

Legal Evaluation of the Saudi-Led Intervention in Yemen: Consensual Intervention in Cases of Contested Authority and Fragmented States

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Abstract

“The forgotten war” of Yemen has been raging since 2015. It has escalated from a strictly internal conflict into an internationalized¹ war and unprecedented human catastrophe.² In June 2017, the World Health Organization (WHO) announced that

“[t]he number of suspected cholera cases in Yemen continues to rise, reaching 101 820 with 791 deaths as of 7 June 2017. Worst affected are the country’s most vulnerable: children under the age of 15 years account for 46 % of cases, and those aged over 60 years represent 33 % of fatalities.”³

The UN Humanitarian Chief referred to the war as “the largest humanitarian crisis since the creation of the United Nations”.⁴ However, despite such bleak facts on the ground, little attention, and even less progress to-

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¹ Legally speaking, it remains a non- international armed conflict. In international relations terms though, it has been internationalized.

² Indicatively see: Amnesty International, Yemen The Forgotten War, <www.amnesty.org>, access 18.6.2017.

³ World Health Organization, Number of suspected cholera cases reaches 100.000 in Yemen, 8.6.2017, <www.who.int>, access 18.6.2017.

⁴ BBC News, UN: World Facing Greatest Humanitarian Crisis Since 1945, access 11.3.2017.

wards peace in the country, has been achieved by the international community or regional actors. Yemen is sinking into a humanitarian disaster and vicious circle of violence.

In addition to the Houthi uprising, a Saudi-led intervention with the consent of ousted President *Hadi* led to a further escalation of the violence in Yemen.⁵ Such intervention raised critical questions in relation to international law and consensual intervention, as well regarding domestic legitimacy.

This article suggests the lawfulness of the consenting government is the primary precondition for the lawfulness of the intervention. Second, whilst in principle consensual intervention remains a right of a legitimate government, it cannot be exercised unconditionally. Consensual intervention is lawful so long as the purpose of the intervention complies with international law. This means that even a lawful government does not possess a *carte blanche* to enable it to legitimize an intervention without any other precondition. Third, the intervention *per se*, maintains its legitimacy only as long as it complies with international law principles, as well as with necessity and proportionality.

The aforementioned argument will be applied in respect of Yemen and the Saudi-led intervention. In reaching my conclusion, I begin with an analysis of the debate surrounding the right of a government to consensual intervention in principle. I then address the issues of government legitimacy in cases of contested authority. In the last part, I apply these findings to the case of Yemen.

I. Intervention by Invitation and Its Limits

1. The Limits of the Right of a Legitimate Government to Consensual Intervention

The concept of intervention by invitation or with consent, has been proven, in practice, to be one of the most complicated, implicating issues of government legitimacy (from different perspectives) as well as collective security.⁶

⁵ Z. Vermeer, *The Jus ad Bellum and the Airstrikes in Yemen: Double Standards for Decamping Presidents?*, EJIL Talk, 30.4.2015, <www.ejiltalk.org>, access 13.7.2015.

⁶ The area under examination is that of internal armed conflicts, in the sense of “sustained, large-scale violence between two or more factions seeking to challenge, in whole or in part, the maintenance of governmental authority in a particular state”. R. A. Falk, Introduction, in:

The main question to be answered is: why, and to what extent, does a government have the right to invite foreign intervention in its own territory. This question allows us to examine how the implementation of consensual intervention is regulated and whether an intervention by invitation is, in any circumstances, legitimate. In addition, in cases where legitimacy is contested, it is necessary to ask, which entity can claim, for itself, the right to consensual intervention. The analysis of this last issue comes down to the criteria regarding the legitimacy of a government in cases of contested authority. All of these questions are important in relation to the Saudi-led intervention.

Traditionally, it was widely accepted that an invitation by the recognized government of a State,⁷ which effectively controlled the territory and the population, constituted a legitimate basis for intervention,⁸ provided the consent to intervention was genuine.⁹

The origins of this approach can be identified in a combination of mainstream concepts about sovereignty, approaches to international law as a legal system built on State consent and the provisions of the United Nations (UN) Charter regarding the equal sovereignty of all States. On the basis of such an understanding of sovereignty, the foundation of which is that the sovereign is the ultimate and sole superior over the territory and the population in legal and political terms,¹⁰ it is widely accepted that the govern-

R. A. Falk (ed.), *The International Law of Civil Wars*, 1971, 18. This is, after all, why the international community has been continuously divided over the legitimacy of specific cases of consensual interventions through these last decades. From British and French interventions during the 60s and later on in Tanganyika, Uganda, Kenya and Lebanon, to a number of such US interventions and from the Soviet interventions up to the recent case of Ukraine the exact circumstances and their assessment generate heated polemic. R. Millerson, *Intervention by Invitation*, in: L. F. Damrosch/D. Scheffer (eds.), *Law and Force in the New International Order*, 1991, 127 et seq.; L. Henkin, *The Invasion of Panama Under International Law: A Gross Violation*, *Colum. J. Transnat'l L.* 29 (1991), 293; W. M. Reisman, *Humanitarian Intervention and Fledgling Democracies*, *Fordham Int'l L. J.* 18 (1995), 794, at 800.

⁷ The government is supposed to bear and exercise the sovereignty of the state and therefore express its will. A. Abass, *Consent Precluding State Responsibility: A Critical Analysis*, *ICLQ* 53 (2004), 211, at 223 et seq.

⁸ D. Whippman, *Military Intervention, Regional Organizations and Host-State Consent*, *Duke J. Comp. & Int'l L.* 7 (1996), 209, at 209.

⁹ R. Ago, *Eighth Report on State Responsibility*, Document A/CN.4/318 and Add.1-4, *ILCYB* 2 (1979), paras. 3, 35-36.

¹⁰ J. R. Worth, *Globalization and The Myth of Absolute National Sovereignty: Reconsidering The "UN-SIGNING" of The Rome Statute And The Legacy of Senator Bricker*, *Ind. L. J.* 79 (2004), 245, at p. 258; R. Kwiecie, *Does the State Still Matter? Sovereignty, Legitimacy and International Law*, *Polish Y.B.Int'l L.* 32 (2012), 45, at 57, 60; B. P. Frohnen, *A Problem of Power: The Impact of Modern Sovereignty on The Rule of Law in Comparative and Historical Perspective*, *Transnat L. & Contemp. Probs.* 20 (2012), 599, at 60. A landmark case is the

ment of a State possesses the authority to opt out of the general prohibition of the use of force, which is foreseen in the Charter, when providing its consent to an intervention in its territory.

The invitation of intervention is perceived as a bilateral agreement between the inviting or consenting part and the intervening part, which suspends the normal code of conduct and rules regulating their relationship regarding the use of force.¹¹ After all, force is not used against the territorial integrity or the political independence of the State, but in furtherance of them, despite literally taking place in the territory of the State.

This view was adopted by the International Court of Justice (ICJ) in the famous *Nicaragua* case,¹² as well as in the *DRC v. Uganda* case where, parenthetically, the Court accepted the legitimacy of consensual intervention provided the consent was valid.¹³ The Draft Articles on State Responsibility also provide that:

“Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.”¹⁴

This is not an uncontested approach, of course. The core of the theoretical argument about non-interventionism, in spite of consent, is that since a government needs to invite a foreign intervention in order to consolidate its authority, its position as sovereign is already compromised and therefore a foreign intervention will determine what is, and what should be, essentially a domestic rivalry for the determination of the polity and the socio-economic model of a country; therefore, a violation of self-determination and sovereignty.¹⁵

“*S. S. Lotus*”, where the court held that “International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.” *The Case of the S.S. “Lotus” (France v. Turkey)*, PCIJ 1927, Series A, No. 10, 18.

¹¹ R. Ago (note 9), at paras. 31-32.

¹² *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, (Merits, Judgment) ICJ Reports 1986, 14, para. 126.

¹³ M. E. McGuinness, *Case Concerning Armed Activities on the Territory of the Congo: The ICJ Finds Uganda Acted Unlawfully and Orders Reparations*, ASIL Insights 10 (2006).

¹⁴ Draft Articles on Responsibility of States for Internationally Wrongful Acts, ILC Reports, 53rd Sess., 23.4.-1.6.2001, 2.7.-10.8.2001, Art. 27.

¹⁵ *Lauterpacht* up to some extent shared this argument. H. Lauterpacht, *Recognition in International Law*, 1947, 93 et seq., 233 et seq.

A number of important scholars endorsed this principle in the framework of de-colonization, advocating non-interventionism in furtherance of a right to revolution and internal self-determination.¹⁶ Consensual intervention in the course of an internal conflict would violate the domestic sphere and eventually change the balance of power.¹⁷ Therefore, “negative equality” is proposed as the principle that should apply in such circumstances.¹⁸

From such a perspective, in 1975 the Institut de Droit International adopted the Principle of Non-Intervention in Civil Wars, according to which, in any case of internal conflict, no intervention should take place. This position was partially amended in 2011¹⁹ by foreseeing some exemptions from non-interventionism: de-colonization wars, wars in the course of which genocidal acts or gross violations of human rights take place, civil riots or conflicts below the threshold of non-international armed conflicts and terrorism.²⁰

It seems difficult, however, from both a historical and an empirical as well as from a normative perspective to embrace an absolute prohibition of consensual intervention or even a reversal of the right – in principle – of a state government to consent to intervention. From the Spanish Civil War experience and the failure of the democratic states to provide valuable help to the legitimate government, to the genocide in Rwanda and the current concerns about non-State actors, a solid and general commitment to a “negative equality” principle and to non-interventionism could seriously undermine international legal norms and collective security.

In addition, a general prohibition of the right of the lawful government to consent would undermine the foundations of international legal order implying a completely centralized legal system, diminishing state sovereignty, which lies out of the UN Charter context and of the *opinio juris* of most international actors, States and non-State actors alike.

Cassese, to some extent, shared this view: he admits, on the one hand, that intervention by invitation is a widely accepted practice among States; on the other hand, however, he finds such consent difficult to harmonize

¹⁶ Q. Wright, *The Role of International Law in the Elimination of War*, 1961, 61; I. Brownlie, *International Law and the Use of Force by States*, 1963, 327.

¹⁷ J. Norton Moore, *Legal Standards for Intervention in Internal Conflicts*, Ga. J. Int'l & Comp. L. 13 (1983), 191, at 196; O. Schachter, *International Law: The Right of States to Use Armed Force*, Mich. L. Rev. 82 (1984), 1620, at 1641.

¹⁸ See C. Gray, *International Law and the Use of Force*, 2008, 81. Independent International Fact-Finding Mission on the Conflict in Georgia, Report Vol. II, (September 2009), 278.

¹⁹ E. Lieblich, *International Law and Civil Wars: Intervention and Consent*, 2013, 135.

²⁰ E. Lieblich (note 19), 135 et seq.

with modern international law. Still, he did not advocate a general prohibition of consensual intervention; rather, he implied that such a prohibition could be the case when the recognized government had lost actual authority over the population and the State.²¹

Since it is reasonable to accept the right of a recognized government state to consent to an intervention in principle, the question then is whether it may exercise this right in all circumstances or not. The answer to this question requires the answer to another question: whether sovereignty is legally unlimited or not.

Traditionally, sovereignty is perceived as legally unlimited and unbound by any other State or authority. This theoretical framework is tendered by scholars and philosophers such as *Jean Bodin*, *Emerich De Vattel*, *Jellinek*, *Austin* and *Hans Kelsen*²² and it has passed into the icon of international law and of the international community as founded on the (inter-)State will and sovereignty, which primarily possesses the authority to legitimize or de-legitimize certain acts.²³

After all, as Professor *Greenwood* explains, contrary to domestic legal systems:

“There is no ‘Code of International Law’. International law has no Parliament and nothing that can really be described as legislation. ... The result is that international law is made largely on a decentralized basis by the actions of the 192 States which make up the international community.”²⁴

Therefore, once the bearer of sovereignty is identified, no, or little, interference in its free will can be acceptable.

However, this is only one way to address the issue of sovereignty. Sovereignty has also been defined as responsibility “... to protect the welfare of its own peoples” and to “meet its obligations to the wider international com-

²¹ *E. Lieblich* (note 19), 137.

²² *J. R. Worth* (note 10), 258; *R. Kwiecie* (note. 10), 57, 60; *B. P. Frohnen* (note 10), 603.

