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FROM UKRAINE AND YEMEN TO CAR, MALI AND SYRIA: IS THIRD COUNTRY INTERVENTION BY INVITATION RESHAPED IN THE AFTERMATH OF RECENT PRACTICE?

«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 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»

ICJ, Nicaragua Case, 1986, para. 204

1. *Introductory remarks*

Invitation as a notion provides a lawful basis for a military intervention by foreign troops in an internal armed conflict, at the invitation of the government of the State concerned. Or not? Current discussions following interventions in Syria, Ukraine/Crimea, Lib-

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ya, Mali, or in Haiti, Sierra Leone, Côte D'Ivoire and Malawi, especially in situations of disputes over recognition in governments, focus on the democratic legitimacy of the "inviting" government and as a consequence, on the need for a *«qualitative evaluation of the party issuing the invitation»*[1]. And most importantly, on an extended notion of the principle, so as to address the invitation by actors other than the government, in particular *«where armed opposition groups control a substantial portion of national territory»*[2]. Moreover, following the adoption of the UN Charter and the non intervention principle, the response of international and regional organisations, such as the EU, OAS, EU and the Council of Europe on the legitimacy of intervention following invitation remains inconclusive. Hence, invitation of a government as a basis for multilateral interventions, either in addition to, or in combination with, an authorisation or commendation of the UN Security Council has emerged, especially since the cold war (Iraq 2004, Sudan 2004, Chad 2008, Solomon Islands 2003).

Questions that will be dealt with in the current paper are: Can in such a situation the government still issue an invitation on behalf of the State? Or the principle of "effectivity" would require otherwise? Can third parties give assistance to either the State or the opposition, in case where the government is not the "legitimate" one? Or must third parties abstain from aiding either side, since neither can legitimately speak on behalf of the State? Is intervention by invitation an autonomous justification for legitimate use of force? Traditional international law and politics have always been in constant search for a balance that will allow States to both preserve their "Westphalian" sovereignty, by addressing the danger of armed opposition and other transnational terrorist networks, while allowing human rights, rule of law and democracy to enter in the realm of high politics.

2. *The principle of non-intervention and "invitations to military assistance" in contemporary international law*

a) Non intervention: definitions

The principle of non-intervention in the affairs of other States is a fundamental principle governing international relations, closely linked to those of sovereign equality, territorial integrity and political independence of States and enshrined in various international instruments and soft law documents[3]. It is true that the principle of non-

[1] G. H. FOX, *Intervention by invitation (2014)*, in M. WELLER (ed.), *The Oxford Handbook on the Use of Force*, Oxford, 2015, forthcoming; Wayne State University Law School Research Paper No. 2014-04. Available at SSRN: http://ssrn.com/abstract=2407539.

[2] See G. NOLTE, *Intervention by Invitation*, in *Max P. Enc. Pub. Int. Law*, 2010.

[3] 68 Art. 2 (7) UN Charter, Art. 8 Arab League Pact, Art. 19 OAS Charter, Art. 3 OAU Charter, Art. 4g AU Constitutive Act; Resolution n. 2131/1965 of the UN General Assembly of 21st December 1965, *Declaration on the inadmissibility of intervention in the domestic affairs of States and the protection of their independence and sovereignty*, in UNGA A/RES/20/2131, 21st December 1965; Resolution n. 2625/1970 of the UN General Assembly of 24th October 1970, *Declaration on principles of international law concerning friendly relations and cooperation among States in accordance with the Charter of the United Nations*, in UNGA A/RES/25/2625, 24th October 1970; Resolution n. 36/103/1981 of the UN General Assembly of 9th December 1981, *Declaration on the inadmissibility of intervention and interference in the internal affairs of States*, in UNGA A/RES/36/103, 9th December 1981. See in general A. KAWSER, *The domestic jurisdiction clause in the UN Charter: a historical view*, in *Singapore Yearbook of International Law*,

intervention rarely had a purely legal connotation[4]; it is often «*the only protection that less powerful States have against the strong…*»[5] and is almost always used in the political rhetoric to justify an intervention with ulterior motives, seldom motivated by the desire to assist consenting governments face threats, but rather for personal gains (be it natural resources or dominion over the State in crisis).

Although there is no official definition, an unlawful intervention consists of «*coercive action taken by one State to secure a change in the policies of another*»[6]. Thus, it consists of three elements: it must be forcible or dictatorial[7]; it must bear on matters on which each State is permitted by the principle of State sovereignty to decide freely; and finally it must in effect deprive the State intervened against of control over the matter in question. A simple interference does not equate with intervention[8]. Those elements are confirmed by the jurisprudence of the International Court of Justice[9], the Declaration on friendly relations, the Declaration on the inadmissibility of intervention, as well as UNSC resolutions[10].

A further consequence of the principle of non-intervention is 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*»[11]. Thus, forcible intervention in a civil war on the side of the insurgents is prohibited. On the other hand, «*intervention is allowable at the request of the government of a State*»[12].

2006, pp. 175-197. The said principle forms part of customary law. See the judgement of the International Court of Justice of 27th June 1986 on the *case concerning military and paramilitary activities in and against Nicaragua*, *Nicaragua v. United States*, in *ICJ Reports*, 1986, p. 14, paras. 184, 203.

[4] For the principle in general and its present-day significance, see A. CASSESE, *International law*[2], Oxford, 2005, pp. 53-55.

[5] See, for instance, the statement of Ecuadorian president R. Correa criticizing M. Gaddafi's killing: *«We are not defending the regime of Gaddafi, we defend the sovereignty of countries, non-intervention»*, available at http://en.mercopress.com/2011/10/24/ecuador-president-condemns-killing-of-gaddafi-and-family-members-as-homicide.

[6] See also M. JAMNEJAD, M. WOOD, *The principle of non-intervention*, in *Leid. Jour. Int. Law*, 2009, pp. 347-348. Other definitions of intervention refer to *«organised»* as *«systematic activities directed across recognized boundaries and aimed at affecting the political authority structures of the target»*. See O. R. YOUNG, *Systemic bases of intervention*, in J. N. MOORE (ed.), *Law and civil war in the modern world*, Baltimore, 1974, p. 111. Another definition by Oppenheim defines intervention as *«dictatorial interference by a State in the affairs of another State for the purpose of maintaining or altering the actual condition of things»*. See L. OPPENHEIM, H. LAUTERPACHT, *International law: a treatise*[8], London, 1955, p. 134. The latter definition, however, is more restrictive as it excludes intervention by invitation.

[7] The ICJ in Nicaragua case confirmed that it is *«the element of coercion, which defines, and indeed forms the very essence of, prohibited intervention»* (*ICJ Reports*, 1986, p. 108, para. 205). And as Oppenheim's *International Law* has explained, *«the interference must be forcible or dictatorial, or otherwise coercive, in effect depriving the state intervened against of control over the matter in question. Interference pure and simple is not intervention»*. (See R. JENNINGS, A. WATTS (eds.), *Oppenheim's international law*[9], vol. I, Oxford, 1993, p. 432).

[8] See R. JENNINGS, A. WATTS (eds.), *Oppenheim's international law*, cit., p. 428.

[9] See the judgement of the International Court of Justice of 9th April 1949 on the *Corfu Channel case*, *United Kingdom vs. Albania*, in *ICJ reports*, 1949, p. 35; the judgment concerning the *Nicaragua case*, cit., pp. 202-209; the judgement of the International Court of Justice of 19th December 2005 on the *case concerning armed activities on the territory of the Congo, Democratic Republic of Congo vs. Uganda*, in *ICJ reports*, 2005, pp. 164-165.

[10] See the Resolution n. 1234/1999 of the UN Security Council of 5th November 1999 *on the situation in the Democratic Republic of Congo*, S/RES/1273 (1999); the Resolution n. 1343/2001 of the UN Security Council of 7th March 2001 *on the situation in Liberia*, S/RES/1343 (2001).

[11] See the *Declaration on friendly relations*, cit., Principle III, (2).; the judgment on *Nicaragua case*, p. 206 et seq.

[12] See the judgment on *Nicaragua case*, cit., para. 246.

b) The intervention by invitation in theory
i) The traditional approach

In international law, the right of a legitimate government to invite foreign troops in its territory is well settled. And when the legitimate government of the State consents to a military intervention by third States, such consent (through invitation or otherwise) justifies action that would otherwise constitute an unlawful unilateral use of force by one State within the territory of another. Each State is free to allow another State to use force within its boundaries, in pursuance of the principle *volenti non fit injuria*, *i. e.* an illegal act is no longer such if the party whose rights have been infringed previously consented thereto, provided of course that the prohibition of the use of force – arguably a *jus cogens* norm – can be derogated from[13].

The invitation has to be clear, given in advance and of free will, and has to come from a legitimate authority, all conditions for a "valid consent", as a condition precluding wrongfulness, also included in the articles on the Responsibility of States for internationally wrongful acts. Pursuant to article 20: *«valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent»*. In the *Nicaragua case* the ICJ examined – *obiter dicta* as it was not invoked by the US – the "invitation" argument, acknowledging that only a government may invite outside help, whereas a third State may not forcibly help the opposition overthrow the government[14]. Furthermore, article 3e of the *«definition of aggression»* implicitly refers to the right of a State to invite a foreign army, by stipulating that, when consent of the receiving State is withdrawn, the failure of the foreign army to leave, or any actions exceeding the framework of the invitation would constitute aggression[15].

However, the doctrine is open to abuse, since in almost all unilateral interventions, concerned States have justified military interventions based on alleged invitations by different actors in a conflict, e.g. USSR in Hungary (1956), France/Belgium in Zaire (1978), USSR in Afghanistan (1979), US in Grenada (1983) etc.[16] Therefore, the case is quite different when there is an armed conflict unfolding. According to the resolution of the *Institut de Droit International «The principle of non-intervention in civil wars»* (1975), any assistance to parties to a civil war, which is being fought in the territory of another State, is prohibited. This was also the British official position, as it was reflected in the 1984 British Foreign Policy Document[17]: *«the principle of non-intervention and the inalienable right of every State to choose its political, economic, social and cultural systems entails also the duty not to intervene to help a government in a civil war, especially if control of the territory is divided between two factions»*.

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[13] See A CASSESE, *International law*, Oxford, 2001, pp. 368-371. See, for a thorough discussion, T. CHRISTAKIS, K. MOLLARD-BANNELIER, *Volenti non fit injuria? Les effets du consentement à l'intervention militaire*, in *Ann. Fr. droit int.,* 2004, pp. 102-137; G. NOLTE, *Eingreifen auf Einladung. Zur völkerrechtlichen Zulässigkeit des Einsatzes fremder Truppen im internen Konflikt auf Einladung der Regierung*, Berlin, 1999; A. TANCA, *Foreign armed intervention in internal conflict*, Leiden, 1993.

