Akehurst, 'Enforcement Action by Regional Agencies, with Special Reference to the Organization of American States', 42 *British Yearbook of International Law (BYIL)* (1967) 175, at 182.

²⁹ With all of the difficulties of interpretation that this imposes. Akehurst, *supra* note 28, at 177–178, 181. Most significantly, of course, which is not 'formally applicable to NATO'. Simma, 'NATO, the UN and the Use of Force: Legal Aspects', 10 *EJIL* (1999) 1, at 10. See also Akehurst, *supra* note 28, at 179–180.

³⁰ Condorelli, 'Custom', in M. Bedjaoui (ed.), *International Law: Achievements and Prospects* (1991) 179, at 206–207.

regionalism',³¹ however, it is difficult to know what one is to make of the dissections of inter- or intra-regionalism (as between, for example, the African Union and the Economic Community of West African States) or of how the dynamic of the 'region' informs events 'currently playing out in Africa',³² when the 'international community' is itself in such a state of ebullient health – rejecting, recognizing, acquiescing, endorsing, and condoning the actions 'by African States in other African States'.³³

For all of the surrounding practice on the democratic *bona fides* of governments after the Cold War, the assessment finds that '[i]nconsistencies'³⁴ are really the order of the day and that, in the end, the mood music recounted here gives way to a very Gradgrindian 'facts on the ground'³⁵ approach that secures pride of place for the principle of effective control in regulating the validity of consent given for force. (One would have hoped, though, for more of a sustained treatment of how precisely states have argued their various actions in legal terms. In my view, it is highly relevant to the precedential value of an incident if an intervening state invokes an argument that does not rest on consent stemming from the effective control or democratic *bona fides* of its progenitor. What if the 'disputed'³⁶ basis of an intervention is unpacked and explored and ultimately found *not* to rest or rely on consent? What if the intervening state has relied instead on a novel and free-standing right of pro-democratic intervention?³⁷ And what if this justification happens to fall on sympathetic ears?³⁸ Why would it then matter for the purposes of juridical categorization or the examination of the lawfulness of a given action as to what the facts are regarding the 'presumption or fiction'³⁹ of 'de facto control of a state's territory'?)⁴⁰

To be sure, and steadfast though it may seem, the principle of effective control is not without limitation as an underpinning for consent for force within international law,

³¹ Schreuer, 'Regionalism v. Universalism', 6 *EJIL* (1995) 477, at 479.

³² De Wet, *supra* note 4, at 981, especially the intervention in Libya (2011) (at 987, 991). Note the notion of the 'intra-African phenomenon' (at 998). Consider also the insights of Akehurst's functionalist approach. Akehurst, *supra* note 28, at 184.

³³ De Wet, *supra* note 4, at 981, and this includes the suggestion of *ex post facto* authorization of the UN Security Council (at 985). Equally, the 'modernity' of the practice (as in 'modern State practice indicates') recalled here imports a crucial temporal dimension into the argumentation (e.g., 'the modern practice of intervention by invitation [which] is first and foremost an intra-African phenomenon'), and it would have been extremely useful to know more of the detail of the *pre-modern* African practice as defined here, and whether it departed from or inclined toward 'a presumption of continued effective control of an incumbent government' (at 992).

³⁴ *Ibid.*, at 988.

³⁵ *Ibid.*, at 984.

³⁶ As per *ibid.*, at 985.

³⁷ Rather usefully, consider Nowrot and Schabacker, 'The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone', 14 *American University International Law Review* (1998) 312, at 378. And I stress the 'free-standing' nature of the proposition at hand – rather than the admixture of 'fact' and 'law' presented as the 'many forms' of 'pro-democratic intervention' itemized by Wipphan, 'Pro-Democratic Intervention', in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (2015) 797, at 799.

³⁸ I.e., if, as the ICJ said in the *Nicaragua* case, *supra* note 1, at 109, para. 207, '[r]eliance by a State on a novel right or an unprecedented exception [is] ... shared in principle by other States'.

³⁹ De Wet, *supra* note 4, at 992.