²³ As the Permanent Court of International Justice in the famous “*S. S. Lotus*” case held: “International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.” *The Case of the S.S. “Lotus”* (note 10), 18.

²⁴ *C. Greenwood*, *Sources of International Law: An Introduction*, United Nations Office of Legal Affairs, 2008, <<http://legal.un.org>>, accessed 6.8.2016.

munity”.²⁵ Or, as it has been suggested, the international system or community is nowadays a

“tightly woven fabric of international agreements, organizations, and institutions that shape [States’] relations with each other and penetrate deeply into their internal economics and politics”,

which necessitates a new type of sovereignty based on achieving common goals by working together.²⁶

Since the adoption of the UN Charter, state sovereignty has been comprehended not as “limit-less” – not even within the domestic sphere – but as limited or restrained because of the participation of the State in the constitutionally formulated international community and therefore by international law.²⁷

After all, it is the State’s free will that determines its participation in the wider international community. In such a sense, state sovereignty is not restrained in favor of another sovereign – which would deprive it essentially of its sovereignty – but within a legal system which the State itself has accepted and “internalized”. State sovereignty emerges as a concept not distinct from that of the international community, but as a concept existing and evolving within the international community, which “trades” its obligations within the international community with equivalent privileges.²⁸

²⁵ General Assembly, A More Secure World – Our Shared Responsibility, Report of the Secretary General’s High Level Panel on Threats, Challenges and Change, A/59/565, (2.12.2004), 22.

²⁶ A. Chayes/A. Handler Chayes, *The New Sovereignty: Compliance With International Regulatory Agreements*, 1995, 26.

²⁷ B. Fassbender, *Sovereignty and Constitutionalism in International Law*, in: N. Walker (ed.), *Sovereignty In Transition*, 2003, 131.

²⁸ As an idea it is not that different from *Aristotelian* or *Freudian* ideas about why the individual needs to (co-)exist in organized societies, in order to enhance its potentials and achieve a more complete form of humanity, despite the restrictions imposed upon him/her because of his/her social life. The change of paradigm regarding sovereignty is, to some extent, a result of the internationalization of human rights and a “humanization” of international law, of the designation of individuals or communities of people not only as objects but also as partially autonomous subjects of international law, who, under specific circumstances, might not be represented by their governments at the international level, as well as of the institutionalization of the international community through international legal norms of a fundamental and binding nature regardless of States’ adherence to such norms or even contrary to domestic legitimacy. I. Cotler, *Building a New International Law: What Have We Learned, What Must We Do?*, Address to the Magna Carta Foundation (2005), <www.justice.gc.ca>, accessed 27.6.2017. Such are the cases of national liberation and self-determination movements. In some opinions this is also the case of systematic and gross violations of human rights, although such arguments are far from unanimously accepted. R. Mullerson/D. J. Scheffer, *Legal Regulation of the Use of Force*, in: L. F. Damrosch/G. Danilenko/R. Muller-

Characteristically, the violation of *jus cogens* norms is to be confronted by the international community regardless of sovereignty and potential domestic legitimacy.²⁹ The undertaking by states, of obligations and commitments, which emerge from the participation in the international community, lead to equivalent restraint of sovereignty powers.³⁰

This is the “international law supremacy principle” which – among other documents – is foreseen in Art. 27 of the Vienna Convention on the Law of Treaties.³¹ International law, therefore, because of the supremacy principle, is not merely seated upon the domestic legal order, but also re-arranges partially the latter.³²

In addition, the transformation or re-interpretation of sovereignty in accordance with international law means that while state sovereignty is centralized and has a singular bearer – namely the government of the State – it is not only a privilege, but also a responsibility towards the people of the State, who participate in the international legal order not only indirectly through their States, but also directly, as subjects and objects of international law.³³

son (eds.), *Beyond Confrontation: International Law For The Post-Cold War Era*, 1995, 125 et seq. *M. Byers*, *Custom, Power and the Power of Rules: International Relations and Customary International Law*, 1999, 194. *F. Spagnoli*, *The Globalization of Human Rights Law: Why do Human Rights Need International Law?*, *Texas Wesleyan Law Review* 14 (2008), 317, at 325 et seq. *W. E. Conklin*, *The Preemptory Norms of the International Community*, *EJIL* 23 (2012), 837, at 838; *J. Crawford*, *The International Law Commission’s Articles on State Responsibility: Introduction, Text, and Commentaries*, 2002, 148 et seq., 158 et seq.

²⁹ *C. L. Rozakis*, *The Concept of Jus Cogens in the Law of Treaties*, 1976, 1.

³⁰ *F. Teson*, *Le Peuple, C’est Moi!: The World Court and Human Rights*, *AJIL* 81 (1987), 173, at 175 et seq.

³¹ “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” *Vienna Convention on the Law of Treaties*, Article 27.

³² In such a sense, international law is internalized and transforms sovereignty. When such is the case, the compliance of state sovereignty with international law comes smoothly. In contrary situations, the relationship becomes conflicting and sovereignty is more or less violently re-arranged, either in the sense of expulsion of the State from the international community, or even of direct interference of the latter within the State.

³³ This is particularly apparent and important in the collective security system which refers not solely to threats, which orientate from inter-state conflict but also covers threats aiming at non-state actors as well, perceiving the latter as of the same level with the former, in line with the human security imperatives and complementarity with state-centered security. It is characteristic, as it is analyzed below, that in a number of cases, events of purely domestic nature of states were perceived by the UNSC as threats against international peace and security, exactly in the name of collective security and of solidarity towards peoples or groups of people. *J. Le Mon/R. S. Taylor*, *Security Council Action in the Name of Human Rights: From Rhodesia to the Congo*, *UC Davis Journal of International Law* 10 (2004), 197, at 199. *N. D. Arnison*, *International Law and Non-Intervention, When Do Humanitarian Concerns Supersede Sovereignty?*, *Fletcher Forum of World Affairs* 17 (2003), 199, at 203.

In such a framework, the traditional concept of state sovereignty is transformed³⁴ in favor of its approach in the wider framework of international law. The argument then, in relation to consensual intervention, is that even if the government of the state is recognized as the legitimate one, its right to consensual intervention is not absolute. Since the government in general needs to comply with international law – or at least with its most fundamental rules – the government’s privilege and right to invite an intervention follows the limitations that are imposed upon sovereignty by international law, as well.³⁵

In the light of this, the scope of intervention, as well as its methods, must be placed under scrutiny.³⁶ An intervention that endangers the collective security system, in furtherance of the commission of internationally prohibited crimes – such as genocide, war crimes, crimes against humanity, ethnic cleansing – implicating the commission of mass and grave violations of human rights, aiming at the suppression of self-determination movements³⁷ or which is supportive of apartheid and racist regimes would profoundly contradict international legitimacy; such a contradiction cannot be “healed” by government invitation. Consent in general can be no excuse for neglecting the rights of individuals within the consenting State, who, after all, are subjects of international law too, or for violating at least fundamental norms of international law.³⁸

A general conclusion is that an invitation on behalf of the government cannot legitimize an intervention in furtherance of scope and acts, which, if conducted by the government of the state itself, would be illegal under in-

³⁴ F. A. Boyle, *Destroying World Order: U.S. Imperialism in the Middle East before and after September 11th*, 2004, at 107.

³⁵ A. Orford, *Reading Humanitarian Intervention, Human Rights and the Use of Force in International Law*, 2003, 4. D. J. Scheffer, *Toward a Modern Doctrine of Humanitarian Intervention*, U. Tol. L. Rev. 23 (1992), 253, at 262 et seq.; A. H. Berlin, *Recognition As Sanction: Using International Recognition of New States to Deter, Punish, and Contain Bad Actors* University of Pennsylvania Journal of International Law 31(2009), 531, at 568 et seq.

³⁶ K. Bannelier/T. Christakis, *Under the UN Security Council’s Watchful Eyes: Military Intervention by Invitation in the Malian Conflict*, LJIL 26 (2013), 855, at 855 et seq.; K. Bannelier/T. Christakis, *Military Interventions against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent*, LJIL 29 (2016), 743, at 745.

³⁷ H. A. Wilson, *International Law And The Use Of Force By National Liberation Movements*, 1988, 91 et seq.

³⁸ A. S. Deeks, *Consent To The Use Of Force And International Law Supremacy* Harv. Int’l L.J. 54 (2013), 1, at 21 et seq.

ternational law.³⁹ Such cases of consensual intervention would endanger international peace and security and distort the collective security system.⁴⁰

The limit of horizontal, inter-State agreements, is international law, in its very own, vertical, hierarchical framework and of course the collective security system, in its holistic interpretation.⁴¹ Therefore, while governments do possess in principle the right to invite an intervention, such a right is not unlimited and cannot contravene their obligations under international law such as those mentioned above.

2. The Question of the Right to Consensual Intervention in the Face of Contested Authority and Government Legitimacy

Things become further complicated in cases of contested sovereignty and government legitimacy. The examination of this last issue requires an analysis of government legitimacy in the course of internal conflict in order to identify criteria according to which one can determine when a government, or any other entity, possesses the authority to consent to an intervention.

The question of government legitimacy has been proven highly divisive partially because of the relative ambiguity of international law,⁴² but mainly because of the double – if not multiple – standards by States, as well as by

³⁹ *D. Whippman* (note 8), 215.

⁴⁰ Human security is complementary to the inter-State security pillar collective security system. This is why after all the founders of the collective security system rejected the notion of a power-politics mechanism of avoidance merely of inter-State war. *N. D. White*, *On The Brink of Lawlessness: The State of Collective Security Law* *Ind. Int'l & Comp. L. Rev.* 13 (2002), 237, at 237. *M. R. Fowler*, *Collective Security and The Fighting In The Balkans*, *N.Ky.L.Rev.* 30 (2003), 299, at 299. The collective security system is designed as an ecumenical security system, expanding both wide-wise, throughout the globe and deep-wise in all the variety of issues that might undermine the fulfillment of the aims of the UN Charter and therefore could endanger international peace and security. In such a sense, even a consensual intervention will be assessed eventually on the basis of whether, in terms of inter-state or human security, it compromises the goal of international peace and security. The UN collective security system is based on an inherent conception about solidarity among all international actors in the face of common threats in furtherance of common goals that are normatively binding. *H. Morgenthau*, *Politics Among Nations*, 1949, at 232. *A. Wolfers*, *Discord and Collaboration*, 1962, 168.

⁴¹ *O. Schachter*, *International Law in Theory and Practice*, 1991, 81.

⁴² *A. Arend/R. Beck*, *International Law and the Use of Force: Beyond the Charter Paradigm*, 1993, 193.

UN organs, in the face of different cases.⁴³ Such conditions make it almost impossible to reach concrete conclusions in relation to the interpretation of international law on the matter.

A standard and traditional approach considers as legitimate the government that controls the territory and the population of a State,⁴⁴ for a sufficient period of time,⁴⁵ regardless of other issues of internal or international legitimacy.⁴⁶ *Hans Kelsen* provided normative justification for the aforementioned argument by identifying government legitimacy with government efficacy,⁴⁷ in line with a long tradition of theories which identify the sovereign with the monopoly of legitimate power.

The UN through its organs appears to have favored such an approach as the case of the seat of China in the United Nations Security Council (UNSC) indicated. Then Secretary General (SG) of the UN, *Trygve Lie*, argued that the legitimate representative of China in the UN should be appointed from the communist instead of the nationalist government,⁴⁸ since the primary was the one controlling the territory and the population and

⁴³ *S. Smith*, *The Plight of the Secular Paradigm*, *Notre Dame L. Rev.* 88 (2013), 1409, at 1412 et seq.

⁴⁴ *T. J. Farer*, *Panama: Beyond the Charter Paradigm* *AJIL* 84 (1990), 503, at 510 et seq.; *K. Nowrot*, *The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone*, *Am. U. Int'l. L. Rev.* 14 (1998), 321, at 388 et seq.; *M. Takashi*, *Recognition of States and Governments in International Law: Theory and Practice*, *Chin. Yb. Int'l L. & Aff.* 28 (2010), 64, at 64 et seq.; *D. O. Lloyd*, *Succession, Secession, and State Membership In the United Nations*, *N. Y. U. J. Int'l L. & Pol.* 26 (1994), 761, at 761.

⁴⁵ *D. Beck*, *The Legal Validity of Military Intervention by Invitation of the Government*, *BYIL* 56 (1985), 189, at 251.