[14] See the judgment on the *Nicaragua case*, cit., para. 246.

[15] *«3.(e): 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»*, see the Resolution n. 3314/1974 of the UN General Assembly of 14th December 1974, *Definition of aggression*, in UNGA res. 3314/1974.

[16] For a thorough list see A. TANCA, *Foreign armed intervention*, cit., p. 149 et seq.

[17] Available in the *Br. YB. Int. Law*, vol. 57 (1986), p. 614.

The 2011 resolution of the *Institut de Droit International* on *«Military assistance upon request»* has set a series of additional criteria regarding the legitimacy of interventions by invitation. In particular, pursuant to the new resolution: a) its field of application is in 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, b) military assistance is prohibited when it is exercised in violation of the Charter of the United Nations, of the principles of non-intervention, of equal rights and self-determination of peoples and generally accepted standards of human rights and in particular when its object is to support an established government against its own population, c) military assistance shall not be provided where such provision would be inconsistent with a Security Council resolution relating to the specific situation, adopted under Chapter VII of the Charter of the United Nations, d) the request shall be valid, specific and in conformity with the international obligations of the requesting State, e) even if military assistance is based on a treaty, an *ad hoc* request is required for the specific case, f) any request that is followed by military assistance shall be notified to the Secretary-General of the United Nations; g) the requesting State is free to terminate its request or to withdraw its consent to the provision of military assistance at any time, irrespective of the expression of consent through a treaty, h) military assistance shall be carried out in conformity with the terms and modalities of the request, i) military assistance shall not be provided beyond the time agreed to by the requesting State, without further agreement thereon[18].

Be that as it may and notwithstanding the theoretical discrepancies and the problems arising in the practical implementation, the "intervention by invitation" theory still constitutes a valid legal argument put forward by third States when they intervene by force in other States. The most recent example, highlighted by declarations of public officials of the intervening States, are the airstrikes carried out by USA, United Kingdom, France, Netherlands and others against the Islamic State of Iraq and the Levant (ISIL) at the request of the Iraqi authorities (from September 2014 onwards).

ii) Who is the legitimate authority to extend an invitation?

The main question and point of conflict that arises in the "intervention by invitation" theory is who is the legitimate government that may extend such an invitation. The words *«valid»* and *«within the limits of that consent»* are crucial points of the intervention's legitimacy. Invitations by non-recognized authorities or actions exceeding the limits of the invitation leave often the so-called "intervention by invitation" theory open to abuse. In fact the majority of instances hitherto are of dubious legality, especially in situations of civil war where the intervention may violate the right to self-determination of peoples, if the insurgents enjoy the support of a large part of the population or control a considerable part of the national territory. In such a case the question that arises is: who is the legitimate government that may extend such an invitation?

Although the ICJ examined the "invitation" argument in *Nicaragua*, it did not go so far as to elucidate which entity is to be considered the legitimate government of the Country, the one that is entitled to invite outside help during a civil conflict. In the past, a similar

[18] See the Resolution of the *Institut de Droit International* of the 8th September 2011, Session de Rhodes – 2011, 10th Commission – Sub-group C, *Military assistance on request*, available at http://www.justitiaetpace.org/idiE/resolutionsE/2011_rhodes_10_C_en.pdf.

confusion was created during the 1983 US intervention in Grenada. One of the justifications put forward by the invading party was an alleged invitation by the Country's Governor-General. However, the latter did not have any real authority since according to the *«Peoples' Laws»*, proclaimed by the Bishop government, all executive and legislative power were vested in the People's Revolutionary Government, the Governor-General being merely the Queen's representative – a relic of the British rule. This question has once again tormented the theory and practice of international law both in the case of Libya and Syria.

One of the criteria of legitimacy of a third Country intervention by invitation is that the authority extending such an invitation is the legitimate government of the Country. Thus, forcible intervention in an armed conflict unfolding on the territory of a State on the side of the insurgents is prohibited – arguably also on the side of the government if we follow the criteria set by the *Institut de Droit International* and more specifically the permissibility of intervention only when the situation is below the applicability threshold of Additional Protocol II '77. Such a move could run contrary to the principle of non-intervention, at least, as it was described above. Even so, a salient exception is the assistance offered to recognized national liberation movements struggling against colonial and alien domination and racist regimes in the exercise of their right to self-determination.

One of the features of the principle of non-intervention is the prohibition of interfering in the internal organization of a foreign State. A corollary is the approach of States not to recognize governments but only States (for instance the famous *«Estrada Doctrine»* developed by the Mexican government in 1930)[19]. Indeed, according to the "objective" standard, a regime is not recognized by virtue of its democratic legitimacy, but on the basis of the effective control it exercised over its territory and the obedience or allegiance of its population, although a salient exception to that was the United States, which refused for decades to recognize China, although the latter had an effective control over the whole of the territory[20]. Given that forcible unilateral intervention in favour of an opposition group in civil conflict is prohibited, when armed interventions were launched against non-recognised regimes, the legal justifications put forward by those intervening referred – *inter alia* – to a request for such intervention by the group allegedly possessing lawful authority or supported by the majority of the people[21].

iii) The right to self-determination and invitations: discussing the cases of Libya and Syria. Could a non-State group fighting for democracy invite outside help?

When a civil war is raging in a foreign State, the other States have a duty to refrain from assisting in any manner whatsoever the insurgents. This duty retreats whenever the insurgents qualify as national liberation movements[22]. In particular, in such a case, third

[19] See, for the famous *«Estrada Doctrine»* developed by the Mexican government in 1930, P. JESSUP, *The Estrada Doctrine*, in *Am. Jour. Int. Law*, 1931, pp. 719-723. See also http://www.diplomaticosescritores.org/obras/DOCTRINAESTRADA.pdf.

[20] See J. VERHOEVEN, *La reconnaissance internationale dans la pratique contemporaine*, Paris, 1975, pp. 90-92. See L. T. GALLOWAY, *Recognizing foreign governments: the practice of the United States*, Washington DC, 1978; M. J. PETERSON, *Recognition of governments should not be abolished*, in *Am. Jour. Int. Law*, 1983, pp. 31-50.

[21] See O. SCHACHTER, *Is there a right to overthrow an illegitimate regime?*, in *Mélanges Michel Virally. Le droit international au service de la justice et du développement*, Paris, 1991, p. 425.

[22] See *Declaration on Friendly Relations*, cit., Principle V, §5: *«such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter»*. There is extensive discussion as to the kind of assistance peoples struggling for self-determination are entitled to. See in that respect G. ABI-SAAB, *Wars of national liber-*

States can assist them and even recognise them *«without this being considered a premature recognition or constituting an intervention in the domestic affairs of the colonial or alien government»*[23]. During the decolonisation phase, several groups of insurgents qualified as national liberation movements. Gradually, they acquired their independence from foreign domination and turned into proper States. The remaining two groups that bear the rights and duties of national liberation movements are the Frente Polisario in Western Sahara, fighting against the occupation by Morocco, and the Palestine Liberation Organization representing the Palestinian people fighting against Israeli occupation[24].

In view of the widespread recognition of the National Transitional Council of Libya by the international community, could one maintain that there is a leaning of attributing particular *status* to peoples fighting for democracy (*i. e.* internal self-determination) similar to that which national liberation movements fighting for external self-determination enjoyed? Is there a tendency of recognising the people fighting for democracy as a distinct subject of international law? Has the Arab Spring changed the way invitations are perceived in international law since the famous statement from the *Nicaragua case*: *«no such general right of intervention, in support of the opposition within another State, exists in contemporary international law»*? Or does the law remain – to a large extent – the same? International practice recorded by the response of third States to the *«Arab Spring»* does not support such a theory.

In particular, this set of questions arose upon the outbreak of the uprising in Libya (February 2011) and the series of recognitions of the National Transitional Council – the main and most supported opposition group – that followed (from March 2011 henceforth). Indeed, in the case of Libya there was a blurring regarding the entity that constituted the legitimate representative of the State[25]. Many States recognized the NTC whether as the legitimate representative of the Libyan people or as the legitimate government of Libya[26].

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ation in the Geneva Conventions and Protocols, in *Recueil des cours*, 1979, pp. 371-372; A. TANCA, *Foreign armed intervention*, cit., pp. 100-110. On the other hand the ICJ in the *Nicaragua* judgment left on one side the question whether assistance to national liberation movements can be considered as an exception to the principle of non-intervention, para. 206. Be that as it may a foreign direct armed intervention is hardly considered legitimate.

[23] G. ABI-SAAB, *Wars of national liberation*, cit.

[24] For the *status* of national liberation movements as subjects of international law, see art. 1 (4) Additional Protocol I (1977) to the Geneva Conventions of 1949 relating to the protection of victims of international armed conflicts, whereby situations in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination are recognized as armed conflicts of international character. See the *Declaration on Friendly Relations*, cit., principle V (7); see the advisory opinion of the International Court of Justice of 16th October 1965 on *Western Sahara*, in *ICJ Reports*, 1975, p. 55.

[25] See, in that respect, S. TALMON, *Recognition of the Libyan Transitional Council*, in *Asil Ins.*, 2011, p. 15.

[26] The first Country to recognise the Libyan insurgents was France, stating that the NTC was *«the sole legitimate representative of the Libyan people»*; see A. COWELL, S. ERLANGER, *France Becomes First Country to Recognize Libyan Rebels*, in *NY Times*, 10th March 2011. Soon Italy followed on the 4th April 2011, declaring that it recognises the NTC as the *«sole legitimate interlocutor»*; see statement of Franco Frattini in *Le Figaro* of the 4th April 2011. Germany, though not participating in the UN authorised military mission, recognised the NTC as *«the legitimate representation of the Libyan people»*; see the statement of Foreign Minister Guido Westerwelle, reproduced in J. DEMPSEY, *Germany officially recognizes Libyan rebel government*, in *NY Times*, 13th July 2011. On the 11th July 2011, Switzerland stated that: *«En attendant l'election d'un gouvernement legitime, le CNT est l'unique interlocuteur de la Suisse en Libye»*; see http://www.eda.admin.ch/eda/fr/home/recent/media/single.html?id=40181. On the 15th July 2011, the USA recognised the NTC as the legitimate government of the Country, allowing the access to 30 billion dollars of Libyan assets in the US; see the statement of the Secretary of State, Hilary Clinton: *«US will join more than 30 Countries in extending diplomatic recognition to the main opposition group, known as the NTC»*, in *NY Times*, 15th July 2011. A salient exception is Cuba that refused to extend any recognition, condemning

Recognition was not limited only to statements, which would have only political and not legal effects, but many States concluded diplomatic relations with the NTC. Even the EU opened a diplomatic representation in Benghazi[27]. Given that the NTC at that time controlled only the eastern part of the Country and the Qaddafi forces still controlled the capital, its recognition as the *de jure* government seemed premature or precipitated and could even be considered illegal intervention in the internal affairs of the State[28].