⁴⁰ As put in the abstract. *Ibid.*, at 981; or 'demonstrable and sustainable effective control over most of the territory and the State institutions' (at 984).

for, as is made clear, the orthodox view holds that this position only obtains ‘as long as the level of violence has not crossed the threshold of a “civil war”’.⁴¹ Thus, there is a certain point – a line in the air, if you will – that constitutes a ‘major restriction’ on what is permitted for consent and its consequences.⁴² One can sense the logic for this position from Resolution III of the Institut de droit international at Wiesbaden in August 1975, where an escalation in violence seemed to be foremost among the considerations presaging the prohibition of ‘giving assistance to parties to a civil war which is being fought in the territory of another State’,⁴³ with civil war defined as:

any armed conflict, not of an international character, which breaks out in the territory of a State and in which there is opposition between: (a) the established government and one or more insurgent movements whose aim is to overthrow the government or the political, economic or social order of the State, or to achieve secession or self-government for any part of that State, or (b) two or more groups which in the absence of any established government contend with one another for the control of the State.⁴⁴

Of course, this language is much affected by that of the *jus in bello* – specifically that contained in common Article 3 of the four Geneva Conventions of August 1949 – and contrasts with the position before the Second World War where:

[i]n the proper sense of the term a civil war exist[ed] when two opposing parties within a State have recourse to arms for the purpose of obtaining power in the State, or when a large portion of the population of a State rises in arms against the legitimate Government ... [b]ut it may become war through the recognition of the contending parties, or the insurgents, as a belligerent Power.⁴⁵

There is a real question, however, to be asked as to the prudence of conscripting terminologies honed for one part of international law’s engagements (that is, the *jus in*

⁴¹ *Ibid.*, at 992; see also at 981. Whatever this term might mean or have meant. Brownlie, *supra* note 7, at 324.

⁴² Gray, *supra* note 19, at 81.

⁴³ Institut de droit international at Wiesbaden Res. III, 14 August 1975, Art. 2(1). As can be gleaned from the preamble of the Resolution (‘any civil war may affect the interests of other States and may therefore result in an international conflict if no provision is made for very stringent obligations of non-intervention’; ‘the violation of the principle of non-intervention for the benefit of a party to a civil war often leads in practice to interference for the benefit of the opposite party’). Cf. the appreciation of Gray, *supra* note 19, at 81: ‘The duty of non-intervention and the inalienable right of every state to choose its political, economic, social, and cultural systems have brought with them the duty not to intervene to help a government in a civil war’ and of Res. III, Art. 3(b): ‘[A]ny technical or economic aid which is not likely to have any substantial impact on the outcome of the civil war’. Consider also Brownlie, *supra* note 7, at 313.

⁴⁴ Res. III, *supra* note 43, Art. 1(1).

⁴⁵ L. Oppenheim, *International Law: A Treatise*, vol. 2: *Disputes, War and Neutrality*, edited by H. Lauterpacht (7th edn, 1952), at 209; H. Lauterpacht, *Recognition in International Law* (1947), at 175ff; P. Malanczuk, *Akehurst’s Modern Introduction to International Law* (7th edn, 1997), at 322. For an equivalence between ‘civil war’ and ‘recognition of belligerency’, see de Wet, *supra* note 4, at 992. See, however, S. Sivakumaran, *The Law of Non-International Armed Conflict* (2012), at 161; M.N. Shaw, *International Law* (7th edn, 2014), at 833; Doswald-Beck, ‘The Legal Validity of Military Intervention by Invitation of the Government’, 56 *BYIL* (1985) 189, at 196–197. De Wet also develops, *supra* note 4, at 993, an equivalence between ‘civil war’ and the ‘threshold for applicability’ of common Art. 3 to the Geneva Conventions – Geneva Conventions 1949, 75 UNTS 31, 85, 135 and 287 – an approach that Sivakumaran has suggested ‘has the potential to mislead’. *Ibid.*, at 161.

bello, where, presumably, the idea is to award as broad a berth as possible for regulating non-international armed conflicts)⁴⁶ in order to transfer them to another (where other considerations might well augur for greater latitude for consent: the political independence of a state would really be dramatically undercut, de Wet argues, if ‘military intervention by invitation of the incumbent government would only be permissible where the violence within the state was sporadic and isolated instances of riot’).⁴⁷ It is worth recalling, too, that, since the end of World War II, the *jus ad bellum* and *jus in bello* have been plotted according to separate trajectories – of ‘force’ for the former and of ‘armed conflict’ for the latter – for the activation of their respective corpuses and that this degree of individualized focus and tailored development has proven much more workable than the singular paradigm of ‘war’ that once mapped the provenances of both of these regimes.

There is an additional problem to be identified in that, as far as the conventional arrangements are concerned, ever since the adoption of Additional Protocol II to the Geneva Conventions in June 1977, the law has in fact embraced *two* definitions for the concept of non-international armed conflict – since Additional Protocol II makes provision for those non-international armed conflicts:

which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.⁴⁸

This comes much closer to the mark of the previous order, it must be said,⁴⁹ but it also complicates the enterprise of forging seamless juxtapositions of ‘fragments’ drawn from different quarters of the international legal order.⁵⁰ And while we are encouraged to treat the concepts of ‘civil war’ and ‘non-international armed conflict’ as being synonymous for the purpose of the present analysis,⁵¹ it appears – reassuringly

⁴⁶ As intimated by de Wet, *supra* note 4, at 993 (‘civil war broadly’). Note also Alston, Morgan-Fletcher and Abresch, ‘The Competence of the UN Human Rights Council and Its Special Procedures in Relation to Armed Conflicts: Extrajudicial Executions in the “War on Terror”’, 19 *EJIL* (2008) 183, at 205: ‘Conflict qualification is unquestionably an element of the practice of humanitarian law’.

