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Legal but Illegitimate Interventions

**Legitimacy of Governments and Intervention
by Invitation under International Law**

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PREFACE

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SUMMARY

Under international law, a government of a state is entitled to the sovereign right to invite another state to intervene militarily on its territory. This type of consensual use of military force is an exception to the rules on prohibition of use of force among states, and unlawfulness is precluded through such governmental consent. The extent to which a government is entitled to invite has been discussed and debated amongst scholars, and it is not entirely clear what the position of international law is in all cases. This is especially true if there is an internal conflict of a civil war character in the state, and this is the issue that I engage with in this thesis. This thesis investigates the legal concept of intervention by invitation, and seeks to understand its reach and limitations in times of civil war. It is concluded that a government's ability to invite foreign intervention is mainly based on control of territory, and not on normative concerns or legitimacy of the government. Therefore, a government's potential lack of support, or abuses of its population, is not taken into account when assessing the validity of an extended invitation. This enables also abusive or authoritarian regimes to invite foreign assistance in times of civil war. It is, in my view, problematic that the incumbent government has an absolute prerogative to invite foreign assistance without any normative criteria, which enables the incumbent government to prevail in the civil war.

This thesis instead poses the suggestion that governmental legitimacy ought to be a significant criterion when assessing validity of an invitation to intervene into a country plagued by civil war or widespread internal unrest. In such an assessment, I suggest that indicators of legitimacy be consulted, in order to establish if the incumbent government indeed is legitimate, and thus is entitled to the sovereign right to invite. The question I engage with is, thus, if a regime can act as the representation of state sovereignty, if it lacks legitimacy stemming from its population. Therefore, this thesis contemplates if there is a need for international law to discuss illegitimate governments, and if an assessment of legitimacy is desirable. In this discussion the normative arguments on Humanitarian Intervention and Responsibility to Protect are discussed and analogised. A new possible order of effective protection of populations, rather than effective control of territory, is discussed. In support of the proposed legitimacy assessment, a number of indicators of legitimacy are discussed, which are supported by the frameworks of human rights and international humanitarian law. Arguments against such a legitimacy assessment are brought forward and discussed as well in this thesis, and possible risks of abuse and objectivity concerns are investigated and considered.

This thesis has its starting point in the Syrian civil war, and thus the proposed legitimacy assessment is applied to this conflict in a limited case study.

SAMMANFATTNING

Enligt folkrätten har en stats regering en suverän rätt att bjuda in en annan stat att ingripa militärt på dess territorium. Sådant samtycke till militär våldsanvändning är ett undantag från folkrättens förbud mot våldsanvändning mellan stater, och samtycket gör således våldsanvändningen laglig enligt folkrätten. Det har diskuterats och debatterats bland forskare i vilken utsträckning en regering har rätt att inbjuda en annan stat, och det är i vissa fall inte helt klart vilken ställning folkrätten tar. Detta är särskilt oklart om det i den inbjudande staten råder inbördeskrig, vilket därför är den frågeställning som jag undersöker i detta arbete. Uppsatsen undersöker den folkrättsliga konstruktionen av inbjuden intervention (*intervention by invitation*), och syftar till att förstå dess räckvidd och begränsningar i förhållande till inbördeskrig. Slutsatsen är att en regering har möjlighet att bjuda in utländsk militär, och att denna rätt baseras huvudsakligen på territoriell kontroll, och inte med hjälp av normativa avvägningar eller på grund av regeringens lämplighet. Därmed beaktas inte en regerings potentiella brist på stöd från folket, eller missbruk av dess befolkning, vid bedömningen av inbjudans giltighet. Detta innebär att även auktoritära regimer, eller regimer som kränker sin befolknings mänskliga rättigheter, har rätt att bjuda in utländskt militärt stöd vid inbördeskrig. Det är, i min mening, problematiskt att den sittande regeringen har en absolut befogenhet att bjuda in utländskt militärt stöd utan att normativa kriterier beaktas, vilket gör att den sittande regeringen får ett stort övertag i inbördeskriget.

Denna uppsats framför istället tesen att en regerings legitimitet torde vara en viktigt kriterium vid bedömningen giltigheten av en inbjudan till militär intervention vid inbördeskrig. Det föreslås att en sådan bedömning bör grundas på ett antal indikatorer av legitimitet, för att fastställa ifall den sittande regeringen verkligen är legitim, och därmed ifrågasätta ifall regeringen kan använda sin suveräna rätt att inbjuda till militär intervention. Frågan jag ställer är om en regim verkligen kan anses vara den egentliga representationen av statssuveränitet, om den saknar en legitimitet härrörande från sin befolkning. Därför diskuterar jag i denna uppsats om det finns ett behov för folkrätten att diskutera icke-legitima regimer, och om en bedömning av legitimitet under folkrätten är önskvärd. Denna diskussion behandlar de normativa argument som humanitär intervention och doktrinen om "responsibility to protect" baseras på, och applicerar dem i diskussionen kring icke-legitima regimer. I denna del diskuteras en ny princip om effektivt skydd av befolkningar, som en potentiell ersättning av principen om effektiv territoriell kontroll. I diskussionen kring en eventuell legitimitetsbedömning resoneras kring ett antal möjliga indikatorer av legitimitet, som stöds av internationella mänskliga rättigheter och internationell humanitär rätt. Argument emot en sådan legitimitetsbedömning förs också fram och diskuteras, och eventuella risker för missbruk och objektivitetsproblem utreds och beaktas.

Denna uppsats har sin utgångspunkt i det Syrisk inbördeskriget, och det är därmed på denna konflikt som den föreslagna legitimitetsbedömningen tillämpas, i en mindre fallstudie.

ABBREVIATIONS

ARSIWA	Draft Articles on Responsibility of States for Internationally Wrongful Acts
FRD	Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations
HI	Humanitarian Intervention
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
IHL	International Humanitarian Law
ILC	International Law Commission
NATO	North Atlantic Treaty Organization
R2P	Responsibility to Protect
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNCh	Charter of the United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
USA/US	United States of America
VCLT	Vienna Convention on the Law of Treaties

1 Introduction

1.1 Background

On the 30th of September 2015 the first Russian bombs hit Syrian territory.¹ Since that day Russia has been heavily engaged militarily in Syria, in a continued co-operation between President Vladimir Putin of Russia and President Bashar al-Assad of Syria. The Russian intervention has been conducted upon an invitation from the Assad regime. No official death toll figures relating to the Russian bombs have been released, but it has been reported that thousands of civilian lives have been lost.² Even prior to the military intervention, Russia backed the Assad regime politically since the start of the Syrian civil war in 2011. The Syrian regime was, however, on decline, and the fall of Assad seemed almost inevitable up until the Russian military intervention. This presumption changed considerably following the launch of the Russian military intervention, which altered the course of the ongoing conflict by giving higher probability to an outcome favouring the Assad government and a lesser chance of success for the opposition.³

As I am writing this thesis the conditions of the conflict have changed entirely, and the Syrian government has with the help of Russian military assistance almost entirely defeated the opposition, however with wide-scale humanitarian consequences and much international critique. This conduct can be brought into question with arguments enquiring if Russian intervention truly can be allowed and appropriate in the face of Assad's apparent neglect for human rights and humanitarian safety of the Syrian population.

The question I want to engage with is whether it can actually be internationally lawful for an ally to help a regime use force against its own population, in order to crush opposition towards an increasingly declining regime. The intervention is controversial in several different ways, certainly morally and politically, but it seems to be uncontroversial, or at least unregulated, under international law. How could this be so? As a bystander it is difficult to accept that international law is passive in the face of such a situation. In situations where a regime is committing gross human rights violations against its own population, a tension in international law is revealed: a tension between respect for state sovereignty on the one hand and the international community's vow to promote and respect basic human rights on the other. Is it possible in all situations to uphold both these ambitions, or do some situations call for a greater protection of human rights?

¹ Cockburn, 30 September 2015.

² Syrian Observatory for Human Rights, 20 November 2016.

³ O'Connor, 12 October 2016.

The key issue here is the fact that the incumbent Syrian regime holds the power to invite foreign states to intervene militarily, even though the regime can be deemed, at the very least, as a questionable representative of the Syrian people. Governmental legitimacy – or illegitimacy – under international law is an issue sometimes overlooked among international lawyers and legal scholars, but has been of increased interest since the 1990's. Nevertheless, legitimacy of governments has often been deemed to be an issue of political rather than legal relevance, and has therefore been somewhat disregarded in legal research. However, as the legality of a state's actions stems from governmental authority, we must consider what we regard as a legitimate government, to reach a conclusion on the legality of actions taken by the group regarded as the government of a state. In other words, how can a regime act as the representation of state sovereignty, if it lacks legitimate authority stemming from its population?

Syria is not the only contemporary example. In the last decades, there has been a prevalence of intrastate conflicts over interstate conflicts, and the conflicts we see today are predominantly of a civil war character that spread across states, rather than having the character of war between states, e.g. the conflicts we see today in Libya, Yemen, and the Democratic Republic of the Congo that ultimately engage a range of states without being of a directly interstate character. Many of these intrastate conflicts have caused great loss of life, much suffering and have frequently been accompanied by mass atrocities, at times committed by the incumbent government.⁴ Therefore, it is, in my view, problematic that the incumbent government has the prerogative to invite foreign assistance, meaning that it is legal for third states to intervene at an invitation, and thus help the incumbent government in the struggle for the country.

When discussing this problem, many connected issues arise. The concept of governmental legitimacy has ties to concepts of sovereignty, recognition and human rights as well as, in the case of intervention by invitation, substantial connections to the prohibition of the use of force under international law. These legal conceptions must be explored and connected in order to reach an understanding of the position of international law on governmental legitimacy, and to thereby challenge it. When challenging the status quo, I borrow a line of argumentation from the doctrines of humanitarian intervention and responsibility to protect, which have justified so-called “illegal but legitimate” interventions. I however reverse this paradigm, and make an argument about “legal but illegitimate” interventions. I argue that this is the case when an illegitimate regime exercises the right to invite foreign military assistance into its territory, and argue that such interventions ought to be impermissible under international law.

⁴ Lieblich (2011), p 339.

1.2 Aim and Research Questions

The objective of this thesis is to investigate the international legal framework regarding intervention by invitation, where there is a concern about legitimacy of the inviting government. The thesis aims to explore whether and to which extent criteria exist to ascertain legitimacy and determine legality of such invitations to interventions. Specifically, the research questions that this thesis aims to answer are the following:

- How is the current use of force regime and the rules on intervention by invitation constructed in regard to civil war?
- Is there under international law an assessment of legitimacy of governments, that affects the governments' claims of acting as the representative of a state in regard to intervention by invitation?
- On what basis can an assessment of legitimacy be argued for, and what aspects ought such a test entail?
- Ought the legitimacy of a government affect international legal rights or obligations of third party states whom the government, whose legitimacy is in question, invites to intervene?

In order to answer these research questions, the concepts of sovereignty and human rights are explored. This essay aims to tie together and connect human rights regulations with the use of force doctrine and the concept of intervention by invitation, to point to the aspects where the laws of intervention by invitation fail to regard human rights and their concrete application. The solution presented for this problem is a call for a recognition of governmental legitimacy as a relevant legal concern. In this thesis it is argued that there is a need for a shift regarding governmental legitimacy in international law, and it is argued that international law ought to impose an assessment or set of criteria enabling and obligating the international community or individual states to determine whether a regime is legitimate or illegitimate before accepting an invitation to intervene.

1.3 Terminology and Concepts

This thesis presupposes that the reader has a basic knowledge of international law, and therefore acknowledged terms and concepts will not be elaborated on or discussed at lengths.

The terms *government* and *regime* are used interchangeably, and the synonyms *rule* and *govern* are used throughout the thesis when describing the power exercised by the government.

The term *intervention by invitation* is used as in the meaning of military intervention unless otherwise specified.

The term *civil war* is used in a general meaning, as describing a war of internal character, that is fought between groups of people living in the same country.⁵ However, in this thesis civil war is further meant to as conflicts having also an element of war between one or more opposition groups and the incumbent government, and where the dispute is mainly concerning over political power.

The term *legitimacy* is explored in chapter 5, and will therefore not be discussed under this section.⁶

1.4 Methodology, Materials and Theory Application

1.4.1 Methodological Aspects

The most common methodology in law, both in international and domestic legal studies, is undoubtedly the legal dogmatic method. The main goal of the method is to describe and interpret law in a systematic way, in order to reach an authoritative conclusion on what the law entails.⁷ The method uses the sources of law to solve the issue at hand, by investigating what is established through law and how that law can be applicable on the given problem. The boundaries are set by the authoritative legal sources, such as law, case law and doctrine.⁸ The legal dogmatic method may however need to be applied differently depending on the subject at hand, such as in different legal areas or depending on if domestic or international law is studied.⁹

The legal dogmatic method is valuable when ascertaining what the law is, when determining *de lege lata*. However, when using this method strictly the result is often an entirely descriptive product. Criticism has been voiced towards the legal dogmatic method, stating that it fails to take into account social effects of law to the extent that it only examines what is deemed to be authoritative sources.¹⁰ In order for legal research to add value to the field, it also needs to engage with normative questions asking, for example, whether a given positive legal state of affairs is appropriate, effective or complete. By including new or different perspectives legal research can help develop the law, or aid in justifying or criticising positive law.¹¹ There is in this sense a need for a discussion of *de lege ferenda* – what the law ought to entail and what effects might be more or less desirable.¹² Many times, it is assumed that such normative discussions can be accommodated within the legal

⁵ Cambridge English Dictionary, "civil war".

⁶ See chapter 5, p. 42 and onwards.

⁷ Sandgren, p. 648; Olsen, p. 111.

⁸ Jareborg, p. 8; Kleineman, p. 21.

⁹ Kleineman, p. 21.

¹⁰ Kleineman, p. 24 – 29.

¹¹ Jareborg, p. 4.

¹² Peczenik, p. 313.

dogmatic method, which then perhaps is not as dogmatic as its name suggests.¹³ In this thesis the legal dogmatic method is used, but the focus and conclusion of the arguments relies on a theoretical basis. This normative perspective is included to avoid a merely descriptive product and to give depth to the analysis.

1.4.2 Theory Application

International legal scholarship is dominated by a positivist legal view. The positivist view rejects the existence of natural law, thus rejecting the view that there is a natural morality which establishes what the law is, and argues that there is no necessary connection between law and morality.¹⁴ Scholars subscribing to so-called inclusive positivism argue that morality does not have to, but can be, included in a test of legal validity, while so-called exclusive positivists argue that moral evaluation can never be part of an evaluation of legal validity.¹⁵ The distinctions of positive law and natural law are two ways of determining *de lege lata*, i.e. what the law is. In the determination of *de lege lata* the general, and fairly uncontroversial, view is that naturalist theories of law are rejected. However, this rejection has at times been overemphasised, and caused scholars to disregard any legal theory that contains moral elements in their *de lege ferenda* analysis.¹⁶ When discussing *de lege ferenda*, what the law ought to be, is however possible to employ a theory containing moral elements while maintaining a positivist legal point of view. Since positivism is concerned with what the law is, it does not prohibit a moral reasoning on what the law ought to be.¹⁷

When adopting a theoretical approach based on moral concerns, it is helpful to first investigate what the current goal of international law is, in order to suggest what the goal of international law ought to be. The goal of international law has traditionally been described as peace *among* states.¹⁸ In the past decades the objective has been expanded to also include justice and human rights. However, many times justice and human rights are presented as ways to reach the overarching goal of peace among states, and are not regarded as goals in themselves.¹⁹ The goal of peace *among* states can be reached even if there is an absence of peace *within* states, i.e. regardless of violent internal conflicts and human rights violations by governments directed at populations. If the goal of human rights, however, is adopted as an overarching goal in itself, and not only as a means to an end to achieve peace between states, then the scope of the goals of international law is broadened. A moral-theoretical view of human rights recognises that all human beings have

¹³ Kleineman, p. 26.

¹⁴ Bix, p. 97.

¹⁵ Bix, p. 98.

¹⁶ Buchanan, p. 20.

¹⁷ Buchanan, p. 21.

¹⁸ See Charter of the United Nations, art. 1 and arts. 39-40.

¹⁹ Buchanan, p. 75 – 78.

inherent human rights that are worth protecting in every circumstance. These rights are, although morally based, however also legal rights as they are enshrined in legal documents. Thus, a normative legal theory, based in moral concerns, of human rights is adopted.²⁰ A normative legal theory of human rights would entail that international law ought to efficiently protect the established human rights, since these rights are indeed not only moral but also legal rights. In this thesis I regard the protection of human rights as a goal that international law ought to demand, and therefore human rights concerns are considered as having a heavy weight in how the law ought to be constructed, and an effective argument for reform. Adopting this view, I regard it as significant that the human rights framework contributes to the shaping and reform of other areas of international law, and important that also the *jus ad bellum* regime is allowed to be influenced by human rights concerns.

In the *de lege ferenda* analysis a non-naturalistic²¹ approach is taken. By this I mean that the basis of my analysis rests on a view that some values, and thereby some rights, exist independently and regardless of who the observer is.²² This can be described as a type of moral universalism, or an ethical non-naturalism. For the purpose of human rights, a non-naturalistic point of view would describe human rights as universal and independently existing, regardless of the spectator,²³ however *not* emanating from something “natural” or as having natural properties given from a higher authority. This viewpoint proposes that human rights are considered as existing independently on a moral level, regardless of if they are enshrined in legal conventions or not. The morally independent existence of human rights is the very reason that human rights are codified and included to be protected under international law, and why human rights arguments are highly relevant when reforming or changing positive law.²⁴ If human rights existed purely because of their presence in positive law, the protection of human rights would not be a stronger argument than any other when discussing *de lege ferenda*. In my view, human rights considerations are strong arguments for international law reform, and this view has its basis in my ethical non-naturalistic starting point. However, as discussed above, I of course recognise that in order for human rights to be enforceable as legal rights they must be specified in positive law and that the institutionalisation of human rights have given the framework concrete content. Thus, I use a normative legal theory and thereby regard only the established sources of human rights law to establish what human rights concretely consist of under international law, while I, at the same time, regard human rights as significant arguments on international law reform on their moral persuasiveness.

²⁰ Besson, p. 404.

²¹ My translation of the term ”värdeobjektivism” as described in Badersten, p. 67.

²² Badersten, p. 67.

²³ Badersten, p. 67.

²⁴ Buchanan, p. 119.

1.4.3 Materials

The materials used in this thesis are, in accordance with legal dogmatic method, the authoritative sources of law. Although identifying the sources of international law is not entirely straightforward due to the absence of an international organ with legislative competence, the authoritative sources in international law are usually determined with reference to article 38(1) of the Statute of the International Court of Justice²⁵ (ICJ-Statute).²⁶ This article is regarded as an authoritative statement of the relevant sources of international law. The listed sources in article 38(1) of the ICJ-Statute are: international conventions, international legal custom, and general principles of law recognized by civilized nations. As subsidiary sources useful for the interpretation of international law, the article lists judicial decisions and teachings by the most highly qualified publicists.

Although judicial decisions and legal research and doctrine are merely listed as subsidiary means of establishing international law, I nevertheless use judicial decisions and legal doctrine in this thesis. When doing so I have used cases from established international courts, and have relied on the research of a variety of scholars. Since I carry out a foremost doctrinal analysis, and only in limited ways perform a case study, I rely considerably on international legal doctrine.

The international framework of human rights law is regarded as an especially relevant source in this thesis. I have adopted the stance that human rights have evolved from being merely goals or ambitions, and have a standing as positive international law today. This view is based on the relevance of United Nations General Assembly (UNGA) resolutions contributing to customary international law. In this thesis the human rights framework is a relevant basis and is considered to be so called “hard law”, rather than “soft law”. This view acknowledges that the 1948 Universal Declaration of Human Rights (UDHR)²⁷, which is an UNGA resolution, indeed could be regarded as “soft law” at its adoption, but that it subsequently has “hardened” and now ought to be regarded as a part of international law.²⁸ This evolution has come about by the repetitive nature of the references to UDHR by states, and by the *opinio juris* and state practice in supporting and adhering to the human rights framework, as well as the unanimity in UNGA when adopting the UDHR. Following human rights treaties, such as the 1966

²⁵ 1945 Statute of the International Court of Justice.

²⁶ Shaw, p. 49 – 50.

²⁷ Universal Declaration on Human Rights, 10 December 1948, UNGA Res 217 A (III).

²⁸ For a discussion on the “hardening” of soft law and the “middle way between legislation by convention and the traditional process of custom making”, see Dissenting Opinion of Judge Tanaka in *South West Africa Cases* 1966, paras. 292 – 294.

International Covenant on Civil and Political Rights (ICCPR)²⁹ has been widely signed and ratified by states and is therefore to be regarded as hard law.