Furthermore, one of the consequences of the recognition of the NTC as the legitimate government of Libya concerns the legality of providing support, such as military advisors and equipment, to the opposition forces. It is true that overall third States' intervention in Libya (through the NATO forces) is covered by the UNSC authorization for the use of force. However, there is a dispute over whether the boundaries of UNSC res. 1973 have been transcended or not[29]. Indeed, the aim of the mission was to *«protect civilians and civilian populated areas, including Benghazi»* (Benghazi had been directly the object of threats by the Qaddafi forces). In this context the provision of arms and the dispatch of military advisors to the NTC[30], insofar as they were intended to achieve the aim of the "responsibility to protect" mission, are considered legitimate. However, the provision of general support for the long-term stabilisation of the new regime and the assistance in the establishment of administrative infrastructure go one step further from the responsibility to protect. Actually these acts could substantiate a forcible intervention in favour of the opposition forces in the civil war[31], an accusation the respective Countries tried to avoid by recognizing the NTC as the legitimate government of the Country.

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this act as an illegitimate interference. In a statement the Cuban Ministry of Foreign Affairs stresses that *«Cuba does not recognize the NTC or any provisional authority in Libya; it will only recognize a government set up in that Country in a legitimate way and by the free, sovereign and unique will of the Libyan people. . . urgent need to allow the Libyan people to find peaceful and negotiated solution, without any foreign interference and in tune with their inalienable right to independence and self-determination, and their sovereignty over their natural resources and territorial integrity of their nation»*, in *NY Times*, 3rd September 2011. See for a list of recognitions http://fr.wikipedia.org/wiki/Reconnaissance_internationale_du_Conseil_national_de_transition#cite_note-66. As far as international organisations are concerned, on the 16th September 2011, the UN General Assembly accepted the credentials of the delegation of Libya at its 66th session, giving thereby the seat of Libya to the NTC (res. 66/1 A). Until then 86 Countries had recognized the NTC as the *«legitimate authority»*. However, the AU declined until the very last moment to recognise the NTC and it was only after the UN recognition that it decided to call it to occupy the seat of Libya [PSC/PR/COMM/2.(CCXCVII), 20th October 2011].

[27] In May 2011, the EU opened a delegation in Benghazi and offered more than 140 million euros for humanitarian needs. See A. GOMES, *Was EUfor Libya an April fool's joke?*, in *EU Observer*, 13th July 2011. One should also pay attention to art. 41 par. 1 of the Vienna Convention on Diplomatic Relations, according to which *«all persons enjoying privileges and immunities have a duty not to interfere in the internal affairs of the receiving State»* and the extent to which it is related with the establishment of diplomatic missions in Benghazi.

[28] See also the statements of French officials, pointing towards the need of regime change: *«Gaddafi can stay in Libya if he relinquishes power»*, in *NY Times*, 20th July 2011. To the contrary, an Obama administration spokesperson was more careful. He said that *«Gaddafi needs to remove himself from power . . . then it's up to the Libyan people to decide»*, in *NY Times*, 20th July 2011.

[29] See the posts of D. AKANDE, *Does SC Resolution 1973 permit coalition military support for the Libyan rebels?*; *Which entity is the government of Libya and why does it matter?*; *France admits to arming Libyan rebels—Was this lawful?*, in *Eur. Jour. Int. Law*, 2011. See also G. HERNANDEZ, T. LIEFLANDER, *Can Gaddafi invoke self-defence against NATO? Have NATO leaders committed the crime of aggression?*, in *Eur. Jour. Int. Law*, 2011.

[30] The United Kingdom, USA and France have admitted doing so; see *NY Times*, 29th June 2011.

[31] See also the wording of the *Nicaragua* judgment: *«The US aid to the contras in Nicaragua in recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding, and directing military and paramilitary actions in and against Nicaragua is a breach of the prohibition of the use of force . . . they participated in acts of civil strife in another State in contravention to the Declaration of Friendly Relations. Arming and training of the contras involves the threat or*

It is true that the National Transitional Council strived to acquire a distinct *status* in international law. In the aftermath of its formation, the NTC issued a document *«A vision for a democratic Libya»*[32], where it exposed its aspirations for a *«modern, free and united Libya»*. The aims comprised, *inter alia*, the drafting of a National Constitution endorsed by a *referendum*, the formation of political parties and the holding of free and fair elections, the upholding of political pluralism, overall the consolidation of democracy through the protection and guarantee of human rights (including social rights) and fundamental freedoms. Though it did not refer particularly to the right to self-determination, *«the establishment of a political authority that will represent the free will of the people, without exclusion or suppression of any voice»* actually describes the very essence of the term. The NTC seemed to fulfil by and large the standards set by the OAU Coordinating Committee for the Liberation of Africa for the recognition of national liberation movements as the sole legitimate representatives of the people. According to these standards, in order to be recognised, the respective groups must be the united action fronts against the rulers (Qaddafi in this case), they must be broad-based, they must have popular support throughout the Country and they must have a reasonable armed forces backing[33]. Could the requisite popular support towards the NTC be deduced from large-scale demonstrations and not through democratic elections? This question has hence remained unanswered.

The Syrian National Council tried to move on the same track but it largely failed to do so not only because it lacked the international recognition offered to the NTC but also due to the diversity of non-State actors controlling effectively territory in the framework of the Syrian conflict[34]. It is interesting to note that, when the Syrian uprising broke out the Syrian National Council[35] stated in a meeting in Turkey that *«the Syrian people would welcome an intervention on the part of Turkey for the protection of civilians»*[36]. Until now no such initiative has taken place in the Syrian case[37], while the recognitions of the Syrian National Council were by far fewer than those of the NTC[38].

Henceforth, the Syrian National Council has been incorporated in a broader opposition group, the National Coalition of Syrian Revolution and Opposition Forces. The latter was formed in November 2012 and, as it is stated in its website, is comprised of a 114-member Parliamentary Assembly. Its goal is to end the conflict in Syria and facilitate the

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use of force. The mere supply of funds, while undoubtedly an act of intervention in the internal affairs of the State, it did not amount to the use of force», at para. 228. It is interesting that according to the same judgment there does not have to be intention. If one State supports and assists armed bands whose purpose is to overthrow the government that amounts to an intervention whether or not the political objective of the state giving such support is equally far-reaching, at para. 241.

[32] Available at http://www.ntclibya.org/english/libya.

[33] One could question the fulfilment of these criteria, especially regarding the broad support, since it has not been upheld through national elections or through another objective mechanism.

[34] See http://www.syriancouncil.org/en/mission-statement.html.

[35] It is the opposition coalition, based in Istanbul (see its official website http://www.syriancouncil.org/). Its military wing is the Free Syrian Army, composed mainly by defected Syrian armed forces personnel. Actually, the statement came by the leader of the Muslim Brotherhood, Mohamed Riad Chakfa, which is considered the backbone of the Syrian opposition.

[36] I. CEMBRERO, *La oposicion siria acepta que Turquia intervenga para proteger a los civiles*, in *El Pais*, 17th November 2011. This situation reminds us of the "humanitarian corridors" applied in Iraq after the First Gulf War (1991).

[37] See, though, S. L. MYERS, *U.S. joins effort to equip and pay rebels in Syria*, in *NY Times*, 1st April 2012, according to which a group of Countries are moving closer to direct intervention.

[38] See for a list http://en.wikipedia.org/wiki/Syrian_National_Council.

democratic transition. The coalition is recognised by 120 States and organisations as the legitimate representative of the Syrian people[39]. Although it aspires to reflect the ethnic and religious diversity of Syria, a significant part of the population, namely ethnic Kurds, are not represented in the coalition. In particular, the vacant position of the third vice-President is to be covered by a representative of the Kurdish minority but it is not yet filled since the Syrian Kurds have formed their own *de facto* autonomous *«Federation of Northern Syria – Rojava»* which comprises parts of Al-Hasakah, Al-Raqqah and Aleppo Governorates and remains unrecognized. Moreover, their political party, the Democratic Union Party (PYD), was excluded from the recent peace talks taking place in Geneva (March-April 2016)[40].

The case-studies of Libya and Syria are by no means representative of a consolidated practice of recognising "people fighting for democracy" as a distinct subject of international law, along with States, international organisations, national liberation movements and individuals. Consequently, there is no separate right of third States to offer direct or indirect assistance to peoples vindicating the right to democracy or the right to internal self-determination[41]. This right still rests with the (legitimate or effective) government of the State in question.

iv) Sanctions imposed by international organisations in cases of anti-democratic alteration of the constitutional order. Do they constitute presumption of illegitimacy of the government?

In recent years, regional organisations in the Americas and Africa have developed a system of imposing sanctions against governments whose legitimacy is seriously questioned due to unconstitutional or undemocratic alterations of government, even if the changes take place under the guise of a *«constitutional clothing»*[42], namely without the use of actual armed force. For instance, in the framework of the Organization of American States, according to the Protocol of Washington (1992), which amended the OAS Charter[43], and the Inter-American Democratic Charter (2001)[44], the Organization has the right to suspend the membership of a State, if the democratic order or the constitutional regime in that State is

[39] See the website of the group http://en.etilaf.org/

[40] See M. BRADLEY, A. ALBAYRAK, D. BALLOUT, *Kurds declare 'Federal Region' in Syria, says official, declaration comes from group excluded from peace talks*, Updated to 24th March 2016, http://www.wsj.com/articles/kurds-declare-federal-region-in-syria-says-official-1458216404.

[41] Such a right would actually be a restatement of the *«Reagan Doctrine»*, which justified United States' military support to insurgents fighting against regimes considered to be totalitarian and illegitimate. See R. TURNER, *International law, the Reagan Doctrine and world peace*, in *The Washington Quarterly*, 1988, pp. 119-136. See also the wording of the ICJ in *Nicaragua*: *«. . .a general right for States to intervene, 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. For such a general right to come into existence would involve a fundamental modification of the customary law principle of non-intervention»*, paras. 206-207.

[42] For the wording see D. CASSEL, *Honduras: coup d'État in constitutional clothing?*, in *Asil Ins.*, 2009. Also available at http://scholarship.law.nd.edu/law_faculty_scholarship/969.

