

# The International Wrongfulness of Unlawful Consensual Interventions

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Recent years have witnessed an upsurge in the literature on the lawfulness of forcible interventions upon governmental consent in internal armed conflicts. The contemporary discussion correlates, to an extent, with the classic debate between those that view such interventions, *at least* when a certain level of conflict is reached, as strictly prohibited (which I call “strict-abstentionists”), and those that proceed from the presumption that in general, governments possess the power to invite external intervention, subject to certain limitations.

In this brief contribution, rather, I will address a question which is frequently glossed over in the discussion: on either approach, what do we mean when we say that in a certain situation, a consensual intervention is unlawful? Or, in other words, what international norm is violated when a consensual intervention is wrongful? Answering this question is necessary for the purpose of properly assigning international responsibility, and also when determining individual criminal liability for the crime of aggression.

The key issue here is to determine whether consent is void *ab initio* (or is otherwise devoid of any legal meaning), or rather, the consent itself is valid, but the actions committed *pursuant to it* are unlawful. This is crucial since if consent lacks any legal effect, it could be said that the intervention is against the will of the state, and consequently, is a violation of *jus ad bellum*.<sup>1</sup> If consent cannot be said to be void, then it seems that *jus ad bellum* is not implicated; but the intervention can still be unlawful in light of other legal frameworks.

There are several scenarios in which we may conclude that consent is void. To understand this, a helpful point of departure is to view interventions upon consent as forms of international agreements, whether in the form of treaties or other agreements under customary international law.<sup>2</sup> First, expression of consent may be void when it is a product of coercion,

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<sup>1</sup> This is because the force can be said to be *against* the state, as prohibited by Art. 2(4) of the UN Charter.

<sup>2</sup> I addressed this issue in depth in *E. Lieblich*, Intervention and Consent: Consensual Forcible Interventions in Internal Armed Conflicts as International Agreements, *B. U. Int'l L. J.* 29 (2011), 337.

either through threats directed against a representative of the state, or against the state itself.<sup>3</sup> A classic example that comes to mind, in this context, is the consent extracted from Hungarian Prime Minister *Imre Nagy* by the USSR, allegedly under personal threats, during the latter's 1956 intervention in the country.<sup>4</sup>

Second, arguably, consent can be void when it conflicts with peremptory norms of general international law (*jus cogens*). For instance, if a government is engaged in mass atrocities, and invites another state to assist it to defeat its internal enemies, then the invited state – in its actions – would be assisting in maintaining a violation of *jus cogens*. As per the law on state responsibility, such situations cannot be recognised as lawful.<sup>5</sup> Admittedly, it is difficult to delineate exactly when the inviting government's actions would be so egregious to merit the conclusion that any request for assistance is null and void. For instance, it is clear that if the inviting government has violated a peremptory norm at some point of the conflict (for example, its forces have violated a norm of International Humanitarian Law [IHL] which constitutes *jus cogens*, such as the prohibition on torture), this would not, in and of itself, render *any* assistance to the government a maintenance of a *jus cogens* violation. Yet, when violations are continuous, gross, and systemic, this might implicate the entire governmental effort and render any assistance to the government a violation of peremptory norms. Arguably, this might be the case in the conflict in Syria.<sup>6</sup>

In this context, if we assume that strict abstentionists are correct, and consensual intervention is never permitted once a significant conflict erupts because it would violate the principle of self-determination, then perhaps, owing to the *jus cogens* status of self-determination, that consent would be void.<sup>7</sup> Yet, to emphasise, such consequence must assume that such interventions are indeed violations of self-determination *per se*, which is a contested issue.

A third case in which consent would be void – or to be more precise, would lack any legal meaning to begin with – is when the inviting party is a state organ, but not competent to extend the invitation (and the intervener

<sup>3</sup> See Vienna Convention on the Law of Treaties 1969, Arts. 51-52 (hereinafter VCLT).

<sup>4</sup> See UNGA, Report of the Special Committee on the Problem of Hungary, UN GAOR 11<sup>th</sup> Session Supp. No. 18 UN Doc. A/ 3592 (1957), 24.

<sup>5</sup> Articles on Responsibility of States for Internationally Wrongful Acts (2011), Art. 41 (hereinafter, ARSIWA), Art. 53 VCLT.

<sup>6</sup> See the various Reports of the UNHRC's Independent International Commission of Inquiry on the Syrian Arab Republic, <<https://www.ohchr.org>>.