1.5 Delimitations

In this thesis, I do not aim to investigate the forming or dissolution of states. Rather, I am interested in the governance of already existing states. My focus lies on investigating whether international law imposes restrictions on *de facto* governments of *de facto* states, based on issues of legitimacy.

In this thesis, I suggest that an assessment of legitimate authority ought to be constructed and consulted before engaging in interventions stemming from an invitation of an incumbent government. Due to issues of length and scope such an assessment is not developed further than its composition through a set of criteria, and should thus not be regarded as complete or exhaustive. It is merely suggested as a starting point for a discussion on possible means of avoiding the problem I call legal but illegitimate intervention.

Since the focus of my studies has been general public international law, this thesis, too, concentrates on public international law and engages only marginally with international humanitarian law (IHL). However, I do recognise that there are certain elements of the specific IHL framework that relate to selected aspects of my thesis. Thus, the thesis refers to IHL as one of six possible indicators of legitimacy of government. I do not attempt to classify conflicts according to the method of IHL, since such classification has no bearing on permissibility under the *jus ad bellum* rules, which is the main focus of this thesis.

1.6 Research Contribution

Research on the topic of intervention focuses largely, on when intervention is or ought to be allowed. In legal scholarship there are, in my opinion, many discussions on how international law can *enable* intervention and a lack of discussions on when international law ought to *prohibit* intervention. Many discuss legitimate intervention in terms of foreign intervention to protect populations and rescue them from oppressive regimes, such as in the responsibility to protect (R2P) and humanitarian intervention (HI) discussions. They, however, seem to neglect the instances of foreign intervention that are damaging to the population, as is the case of intervention in support of an oppressive regime. In this thesis I aim to contribute to the research on the *jus ad bellum* in situations of intervention by invitation by reversing the perspective, and discussing when intervention ought to be impermissible rather than permissible. In my opinion legal scholarship ought to

²⁹ International Covenant on Civil and Political Rights, 16 December 1966 (adopted 16 December 1966, entered into force 23 March 1976), 999 UNTS 171.

focus not only on “illegal but legitimate interventions”, such as R2P and HI, but also on “legal but illegitimate interventions” that are possible under the current *jus ad bellum*. By this I argue that international law currently permits some interventions that can be questioned on their legitimacy and moral standing, although they are legal under the status quo. If the international community is ready to be in breach of international law when intervention is based on legitimacy, then the international community ought, in my opinion, also to be ready to strengthen the prohibition of the use of force based on legitimacy.

1.7 Outline

This thesis is divided into 7 chapters, where chapter 1 is the introduction, chapter 2-4 are *de lege lata* chapters, and chapters 5-6 consist of *de lege ferenda* analysis, and chapter 7 consists of a concluding discussion and conclusion.

Chapter 2 investigates the concept of state sovereignty, in order to discuss who is the bearer of state sovereignty. The chapter also emphasises the separation of the state and the regime, and connects this to the concept of state sovereignty.

Chapter 3 focuses on recognition under international law, laying the foundation in recognition of states but putting focus on recognition of governments and what recognition means for governmental authority. Chapter 3 also discusses to what extent a government is recognised beyond the point of its decline.

Chapter 4 is the main substantive chapter on the *jus ad bellum* regime and starts out with the basic principles of non-intervention and non-use of force. The exception of intervention by invitation is then investigated, and is tied specifically to the intervention into situations of civil war. The chapter also discusses why internal conflicts are a matter of international law, and how internationalisation of civil war makes the *jus ad bellum* regime applicable also in cases of civil war.

Chapter 5 discusses legitimacy of governments under international law. The chapter explores why illegitimate governments ought to be treated as a separate category of international law, and presents arguments for why an assessment of legitimacy is relevant. In this chapter I call for the adoption of a legitimate authority assessment, and present arguments on some indicators that ought to be considered in such an assessment.

Chapter 6 closes the loop by applying the indicators of legitimacy developed in chapter 5 to the conflict in which this thesis has its starting point, namely the situation in Syria.

Chapter 7 provides a summation with closing remarks.

2 The Concept of Sovereignty

2.1 Introduction

This chapter briefly examines the concept of sovereignty, as this is the main principle of international law with which a legitimacy assessment could be in conflict with. First the principle of sovereignty is studied in chapter 2.2, following is a description of the inherent paradox of sovereignty in 2.3, and then in chapter 2.4 the separation of the state and regime is explained. These concepts show the continual evolution and development of international law, and how this has increasingly turned away from state-centred principles and more towards population-centred concerns. In regard to legitimacy a more modern interpretation of sovereignty is likely to conflict less with an assessment of legitimacy stemming from rights-based arguments. This section highlights the importance of the separation of state and regime for the purpose of this thesis, since what aims to be assessed is not the existence of statehood but rather the legitimacy of those claiming to represent that statehood.

2.2 Sovereignty – From Absolute to Popular

Sovereignty is in international law a long-standing and elementary principle. It is established in article 2(1) of the 1945 Charter of the United Nations (UNCh), which states that “[t]he Organization is based on the principle of the sovereign equality of all its members”. However, the precise meaning of sovereignty is not as easily defined, and has been discussed thoroughly among scholars. Sovereignty can be described to be an expression of a state’s independence and equality to other states, which is a founding principle of the international legal order. States are subjects of international law based on their status as sovereign entities, and as a consequence of this status states enjoy equality of rights and duties under the international order.³⁰ Sovereignty is also traditionally interpreted as an obligation among states to respect the sovereignty of other states.³¹ Although these are generally accepted views of the content of the principle of sovereignty, the normative limits of the principle is continually debated.³²

Although the concept of sovereignty has been under change in recent times, the historical view of sovereignty as unlimited authority for the ruler, still remains and affects the interpretation of the concept of sovereignty today.³³ This can be described as absolute sovereignty³⁴, or as a hard-line view on sovereignty. This more traditional view of sovereignty has been criticised for being a principle of

³⁰ Shaw, p. 153 – 156.

³¹ See Shaw p. 153 ff.; Beckman, p. 50 ff.

³² Beckman, p. 52.

³³ Beckman, p. 50.

³⁴ Beckman, p. 51.

order rather than of justice among states.³⁵ The more modern notion of popular sovereignty is instead the view that true sovereignty lies in the hands of the peoples of the state, and that it is in fact they that are the true bearers of sovereignty. This notion is embraced and promoted in the UNCh. Popular sovereignty can be interpreted from article 21(3) of the UDHR, stating that “the will of the people shall be the basis of the government”. This type of sovereignty lies not in “dynastic claims” of for example a monarch, but instead lies in the hands of the people and what they have deemed as an acceptable internal process leading to representation.³⁶ This more modern view of sovereignty not as unlimited rights of rulers, but rather as a social function of the international community has gained support in contemporary international law.³⁷ As is argued by Roth, the notion of popular sovereignty is not new, and that it has been included in positive international law since centuries back.³⁸ Roth argues that a new interpretation of sovereignty has evolved, which emphasises that state sovereignty is built upon popular sovereignty, and presumes that the state apparatus represents the political communities or people’s within the territory of the state.³⁹ What remains unclear is however how far reach this principle has in international law and how to give popular sovereignty an actual effect.⁴⁰

2.3 The Paradox of Sovereignty

The concept of sovereignty contains an inherent paradox.⁴¹ In order for states to reach the status of a sovereign state, they must accept and submit to rules of international law, and seek recognition of their statehood under international law. However, by submitting to international law states also give up a portion of the very object they sought,⁴² in the sense that they give up portions of their sovereignty in regard to areas that are universally regulated by or regarded as *jus cogens* in international law, such as human rights law and the non-intervention and non-use of force regime. To be sovereign contains an inherent element of being subject to international law as a member of the international legal system.⁴³ It is therefore unrealistic to argue that sovereignty in itself should exclude the possibility for evaluating sovereignty, since an essential characteristic of sovereignty is that it embodies restrictions on an “absolute” sovereignty. Thus, qualified sovereignty is not an impossibility. Rather, it is a natural consequence of the paradox of sovereignty. To put it simply: the very existence of sovereignty does not give a right

³⁵ Beckman, p. 56.

³⁶ Roth (1997), p. 365.

³⁷ Beckman, p. 51 – 52.

³⁸ Roth (1997), p. 365.

³⁹ Roth (1999), p. 12.

⁴⁰ Roth (1997), p. 365.

⁴¹ Roth (1999), p. 10.

⁴² Roth (1999), p. 10.

⁴³ Buchanan, p. 50.

for a state to act contrary to established principles of international law that are in place to protect sovereignty and to protect and govern the international community of states.⁴⁴ This has been an established principle since the very beginning of the United Nations era, and was enshrined in article 14 of the 1949 Draft Resolutions on Rights and Duties of States which confirms “that the sovereignty of each State is subject to the supremacy of international law”.⁴⁵

The adoptions of human rights frameworks such as the UDHR, the ICCPR and the ICESCR further limited the scope and powers of sovereignty, as they introduced obligations for states to respect human rights and refrain from aggression.⁴⁶ Since human rights are in contemporary international law an expressed priority, it can be argued that sovereignty cannot any longer be an excuse in an attempt to avoid human rights obligations.⁴⁷ From the human rights regime a responsibility can be interpreted into the principle of sovereignty, obligating each sovereign state to uphold human rights within its sovereign territory.⁴⁸ This paradox of sovereignty indeed means that the meaning of sovereignty has shifted, and can no longer entail an absolute discretion but also imposes obligations on states regarding the treatment of their populations.⁴⁹

2.4 The Separation of State and Regime

Conceptually, the government of a state is separate from the state itself. However, the two are often treated as one entity, and it can be hard to separate the two other than conceptually. This separation is however crucial in this thesis since it is not the existence or recognition of a state that is the issue at hand. Rather, the issue is whether the incumbent regime is a legitimate representative of that state, and thus whether the regime is competent to hold functions of sovereignty. The general principle in international law is that the government speaks on behalf of the state, and that the only way in which a state can act is through the representatives making up the government.⁵⁰

In the 1969 Vienna Convention on the Law of Treaties (VCLT)⁵¹ article 2(c) in combination with article 7 it is stated who is considered as the representative of a state, for the purpose of the treaty. Article 7 states that persons are considered the representative of a state if (1) they produce appropriate full powers or if it appears

⁴⁴ Roth (1999), p. 10.

⁴⁵ UNGA Res 375 (IV) (6 December 1949).

⁴⁶ Buchanan, p. 50.

⁴⁷ Beckman, p. 54.

⁴⁸ Beckman, p. 55.

⁴⁹ Roth (1999), p. 12.

⁵⁰ Doswald-Beck, p. 190.

⁵¹ Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.

from the state's practice that they are the correct representative⁵² or (2) if they are a Head of State, Head of Government or Minister for Foreign Affairs, or a head of Diplomatic mission or otherwise accredited.⁵³ Article 2(c) defines "full powers" as "a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty".⁵⁴ This means that power emanating from the government, gives the government authority to act on behalf of the state.

Being the representative, or being part of the group of representatives that makes up the government of a state, thus gives the right to act on behalf of the state. Being competent to perform functions of sovereignty means that a government has the capacity to enter into binding treaties with other states, the right to develop the states domestic policies and politics, and that it has the right to decide over territorial issues of the state. This means that the acting government has the right to invite foreign military assistance onto its territory, through an invitation to intervene. It also means that the government is the sole representative of the state, and thus the people. In this capacity, it is the government that is also ultimately responsible for the domestic policies, government actors and actions of the military of the state. When government actors, affiliates or others on the command or acquiescence of the government commit actions, it is the government who bears accountability. Thus, treatment of peoples within the state, upholding of human rights principles, upholding of the rule of law and coherence with international law is thus also ultimately the responsibility of the government.

The regime of a state is also exchangeable, through political process or other means. The statehood is however intact regardless of the regime changes that the state may undergo. Thus, it is of conceptual importance to identify the state as an entity independently from the government representing the state, and recognise the two as separate concepts.

⁵² VCLT art. 7(1).

⁵³ VCLT art. 7(2).

⁵⁴ VCLT art. 2(c).

3 Recognition Under International Law

3.1 Introduction

This chapter aims to introduce the concept of recognition of governmental authority, to build further on the emphasis of the role of the government and how it is recognised under international law. Chapter 3.2 investigates what governmental recognition entails in terms of authority of the government. Chapter 3.3 explains the effective control doctrine, which is the predominate guiding principle when establishing which group of representatives is the authority of a state. This is important for the main legitimacy-argument of this thesis, as it demonstrates the current method of establishing which group of representatives is the appropriate government of an established state. The concept of recognition is crucial and lays an important foundation for the *jus ad bellum* rules on intervention by invitation, which are investigated in chapter 4.

3.2 Recognition of Governmental Authority

Recognition of states and of governments are two separate issues, and must not be confused. Recognition of a state affects the legal personality of the state, whereas recognition of a government affects the status of the governing authority of the state.⁵⁵ However, when a state has been recognised as an entity in the international order, the international community must also take a stance on who the legitimate representative of that state is. Such recognition can, but must not, take place simultaneously.⁵⁶ States can choose to not recognise, or even de-recognise, a government with which they do not wish to cooperate. There is no settled definition of what a recognition of a government exactly entails, but according to Stefan Talmon it can either be read as an expression of willingness to establish or maintain relations with that government in an either intimate or merely less hostile manner,⁵⁷ or as an opinion of legal status expressed by the recognising state. Recognition of a government is not the objective legal source of authority of the government, but can however be a subjective statement supporting the status of that government.⁵⁸ Recognition of a government is thereby a signal of the perceived authority of the government to rule over the territory of the state, not the actual establishment of it as a government.⁵⁹ A government can in fact be a *de facto* government for a long time before it is generally recognised by the international community.⁶⁰ An act of recognition is thereby a “manifestation of an opinion on legal status” of that

⁵⁵ Shaw, p. 330.

⁵⁶ Shaw, p. 330.

⁵⁷ Talmon, p. 23.

⁵⁸ Talmon, p. 30.

⁵⁹ Talmon, p. 30.

⁶⁰ Talmon, p. 26.

government.⁶¹ By recognising a government of a state, the recognising government is expressing an opinion that the government exists, and that it qualifies as having status of government in accordance with the criteria under international law.⁶² The use of the term recognition as expressing an opinion of the recognising state is most common when the authority of the state is unclear for some reason, such as issues owing to recognition of statehood, in cases of civil war or in cases where governments have been installed by foreign intervention.⁶³ In the context of this thesis, recognition is therefore meant in the second sense of the term, i.e. as an expression of opinion on legal status, as this thesis focuses on cases where governmental authority is unclear due to internal unrest or civil war.

3.3 Effective Control Doctrine

The principle of *de facto* control, or effective control, has been guiding for a long time in international law, and recognition has rested on *de facto* control of the territory and by the obedience of the “bulk of the populace”.⁶⁴ However, as early as the mid 1800s also support of the population was discussed as a relevant factor when assessing if a government is the true representative. In this context a declining regime is deemed unrepresentative as it is a “spasm of dying power” that does not represent the true will of the people.⁶⁵ This discussion occurred at a time when democracy was not widespread and thus this was not part of the discussion; instead the will of the people was evidenced and realized by the force of arms.⁶⁶ This suggests that the will of the people was in fact the will of the militarily strongest faction of the country, whether that be civilians or the institutional force of the government. In this context it was also said that a government could only be considered valid if it was in fact the strongest and most influential organization within the state, meaning that it needed to maintain its power without the assistance of foreign military.⁶⁷ This suggests that it was not the will of the people as in terms of political self-determination that was intended, but rather the will of the strongest organization within the territory. Legitimacy was thus based on effective territorial control through force, and the origin of the control did not impact legitimacy or standing under international law.⁶⁸

In more contemporary times there is a lack of judicial decisions on recognition of governments. There is however a significant amount of state practice that can be identified. Recognition of governments still primarily rests on the principle of

⁶¹ Talmon, p. 29.

⁶² Talmon, p. 30.

⁶³ Talmon, p. 32 – 33.

⁶⁴ Doswald-Beck, p. 193.

⁶⁵ Doswald-Beck, p. 193.

⁶⁶ Doswald-Beck, p. 193.

⁶⁷ Doswald-Beck, p. 194.

⁶⁸ Doswald-Beck, p. 192.

effective control of territory, as is evidenced in cases of state practice during the 1900s.⁶⁹ A pragmatic approach is often taken, where effective control and likelihood of continued effective control is favoured over approaches where normative values, such as approval or disapproval, can be read into the recognition decision.⁷⁰ However, it has not in every case been the sole guiding principle, and in the pre-UNCh era theories of recognition based on legitimacy of governments arose.⁷¹ This conduct was particularly carried out by the United States in relation to Central American states.⁷² It was however gradually abandoned, and is, according to Shaw, today only a political and not legal consideration when recognising governments.⁷³ Instead, in contemporary times, recognition or with-holding of recognition based on illegitimacy or unlawful grasping of power is generally regarded as of less weight, than recognition or with-holding of recognition based on in-effective control of territory.⁷⁴ If a government has effective control of the state territory, than challenging its recognition based on legitimacy will not affect the legal status of the government under international law.⁷⁵ Thus, effective control is the main decisive factor in determining the appropriate government of a state. it can also be added that states engage in governmental recognition of a much lesser degree today, and instead mainly engage in recognition of statehood.⁷⁶

⁶⁹ Doswald-Beck, p. 194.

⁷⁰ Doswald-Beck, p. 195.

⁷¹ Shaw, p. 330.

⁷² Válek, p. 618; Shaw, p. 330.

⁷³ Shaw, p. 330.

⁷⁴ Shaw, p. 329.

⁷⁵ Shaw, p. 330.

⁷⁶ Shaw, p. 331.

4 Non-Use of Force and Intervention by Invitation

4.1 Introduction

This chapter aims to investigate and clarify the rules on non-intervention and non-use of force generally in chapter 4.2, the basics of the principle of intervention by invitation in chapter 4.3, as well as investigate specifically the current rules on intervention by invitation into civil war in chapter 4.4. This chapter aims to answer the following research question posed in the introductory chapter: *How is the current use of force regime and the rules on intervention by invitation constructed in regard to civil war?*

4.2 The Principles of Non-Intervention and Non-Use of Force

4.2.1 Non-Intervention

The principle of non-intervention forbids any intervention into domestic matters of the state, such as political, social or economic interference. The rule is established in customary international law⁷⁷, and is also affirmed in article 2(7) of the UNCh. The principle forbids intervention into the domestic affairs of another state, if the intervention is of a coercive or forcible nature. Mere interference without a coercive element causing the state to lose control over the matter, does not qualify as prohibited intervention.⁷⁸ The principle of non-intervention is established in several UNGA Resolutions, amongst them the 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty.⁷⁹ The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations⁸⁰ (FRD) also includes a passage on the principle of non-intervention. In the case of *Nicaragua v. the United States of America*⁸¹ (the Nicaragua Case) the ICJ concludes that every sovereign state has the right to conduct its affairs free of foreign interference⁸², and goes on to define coercion in domestic state matters as the very essence of prohibited intervention⁸³. The court also stated that: “a prohibited intervention must accordingly be one

⁷⁷ Doswald-Beck, p. 208.

⁷⁸ Lieblich (2013), p. 55.

⁷⁹ UNGA Res 2131 (XX) (21 December 1965) (adopted by 190 votes to none; 1 abstention).

⁸⁰ UNGA Res 2625 (24 October 1970).

⁸¹ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits) [1986] ICJ Rep 1986.

⁸² *Nicaragua v. USA*, para 202.

⁸³ *Nicaragua v. USA*, para 205.

bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy.”⁸⁴

If a government consents to intervention, then the inviting government is not in breach of their own right to non-intervention, since the principle does not prohibit *any* intervention. Rather, the principle of non-intervention protects a state from *unwanted* external intervention into its domestic affairs. It does not by extension prohibit a state to consent to intervention into domestic affairs, and does not mean that a state is unable to invite the help of other states when facing domestic issues.⁸⁵

4.2.2 Non-Use of Force

The principle of non-use of force, also called the prohibition of the use of force, can be described as a more specific rule within the general prohibition on intervention⁸⁶, or as a parallel rule which considerably overlaps with the more general principle of non-intervention.⁸⁷ The prohibition covers the cases where a prohibited intervention includes the use of force or the threat of force. The prohibition on the use of force is widely acknowledged as a rule of customary international law⁸⁸ of *jus cogens* nature.⁸⁹ The prohibition is established as a codification of customary international law⁹⁰ in the UNCh article 2(4), as well as throughout the practice of the United Nations⁹¹. The customary nature of the prohibition and the regulation in the UNCh exist in a parallel manner and together establish a prohibition on the use of force between states. The prohibition is not absolute, and multiple exceptions exist. Among these are the right to self-defence, invitation to intervene and Security Council authorization of force. The prohibition of the use of force is meant to deal exclusively with inter-state matters, and is not intended to govern over internal matters.⁹²

The law on the use of force continues to be one of the more controversial areas of international law, and disagreement continually arises among states and among scholars on what is included in the prohibition.⁹³ Perspectives vary between developed and developing countries, as well as between states of the East/West paradigm or the North/South paradigm.⁹⁴ The very basis of the principle, that

⁸⁴ *Nicaragua v. USA*, para 205.