[43] Protocol of amendments to the Charter of the Organization of American States, *«Protocol of Washington»*, approved on the 14th December 1992, at the sixteenth special session of the general assembly (A-56), 1-E Rev. OEA *documentos oficiales* OEA/Ser.A/2 add. 3 (SEPF).

[44] AG/Res.1 (XXVIII-E/01), 11th September 2001.

unconstitutionally interrupted or altered. This mechanism has been implemented in its entirety in the Honduras' *coup d'État* (2009)[45].

In Africa[46], similar efforts begin to take place only in the last decade, both as to the main regional organization (Organization of African Unity/African Union)[47], as well as to various sub-regional organizations (ECOWAS[48], SADC[49], East African Community[50] etc.). Indeed, democratic governance and the condemnation of unconstitutional changes of governments is one of the bases for cooperation under the new institutional framework of the African Union[51]. According to the Protocol on Amendments to the AU Constitutive Act, the Assembly can decide on intervention, *inter alia*, following a serious threat to the legitimate order within a member State[52]. The insertion of this provision was meant to cover situations where the provision relating to intervention due to genocide, war crimes and crimes against humanity would not be applicable. Definition of *«the threat to legitimate order»* is not provided and in theory it could also include the chaos resulting from a government's refusal to hand over power after losing an election, the so-called pro-democratic intervention. However, the Protocol has not yet entered into force (it requires 36 ratifications and the number so far is 28)[53]. Hitherto, threats to or disturbances of the democratic order

[45] See, for an analysis of the system established in the OAS framework as well as an overview of the democratisation processes at the international level, V. SARANTI, *A system of collective defence of democracy: the case of the Inter-American Democratic Charter*, in *GoJIL*, 2011, pp. 675-714.

[46] See for a general approach, F. COWELL, *Preventing coups in Africa: attempts at the protection of human rights and constitutions*, in *Int. Jour. Hum. Rights*, 2011, pp. 749-764.

[47] See the Declaration on the framework for an OAU response to unconstitutional changes of government (2000), the Constitutive Act of the African Union (2000, arts. 3 and 4), the Protocol on amendments to the Constitutive Act (2003) and the Protocol relating to the establishment of the Peace and Security Council of the African Union (2002, arts. 3f and 7 para. 1m). In 2007, the African Charter on democracy, elections and governance was adopted and has entered into force on 15th February 2012.

[48] 36 protocol a/sp1/12/01 on democracy and good governance supplementary to the protocol relating to the mechanism for conflict prevention, management, resolution, peacekeeping and security, adopted by the economic Community of West African States (ECOWAS) in Dakar, in December 2001. During the recent turmoil in Côte d'Ivoire, where the outgoing president, Laurent Gbagbo, refused to recognise Alassane Ouattara as the winner of the elections, the Country had been suspended on 7th december 2010 from participation in the decision-making bodies of ECOWAS, by virtue of art. 45 of the aforementioned instrument, until the democratically elected president effectively assumed power. The same sanction, along with an array of financial, economic and political measures, has been imposed against Mali on 30th march 2012, due to the violent overthrow of the government only a month before the national elections, see *emergency mini-summit of ECOWAS heads of state and government on the situation in Mali*, press release no. 092/2012, 30th March 2012. On the 10th January 2009, ECOWAS had also suspended Guinea, see press release no. 003/2009 *ECOWAS leaders reject military transition in Guinea.*

[49] See the suspension of Madagascar, discussed in F. COWELL, *Preventing coups in Africa*, cit.

[50] It was actually the Countries of the Eastern African region and not the organisation proper that imposed trade and economic sanctions against Burundi in 1996, following a *coup d'État* against the democratically elected government and the assassination of the president of the Country.

[51] See B. KIOKO, *The right of intervention under the AU's Constitutive Act: from non-interference to non-intervention*, in *Int. Rev Red Cr.*, 2003, pp. 807-825.

[52] The amended article 4(h) reads: *«[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 as well as a serious threat to legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council».*

[53] The amendment was due to come into force 30 days after two-thirds of the AU member States had deposited their instruments of ratification. See for the list of ratifications, http://www.au.int/en/sites/default/files/treaties/7785-sl-amendments_to_the_constitutive_act_0.pdf (last accessed 13th June 2016).

were not treated through military action. To the contrary, the strongest sanction that was adopted by the AU Peace and Security Council in relevant situations was suspension of membership[54].

According to practice developed mainly in Africa, invitations of third States by governments that do not enjoy the basic attributes of legitimacy or are suspended pursuant to the mechanisms described above due to this kind of constitutional crises cannot be deemed valid, although the practice still remains inconclusive[55]. Thus, this approach cannot be applied in other cases, for instance Syria. In particular, the league of Arab States, although it does not include provisions on human rights or protection or democracy in its pact, decided to suspend Syria from membership[56], in the aftermath of the violent repression of the *«Arab Spring»* uprising in the Country. Nevertheless, it was the government of Assad that invited Russia to assist him in the repression of anti-government elements and it is again the government of Assad that – tacitly at least – recognises the airstrikes carried out by the international coalition against ISIS in Syrian territory. Although the legitimacy of the Assad regime is highly contested, one cannot maintain that there can be another entity legally representing Syria at the moment.

v) Invitations by governments lacking effective control or/and legitimate authority
a) Syria: invitation and stationing of Russian forces

In the previous section we discussed whether the "intervention by invitation" theory has changed so as to allow an intervention upon the invitation of a non-State entity that enjoys popular support against totalitarian regimes and we arrived at the conclusion that such an alteration of the theory has not taken place regardless of the recognition of the entity by the international community. The Syria case is even more complex in that the Assad regime, which enjoys limited effective control and questionable legitimacy, has extended an invitation to Russia for military assistance in its fight against various non-State actors active on the Syrian territory.

The controversial military pact of 26th August 2015[57] was based on the provisions of the Treaty of Friendship of 8th October 1980 between the former USSR and the Syrian Arab Republic and a number of other agreements signed between the respective Ministers of

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[54] See the Communication of the AU Peace and Security Council n. PSC/PR/COMM.1(CCLII) of 9th December 2010 *concerning Côte d'Ivoire*. The suspension was lifted on 21st April 2011, see the Communication of the AU Peace and Security Council n. PSC/PR/COMM.1(CCLXXIII) of 21st April 2011 *concerning Côte d'Ivoire*; the Communication of the AU Peace and Security Council n. PSC/PR/COMM(CCCXV) of 23rd March 2012 *concerning Mali*; the Communication of the AU Peace and Security Council n. PSC/PR/COMM(CLXV) of 29th December 2008 *concerning Guinea*.

[55] See E. DE WET, *The modern practice of intervention by invitation in Africa and its implications for the prohibition of the use of force*, in *Eur. Jour. Int. Law*, 2015, pp. 979-998.

[56] Follow-up on the developments of the situation in Syria, see the Resolution n. 7438/2011 of the League of Arab States Council, extraordinary session, of 2nd November 2001, *Developments situations in the Syrian Arab Republic*, available at http://www.arableagueonline.org.

[57] Agreement between the Russian Federation and the Syrian Arab Republic on deployment of an aviation group of the Russian Armed Forces on the territory of the Syrian Arab Republic, for the agreement in Russian see https://www.washingtonpost.com/r/2010-2019/WashingtonPost/2016/01/15/Foreign/Graphics/syria.pdf, for a translation in English see M. BIRNBAUM, *The secret pact between Russia and Syria that gives Moscow carte blanche*, 15th January 2016, available at https://www.washingtonpost.com/news/worldviews/wp/2016/01/15/the-secret-pact-between-russia-and-syria-that-gives-moscow-carte-blanche/.

Defence on 7th July 1994 and provides for Russian military assistance to the Assad government in order to counteract terrorism and extremism.

The Agreement is signed between the respective Ministers of Defence and is similar to other Status of Forces Agreements allowing stationing of armed forces on foreign territory[58]. It stipulates that Russian military personnel can transit Syria without being subject to control by the Syrian authorities; Syrians are prohibited from entering Russian bases, unless an explicit permission is given; Russia will not bear any responsibility for any damage caused by its activities in the Syrian territory and Syria assumes all responsibility for settling claims with third parties. The exact places of deployment and the list of facilities transferred over to the Russian side are stipulated in a separate protocol annexed to the Agreement (for instance the Hmeimim airbase in Latakia). The Agreement is of an indefinite period and either side can terminate it with a year's notice.

What is interesting is that it is explicitly stipulated that the agreement is temporarily used from the date of its signing (resembling thus to so-called executive agreements) and that it will enter into force *«as of the date of notification through diplomatic channels of fulfilment of the parties' internal procedures»*, namely the exchange of the ratification instruments. It is not known whether these internal procedures have taken place. Finally, it is explicitly stipulated that the deployment of the Russian aviation group is purely defensive and it is not directed against any other State.

Although the exact military objective is not stipulated in the Agreement, the Russian President has officially announced during the UN General Assembly in September 2015 that Russia's assistance would cover operations against ISIS[59]. However, other governments implicated in the conflict maintain that in reality the Russian forces target other rebel groups and the moderate opposition and not exclusively ISIS[60]. Furthermore, Russia does not participate in the international coalition authorised by UNSC resolution 2249[61]. In this framework, the implementation of the bilateral agreement seems to run counter to the criteria set by the *Institut de Droit International* on *«Military assistance on request»* and more specifically to the following precondition of legitimacy of the intervention: *«military assistance shall not be provided where such provision would be inconsistent with a Security Council resolution relating to the specific situation, adopted under Chapter VII of the Charter of the United Nations»*.

Another issue is the tensions produced between Russian forces and neighbouring Countries. If the invited State attacks a third State who is responsible? And who shall respond? Syria or Russia? Even before the Syrian-Russian bilateral agreement, Turkey had already called for NATO consultations by invoking article 4 of the North Atlantic Treaty – one step before the activation of article 5 the collective defence provision – due to fierce incidents taking place in the Syrian-Turkish border in July 2015. Further escalation was feared after the downing of a Russian aircraft by the Turkish military on 24th November 2015 but both sides showed restraint.

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[58] C. BORGEN, *Parsing the Syrian-Russian Agreement concerning Russia's deployment*, 18th January 2016, available at http://opiniojuris.org/2016/01/18/32350/

[59] See http://en.kremlin.ru/events/president/news/50385.

[60] See L. SLY, A. ROTH, *U.S.-backed Syrian rebels appeal for antiaircraft missiles*, 2nd October 2015, available at https://www.washingtonpost.com/world/russian-warplanes-strike-deep-inside-islamic-statesheartland/2015/10/02/ace6dfcc-6866-11e5-bdb6-6861f4521205_story.html

[61] Adopted in the aftermath of the 13 November 2015 terrorist attacks in Paris, see the Resolution n. 2249/2015 of the UN Security Council of 20th November 2015, UN doc. S/RES/2249 (2015).