⁴⁶ *B. R. Roth*, *Governmental Illegitimacy Revisited. "Pro-Democratic" Armed Intervention in the Post-Bipolar World*, *Transnat'l L. & Contemp. Probs* 3 (1993), 481, at 482. *H. Wimmer*, *State's Monopoly on Legitimate Violence in History and in the Contemporary World Society as Challenges to the State*, <homepage.univie.ac.at/johann.wimmer>, accessed 11.2.2015. *J. Vidmar*, *Territorial Integrity and The Law of Statehood*, *George Washington International Law Review* 44 (2012), 697, at 700.

⁴⁷ *H. Kelsen*, *General Theory of Law And State*, 1961, 220 et seq.; Similar is *Krasner's* suggestion. He went on saying that "Domestic sovereignty does not involve a norm or a rule, but is rather a description of the nature of domestic authority structures and the extent to which they are able to control activities within a state's boundaries. Ideally, authority structures would ensure a society that is peaceful, protects human rights, has a consultative mechanism, and honors a rule of law based on a shared understanding of justice." *S. Krasner*, *Sharing Sovereignty. New Institutions for Collapsed and Failed States*, *International Security* 29 (2004), 85, at 88; *S. Krasner*, *Sovereignty. Organized Hypocrisy*, 1999, at 3.

⁴⁸ According to that syllogism and since it constitutes the framework of state authority, the government is identified with the state concerning the criteria determining its legitimacy. *I. Brownlie*, *Principles of Public International Law*, 1998, 91.

was capable of fulfilling China's obligations towards the UN.⁴⁹ A reliance on such a doctrine seems, at a first glance, better positioned to provide stability and therefore enhance the potential for international peace and security.⁵⁰

Contrary, or at least differentiated, approaches with strong theoretical and factual arguments have emerged. The critical factors for government legitimacy are not considered only the effective control of territory and population, but also the internal, constitutional legitimacy and compliance with international law.⁵¹

In 1944, *Lauterpacht* proposed that the act of recognition constitutes a declaration that the recognized government fits within the framework of international law.⁵² The legitimacy of a government and subsequently of its acts – among which its authority to consent to an invitation – must be determined by also taking into account the respect of the latter for international law or its internal legitimacy.⁵³

⁴⁹ *J. Downer*, Towards A Declaratory School of Government Recognition *Vand. J. Transnat'l L.* 46 (2013), 581, at 591. However, this approach does not imply that the communist China did not meet the criteria as they are set by the Charter, concerning international law.

⁵⁰ *J. Downer* (note 49), 589 et seq. It has also been proposed that States should not officially recognize or deny recognition to other governments and regimes, but simply deal with them. The official US approach is not that different. The legal adviser of the US Department of State suggested that: “[I]nternational law focuses on the question of recognition, and recognition tends to follow facts on the ground, particularly control over territory. As a general rule, we are reluctant to recognize entities that do not control entire countries because then they are responsible for parts of the country that they don't control, and we're reluctant to derecognize leaders who still control parts of the country because then you're absolving them of responsibility in the areas that they do control.” US Senate, Committee on Foreign Relations, Libya and War Powers, Hearing, 112 et seq., 28.6.2011, 39, <www.gpo.gov>, access 15.10.2016.

⁵¹ This was not a totally novel approach. In 1964, for example, President *Julius Nyerere* of Tanganyika turned to the UK army when he was overthrown by a coup, asking and legitimizing an intervention although he was not in control of his country. Similar consensual interventions have taken place by France in its former colonies. In all these cases, the international community did not seem to question the legitimacy of the interventions. *W. M. Reisman* (note 6), 796; *D. Whippman* (note 8), 216.

⁵² *H. Lauterpacht*, Recognition of States In International Law, *Yale L.J.* 53 (1944), 385. Having said that, it must not be overlooked that *Lauterpacht* was of the view that a government “is entitled to continued recognition de jure so long as the civil war, whatever its prospects, is in progress. So long as the lawful government offers resistance which is not ostensibly hopeless or purely nominal, the de jure recognition of the revolutionary party as a government constitutes premature recognition which the lawful government is entitled to regard as an act of intervention contrary to international law.” *H. Lauterpacht* (Anm. 15), 94. *J. F. Williams*, Some Thoughts on the Doctrine of Recognition In International Law, *Harv. L. Rev.* 47 (1934), 776, at 777 et seq.

⁵³ *M. N. Shaw*, International Law, 1997, 456. *Shaw*, however, in uncertain cases favors reliance on the objective criteria.

It is in this framework, that in cases of contested authority between the government exercising effective control and the legitimate one according to domestic law, when consensual foreign intervention is at stake. *Talmon* argues in favor of attributing authority for lawful consent to the latter.⁵⁴

D'Aspremont presented a somewhat different distinction "... between the legitimacy pertaining to the source of power and the legitimacy related to the exercise of power", with the primary referring to the origin of power, while the latter to its actual implementation; the qualification of a government originates from the legitimacy according to the origin of power, while disqualification refers to its exercise.⁵⁵

A number of cases were based on such criteria. Most of them refer either to military coups or to specific types of regimes, which violate the fundamentals of international law.⁵⁶ In such circumstances, it is not uncommon to see the effective control criterion recede in front of internal legitimacy.

⁵⁴ *S. Talmon*, *Recognition of Governments in International Law*, 1998, 113. In the aftermath of the events in Haiti and of the coup against *Gorbachev*, the school of Manhattan, and in particular, the work of *Thomas Franck* advocated the recognition of a right to democratic governance, as an ecumenical criterion for government legitimacy. *S. Marks*, *What Has Become of the Emerging Right to Democratic Governance*, *EJIL* 22 (2011), 507, at 511; Despite its influence in the academic environment and public debate, the general acceptance of such a criterion of legitimacy has been denounced both on political and legal grounds. After all, neither *opinio juris* leading to a customary rule nor a universal definition of democracy can be traced. *B. R. Roth*, *Popular Sovereignty: The Elusive Norm*, *ASIL Proc.* 91 (1997), 363, at 368; *H. Steiner/P. Alston*, *International Human Rights in Context: Law, Politics, Morals*, 2nd ed. 2000, 888; *A. Nathan*, *The Tiananmen Papers*, 80 *Foreign Affairs* (2001), <www.foreignaffairs.com>, access 11.2.2015; *U. Haltern*, *Book Review*, *EJIL* 7 (1996), 135, at 136; *G. Fox*, *Democracy, Right to, International Protection*, *MPEPIL*, <www.mpepil.com>, access 12.2.2015; *G. Fox/B. R. Roth*, *Democracy and International Law*, *Rev. Int'l Stud.* 27 (2001), 327, at 338; *D. Murphy*, *Democratic Legitimacy and the Recognition of States and Governments*, in: *G. Fox/B. R. Roth* (eds.), *Democratic Governance and International Law*, 2000, 123, 153.

⁵⁵ *J. d'Aspremont*, *Legitimacy of Governments In the Age of Democracy*, 881 et seq.; *J. d'Aspremont/ E. de Brabandere*, *The Complementary Faces of Legitimacy In International Law: The Legitimacy of Origin and the Legitimacy of Exercise*, *Fordham Int'l L. J.* 34 (2011), 190, at 193.

⁵⁶ Two such cases are the ones of the South African and Rhodesia racist regimes and of the so-called Turkish Republic of Northern Cyprus. In both cases, *jus cogens* were violated. The apartheid governments and subsequently South Africa as a State passed from the level of "normal" admission in the international community, to a gradual de-legitimization in the UN GA from which they were eventually excluded from it, as well as by all UN bodies, in favor of antagonistic entities, namely the African National Congress (ANC) and the Pan Africanist Congress of Azania, which were attributed the status of authentic representatives of the majority of the South African people. In the case of the so-called Turkish Republic of Northern Cyprus, the international community again has denied the recognition of the *de facto* created conditions on the ground due to the fact that it emerged out of a violation of *jus cogens* norms. UNSC Res. 216 (1967); UNSC Res. 217 (1967); UN GA Res. 2202/1966; UN GA

For example, in relation to the issue of credentials and representation of Ethiopia in the League of Nations, as well as of Congo in 1960 and of Yemen in 1962 in the UN, a synthesis of criteria was adopted, including not only the exercise of effective control over territory and population, but also the compliance with international law and the dedication to world public order.⁵⁷

During the 1990s in Liberia and in Sierra Leone, the ousting of incumbent presidents, despite the fact that they either controlled small parts of the territory – in the first case – or had fled the country – in the second case – did not prevent them from requesting foreign intervention, requests which were treated by the international community as valid and legitimate.⁵⁸

Significant attention was given to the case of the coup in Haiti, possibly because Chapter VII was invoked in relation to the situation of internal legitimacy and constitutional order. The overthrow of President *Aristide* by a military coup was followed by widespread condemnation and the demand for *Aristide's* return to power. Both the General Assembly (GA) and the Security Council (SC) adopted resolutions concerning the condition of democracy and human rights in Haiti.⁵⁹ The denial of the military junta to comply led to the adoption of UNSC Res. 940, under Chapter VII, which, apart from authorizing the use of force, referred to the ruling regime as the “illegal de facto regime”.⁶⁰

Res. 3068/1973; UN GA Res. 3151/1973; UN GA Res. 3411/1975. *N. Stultz*, Evolution of the United Nations Anti-Apartheid Regime HRQ 13 (1991), 1 at 13 et seq.; *E. Reddy*, United Nations and the African National Congress, Partners in the Struggle against Apartheid, 3 et seq., <<http://www.anc.org.za>>, access 11.4.2016; *D. O. Lloyd* (note 44), 767 et seq. Somewhat similar was the denial by the Allies of the legitimacy of newly established governments of collaborators of the Axis during World War II. *S. Talmon*, Who Is a Legitimate Government In Exile? Towards Normative Criteria for Governmental Legitimacy In International Law, in: G. Goodwin/S. Talmon (eds.), *The Reality of International Law. Essays in Honour of Ian Brownlie*, 1999, 499.

⁵⁷ *M. S. McDougal/R. M. Goodman*, Chinese Participation In the United Nations: The Legal Imperatives of a Negotiated Solution, 1966, 694 et seq.

⁵⁸ *Z. Vermeer*, Intervention with the Consent of a Deposed (but Legitimate) Government? Playing the Sierra Leone Card, EJIL Talk, <<http://www.ejiltalk.org>>, access 10.10.2016. However, in the same article it is mentioned that in both cases, the Economic Community of West African States (ECOWAS) and the Economic Community of West African States Monitoring Group (ECOMOG) attempted to find complementary sources of legitimacy for their intervention in furtherance of the ousted presidents. Although that is true, it is also true that the international community did not take a hostile position toward the interventions.

⁵⁹ *F. Teson*, A Symposium on Reenvisioning The Security Council, Collective Humanitarian Intervention Mich. J. Int'l L. 17 (1996), 323, at 355 et seq. UN GA Res. 20B (1993); UN GA Res. 143 (1993); UNSC Res. 841(1993).

⁶⁰ Whilst this was obviously a reference to the domestic constitutional order, it was mainly on the basis of violations of international law endangering international peace and security

In Côte d'Ivoire, a similar position was adopted when, following the 2010 presidential elections, *Laurent Gbagbo*, who contested the official results, managed to get proclaimed President of the country by the President of the Constitutional Council at the expense of the President-Elect *Alassane Ouattara*. The UN insisted on the recognition of *Quattara*, imposing sanctions on *Gbagbo's* government, despite the fact that the government of the latter exercised effective control.⁶¹

In the coup d'état in Honduras and the overthrow of President *Zelaya*, the UN GA in resolution 63/301, apart from the condemnation of the coup, called "... firmly and unequivocally upon States to recognize no Government other than that of the Constitutional President, Mr. *José Manuel Zelaya Rosales*",⁶² just as the Organization of American States (OAS).⁶³ In a similar context, in Sierra Leone⁶⁴ and in Cambodia in 1997,⁶⁵ the internal legitimacy criteria were considered as the dominant ones.

It seems that to some extent, in the immediate aftermath of coups against democratically elected governments, States, and the international community, are keen to deny legitimacy to governments that have emerged out of breaches of the constitutional order of States.

The most logical explanation for this approach is that military coups are profoundly distinct from whatever any popular uprising or rebellion could be, given that coups originate from within the State apparatus and certainly are in no position to claim that they implement internal self-determination better than a democratically elected government. A preference for this latter type also indicates the prevalence of the "liberal peace" model in international relations.