⁴⁷ De Wet, *supra* note 4, at 994. And Brownlie, *supra* note 7, at 324: ‘[T]he prohibition [of intervention] can hardly apply to every case of civil disorder since this would considerably restrict the freedom of action of governments in obtaining foreign military and economic aid.’

⁴⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II) 1977, 1125 UNTS 609, Art. 1(1). As distinct from the customary definition for non-international armed conflict, which seems to be an issue at the bottom of de Wet, *supra* note 4, at 993.

⁴⁹ Certainly, the view of Gray, *supra* note 19, at 81, n. 70.

⁵⁰ And I think it is better to emphasize this aspect rather than any confirmatory power of Additional Protocol II, *supra* note 48, as per de Wet, *supra* note 4, at 993.

⁵¹ This encouragement is pursued more tentatively at first (‘[i]f one accepted that the [term] civil war ... had to be interpreted synonymous to a [non-international armed conflict]’). De Wet, *supra* note 4, at 994), but quickly becomes ingrained into the reasoning (‘the government can also come about through a civil war (NIAC)’ (at 995); ‘to overthrow the incumbent government through civil war (NIAC)’; ‘foreign military assistance during a civil war (NIAC)’ (at 995); ‘[d]etermining in practice when hostilities within a State has escalated beyond mere internal disturbances and constitutes a civil war (NIAC) remains highly challenging’) (at 996). Note the notion, too, of ‘civil conflict’ (at 998).

or otherwise – that ‘in practice’ drawn from Mali and the Democratic Republic of Congo ‘military intervention on the invitation of the incumbent government is tolerated ... in situations that may actually have escalated into a [non-international armed conflict]’⁵² and that a ‘similar leniency’ has attended interventions in both Afghanistan and Iraq.⁵³ It is also interesting to observe that in the ninth edition of *Oppenheim’s International Law*, published in 1992, the term ‘civil war’ is retained for the qualification of permissible ‘assistance on request’⁵⁴ and that this is done in order to convey a sense of the impasse or the impossibility in the representation of a state in these circumstances: ‘In such a case the authority of any party to the conflict to be the government entitled to speak (and to seek assistance) on behalf of the state will be doubtful’.⁵⁵

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A final matter to present itself in the closing pages of the analysis relates to the right of self-determination, and this recaptures an earlier claim that ‘intervention on request which violated the right to self-determination ... would constitute an intervention “against the political independence” of the requesting state’.⁵⁶ We can deduce from this statement that not all interventions occurring at the behest of ‘the requesting state’ violate the right of self-determination in international law, and the position taken is that the right of self-determination ‘set[s] a limit to the right of the incumbent government to receive foreign military assistance during civil war’.⁵⁷ As has been discussed above, however, a ‘limit’ is already in place for this ‘right’⁵⁸ of the incumbent government by virtue of the occurrence of civil war itself,⁵⁹ so it is an open question whether

⁵² De Wet, *supra* note 4, at 996. See further the ‘presumption’ invoked at note 39 in this article.

⁵³ *Ibid.*, at 997. See also Cassese, *supra* note 14, at 144–145. This ‘leniency’ or ‘extensive leeway’ for ‘inviting direct military support from other States’ is adverted to in the conclusion. De Wet, *supra* note 4, at 998. In her seminal study, Doswald-Beck concludes that these matters are encumbered by various relativities – that ‘although *de facto* control is generally required of a new regime, recognition will rarely be withdrawn from an established regime, even once it has lost control, if there is no new single regime in control to take its place’. Doswald-Beck, *supra* note 45, at 199. De Wet, *supra* note 4, at 998, would seem to accept this with the development of a presumption of ‘continued legitimacy’ for the established regime.

⁵⁴ R. Jennings and A. Watts (eds), *Oppenheim’s International Law*, vol. 1: *Peace* (9th edn, 1992), at 435–439. Tellingly, this is not considered as part of the taxonomy on the ‘[c]ircumstances which may justify intervention’ (at 439–447), but features under its own rubric (‘[a]ssistance on request’) because ‘[t]he requirement that interference be dictatorial if it amounts to intervention excludes from intervention assistance rendered by one state to another at the latter’s request and with its consent’ (at 435). See further Brownlie, *supra* note 7.