It is interesting to note that the USA has a similar agreement with Iraq since 2008 which has given its consent for military operations against ISIS on its territory[62].

b) Ukraine

Another complex situation was the Russian intervention in Crimea. During the discussions at the Security Council, the Russian representative relied on an official letter of invitation by the ousted President Yanukovych requesting the Russian assistance to solve the conundrum in Crimea. The argument was rejected by the majority of international theory – including the Ukrainian Association of International Law[63] – that challenged the authority of Yanukovych who had lost effective control over the Country and remained "exiled" in Kharkov. On the other hand, the proponents of the Russian argument maintained that he was illegally removed from power, since the voting procedure at the Ukrainian Parliament did not comply with the constitutional standards. A relevant question needs to be addressed: was Yanukovych the legitimate authority in Ukraine at the time the request was sent?

As we have already analysed, invitations in situations of internal disturbances and armed conflicts, when the constitutional legality of governmental bodies is questioned, turning to domestic laws and regulations and the constitutional laws of a State is required so as to settle issues of legality. Even then, legitimate governments – in exile – have not been considered as able to issue "valid consent" due to their lack of "effective control".

All the abovementioned issues of a questionable representation are present in the Ukraine/Russian invitation. No doubt Yanukovych had lost the effective control of the State, being in exile in Kharkov, a border town of Ukraine. His ousting though was far from clear, since his stepping out of office was unlawful, not following the constitution's requirements (*inter alia* Parliamentary voting)[64]. This is indeed the strongest argument of Russia, claiming the legality of its intervention in Ukraine, notwithstanding many "grey areas", including the divisions in Ukraine between philo-Russian and philo-west supporters. And in any case, even if the request was considered as coming from the legitimate President, this would never justify annexation (integration) of Crimea to Russia.

In that respect, intervention transgressing the extended invitation could even constitute armed attack. Indeed, article 3e of the *«Definition of aggression»* (UNGA res. 3314/1974) acknowledges implicitly the right of a State to invite a foreign army, since it stipulates that failure of the foreign army to leave or actions that exceed the framework of the invitation would constitute aggression. Besides, the ICJ in its judgment of 19th December 2005 in case *DRC/Uganda* has already pointed out that Uganda was responsible for violating the principle of the prohibition of the use of force (that did not amount to aggression), since any earlier consent by the DRC to the presence of Ugandan troops on its territory had been withdrawn by 8th August 1998. In the Crimean peninsula the Russian army was authorised to maintain armed forces by virtue of a bilateral treaty signed between Russia and Ukraine in 1997 (Agreement between Russia and Ukraine on the *Status* and conditions of the presence of the Russian Black Sea fleet on the territory of Ukraine). In the wake of internal tensions

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62 D. AKANDE, Z. VERMEER, *The airstrikes against Islamic State in Iraq and the alleged prohibition on military assistance to governments in civil wars*, in *Eur. Jour. Int. Law*, 2015.

63 D. AKANDE, *Appeal from the Ukrainian association of international law*, in *Eur. Jour. Int. Law*, 2014.

64 See Z. VERMEER, *Intervention with the consent of a deposed (but legitimate) government? Playing the Sierra Leone card*, in *Eur. Jour. Int. Law*, 2014.

in Ukraine, Russia placed under its effective control and ultimately annexed this part of the Ukrainian territory.

c) Yemen

Yemen has been at war since early 2011. Several parallel non-international armed conflicts have been taking place between armed opposition groups and the government, or among armed groups themselves[65]. The main non-State armed groups that are involved in armed hostilities against government forces and the pro-government tribal proxies included: the Houthi militias; a number of Islamic insurgent groups, including Al-Qaeda in the Arabian Peninsula (AQAP) and its offshoot, Ansar al-Shari'a (AAS); and the anti-Saleh militia groups affiliated with opposition groups in strategic towns and cities. All conflicts are not of an international character and include hostilities between the Houthi rebels and the government in the north, the Houthis and different armed members of the Salafi group and tribal groups, as well as between the government and AAS in the South. AQAP is also effectively controlling areas of Yemen. Third States have provided support (financial, arms transfers, military or otherwise) to either the government or the Houthis. For example, Iran has been providing financial support to the rebels[66], Saudi Arabia has provided financial and military support to the Yemeni government and a counter-terrorism cooperation involving strikes by drone has intensified between the United States and Yemen.

Most importantly early on March 26, 2015, a Saudi Arabia-led coalition used warplanes to attack the forces of Ansar Allah, (Houthis), in several locations in Yemen. The coalition members (Gulf Cooperation Council) include: Bahrain, Egypt, Jordan, Kuwait, Morocco, Qatar, Sudan, and United Arab Emirates. They justify their operation as a response to a request by the President Abdu Rabu Mansour Hadi of Yemen for the support of the *«protection of Yemen and Yemeni people from the Houthi destructive aggression»*. However, as in most of the case of interventions by invitation, the legitimacy of Hadi's Presidency has been questioned. His term in office officially ended on February 2014, he then remained as a transitional President. In January 2015 the Yemeni capital Sana'a was captured by rebels, who overran many government buildings, and subsequently the President and his cabinet resigned *en masse*[67]. He then remained under house arrest for a month and escaped to Aden where he reclaimed his Presidency and attempted to establish a transitional authority. During his days in Aden, he forwarded a request for support to third States and when the Saudi led Operation *«Decisive Storm»* begun, he fled to Riyad[68]. As a resigned President in exile, he invited third States to bomb the armed groups in his Country. Was it a valid consent? Most

[65] See INTERNATIONAL COMMITTEE OF THE RED CROSS, *Annual Report 2012*, 2012, pp. 403 and 448.
[66] See *With arms for Yemen rebels, Iran seeks wider Mideast role*, in *NY Times*, 15th March 2012, available at http://www.nytimes.com/2012/03/15/world/middleeast/aiding-yemen-rebels-iran-seeks-wider-mideast-role.html?pagewanted=all&_r=0.
[67] See H. ALMASMARI, M. CHULOV, *Houthi rebels seize Yemen President's palace and shell home*, in *The Guardian*, 21st January 2015, available at www.theguardian.com/world/2015/jan/20/houthi-rebels-seize-yemen- presidential-palace, and H. ALMASMARI, M. CHULOV, *Yemeni Government quits in protest at Houthi rebellion*, in *The Guardian*, 22nd January 2015, available at www.theguardian.com/world/2015/jan/22/yemeni-government-quits-houthi-rebellion.
[68] See D. ROBERTS, K. SHAHEEN, *Saudi Arabia launches Yemen airstrike as alliance builds against Houthi rebels*, in *The Guardian*, 26th March 2015, available at www.theguardian.com/world/2015/mar/26/saudi-arabia- begins-airstrikes-against-houthi-in-yemen.

probably not, however, he is still internationally recognized as the *«legitimate authority of Yemen»* and only Iran has disputed the Saudi-led intervention.

Moreover, the US has used consent as a justification to the lawfulness of its drone programme also in Yemen. Already in a 2012 speech, US Attorney General Eric Holder stressed that extraterritorial uses of force were *«consistent with international legal principles if conducted... with the consent of the nation involved»*[69], as long as the consent is "valid". There is no assertion that consent has not been freely given by President Hadi and, as such, Yemeni consent is *prima facie* valid. However, it is highly questionable as to whether the government had the effective control necessary to be deemed legitimate with regard to consent.

Having said that, Yemen stands for another case demonstrating that there is a large degree of discretion in the interpretation of what a valid consent is, or the degree of control a government must exercise in order to remain "legitimate". Indeed The international community has not contested the legal basis of the military intervention[70]. Saudi Arabia, Qatar, Kuwait, Bahrain and the United Arab Emirates specifically have referred to the Hadi regime as *«the legitimate authorities»* in responding to the Hadi government's invitation for intervention[71]. Furthermore, in April 2014, the Security Council passed a resolution in which it reaffirmed *«its support for the legitimacy of the president of Yemen, Hadi»*[72].

vi) Third Country "interventions by invitation" and peace-enforcement operations led by international organisations: enhancing the legitimacy of the involvement

The obscurity surrounding interventions by invitation in complex situations of constitutional and humanitarian crisis calls for an additional guarantee of legality, namely the support or authorisation of the use of force by the UN Security Council. The AU has also an explicit provision covering such situations. Pursuant to article 4 of its Constitutive Act, the AU may authorise collective action in a member State in the following circumstances: a) in pursuance of a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity[73] and b) at the invitation of a member State, in order to restore peace and security within their territory[74]. The cases that will be examined below are France's intervention in Mali, CAR and Côte d'Ivoire.

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[69] See E. HOLDER, *Attorney General Eric Holder speaks at Northwestern University school of law*, 2012, United States Department of Justice, available at www.justice.gov/opa/speech/attorney-general-eric-holder-speaks- northwestern-university-school-law. See also J. O. BRENNAN (White House Counterterrorism Advisor), *The ethics and efficacy of the President's counterterrorism strategy*, April 2012, prepared remarks at the Woodrow Wilson International Center for Scholars, available at www.wilsoncenter.org/event/the-efficacy-and- ethics-us-counterterrorism-strategy.

[70] See *The Yemen peace project, United States' policy and Yemen's armed conflict*, September 2015, available at http://www.yemenpeaceproject.org/blogpost/us-policy-2/us-policy-yemens-armed-conflict/.

[71] See, *inter alia*, the 26th March 2015 letter of Qatar to the UNSecurity Council, UN Doc S/2015/217, 3.

[72] See the Resolution n. 2216/2015 of the UN Security Council of 14th April 2015, UN Doc. S/RES/2216.

[73] Article 4h AU Constitutive Act. See for a thorough analysis of the article, especially in conjunction with the responsibility to protect doctrine, D. KUWALI, F. VILJOEN (eds.), *Africa and the responsibility to protect. Article 4h of the African Union Constitutive Act*, Oxford-New York, 2014.

[74] Article 4j AU Constitutive Act.

a) Mali

On January 2013 France launched airstrikes against Jihadist positions in northern Mali (Operation Serval[75]), following an invitation by the *Interim* President of the Republic of Mali, Mr. Dioncounda Traore. As in other case where invitation is used as a justification for unilateral use of force, in order to justify the military intervention in Mali, France put forward three legal grounds, one of which was the invitation by the Malian government (the other two were, its right of collective self-defense and the authorization given by the United Nations (UN) Security Council in Resolution 2085 (20th December 2012)[76].

More specifically, in a letter sent to the UN Security Council France stated that *«France has responded today to a request for assistance by the interim President of the Republic of Mali, Mr. Dioncounda Traore. Mali is facing terrorist elements from the north, which are currently threatening the territorial integrity and very existence of the State and the security of the population »*[77].