⁸⁵ Doswald-Beck, p. 208.

⁸⁶ Doswald-Beck, p. 244.

⁸⁷ Gray, p. 76.

⁸⁸ Gray, p. 6.

⁸⁹ Lieblich (2011), p. 366.

⁹⁰ Gray, p. 76.

⁹¹ Gray, p. 9.

⁹² Fox, p. 820; Gray, p. 67.

⁹³ Gray, p. 7.

⁹⁴ Gray, p. 7.

aggressive or non-consensual military force towards another state is prohibited, is rather uncontroversial. The disagreements arise on what constitutes force, and questions have been posed on if for example economic coercion, such as economic sanctions, is included. Discussion has also regarded questions on which cases the prohibition covers, such as cases of self-determination struggles, self-defence and the possibility of intervention in civil wars.⁹⁵ In summary it can be concluded that although the rule on prohibition of use of force is widely accepted and authoritative, it however remains disputed exactly what the rule entails and protects.

4.3 The Exception of Intervention by Invitation

Intervention by invitation is regarded as an exception to the prohibition on the use of force, and it is considered that an invitation to intervene from a government of a state is a legally justifiable basis for foreign military intervention into the inviting state's territory.⁹⁶ The exception has its basis in customary international law, and although it is widely recognised it is not mentioned in the UNCh. Rather it is accepted that the scope of Article 2(4) does not contain a prohibition of invited force, as it is not deemed as interstate force as it is consensual, and is thus not prohibited under article 2(4). Whether intervention by invitation is indeed an exception to the non-use of force rules, or if it is permissible because it falls outside of the scope of article 2(4) is an interesting discussion, but for the purpose of this thesis the most relevant aspect is the permissibility of intervention by invitation under international law.

Intervention by invitation is implicitly established as permissible in the UNGA 1974 Resolution on the Definition of Aggression⁹⁷, which states that foreign military presence is prohibited if it is in contravention with agreements between the involved states. This is commonly read by scholars as affirming the exception of intervention by invitation.⁹⁸ The exception of intervention by invitation to the rule of non-use of force is also supported by the Draft Articles on State Responsibility of Internationally Wrongful Acts⁹⁹ (ARSIWA) which, in article 20, establishes that consent precludes responsibility for otherwise wrongful acts. This is applicable to the exception of intervention by invitation; normally a breach of the prohibition of the use of force would give rise to state responsibility, but the presence of consent through an invitation precludes responsibility and thus serves as an exception to the general rule.

⁹⁵ Gray, p. 7.

⁹⁶ See Fox, p. 816 and Orakhelashvili, p. 167. See also *Armed Activities Case*, paras. 43 – 47.

⁹⁷ UNGA Res 3314 (XXIX) (14 December 1974), art. 3 (e).

⁹⁸ See Doswald-Beck, p. 189.

⁹⁹ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/56/10 (2001).

The exception has also been reaffirmed by the ICJ in the *Nicaragua Case* and in the case of the *Democratic Republic of Congo v. Uganda*¹⁰⁰ (the Armed Activities Case). In the *Nicaragua Case* the court states that intervention is “allowable at the request of a government of a State”,¹⁰¹ but does not discuss the specific issue at any length. In the *Armed Activities Case* the ICJ assumes for its discussion the premise that a government can consent to foreign military presence on its territory.¹⁰² Thus, the court regards this as a basic principle of international law and does not problematize the consensual military intervention.

4.4 Permissibility of Intervention by Invitation in Situations of Civil War

4.4.1 Introduction

This chapter starts out with investigating whether civil war is at all a matter of international law on the use of force rather than of domestic law in chapter 4.2.2. This is important in order to apply rules and principles of international law to conflicts of a civil war character. Thereafter, it is investigated in chapter 4.2.3 if there is a prohibition on intervention into civil war, conducted through a review of current scholarship. This is significant since the area suffers from a lack of clarity and a tendency of over-simplification, and thus such a possible prohibition needs to be examined and evaluated thoroughly. In chapter 4.2.4 the nature of a valid invitation is studied, which ties back to the discussion on recognition of governmental authority in chapter 3 above.

4.4.2 Is Civil War a Matter of *Jus Ad Bellum*?

The issue of civil war forces the question of the interstate character of the prohibition of the use of force to be discussed and clarify why it is applicable in the case of internal conflict. As noted above in chapter 4.1.2., the prohibition on the use of force is applicable in international situations, and not in purely domestic cases. Thus, the prohibition is not directly applicable in cases that are strictly internal or domestic. Many scholars, among them Georg Nolte, Christine Gray and Malcolm N. Shaw, agree that international law on the use of force is not applicable in cases of pure internal unrest, as it is a strictly internal matter that cannot be dealt with under international law but rather is dealt with under domestic law. In this context, a civil conflict would only be a matter of international law in the event of it being successful, and becoming an issue of recognition under international law.¹⁰³ However, other scholars, such as Gregory Fox and Eliav Lieblich, disagree with

¹⁰⁰ *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda) (Merits) [2005] ICJ Rep 2005.

¹⁰¹ *Nicaragua v. USA*, para 246.

¹⁰² *Armed Activities Case*, paras. 42 – 54.

¹⁰³ Shaw, p. 833.

this notion in such absolute terms, and argue that if an internal conflict has become internationalized, either through a so-called spill-over effect or through foreign intervention, then it is in fact subject to the international law on the use of force. Many conflicts that start out as purely internal or domestic, are often effectively internationalised as third party states intervene militarily in the conflict, either by invitation or without. Often consensual interventions follow first after non-invited foreign intervention already has occurred, making the cases where intervention by invitation into civil war actually occurs already effectively internationalised. Fox puts it quite simply: foreign intervention effectively internationalizes the conflict and places it under international law, even though the original parties to the conflict are dealing with internal matters and the issues at hand remain predominantly domestic.¹⁰⁴

Recent times have showed a prevalence of intrastate conflicts turning international, over actual interstate conflicts taking place.¹⁰⁵ That civil conflict is of international concern can also be shown by the increased involvement of the UNSC in the post-Cold War era, where the UNSC has shown an increasing tendency to classify also civil conflicts as having international aspects.¹⁰⁶ Practice from the UNSC shows that it has repeatedly deemed civil war as a threat to international peace and security in accordance with article 39 under chapter 7 of the UNCh. The Council has called upon the cessation of hostilities, decried human rights violations and the commission of international crimes, has endorsed peace agreements, and have launched post-conflict missions to oversee the implementation of such agreements.¹⁰⁷ The International Tribunal on Yugoslavia (ICTY) has, in the *Tadić Case*,¹⁰⁸ stated that there is a common understanding, due to the practice of the UNSC, that internal armed conflict is indeed a matter of international concern and should in certain cases be regarded as a threat to peace and security under chapter 7 of the UNCh.¹⁰⁹

The situations that I deal with and focus on in this thesis are these cases of an internationalised civil conflict, i.e. when the conflict in some way has become a matter of international concern prior to its outcome in any direction. In these cases, the use of force is indeed a matter for international law to analyse and evaluate. This may mean that an initial prohibition to intervene has potentially already been breached or that the incumbent government has invited intervention, which means that the situation ought to be evaluated for what it has become rather than what it

¹⁰⁴ Fox, p. 820.

¹⁰⁵ Gray, p. 67. Quoting Human Security Report 2005, *War and Peace in the 21st Century*, (2005) at 22 – 23.

¹⁰⁶ Shaw, p. 834, see footnote 164.

¹⁰⁷ Fox, p. 824.

¹⁰⁸ *Tadić Case* (Decision on Jurisdiction) ICTY-94-1-AR72 (2 October 1995), para. 30.

¹⁰⁹ *Tadić Case* (Judgment) ICTY-94-1-AR72 (2 October 1995), para. 30.

could or ought to have been. By this I argue that an internationalised civil conflict should be treated as such, even if one could of course wish that it had not become internationalised in the first place.

4.4.3 Prohibition of Intervention by Invitation in Cases of Civil War?

4.4.3.1 Introduction

As mentioned above in the general overview of the prohibition of use of force (see chapter 4.1.2) it remains disputed which cases are covered by the non-use of force rules, and this is especially true regarding situations of civil conflict. When it comes to unwanted or uninvited intervention into internal matters, scholars agree upon the prohibition of such intervention, based on the principle of non-intervention and the prohibition of the use of force. However, beyond this point there is not much consensus. There is much debate and difference of opinion within scholarship, and the legality and legal scope of intervention by invitation remains unclear. A majority of scholars argue that intervention by invitation is indeed allowed also in cases of civil conflict, however with the limitation of *valid* consent given by the government. A minority of scholars are however of the view that a situation of civil war precludes the validity of such an invitation meaning that governments experiencing civil war within their territories are automatically unable to invite foreign force under international law. As this issue is of such divergence among scholars, this chapter will investigate in depth the different arguments and reach a conclusion on if there in fact is a prohibition of intervention by invitation into civil conflict or not. First, the evolution of the law will be explained in an attempt to frame the issue in chapter 4.4.3.2. Thereafter, in chapter 4.4.3.3 the contemporary law will be studied. This study leads to an in-depth analysis of the controversial issues and arguments in chapter 4.4.3.4, and ends with a conclusion on the permissibility of intervention by invitation into civil war in chapter 4.4.3.5.

4.4.3.2 Evolution of the Law: The Pre-UNCh Era

When looking to history, to the pre-UNCh era, there were in fact categorical rules in place on when intervention into civil war was permissible or not. These rules are referred to as “belligerent recognition” or “belligerency-rules”, after the category of which intervention was impermissible.¹¹⁰ The system was built on categorising, or recognising, internal conflicts into different stages. The different categories were rebellion, insurgency and belligerency, with rebellion being the lowest and belligerency the most severe. Belligerency status was reached when four criteria were met, where widespread control of territory was perhaps the most important criterion.¹¹¹ However, no consensus was reached on what exactly belligerency

¹¹⁰ Fox, p. 822.

¹¹¹ Fox, p 822.

status entailed. Some argued that foreign intervention by invitation was permissible up until the most severe stage of belligerency was reached, when a position of neutrality instead was asserted.¹¹² Others argued that belligerency status entailed a right to intervene by invitation on behalf of both warring parties, since they, at the stage of belligerency, had reached the status of co-sovereign.¹¹³ The system was however mostly built upon recognition of opposition groups, and less upon legality of intervention. Recognition of belligerency status granted the opposition groups both rights and obligations in the conflict.¹¹⁴

A criticism towards the framework was that it was very difficult for outside states to determine which stage was reached, and that the concept of belligerency was unclear and highly subjective.¹¹⁵ The lack of clear criteria for determining the different stages of internal conflict led to confusion and difficulty in classification, and lack of legal consensus made the situation unclear even once belligerency status was reached. In practice states would tend to not recognise the parties to the conflict, perhaps to circumvent the prohibitions or in other ways create flexibility in their course of action.¹¹⁶ This prevented the framework from being effectively applied and meant that the rules did not have the intended, or any, effect.¹¹⁷ Another criticism that was raised was that it was nearly impossible for any internal conflict to reach the status of belligerency, since foreign intervention prohibited the opposition movement to grow past the lower stages of uprising since neutrality and non-intervention was not demanded in the early stages of the uprising. Thus, the opposition would be defeated early in the conflict by the government which was aided by foreign military assistance. A contemporary critique toward the framework is that it had no regard for the internal political dynamics or any other elements of civil war, and did not regard democracy or political self-determination in any way, nor any other human rights issues or crimes perpetrated by the incumbent government. This was however due to that the principle of self-determination was not considered a principal of international law at the time, and that the values of human rights had not yet spread. At this point in history international law was built on a very strict principle of sovereignty, and international law was seen to govern only the relations between states and not have any say in the internal conditions of states. These rules regulating outside participation into civil war are nowadays essentially abandoned, as they have not been effectively used since the 1861-1865 American Civil War.¹¹⁸ After this point

¹¹² Fox, p 823.

¹¹³ Fox, p. 822 – 823.

¹¹⁴ Shaw, p. 833.

¹¹⁵ Shaw, p. 833.

¹¹⁶ Shaw, p. 834.

¹¹⁷ Shaw, p. 834.

¹¹⁸ Doswald-Beck, p. 197.

in time states gradually stopped using the rules, and they fell into desuetude.¹¹⁹ The framework is however still often referenced in scholarship, although described as obsolete and unclear.¹²⁰ This is most probably because of the lack of an effective and clear framework also in contemporary international law.

4.4.3.3 Contemporary International Law

The belligerency-rules have since the adoption of the UNCh in 1945 instead been replaced by the principles of non-intervention and non-use of force as described above,¹²¹ as well as by resolutions and declarations emanating from the UN General Assembly seeking to expand and clarify the rules on intervention into civil war. This effort has been developed continually since the adoption of the UNCh. As early as 1949 the UNGA adopted resolution 375 on the Rights and Duties of States, which declares that all states must refrain from intervening in the internal or external affairs of other states, and that all states have a duty to refrain from fomenting civil strife within other states.¹²² This means that aggravating, inciting, stimulating or increasing situations of civil strife is prohibited. In 1965 the principle of non-intervention in civil strife was repeated in the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty.¹²³ The declaration states that “[n]o State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State” as well as stating 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.”

The FRD followed in 1970, and further emphasised the duty to refrain from intervention into internal affairs of states. The declaration states again that “[n]o State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State” and 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”. The declaration also adds that:

“[e]very State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force”.¹²⁴

¹¹⁹ Fox, p 823.

¹²⁰ See Shaw, Doswald-Beck, Fox and Roth.

¹²¹ Doswald-Beck, p. 197.

¹²² UNGA Res 375 (6 December 1949).

¹²³ UNGA Res 2131 (21 December 1965).

¹²⁴ UNGA Res 2625 (24 October 1970).

In regard to these resolutions, it can be brought into question whether the prohibition on interference into civil war also covers invited measures to quell an insurrection or opposition upon the invitation of an incumbent government, or if the prohibition merely covers unwanted intervention into or stimulation of civil strife. The core issue here therefore becomes the distinction between wanted and unwanted intervention.

4.4.3.4 The Controversial Issues and Arguments

International law on non-intervention and non-use of force protects states from unwanted intervention, and prohibits foreign states from intervening when such intervention is not desired by the state receiving intervention. On the other hand, international law permits intervention when it is sought by the state, such as when asked for through an invitation to intervene. Such intervention is largely unregulated, and largely hinging upon the consent of the state receiving intervention. Such consent seems to be considered valid regardless of the internal state of matters, i.e. regardless of if there is a situation of civil war within the state. This view is common among scholars, and for example Gregory Fox and Eliav Leiblich have concluded that there is not enough evidence to show a norm prohibiting intervention by invitation into civil wars. There is, however, a faction of scholars of an opposing view, among them Christine Gray and Louise Doswald-Beck.

Gray argues that the duty of non-intervention and the absolute right of every state to choose its political system means that all states also have a duty to refrain from aiding incumbent governments in times of civil war.¹²⁵ This is a view shared by Doswald-Beck. This view is what can be called the negative equality principle, which been described as a recent trend in scholarship and has support in doctrine from the Institut de Droit, in their 1975 resolution called “The Principle of Non-intervention in Civil Wars”.¹²⁶ The negative equality principle supports the view that intervention is entirely impermissible in cases of civil war, to either party of the conflict. It is however far from uncontroversial among states, according to Fox.¹²⁷ Gray acknowledges that the brevity of the discussion in the Nicaragua case opens up for inconclusive interpretations, and that the issue is extremely complex in regard to interpretation and application.¹²⁸ Gray argues that the only time foreign intervention in civil war is permissible is if there has already been outside assistance to the opposition, or if the unrest is in fact not a civil war but merely an internal unrest. The merits of this argument are hard to assess, as there is no accepted legal

¹²⁵ Gray, p. 81.

¹²⁶ Institut de Droit International, 1975.

¹²⁷ Fox, p. 827.

¹²⁸ Gray, p 81.

definition of civil war in international law. Gray argues that internal conflicts are purely domestic, at least up until foreign intervention has come about through aid to the opposition. In Gray's research a number of situations are highlighted where intervention has been disguised as something other than intervention into the civil war, as for example the United States intervening in Colombia upon invitation, and as a response to questions justifying it as helping Colombia with suppressing the country's drug trade.¹²⁹ Gray also gives examples of when an internal uprising has been argued not to be an organic civil war but instead fuelled by foreign subversion, justifying intervention to help the government on grounds of collective self-defence.¹³⁰ Gray argues that states tend to cite prior foreign intervention as the justification of their intervention even when such prior foreign intervention has not been showed.¹³¹ By using these exceptions or cover-stories, Gray argues that states accept that there indeed is a prohibition in place, and that they therefore need to fabricate a chain of events to justify their intervention, thus supporting the argument that there is a prohibition to intervene upon invitation into civil war. Fox, however, instead argues that this shows that the same states' opinions varied and that the positions taken on the legality of the interventions were largely dependent on political considerations rather than legal opinion.¹³²

Gray and Doswald-Beck both argue essentially that when the outcome of a civil conflict is unclear, then also aid to the incumbent government should be impermissible due to that such aid would alter the course of the conflict and indeed be a case of foreign interference in an inherently domestic matter. However, as Fox puts it, the traditional view of civil wars as inherently domestic matters might be incomplete in a more contemporary context, and so a more traditional view of intervention by invitation in civil war might not be accurate in modern international law. In this line of argument, he cites the increased involvement of the UNSC in internal conflicts, and means that a prohibition on intervention into civil conflict is undermined by this increased involvement.¹³³ Fox suggests that if there is indeed such a prohibition, then it would only apply to those civil wars where there has not been any UNSC involvement in the conflict. However, he writes that this type of separation assumes that the actions of the UNSC has no effect on customary international law – a view he deems as increasingly fragile and untrue.¹³⁴

Gray and Doswald-Beck are not alone in stating that there ought to be a prohibition of intervention into civil wars. Also other scholars have suggested that this would be a logical or desirable outcome of the principle of non-intervention, e.g. Browlie

¹²⁹ Gray, p 87.

¹³⁰ Gray, p. 87.

¹³¹ Gray, p. 92.

¹³² Fox, p. 823 – 824.

¹³³ Fox, p 825.

¹³⁴ Fox p 826.

has argued that there are certain objections to giving aid to a government in times of civil war, although concluding that there is not sufficient evidence to cite a prohibition.¹³⁵ Shaw suggests that “substantial assistance” to governments nearing collapse may be questionable and that the argument against intervention is in that way strong, but acknowledges that there are considerable definitional problems making the matter highly complex and as of yet un-resolved.¹³⁶ The view that intervention into civil war ought to be impermissible is shared by Georg Nolte, who however concludes that such a norm is not identifiable under international law and thus the view on impermissibility cannot be extended further than as an opinion of scholarship.¹³⁷

Doswald-Beck has studied the UNGA debates on the 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty.¹³⁸ She finds that the reach of the statements “interfere in civil strife in another State” and “assisting or participating in acts of civil strife” were not directly discussed and thus, although they seem wide and general and potentially could cover also invited intervention, there was no consensus provided on their exact content.¹³⁹ Doswald-Beck also writes that, after studying the preparatory documents to the 1970 FRD, an overall tendency can be detected as to states being of the view that intervention into civil war shall be prohibited, although this is not specified in the declaration.¹⁴⁰ Doswald-Beck however points out that statements in the debate often were in the context of decolonialization, and thus may have limited applicability in other cases of civil strife. Doswald-Beck argues that there is some room to interpret the resolutions as entailing an absolute prohibition on intervention into civil war, although to conclude the existence of such a norm state practice must be examined to see if such an interpretation of the resolutions is correct. As her research shows, state practice does not without question support such a strong interpretation of the resolutions.¹⁴¹ Her research shows that state practice does not support an absolute prohibition, as states have frequently intervened in civil wars upon invitation. However, she argues that the statements of states point to an opinion of an absolute prohibition being in place, as states’ justify their interventions not only on being invited, but also on prior assistance to opposition forces. Doswald-Beck argues that this shows an opinion among states that intervention by invitation is impermissible, and that it is only permissible to intervene on behalf of the government if there first

¹³⁵ Brownlie, p. 323 ff.

¹³⁶ Shaw, p. 835.

¹³⁷ Nolte, *OPIL*, 2010. See also Nolte, *Eingreifen auf Einladung: Zur völkerrechtlichen Zulässigkeit des Einsatzes fremder Truppen im internen Konflikt auf Einladung der Regierung*.