<sup>7</sup> See e.g. ILC, Third Report on Peremptory Norms of General International Law (*Jus Cogens*), by *Dire Tladi*, Special Rapporteur (12.2.2018), UN Doc. A/CN.4/714.

knew, or should have known that);<sup>8</sup> or, if the inviting party was competent in the past but is no longer the state's government (in accordance with any standard for government recognition); or when premature recognition is afforded to an opposition group. For instance, if, in the 2019 constitutional crisis in Venezuela, *Juan Guaidó* – the president of the National Assembly and self-proclaimed President of Venezuela – would invite a third party to intervene forcibly in the state, then – to the extent that *Guaidó* cannot be said to be the country's lawful president –<sup>9</sup> such an invitation would have no legal effect.

In sum, it seems that in cases where there is coercion, assistance in widespread *jus cogens* violations, or consent by entities that are not governments, consent is deemed void or otherwise meaningless, and accordingly interventions which rely on such “consent” might be a violation of the prohibition on the use of force. Whether such interventions would also constitute crimes of aggression depends on the circumstances.<sup>10</sup> While intervention upon coerced consent seems a classic case of aggression, interventions in the other situations mentioned above might or might not amount to aggression, in accordance with the facts of the case.

Yet, there might be cases in which consent would be valid, and therefore an intervention would not be a violation of *jus ad bellum*, but it would still be unlawful by violating other normative frameworks. One obvious case is when the inviting state is requesting the intervener to participate directly in a violation of *jus in bello*. For instance, if State A requests State B to conduct an attack against a civilian object, then the intervention might be lawful *ad bellum*, but would still be internationally wrongful as a violation of international humanitarian law. Similarly, outside the context of hostilities, if State A invites State B to attack any person in circumstances where lethal force would be prohibited by international human rights law,<sup>11</sup> then the in-

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<sup>8</sup> Compare Art. 46 VCLT. Such was the case in Hungary, 1956, when the initial invitation to the USSR was extended by the head of the local communist party. See *E. Lieblich*, The 1956 Soviet Intervention in Hungary, in: T. Ruys/Olivier Corten (eds.), *International Law on the Use of Force: A Case-Based Approach*, 2018, 48, 60 et seq. Another doubtful case was the 1983 US invasion of Grenada, where consent was expressed by the state's Governor General. See *J. N. Moore*, Grenada and the International Double Standard, *AJIL* 78 (1984), 131, 148 et seq.

<sup>9</sup> And I do not express any opinion on this question here.

<sup>10</sup> Chiefly, because crimes of aggression require that a threshold of gravity be crossed. Rome Statute of the International Criminal Court (1999), Art. 8 bis (1).

<sup>11</sup> See Human Rights Committee, General Comment No. 36 (2018) on Art. 6 of the ICCPR, on the Right to Life (30.10.2018), CCPR/C/GC/36.

intervening state would commit a wrongful extrajudicial killing even if it would not be in violation of *jus ad bellum*.<sup>12</sup>

Last, there might be situations where the invited state would be rendering aid to unlawful acts, even if not committing them itself. For instance, assume that State A invites State B to assist in its struggle against rebel group C. Assume further that while State A constantly violates IHL, State B conducts its operations in perfect conformity with IHL. But to the extent that B is aware of this, and by its actions it in fact perpetuates A's violations, it might be said that by its intervention, it assists in the commission of an internationally wrongful act.<sup>13</sup> Admittedly, the line between such situations and cases in which the consent would be void due to violations of *jus cogens* is blurry. For the purpose of this brief contribution, it suffices to say that the difference between the situations is probably one of degree.

In sum, for the sake of legal clarity, it is necessary to outline precisely which form of illegality we are referring to when discussing the possible wrongfulness of consensual interventions. This is not merely an exercise in formalism; with the recent acquisition of jurisdiction by the International Criminal Court over the crime of aggression, this determination becomes crucial.

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<sup>12</sup> This would be true both if international human rights law would apply to the attack extraterritorially, or if the attacker would accrue the human rights obligations of the territorial state.

<sup>13</sup> ARSIWA, Art. 16. Compare *K. Beckerle/D. Minogue*, U.K. Court Nixes Saudi Arms Sales – What It Means for the US and Other EU Countries, Just Security (24.6.2019), <<https://www.justsecurity.org/>>.