The goal of the intervention was *«to prevent the establishment of a terrorist State»* after armed groups linked to Al Qaeda managed to gain control over areas in northern Mali in March 2012, in the aftermath of a military *coup*.

Indeed, the ongoing non-international armed conflict continued in the territory of Mali as of around 17th January 2012, had as a consequence, first, the emergence of a rebellion in the North on or around 17th January, which resulted in Northern Mali being seized by armed groups; and second a *coup d'État* by a military junta on 22th March, which led to the ousting of President Touré shortly before presidential elections could take place, originally scheduled for 29th April 2012. At the beginning of April 2012, President Touré officially resigned as part of an agreement between ECOWAS and the military junta. Parliamentary speaker Dioncounda Traoré was elected *interim* President.

The hostilities were between the government forces and different organized armed groups, particularly the *Mouvement national de libération de l'Azawad* (National Movement for the Liberation of Azawad, MNLA), Al-Qaeda in the Islamic Maghreb (AQIM), Ansar Dine and the *Mouvement pour l'unicité et le jihad en Afrique de l'Ouest* (Movement for Oneness and Jihad in West Africa, MUJAO) and *«Arab militias»*, as well as between these armed groups themselves absent the involvement of government forces.

On 12th January 2013 the ECOWAS in a statement *«welcomes UN Security Council Press Release of 10th January 2013 authorising immediate intervention in Mali to stabilise the situation»* and *«thanks the French government for its initiatives to support Mali»*[78]. Moreover, on 25th April 2013

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[75] *«Operation Serval»* comprised of 4000 French soldiers, ended in 2014 and was later followed by *«Operation Backhave»*, a task force of around 3000 French soldiers, with the aim to track down Islamist rebels in the Sub-Saharan area

[76] See K. MOLLARD-BANNELIER, T. CHRISTAKIS, *Under the UN Security Council's watchful eyes: military intervention by invitation in the Malian conflict*, in *Leid. Jour. Int. Law*, 2013, pp. 855-874, as well as see T. CHRISTAKIS, K. MOLLARD-BANNELIER, *Volenti non fit injuria?*, cit., pp. 102-138 and M. Bennouna, L. Doswald-Beck or by the Institute of International Law in its 1975 Wiesbaden Resolution on The Principle of Non-Intervention in Civil Wars (esp. art. 2) or the 2011 Rhodes Resolution on Military Assistance on Request.

[77] Identical letters dated 11th January 2013 from the Permanent Representative of France to the UN addressed to the Secretary-General and the President of the Security Council (S/2013/17).

[78] See *The Authority thanks the Security Council members and the French government for their expeditious reaction aimed to stabilise the military situation in Mali*, published at http://echoes.ecowas.int/wp-content/uploads/2013/02/Echoes-of-ECOWAS-Vol-01-2013.pdf. In the same extraordinary session of ECOWAS, Minister Traoré confirmed that *«the Government of Mali requested for and obtained the military assistance of France within the context of bilateral agreements between both Countries and in line with the provisions of UN Security Council Resolution 2085 adopted in December 2012. […] He also seized the opportunity to thank the French President and the gov-*

the Council welcomed *«the swift action by the French forces, at the request of the transitional authorities of Mali, to stop the offensive of terrorist, extremist and armed groups towards the south of Mali»*[79]. Whereas at the same time, UN SG Ban Ki Moon in a report on Mali cautioned on the French operation (*«I am profoundly aware that if a military intervention in the north is not well conceived and executed, it could worsen an already fragile humanitarian situation and also result in severe human rights abuses»*)[80].

Was the invitation (or the consent) valid? Was it "given freely" and "clearly expressed"? And were the authorities issuing the invitation legitimate?

When it comes to the first condition, the request was clear and leaving no doubt. However, the *interim* President who issued the invitation was sworn in April 2012, after a military *coup* in Bamako and his days in power were uncertain when the invitation was issued[81].

b) Intervention of France in the CAR conflict

France has a long-standing presence in the CAR. As a former colonial power and the only European Country to have a diplomatic representation in the Country, France has already been involved, albeit not directly, in the conflict ravaging the Country during the 90s. In 1997, France has offered logistical support to the inter-African Mission to monitor the implementation of the Bangui agreements (MISAB), an 800-strong force under Gabonese command. This mission has been endorsed by the UNSC in resolution 1125. In the following year, when French support gradually came to its end, the UNSC by virtue of resolution 1159 authorised the UN Mission in the Central African Republic (MINURCA), which ended officially in 2000.

France's direct involvement in the CAR is inaugurated in 2010, when the two Countries signed a Defence Partnership Agreement which framed their military cooperation and the operational and logistical support provided by the French detachment *«Boali»* to MICOPAX (*Mission de Consolidation de la Paix en Centrafrique*), a mission led by the Economic Community of Central African States (ECCAS) from 2008 to 2013. The Defence Partnership Agreement aimed at the support of the Central African Armed Forces (FACA) to help them gain control of the whole territory of the Country, within the framework of the reform of the security sector (RSS), a dimension included in all subsequent UNSC resolutions. This operational support continued through the *«Sangaris»* operation by virtue of UNSC mandate for the benefit of MISCA initially and later MINUSCA, as we shall see later on.

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ernment and people of France for providing the necessary assistance for the restoration of Mali's territorial integrity and for peacekeeping and security within the region and the world», *ibid.* See also the Communication of the AU Peace and Security Council n. PSC/AHG/COMM/2.(CCCLIII) of 25th January 2013, which in para. 10 *«Renews AU's support to President Dioncounda Traoré and to his Prime Minister Diango Cissoko, who have the responsibility of successfully carrying out the transition, and urges them to take the necessary steps for the elaboration and adoption of the Transition Roadmap, including measures to be taken for the holding of free, transparent and credible elections, ahead of the meeting of the Support and Follow-up Group scheduled to take place in Brussels, on 5 February 2013…»*.

[79] See the Resolution n. 2100/2013 of the UN Security Council of 25th April 2013, UN Doc. S/RES/2100 (2013).

[80] See, on invitation by Malian authorities, S. ERLANGER, S. SAYARE, *French air strikes in Mali deter Islamist rebels*, in *NY Times*, 11th January 2013; UN Doc. _ S/PV.6905, at 6 (22nd January 2013)(Statement of Malian Representative describing the Malian request for assistance to France).

[81] J.P. REMY, *Le pouvoir malien sauvé des putschistes par les militaires français*, in *Le Monde*, 14th January 2013.

When the recent crisis broke out (December 2012), the French troops stationed at Bangui M'Poko international airport, roughly around 400, were mandated to ensure the security of the French citizens and help secure the international airport that serves the capital. The intervention of foreign forces for the protection of nationals abroad is an additional argument proposed alternatively in similar circumstances by the intervening force, especially when the invitation of the government is not clear (it was included for instance in the set of arguments put forward by Russia in the Crimea crisis). In particular, in the case of the CAR, France has a long history of initiatives for the protection of nationals abroad, since it has done so during the armed mutinies in 1996 and 2003. However, the overall presence of France in the CAR does not fit entirely in the protection of nationals abroad doctrine, since it does not fulfil all the criteria of legitimacy. Namely, although there was an imminent threat of injury to French citizens and the sovereign government of the Country was unable to protect them, nonetheless the third criterion, the one referring to the in-out character of the operation, is missing.

It is on 27th December 2012, when the then President of the Country, François Bozizé, appealed to the French authorities to send troops to help the government halt the Seleka rebellion. At that point the French reaction was a modest one. In particular, the French President, François Hollande, while condemning the continued hostility by the rebel groups, rejected the request proclaiming that the French troops stationed at the airport did in no way intend *«to intervene in the internal affairs of the State»*. It is interesting that France declined the plea, in spite of the fact that Bozizé was indeed the legitimate representative of the State, since he had won two consecutive presidential elections in 2005 and again in 2011. The people of the CAR had elected him in the exercise of their right to self-determination (*«freedom to determine their political status»*), thus conferring him also the right to protect the State against attempts at the constitutional order.

The reaction of the French government demonstrates that at this point we witness a revival of the resolution of the *Institut de Droit International «The principle of non-intervention in civil wars»* (1975), according to which any assistance to parties to a civil war which is being fought in the territory of another State is prohibited, as well as of the British official position, as it was reflected in the 1984 British Foreign Policy Document (available in *Br. YB. Int. Law*, vol. 57 (1986), p. 614): *«the principle of non-intervention and the inalienable right of every State to choose its political, economic, social and cultural systems entails also the duty not to intervene to help a government in a civil war, especially if control of the territory is divided between two factions»*, a description which reflects exactly the situation in the CAR and the split of the Country between the Bozizé rule and the Seleka rebel forces.

On 11th January 2013, the two sides signed a set of ceasefire and peace agreements the Libreville Agreements which, together with the N'Djamena Declaration of 18th April 2013 and the N'Djamena Summit Roadmap, provided the basis for a peaceful political resolution to the crisis. These documents referred, *inter alia*, to transitional arrangements that would lead to the holding of free, fair and transparent presidential elections. During the transition period, the Prime Minister would be the Head of the Government of national unity which would be in charge of implementing the priorities stipulated in the agreement. The Seleka rebels, accusing President Bozizé of failing to abide by the Libreville Agreements, advanced towards the capital and seized power by force on 24th March 2013.

The regional reaction to the *coup d'État* was swift. The African Union condemned the violent seizure of power. At its 363rd meeting, held in Addis Ababa on 25th March 2013, it adopted a decision suspending the participation of the CAR in all AU activities, as well as

imposing sanctions, including travel ban and asset freeze, on leaders of the Seleka group. In its decision the Peace and Security Council put explicitly the blame on the Seleka group for the *«unilateral and unjustified decision to flagrantly violate the Libreville Agreements»*. At the universal level, the UNSC condemned the violent seizure of power and welcomed the regional initiative of suspension of membership[82].

Following these international reactions, it comes as no surprise that France declined to intervene when the Seleka-led government appealed for assistance in April 2013, one month after the *coup d'État*. Indeed, the Seleka-led government did not seize power by popular vote and therefore did not constitute the legitimate authority of the State, the one authorized to invite outside help. Furthermore, the Seleka-led government was not recognised as the legitimate representative of the State (as was the case of the National Transitional Council in Libya), while the *coup d'État* was internationally condemned.