¹³⁸ UNGA Res 2131 (XX) (21 December 1965).

¹³⁹ Doswald-Beck, p. 208.

¹⁴⁰ Doswald-Beck, p. 208.

¹⁴¹ Doswald-Beck, p. 213 ff.

has been an intervention in favour of opposition groups.¹⁴² She argues that a consistent state practice has in fact emerged, which is evidence of an absolute norm prohibiting aid to governments engaged in civil strife.¹⁴³ Doswald-Beck however concludes in less absolutist terms that *if* there is not an absolute prohibition, there is at least “a very serious doubt whether a State may validly aid another government to suppress a rebellion, particularly if the rebellion is widespread and seriously aimed at the overthrow of the incumbent regime”.¹⁴⁴ In large parts, Gray’s line of argument is consistent with Doswald-Beck’s, in that she also argues that intervention by invitation is prohibited if the internal conflict has reached a status of civil war. However, up until a point of civil war has been reached, intervention by invitation is in Gray’s view permitted.¹⁴⁵ This line of argumentation is very similar to the pre-UNCh doctrine, and is argued by Liebllich as returning back to the “largely unhelpful discourse of the belligerency doctrine.”¹⁴⁶

Fox argues that there is no longer a prohibition on intervention by invitation under international law. He submits that one of the main reasons why the pre-UNCh rules on belligerency have become obsolete is the inability of states to reach consensus on the issue of intervention by invitation, the many interventions taking place in different conflicts to aid both sides, as well as the tendency of states to vary their opinion on the issue depending on the situation at hand.¹⁴⁷ The old belligerency rules became impossible to apply, since they were largely ignored and were impossible to reconcile with state behaviour.¹⁴⁸ Fox argues that states’ opinions varied so much that state behaviour became irreconcilable with the belligerency-rules, and argues that states’ opinions differed on political considerations rather than on legal considerations.¹⁴⁹ Gray, however, also gives examples of when interventions based on invitations are not met with any response or condemnation from the international community, and thus pass without much controversy. These examples support Fox’s conclusion, i.e. that there is no prohibition since there is no state consensus and states’ positions tend to change depending on the situation at hand. Liebllich writes that while scholars like to take a “strict-abstentionist approach” to intervention by invitation into civil war, there is an absence of state practice to back up this view.¹⁵⁰ Instead, Liebllich writes that states have virtually always accepted consent as a valid justification for intervention.¹⁵¹

¹⁴² Doswald-Beck, p. 213.

¹⁴³ Doswald-Beck, p. 242.

¹⁴⁴ Doswald-Beck, p. 251.

¹⁴⁵ Gray, p. 82.

¹⁴⁶ Liebllich (2013), p. 162.

¹⁴⁷ Fox, p. 823.

¹⁴⁸ Fox, p. 823.

¹⁴⁹ Fox, p. 823 – 824.

¹⁵⁰ Liebllich (2013), p. 141.

¹⁵¹ Liebllich (2013), p. 141.

It is, thus, difficult to point to an authoritative source stating that intervention upon invitation into civil conflict is indeed prohibited. Rather, the absence of clarity regarding such a prohibition seems to lead to the practical legality of intervention by invitation into civil war, even if only by tacit acquiescence. When consulting judgments of the ICJ, the court seems to accept without discussion the legality of intervention by invitation into civil war, and only deals with the illegality of unwanted intervention or when consent has been overstepped.¹⁵² The right of an invited state to use force when invited by a state needing help to keep itself in power seems to have been taken for granted by states since 1945, at least if the domestic unrest is below the threshold of civil war, according to Gray.¹⁵³ Again, since there is not a generally accepted definition of civil war under international law, this perceived threshold is extremely arbitrary. It is therefore not improbable that the right to intervene is assumed even in cases where civil war potentially is underway. It is possible that when the international community is politically loyal to the incumbent regime the situation is less likely to be classified or called a civil war by the international community, and thus such an arbitrary line of civil war would not stop a foreign power from intervening upon invitation of the incumbent government.

4.4.3.5 Conclusion: There is No Clear Prohibition

Scholars thus diverge on the issue whether intervention by invitation is allowed into states where an internal conflict is present, and state practice does not aid in confirming such a norm. Consequently, a majority of scholars support the view that there is not enough evidence to claim that there is a prohibition to intervene into countries suffering from civil war. Also, even if there were such a prohibition, scholars on both sides of the issue agree that the absence of a definition of civil war makes such a prohibition extremely arbitrary and ineffective, as intervening states simply can choose to see the internal strife as an uprising rather than a civil war. Claiming legality of intervention into conflicts not reaching civil war in effect makes it hard to ever claim that intervention is illegal, when there is no agreed upon definition of civil war under international law. These difficulties are the same issues that the pre-UNCh belligerency-rules suffered from: if a conflict is never classified as severe enough to prohibit intervention, then intervention will never become illegal. Another difficulty is that even if there were a prohibition to intervene into purely domestic conflicts, such a prohibition would not be applicable in many cases since many civil wars are internationalised in some way. Thus, when invited intervention takes place it is often into an already internationalised civil war.

In conclusion, there is an established general prohibition to intervene into state matters if intervention is undesired, but there is not similarly a strong general

¹⁵² See *Nicaragua v. USA* paras. 206 – 246, and *DRC v. Uganda* paras. 42 – 54.

¹⁵³ Gray, p. 85.

prohibition of intervention during situations of civil strife if such intervention is desired by the government of the inviting state. As Gray writes, the principle of the right for a government to invite outside assistance is widely accepted in theory, but the application in practice is much more difficult. As it seems, state practice is largely incoherent and varies upon situations, and opinions among international law scholars vary widely. With opinions ranging from an absolute prohibition to no prohibition at all, one must conclude that the law on intervention by invitation in situations of civil conflict is inherently unclear and renders the issue inconclusive. Therefore, the most convincing conclusion is, in my opinion, that there is indeed no clear prohibition on intervention by invitation into civil conflicts on behalf of governments.

4.4.4 Issuing a Valid Invitation

4.4.4.1 Introduction

This chapter examines how a valid invitation to intervene is issued. First, it is examined if intervention by invitation is allowed on behalf of both parties of the conflict in chapter 4.4.4.2. Thereafter, in chapter 4.4.4.3 it is studied how validity of an invitation is decided through the effective control doctrine (see chapter 3.3). This chapter aims to answer, in part, the following research question posed in the introductory chapter: *Is there under international law an assessment of legitimacy of governments, that affects the governments' claims of acting as the representative of a state in regard to intervention by invitation?*

4.4.4.2 Invitation on Behalf of the Incumbent Government or Opposition Groups?

It is generally seen as permitted for a state to intervene upon an invitation of the incumbent government of the inviting state.¹⁵⁴ There is a strong presumption for the government that the invitation is valid. When it comes to intervention on behalf of an oppositional force it is generally not accepted to intervene as an outside state, regardless of the political legitimacy the opposition may hold. In the FRD it is clearly stated that “[n]o 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.” The principle here is clear and straightforward, and does not take into account any political legitimacy nor any regards to the status of the regime or the right of the population to political self-determination. It simply states a prohibition to intervene into civil war. It does not deal with or raise any concerns regarding intervention by the government.

¹⁵⁴ See *Nicaragua v. the USA*, Doswald-Beck, Gray, Shaw, Fox, etc.

This prohibition stems largely from the *Nicaragua Case*. In the case the court states that there is no right under international law to intervene in a civil war in favour of the oppositional group.¹⁵⁵ The court goes on to explain that the basis for this is found in the FRD and other UNGA resolutions, and that there is an absolute prohibition under international law to lend lethal assistance to a rebel force seeking governmental overthrow.¹⁵⁶ In the case it is not discussed at length in what circumstances assistance to the government is allowed, but it is assumed as a premise that assistance to the incumbent government is allowed. The court simply states that intervention is “already allowable at the request of the government of a State” and says that if this was extended also to the opposition then the principle of non-intervention would be completely undermined.¹⁵⁷ There thus seems to be a strong presumption that the government is the justified party in internal conflicts and that aid to governments is allowed at all circumstances, and aid to rebel groups is prohibited, especially if they aim to overthrow the government.¹⁵⁸

State practice, however, is in contrast with what is allowed by international law. Many internal conflicts have been subject to intervention by foreign powers, both through UNSC authorisation and through unilateral force.¹⁵⁹ States have intervened both on behalf of governments and on behalf of opposition groups,¹⁶⁰ even though the latter is undeniably impermissible under international law.¹⁶¹ In cases where foreign assistance has already been given to opposition groups, scholars tend to agree that assistance to the government is given added justification as assistance can, in those cases, be validly given both through intervention by invitation, and through collective self-defence, which is another accepted exception to the prohibition on the use of force.¹⁶² However, no qualitative factors are taken into account on permissibility of collective self-defence, as it is only submitted that self-defence shall be proportionate to the attack suffered. However, as both Gray and Fox argue, claims of prior foreign intervention on behalf of opposition groups are often examples of misuse of the principle of collective self-defence.¹⁶³

4.4.4.3 Effective Control Doctrine & Validity of Consent

The factor most often discussed in regard to validity of an invitation is the degree of control over territory,¹⁶⁴ i.e. the same principle as is applied in regard to recognition of governments under international law as discussed under chapter 3.3

¹⁵⁵ *Nicaragua v. USA*, para. 209.

¹⁵⁶ *Nicaragua v. USA*, para. 242.

¹⁵⁷ *Nicaragua v. USA*, para. 246.

¹⁵⁸ Fox, p. 821.

¹⁵⁹ Lieblich (2011), p. 339.

¹⁶⁰ Lieblich (2011), p. 339.

¹⁶¹ Gray, p. 67. See also Human Security Report 2005, p. 22 – 23.

¹⁶² Fox, p. 831.

¹⁶³ Fox, p. 831; Gray, p. 87.

¹⁶⁴ Fox, p. 821.

above. Whether it is the regime or the opposition that maintains control over the territory seems to be regarded by scholars as a decisive factor in the issue. This was also the decisive point in the pre-UNCh rules on intervention into civil war.

Several scholars of international law have reached the conclusion that the effective control doctrine gives the right to speak for a state to the government holding effective control over the state's territory. Conversely, they argue that the lack of effective control ought to cause the government to lose its right to speak for the state. This would mean that only a government in effective control has the right to invite foreign military forces to intervene on the territory of the state. If foreign military assistance is needed to suppress an uprising, then the government is evidently not in effective control and has thus lost the ability to speak for the state.¹⁶⁵ Scholars have also expressed the sentiment that the existence of civil conflict is evidence that the effective control of the territory is disputed and that the outcome is uncertain, which in turn renders consent to intervene uncertain as the legal representative of the state is in question.¹⁶⁶ Fox argues that if the inviting state has lost control over a portion of the territory, it is questionable if the inviting government can give valid consent for intervention on behalf of the state as a whole, and especially on behalf of the non-controlled territory.¹⁶⁷ Fox, further, argues that an invitation to intervene might be the government's only way of maintaining effective power within the country and that the intervention thus is a decisive factor in determining the outcome of the struggle.¹⁶⁸ This argument suggests that the existence of authority of the government is derived from having effective control, and when such control diminishes, so does the capacity to issue invitations to foreign states.¹⁶⁹ Thus, when control over the sovereign territory has been entirely lost, then the capacity of the government will be lost as well.¹⁷⁰ Thus, scholars argue that even a previously recognised government does not possess the ability to consent for the state, if it no longer holds effective control over the territory. This can be expressed as giving *de facto* situations prevalence over *de jure* situations.¹⁷¹ The argument follows logically from the principle of effective control, and seems to be well-rationalised.

However, the statement is controversial, and not agreed upon amongst scholars.¹⁷² International law, rather, seems to favour intervention in favour of the incumbent government regardless of degree of control over the territory. The interpretation

¹⁶⁵ Doswald-Beck, p. 196.

¹⁶⁶ Doswald-Beck, p. 196.

¹⁶⁷ Fox, p. 817.

¹⁶⁸ Fox, p. 817.

¹⁶⁹ Fox, p. 818.

¹⁷⁰ Fox, p. 818.

¹⁷¹ Doswald-Beck, p. 196.

¹⁷² Fox, p. 818.

and arguments made by some scholars on the meaning of the effective control doctrine seem to match poorly with the stance of positive international law, as it is made up of state practice. State practice instead seems to suggest that although effective control is needed for recognition of a government on the first hand, this does not imply that loss of effective control immediately renders the government as un-representative.¹⁷³ The identifiable trend in state practice is instead that the incumbent government is seen as the viable representative of the state long past losing effective control, and that this status quo is upheld until a new government or group has been identified as being in control of the territory of the state.¹⁷⁴ In this sense the effective control doctrine offers a presumption in favour of the incumbent government, which has been expressed by Lauterpatch as the government being "entitled to continued recognition *de jure* so long as the civil war, whatever its prospects, is in progress."¹⁷⁵

There are many examples where the incumbent government has been regarded as validly speaking for the state, regardless of a widespread civil war making the overall territorial control disputed.¹⁷⁶ Thus, a valid invitation can be extended by the incumbent regime regardless of its degree of effective control of territory. Validity of an intervention is thereby merely based on that the invitation is an expression of governmental consent, as is stated in article 20 of the ARSIWA.¹⁷⁷ This consent is valid as long as it has been properly given by an agent or person authorized by the state to do so¹⁷⁸ and as long as consent is not coerced or in any other manner forced.¹⁷⁹ If consent is clearly established and freely given by a representative of the state, then it is regarded as valid under international law.¹⁸⁰ Apart from consent there is no criteria on the form of an invitation or other requirements, such as normative considerations of quality of governance, affecting the validity of an invitation.¹⁸¹

¹⁷³ Doswald-Beck, p. 197.

¹⁷⁴ Doswald-Beck, p. 198.

¹⁷⁵ Roth (1999), p. 182.

¹⁷⁶ Doswald-Beck, p. 198.

¹⁷⁷ ARSIWA, art. 20.

¹⁷⁸ i.e. as established in the VCLT articles 2(c) and 7. See chapter 2.4.

¹⁷⁹ ILC, Commentaries to ARSIWA, art. 20.

¹⁸⁰ ILC, Commentaries to ARSIWA, art. 20.

¹⁸¹ Nolte, OPIL, 2010. See also Nolte, Eingreifen auf Einladung: Zur völkerrechtlichen Zulässigkeit des Einsatzes fremder Truppen im internen Konflikt auf Einladung der Regierung.

5 Legitimacy of Governments in Civil War

5.1 Introduction

In this chapter I aim to identify what legitimacy could mean, and thus start out in chapter 5.2 with studying why illegitimate governments need to be treated as a separate category of international law and why such a discussion is relevant. In chapter 5.3 I build on the concept of illegal but legitimate interventions, and analogise the arguments in support of a legitimacy assessment to prohibit legal but illegitimate interventions. In chapter 5.4 I identify possible indicators of legitimacy. In chapter 5.5 I call for a legitimacy assessment and discuss what such an assessment ought to entail and who ought to conduct it. In chapter 5.6 I raise arguments against a legitimacy assessment and discuss possible risks of abuse. This chapter aims to answer the following research questions posed in the introductory chapter: *On what basis can an assessment of legitimacy be argued for, and what aspects ought such a test entail?* and *Ought the legitimacy of a government affect international legal rights or obligations of third party states whom the government, whose legitimacy is in question, invites to intervene?*

5.2 Illegitimate Governments: A Necessary Debate?

For a long period of time, international law has regarded all domestic dealings on power and authority as strictly internal matters,¹⁸² deeming civil strife as something not dealt with under international law. Traditionally, there has not been any qualitative criteria regarding national governance and the legitimate acquisition of political power under international law.¹⁸³ Indeed, there is no definition in international law of the term ‘legitimate government’.¹⁸⁴ This has led to a pragmatic approach to legal authority, stemming from the doctrine of effective control, without normative concerns and the question of legitimacy taken into account. Issues of foreign intervention into civil war and issues of sitting governments’ human rights abuses have therefore been largely overlooked in the discussions of intervention by invitation, since international law has failed to make the connection between the issues and left it largely unregulated. Questions of legitimacy of government and how governmental power is used or abused, as well as questions of a population’s right to rid itself of an oppressive regime have therefore not been discussed at lengths in the context of the use of force and intervention by invitation. There is therefore a disconnect between these issues and a treatment of the two as separate discussions, although they are, in my opinion, closely intertwined. In this chapter I intend to connect what has been discussed above regarding intervention by invitation, with the question of governmental legitimacy.

¹⁸² Fox, p. 817.

¹⁸³ Fox, p. 817.

¹⁸⁴ Brownlie, p. 323.

As is explained above in chapter 3.3, the international law of recognition is based largely on territorial control. Traditionally effective territorial control is the most decisive factor of recognition, and it appears to have heavily influenced the view of governmental power also in regard to the *jus ad bellum* regime.¹⁸⁵ This is the case also in the pre-UNCh rules on intervention into civil strife, as well as in post-UNCh rules and scholarship. The post-Cold War era has however seen the emergence of scholarship revolving around qualitative factors such as democratic governance and political self-determination, albeit to a somewhat limited extent. Since the early 1990's international law has slowly started to shift towards viewing governance as a substantive issue, and begun to develop qualitative criteria of governance.¹⁸⁶ These developments have the potential to challenge the status quo of the intervention by invitation regime, although it is still controversial to claim that an invitation from a regime which is responsible for abusive policies is rendered invalid. Objections to validity of invitations based on that the regime lacks effective control are still more accepted.¹⁸⁷ Some authors argue that a general illegality of intervention by invitation into civil strife is enough, and that because of this there is no need for a test of legitimacy.¹⁸⁸ However, as seen in chapter 4.3.1 there is not a prohibition on intervention by invitation into civil war that can be agreed upon amongst international scholars. Even if such a prohibition were to be established, several issues would still be at hand. What is missing in this discussion, in my opinion, are perspectives on legitimacy of governments stemming from the treatment of their populations. *De facto* power over a state, i.e. a government holding rule over a state, cannot unquestionably lead to the conclusion that this power is legitimate. The power may be maintained through other sources than legitimacy, such as through military force. Thus, *de facto* power does not *per se* equal legitimacy.¹⁸⁹ A mere pragmatic view is not enough to establish legitimacy of a government, but a normative perspective on moral persuasiveness is needed to a certain extent to fulfil the moral foundations of international law.¹⁹⁰ These moral foundations of international law can be found in the goal of the protection of human rights, and therefore it is from the perspective of human rights and human security that a discussion of legitimacy ought to have its starting point.

State security is often valued over human security, and interests of governments are often prioritised over interests of populations. The UNCh and the framework of public international law is heavily influenced and steered by state interests, and tend to prioritise state interests over human rights interests. This can be seen in the

¹⁸⁵ Fox, p. 833.

¹⁸⁶ Fox, p. 817.

¹⁸⁷ Fox, p. 819.

¹⁸⁸ Bring, p. 113.

¹⁸⁹ Roth (1999), p. 10.

¹⁹⁰ Roth (1999), p. 10.

human rights framework. Human rights are often described as “soft law”, or as binding but not enforceable onto states. However, it is clearly stated in article 1(3) of the UNCh that one of the main purposes of the United Nations is the protection of human rights. All states have a duty to take action to promote human rights under articles 55 and 56 of the UNCh. This includes the duty to respect the principle of equal rights and the norm of self-determination of peoples. This duty is, however, written in such a way that it can be argued to be “non-self-executing” or “programmatic rather than operative”.¹⁹¹ This means that the duty of protecting human rights is stated as a goal or interest, rather than a binding course of action for states. The protection of basic human rights could, however, be regarded as the moral justification needed for a legitimate exercise of political authority over a state, thus giving legitimacy to the governing entity. Buchanan defines political power as morally justifiable “only if it meets a minimal standard of justice, understood as the protection of human rights”.¹⁹² This is a view which I agree with and have adopted in this thesis. For this reason, the protection of human rights is an essential argument on legitimacy in this thesis.

In my opinion, a duty of non-intervention by invitation in cases where a government is abusive or illegitimate, needs to be based in other norms than the traditional principles presented in the previous chapters. Instead we need to re-introduce normative concerns, and apply a moral-based and normative legal theory to find a duty of non-intervention in human rights norms and norms of legitimacy, and to tie these closely with the use of force doctrine. The past half-century has seen significant progress in the field of human rights, and today it is less acceptable to claim that domestic jurisdiction prohibits the international community from acting when human rights abuses occur within the territory of a state.¹⁹³ Since the 1990’s the UNSC has brought the issues of human rights and humanitarian concerns in internal conflicts to the table, and treated them within the peace and security sphere.¹⁹⁴ This suggests that international law and the international community is indeed moving towards an order where human rights and human security matter in the use of force doctrine and are seen as crucial for reaching peace and security, and increasingly we may be moving to an order where human rights may be seen as an independent overarching goal of international law in themselves, rather than just as a means to the end of military peace.¹⁹⁵ In order to fully do so, it is my opinion that we need to distinguish illegitimate governments as a separate category of international law.