However, this has not yet come to be a solid approach. On the contrary, it is still "vulnerable" to *ad hoc* and politically biased assessments. The international community, for example, was ready to legitimize and recognize the overthrow of Egyptian President *Morsi* by a military coup as well as the

that the potential of the use of force was invoked although the connection between the two seemed to imply that the illegitimacy of the government should be and was assessed from an international law perspective, despite its *de facto* control of population and territory. UNSC Res 940 (1994); *K. Tyagi*, The Concept of Humanitarian Intervention Revisited, Mich. J. Int'l L. 16 (2005), 883, at 898 et seq.

⁶¹ *J. d'Aspremont*, Duality of Government in Côte d'Ivoire, EJIL Talk, 4.1.2011, <<http://www.ejiltalk.org>>, access 9.10.2016.

⁶² UN GA Res. 63/301. Situation in Honduras: Democracy Breakdown, 1.7.2009.

⁶³ *G. Thompson/M. Lacey*, O.A.S. Votes to Suspend Honduras Over Coup, The New York Times, 4.7.2009.

⁶⁴ Similar is the case of Liberia in 1990. In both cases, a request to ECOWAS for action was sent, by the overthrown but otherwise legitimate presidents. *Z. Vermeer* (note 58).

⁶⁵ *J. Downer* (note 49), 604 et seq.

new government that was formed by the military junta.⁶⁶ It is a profound case of double standards and over-politicization undermining the emergence of a possible legal trend.

A few decades before that, in Cambodia, during the controversy between *Sihanouk's* and *Lon Nol's* government, the UN GA recognized as legitimate the latter, which had been established by a coup, on the basis of the effectiveness criterion.⁶⁷ In this sense, the argument that under all circumstances government changes that take place through military coups are deemed as illegitimate⁶⁸ is not confirmed in a stable way.

It is true that UN organs as well as States' practice has failed to produce a uniform opinion or trend within the international community.⁶⁹ Recent events, apart from the one under examination, prove that the international community is more willing to adopt *ad hoc* positions.

The events of the Arab Spring, concerning government legitimacy and consensual intervention, blurred the lines even further both in legal and political terms. The cases of the Arab Spring do not mainly refer to military coups versus elected governments – apart from Egypt – but to the debate about what constitutes popular uprising and what rights such movements may claim in terms of representation of the State at the expense of the recognized government.

Libya and Syria pose two such paradigms. Although in the first, consensual intervention was not invoked, the attempted de-legitimization of the then-recognized *Qaddafi* government and the partial-recognition of another entity instead, raised a great deal of legal uncertainty.

During the internal war in Libya, the Libya Contact Group⁷⁰ recognized as legitimate authority of Libya the National Transitional Council (NTC) instead of the Libyan government, on humanitarian grounds and despite the fact that NTC did not exercise effective control over Libyan territory.⁷¹

⁶⁶ Indicatively see: US Department of State, Diplomacy in Action, *Jen Psaki* Spokesperson, Daily Press Briefing Washington, DC, 26.7.2013, <<http://www.state.gov>>, access 12.2.2015.

⁶⁷ UN GA Res. 3238 (1974).

⁶⁸ *J. d'Aspremont*, Responsibility for Coups d'État in International Law, *Tul. J. Int'l & Comp. L.* 18 (2010), 451, at 455 et seq.

⁶⁹ In such a framework, the US position during the proceedings of UN GA resolution 396/1950 referred to a synthesis of criteria incorporating the effectiveness of control over territory and population, the acceptance of responsibility for carrying out the obligations under UN Charter and the internal processes in the state. UN GA Official Records, 5th Sess., Annexes, Agenda Item 61, at 9, UN Doc. A/AC.38/L.45 (1950).

⁷⁰ Libya Fourth Meeting of the Libya Contact Group Chair's Statement.

⁷¹ *D. Akande*, Recognition of Libyan National Transitional Council as Government of Libya, *EJIL Talk*, 23.7.2011, <<http://www.ejiltalk.org>>, access 8.10.2016; *S. Talmon*, The Dif-

Dapo Akande in an accurate critique noted that

“Recognition of the Libyan NTC as the government of Libya when it did not have effective control of most of Libya was premature and therefore of dubious legality. ... Moreover premature recognition of governments coupled with assistance to that ‘government’ would set a very bad precedent indeed. It would also create a big hole in the prohibition of the use of force, allowing States to circumvent the rule by simply recognizing groups that are not in reality the government.”⁷²

And Professor *Talmon* asked:

“Through his actions, Colonel *Qadhafi* may ‘have lost the legitimacy to govern’ but has he also lost the competence to do so under international law? [...] International law does not distinguish between illegitimate regimes and lawful governments. ‘Legitimacy’ is a political concept and not a legal term of art. In fact, international law does not provide any criteria for defining and determining legitimacy. If consent of the people or a democratic mandate were indeed such criteria, many governments in the world would have to be ‘downgraded’ to illegitimate regimes.”⁷³

The events in Libya, for those advocating government legitimization mainly on humanitarian grounds, were supposed to indicate a shift towards a criterion based on the respect of human rights and international law at the expense of the effective control of territory and population. However, what followed, with the total collapse of Libya as a State, rather proved such an attitude to be opportunistic; an arbitrary manipulation of legal norms, which bears grave dangers for the regional and international stability as well as for the welfare and the protection of human rights of the people concerned.⁷⁴

ference between Rhetoric and Reality: Why An Illegitimate Regime May Still Be a Government in the Eyes of International Law, EJIL Talk, 3.3.2011, <<http://www.ejiltalk.org>>, access 10.10.2016.

⁷² *D. Akande*, Would It Be Lawful for European (or other) States to Provide Arms to the Syrian Opposition?, EJIL Talk, 17.1.2013, <<http://www.ejiltalk.org>>, access 9.10.2016.

⁷³ *S. Talmon* (note 71). To some extent that was the position, which was shared by the US administration itself, which distinguished between legality and legitimacy of the Libyan government. *D. Akande*, Which Entity Is the Government of Libya and Why Does It Matter?, EJIL Talk, 16.6.2011, <<http://www.ejiltalk.org>>, access 10.10.2016.

⁷⁴ “One further point to consider in all of this is whether the recognition of the National Transition Council (NTC) as the legitimate representative of the Libyan people points towards the creation of some sort of new status in international law ... Something which is not quite a government (or perhaps even a kind of government), not quite a national liberation movement, not quite an insurgent. None of the States that has described the NTC as legiti-

Syria has also been a hard test of all legal theories.⁷⁵ A bloc of states, mainly built around the United States (US) and its allies, attempted to delegitimize the Syrian government and recognize the National Coalition for Syrian Revolutionary and Opposition Forces (National Coalition) as the legitimate representative of the Syrian people in an attempt, which bears profound similarities with Libya, on implicitly internal self-determination and humanitarian grounds, since that entity was recognized as the representative of the Syrian people. This attempt fell short of a full recognition as government in exile not only because of legal reasons, but also following the developments on the battlefield, which gave the advantage to the Syrian government.⁷⁶

However, the US intervened in Syria partially on the basis of UNSC Res. 2249 (2015), referring to the fight against the Islamic State (IS) and other terrorist organizations, but also – lately – in defense of the so-called Syrian Democratic Forces (SDF) a US – affiliated group – at least currently – of Kurds and Arabs as well as directly against the Syrian government following allegations of the use on its behalf of chemical weapons. While in initial stages of the US strikes against IS there could be some allegations of “passive” or “implied” consent on behalf of the Syrian Government, it is by now obvious that the latter considers the actions taken by the US and its allies on Syrian territory as hostile acts of aggression, in violation of its sovereignty.⁷⁷ Still though, the US without any solid legal justification, maintains and expands its presence in Syria.

Russia and Syria’s regional allies on the other hand invoked the invitation by the Syrian Government for their own intervention⁷⁸ and denounced the US intervention as illegitimate. While the US and its allies have criticized the Russian intervention up to the extent that it has been critical for the sur-

mate representative have stated explicitly that they regard this as a legal status ...” *D. Akande* (note 73).

⁷⁵ It will not be analyzed here extensively, apart from some remarks that show the division of the international community over the issue of government legitimacy, mainly on the grounds of political speculations.

⁷⁶ “Arab League grants the seat of Syria to the opposition which welcomes the decision”, National Coalition of Syrian Revolution and Opposition Forces, 25.3.2013, <www.etilaf.org>, access 2.7.2017; BBC News, “Russia Anger at Syrian Arab League Opposition Seat”, 27.3.2013, <www.bbc.co.uk>, access 13.2.2015; Official Journal of the European Union, Council Decision 2013/186/CFSP of 22.4.2013, <eur-lex.europa.eu>, access 13.2.2015; Official Journal of the European Union, Council Decision 2013/103/CFSP of 28.2.2013, <eur-lex.europa.eu>, access 13.2.2015; Deutsche Welle, Syria, EU Boosts Status of Syria’s National Coalition, <www.dw.de>, access 13.2.2015.

⁷⁷ *R. van Steenberghe*, From Passive Consent to Self-Defence after the Syrian Protest against the US-led Coalition, EJIL Talk, 23.10.2015, <<http://www.ejiltalk.org>>.

⁷⁸ *S. Lucas*, The Effects of Russian Intervention in the Syria Crisis, 2015, 1.

vival of the Syrian Government, they have not directly denied its legitimacy. Their position towards the Syrian Government has not reached the level of its complete de-legitimization.

Even more difficult, concerning the legitimacy of the consent, has been the case of Ukraine, which involved the overthrow of the elected president and a request on his behalf for foreign – Russian – intervention. Following the recent overthrow of President *Yanukovych* of Ukraine, the majority of the international community recognized as legitimate the *de facto* government of Ukraine, instead of the overthrown president, who claimed that he had fled the country out of fear for his life, despite the agreement he had reached with the opposition for a peaceful transition⁷⁹ and although the vote for his removal by the Ukrainian Parliament fell short of the constitutional provisions.⁸⁰

Ousted President *Yanukovych* asked for Russian intervention, a request which in principle should amount to a sound and valid justification for foreign intervention.⁸¹ Both the Russian ambassador in the UNSC as well as the Russian President invoked this letter of consent from the President of Ukraine as a legitimate provision of consent for intervention.⁸²

Yanukovych's consent was rejected as potential basis for Russian intervention by large parts of the international community, profoundly because he was not exercising effective control over Ukrainian territory and population.⁸³ In addition, not even Russia invoked such consent as legal argument for taking action in Eastern Ukraine, since it denied that it had sent any of its troops into the neighboring country,⁸⁴ although it maintained that it considered it as a legitimate request from the legitimate – at that point – president.⁸⁵

⁷⁹ Agreement on the Settlement of Crisis in Ukraine, Kyiv, 21.2.2014, <www.auswaertiges-amt.de>, access 9.10.2016.

⁸⁰ Z. Vermeer (note 58).

⁸¹ BBC News, Ukraine's *Yanukovych* Asked for Troops, Russia Tells UN, 4.3.2014, <<http://www.bbc.com>>, access 9.10.2016.

⁸² V. Putin, Vladimir Putin answered journalists' questions on the situation in Ukraine, President of Russia, 14.3.2014, <en.kremlin.ru>, access 1.7.2017.

⁸³ D. Wisehart, The Crisis in Ukraine and the Prohibition of the Use of Force: A Legal Basis for Russia's Intervention?, EJIL Talk, 4.3.2014, <<http://www.ejiltalk.org>>, access 9.10.2016; R. Allison, Russian "Deniable" Intervention in Ukraine: How and Why Russia Broke the Rules, *Int'l Aff.* 90 (2014), 1255, at 1264.

⁸⁴ Interview with Radio Europe 1 and TF1 TV channel, 4.6.2014, Russian Presidential Website and BBC Monitoring Online, 4.6.2014, <www.bbc.monitoringonline.com>, access 9.10.2016.

⁸⁵ V. Churkin at Security Council 7125th Meeting, 33.2014. It is interesting to note here that the US declined *Yanukovych's* consent – at least partially – on the basis of the unconstitutionality of his act. R. Allison (note 83), 1264 et seq.

Behind these inconsistent practices lie obviously geopolitical and national security interests, which prevail over legal clarity. One could also trace – in indirectly legal and moral terms – a differentiation on the basis of whether the entity challenging government authority resembles a popular uprising or rebellion turning against an authoritarian government and therefore bears the potential for genuine expression of popular will or not. In the primary case, a part of the international community is keen to recognize and legitimize the domestic transformations within the State as legitimate.

