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**INTERVENTION AND CONSENT: CONSENSUAL  
FORCIBLE INTERVENTIONS IN INTERNAL  
ARMED CONFLICTS AS  
INTERNATIONAL AGREEMENTS**

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#### ABSTRACT

This article addresses the issue of consensual forcible intervention in internal armed conflict—meaning, intervention undertaken with the consent of a party to an internal conflict—and seeks to clarify the place of such interventions within the framework of the law of international agreements in conjunction with the law on the use of force. It analyzes the question of consent strictly in the context of relations between a consenting party and an *external* intervener (“procedural consent”), as opposed to questions regarding the *internal* legitimacy or capacity of a party to express consent (“substantive consent”)—which are not dealt with in this article. The article attempts to demonstrate that consensual forcible interventions, in their “procedural” sense, are regulated by firm and accepted norms of international law. These are found in the Vienna Convention on the Law of Treaties (VCLT), found in customary international law, found in the law on the use of force, and augmented by the law of state responsibility. The article seeks to systematically elaborate on these frameworks and to clarify them. It demonstrates the general dynamics of consensual interventions, as they occurred in the different stages of the conflict in the Democratic Republic of Congo; it then addresses the regulation of consensual interventions under the VCLT and customary international law; discusses the question of withdrawal of consent and aggression; analyzes the dilemma of forward-looking consent in the context of regional defense treaties; surveys the role of consent in relation to U.N. Chapter VII interventions; and briefly touches upon the question of consent and non-state actors, exemplifying this issue through the analysis of the development of the legal status of the Palestine Liberation Organization.

## I. INTRODUCTION

Since the end of World War II, the international community has witnessed a tragic increase in the number of internal armed conflicts taking place across the globe. In fact, internal armed conflicts have become the dominant form of conflict—greatly outnumbering inter-state conflicts—in the last few decades.<sup>1</sup> This global trend has culminated in the deadly post Cold-War internal conflicts in Africa, which have caused tremendous loss of life, inflicted severe human suffering, and were accompanied, many times, by mass atrocities.<sup>2</sup>

In numerous instances throughout recent history, internal armed conflicts have prompted external forcible interventions—undertaken both unilaterally and pursuant to U.N. Security Council resolutions. Between the years 1946 and 2009, the UCDP/PRIO Armed Conflict Dataset has recorded many dozens of internal armed conflicts in which external interventions occurred—either on behalf of governments or of opposition groups, and many times by more than one intervening power.<sup>3</sup> Since any intervention, with the exception of seemingly neutral peacekeeping operations, has the potential to advance the interests of one party over the other, it comes as no surprise that in many cases, forcible interventions receive the consent—explicit or tacit—of one or more of the warring parties. For instance, consensual interventions have taken place, in recent years, in at least two major internal conflicts. One was the chaotic conflict in the Democratic Republic of Congo, where multiple consensual interventions have taken place since the conflict's eruption in 1996.<sup>4</sup>

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<sup>1</sup> See Nils Peter Gleditsch et al., *Armed Conflict 1946–2001: A New Dataset*, 39 J. PEACE RES. 615, 620, 623 (2002).

<sup>2</sup> See, e.g., William G. Thom, *Congo-Zaire's 1996–1997 Civil War in the Context of Evolving Patterns of Military Conflict in Africa in the Era of Independence*, 19 J. CONFLICT STUD. (1999) (addressing, *inter alia*, the characteristics of internal armed conflicts in Africa).

<sup>3</sup> See Nils Peter Gleditsch et al., *UCDP/PRIO Armed Conflict Dataset* (Version 4-2009), PEACE RESEARCH INSTITUTE OSLO, available at <http://www.prio.no/CSCW/Datasets/Armed-Conflict>. It should be noted, however, that the definition given by datasets such as UCDP/PRIO and the earlier Correlates of War dataset to the terms *internal armed conflict* or *intervention* are not legal, but rather from the discipline of political science. Thus, these databases are helpful to further the understanding of general worldwide trends regarding armed conflicts, but not necessarily in order to draw legal conclusions. J. David Singer & Melvin Small, *Correlates of War Project: International and Civil War Data, 1816–1992* (1994), INTER-UNIVERSITY CONSORTIUM FOR POLITICAL AND SOCIAL RESEARCH (ICPSR), available at <http://www.icpsr.umich.edu/icpsrweb/IDRC/series/232> [hereinafter *COW Dataset*]; see also James N. Rosenau, *Intervention as a Scientific Concept*, 13 J. CONFLICT RESOL. 149, 152 (1969) (highlighting the different meanings encompassed by the term “intervention” across different disciplines).

<sup>4</sup> See, e.g., Gary Cleaver & Simon Massey, *DRC: Africa's Scramble for Africa*, in AFRICAN INTERVENTIONIST STATES 193, 193 (Oliver Furley & Roy May eds., 2001).