The Seleka-led government was soon replaced by a transitional one. The official authorities of the State that are mentioned in subsequent UNSC resolutions as *«transitional authorities»* are the transitional council and the *interim* president elected by it. The transitional authorities would govern CAR for the whole period of transition, namely from the moment of the *coup d'État* until the holding of elections that were planned to take place in 2015. The transitional council, composed of 105 members, met on 13 April 2013 and appointed Michel Djotodia as *interim* President in furtherance of the Libreville Agreements. On 10th January 2014, Djotodia was replaced by Catherine Samba-Panza within the same framework. It is to the call of the transitional authorities that France reacted positively, as we shall analyze in the following section.

To sum up, by virtue of the Defence Partnership Agreement the French forces in the CAR had focused on building the capacity of the CAR's military. During the Seleka advance in 2012, the French forces assumed the additional task of protecting French citizens and the international airport in Bangui, without any further active involvement in the conflict, despite two calls by President Bozizé initially and the Seleka leaders afterwards.

When the situation had worsened significantly in August 2013 and the attacks against civilians amounted to genocide, France's approach began to shift. The deterioration of the situation was highlighted by the French President François Hollande in September 2013 at the UN General Assembly. Under the fear that ethno-religious violence could destabilise the whole region, France played a central role in the UNSC deliberations, authorizing MISCA (*Mission internationale de soutien à la Centrafrique*), the African-led force, and MINUSCA (United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic), the UN force.

The CAR transitional authorities had officially requested the support to MISCA by French forces on 20th November 2013. However, France did not rely entirely on the invitation extended by the *interim* authorities, since accepting such an initiative of a government that is *par excellence* provisional and does not represent the will of the people could be considered as exceeding the boundaries of the "intervention by invitation" theory. Moreover the legitimacy of the *«transitional authorities»* derives from a political agreement (the Libreville Agreements) and not from constitutional provisions, as would be the case of a government elected by national suffrage pursuant to the Constitution of the State. Thus, the official authorisation of the French forces' involvement is included in UNSC resolution 2127/2013,

[82] See the Resolution n. 2121/2013 of the UN Security Council of 10th October 2013, UN Doc. S/RES/2121 (2013).

put forward by France. It is the first time that the UNSC makes reference to the French presence in the CAR. Three major events have preceded this document: a) the seizure of power by force on 24th March 2013 by the Seleka coalition, b) the decision of the African Union Peace and Security Council on 25th March 2013 to suspend the participation of the CAR in all the activities of the African Union in accordance with the Charter on Democracy, Elections and Governance, c) the decision of the African Union Peace and Security Council on 19th July 2013 to authorise the deployment of MISCA, which subsumed the role of MICOPAX, an operation led by the sub-regional organisation ECCAS. In previous resolution 2121/2013, the UNSC had, amongst others, encouraged UN Member states to provide *«timely and effective support to MISCA»*.

Furthermore, the strengthening of the French forces to better support MISCA has been welcomed by the African Union Peace and Security Council in its *communiqué* of 13th November 2013. The French operation, named *«Sangaris»*, with strength of 1200 troops was deployed on 5th December 2013 in the immediate aftermath of resolution 2127/2013. Although its presence is officially mandated by the UNSC resolution, it came as a response to the request of the transitional central African authorities.

Pursuant to the UNSC mandate as spelled out in resolution 2127/2013, the French forces were authorised to take all necessary measures to support MISCA in the discharge of its mandate, *i. e. inter alia* to protect civilians, enable humanitarian access, support the disarmament of militias, and contribute to security sector reform within the limits of their capacities and areas of deployment. Moreover, France assumed the responsibility to report to the Security Council on the implementation of its mandate. It is interesting that the Council called upon the transitional authorities to cooperate fully with the deployment of the French forces, by ensuring its safety, security and freedom of movement *«with unhindered and immediate access throughout the territory of CAR»*, a demand that seems superfluous since it was the transitional authorities that invited French help and so are supposed to offer this kind of guarantees to them.

France decided to increase the number of its troops on the ground on 14th February 2014, reaching a strength of 2000, a move that was welcomed by the UNSC in its subsequent resolution 2149/2014 that established MINUSCA, the UN operation subsuming MISCA. The UNSC mandate to the French forces is reiterated in resolution 2149/2014. Thus the French forces are authorized *«to use all necessary means to provide operational support to elements of MINUSCA»* until the end of its mandate and report to the Council in this regard.

It seems that the French authorities were not willing to rely exclusively on the invitation extended by the CAR transitional authorities, at least not until a UNSC resolution was adopted authorising explicitly the French presence in the Country. This was also the case in Mali, when the Security Council decided to establish MINUSMA (United Nations Multidimensional Integrated Stabilization Mission in Mali) that replaced the African-led force AFISMA and requested French troops *«to intervene in support of elements of MINUSMA»*, notwithstanding the invitation extended by the authorities of the State and the military operations already (*i. e.* before explicit UNSC authorisation) carried out against the rebels by the Malian military in cooperation with the French troops.

c) ECOWAS and France in Côte d'Ivoire

Part of the army rebelled in the early hours of 19th September 2002, launching attacks in several cities, including the capital Abidjan. Until around noon the rebels took control of

the whole of the north, whereas the government forces maintained control of the capital and the south. The attacks were vindicated by the Patriotic Movement of *Côte d'Ivoire* (*Mouvement Patriotique de Côte d'Ivoire*, hereinafter MPCI). During this crisis the first intervention of foreign actors takes place, France initially and the sub-regional organization ECOWAS afterwards.

The French intervention, known by the code name *«Operation Unicorn»* (*«Operation Licorne»* in French), took place immediately after the outbreak of the conflict and was based on the defence agreement that the two Countries had signed in August 1961[83], a year after the independence of Côte d'Ivoire. The Licorne forces helped in the evacuation of civilians in towns behind rebel lines, while following the signing of the ceasefire agreement on 17th October 2002 they deployed along the ceasefire line, on the basis of bilateral arrangements[84].

In that phase, the UN had not yet been activated. Nor the OAU, the predecessor of the African Union, had done so. At the regional level, ECOWAS bore the brunt of assisting the Country in exiting the crisis. During an emergency summit on 29th September 2002, the member-States of the sub-regional organisation decided to take concrete steps to end the conflict, through mediation and peacekeeping. ECOWAS mediators succeeded in their mission and, as already mentioned, the belligerents agreed on a cease-fire on 17th October 2002. Furthermore, ECOWAS approved a peacekeeping mission with the following mandate: monitor the cessation of hostilities; facilitate the restoration of public services and the free movement of goods and services; make a general contribution to the peace process; guarantee the safety of observers, humanitarian aid personnel and insurgents[85].

The immediate deployment of the operation was delayed on the one hand due to logistics and financial issues and on the other due to the reluctance of neighbouring States to send their troops without an effective peace agreement in place, which would be indicative of the consent of the parties to the conflict. This delay gave to the sub-regional organisation the opportunity to obtain beforehand the consent and actually the invitation of the legitimate president of the war-affected Country[86]. Thus, at an extraordinary summit of Heads of State and Government that took place on 18th December 2002, with the presence of *Côte d'Ivoire*'s President, Laurent Gbagbo, an official invitation was extended by the head of the State, who requested that *«the ECOWAS force be set up immediately»*[87]. ECOWAS troops started to deploy in the Country in January 2003 after the Linas-Marcoussis agreement and it was endorsed retroactively by the UNSC in its resolution 1464 (2003) of 4th February 2003 as we shall see in the following paragraphs. Initially, the operation was known as ECOFORCE (ECOWAS Force in *Côte d'Ivoire*) so as to be distinguished from

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[83] See the *Accord de défense entre les gouvernements de la République de la Côte d'Ivoire, de la République de Dahomey, de la République Française et de la République de Niger* of 24th April 1961, in *Journal Officiel de la République Française*, 5th February 1962, available at http://yanko.chez-alice.fr/ci/crise/docs/accord_def_24_avril_1961.pdf (last visited in 2nd June 2015).

[84] Report of the Secretary-General on the United Nations Mission in Cote d'Ivoire submitted pursuant to Security Council resolution n. 1514/2003 of 13th November 2003, UN doc. S/2003/3, 6th January 2004, para. 48.

[85] T. MAYS, *Historical dictionary of multinational peace-keeping*[3], Maryland, 2011, p. 96.

[86] The operation seems to have had the consent of all the parties to the conflict, see UN doc. S/2003/472.

[87] See the letter dated 19th December 2002 from the Permanent Representative of Senegal to the United Nations addressed to the President of the Security Council, UN doc. S/2002/1386, 19th December 2002, para. 11.

ECOMOG's missions but later it was officially renamed into ECOMICI (ECOWAS Mission in *Côte d'Ivoire*)[88].

3. Distinguishing collective self-defence and invitations

Collective self-defence is applicable following an explicit request for assistance by the State in question when the latter is the victim of armed attack by another State (art. 51 UN Charter). In that respect, use of force, as collective self-defence, which extends beyond the borders of the requesting State, has the aim of repelling the armed attack and has to be the last resort (necessary), immediate, and proportional. Whereas, when the government of a State faces a (*prima facie*) internal threat, an insurgency, an armed opposition group, then military assistance on request will have to take place exclusively within the borders of the inviting State, in order to repel that internal threat. States relying on collective self-defence – in addition to invitation by Iraq – in order to justify military operations in Syria certainly miss a point[89].

Why are these two different grounds for justification of intervention used as alternative, or complementary, legal bases in the situations of Iraq (and Syria to a certain extent) to address the threat posed by Daesh /ISIS /ISIL? And why are both inadequate in that respect?

As far as Iraq is concerned, the invitation argument seems adequate. However, in Syria, the situation is more complex, as Syria never consented to US and allies intervention in its territories (although it did invite the US to *«coordinate their actions against ISIS/ISIL»*)[90]. Moreover, Iraq's invitation for assistance cannot extend to Syrian territory, as intervention by invitation cannot predetermine the consent of a third State. And most importantly, even if ISIS/ISIL has emerged as the most powerful jihadist group posing according to the UNSC res. 2249 (2015) *«a global and unprecedented threat to international peace and security»*, the argument that allied forces responding to that threat and their intervention against the territories the group controls in both Iraq and Syria can be justified as collective self-defence, is essentially beyond the scope of article 51 of the UN Charter.

Furthermore, as far as the second argument on collective self-defence is concerned, the Syrian government declared, although not early enough[91], that if *«any State invokes the excuse of counter-terrorism in order to be present on Syrian territory without the consent of the Syrian Government, whether on the Country's land or in its airspace or territorial waters, its actions shall be considered*

[88] T. MAYS, *Historical dictionary*, cit. It is also described as ECOMOG IV, the three previous being ECOMOG I in Liberia, ECOMOG II in Sierra Leone and ECOMOG III in Guinea-Bissau, see K. OMORAGBON, *The legality of ECOWAS intervention in peace support in terms of the UN Charter*, in T. FALOLA, C. THOMAS (eds.), *Securing Africa. Local crises and foreign interventions*, New York, 2014, pp. 210-228 (212-218).