At the core of this implied tendency could lie the idea that States' internal formation must be moving closer to enhanced fulfillment of internal self-determination and of democratic criteria. While this can barely be established as a clear and legally sound criterion, it still offers some insight into differentiated positions, apart from the reference to power politics.

Supposedly, things are simpler in cases where a government has to deal with non-State, terrorist actors, such as the Islamic State or Al Qaeda and affiliated groups. The French intervention in Mali under UNSC Resolution 2085 following the invitation of the government of Mali,⁸⁶ as well as the participation of coalition forces on the side of the Iraqi Government in the course of the fight against IS in Iraq pose two such examples.

In addition, there are cases where consent is an additional basis of the legitimacy of the intervention, together with the invocation of self-defense, such as that of Kenyan intervention in Somalia in 2011 against Al-Shabaab. The most “convenient” justification was the consent of the Somali Government although Kenya invoked implicitly its right to self-defense against Al-Shabaab. The Somali position was somewhat ambiguous, but still its most reasonable interpretation is that the government of Somalia consented to the intervention.⁸⁷

A similar case is the prolonged US intervention in Afghanistan. Whilst initially the US invoked the right to self-defense in order to invade Afghanistan and overthrow the *de facto* Taliban regime following the 9/11 attacks on the basis of the ties between the Taliban and Al Qaeda⁸⁸ and although

⁸⁶ T. Christakis/K. Bannelier, French Military Intervention in Mali: It's Legal but ... Why?, Part II: Consent and UNSC Authorisation, EJIL Talk, 25.1.2013, <www.ejiltalk.org>.

⁸⁷ E. Lieblich (note 19), 16.

⁸⁸ G. W. Bush, Address to the Nation Announcing Strikes against Al Qaida Training Camps and Taliban Military Installations in Afghanistan, Book II Pub. Papers, 7.10.2001, 1201 et seq.; G. W. Bush, President's Radio Address, Book II Pub. Papers, 13.10.2001, 1235 et seq.; G. W. Bush, Remarks on Signing the Afghan Women and Children Relief Act of 2001, Book II Pub. Papers, 12.12.2001, 1506 et seq.; On 7.10.2001, the US informed the UN Security Council that it was exercising "... its inherent right of individual and collective self-defense ...", by actions "... against Al Qaeda terrorist training camps and military installations of the

the UNSC Res. 1368 and 1373 are widely considered as authorizing US use of force at the time,⁸⁹ the continuous presence of US forces – apart from those of the International Security Assistance Force (ISAF) – is based at large on the consent of the Afghani Government.⁹⁰

Although the Afghani Government was imposed and is kept in power mainly because of the US intervention and despite the fact that it does not exercise full control over the territory and the population, its endorsement by the international community as the legitimate one and the nature of the organization fighting against are two main reasons for attributing to it the right to consent to intervention.⁹¹

In practice though, even under such conditions, it quite often becomes complicated enough to reach a uniform solution, as the war in Syria has proven.⁹² The lack of unanimous definition of terrorist organizations, the complicated conditions on the ground and the contradictory State interests prove that even seemingly obvious legal trends and norms are quite often too complicated to implement.

Parenthetically, the case of Afghanistan, as well as the case of Iraq in relation to the fight against IS, could give rise to the question of the genuineness of the consent, since both governments are the outcome of US actions and need – or at least needed – US help in order to survive. Therefore, the origins and the dependency of the two governments raise the issue of whether they were in fact coerced to consent.

It is true that in such situations of inequality and dependency, the actual limits between coercion and genuine consent are blurred. While such an argument is interesting, it bears the danger that almost all cases of consent provided by weaker States to significantly more powerful States would be considered as null and void. Normatively speaking, such a consent can be

Taliban regime in Afghanistan ...”; US permanent representative to the UN Security Council President, UN Doc. S/2001/946, 7.10.2001.

⁸⁹ In the SC Res. 1368 is stressed “... the inherent right of individual or collective self-defense in accordance with the Charter ...” In the first paragraph, the resolution “Unequivocally condemns in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. and Pennsylvania and regards such acts, like any act of international terrorism, as a threat to international peace and security;”. The resolution also reaffirmed “... that such acts, like any act of international terrorism, constitute a threat to international peace and security ...”, “... the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001) ...” and “... the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts ...”.

⁹⁰ E. Lieblich (note 19), 17 et seq.

⁹¹ E. Lieblich (note 19), 18 et seq.

⁹² Even more, the endless Afghani war, if we take into account the US support back in the 80s, towards what came to be the Taliban.

considered as valid since the international community has recognized the government as lawful, meaning, therefore, that in terms of international law it falls under the equal sovereignty provision of the UN Charter.

A similar case, in terms of the genuineness of the consent, is that of the Syrian intervention and presence in Lebanon for almost three decades, from 1976 to 2005. In this case, whilst the consent of the Lebanese government had been offered and re-affirmed, the international community eventually demanded the withdrawal of all foreign troops, treating the Lebanese consent as more or less the outcome of coercion or at least as non-satisfactory under international law to provide legitimacy.⁹³

Apart from its significance regarding the genuineness of the consent in principle, this case is important because it shows that the act of consent might be singular, but its assessment is continuous. In addition, it showed that the UNSC maintains the right to evaluate from its own perspective issues not in relation to *stricto sensu* international legal norms, but also in relation to domestic sovereignty and to determine the validity of consent notwithstanding the explicit will of the consenting State. The fact that consensual intervention is a form of bilateral agreement does not exclude the UNSC as an organ to which international peace and security is entrusted.

Therefore, a once valid act of consent might be de-legitimized in the future for a variety of reasons. This is also important for the Saudi-led intervention in Yemen, not in relation to the genuineness of *Hadi's* consent, but in relation to the violations of *jus in bello*.

In general, the variety of cases and State approaches indicate that the interpretation of law in relation to government legitimacy in situations of contested authority necessitate answers, which must include a combination of criteria, keeping though in mind that an *ad hoc* assessment is inevitable and critical.⁹⁴

The existence of the government as a matter of the control of territory and population for a sufficient period of time constitutes undoubtedly the primary criterion of legitimacy. When, due to the emergence of antagonistic entities, which control an extended part of the territory and of the popula-

⁹³ E. Lieblich (note 19), 18 et seq.; UN SC Res. 1599 (2004).

⁹⁴ It must be mentioned here that the history of the UN itself indicates not an absolute persistence on the objective criteria. According to *Brad Roth*: "The history of the United Nations has known eight significant credentials contests involving China, HUN GARY, Congo (Leopoldville), Yemen, Cambodia (1973-74 and post-1978), South Africa, and Israel. The de facto regime was denied credentials in the cases of China (1950-71), HUN GARY (1957-63), Cambodia (post-1978) and South Africa (1974), and narrowly prevailed in the case of Cambodia in 1973-74." *B. R. Roth* (note 46), 495.

tion,⁹⁵ the governmental capacity and its primary source of legitimacy are contested,⁹⁶ an *ad hoc* assessment on two fronts is needed: on the one hand it must be determined to what extent the government has lost control over the State.

Governments that control the capital of the State and extended parts of the territory, without facing imminent danger of collapse, at least in some instances, are comprehended as possessing internal legitimacy.⁹⁷ A contrary, and not totally unjustified position, though, is that a contested government, even in partial control, should share its power with the opposition, given that it fails to control the whole of territory and population.⁹⁸

In addition, a further evaluation is necessary on the basis of why government control (on the ground) is challenged. It is one thing to lose control because of a coup with little or no democratic legitimacy and another thing (for a government) to collapse under a popular uprising.

A second criterion refers to compliance, or not, with the constitutional formation and democratic standards,⁹⁹ in order to evaluate which one of the antagonistic entities is better poised not only to secure domestic stability

⁹⁵ The most suitable legal term would be that it must be questioned “beyond reasonable doubt”.

⁹⁶ Obviously, the terms “legitimate representative” and “legitimate government” are not identical. The analysis here focuses on the issue of government. The reference to the attribution of the status of “legitimate representative” is made here only parenthetically, in the sense of a first step leading to the second and most important one. While it is less intervening compared to regime change intervention, still it bears significant legal consequences. For example, it raises the question of which entity possesses the authority to provide consent for an outside intervention. *Y. Dinstein*, *War, Aggression and Self-Defence*, 4th ed. 2005, at 116; *E. Lieblich*, *Intervention and Consent: Consensual Forcible Interventions in Internal Armed Conflicts as International Agreements*, *B. U. Int'l L. J.* 29 (2011), 337, at 357 et seq.; *D. Auron*, *The Derecognition Approach: Government Illegality, Recognition, and Non-Violent Regime Change*, *George Washington International Law Review* 45 (2013), 443, at 484 et seq.

⁹⁷ *T. J. Farer* (note 44), 510 et seq. However, even in such cases it is not irrational to suggest that.

⁹⁸ *D. Wippman*, *Treaty-Based Intervention: Who Can Say No?*, *U. Chi. L. Rev.* 62 (1995), 605, at 627 et seq.; *D. Wippman*, *Change and Continuity in Legal Justifications for Military Intervention in Internal Conflict* *Colum. Hum. Rts. L. Rev.* 27 (1996), 435, 435 et seq.; *M. Walzer*, *The Moral Standing of States: A Response to Four Critics*, *Philosophy & Public Affairs* 9 (1980), 209, at 216 et seq.; *R. J. Delahunty/J. Yoo*, *Statehood and the Third Geneva Convention*, *Va. J. Int'l L.* 46 (2005), 131, at 138; *G. Fox*, *Self-Determination In the Post-Cold War Era: A New Internal Focus?*, *Mich. J. Int'l L.* 16 (1995), 733, at 738; *L. Buchheit*, *Secession: The Legitimacy of Self-Determination*, 1978, 9 et seq.; *P. Thornberry*, *The Democratic or Internal Aspect of Self-Determination*, in: C. Tomuschat (ed.), *Modern Law of Self-Determination*, 1993, 102, 124 et seq.; *T. Grant*, *Between Diversity And Disorder: A Review of Jorri C. Duursma, Fragmentation and the International Relations of Micro-States: Self-Determination and Statehood*, *Am. U. J. Int'l L. & Pol'y* 12 (1997), 629, at 637.

⁹⁹ *J. Crawford*, *The Creation of States in International Law*, 2nd ed. 2007, 57.

and legal certainty, but also internal self-determination. While it is not always clear how these capacities are to be demonstrated in the course of internal war, some standards of representativeness in the framework of internal self-determination must be fulfilled.¹⁰⁰ That means that not all internal chasms and discontinuities are, or should be, seen as negative.

In such a sense, we can think of two sub-criteria, regarding governments' internal legitimacy: first, governments, which in principle serve internal self-determination by meeting democratic standards at a somewhat satisfying level and governments which do not; second, governments that are well established in the course of internal constitutional history and governments of transitional character with little or no consistency in the latter.

A government that originates – at least to some extent – from fair and democratic elections, fulfilling the basic standards of civil and political liberties as well as of human rights, will be positively assessed in terms of the first sub-criterion. Regarding the second category, governments with deep roots in the constitutional history of the States, as well as more or less uninterrupted systems of authority, have also acquired some type of internal legitimacy. On the contrary, governments and, in general, authorities of transitional type, which most often emerge from of delicate and complex negotiations are, at least for some time, less “legitimized”.

Some governments might have positive “results” in both sub-criteria, while others in none or in only one. In addition, their classification is eventually not taking place at an abstract level, but – at least – to some extent in the real world and therefore is comparative, too, meaning it is determined in relation with the rest of the existing actors. In addition, the respect afforded to international law is rightly considered as a criterion of legitimacy from the perspective of the international community and of the admittance of the State to the latter.¹⁰¹

In the face of such circumstances, it often becomes extremely difficult to determine the entity which bears legitimacy and the right to provide consent for an intervention. The extent of control of population and territory plays a major role. In addition, the political entity which has a political and institutional structure, convincing of its representative capacities,¹⁰² as well

¹⁰⁰ Such a case of implementation of self-determination without state authority, although in the course of a national-liberation and self-determination struggle, is the one of the Palestine Liberation Organization (PLO). *R. Hamid*, What is the PLO?, *J. Palest. Stud.* 4 (1975), 90, at 90 et seq.

¹⁰¹ *T. W. Lee*, Point-Counterpoint: The International Legal Status of Taiwan: The International Legal Status of the Republic of China on Taiwan, *UCLA Journal of International Law & Foreign Affairs* 1 (1997), 351, at 385.