Another example is the conflict in Iraq, which started as an inter-state conflict in 2003, but was converted, *de jure*, to an internal one in June 2004; accordingly, the coalition forces in Iraq have arguably transformed from occupiers to interveners, on behalf of the Iraqi Government.<sup>5</sup>

These conflicts seem to represent two extremes: the first resembles an impossible bundle of shifting alliances and *ad hoc* agreements, while in the second, the consent of the Iraqi government has been carefully documented and regulated—first through letters annexed to Security Council resolutions;<sup>6</sup> and later by the conclusion of a Status of Forces Agreement in 2008 (SOFA).<sup>7</sup> Despite their differing circumstances, both of these conflicts raise many similar legal questions.

The question of intervention in internal armed conflict gives rise to complex problems across different disciplines.<sup>8</sup> In the field of international law, and specifically in the field of consent and intervention, two main sets of questions arise. Questions of the *first* type deal with the *internal* consent-capacity of the different parties to the conflict. Analysis of these issues requires the consideration of perplexing legal problems involving the difficulty of specifying which party, if at all, has the power to invite an external intervention or consent to it. Since these questions merit the assessment of different substantive characteristics of the conflicting parties, they can be labeled as questions of *substantive consent*.<sup>9</sup>

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<sup>5</sup> See S.C. Res. 1546, annex, U.N. Doc. S/RES/1546 (June 5, 2004). The consent by the Interim Government supplemented the Security Council's recognition of the coalition forces as a Multinational Force operating under Chapter VII of the U.N. Charter.

<sup>6</sup> After the initial letter of consent annexed to S.C. Res. 1546, *supra* note 5, annex 5, further Iraqi requests for the extension of the multinational forces' mandate were authorized in S.C. Res. 1637, U.N. Doc. S/RES/1637 (Nov. 8, 2005); S.C. Res. 1723, U.N. Doc. S/RES/1723 (Nov. 28, 2006); and S.C. Res. 1790, U.N. Doc. S/RES/1790 (Dec. 18, 2007).

<sup>7</sup> Agreement on the Withdrawal of the United States Forces from Iraq and the Organization of their Activities during their Temporary Presence in Iraq, U.S.-Iraq, Nov. 17, 2008, S. EXEC. DOC. 09-6 (2009) [hereinafter *Status of Forces Agreement*].

<sup>8</sup> See, e.g., John Stuart Mill, *A Few Words on Non-Intervention* (1859), reprinted in 3 DISSERTATIONS AND DISCUSSIONS 238 (1865), available at <http://google.books.com>; MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* (4th ed. 2006) (addressing, *inter alia*, the ethics of intervention in internal armed conflicts). Compare THE INTERNATIONAL DIMENSIONS OF INTERNAL CONFLICT (Michael E. Brown ed., 2001), with PEACEMAKING AND PEACEKEEPING FOR THE NEW CENTURY (Olara A. Otunnu & Michael W. Doyle eds., 1998) (analyzing intervention through the prism of political science).

<sup>9</sup> International law in this context has been described as "chaotic." See *Independent Int'l Fact-Finding Mission on the Conflict in Georgia*, Report (Vol. 2), at 276 (Sept. 30, 2009) [hereinafter *Report on Georgia*]. For sources addressing the issue of *substantive consent*, see, e.g., David Wippman, *Pro-democratic Intervention by Invitation*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 293, 297

For example, a question of *substantive consent* would be whether the Iraqi Interim Government has had the power to consent to the presence of coalition forces in Iraq since June 2004, despite the fact that it was not elected and has, at times, lacked effective control over Iraqi territory.<sup>10</sup>

Questions of the *second* type deal with the issue of consent in relation to an *external* party. Unlike questions of *substantive consent*, questions of this type are not concerned with the *internal* legitimacy of the consent expressed.<sup>11</sup> A basic question of this type, for instance, is whether a genuine expression of consent took place, rather than being a product of some form of external coercion. In the Iraqi context, the obvious question is whether the consent expressed to the presence of coalition forces was genuine or coerced, as it was extended *ex post* while Iraq was under occupation. Since these questions largely do not address the characteristics of the parties involved—but rather the process of expression of consent—they can be collectively labeled as issues of *procedural consent*.

This article addresses the *second* set of questions—those of *procedural consent* by asserting that, in general, many of the questions regarding *procedural consent* can find answers in firmly established norms of international law.<sup>12</sup> It explores the legal framework that consensual interventions constitute agreements, to which the law of international agreements and the international law on the use of force apply concurrently.

This article focuses mainly on the framework regulating consent expressed by governments. However, it will also address—rather briefly and by no means exhaustively—the general legal capacity of non-state actors to express consent in areas which concern security and sovereignty issues. Further works may expand the inquiry to the issue of when, if

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(Gregory H. Fox & Brad R. Roth eds., 2000); Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BRIT. Y.B. INT'L L. 189, 251 (1985); Robert W. Gomulkiewicz, *International Law Governing Aid to Opposition Groups in Civil Wars: Resurrecting the Standards of Belligerency*, 63 WASH. L. REV. 43, 48-50 (1988); David Wippman, *Treaty-Based Intervention: Who Can Say No*, 62 UNIV. CHI. L. REV. 607, 628-29 (1995) [hereinafter *Who Can Say No*]; David Wippman, *Military Intervention, Regional Organizations, and Host-State Consent*, 7 DUKE J. COMP. & INT'L L. 209, 209-10 (1996) [hereinafter *Military Intervention and Host-State Consent*].