¹⁹¹ Roth, p. 211.

¹⁹² Buchanan, p. 234.

¹⁹³ Beckman, p. 70.

¹⁹⁴ Beckman, p. 70.

¹⁹⁵ Buchanan writes that the idea of an international order based on protection of human rights may already be becoming less radical.

Traditionally there has been no specific category of international law in regard to illegitimate governments. Instead focus has primarily been on the *de facto* or *de jure* governments in power, without regard to their appropriateness or desirability. This can be described as a merely descriptive way of categorizing governments. Thus, a realist approach is adopted in this determination.¹⁹⁶ When employing a strictly realist approach it can be called into question what need there is for legitimacy to be discussed, since the realist approach regards that the *de facto* power of the government is its basis for existence, and legitimacy in the eyes of the people or in the eyes of the on-looking international community would thus be both irrelevant and inappropriate to discuss. Roth argues that this is a view giving power primacy over principle, and is thus a view that can be regarded as morally questionable.¹⁹⁷ In order to discuss principle and morality, one must employ a normative approach that seeks to evaluate or place the international order into a larger scheme of appropriateness under guiding principles of international law. This is a relevant task since international law ought to strive for more than just regulating certain interstate dealings – it ought to strive to fully promote and fulfil values of human rights and dignity, while also protecting the principle of sovereignty among states. Therefore, a high ethical standard needs to be applied to all states, demanding that they base their exercise of control not only on the power of force but also on the power of legitimate authority and principles of human rights.

Since the late 1990's the concept of "illegal but legitimate" intervention has been discussed under the doctrines of responsibility to protect (R2P) and humanitarian intervention, re-introducing the aspect of morality into international law. This re-introduction of morals and normativity can be viewed as a reaction to the gap between positive law and fundamental values, or in other words the conflict between legality and legitimacy.¹⁹⁸ It is my contention that this line of argumentation is applicable also in the opposite direction, i.e. on "legal but illegitimate" interventions, as is the case when an unjust regime exercises the right to invite foreign military assistance into its territory. In order to discuss a prohibition of these types of legal but illegitimate interventions, it is relevant to discuss illegitimate governments as a separate category of international law.

¹⁹⁶ Roth (1999), p. 8.

¹⁹⁷ Roth (1999), p. 9.

¹⁹⁸ Válek, p 616 in Miller and Bratspies.

5.3 Illegal but Legitimate Interventions vs. Legal but Illegitimate Interventions

5.3.1 Introduction

This chapter starts with explaining the evolution, main arguments and controversies surrounding the establishment of so-called illegal but legitimate intervention through humanitarian intervention and the responsibility to protect, in chapter 5.3.2. Thereafter these arguments are analogised and used in an opposite manner, supporting the argument of regarding some seemingly legal interventions as illegitimate due to issues of legitimacy of the inviting government in chapter 5.3.3.

5.3.2 Humanitarian Intervention and Responsibility to Protect

During the Cold War era state sovereignty was regarded as a stronger interest than what human rights were, even though the UNCh also at this time protected human rights and even though many human rights instruments were already in place. However, during the 1990's this view started to change, but it was first after many humanitarian failures that caused the international community much grievances. After seeing humanitarian failures and UNSC inability during conflicts in e.g. Rwanda and Bosnia, international lawyers and the international community started discussing the possibility to bring in normative rules on interventions where there were large human rights abuses and/or severe war crimes. The UNSC was however still unable act effectively in the face of such crises. The Kosovo conflict risked becoming another humanitarian failure, and instead of waiting for authorisation the international community decided to act basing its legitimacy of intervention on humanitarian grounds. When NATO intervened in Kosovo, the term humanitarian intervention (HI) was coined. This intervention was widely supported by the international community. However, it had no basis in the *jus ad bellum* regime – it was illegal and in breach of the *jus ad bellum* rules under international law. The Independent International Commission on Kosovo concluded that the intervention was illegal under international law, but that it was legitimate due to the exhaustion of diplomatic channels and because the intervention had a positive humanitarian effect in the liberation of the population of Kosovo from a long period of oppression under Serbian rule.¹⁹⁹ Hence, the term illegal but legitimate intervention was born.

The events in Rwanda, Bosnia and Kosovo led to enormous discussion and serious debate on how to tackle gross violations of populations. The Secretary General at the time, Kofi Annan, posed a significant question in his Millennium Report of 2000, asking: “If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica, to gross and

¹⁹⁹ Kosovo Report, p. 4.

systematic violation of human rights that offend every precept of our common humanity?”²⁰⁰ He goes on to write that when international law faces a clash between human rights and sovereignty, it is unclear and controversial which principle should prevail. However, he concludes by stating that: “surely no legal principle – not even sovereignty – can ever shield crimes against humanity.”²⁰¹ The United Nations empowered an *ad hoc* commission to investigate how to balance state sovereignty and gross violations of populations, called the International Commission on Intervention and State Sovereignty. Their work led to a report called “The Responsibility to Protect”²⁰², that laid the basis for what today is the Responsibility to Protect (R2P) framework of international law.

The R2P framework added a normative characteristic to the *jus ad bellum* regime in international law. Since interventions based on R2P shall still be undertaken after Security Council authorization, the framework does not in itself constitute a new exception to the principle of non-use of force. However, what it did add to the use of force rules is the element of a normative justification, based on the rights and the protection of the population. The R2P framework justifies interventions on the basis that they are legitimate when evaluated from humanitarian concerns. These types of interventions have been called illegal but legitimate, implying that there is no positive law allowing forcible intervention but that the normative values the intervention is based on gives it legitimacy. This is still true to some extent even after the adoption of R2P, since it remains a controversial addition to international law. However, since R2P interventions are to be mandated by the UNSC they effectively become legal under international law, since force is allowed after UNSC authorisation. Libya is one example of an R2P-intervention based on the illegitimacy of the regime. A majority of world-leaders stressed that the Libyan government had lost its legitimacy and thereby authority, due to the use of military force towards its own population following peaceful protests, that amounted to gross human rights violations and humanitarian consequences. Ultimately it was the treatment of the population that rendered the Libyan regime illegitimate in the eyes of the world, and it was upon this the intervention into Libya was justified.²⁰³ Since the intervention took place after UNSC authorization was given, it was thus indeed a legal intervention, however with its basis in issues of legitimacy.

The basis of HI and R2P lie in the belief that human rights and human security shall be respected and protected under international law. Traditionally principles of sovereignty and non-intervention have been given a greater weight than “softer” values as human rights or humanitarian concerns. Supporters of HI and R2P

²⁰⁰ Annan, Secretary-General Millennium Report, p 48.

²⁰¹ Annan, Secretary-General Millennium Report, p 48.

²⁰² Report of the International Commission on Intervention and State Sovereignty, “Responsibility to Protect”.

²⁰³ Odendahl, p. 1.

however claim that all principles of the UNCh shall be equally respected and upheld. When concepts of sovereignty and human rights conflict it is up to the international community to give them equal standing to the extent that is possible, and also to decide which one to give more weight in the event that they are mutually exclusive. The international community must then, in the event of a conflict, ask itself which principle of international law that is worthiest to uphold. When employing an ethical non-naturalistic and moral-theoretical point of view it is hard to see why a principle of absolute sovereignty is more worthy to uphold than the protection of populations and their human rights, unless upholding an absolute principle of sovereignty would indeed be a stronger safe-guard to the protection of populations. The R2P framework includes in the concept of sovereignty also a responsibility for states to protect its population, and if the state fails this responsibility is conferred upon the international community. The R2P framework can thus be said to have both widened the obligations that sovereignty necessitates, and also infringed increasingly upon a state's sovereignty.

5.3.3 An Analogy: Legal but Illegitimate Interventions

The arguments in support of HI and R2P can be analogised to bring justification to the propositions of my thesis. HI and R2P are essentially based on the premise of illegal but legitimate interventions, i.e. interventions that have a weak legal basis in classic international law but a strong humanitarian and human rights basis. When the arguments in favour of HI and R2P are reversed, one can speak of legal but illegitimate interventions instead. The main issue, in my opinion, with the intervention by invitation rules today is that there is no real evaluation on validity of invitations other than formal qualifications. Normative questions and human rights concerns are largely ignored or overlooked, or at least given a secondary status in regard to the *jus ad bellum*. Therefore, we end up with interventions that are in fact legal, but can be considered as illegitimate. My argument is that if we can justify legality of certain interventions based on legitimacy, then we can, and ought to, also deem certain interventions illegal based on illegitimacy. This can be done by elevating norms of human rights and human security to a primary, rather than secondary, status and indeed as a prioritised goal of international law.

Lieblich argues that the traditional doctrine of effective control as a basis for governmental authority is outdated and ought no longer to be applicable in contemporary international law.²⁰⁴ Instead of effective control of territory and state functions, Lieblich argues that the main relevant factor in assessing authority is now rather normative factors, such as whether the regime is capable of offering effective protection to the civilian population within the territory.²⁰⁵ This principle of effective protection of populations can be argued to have reached an elevated status

²⁰⁴ Lieblich (2013), p. 173.

²⁰⁵ Libelich (2013), p. 173.

as a principle of contemporary international law, that shall be regarded as principal or overriding.²⁰⁶ Thus, if such a principle of effective protection of populations was indeed applied, human rights concerns would have a primary, rather than secondary standing in the international law in the use of force. Lieblich cites the implementation of human rights treaties, the increased protection of civilians through IHL, the establishment of international criminal law, and the emergence of HI and R2P as evidence for a contemporary norm of effective protection of populations.²⁰⁷

It is my contention that this can be extended also to the sphere of consensual interventions by invitation, where it can be questioned if the regime indeed fulfils the principle of effective protection of populations. Thus, if instead of assessing governmental authority in accordance to the effective control doctrine, and instead in accordance with the principle of effective protection of populations, the validity of an issued invitation could be assessed on normative concerns, rather than on territorial control. A declared lack of legitimacy of a government, based on its contravention of the principle of effective protection of civilians, ought in my opinion render invitations it extends as invalid, since the government through its lack of legitimacy would lose its ability to legitimately consent for the state. This would mean that an invited state cannot legally accept the invitation, based on the illegitimacy of the inviting government. If the invited state chooses to intervene upon such an invalid invitation, the conduct would be illegal under international law due to the absence of valid consent. Shifting the focus from effective control of territory to effective protection of civilians would effectively tie the *jus ad bellum* to the frameworks of international human rights and international humanitarian law.

5.4 Possible Indicators of Illegitimacy

5.4.1 Introduction

In this chapter I study three possible indicators of legitimacy, that I have identified as potentially suitable for a legitimacy assessment. These indicators share a presence in established human rights law and/or humanitarian law, and aim to protect populations from abuse originating from their state. These indicators can be supported by the principle of effective protection of populations as discussed in chapter 5.3.3. In this chapter, the indicators are listed and assessed on their merits and persuasiveness.

²⁰⁶ Lieblich (2013), p. 173.

²⁰⁷ Lieblich (2013), p. 176 – 178. These notions are further discussed as indicators of legitimacy, in chapter 5.4.

5.4.2 Right to Self-Determination

Article 1(1) of the UNCh states the right to self-determination, and what it entails: “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” The right belongs to “peoples”, i.e. the group of communities together making up an entity with a right to determine their belonging. This can typically be applied to groups under colonial rule or oppression, which are aiming to secede from their current state. This is however not the topic of this thesis and the right to self-determination in these cases will not be discussed. For the purpose of this thesis, the term “peoples” is read as meaning the combined communities of individuals making up the population of the state. Therefore, the right to self-determination in this context focuses not on secession or splitting of territories, but rather on the right to determine their political status and development within the state. This is a more modern interpretation of the right to self-determination that has been brought forward in the post-colonial era²⁰⁸, and an important distinction for the purpose of this thesis.

When self-determination is discussed in contemporary discussion it is sometimes in regard to foreign involvement in domestic crises such as civil war and coups, or foreign ousting of regimes. In these cases, there is often critique or condemnation from other countries on the illegality of the foreign involvement. Countries opposing the involvement have called for respect for the principle of self-determination, and stressed that the principle entails the right for a people to freely choose their own government without the interference of a foreign power.²⁰⁹ However, the *opinio juris* of states seems to point towards that the political self-determination of peoples is fulfilled if the regime consists of persons belonging to the group holding the right of self-determination, and that this regime does not need to reflect the majority will of the people for self-determination to be fulfilled.²¹⁰ This would mean that self-determination, in the view of the community of states, stretches far enough to prohibit foreign intervention in the choosing of government, but not far enough as to regard the expression of will of the people as the ultimate fulfilment of the right to self-determination. This means that the principle of self-determination does not regard quality of regimes, but only absence of foreign intervention in the question of self-determination.²¹¹

Scholars have however tended to be of slightly different view of what the principle of self-determination indeed entails. In scholarship the right of self-determination

²⁰⁸ Nolte, OPIL, 2010. See also Nolte, Eingreifen auf Einladung: Zur völkerrechtlichen Zulässigkeit des Einsatzes fremder Truppen im internen Konflikt auf Einladung der Regierung.

²⁰⁹ Doswald-Beck, p. 203.

²¹⁰ Doswald-Beck, p. 207.

²¹¹ Doswald-Beck, p. 207.

has been viewed as entailing an implicit “right of revolution” by Quincy Wright,²¹² who has stressed that this right is ultimately denied in the event of foreign intervention in governmental change, since the regime is not in a position to invite foreign assistance. Wright argues that the state is temporarily inhibited from acting through its regime in times of civil war, due to the implicit “right of revolution” in the concepts of state sovereignty and self-determination.²¹³ Foreign intervention into civil strife has been described as becoming “an instrument to prevent social change which is a vital aspect of national self-determination”.²¹⁴ It is argued that such a foreign intervention, regardless of being invited or not, is undesirable and conflicting with the principle of self-determination.²¹⁵ The view that invited foreign assistance in civil war is in conflict with the right to self-determination has been expressed by several scholars.²¹⁶

Beckman, however, argues that the self-determination argument is weak and would not be a sufficient basis for an argument on illegitimate governments.²¹⁷ He submits that the argument of self-determination is complicated since it can be used to challenge state sovereignty, while it at the same time can be used to oppose foreign intervention. He argues that this possibility of “dual use” prevents it from being appropriate in arguments of governmental legitimacy.²¹⁸

However, in my opinion, the right to self-determination is a durable argument on legitimacy of governments in this context, although it might be difficult to apply in practice and might give merely a minimum protection. Since the right to self-determination is widely regarded as *jus cogens*, it has a strong legal standing and indeed is a relevant aspect when discussing legitimacy of regimes. As explained above, however, the typical interpretation of the right to self-determination gives a right to absence of foreign involvement in selection of government, but does not imply that the government must be in coherence with the majority will of the people as long as the government contains representatives of that peoples having the right to self-determination. However, Nolte argues that the right to self-determination could be interpreted as entailing a hypothetical right to secession which could prohibit an incumbent regime from inviting foreign assistance when a dispute over territorial power has arisen.²¹⁹

²¹² Wright, as quoted in Doswald-Beck, p. 200.

²¹³ Doswald-Beck, p. 200.

²¹⁴ Friedmann, as quoted in Doswald-Beck, p. 200.

²¹⁵ Doswald-Beck, p. 200.

²¹⁶ Doswald-Beck, p. 200.

²¹⁷ Beckman, p. 90.

²¹⁸ Beckman, p. 90.

²¹⁹ Nolte, OPIL, 2010. See also Nolte, Eingreifen auf Einladung: Zur völkerrechtlichen Zulässigkeit des Einsatzes fremder Truppen im internen Konflikt auf Einladung der Regierung.

The argument of self-determination is not entirely straight-forward and possibly quite limited, but could nevertheless be regarded as valuable in a legitimacy assessment. If an incumbent government does not consist of or enjoy the support of members of the peoples having a right to self-determination, then the legitimacy of that government can surely be questioned on the basis of the right to self-determination. Further, if an incumbent government is chosen due to foreign intervention then the legitimacy of that government could be questioned on grounds of self-determination as well. If a government is also kept in power merely through the support of foreign intervention in the face of civil war, then I would argue that also this is in breach of the right to self-determination, and ought to be a basis for questioning the legitimacy of that government as well.

5.4.3 Human Rights: Political Participation, Expression & Life

The right to meaningful political participation has in literature been discussed as a civil and political right.²²⁰ It is established in several international human rights treaties, among them in article 25 of the ICCPR and article 21 of the UDHR. The right to political participation requires the right to universal and equal suffrage, to cast secret ballots, to be free of discrimination as a voter, candidate or party, and requires that elections are held at reasonable intervals.²²¹ In article 21(3) of the UDHR it is established that the will of the people shall be the basis of the government.

The right to political participation is probably most extensively defined in article 25 of the ICCPR and the practice of the overseeing organ the Human Rights Committee. It specifies that genuine participation is to be guaranteed, but however fails to define what this entails.²²² The ICCPR does not require multi-party election systems, and the original drafting text of the ICCPR does not develop on one-party elections. However, the issue has regularly been raised by the Human Rights Committee which has questioned if single-party systems in fact live up to the criterion of genuine political participation. The Human Rights Committee has emphasised that the right to political participation is a core element in popular sovereignty, and that democratic multi-party elections are necessary to determine the consent of the peoples of the state and minimise the misrepresentation of the will of the people.²²³ However, the extent of this remains debated and is indeed problematic as the ICCPR mentions nothing on single-party election systems. Thus it could be possible for a state to fulfil the right to political participation, even if it would perhaps not be regarded as a genuine democracy.

²²⁰ Joeseph, p. 89.

²²¹ Fox (2000), p. 69.

²²² Fox (2000), p. 56.

²²³ Fox (2000), p. 58 – 59.

International law does not, however, obligate states to secure genuine democratic rule. To the extent that international law does engage with the concept of democracy it is merely to the formal requirement of political participation of elections, and not in regard to any substantive measures of what a true democracy ought to entail. Nevertheless, some scholars, most famously Thomas Franck, have argued for an emerging right to democracy. Franck, and other scholars of the so called democratic entitlement school, have argued that democracy is beginning to become a norm in the international system, although it is not fully encapsulated in law quite yet.²²⁴ Franck argues that governments increasingly realise that their legitimacy depends on abiding to normative requirements set up by the community of states, causing democracy to increasingly becoming an international right.²²⁵ Although such a development can be seen and might be positive, it is however not yet established as a hard human right and thus is not appropriate to include in a legitimacy assessment yet, at this point in time. However, if such a right eventually does become enshrined in the human rights framework and internationally recognised, then it could be suitable to include in a legitimacy assessment.

Nevertheless, regimes that face a democratic deficiency often are in violation of other established norms of human rights law.²²⁶ The concept of democracy entails already established human rights, and many of its substantive elements are enshrined in positive international law.²²⁷ Such human rights are, most notably, the freedom of opinion and expression which is established in article 19 of the UDHR and article 18-19 of the ICCPR. The right to peaceful assembly is also closely connected with what is commonly regarded as democratic features, which is found in article 20 of UDHR, as well as the freedom of association which is established in article 22 of the ICCPR. Although no clear right to democracy can be found in human rights law, states in breach of the rights to freedom of expression and assembly may validly be criticised for not upholding basic human rights, and their legitimacy to consent for the state may very well be called into question. However, the right to life might be the most significant human right in this context.²²⁸ According to article 3 of the UDHR everybody has a right to life, and according to the ICCPR article 6 arbitrary deprivation of life is impermissible. Thus, if an opposition group is met with lethal force, the regime is in breach of the right to not be arbitrarily deprived of life. Thereby, states responding militarily or excessively forcefully to peaceful protests are not only in breach of freedoms of assembly and of expression, but also be in breach of the right to life.

²²⁴ Franck, p. 26.

²²⁵ Franck, p. 26.

²²⁶ Lieblich (2013), p. 218.

²²⁷ Lieblich (2013), p. 219.

²²⁸ Lieblich (2013), p. 218.

A regime that is guilty of a breach of the rights discussed above may validly be questioned on its ability to consent to outside force intervening within the state, especially if the invited assistance is in order to quell a situation arising from the escalation of peaceful protests into a civil war situation. This is especially true if the regime is not in power through a genuine electoral process, and furthermore responds to public dissent with lethal force. Furthermore, the human rights enshrined in the ICCPR also apply extraterritorially, such as if an invited state takes on functions of the inviting state, which may be the case during intervention by invitation.²²⁹ Thus, an invited state is not only obliged by their own human rights obligations, but also by the inviting state's human rights obligations.