¹⁰² See *Y. Dinstein* (note 96), 116.

as deeper roots in the constitutional history of the State can claim more successfully that it fulfills the internal self-determination and the constitutional permanent sub-criteria. And of course, the respect of international law, as a prerequisite for the fulfillment of a State's responsibility due to its participation in the international community, constitutes another precondition for legitimacy.

It would be convenient enough to be able to draw an equation determining the exact relationship among these three types of criteria; regrettably, that is impossible. It is logical, though, to suggest a combined assessment of legitimacy including all types of criteria. The entity which meets most of the standards in all categories should bear legitimacy. Obviously, these guidelines come down to an *ad hoc* examination. The most that anyone can expect from an international lawyer or the international community is sincerity in the implementation of these criteria, since no pre-determined solutions can be provided.

Summing up, in cases of contested government authority, the claim of any entity to government legitimacy, in principle, prerequisites both a sufficient extent of control over the population for a certain period of time and its capacity to implement self-determination imperatives – as well as to fulfill some fundamental obligations arising from international law – at least at a level better than that of its antagonistic entities. When no entity gathers all the necessary pre-conditions, an *ad hoc* weighting must take place. After having determined the legitimate bearer of sovereignty, a further evaluation of the consensual intervention can take place.

The developments especially over the last decades have “offered” multiple cases where no – or almost no – alternative is good enough to satisfy any of the aforementioned criteria. This is the case in what could be categorized as “States of fragmented authority”, meaning States where a government having some type of legitimacy is present, but the fragmentations of State authority and sovereignty run so deep and are so extended and for such a long time that the government, despite being legitimate, clearly cannot claim that it represents the whole of society – or people – or that it is possible for it to achieve a complete and unifying control over the State.

In States of fragmented authority, there might be unlawful military or militarized movements challenging government legitimacy through the use of force outside the legal order, but the problems run deeper: internal chasms of ethnic, religious or social type are usually well-established, autocratic systems of authority or at least problematic compliance with democratic standards, serious violations of human rights, quite often uprisings of any type which disrupt constitutional coherence leading to transition “solu-

tions” and continuous foreign interference are some of the factors which are met in such States – all of them together or separately – creating legal uncertainty and eroding the confidence towards the legal system and the system of governance.

In such cases, despite the existence of a legitimate government, the government objectively experiences restrictions in its authority and in its capacity to exercise the sovereignty of the State. Therefore, its legal actions must be assessed against such a background, too. The important question becomes not only who is the legitimate government and the sovereign, but also what type of sovereign and government exists and with what level of legal and practical authority.

States of fragmented authority are not failed States, yet; they might disintegrate completely into failed States, they might remain States of limited sovereignty or they could evolve into a procedure of consolidation of their sovereignty.

The differentiation from these terms is that the scope of the concept of “States of fragmented authority” is not mainly to depict the current conditions on the ground – which will probably resemble States of limited statehood – but to indicate the accumulation of root-causes over time which have led to a certain outcome and to explain the current situation by taking into account the root-causes of the problem. An obvious case, as it is analyzed below, is that of Yemen. On the basis of the aforementioned framework, the Saudi-led intervention is examined.

II. Yemen and the Saudi-Led Intervention

The evaluation of the Saudi-led intervention in Yemen, as a case of consensual intervention, prerequisites the reference to some historical facts, namely those which are necessary in order to answer the following questions: a) whether President *Hadi* and his government remained the legitimate authorities of Yemen at the time of the consent; b) in case the answer to question a) is positive, whether *Hadi* possessed the authority to provide consent to intervention¹⁰³ and c) whether the Saudi-led intervention violates *jus in bello* and what are the consequences of such potential violations regarding the legitimacy of the intervention.

¹⁰³ B. Ghafarzade, Yemen: Post-Conflict Federalism To Avoid Disintegration, N.Y.U. J. Int'l L. & Pol. 48 (2016), 933, at 970; M. Zenko, Make No Mistake – The United States Is at War in Yemen, Foreign Policy, 30.3.2015, <foreignpolicy.com>, access 10.10.2016.

1. The Legitimacy of *Hadi's* Presidency

As it has already been mentioned in the first part, in order for a consensual intervention to be assessed, two fundamental issues should be considered: which is the lawful government and how far can it go in terms of its consent. The first of them is analyzed here, namely *Hadi's* legitimacy as President of Yemen at the time of his consent.

In order to assess the legitimacy of *Hadi's* presidency at the time that he provided consent, we need to take into account a combination of criteria and events, including the effectiveness control criterion, the criterion of internal, constitutional legitimacy and the criterion of legitimacy from the perspective of the international community and international law, since the position of the article in the first part is that the effective control criterion, in States of contested authority should not be the sole criterion for the determination of the legitimate government.

In order to reach a conclusion on the issue of government legitimacy, I will consider the critical events and then analyze them in line with these three criteria, invoking some critical cases that have already been analyzed in the first part.

At the time when the events which led to the intervention under examination began to unfold, President *Hadi* had already been appointed as head of the transition procedure – since 2011 – and he had later also been elected President of Yemen – in February 2012.¹⁰⁴ His interim presidency was the outcome of a wider agreement on the basis of a plan, which was proposed by the Gulf Cooperation Council (GCC) later endorsed by the UN Security Council¹⁰⁵ and eventually accepted by former President *Al Saleh* on 23.11.2011.¹⁰⁶ It followed “Arab Spring” – type events against former Presi-

¹⁰⁴ International Crisis Group, *Yemen: Enduring Conflicts, Threatened Transition* Middle East Report 125 (2012), I; *E. Gaston*, *Process Lessons Learned in Yemen's National Dialogue*, United States Institute for Peace, Special Report 342 (2014), at 1.

¹⁰⁵ “In view of the heightened tensions and continuing violence in Yemen, the members of the Security Council urged all sides, in the period after President Ali Abdullah Saleh's return to Yemen on 23 September 2011, to reject violence, including against peaceful and unarmed civilians, and show maximum restraint. They called on all parties to move forward urgently in an inclusive, orderly and Yemeni-led process of political transition, on the basis of the Gulf Cooperation Council initiative, that meets the needs and aspirations of the Yemeni people for change. They also called upon all the parties to respect their obligations under applicable international law.” UNSC, Security Council Press Statement on Situation in Yemen, 24.9.2011.

¹⁰⁶ International Crisis Group (note 104), i.

dent *Saleh*, which began in 2011¹⁰⁷ and the prolonged uprising of the Houthis.¹⁰⁸

Whilst in office, President *Hadi* failed to meet higher expectations, provoking renewed discontent in the framework of which the Houthis maintained a significant role,¹⁰⁹ mainly due to his effort to adopt measures which the International Monetary Fund (IMF) asked for.¹¹⁰ With the Houthi uprising issue practically intact, *Hadi* waived between a military and political solution in the conflict.

During September 2014, the Houthis advanced rapidly and after only a few hours of fighting, they took over the capital Sanaa. President *Hadi* chose not to confront them, but to share his authority. In this regard, he signed the Peace and National Partnership Agreement with the Houthis for a new government that would supposedly be more representative.¹¹¹

In spite of the agreement, the Houthis maintained their military control over the capital and other areas of Yemen. This hybrid situation of shared state authority, eventually led President *Hadi* to submit officially his resignation on 22.1.2015. The Houthis, who welcomed the resignation, proposed the formation of a presidential council, but the Parliament refused to accept the resignation.¹¹²

Amid the constitutional chaos and deadlock, the Houthis who controlled the capital announced a new presidential council with the aim of forming an interim government which would propose constitutional reforms until 2017 and dissolved the Parliament. However, almost a month after his resignation

¹⁰⁷ International Crisis Group (note 104), 1 et seq.; *M. Sudam/J. Benham*, Yemeni President Leaves Country for Medical Treatment, Reuters, 4.6.2011.

¹⁰⁸ International Crisis Group (note 104), 3; *B. Ghafarzade* (note 103), 965; *M. Sudam/J. Benham* (note 107); *T. A. Peter*, Yemen Elections: Only One Choice, But Is It Still Progress?, The Christian Science Monitor, 20.2.2012, <www.csmonitor.com>, access 12.7.2017.

¹⁰⁹ International Crisis Group, Popular Protest In North Africa And The Middle East (II), 6 et seq.; *E. Gaston* (note 104), 1; *C. Schmitz*, Yemen's National Dialogue, The Middle East Institute, 10.3.2014, <http://www.mei.edu>, access 8.7.2017; *B. Ghafarzade* (note 103), 969; *P. Williams/T. Sommadossi/A. Mujais*, A Legal Perspective on Yemen's Attempted Transition from a Unitary to a Federal System of Government, Utrecht Journal of International and European Law 33 (2017), 4, at 5.

¹¹⁰ Al Jazeera, Yemen protests erupt after fuel price doubled, 30.7.2014, <www.aljazeera.com>, access 8.7.2017.

¹¹¹ *A. Ibrahim Al-Moshki*, Peace and National Partnership Agreement Signed, Yemen Times, 23.9.2014, <http://www.yementimes.com>; *I. Craig*, How Yemen's Capital Sanaa Was Seized by Houthi Rebels, BBC News, 27.9.2014, <www.bbc.com>, access 8.7.2017.

¹¹² Staff writer, Yemeni President Hadi Resigns from Office, Al Arabiya News, 22.1.2015, <english.alarabiya.net>, access 8.7.2015.

Hadi fled to Aden where he retracted his resignation and declared that all the measures which had been adopted by the Houthis were null and void.¹¹³

The Houthis responded with further military advancement on the South by March 2015,¹¹⁴ in the face of which *Hadi* eventually fled to Saudi Arabia.¹¹⁵ Almost three days before fleeing to Saudi Arabia, he asked GCC to intervene in Yemen in order to help him restore his authority and prevent the Houthi advance.¹¹⁶ Two days later and one day before leaving for Saudi Arabia, he addressed the UNSC with a similar letter.¹¹⁷

Saudi Arabia wasted no time to respond positively and by late March 2015 initiated the air raids against a number of targets in Yemen. The Saudi-led coalition includes all GCC states – except Oman – as well as Egypt, Jordan, Morocco, Pakistan, and Sudan while the United States provided logistical support.¹¹⁸ The intervention managed to drive Houthis out of Aden, where President *Hadi* returned after six months – by late 2015 – but apart from that, it had little success, leading eventually to a military stalemate.¹¹⁹

In relation to the effective control criteria, President *Hadi* had minimal or – at some point – nonexistent control over the territory and the population of Yemen at the time of his consent,¹²⁰ since he only possessed a short-lived basis of control in Aden, which, by the way, he has failed to completely restore even after the Saudi-led intervention.

In this sense, his position is different from that of *Assad*, who kept control of the capital and of an extended part of Syria throughout the war and who – following the consensual intervention of Russia – has managed to gain the momentum on the ground.¹²¹

¹¹³ Agence France-Presse in Aden, Yemen's President Retracts Resignation after Escape from House Arrest, *theguardian*, 24.2.2015, <www.theguardian.com>, access 8.7.2015.

¹¹⁴ *Y. Mawry*, Yemen's Houthis Advance Closer to Aden, *Middle East Eye*, 22.2.2015, <www.middleeasteye.net>, access 8.7.2015.

¹¹⁵ *K. Abdallah/S. Aboudi*, Yemeni Leader Hadi Leaves Country as Saudi Arabia Keeps Up Air Strikes, *Reuters*, 23.3.2015, <www.reuters.com>, access 9.7.2016.

¹¹⁶ Staff writer, Yemen Asks GCC for Military Action against Houthis, *Al Arabiya*, 23.3.2015, <english.alarabiya.net>, access 9.7.2017.

¹¹⁷ BBC News, Yemen's President Hadi Asks UN to Back Intervention, 25.3.2015, <<http://www.bbc.com>>, access 9.7.2017.

¹¹⁸ *B. Ghafarzade* (note 103), 975.

¹¹⁹ *Al Jazeera*, Yemen's Exiled President Returns to Aden, 17.11.2015.

¹²⁰ As it is analyzed above, the mainstream approach would deprive him of legitimacy since he was not effectively in control of the population and the territory.

¹²¹ Despite a two year old intervention he has failed to restore his authority. It seems that his presidency has nowadays been minimized to being one of the – many – parts of a protracted conflict and therefore he cannot reasonably claim authority over the whole of Yemen, even as a mid-term goal.

