“Intervention by Invitation” and the Construction of the Authority of the Effective Control Test in Legal Argumentation

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The claim of “intervention by invitation” has been increasingly used in international law to assert the legality of interventions (including military) requested by states, e.g. to quell an internal strife.¹ One of the avenues in which the discourse on “intervention by invitation” has unfolded considers that the consent of the state requesting the external intervention operates as a circumstance precluding wrongfulness² of the breach of the legal principle of non-intervention.³ However, during a civil strife, the state authority may face internal challenges, to the extent that doubts arise as to its legal capability to express a valid consent. To obviate this, a pragmatic – and arguably objective – reference is made to the government that exercises effective control over the state territory as the authority entitled to express a valid consent.⁴ The determination of such an entity based on the effective control test plays an important part of the debate on “intervention by invitation”.⁵ As

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¹ Notably, there is “no general right of intervention, in support of an opposition within another State”, see Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US), Judgment of 27.6.1986, ICJ Reports 1986, 14, § 246.


⁴ For a critical account of the effective control test, see B. R. Roth, Secessions, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Test, Melbourne Journal of International Law 11 (2010), 393.

such, the effective control test over the state territory in the argumentation of the legality of “intervention by invitation” epitomises the way in which the authority of a test is constructed in legal argumentation. Like other tests, the effective control test has a bearing on legal determinations, in the specific case in the ascertainment of who is vested with the authority to express a valid consent to an external intervention.

This short contribution shows that, within the discourse on “intervention by invitation”, the effective control test has been constructed and reasserted through judicial decisions and “the teachings of the most highly qualified publicists”, i.e. through subsidiary means to determine rules of law.

Arbitral awards rendered in the 1920s in relation to the continuity of states under international law defined the notion of government by reference to the effective control test. Three cases are worth-mentioning to trace the genesis of the effective control test. In the 1923 Tinoco case (Great Britain v. Costa Rica), the arbitrator purported the relevance of the de facto character of the Tinoco’s government to be “according to the standard set by international law”, despite the lack of formal recognition by Great Britain. Similarly, in the 1926 Hopkins case (U.S.A. v. United Mexican States), the claims commission determined that acts put in place by the Huerta government – which gained the power through a coup d’état – legally bound the Mexican state if the government had “real control and paramountcy […] over a major portion of the territory and a majority of the people”.

In making such legal determinations, the adjudicators made extensive reference to a panoply of authorities, i.e. scholarly writings and prior arbitral awards. In particular, the Tinoco award referred first to Moore’s “Digest of International Law” (1906), “announc[ing] the general principle [of the continuity of states] which has had such universal acquaintance to become well settled in international law”, second to Borchard’s “The Diplomatic Protection of Citizens Abroad” (1915) citing further subsidiary means including
an arbitral award, to Chancellor Kent, Wheaton’s “International Law” (1836), Hall’s “International Law” (1909), and third to Woosley’s “Introduction to the Study of International Law” (1873). Instead, the claims commission in the Hopkins case made reference to the 1901 Dreyfus case (France v. Chile), to reassert that

“the illegal origin of a government [does] not defeat the binding force of its executive acts. [...] Once it had lost this control, even though it had not been actually overthrown, it would not be more than one among two or more factions wrestling for power as between themselves.”

Although the above mentioned cases pertain to issues of recognition of governments under international law, a number of scholarly writings have reasserted ever since the notion that only governments having effective control over the territory can act on behalf of the state, and thus express a valid consent to an external intervention. In 1947, Hersch Lauterpacht maintained that

“the principle of effectiveness [...] conceived as the test of recognition of governments must be regarded as expressing most accurately the general practices of States [...] which emerges as the predominant and governing principle.”

Yet – and this is material for the argument of this reflection – Lauterpacht traces “the foundations of the principle of effectiveness in the seventeenth century in the writings of the founders of international law,” and reaffirms the same de facto principle drawing from the pronouncements in the Dreyfus as well as in the Tinoco cases. A cursory inquiry into scholarly sources dealing with “intervention by invitation” shows that the Tinoco case is often cited in contemporary literature, too.

This leads us to derive an important consideration. Determining who is entitled to express a valid consent to a military intervention in the state ter-

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12 Great Britain v. Costa Rica (note 8), 377 et seq.
13 George W. Hopkins (U.S.A.) v. United Mexican States (note 10), 45. The Dreyfus case affirmed that the acts performed by the government exerting de facto authority bound the state (Peru) irrespective of its legitimacy.
14 H. Lauterpacht, Recognition in International Law, 1947, 98.
15 Hersch Lauterpacht cites Grotius, Pufendorf, Bynkershoek and Vattel in support of the de facto principle. See H. Lauterpacht (note 14), 99 et seq. [emphasis added]. Brad Roth posited that “the effective control doctrine is rooted in Kelsenian positivism”. See B. R. Roth (note 4), 423.
16 H. Lauterpacht (note 14), 103 et seq.
ritory is operated on the basis of tests which bear authority in the argumentation of international law thanks to the iterative reference to it by scholarly writings and judicial decisions. The reference to state practice (see *Lauterpacht* in the cited excerpt) allows an essentially doctrinal test, such as the effective control, to be “validated” as a limb of the law. Similarly, the appeal to the democratic legitimacy of the government, which is gaining terrain in scholarly writings, is finding correspondence in some state practice. As such, the democratic legitimacy test may in due course be “validated” as a plausible and correct test to determine the government entitled to express a valid consent to intervention.

This is not to support the necessity or the desirability of such a test, rather to stress that changes in *doctrinal* tests evidenced via the iterative citation of judicial decisions and scholarly writings materially bear on the outcomes of *legal* determinations.

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18 A number of scholars have claimed that an additional test of democratic legitimacy shall be considered for the purposes of identifying such a government. See, *inter alios*, G. H. Fox, Democracy, Right to, International Protection, in: R. Wolfrum (ed.), MPEPIL (2008), 773. Other scholars take the view that such a democratic legitimacy test is conducive to the identification of the government that can validly consent to an intervention, even when the effective control test is not met. See e.g. *J. Levitt*, Pro-Democratic Intervention in Africa, Wis. Int’l L.J. 24 (2006), 758.

19 See e.g. the cases of *Haiti* (1991) and of *Sierra Leone* (1997), in B. R. Roth (note 4), 427 et seq.