[89] See the letter addressed by the Permanent Representative of Belgium to the Security Council invoking article 51 UN Charter and an invitation by the Iraqi government to justify military action on the *Syrian* territory (emphasis added), NYKUNO//MUL.04FL/L/2016/293, 7th June 2016.

[90] See C. KRESS, *The fine line between collective self-defense and intervention by invitation: reflections on the use of force against "IS" in Syria*, in *Just Security*, 17th February 2015, available at https://www.justsecurity.org/20118/claus-kreb-force-isil-syria/.

[91] See the identical letters dated 17th September 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2015/719, 21st September 2015.

a violation of Syrian sovereignty» and that the justification of collective self defense *«distorted article 51 UN Charter»*.

And indeed, US did attempt such a distortion of art. 51, since it justified the use of force against ISIS/ISIL in Syria primarily on the right of collective self-defence to the benefit of the victim State Iraq. This justification is evident in a letter sent to the UNSC on 23rd September 2014 by the US[92], as well as in the opinions expressed by a coalition of States[93]. Three days earlier, Iraq had sent a letter to the UNSC with a statement of the armed attack against it and a request for assistance[94]. The claim of collective self-defence was not formulated in inter-State terms: no State argued that ISIS's violence against Iraq is attributable to Syria, but rather that the US and its allies use force in Syria at the request of Iraq to defend that State against the non-State armed attack carried out by the ISIS/ISIL against Iraq *from* Syrian territory. This claim implies the legal conviction that the right of self-defence, as recognized in article 51 of the UN Charter, covers not only armed attacks by other States, but also those of highly destructive non-State actors. Is this an acceptable extension of article 51 UN Charter?

The reason is that attacks originating from a non-State actor are not included in the necessary conditions for a collective self-defence. Or at least according to the jurisprudence of ICJ (*Nicaragua Case*, *Armed Activities case*, and their interpretation of the 3314 UNGA resolution on the definition of aggression art. 3 g) if non-State actors are the authors of an armed attack, they have to be proxies, *de facto* organs (art. 8 articles on State Responsibility) and therefore their actions should always be attributed to a State. A case not evident in the case of ISIS/ISIL. So, collective self-defence is a dubious argument in addressing the intervention against ISIS /ISIL. On the other hand, authorisation by the US SC is a valid argument in that respect, based on UNSC res. 2249/2015.

One should carefully examine other instances of such a collective self-defence argument, especially through regional organisations. Instances of addressing arguments of self-defence and intervention by invitation was evident in regional organisations, especially in Africa, with ECOWAS being one of the most important proponents of the trend. Indeed apart from the *«NATO system and article 5 of the North Atlantic Treaty»*, collective defence mechanisms are still alive in all regional organisations. The Protocol relating to the Mutual Assistance of Defence, adopted in 1981[95], is an agreement of collective self-defence in case of external aggression, armed conflict between member States or non international armed conflict that receives outside support (the so-called internationalized armed conflicts). In particular article 16 PMAD stipulates that ECOWAS may intervene in situations of armed threat or aggression directed against a member State at the request of the State, thereby establishing a mechanism of collective self-defence. In case of a conflict between two member States, ECOWAS shall first engage in mediation and if the need arises, it may order the interposition of the Allied Armed Forces of the Community between the troops engaged in

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[92] See the Letter dated 23rd September 2014 from the Permanent Representative of the US of America to the United Nations Addressed to the Secretary-General, UN Doc. S/2014/695 (2014), 23rd September 2014.

[93] See the identical letters dated 25th November 2014 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2014/851 (2014), 26th November 2014.

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

[95] Not registered with the UN Secretariat, available at http://www.operationspaix.net/DATA/DOCUMENT/3827~v~Protocole_d_Assistance_Mutuelle_en_matiere_de_Defense.pdf (last visited 28th May 2015).

the conflict (article 17 PMAD). This action resembles to traditional peacekeeping of the UN (under the so-called *«Chapter VI ½»* UN Charter, as labelled by former UN Secretary-General Dag Hammarskjold), namely monitor of a buffer zone in the aftermath of a cease-fire agreement, consent of the parties involved in the conflict, no use of enforcement measures under Chapter VII UN Charter, use of force in personal self-defence but not for the defence of territory and strict impartiality regarding the conflict and the parties embroiled in it[96].

Last but not least, article 18 §1 PMAD stipulates that force will be used against external aggression or internal crisis that is externally maintained and sustained, at the express request of the State, excluding thereby any forcible intervention of the sub-regional organisation against its own member States. This is further corroborated by article 18 §2 PMAD which stipulates that community forces shall not intervene if the conflict remains purely internal. It is clear, therefore, that the abovementioned instruments do not offer a legal basis for action even if flagrant human rights violations occur. The rationale for their application is not the gravity of the crimes perpetrated against innocent civilians but the external threat to the independence and sovereignty of the State.

However, this security *apparatus* has never functioned in its entirety. Although the PMAD was invoked as a legal basis for ECOWAS' intervention in Liberia[97] and Sierra Leone, the Allied Armed Forces of the Community were never used as such. Rather, they were later incarnated in ECOMOG, a monitoring group established in 1990 destined initially for classical peacekeeping, namely observing of cease-fires, engaged though also in enforcement action mainly in Liberia and Sierra Leone. Its legal basis remains still today a thorny issue[98], the more so because it was actually used not as interposition force but it was

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[96] A salient example of operation of this type is UNFICYP in Cyprus, present in the island since 1964. UNPROFOR in Bosnia-Herzegovina tested the limits of Chapter VI ½ operations, since it overstretched the role of UN peace-keeping personnel, especially after the adoption of UNSC resolutions 819 and 836 (1993) of 4th June 1993, regarding the protection of safe areas.

[97] The PMAD strictly prohibits intervention in internal armed conflicts. In order to outflank this legal obstacle, the West African Countries justified their intervention pointing out that, owing to the large number of their own nationals trapped in Liberia and thousands of refugees fleeing to neighbouring countries, the conflict could no longer be characterised as purely internal. See HUMAN RIGHTS WATCH, *Waging war to keep the peace: the ECOMOG intervention and human rights*, June 1993, available at http://www.hrw.org/reports/1993/liberia/ (last visited in 30th May 2015). This is not precise and renders extremely shaky the legal bases used by ECOWAS intervening States. The conflict was indeed non-international, before the outside intervention took place, since the warring factions were the armed forces of the Country and the rebels and it had not yet spilled over to neighbouring Countries. The humanitarian emergency caused by thousands of refugees crossing the borders could potentially destabilize the region, creating what the UNSC aptly describes as *«threat to international peace and security»*. But it does not change the qualification of the conflict as such. The intervention to protect nationals abroad is a wholly different issue and it is out of the scope of this paper, but it seems, by the facts on the ground, that the intention of the ECOMOG force was not limited to a rescue operation.

[98] It was established by the Standing Mediation Committee (which was created by the Authority – the Heads of States and Governments of ECOWAS – by virtue of decision A/DEC.9/5/90, 30th May 1990 and comprised the Gambia, Ghana, Mali, Nigeria and Togo, see E. BERMAN, K. SAMS, *Peacekeeping in Africa: capabilities and culpabilities*, UNIDIR United Nations, 2000, p. 85) at its meeting in Banjul on 6–7 August 1990 (see *lettre datée du 9 août 1990, adressée au Secrétaire Général par le Représentant Permanent du Nigeria auprès de l'Organisation des Nations Unies*, UN doc. S/21485, 10th August 1990) and its backbone was the Nigerian armed forces which henceforth assumed a leading role. See A. ADEBAJO, *Liberia's civil war. Nigeria, ECOMOG and regional security in West-Africa*, Boulder, 2002; M. WELLER (ed.), *Regional peace-keeping and international enforcement: the Liberian crisis*, Cambridge, 1994. The legal procedure stipulated by the PMAD was totally ignored. The Allied Armed Forces of the Community could not be activated *«because of the divide between Francophone Countries, who were in support of*

involved in active combat, using lethal force for offensive purposes[99]. Be that as it may, ECOMOG as a standby force with civilian and military components is incorporated in the subsequent Protocol on the Mechanism for Conflict Prevention *«as a supporting organ of the institutions of the Mechanism»* (article 17 Protocol) with a broad mandate.

4. Tentative conclusions regarding the "intervention by invitation" theory

In the contemporary international legal order with the existence of international institutions and organs responsible to maintain international peace and security, States are hesitant to act unilaterally even if they have the official support of the Country to the side of which they intervene. Especially so in situations of intense armed conflict, where there is a blurring regarding the legitimate authorities of the Country or when the State is in a period of transition.

One could also contend that current State practice reflects a resurrection of the 1975 resolution of the *Institut de Droit International* regarding the prohibition of intervention in civil wars even at the request of the government in the absence of UN authorization, even though the strict wording of that resolution is not reiterated in the respective document of 2011 on *«Military assistance on request»*. It is interesting that even in the case of the military airstrikes against ISIL in Iraq the States that participate in the international coalition do not recognise explicitly the situation as a civil war where the purported intervention might prejudice the principle of non-intervention or the right to self-determination of the peoples. Rather, the respective governments have stressed in their official declarations that the intervention comes as a response to Iraqi invitation and consent and that it aims at the elimination of a *«terrorist organization»* in the *«exercise of the right to collective self-defence»* and pursuant to relevant UNSC resolutions authorising the adoption of *«all necessary measures»*. In other words, States in their effort to legitimise otherwise illegitimate interventions tend to invoke a series of arguments – not always pertinent – from invitation by the legitimate authorities to collective self-defence (against non-state actors?), creating thus a deliberate confusion on the applicable exceptions to the prohibition of the use of force.

Charles Taylor, the rebel leader and the Anglophone countries who were in support of Samuel Doe, the president». See L. MALU, *Background note on ECOWAS, Pan African strategic and policy research group*, World Bank Headline Seminar on the Global and Regional Dimensions of Conflict & Peace-building, Addis Ababa, 10th and 12th October 2009.

[99] The legal paradigms applicable to multinational operations, on the basis of which the rules of engagement of each operation are adopted, are mainly the following two: the law enforcement paradigm (use of lethal force is based on the stipulations of international human rights law) and the armed conflict paradigm (use of force is based on the provisions of international humanitarian law). For a relevant discussion see, R. MCLAUGHLIN, *The legal regime applicable to use of lethal force when operating under a United Nations Security Council Chapter VII mandate authorising "all necessary means"*, in *Jour. Conf. Sec. Law*, 2008, pp. 389-417.