Regarding the criterion of constitutional legitimacy, there are cases where, in spite of the total loss of control over the population and the territory, the legitimacy of the overthrown governments was sustained, from the perspective of the international community, especially as a reaction against military coups, given the contradiction in principle of the latter to internal self-determination imperatives.

However, this is not the case in Yemen. The Houthis' advance which, through a chain reaction, eventually compelled *Hadi* to resign is the outcome of a militarized uprising originating mainly from a certain part of the population in an already fragmented State and authority. The Houthis were not part of the State apparatus, but a long established, internal movement – one of the few which are active in multi-fragmented Yemen – with social and religious – Zaydi Shia – roots and strong presence in the opposition both against *Al Saleh* and against *Hadi*.¹²²

While, Houthis' actions do not amount to a popular rebellion in the sense of a genuine representation of the majority of the Yemeni people – although even that, *per se*, would not provide lawfulness to their actions – a mechanical “coup-against-the-lawful-president” approach does not depict accurately the situation. Such analogies despite having some level of truth, might lead to over-simplifications. Therefore, analogies to cases such as the one of Haiti cannot be easily drawn.

The combination of the conditions on the ground and of the constitutional impact of the uprising by part of the population brings *Hadi* closer to the Ukrainian case, although profound differences are to be found.¹²³ The differentiation on behalf of large parts of the international community in its approach to the two situations is a reminder of the over-politicization and of the multiple standards of the issue of government legitimacy, at the expense of legal certainty and clarity.

Remaining, at the level of internal, constitutional legitimacy, the other important event is *Hadi's* resignation. While *Hadi* officially resigned from his office, his resignation was not validated by Parliament and in this sense

¹²² Although and in order to be accurate, in the complicated mosaic of Islam, Zayidism is located somewhere between Sunnism and Shia but for various reasons is considered as closer to the latter. *B. A. Salmoni/B. Loidolt/M. Wells, Regime and Periphery In Northern Yemen: The Huthi Phenomenon*, RAND, National Defense Research Institute, 2010, xv.

¹²³ For example, in Ukraine, the majority of the Parliament voted against the presidency of *Yanukovich*. Although it did not reach the necessary majority among the members of the Parliament in order to have a lawful impeachment, it still showed a disharmony between the two functions of the state, contrary to Yemen, where the Parliament defended *Hadi's* legitimacy. For such an analysis see: *Z. Vermeer* (note 5).

according to analyses of Yemeni lawmakers and lawyers he had the right to retract his resignation, which he eventually did.

Contrary constitutional interpretations argued that he should have been succeeded by the next in line, who was the speaker of the Parliament and a close ally to former President *Al Saleh*, although this is a contested view.¹²⁴ In addition, *Hadi* implied later that his resignation was more or less forced upon him because of the military presence of the Houthis and in this sense, it could be considered as a result of coercion.

It must also be kept in mind that the Houthi movement failed to achieve any significant extent of legitimization among the Yemeni constitutional institutions – e.g. from Parliament. This failure has cost them in terms of internal legitimacy when compared to *Hadi's* presidency.

In order to conclude on the assessment of legitimacy on the basis of the constitutional criterion, we need to take into account two more components: first, that the determination of the legitimacy of the government in States of contested authority, as is Yemen, is a comparative approach, too. In this case between *Hadi* and the Houthis.

Second, the two scale sub-criteria clarifying further the criterion of internal constitutional legitimacy, which are mentioned in the first part, meaning fulfillment of internal self-determination standards and persistence in the constitutional history of the State. *Hadi's* presidency was mediocre in terms of meeting the internal self-determination threshold and profoundly superficially rooted as a type of governance. Still, the achievements of the Houthis regarding the same criteria are worse. *Hadi* was elected and enjoyed the support of the constitutional organs of the state of Yemen. The Houthis did not meet any of these standards and this ellipsis cannot be “healed” by the alleged support towards them by parts of the population.

Therefore, regarding the internal, constitutional structure, President *Hadi* can be considered as the legitimate authority – or at least more legitimate compared to his rivals – although his domestic legitimacy was considerably weak not only because of forceful actions of his rivals, but also given that he was part of a transition procedure with significant weaknesses and a short presence as a type of governance.

From an international law perspective, another argument in favor of *Hadi's* legitimacy was invoked. The alleged foreign interference by Iran.¹²⁵

¹²⁴ A. Al Ibrahim Al-Moshki, President or fugitive? Houthis reject Hadi's letter to Parliament, Yemen Times, 25.2.2015, <www.yementimes.com>, access 13.7.2017; Al Jazeera Center for Studies, President Hadi's Resignation: Dangers and Alternatives, Position Paper, 1.2.2015, <studies.aljazeera.net>, access 13.7.2017.

¹²⁵ US Senate Foreign Relations, Resolving The Conflict In Yemen: U.S. Interests, Risks And Policy, Testimony by Amb. (Ret'd), Gerald M. Feierstein, 9.3.2017, <www.foreign.

In such a case, *Hadi's* legitimacy could be advocated given the precedents of South Rhodesia and of the so-called Turkish Republic of Northern Cyprus, in the sense that his loss of control would be the outcome of aggression and of a breach of a *jus cogens* norm¹²⁶ not producing lawful and legitimate consequences.¹²⁷

While the alleged influence and support of Iran to the Houthis is not unknown, still no direct interference constituting some type of aggression has been ascertained. Therefore, such an argument is not valid.

What provides *Hadi* with a more solid claim to legitimacy from an international perspective, was the UNSC, in particular by its resolution 2206 (2015) which was adopted on 14.4.2015. That resolution reaffirmed the UNSC "... support for the legitimacy of the President of Yemen, *Abdo Rabbo Mansour Hadi*", while condemning Houthis' actions. While the choice of the government or of the head of a state falls within the framework of domestic sovereignty, the SC adopted its position under Chapter VII and in line with its wide discretion to determine threats against peace and security. The resolution regarding its substance can be criticized as one-sided and as failing to promote legal certainty, since it adopted a different stance in relation to the similar case of Ukraine. Still though, it is an attribution of legitimacy to President *Hadi* from the international community perspective. As several cases indicated in the past, the attribution of legitimacy from the UNSC, especially under Chapter VII, often acts as a catalyst for overcoming legal doubt over the matter.

That decision of the UNSC was different and more straightforward compared to previous resolutions about Yemen. For example, in February 2015, the UNSC had adopted unanimously resolution 2204 (2015), under Chapter VII, which, while indirectly referred to the Houthis when it called

"... all parties in Yemen to adhere to resolving their differences through dialogue and consultation, reject acts of violence to achieve political goals, and refrain from provocation,"

had declined to refer to them explicitly. In addition, in contradiction to UNSC direct reference to overthrown president *Aristide* in the case of Haiti, it had made no direct mention to president *Hadi*.¹²⁸ UNSC 2140 (2014)

senate.gov> , access 9.7.2017; Al Jazeera, Thousands Protest against Houthi Coup in Yemen, 7.2.2015, <www.aljazeera.com>, access 9.7.2017.

¹²⁶ Z. Vermeer (note 5).

¹²⁷ As is the case with the non-recognition of the so-called Turkish Republic of Northern Cyprus, for example.

¹²⁸ UNSC Res. 2204 (2015), 24.2.2015).

resolution had also adopted an encouraging tone towards the Houthis, as parts of the transition procedure.¹²⁹

Things obviously changed when the Houthis disengaged themselves from the transition procedure, by attempting to completely take over power, “forcing” (eventually) the UNSC to demonstrate its support to *Hadi’s* presidency and its polemic to Houthi movement, albeit in a course which seems to some extent inconsistent.

Summing up, the combination of internal legitimacy and the international recognition in the framework of Chapter VII, as well as the comparison to the Houthis’ movement as an alternative, favor the acceptance of President *Hadi* as the lawful President of Yemen at the time of his consent, albeit with an eroded legitimacy and in an internally fragmented State and despite his minimal control over Yemen.

2. The Legitimacy of *Hadi’s* Invitation/Consent to the Saudi-Led Intervention

As it is noted in the first part of this paper, while from a traditional perspective, the mere fact of *Hadi’s* legitimacy would be all that is needed in order to conclude that his consent to intervention was lawful and while it is a right of the lawful government to invite an intervention, a further analysis must be conducted in order to conclude that he had indeed the right to consent to the specific intervention with the specific goals.¹³⁰

Not only the legitimacy of the consenting government, but also the scope of the intervention must be examined in order to conclude whether the act of consent is lawful. In such a sense, a two-level assessment of the consent is proposed: the first level is subject-oriented and the second level is goal-oriented.

The first level reflects the traditional debate about sovereignty, which goes as far as the verification of the sovereign, while the second level encompasses the more advanced debate about sovereignty, which attempts to trace the re-arrangement of sovereignty under international law and therefore its normative and practical limitations. Again, in order to reach a conclusion, only the necessary events will be analyzed.

The critical event and element regarding the lawfulness of the consent in relation to its goal of the intervention is the actual letter, which was sent by

¹²⁹ UNSC Res. 2140 (2014), 26.2.2014.

¹³⁰ The discussion about the genuineness of the consent is not conducted since there is little doubt about that in relation to *Hadi’s* consent.

President *Hadi* to the UNSC with which he sought authorization for a military intervention in order to “deter Houthi aggression”, following his similar request to Gulf Cooperation Council and the Arab League. He also invoked Art. 51 of the Charter.

As *Ashley Deeks* comments, since the Houthis are an internal group of Yemen, the invocation of Art. 51 is misplaced, given that there is no substantiated evidence that they act as proxies of Iran.¹³¹ The criteria of Art. 3 (g) of GA resolution 3314 (XXIX) are not met in the Houthis’ case.¹³²

In addition, as *Paulina Starski* argues, the ICJ, in interpreting Art. 51 in relation to non-State actors, while not explicitly rejecting the possibility of invoking it against non-State actors, “... continued to apply the state-centric concept of armed attack”, in its decision on the *Oil Platform* case, as well as in its advisory opinion in the *Palestinian Wall*.¹³³ The tendency is, in general, to apply Art. 51 in an as strict as possible way.

The question is whether a “misplaced” basis of justification for the consensual intervention is critical enough to “de-legitimize” the intervention or not. Apart from the pure normative significance, which is important enough, invoking Art. 51 and attempting to attribute to an internal military and political group the status of a proxy of a foreign State, implies a scope of total ostracization of this group, contrary both to peace plans and the transition procedure on the basis of which President *Hadi* became President of Yemen, as well as the facts on the ground.

We also need to keep in mind that after the initial advance of the Houthis in Sanaa, *Hadi* did not confront them, but agreed to further share power with them by signing a new agreement.¹³⁴ In various ways, since the beginning of his term as an interim president, he had acknowledged the multi-fragmented political landscape, which limited his actual authority and the need to share power with other groups and movements, including the Houthis. Yemen is a profound case of a State of fragmented authority in the sense that the concept is proposed above. This is why various peace plans

¹³¹ *A. Deeks*, International Legal Justification for the Yemen Intervention: Blink and Miss It, *Lawfare* (30.3.2015), <www.lawfareblog.com>, access 13.7.2017.

¹³² Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of Art. 2, qualify as an act of aggression: “(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.” UN GA, Definition of Aggression General Assembly Resolution 3314 (XXIX), 14.12.1974.

¹³³ *P. Starski*, Right to Self-Defence, Attribution and the Non-State Actor – Birth of the “Unable and Unwilling” Standard?, *HJIL* 65 (2015), 455, at 461.

¹³⁴ *Z. Vermeer* (note 5).

and UNSC resolutions advocate not a violent campaign, but efforts including all major internal actors.

In such a sense, the consent to the intervention on false grounds cancels the legitimacy of the specific legal act *per se*, since the basis of the consent implies a scope contravening the peace process in Yemen, the decisions of the UNSC under Chapter VII and therefore the implementation of the collective security system in the specific circumstances. As it has already been analyzed, the scope of the intervention is co-determinative of its legitimacy.

Here, the problematic aspect of the scope does not refer to the breach of a norm prohibiting an international crime; the implied scope of the consent inflicts a breach of the norms about the role of the UNSC in relation to the implementation of the collective security system in the given circumstances and towards the Yemeni people.

In such a sense, it is a scope contravening in principle the centralized regulation of the international community in furtherance of international peace and security and the international law supremacy principle, which are both fundamental in international law. It also contradicts in particular the peace process in Yemen, which has severe repercussions for regional, and potentially international, peace and stability.