5.4.4 International Humanitarian Law & International Crimes

In times of armed conflict IHL contains specific rules for the treatment of both civilians and parties to the conflict, which are established in the Geneva Conventions. These rules apply to some extent in times of civil war, so long as the civil war is defined as a “an armed conflict not of an international character” and, thus, reaches the threshold of intensity established in the Geneva Conventions.²³⁰ For civil wars the rules of non-international armed conflict (NIAC) are applicable, meaning that common article 3 is applicable as well as Additional Protocol II to the Geneva Conventions.²³¹ Common article 3 establishes a minimum protection for civilians, and prohibit violence to life and person, taking of hostages, humiliating and degrading treatment, and sentencing and executions without previous judgement of a constituted court.²³² Additional Protocol II establishes, among other things, the prohibition of attacks on civilians, the obligation to respect and protect medical and religious personnel, medical units and transports, the prohibition of starvation, the prohibition of attacks on objects indispensable to the survival of the civilian population, and the prohibition of the forced movement of civilians.²³³ Also other IHL treaties are applicable, such as the protocols to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons (CCW)²³⁴. These rules establish prohibitions on the use of weapons regarded as excessively damaging and un-proportionally harmful. Further, other international conventions, such as the 1948 Convention on Prevention and Punishment of the

²²⁹ *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, paras. 158-159.

²³⁰ Geneva Conventions of 12 August 1949.

²³¹ Protocol II Additional to the Geneva Conventions of 12 August 1949.

²³² Common article 3, Geneva Conventions of 12 August 1949.

²³³ ICRC, p. 9.

²³⁴ Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (and Protocols) (as amended on 21 December 2001), 10 October 1980, 1342 UNTS 137.

Crime of Genocide,²³⁵ are an integral part of IHL that seek to protect civilian from abuse.²³⁶ Certain rules of IHL are also regarded as customary international law and are thus applicable also for non-treaty states.²³⁷

The applicable rules of IHL seek to safeguard civilians and to establish that warfare is conducted with minimal humanitarian suffering and harm. A regime breaching these rules in regard to its own population can be questioned on its legitimacy and it can be brought into question if it is desirable that a regime responsible for breaches of IHL is entitled to foreign military assistance through intervention by invitation, especially if the intervention will aid or continue the breaches of IHL. The rules of IHL are more permissible than the rules of international human rights law when it comes to safeguarding the lives of civilians. This means that an escalation of an internal conflict into a civil war meeting the criteria of a NIAC, enables a regime to use more lethal force than what is permissible for a conflict not reaching the level of a NIAC. According to Lieblich, this may be an incentive for states to claim that there is an armed conflict.²³⁸ It may, likewise, be an incentive to actually escalate the conflict to make the IHL rules applicable. Thus, a regime can deliberately escalate an internal conflict in order to bring a wider legality to the use of lethal force against its population. A regime using such tactics, ought, in my opinion, be questioned on its legitimacy. Further, the respect for IHL is a norm of *jus cogens* that obligates states to not aid the commission of breaches perpetrated by another state, as such a norm is of an *erga omnes* character, i.e. owed to all. This is concluded by the ICJ, in the 2004 *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, a principle derived from common article 1 of the Geneva Conventions.²³⁹

International criminal law is the body of international law which aims to end impunity for the most serious atrocities committed during conflict, which has been firmly established in contemporary public international law through the adoption of the Statute of the International Criminal Court (ICC-Statute), Statute of the International Tribunal for Yugoslavia (ICTY-Statute) and the International Tribunal for Rwanda (ICTR-Statute) and the following jurisprudence of the courts. The crimes established as international crimes are the following: genocide, war crimes, crimes against humanity and aggression. The three first listed are

²³⁵ Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277.

²³⁶ See ICRC Database over IHL Treaties for a complete list of applicable treaties.

²³⁷ See ICRC Database over Customary IHL for further specification.

²³⁸ Lieblich (2013), p. 50.

²³⁹ *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice (ICJ), 9 July 2004, paras. 158-159.

commonly referred to as the core crimes, or as crimes of atrocity, and are the crimes established to secure protection for civilians in time of conflict.

Commission of international crimes by an incumbent regime ought as well to contribute to a decline of legitimacy of a regime, as it is in breach of fundamental provisions aiming to safeguard civilians in times of conflict and aiming to end serious violations of international humanitarian law. Nolte argues that at least the prohibition of genocide ought to prohibit a regime from inviting foreign assistance to quell a civil war, although no such rule is firmly established in international law as of yet.²⁴⁰ This argument ought to be extended, in my opinion, to all breaches of IHL and international criminal law. Since the IHL and the international criminal law have been constructed to safeguard a minimum humanitarian protection and to end impunity for the most atrocious crimes during conflict, there is indeed already a consensus established that such breaches and crimes are unacceptable under international law. Thus, if a regime is guilty of committing such breaches or crimes towards its own population, it ought to be precluded from inviting foreign assistance to aid it in its breaches and crimes.

5.4.5 What Ought a Legitimacy Assessment Entail?

It is my contention that a regime representing a state that is deemed illegitimate should lose their sovereign right to invite foreign assistance, and that an invitation to intervene thereby should be viewed as invalid under international law, since the regime has lost their ability to give valid consent as a representative of the state.

In an ideologically pluralistic world it is undoubtedly very difficult to reach consensus on what a principle of governmental illegitimacy should entail. As is the case in most areas of international law, it will therefore most probably regulate the most “extreme” situations, or in other words the situations where a limit of acceptability has been over-stepped.²⁴¹ This will undoubtedly be quite a high threshold, applicable to regimes that are very far beyond what is considered acceptable by the community of states. Examples of when this has been the case in the past is when the world has seen colonial, racist or unjust regimes and refused to prolong their rule, such as in South Africa and the short-lived Rhodesia²⁴² as well as the Gadhafi regime of Libya that was deemed illegitimate based on the government’s treatment of the population.²⁴³ There is also a consensus that when a state has been subject to foreign overthrow, the forcibly imposed regime is not acceptable as a representative of that state. This points to that the international

²⁴⁰ Nolte, *OPIL*, 2010. See also Nolte, *Eingreifen auf Einladung: Zur völkerrechtlichen Zulässigkeit des Einsatzes fremder Truppen im internen Konflikt auf Einladung der Regierung*.

²⁴¹ Roth, p. 39.

²⁴² Roth, p. 69.

²⁴³ See chapter 5.3.2.1 above.

community is indeed capable of reaching consensus on legitimacy of governments, when a situation far exceeds the level of moral acceptability shared by states. It is however difficult to say exactly when this level is reached and exceeded, but the given examples show a tendency to not accept regimes that are installed by foreign intervention, are racist or colonial, or are guilty of wide-spread abuse of their population.

In my opinion, an assessment of legitimacy ought to entail only the indicators of legitimacy as suggested above, based on established human rights instruments and principals. The suggested indicators of legitimacy as stated above are:

- Respect for self-determination
- Respect for human rights: political participation, expression and life
- Refrain from breaches of IHL and from committing international crimes

However, this list of criteria should not be seen as exhaustive. Perhaps more criteria are necessary, or perhaps less criteria are more appropriate. There is an obvious difficulty to determine absolutely or objectively which criteria is most suitable, and a discussion of appropriate combination and gradation of criteria would be necessary to calibrate a functioning and suitable assessment. It may as well need to be adopted differently on a case-by-case basis, or at least be constructed so that there is flexibility to adopt it according to the interpretation of the conflict at hand. In some conflicts perhaps one or a few criteria is sufficiently breached, but not the remaining ones. Then the assessment may still weigh over towards illegitimacy, if the breach of those criteria is deemed as sufficient.

If such a legitimacy assessment is undertaken at every invitation to intervene, then there could be an increased tendency for states to thoroughly evaluate the actions of the inviting regime, but also evaluate their own human rights obligations, commitment to international humanitarian law and obligations under general public international law and the possibility of prosecution under international criminal law and state responsibility.

5.4.6 Who Ought to Assess Legitimacy?

When discussing international law on the use of force, the most authoritative actor is the UN Security Council. The UNSC already performs duties related to the use of force, and is the body competent of classifying conflicts as a threat to or breach of peace, as well as being able to authorise peacekeeping missions and use of force by member states.²⁴⁴ Therefore, the UNSC would be the natural actor to suggest be the organ to perform a legitimacy assessment. Unfortunately, we have time and time again in the history of the UN witnessed an inability of the UNSC to act in

²⁴⁴ See the UNCh, chapter 7.

times of political division. This is especially true in the ongoing case of Syria, where the veto-powers have a stake in the conflict and, where a veto-power is the invited state that is intervening in the conflict. Even prior to the military intervention by Russia, a “diplomatic shield” protecting the sovereignty of the Syrian regime had been created by Russian vetoes in the UNSC, and Russia has vowed to prevent any chapter VII resolutions on the crisis.²⁴⁵ In many cases of conflict there is political division among states, and many times at least one of the permanent members of the UNSC has a political stake in an international conflict, and thus is tempted to veto for political reasons. Nevertheless, if the UNSC is competent to provide a legitimacy assessment and thus declare certain invitations as invalid based on legitimacy, this would be a way of giving weight and authority to such an assessment, and could also be constructed as a resolution that is binding for the UN member states if adopted under chapter 7 of the UNCh. The UNSC can however be accused of having a democratic deficiency, as it is only represented by 15 of 193 member states. Thus, another possible solution is that the wider community of states assert their opinion on legitimacy of regimes through the UNGA, and in such a non-binding resolution give their opinion on governmental ability to issue a valid invitation to intervene.

My main suggestion is, however, that each state receiving an intervention shall undertake a legitimacy assessment, so that they ensure that the invitation can be regarded as truly valid, and that their subsequent intervention can indeed be legitimate. Under my proposed legitimacy assessment invited states would be obliged to conduct a legitimacy assessment prior to intervention upon invitation from the government, from a defined set of criteria as suggested above. This type of assessment ought to be conducted in a genuine manner, and would in cases of illegitimate governments lead to an obligation to decline an invitation. This obligation would be derived from the invited states obligation to uphold the set criteria as well, which they indeed already are obliged to do under contemporary international law as invited states. The obligations under ICCPR already apply extraterritorially when states use force beyond their borders, and so does states obligations to respect self-determination, and refrain from breaches of IHL and the commission of international crimes.²⁴⁶ Thus, an obligation for invited states to conduct a legitimacy assessment prior to intervention indeed does not extend the international obligations they are already under, but could however help strengthen the enforceability of human rights obligations.

Such an obligation to decline invitation is also already supported by ARSIWA, specifically in article 26 which states that nothing in ARSIWA can preclude

²⁴⁵ Allison, p. 798.

²⁴⁶ *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, paras. 109-112.

wrongfulness of breach of peremptory norms. As is specified in the commentaries to ARSIWA, the inclusion of article 26 was not intended to determine the validity of given consent, for example in cases of intervention by invitation.²⁴⁷ Instead, it was included to determine that nothing in ARSIWA, not even consent, could be used as a means for a state to escape any obligations of a *jus cogens* nature. This means that although ARSIWA does not provide criteria for validity of consent, it acknowledges that not even consent can preclude wrongfulness for breaches of human rights law or humanitarian law. Thereby, it can be argued that although the invitation or the consent issued by the inviting state is legal under international law, the following intervention leading to breaches of human rights obligations, international criminal law or international humanitarian law, is not legal. I would argue that the responsibility to uphold human rights and respect international humanitarian law, indeed ensues a responsibility to decline an invitation to intervene if an intervention will ultimately lead to a breach of peremptory norms.

However, it is of course possible that individual states would tend to re-define legitimacy in such a way that their interventions are always deemed legitimate. That is why the proposed indicators of legitimacy have been presented above, so that there are set criteria for states to consult when making such an assessment. If there for example is evidence of widespread humanitarian abuse, then it would be unreasonable for a third state to claim that its intervention is indeed legitimate under the proposed legitimate authority assessment. This type of obligation to assess before action is in my opinion a reasonable criterion, that can be compared to other legal criteria such as the criterion of undertaking a proportionality assessment before acting in self-defence.

5.5 Arguments Against a Legitimacy Assessment

5.5.1 Introduction

Arguments against a legitimacy assessment are in this chapter raised and countered, specifically arguments on sovereignty in chapter 5.5.2, on non-intervention in chapter 5.5.3 and arguments on ideological pluralism in chapter 5.5.4. The possible risk of abuse is discussed in chapter 5.5.5.

5.5.2 Sovereignty of States

Sovereignty is at times used as an argument against assessing legitimacy. When it comes to intervention by invitation, sovereignty is what gives the regime the right to invite foreign military existence and consent on behalf of the state. Thus, it is argued that inhibiting a states right to consent and invite would be a way to limit the sovereignty of the state. However, as discussed in chapter 2 above, sovereignty is an elusive norm that can be interpreted in different ways, and the normative limits

²⁴⁷ ILC, Commentaries to ARSIWA, art. 26.

of the principle are hard to ascertain. Beckman argues that due to the unclear legal definition of sovereignty, it is not a strong argument either in favour of or in opposition to intervention by invitation, and that sovereignty is more of a political notion than a convincing legal argument.²⁴⁸ Beckman further argues that although states enjoy status of sovereignty, many developing countries or weaker states do not have true independence and thus cannot freely consent to or invite intervention, due to political and economic pressures from other states.²⁴⁹

Sovereignty as an argument against a legitimacy assessment seems to be grounded in a more traditional view of sovereignty, entailing that the regime holds absolute authoritative power. However, if a more modern view of sovereignty is adopted it can be questioned if sovereignty is an argument against a legitimacy assessment at all. If popular sovereignty means that the peoples are the true bearers of sovereignty, then it ought to be in the interest of the peoples that the competent regime does not use its sovereign functions as a means to hold on to power in opposition of the will of the people. If the incumbent regime is using its sovereign functions to invite assistance in order to triumph over a political opposition, then this cannot be in line with the goals of popular sovereignty. Thus, from this perspective, true popular sovereignty would in my opinion instead benefit from a legitimacy assessment as it would ensure that sovereign functions cannot be abused by an illegitimate regime. Further, as the legitimacy assessment proposed in this essay does not intend to support intervention, but rather seeks to limit its permissibility in times of civil war, the sovereignty of a state would indeed be safe-guarded under a legitimacy assessment. Thus, the sovereignty of neither state is indeed breached by an intervention; instead the prohibition on the use of force is strengthened with normative considerations.

5.5.3 The Principle of Non-Intervention

Imposing an assessment of legitimacy on states and deciding their capabilities based on legitimacy, could be argued to be a breach of principle of non-intervention as it would mean outside interference into an area of domestic jurisdiction. However, introducing an assessment would be binding for third party states contemplating whether to accept an intervention or not – i.e. it would only indirectly affect the inviting state and would thus not breach the principle of non-intervention. Also, the purpose is not to force new political orders onto states – only if populations uprising is forcibly crushed with military means would such a test be applicable. Since the test would bind the intervening state, not the inviting state, then it does not breach principle of non-intervention.

²⁴⁸ Beckman, p. 57.

²⁴⁹ Beckman, p. 57.

Critique towards assessment of legitimacy sometimes also relates to that such an assessment would undermine the principle of non-intervention. Beckman writes that deciding on legitimacy of governments will inevitably undermine the principle of non-intervention, since it in his opinion ultimately leads to that intervention can be extended to either or both sides of a civil war conflict.²⁵⁰ In support of this argument he cites the *Nicaragua Case*. As previously stated, the *Nicaragua Case* brings up the issue of possible violation of the principle of non-intervention into domestic matters, questioning what would stop the erosion of the principle of the non-intervention if rebels could receive support in a civil strife.²⁵¹ However, the legitimate authority assessment that I suggest in this thesis does not aim to legalize intervention by invitation on behalf of opposition groups – rather it aims to provide a nuanced way of assessing when intervention by invitation on behalf of incumbent governments is illegitimate and, thus, illegal. Under such a legitimate authority assessment, the principle on non-intervention would not, in reality, be violated for either of the states involved. A legitimacy assessment like the one suggested here could prohibit foreign assistance in favour of the incumbent government in cases where the regime acts in such a way that it cannot be regarded as legitimate anymore, but would not attempt to legitimize or legalize intervention on behalf of opposition groups. With the application of a legitimate authority assessment, an illegitimate regime could possibly be ousted by opposition forces, without foreign assistance to either side. A legitimate authority assessment would thereby lessen the probability of the non-intervention principle to be breached.

Furthermore, my opinion is that the legal status quo already undermines the principle of non-intervention, when on-looking states are forced to either breach international law through opposition support or through humanitarian intervention, or need to continually wait for UNSC authorisation for R2P in order to act. The only other option in the status quo is to stand idly by when a regime is committing gross human rights violations with the help of foreign intervention. In the face of international political division, as has been seen in the case of Syria, the UNSC is unable to act due to vetoes being cast, and the questionable intervention by invitation can continue without any means to stop it or to counteract it without breaching international law. If a legitimate authority test was instead employed, the intervention by invitation could be deemed as invalid, and thus the invited foreign power could not claim that their military course of action was indeed legal under international law. This might not actually stop the invited intervention (as international law in general suffers from its non-enforceability) but would however send a normative signal on what type of interventions are seen as illegitimate and illegal by the international community. In the long-term perspective, it could open

²⁵⁰ Beckman, p. 88.

²⁵¹ *Nicaragua v. USA*, para 246.

up to state responsibility and the end of impunity for actions of states that breach human rights.

5.5.4 Ideological Pluralism

Beckman writes that an assessment of legitimacy of governments has only two alternatives. Either, all states are accepted on the premise of their *de facto* power regardless of political status and opposition groups are disregarded, or legitimacy is assessed on an *ad hoc* basis.²⁵² Beckman argues that such an *ad hoc* assessment forces the recognition of opposition groups based on their greater legitimacy, and that the discussion essentially comes down to the issue of what types of entities should make up the international system.²⁵³ However, I disagree and question this line of argumentation. In my view, assessing the legitimacy of a government of a state is separate from discussing the existence of the state as an entity of international law. It is, in my opinion, also possible to deem an incumbent government as illegitimate in terms of prerogatives to invite military assistance, without recognising the opposition as the legitimate authority and without granting the opposition invitation-rights. In my view, a legitimacy assessment shall instead be conducted to highlight that the outcome is uncertain, and that foreign intervention cannot legitimately be given to the incumbent government.

Beckman argues that illegitimate governments usually are distinguished on the basis of their political constitution, i.e. if they are a democracy or a dictatorship.²⁵⁴ This is a view brought forward also by Franck and other of the so-called democratic entitlement school.²⁵⁵ However, I believe that it is important that a legitimate authority test does not seek to challenge the constitution of states, and does not seek to challenge the political foundations of a state, so long as the state is able to uphold human rights. Here it is important to remember that the Western outlook favouring liberal democracies is not necessarily what is promoted, and it is important to recognise that from a post-colonial point of view it is crucial not to impose standards of the global north indifferently on the countries of the global south. A legitimate authority test ought instead to be neutral to the different types of political solutions of government – so long as the power held can be deemed legitimate. This may, at first sight seem to be a paradox, but is however two separate discussions. In order to grasp this, one must come to terms with the idea that different types of ruling orders can be equally legitimate, so long as the governance is in coherence with the will of the people, i.e. so long as it is a government in line with popular sovereignty. This could, in theory, be the case of a single-party election system where the people actually support the rule of the only candidate, who's rule is in

²⁵² Beckman, p. 88.

²⁵³ Beckman, p. 88.

²⁵⁴ Beckman, p. 87.

²⁵⁵ See Franck (1992), pp. 46 – 91.

line with the will of the people. A parallel can here be drawn to the right of self-determination as discussed above: a people are generally not seen as deprived of their right to self-determination simply on the basis that a regime change has come about from a coup or from a single-party election system, if it is also the case that the regime is in fact made up of persons belonging to the group that is entitled to self-determination.²⁵⁶ However, this type of political rule is most probably an unattainable ideal, and it is difficult to think of real-world examples where we have seen “benevolent dictatorships” that fully respect human rights and bear full legitimacy from their population. This type of regime would also perhaps not live up to the right to political participation, and as discussed above it is questionable if single-party elections are able to genuinely fulfil the right to political participation. Nevertheless, if such a government would be deemed illegitimate under a legitimacy assessment it would not on the basis of the constitution of the state, but on the ability of respect for human rights.

At this point, one must lay aside normative values on what political ideology and solution is most desirable. This is necessary in order to protect the pluralistic world order we have, and is equally necessary when creating law that needs to fit into an ideologically pluralist world.²⁵⁷ A legitimacy assessment that aimed to change the constitutions of states would be in breach of the principle of non-intervention, and would thus be not be possible under international law and legally non-enforceable. It is necessary to maintain the legal status of such a test, instead of creating a politically motivated test, in order to make it enforceable under international law and in order for it to be motivated from a legal point of view and not disregarded or abused due to political motivations or disagreements. Maintaining the legal nature of the assessment also contributes to its weight as it then is established from objective standards established in law, rather than in political motivations and changeable opinions. Therefore, a legitimacy assessment must indeed be based on legally established human rights and not on general moral concerns or on so-called “emerging” or newly proclaimed rights that are not established in positive international law.