⁵⁵ Jennings and Watts, *supra* note 54, at 438. See also the reference to ‘an alleged government having only limited, temporary and precarious authority’ (at 436). Note, however, the observation of Brownlie, *supra* note 7, at 323: ‘[O]nce intervention has commenced the requesting government ceases to be a completely free agent as its security rests on foreign aid.’ Malanczuk considers ‘the government [as] the agent of the state’. Malanczuk, *supra* note 45, at 322.

⁵⁶ De Wet, *supra* note 4, at 980.

⁵⁷ *Ibid.*, at 995. Consider, too, the discussion in Brownlie, *supra* note 7, at 323.

⁵⁸ *Ibid.* I presume that the reference to ‘receive’ is intended to mean to ‘request’ – i.e., by the incumbent government – as in ‘inviting any foreign military assistance’. De Wet, *supra* note 4, at 995; see also at 992.

⁵⁹ As discussed in Jennings and Watts, *supra* note 54, at 437–438: ‘So long as the government is in overall control of the state and internal disturbances are essentially limited to matters of local law and order

the idea is for the logic of self-determination to bolster the argument for an absolute prohibition of intervention in the event of civil war⁶⁰ or whether it is intended as a separate and parallel limitation – one that, presumably, applies to non-international armed conflicts more generally, given what is maintained elsewhere in the article.⁶¹ Of course, in a sure contrast to the impetus behind Resolution III of August 1975,⁶² the ‘principle’ of self-determination informed a good deal of the thinking of the Institut de droit international in the adoption of Resolution II in Rhodes in September 2011,⁶³ and this might give some pause for thought as to whether it is ever conceivable that force or intervention will be ‘allowed at the request of the opposition’ if undertaken in the name of or for the cause of self-determination.⁶⁴

or isolated guerrilla or terrorist activities, it may seek assistance from other states which are entitled to provide it. But when there exists a civil war and control of a state is divided between warring factions, any form of interference or assistance ... to any party amounts to intervention contrary to international law.’ However, see the discussion in Malanczuk, *supra* note 45.

⁶⁰ Again, as discussed in Jennings and Watts, *ibid.*, where de Wet, at *supra* note 4, at 995, appears to accord with this view: ‘Where an incumbent government has lost control over parts of its population and territory, it would lack the level of representativeness required by the right to self-determination, for the purpose of inviting any foreign military assistance.’ That said, the ‘absoluteness’ of this prohibition is itself compromised by suggestions of a ‘right’ of counter-intervention. Perkins, ‘The Right of Counterintervention’, 17 *Georgia Journal of International and Comparative Law* (1987) 171. See also Res. III, *supra* note 43, Art. 5: ‘Whenever it appears that intervention has taken place during a civil war in violation of the preceding provisions, third States may give assistance to the other party only in compliance with the Charter and any other relevant rule of international law, subject to any such measures as are prescribed, authorized or recommended by the United Nations.’

⁶¹ See note 51 in this article and also the remark ‘that a violation of the right to self-determination in the form of foreign military assistance during a civil war (NIAC) can simultaneously result in a violation of the prohibition of the use of force’. De Wet, *supra* note 4, at 995. Curiously, as the analysis comes to a close, the interest in the Geneva Conventions and the Additional Protocols dissipates – even though Additional Protocol I designates ‘armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination’. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) 1977, 1125 UNTS 3, Art. 1(4) as international armed conflicts following compliance with the procedure set out in Additional Protocol I, Art. 96(3), and, thus, removes these armed conflicts from the designation of non-international armed conflict as per the discussion in note 51.

⁶² Res. III, *supra* note 43, Art. 1(2). And where Resolution II is applicable to ‘situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, including acts of terrorism, below the threshold of non-international armed conflict in the sense of Article 1 of Protocol II Additional to the Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts of 1977’.

⁶³ Whose preamble provides that ‘each State must respect the principle of equal rights and self-determination of peoples’ as enshrined in the UN Charter – and that ‘[m]ilitary assistance is prohibited when it is exercised in violation of the Charter of the United Nations, of the principles of non-intervention, of equal rights and self-determination of peoples and generally accepted standards of human rights and in particular when its object to support an established government against its own population’. Institut de droit international at Rhodes Res. II, 8 September 2011, Art. 3(1). See also Brownlie, *supra* note 7, at 329.

⁶⁴ *Nicaragua* case, *supra* note 1. Or, in an alternative reading, whether any intervention can be said to ‘coerce the outcome of the internal contest for political power and thereby violate the right to self-determination’. De Wet, *supra* note 4, at 995. Note further Brownlie, *supra* note 7, at 323 (regarding the circumstance where ‘a substantial body of the population [that] is giving positive support to the insurgents’).