The statements of the UNSC members during the session in which resolution 2216 (2015) was adopted are characteristic. The UK representative was the only one to openly advocate the intervention, although even he argued in favor of the quickest possible return to the peace plans. All the other member-States' representatives were even more straightforward, concerning the need to avoid military escalation and to return to the political procedure.

Therefore, the specific Saudi-led military intervention and the consent to it fell outside the context of the internal transition process and of the UNSC resolutions. The destructive consequences verify *posteriori* that argument.¹³⁵

Last but not least, one may question whether, under the given conditions, President *Hadi* could provide consent to an intervention of some other scope and type. Given the UNSC resolutions, which call for implementation of the transition and peace plans, the answer is that the most suitable way to deal with the situation would be with a UNSC mandate establishing a peace-keeping and peace-building mission.¹³⁶ With such a scope, President *Hadi* could also offer his consent and support lawfully.

¹³⁵ J. Dyke, *Is the Saudi War on Yemen Legal?*, IRIN, 3.4.2015, <www.irinnews.org>, access 15.7.2015.

¹³⁶ Which of course would be more suitably based on direct UNSC authorization.

3. Evaluation of the Saudi-Led Intervention in the Context of *Jus in Bello*

The last question is whether, even if assumed that the provision of consent by President *Hadi* for this intervention had been lawful, the developments which have followed in relation to the actions by the Saudi-led coalition have some impact on the lawfulness of the consent and of the intervention.

The argument is that while the provision of consent takes place at a specific place and time, as a singular act, it must remain valid during the whole time of the intervention and that the scope as well as the means of the intervention are also assessed over time and through an international law perspective.¹³⁷ In addition, the validity of the consent can be re-assessed not only on a bilateral basis, but also from the international perspective, namely and mainly the UNSC.

Therefore, when a consensual intervention after some point harms the collective security system imperatives or fails to meet international law standards, the consent which has been provided as a basis of justification, even if initially justified and legitimate, becomes null and void under international law.

Two years after the beginning of the Saudi-led intervention on the basis of *Hadi's* consent, the restoration of President *Hadi's* power is limited to parts of Aden, the war is in a stalemate, the political process is totally derailed and the humanitarian catastrophe is reaching unprecedented levels. Since the intervention has failed to fulfill the scope which has been set by the UNSC under Chapter VII, it falls outside the collective security system imperatives, as they are exemplified in the specific case. Even worse, it openly contradicts them and violates respective international norms due to its consequences at the humanitarian level.

“A Saudi naval embargo has since 2015 stopped the delivery of food and medical aid to the country ... the Saudi-led coalition bombed the cranes at the Al-Hudaydah port, limiting the ability to offload humanitarian aid. There is ... evidence that ... Saudi Arabia intends to use starvation as a method of war ... the war involves accusations of extensive *jus in bello* and human rights violations by the

¹³⁷ In such a framework, the precedent which has been set by the intervention of Syria in Lebanon and the de-legitimization of the intervention by the UNSC despite the Lebanese consent is indicative.

Saudi coalition ... The Saudi coalition has been accused of using US-made cluster munitions in civilian areas ...”¹³⁸

By January 2017, according to the UN Aid Chief

“more than two thirds of the population – an alarming 18.8 million – [were] in need of humanitarian and protection assistance, including an astounding 10.3 million Yemenis who require immediate assistance to save or sustain their lives ... Some 14 million people are currently food insecure, of whom half are severely food insecure.”¹³⁹

The United Nations Human Rights Office in Yemen also recalled

“... that indiscriminate or disproportionate attacks, or attacks targeting civilian objects such as markets, are prohibited under international humanitarian law, ... reminding all parties to the conflict of their obligation to ensure full respect for international human rights and humanitarian laws”.¹⁴⁰

With all the peace initiatives failing, the humanitarian conditions have reached a disastrous level. As the UN reported in June 2017:

“Yemen is now facing the worst cholera outbreak in the world, with suspected cases exceeding 200,000 and the number increasing at an average of 5,000 a day ... Already more than 1,300 people have died – one quarter of them children – and the death toll is expected to rise. This deadly cholera outbreak is the direct consequence of two years of heavy conflict.”¹⁴¹

¹³⁸ N. Subramanian, *A Misguided Military Escalation in Yemen*, Georgetown Security Studies Review, 15.4.2017, <georgetownsecuritystudiesreview.org>, access 9.7.2017.

¹³⁹ UN, *Urging “Bold Decisions” to End Yemen Conflict*, UN Envoy Says Viable Peace Plan Within Reach, UN News Center, 26.1.2017, <www.un.org>, access 9.7.2017.

¹⁴⁰ UN, *Civilian Casualties Continue to Rise In Yemen, Warns UN Human Rights Office*, UN News Center, 23.6.2017, <www.un.org>, access 9.7.2017.

¹⁴¹ UN, *Yemen Hit by World’s Worst Cholera Outbreak as Cases Reach 200,000*, UN News Center, 24.6.2017, <<http://www.un.org>>, access 9.7.2017. Also see: Human Rights Watch, *Yemen: No Accountability for War Crimes, Saudi-Led Coalition, Houthi-Saleh Forces Abuses Persist*, 12.1.2017, <www.hrw.org>, access 15.7.2017. “Dozens of coalition airstrikes were indiscriminate, violating the laws of war and killing and wounding thousands of civilians ... Southern forces, supported by the Saudi-led coalition, also committed serious abuses, executing Houthi prisoners in Aden ... Human Rights Watch documented dozens of coalition airstrikes that appear to have been unlawfully indiscriminate, causing civilian casualties, some of which may have amounted to war crimes. They include a March 30 airstrike on a camp for internally displaced persons near Yemen’s border with Saudi Arabia that killed at least 29 civilians; a March 31 airstrike on a dairy factory outside Hodaida that killed at least 31 civilians; a May 12 airstrike on a market and neighboring lemon grove in the town of Zabid, south of Hodaida, killing at least 60 civilians; a July 4, airstrike on a village market in Muthalith Ahim, south of the Saudi border, killing at least 65 people; and a July 24 airstrike on homes in the port city of Mokha that killed at least 65 civilians. In the Houthi’s northern stronghold of Saada, Human Rights Watch examined a dozen coalition airstrikes that de-

In light of this failure, more recent UNSC resolutions, despite maintaining their targeted sanctions against the Houthis and their allies in Yemen, continuously call

“for all parties in Yemen to adhere to resolving their differences through dialogue and consultation, reject acts of violence to achieve political goals, and refrain from provocation”

and reaffirm

“the need for all parties to comply with their obligations under international law, including international humanitarian law and international human rights law as applicable”.¹⁴²

In a significant political shift, again in light of recent developments, even the US ambassador to the UN, last year stated that

“[it] is also incumbent on the Saudi-led coalition and the forces of the Yemeni government to refrain from taking steps that escalate this violence and to commit to the cessation of hostilities ... there is absolutely no military solution to this conflict. Airstrikes that hit schools, hospitals and other civilian objects have to stop.”¹⁴³

Apart from the failure of the intervention in terms both of its own goals as well as of the UNSC ambitions for reconciliation, its main failure is to comply with *jus in bello* norms.

The war in Yemen can be classified as a non-international armed conflict, taking into account the definition in Art. 1, paras. 1 and 2 of Additional Protocol II about armed conflicts.¹⁴⁴

The Saudi-led intervention took place following the consent of the Yemeni President against internal actors, in support of the government of the

stroyed or damaged homes, five markets, a school, and a gas station, but found no evidence of military targets. The strikes killed 59 people, all reportedly civilians, including at least 35 children, between April 6 and May 11.” Human Rights Watch, Yemen, Events of 2015, <www.hrw.org>, access 15.7.2015.

¹⁴² UNSC Res. 2266 (2016); UNSC Res. 2342 (2017).

¹⁴³ J. Berger, US Calls for End to Saudi Airstrikes in Yemen, the Guardian, 31.10.2016, <www.theguardian.com>, access 15.7.2017.

¹⁴⁴ “Which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations 2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8.6.1977, Art. 1, paras. 1 and 2.

State. It is mistaken to claim that either the Houthis are proxies of Iran or that the Houthis are the legitimate government of Yemen, so that the conflict could be labeled as international.¹⁴⁵

Art. 3 of the Geneva Convention provides that

“In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;(b) taking of hostages;(c) outrages upon personal dignity, in particular humiliating and degrading treatment;(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”¹⁴⁶

The provisions are incomplete; they can serve as fundamental guidelines. Their most important contribution is that they implicitly impose a positive duty of humane treatment for those out of combat,¹⁴⁷ which is further exemplified and explicitly articulated by Additional Protocol II to the 1949 Geneva Conventions, to which Yemen is a state party,¹⁴⁸ in order for it to be implemented at each case in the most suitable and effective way.¹⁴⁹ Human

¹⁴⁵ In this latter case, the intervention would also be unlawful.

¹⁴⁶ Convention (III) Relative to the Treatment of Prisoners of War, Geneva, 12.8.1949. Conflicts not of an international character.

¹⁴⁷ G. D. Solis, *The Law Of Armed Conflict: International Humanitarian Law In War*, 2010, 97 et seq.

¹⁴⁸ For example, the obligation of humane treatment, fundamental guarantees, protection and care, protection of medical units, protection of civilian population and of its means of survival.

¹⁴⁹ The principle of humane treatment functioned as a point-section for the gradual introduction of laws of international armed conflicts to non-international, too, through the ICTY in the *Tadić* case, the International Criminal Court, the Secretary-General’s Bulletin of International Humanitarian Law, as well as by the International Committee of the Red Cross (ICRC) study *Customary International Humanitarian Law*. C. Garraway, *Non-International Armed Conflict in the Twenty-First Century Part III: Type of Non-International Armed Conflicts and the Applicable Law*, in: K. Watkin/A. J. Norris (eds.), *International Law Studies*, Vol. 82, 2012, 98. As ICTY held: “... a number of rules and principles ... have gradually been extended to apply to internal conflicts ... this extension has not taken place in the form of

rights have also been adopted as legal template which needs to be followed in cases of non-international armed conflicts.¹⁵⁰

The acts of the Saudi-led intervention obviously and emphatically contravene the aforementioned legal norms,¹⁵¹ as well as the principles of necessity and proportionality, given that unnecessary damage and suffering is inflicted and civilian losses are disproportionately high.¹⁵²

On the basis, both of the contradiction of the intervention with the UNSC mandate and with international humanitarian law and given that a government cannot consent to acts which would be illegal if committed by the government itself, even if *Hadi's* consent was lawful in the first place it would have lost its legitimacy in light of the events which are described above.

III. Conclusion

The analysis of the Saudi-led intervention in Yemen following President *Hadi's* consent poses the question of how to act and implement international law in cases where no good solutions are to be found. In such circumstances, international law, in order to avoid its collapse, must come up with delicate balances and imaginative answers.

That is why it was proposed that consensual intervention in order to be lawful must originate from a legitimate government, it must aim towards a legitimate goal and the actions of the intervening forces must be in accord-

a full and mechanical transplant of those rules to internal conflict; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts." *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, International Criminal Tribunal for the Former Yugoslavia, 2.10.1995.

¹⁵⁰ According to the ICJ "As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question, put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law." *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ 136 (2004), 106.

¹⁵¹ The Houthis are also held responsible for serious violations of humanitarian law. They are not mentioned here, first, because their actions are not the main theme of this paper and because, of course, their violations of international law cannot serve as justification for the violations which are committed by the opposite side.

¹⁵² *U. Kadam*, Importance of International Humanitarian Law In the Contemporary World, *Chinese Yb. Int'l L. & Aff.* 25 (2007), 161, at 174.

ance with international law obligations. The different criteria of government legitimacy were analyzed as well as the limits to sovereignty and subsequently to consent.

A theoretical framework was adopted in order to examine the legitimacy of the intervention in Yemen. The proposal is that while President *Hadi* retained his legitimacy, albeit eroded and in a fragmented state, he did not have the right to invite the specific intervention to which he consented. In addition, the means which have been adopted in the course of the intervention have further de-legitimized it.

In such a sense, the intervention in Yemen constitutes a clear case not only of the difficulty to find a clear pathway for such cases, but also of the limitations to sovereignty and to the rights flowing out of it, on the basis of internal legitimacy as well as of international law. Last but not least, in light of such a catastrophe, the international community and the UN organs should have come up with more constructive and effective solutions, compared with their current position, which is inconsistent and, to some extent, hypocritical.