5.5.5 Risk of Abuse and Objectivity Concerns

A concern can be raised whether an assessment of legitimacy is in risk of undermining the objectivity of the use of force regime, since an assessment will largely be at the hands of the international community and be subject to political motives and consensus. There is therefore a substantial risk of a double standard developing, where force under intervention by invitation is deemed legal in some cases and illegal in others, when the factual situation is indeed very similar. The difference being only the subjective assessment of the community of states or by

²⁵⁶ Doswald-Beck, p. 203.

²⁵⁷ Roth, p. 33.

the UNSC. This is certainly a valid objection to this type of legal construction, where the rule risks being applied differently in different situations and thus not objectively or after clearly objective standards. However, this is already the situation and, in reality, the basis of the international law on the use of force, where many of the rules can be accused of being subjectively applicable, and where force by UNSC authorisation can be criticised for the very same reasons. The international law on the use of force is widely based on consensus among states, and the rules are indeed applied in a manner of double standards at many times, especially in times of politically motivated vetoes in the UNSC. As with all types of intervention under international law, it can always be questioned if the guiding principles will be human rights, or if it in fact will be politically motivated decisions, regardless if it is up to individual states or the UNSC whether or not intervention shall be accepted.²⁵⁸ However, in the types of cases discussed in this thesis it is less of an issue, since the legitimacy assessment proposed in this thesis is in regard *only* to the government's ability to invite foreign intervention and not in order to justify foreign intervention into conflicts and not in regard to recognition. Nonetheless, the point could be raised that a regime may be deemed illegitimate for political reasons and for other states of the international community wishing the demise of the incumbent regime. Thus, a regime that is in fact legitimate and potentially deserving of foreign assistance to combat an internal threat or uprising, may be unfairly affected by a legitimacy assessment if it is undertaken wrongly and for political means.

In the R2P-discussion much criticism has been raised from post-colonial states about the risk of a new form of colonialism through a perceived need to intervene and impose certain resolutions to internal conflicts. However, the risk of re-colonialization that has been in centre of the R2P-discussions is of a much lesser degree in the case of a legitimacy assessment. Given that such an assessment does not advocate intervention, but rather non-intervention, the risks involved are smaller since my proposal promotes less foreign involvement and intervention.

²⁵⁸ Fox, p. 840.

6 The On-Going Civil War in Syria

6.1 Introduction

This chapter is intended as a limited case study, where the above theoretical discussion will be applied to the specific case that forms the starting point of this thesis. First, I apply current international law in chapter 6.2, and discuss the legality of intervention and the limitations the current law suffers from. In chapter 6.3. I go on to applying the legitimacy assessment as proposed in chapter 5. Finally, the possible consequences and/or obligations of invited states is discussed under chapter 6.4.

This chapter highlights the complexity of this area of law, and also the complex nature of the conflict where a multitude of actors makes an accurate assessment highly challenging. The problematic aspects of a legitimacy assessment will be further raised here, when the proposed legitimacy assessment is tried out on the specific case study.

6.2 Applicability of Current International Law

6.2.1 Introduction

This chapter aims to apply the current international law on intervention by invitation to the on-going civil war in Syria. In 6.2.2 it will be discussed if Russia's intervention is indeed legal, and in chapter 6.2.3 the effective control doctrine and its limitations will be discussed.

6.2.2 Is Russia's Intervention Illegal Under International Law?

The majority view among scholars in international law, as has been discussed in chapter 4.3, is that intervention by invitation into civil conflict is indeed allowed. Some scholars however argue that a principle of negative equality should be guiding, prohibiting intervention to either side of the conflict. Even when applying the minority view on the law, that intervention by invitation is illegal to both parties in cases of civil war, the Russian intervention by invitation would not be illegal, since foreign involvement has occurred prior to the Russian intervention. Other states, among them the US had involved themselves militarily prior to the invitation extended to Russia, superseding Russian military involvement by almost a whole year. Russia was at the time of US involvement supporting the Syrian regime with diplomatic backing and arms, but not involving itself directly through military action. This would mean that the military engagement of other states on behalf of the opposition groups would render the Russian intervention legal since Russia was not the first foreign state to intervene in the civil war. However, the Syrian conflict

suffers from that there are multiple actors involved in the conflict, and that it is unclear which aspect of the conflict that foreign involvement has targeted.

When adopting the majority view of the law there is indeed no prohibition on Russia to intervene in the civil war, since an invitation from the incumbent regime has been extended. This is the view also held by Russia, as has been expressed by Russian Foreign Affairs Minister Sergey Lavrov who has explained that the justification for Russian assistance is the explicit request from President Assad for Russian support in dismantling Syrian opposition factions, and that they thereby have invoked the legal right of intervention by invitation on the request of a government.²⁵⁹ Lavrov has said that the Russian “position is absolutely in line with international law”.²⁶⁰ Adopting the majority view of scholars would render the intervention by invitation legal, and thus the Russian viewpoint has support in international law.

The Russian intervention has been criticised by Western countries, and criticism has been based on the systematic targeting of the political opposition in Syria.²⁶¹ The targeting of opposition and civilians has been strongly condemned, and Russia and Syria have been urged to cease this targeting. The legality of intervention by invitation into civil war has however not been widely discussed.

6.2.3 Effective Control Doctrine and Validity of Invitation

As previously discussed, it is the effective control doctrine that is the current basis of authority in international law currently. The degree of control held by the regime in Syria has shifted during the course of the civil war, from complete to very limited in certain areas.²⁶² However, as discussed above the degree of effective control does not de-legitimise a regime until effective control is completely lost, since the way effective control doctrine is applied today gives a long-lasting presumption in favour of the incumbent government. Thus, international law identifies a regime as the authority of a state long past the point of lost effective control. Therefore, the decline of effective control as experienced by the Assad regime is of less significance and does not in reality affect the regimes ability to consent for the state.

There has been no official document evidencing the invitation from the Assad regime, but the continued co-operation between the Syrian and Russian regimes suggests that the Assad regime has indeed consented to the intervention, and the Russian Foreign Minister claims that an invitation has been extended.²⁶³ If the

²⁵⁹ Robins-Early, 10 January 2015.

²⁶⁰ Robins-Early, 10 January 2015.

²⁶¹ Joint Statement from the governments of France, Germany, Qatar, Saudi Arabia, Turkey, United Kingdom and USA on Russian military action in Syria, Statement by the UK Foreign & Commonwealth Office.

²⁶² See statistics on territorial control from the Institute for the Study of War.

²⁶³ Robins-Early, 10 January 2015.

consent has been given freely and by a competent authority of the Syrian state, as is established by the VCLT articles 2 and 7, then the consent is in coherence with article 20 ARSIWA and is thus valid under international law.

6.3 Syria: Applying Legitimacy Assessment

6.3.1 Introduction

In the last five years of civil war in Syria, hundreds of thousands of Syrians have lost their lives and millions have been forced to flee their homes.²⁶⁴ The international community has been unsuccessful in stopping the conflict. Could a legitimacy assessment have helped in limiting the consequences of the war, or could it have ended impunity in the conflict? This chapter aims to apply the criteria of the proposed legitimacy assessment, in order to try it out on the conflict that is the starting point of this thesis. The application of the legitimacy assessment highlights both the benefits and the difficulties of such an assessment, and evaluates to what extent a legitimacy assessment could have been applied in the Syrian civil war. This chapter also aims to investigate the Syrian regime's legitimacy in the view of the international community.

This chapter deals only with the conduct of the Syrian regime, and not of conduct of other parties to the conflict. Evidence suggests that unlawful conduct and violations has been conducted by also the opposition forces and their allies, as well as by ISIS and other groups active in the conflict. These violations are, however, not discussed in this context. This is because I deal, in this thesis, with the sovereign right to invite intervention, which is not possessed by the other parties to the Syrian civil war. Therefore, in regard to a governmental legitimacy assessment, it is primarily the conduct by the Syrian government that is of interest and significance.

6.3.2 Applying the Indicators of Legitimacy

6.3.2.1 Introduction

In this chapter the proposed criteria in chapter 5 will be applied to the situation in Syria. This is done in an attempt to try the legitimacy assessment, and to highlight the difficulties such an assessment might encounter.

6.3.2.2 Respect for Self-Determination

Depending on what interpretation of the right to self-determination that is adopted, this criterion can be said to be fulfilled to a certain degree in Syria. Prior to the conflict the Assad family had ruled for the last forty years in Syria. The rule was however not racist nor colonial, and in the traditional sense the principle of self-determination was fulfilled by the rule of Assad. However, if one adopts a more

²⁶⁴ Syrian Observatory for Human Rights, 13 December 2016.

modern interpretation of the principle as entitling the people of Syria to choose their government freely without foreign intervention, the principle of self-determination can possibly be viewed as violated at least since the start of the conflict. Although the Syrian government has not been installed by a foreign power, it has indeed been kept in power through foreign intervention. As I have argued above, the principle could be argued to be violated when a government is sustained and kept in power solely due to foreign involvement. Although the quality of the regime is not assessed by the right to self-determination and does not concern itself with the actual will of the people, the principle does demand that governments are chosen without foreign intervention. The right to self-determination contains a right for the people to choose the government, and has by some scholars been argued to include a “right to revolution”, and scholars have also argued that self-determination ought to prohibit the incumbent regime from inviting assistance when a civil war is under way.

In the context of Syria, however, several states have involved themselves in the conflict on either side, and the extent to which each party is responsible of violation of the right to self-determination is increasingly unclear and difficult to assess. However, since the government has largely been kept in power by the support of Russia at the invitation of the Syrian regime, at least the Syrian regime can be accused of being in violation of the right to self-determination as it has relied on foreign intervention as a means to prevent the people of Syria from demanding social change and change of government.

6.3.2.3 Respect for Human Rights: Political Participation, Expression & Life

Syria is a state party to the ICCPR since 1969 and is thus bound by its obligations under the ICCPR.²⁶⁵ The Syrian civil war started in 2011, after peaceful protests against the four-decade rule of the Assad family was met with government military force.²⁶⁶ President Assad has repeatedly been established as president through elections. However, these elections have been disputed.²⁶⁷ It can be questioned if the Syrian elections have met the requirements for the right to political participation, as the genuine nature of the elections can be challenged. The Syrian and Russian regimes have been criticised by, among others, the Council of the EU for not allowing the political change that has been demanded by the people, and have in a statement expressed the notion that peace cannot be achieved in Syria under the current regime and until the aspirations of the Syrian people has been addressed, urging the Syrian regime to implement a genuine political transition.²⁶⁸

²⁶⁵ OHCHR, Status of Ratification, Syrian Arab Republic.

²⁶⁶ Lederer, September 24 2016.

²⁶⁷ New York Times, 4 June 2014.

²⁶⁸ Council of the EU, statement 17 October 2016.

The German Chancellor Angela Merkel has stated that a political solution must take the interest of the opposition into account, and the French President Francois Hollande has expressed the view that a solution in Syria “must include the departure of Bashar Al-Assad”.²⁶⁹

It can also be concluded with quite a high degree of certainty that the human rights of freedom of expression and freedom of peaceful assembly, and the right to life have been violated in the origins of the conflict, when peaceful protests were met with military response from the regime, and that it possibly was these violations that led to an escalation of the conflict into a widespread civil war. All parties to the civil war have been accused of violating human rights, and the international community has condemned these violations in resolution 2139,²⁷⁰ and a special session of the OHCHR has been held on 21 October 2016 on the human rights situation in Syria, urging the regime and its allies failing to fulfil their human rights obligations.

6.3.2.4 Refrain from International Crimes and from Breaches of IHL

The Syrian regime has, however, since early on in the conflict claimed to be facing an “armed insurgency” in an attempt to define the rules of IHL rather than of human rights law as applicable to the situation.²⁷¹ According to the International Committee of the Red Cross (ICRC) there has been an armed conflict in Syria since 2012, and thus since that point in the conflict the rules of international humanitarian law are applicable to the conflict.²⁷² The classification of the Syrian conflict as a non-international armed conflict or international armed conflict can definitely be discussed, but for the purposes of this chapter a conclusion on the applicable category is not necessary and therefore I do not engage with the issue of classification. However, in the case of the Syrian conflict it has been expressed that there is such sufficient evidence of breaches of IHL that there is probably sufficient evidence of breaches either way the conflict is classified.

According to the UN Human Rights Council, collected evidence suggests that all parties to the conflict are guilty of breaches of IHL. However, the Council states that in the battle over Aleppo it is government forces and their allies who have been responsible for the overwhelming majority of civilian casualties.²⁷³ These breaches amount to war crimes, and possibly also crimes against humanity, according to the

²⁶⁹ Baker and MacFarquhar, 2 October 2015.

²⁷⁰ UNSC Res 2139 (22 February 2014) UN Doc S/RES/2139 (2014).

²⁷¹ Lieblich (2013), p. 50.

²⁷² ICRC, Operational Update 17 July 2012.

²⁷³ Human Rights Council, Statement 21 October 2016.

Human Rights Council. With evidence of the use of chemical weapons leading to destruction of Syria's arsenal of chemical weapons,²⁷⁴ attacks on aid convoys, hospitals, schools and deliberate targeting of civilians, as well as disproportionate bombings it seems possible that Syria and its allies have indeed breached IHL and committed international crimes.

In the face of such overwhelming evidence of unlawful conduct, it is my opinion not controversial to state that the Syrian government lacks legitimacy and support of the population it is targeting. Indeed, the very need to target civilians is a strong indicator that the Syrian government is illegitimate in the eyes of its population, and indeed in the eyes of the world. A regime treating its population in such a manner could definitely be questioned on its ability to validly consent on behalf of the state, and thus an ongoing invitation to intervene should in my opinion be rendered equally illegitimate. However, both the Russian and Syrian regimes deny wrong-doing and argue that they are not responsible for the breaches. In a complicated conflict such as the civil war in Syria, it is, of course, very difficult to secure evidence of which party is responsible for which breach. For example, Russia denies involvement in the targeting of UN aid convoys.²⁷⁵ Also, it is not clear which party to the conflict that was guilty of the use of chemical weapons as both sides have been accused and denied involvement. However, when there have been reports of unlawful conduct by the regime since the conflict's beginning, it is, in my opinion, unreasonable to argue that the Assad regime should be able to validly invite foreign assistance to aid it in its commission of breaches.

Nevertheless, evidence of breaches of IHL and international crimes may not lead to prosecution. A practical issue in the case of Syria is that the state of Syria is not a member state to the ICC-Statute and thus cannot be brought under ICC prosecution unless the situation is referred to the ICC by the UNSC.²⁷⁶ The UN High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, has requested that the UNSC to refer the situation in Syria to the ICC, as evidence of both war crimes and crimes against humanity has been observed and as "ongoing operations are conducted in complete disregard for the most basic standards of international humanitarian law".²⁷⁷ In the current state of affairs, with Russia as a close ally to the Syrian regime, it is highly unlikely that any resolution containing an ICC referral will pass through the UNSC. There has indeed been attempts to do so that have been blocked by Russian and Chinese vetoes.²⁷⁸

²⁷⁴ UNSC Res 2118 (27 September 2013) UN Doc S/Res/2118 (2013).

²⁷⁵ Russian News Agency, 20 September 2016; Russian Foreign Ministry, 20 September 2016.

²⁷⁶ See ICJ-Statute art. 13(b).

²⁷⁷ Statement by the High Commissioner for Human Rights, 4 October 2016.

²⁷⁸ UN press release, 22 May 2014, UN Doc SC/11407.

6.3.3 International Community on Syrian Legitimacy

Already in 2012, in the second year of the Syrian civil war, a number of states questioned the legitimacy of the Syrian regime and instead voiced opinions stating that the opposition was the “sole legitimate representative” of the people of Syria.²⁷⁹ There have been many statements emanating from different actors on the legitimacy of the Syrian regime. As previously stated, the Council of the EU have in a statement voiced the view that the current Syrian regime must go, and leave way for a genuine political transition.²⁸⁰ The regional actor the Arab League have also addressed the Syrian regime with harsh criticism and imposed sanctions on Syria, which can be seen as an expression of regional view on legitimacy.²⁸¹

Russia is not the only country which has been invited to intervene in Syria. The US was invited by Assad to intervene in the fight against ISIS, but only if it was in a “coordinated” manner with Syria and Russia. The US declined this invitation to intervene, however without an official statement as to why.²⁸² US President Barack Obama has been quoted as saying that “the problem here is Assad and the brutality he’s inflicted on the Syrian people (...) We are not going to cooperate with a Russian campaign to simply try to destroy anybody who is disgusted and fed up with Mr. Assad’s behaviour.”²⁸³ The reluctance is possibly due to two reasons: an unwillingness to strengthen Syria’s current regime which is abusing its governmental powers, and an unwillingness to cooperate and aid in war crimes and crimes against humanity.²⁸⁴ Both these instances suggest that the US deem Syria’s regime as illegitimate, and therefore decline to participate in any use of force perpetrated by the regime and decline to confirm the governmental power of the regime in any way. Some critics argue that it is legally questionable for the US to decline Syria’s intervention but to intervene in Syria anyway on the basis of on collective self-defence on behalf of Iraq, since a direct invitation to intervene is seen as an exception to the principle of non-use of force that ranks higher than what intervention based on collective self-defence does.²⁸⁵ On the other hand, the American justification is possibly based on the reluctance to co-operate with the Syrian regime, in an effort not to lend any aid to the regime – neither militarily nor politically. In this case, the American authorities are doing precisely what is advocated in this thesis when they are turning down the Assad regime’s invitation to intervene as they recognise that the legitimacy of the regime can be questioned. Their decision to intervene in other ways is however not advocated for in this thesis.

²⁷⁹ See Shaw, p. 837 and Talmon (2013), p. 219.

²⁸⁰ Council of the EU, statement 17 October 2016.

²⁸¹ Allison, p. 799.

²⁸² Kreß, 17 February 2015.

²⁸³ Baker and MacFarquhar, 2 October 2015.

²⁸⁴ Kreß, 17 February 2015.

²⁸⁵ Kreß, 17 February 2015.

Also, the joint call of 69 member states of the UN, led by Canada,²⁸⁶ to bring the question of international peace and security to the UNGA instead of the UNSC can also be read as a signal of the international community's view on legitimacy of the regime and of the invited intervention. The initiative is based on the Uniting for Peace Resolution, which gives the UNGA competence to act in issues of international peace and security when the UNSC fails to fulfil its duties.²⁸⁷ The perceived need for the issue to be brought to the UNGA stems from the inability of the UNSC to act, due to the one or more veto-powers having a significant stake in the outcome of the conflict.

However, Shaw writes that statements and actions like these are political and not legal in nature, being expressed in support of humanitarian efforts and not in an effort to recognise the opposition as the new government of Syria.²⁸⁸ This view is reiterated by Fox, however slightly less absolute, stating that the legal effects of the statements is unclear.²⁸⁹ Shaw argues that the political nature of these statements prevent them from being a legal basis for forcible intervention into Syria on behalf of opposition forces, and Fox argues that there is no precedent for intervention on behalf of the opposition merely based on these types of statements on legitimacy. This view is fairly uncontroversial, and I do not wish to refute this argument. However, I would assert that these statements do signal an opinion on legitimacy of the regime, and that they could have legal significance under a legitimate authority assessment. As previously emphasised, I do not in this thesis wish to promote intervention on behalf of opposition groups, and thus am not in statements seeking a legal basis for intervention. Instead, I am rather seeking evidence of consensus on what types of regimes can be deemed as illegitimate under international law. In my opinion, these statements can show where a limit of acceptability could be drawn, and I submit that statements like these from the international community could aid in a legitimacy assessment.

²⁸⁶ Permanent Mission of Canada to the United Nations, letter dated 13 October 2016.

²⁸⁷ See UNGA Res 377(A) (3 November 1950).

²⁸⁸ Shaw, p. 838.

²⁸⁹ Fox, p. 838.

7 Concluding Remarks

Intervention by invitation into civil war is a challenging issue to address. Both the factual circumstances and the legal framework are complicated to navigate. In this thesis, I have aimed to clarify how international law treats intervention by invitation, and if normative considerations are taken into account when determining if an extended invitation is in fact a valid consent for the state. However, the lack of clarity of international law and the wide differentiation of opinion among scholars leads to a somewhat open-ended conclusion in the matter. It can be concluded that there is currently no absolute prohibition of intervention by invitation into civil war. Instead, contemporary international law allows invited intervention if consent is extended and validly given by a representative of the incumbent government. The criteria for determining what valid consent is takes no normative considerations, and is not an evaluation of suitability or legitimacy of the regime in power. Instead, the effective territorial control of the regime is what is regarded as the most decisive factor, even though in reality effective control of territory throughout the course of a civil war is not needed for an incumbent regime to validly invite assistance. Rather, international law provides a presumption of legitimacy for the incumbent government, based on that it previously possessed effective control and therefore the means to maintain power over the territory. A decline in effective control does not render the incumbent government illegitimate, but rather serves as the base for legitimacy up until the point that the control is completely lost and the regime is exchanged in favour of a new governing group. Thus, an incumbent regime is able to validly invite foreign assistance in times of civil war, up until the point that the government is removed from power.

The current state of international law allows a government overwhelmed by political opposition and civil war to employ not only the national military force available to the regime, but also the force of its invited allies. Thus, the force which a government is allowed and able to respond with towards an internal uprising and civil war is almost unlimited. This enables the government to effectively succeed over its opponents, so long as there is foreign assistance from allies. The political validity of the regime is not taken into account, and the will of the peoples rising up against its government is largely ignored. My opinion is that this status quo is undesirable, and indeed in contrast to the values of human rights and human security that international law prescribes. Therefore, I propose in this thesis a reform to the available framework of intervention by invitation, that connects the use of force regime with the frameworks of international humanitarian law and international human rights law.

A proposed solution to the objectionable current legal situation is in this thesis presented: a governmental legitimacy assessment. Such an assessment would seek to determine if the incumbent government is legitimate or not, in regard to its right

to invite foreign intervention. It is not suggested to affect any other functions of the government or its status. If the incumbent regime is indeed deemed to be illegitimate, then the legality of an invited intervention ought to be invalidated and an intervention upon such an invitation would be contrary to the law on the use of force. Thus, deeming the consent given by the regime as invalid due to illegitimacy, a subsequent intervention would be in breach of the prohibition of the use of force, and thus be illegal under international law. This assessment is suggested to have its basis in a range of provisions in human rights law and humanitarian law, and aims to add a normative perspective to the concept of intervention by invitation by allowing for an assessment of whether the incumbent regime is in a position to validly consent for the state. In this way, the non-use of force regime is allowed to be influenced by human rights concerns. This would resonate well with the more modern view on sovereignty as experienced in contemporary international law, where sovereignty indeed can be viewed as qualified based on treatment of populations and respect for human rights. It would be in line with the evolving contemporary doctrine of effective protection of populations, which seeks to shift the standards by which international law evaluates legality of the use of force and intervention by invitation.

This proposition of a legitimacy assessment is of course not uncontroversial. Some would argue that an assessment of a governments legitimacy is contrary to each state's right to sovereignty and right to non-intervention from other states. However, a shift in international law towards a principle of qualified sovereignty, based on the adherence to popular will and respect for human rights, has long been underway in international law. Thus, sovereignty can no longer be a shield for all normative concerns expressed by the international community, and cannot any longer be an effective shield that justifies abhorrent treatment of populations and complete disrespect of the people's right to self-determination and right to political participation. Further, the principle of non-intervention would rather be strengthened by the addition of a legitimacy assessment. A legitimacy assessment would prohibit invited foreign intervention to an illegitimate government, and could thus potentially lessen the need of the international community to intervene to safeguard populations from their own governments. Such is the case in Syria, where the humanitarian suffering and human rights abuses have continued and worsened after the involvement of an invited ally, and the international community has been unable to act. This forces the international community to either stand idly by and watch the horrors committed by the regime and its ally, or forces the international community to intervene contrary to the principle of non-intervention and non-use of force. If the extended invitation from the Syrian regime could be deemed as invalid under international law, the intervention by Russia would consequently be illegal as well. Such an illegal intervention could then give rise to state responsibility for the regime that chose to accept an invitation from an illegitimate regime. Even if international law suffers from unenforceability and thus such assignment of responsibility would

be unlikely, it would indeed send a clear message on what types of interventions are so far beyond a moral acceptability that they cannot be ignored by the international community of states.

This type of assessment of legitimacy is a proposition intended to start a discussion on how to change the legal status quo to a more appropriate way of regulating intervention by invitation. As previously stated, this is by no means an uncomplicated issue, and it is difficult to assert to what extent such a legitimacy assessment could have been a barrier to escalation of the civil war in Syria. The conflict in Syria is extremely complicated, with a multitude of actors engaged and a multitude of political wills. However, one could imagine that such a situation as we see today would not have arisen if the self-determination and human rights of the population of Syria had been respected from the onset of the conflict. However, even with a legitimacy assessment in place, the conflict could very well have escalated to a similar extent with similar humanitarian devastation. It could, as well, be the case that an invitation is regarded as legal under a legitimacy assessment at the time that it is extended, but further along in the conflict the government might suffer a loss of legitimacy which ought to render an ongoing intervention by invitation as illegal.

It is difficult to deliver a solution to the issue of illegitimate governments and intervention by invitation, and it is equally difficult to know what possible impact such a solution could have. It is also, undeniably, challenging for the international community to assess ongoing conflicts. Nevertheless, I believe that these are insufficient reasons to not engage with the issue. Although it is difficult to foresee an effect and although it may be difficult to assess retrospectively how a legitimacy assessment could have been valuable during the start of a conflict, like the Syrian conflict, it is still important to ask the question and discuss how the law can be constructed in a more appropriate or effective way. The issue is difficult, but it is indeed not irrelevant.

If a legitimacy assessment were to be adopted and implemented under international law, it would be crucial that it aimed not to fulfil political motivations of members of the international community. Rather, such an assessment ought to concern only human rights law and humanitarian law, and to assess a regime's right to issue invitations based only on these matters and not on notions of political desirability or self-interest of other states. If a legitimacy assessment were to be adopted, it ought to be used to safeguard populations from illegitimate regimes, and thus safeguard the values of human security and human rights that the international community has agreed upon today.

BIBLIOGRAPHY

LITTERATURE

Monographs

Baderin and Ssenyonjo (eds.), *International Human Rights Law – Six Decades After the UDHR and Beyond*, Ashgate Publishing, Surrey 2010.

Badersten, Björn, *Normativ Teori – Att Studera Det Önskvärda*, Studentlitteratur, 2006.

Beckman, Olof, *Armed Intervention Pursuing Legitimacy and the Pragmatic Use of Legal Argument*, Lund University, Lund 2005.

Besson, Samantha, “Moral Philosophy and International Law”, in Orford, Anne and Hoffmann, Florian (eds.), *The Oxford Handbook of the Theory of International Law*, Oxford University Press, Oxford 2016.

Bix, Brian. H, “Natural Law: The Modern Tradition”, in Coleman, Jules and Shapiro, Scott (eds.), *The Oxford Handbook of Jurisprudence & Philosophy of Law*, Oxford University Press, Oxford 2002.

Bring, Ove, *FN-Stadgan och världspolitiken*, Nordstedts Juridik, 2002.

Buchanan, Allen, *Justice, Legitimacy and Self-Determination Moral Foundations for International Law*, Oxford University Press, Oxford 2004.

Coleman, Jules and Shapiro, Scott (eds.), *The Oxford Handbook of Jurisprudence & Philosophy of Law*, Oxford University Press, Oxford 2002.

Fox, Gregory H., ”Intervention by Invitation”, in Weller, Marc (ed.), *The Oxford Handbook of the Use of Force in International Law*, Oxford University Press, Oxford 2015. [Cited as: Fox (2015)]

Fox, Gregory H., “The Right to Political Participation in International Law”, in Fox, Gregory H., and Roth, Brad R., (eds.) *Democratic Governance and International Law*, Cambridge University Press, Cambridge 2000. [Cited as Fox (2000)]

Fox, Gregory H., and Roth, Brad R., (eds.) *Democratic Governance and International Law*, Cambridge University Press, Cambridge 2000.

Gray, Christine, *International Law and the Use of Force*, Oxford University Press, Oxford 2008.

Joeseeph, Sarah, "Civil and Political Rights", p 89 in Baderin and Ssenyonjo (eds.), *International Human Rights Law – Six Decades After the UDHR and Beyond*, Ashgate Publishing, Surrey 2010.

Kleineman, Jan, *Rättsdogmatisk metod*, in Korling Fredric and Zamboni, Mauro (eds.), *Juridisk Metodlära*, Studentlitteratur, Lund 2013.

Korling, Fredric and Zamboni, Mauro (eds.), *Juridisk Metodlära*, Studentlitteratur, Lund 2013.

Lieblich, Eliav, *International Law and Civil Wars Intervention and Consent*, Routledge, Oxon 2013. [Cited as: Lieblich (2013)]

Miller, Russel A., and Bratspies, Rebecca M., *Progress in International Law*, Martinus Nijhoff Publishers, Leiden 2008.

Nolte, Georg. *Eingreifen auf Einladung: Zur völkerrechtlichen Zulässigkeit des Einsatzes fremder Truppen im internen Konflikt auf Einladung der Regierung (Intervention upon Invitation: Use of Force by Foreign Troops in Internal Conflicts at the Invitation of a Government under International Law)*. Springer, Berlin 1999.

Orakhelashvili, Alexander, *Changing Jus Cogens Through State Practice? The Case of the Prohibition of the Use of Force and its Exceptions*, in Weller (ed.), *The Oxford Handbook of the Use of Force in International Law*, Oxford University Press, Oxford 2015.

Peczenik, Aleksander, *Vad är rätt? Om demokrati, rättssäkerhet, etik och juridisk argumentation*, Fritzes Förlag, Stockholm 1995.

Roth, Brad, *Governmental Illegitimacy in International Law*, Clarendon Press, Oxford 1999. [Cited as: Roth (1999)]

Shaw, Malcolm N., *International Law*, 7th ed., Cambridge University Press, Cambridge 2014.

Talmon, Stefan, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile*, Clarendon Press, 1998.

Válek, Peter, "Legality versus Legitimacy and the Use of Force" in Miller, Russel A., and Bratspies, Rebecca M., *Progress in International Law*, Martinus Nijhopp Publishers, Leiden 2008.

Weller, Marc (ed.), *The Oxford Handbook of the Use of Force in International Law*, Oxford University Press, Oxford 2015.

Articles

Allison, Roy, "Russia and Syria: Explaining Alignment with a Regime in Crisis" *International Affairs*, Vol. 89:4 2013.

Deeks, Ashley S., "Unwilling or Unable: Toward a Normative Framework for Extraterritorial Self-Defense", *Virginia Journal of International Law*, Vol. 52:3 2012.

Doswald-Beck, Louise, "The Legal Validity of Military Intervention by Invitation of the Government", *British Yearbook of International Law*, Vol 66:189 1985.

Franck, Thomas M., "The Emerging Right to Democratic Governance", *American Journal of International Law*, Vol. 86 1992. [Cited as: Franck (1992)]

Jareborg, Nils, "Rättsdogmatik som vetenskap", *Svensk Juristtidning*, Vol. 1:1 2004.

Leiblich, Eliav, "Intervention and Consent: Consensual Forcible Interventions in Internal Armed Conflicts as International Agreements", *Boston University International Law Journal*, Vol. 29:337 2011. [Cited as: Lieblich (2011)]

Nolte, Georg, "Intervention by Invitation", *Max Plack Encyclopedia of Public International Law*, Oxford Public International Law, 2010. Available online at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1702?prd=EPIL>. [Cited as Nolte, OPIL, 2010]

Odendahl, Kerstin, "National and International Legitimacy of Governments", *European Society of International Law*. Vol. 4:5 2015.

Olsen, Lena, "Rättsvetenskapliga perspektiv", *Svensk Juristtidning*, Vol. 2:105 2004.

Roth, Brad, "Popular Sovereignty: The Elusive Norm", *Proceedings of the American Society of International Law*, Vol. 91:363 1997. [Cited as Roth (1997)]

Sandgren, Claes, "Är rättsdogmatiken dogmatisk?", *Tidsskrift för rettsvetenskap*, Vol. 118:(4 – 5):648 2005.

INTERNATIONAL LEGAL INSTRUMENTS

Treaties and Conventions

Charter of the United Nations, 26 June 1948.

Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (and Protocols) (as amended on 21 December 2001), 10 October 1980, 1342 UNTS 137.

Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277.

International Covenant on Civil and Political Rights, 16 December 1966 (adopted 16 December 1966, entered into force 23 March 1976), 999 UNTS 171. [Cited as: Geneva Conventions of 12 August 1949.]

International Committee of the Red Cross (ICRC), Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31. [Cited as: Geneva Conventions of 12 August 1949.]

International Committee of the Red Cross (ICRC), Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949, 75 UNTS 85. [Cited as: Geneva Conventions of 12 August 1949.]

International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135. [Cited as: Geneva Conventions of 12 August 1949.]

International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287. [Cited as: Geneva Conventions of 12 August 1949.]

International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609. [Cited as: Protocol II Additional to the Geneva Conventions of 12 August 1949.]

UN Documents

International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/56/10 (2001).

Universal Declaration on Human Rights, 10 December 1948, UNGA Res 217 A (III).

UNGA Res. 217(III) A, Universal Declaration on Human Rights, 10 December 1948.

UNGA Res. 375 (IV), Draft Declaration on Rights and Duties of States, 6 December 1949.

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

UNGA Res. 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (FRD), 24 October 1970.

UNGA Res 3314 (XXIX), Definition of Aggression, 14 December 1974.

UNSC Res 2118 (27 September 2013) UN Doc S/Res/2118 (2013).

UNSC Res 2139 (22 February 2014) UN Doc S/RES/2139 (2014).

REPORTS AND RESOLUTIONS

Annan, Kofi, Secretary-General Millennium Report, *'We the Peoples' The Role of the United Nations in the 21st Century*, 2000. Available online at: http://www.un.org/en/events/pastevents/pdfs/We_The_Peoples.pdf

Human Security Centre, *Human Security Report 2005: War and Peace in the 21st Century*, Oxford University Press, New York 2005.

Institut de Droit International, "The Principle of Non-Intervention in Civil Wars", August 14 1975. [Cited as: Institut de Droit, 1975.] Available online at: http://www.justitiaetpace.org/idiE/resolutionsE/1975_wies_03_en.pdf

Independent International Commission on Kosovo, *Kosovo Report: Conflict, International Response, Lessons Learned*, Oxford University Press, Oxford 2000. [Cited as: Kosovo Report.]

International Committee for the Red Cross, "Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts", 2008. Available online at: https://www.icrc.org/eng/assets/files/other/icrc_002_0923.pdf

International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, International Development Research Centre, Ottawa 2001. [Cited as: Report of the International Commission on Intervention and State Sovereignty, "Responsibility to Protect".]

International Law Commission, Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission, 2001, vol. II, Part Two (2009). [Cited as: ILC, Commentaries to ARSIWA.]

STATEMENTS AND LETTERS

Council of the EU, Statement 17 October 2016. Available online at: http://dsms.consilium.europa.eu/952/Actions/Newsletter.aspx?messageid=8136&customerid=35584&password=enc_313375746D35324D55363737_enc

Human Rights Council, Statement 21 October 2016, "Special Session of the Human Rights Council on the deterioration of the situation of human rights in the Syrian Arab Republic, and the recent situation in Aleppo". Available online at:

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20723&LangID=E>

Office of the High Commissioner for Human Rights, Statement 4 October 2016. Available online at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20636&LangID=E>

Press release, 22 May 2014, SC/11407, 7180th Meeting, “Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution”. Available online at: <https://www.un.org/press/en/2014/sc11407.doc.htm>

Canadian Office of the Minister of Foreign Affairs, Statement 1 December 2016. Available online at: <http://news.gc.ca/web/article-en.do?nid=1164109>

United States White House Statement, 23 September 2014. Available online at: <https://www.whitehouse.gov/the-press-office/2014/09/23/statement-president-airstrikes-syria>

Permanent Mission of Canada to the United Nations, Letter to the President of the General Assembly, 13 October 2016. Available online at: <http://s3.documentcloud.org/documents/3142789/LETTER-to-the-PGA-on-SYRIA-2016-10-13.pdf>

International Committee for the Red Cross, Operational Update 17 July 2012, “Syria: ICRC and Syrian Arab Red Crescent maintain aid effort amid increased fighting”. Available online at: <https://www.icrc.org/eng/resources/documents/update/2012/syria-update-2012-07-17.htm>

Russian Foreign Ministry, Comment by the Information and Press Department on an attack on a humanitarian convoy in Syria, 20 September 2016. Available online at: http://www.mid.ru/en/maps/sy/-/asset_publisher/9fcjSOwMERcf/content/id/2453130

United Kingdom Foreign & Commonwealth Office, “Joint Declaration on Recent Military Actions of the Russian Federation in Syria”, 2 October 2015. Available online at: <https://www.gov.uk/government/news/joint-declaration-on-recent-military-actions-of-the-russian-federation-in-syria>

NON-DOCTRINAL MATERIAL

Baker, Peter and MacFarquhar, Neil, “Obama Sees Russia Failing in Syria Effort”, *The New York Times*, 2 October 2015. Available online at: http://www.nytimes.com/2015/10/03/world/middleeast/syria-russia-airstrikes.html?_r=0

Barnard, Anne, “Victory in Syrian Election Is Show of Assad’s Control”, *The New York Times*, 4 June 2014. Available online at: <https://www.nytimes.com/2014/06/05/world/middleeast/former-syria-ambassaorford-criticizes-us.html>

Cambridge English Dictionary. Available online at: <http://dictionary.cambridge.org/dictionary/english>

Cockburn, Patrick, “Why Russia has started bombing Syria now - and what it hopes to achieve”, *The Independent*, 30 September 2015. Available online at: <http://www.independent.co.uk/news/world/russia-air-strikes-in-syria-why-putin-has-started-bombing-isis-now-and-what-it-hopes-to-achieve-a6674041.html>

Institute for the Study of War, Syria Project, Maps and statistics. Available online at: <http://www.understandingwar.org/maps?tid=293>

International Committee for the Red Cross, Database over IHL Treaties, available online at: <https://ihl-databases.icrc.org/ihl>

International Committee for the Red Cross, Database over Customary IHL, available online at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>

Kreß, Claus, “The Fine Line Between Collective Self-D... against ‘IS’ in Syria”, *Just Security* 17 February 2015, available online at: <https://www.justsecurity.org/20118/clauss-kreß-force-isil-syria/>

Lederer, Edith M., “Syria believes it's on the way to military victory”, *CBC News*, 24 September 2016. Available online at: <http://www.cbc.ca/news/world/syria-believes-it-s-on-the-way-to-military-victory-1.3777590>

O’Connor, Tom, “Why Is Russia Bombing Aleppo? Everything You Need to Know About Moscow's War in Syria”, *International Business Times*, 12 October 2016. Available online at: <http://www.ibtimes.com/why-russia-bombing-aleppo-everything-you-need-know-about-moscows-war-syria-2429898>

Office of the High Commissioner of Human Rights, United Nations, Status of Ratification, OHCHR Website. Available online at: <http://indicators.ohchr.org/>

Russian News Agency, 20 September 2016, ” Moscow says attempts to accuse Russia of aid convoy attack are 'outrageous'”. Available online at: <http://tass.com/politics/901114>

Wood, Sir Michael, “Teachings of the Most Highly Qualified Publicists (Art. 38 (1) ICJ Statute)”, *Max Plack Encyclopedia of International Law*, Oxford Public International Law Online Database. Available online at: <http://opil.ouplaw.com.ludwig.lub.lu.se/view/10.1093/law:epil/9780199231690/law-9780199231690-e1480?rskey=IZJgB&result=1&prd=EPIL>

Robins-Early, Nick, “Russia Says Its Airstrikes in Syria are Perfectly Legal. Are They?”, *Huffington Post*, 10 January 2015. Available online at: http://www.huffingtonpost.com/entry/russia-airstrikes-syria-international-law_us_560d6448e4b0dd85030b0c08

Syrian Observatory for Human Rights, “About 450 thousand were killed and more than two millions were injured in 69 months of the start of the Syrian revolution”, 13 December 2016. Available online at: <http://www.syriaahr.com/en/?p=56923>

Syrian Observatory for Human Rights, “More than 14,500 civilians killed by Aerial bombardment by Syrian and Russian warplanes in 25 months”, 20 November 2016. Available online at: <http://www.syriaahr.com/en/?p=55152>

TABLE OF CASES

International Court of Justice (ICJ)

Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004, ICJ Reports 2004.

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986.

Armed Activities on the Territory of the Congo (DRC v. Uganda), Judgment of 9 December 2005, ICJ Reports 2005, 168.

Joined cases of Ethiopia v. South Africa and Liberia v. South Africa, ICJ Reports 1966.

International Tribunal for Yugoslavia (ICTY)

Tadić Case (Decision on Jurisdiction) ICTY-94-1-AR72 (2 October 2005).