<sup>10</sup> See S.C. Res. 1546, *supra* note 5; see also Sharon Otterman, *Iraq: The Interim Government Leaders*, COUNCIL ON FOREIGN RELATIONS PUBLICATION (June 2, 2004), available at <http://www.cfr.org/publication/7664> (surveying the background of the Iraqi Interim Government).

<sup>11</sup> See, e.g., John Lawrence Hargrove, *Intervention by Invitation and the Politics of the New World Order*, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 113, 116-18 (Lori Fisler Damrosch & David J. Scheffer eds., 1991) (outlining briefly a framework for legal principles for procedural consent).

<sup>12</sup> See *Military Intervention and Host-State Consent*, *supra* note 9, at 209 (expressing, in general, the same notion).

ever, such actors possess the *material* capacity to consent to an intervention, as parties to an internal armed conflict. Since this is mainly an issue of *substantive consent*, it is beyond the scope of this article.

Section II will define the key terms used in this article—*internal armed conflict*, *intervention* and *forcible* intervention—and will provide some theoretical clarifications. Section III will explain the dynamics of consensual forcible intervention, by outlining the different stages of the conflict in the Democratic Republic of Congo. Section IV examines the relationship between consensual intervention and the Vienna Convention on the Law of Treaties; and Section V looks at the laws governing instances of consensual intervention which *cannot* be designated as treaties under the Vienna Convention. We will address the question of withdrawal of consent in Section VI; and in Section VII, we will raise this issue in the context of *forward-looking intervention treaties*, such as the African Union and ECOWAS's (Economic Community of West African States) regional defense protocols. Section VIII will attempt to clarify the relationship between consent and enforcement actions under Chapter VII of the U.N. Charter; and in Section IX, we shall briefly discuss the (potential) power of non-state actors to express consent under international law by focusing on the development of the status of the Palestine Liberation Organization. Accordingly, we shall survey some international norms that might serve to regulate the power of non-state actors to express consent, in the context of internal armed conflicts.

## II. DEFINITIONS AND CLARIFICATIONS

### A. *Internal Armed Conflict*

In this article, the term *internal armed conflict* is used to describe intra-state violent strife. The common term *civil war* will not be used due to its lack of precision;<sup>13</sup> and although it may be tempting to do so, on account of its broad meaning, the term *non-international armed conflict* will also

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<sup>13</sup> The word “civil” implies that the “war” takes place between *citizens* of the conflict-ridden state. However, as history teaches us, parties to intra-state conflicts are not always comprised in their entirety of citizens of the said state. For instance, in the Lebanese Civil War of 1975–1990, Palestinian refugees and P.L.O. militants (who were never granted Lebanese citizenship) played a central role. See THE PLO AND ISRAEL: FROM ARMED CONFLICT TO POLITICAL SOLUTION, 1964–1994 13, 261 (Avraham Sela & Moshe Ma'oz eds., 1997). Another example can be found in the ongoing participation of Rwandese *Interahamwe* militias in the conflict in East Congo, as detailed *infra*. See, e.g., Int'l Crisis Group, *How Kabila Lost His Way: The Performance of Laurent Désiré Kabila's Government* 4, ICG Congo Report No. 3 (May 21, 1999). Moreover, the word “war,” in the international-legal context, presupposes the existence of a factual condition which may (or may not) have effects over the rights of the parties involved—and therefore its use may be misleading. See, e.g., Gomulkiewicz, *supra* note 9 at 46-48 (outlining briefly the effective control tests used traditionally as indicators for the rights and powers of parties in internal armed

not be used—so as not to cause confusion, since the term is also used in the context of International Humanitarian Law.<sup>14</sup> However, the definition of the term *non-international armed conflict*, as provided in article 1(2) of the Protocol Additional to the Geneva Conventions (“Additional Protocol II”), can still serve as guidance regarding the *scope* of violence that amounts to an internal armed conflict, as it provides that non-international armed conflicts are *not* “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of similar nature.”<sup>15</sup> Therefore, “sporadic, disorganized, apolitical violent strife” does not amount to an internal armed conflict.<sup>16</sup> Nor do

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conflicts; the use of the term “war” might have implications regarding the existence of such powers, if one views these tests as still reflecting customary international law.)

<sup>14</sup> This is because not every *non-international* armed conflict, as regulated by the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter *Additional Protocol II*], is necessarily an *internal* armed conflict. A recent example for such a situation can be found in the conflict between Israel and Hamas in Gaza, which erupted in December 2008. It is not an international armed conflict, since neither Hamas nor the Palestinian Authority constitutes a “High Contracting Part[y]” to the Geneva Conventions; however, since Gaza is not a territory of Israel, the conflict cannot be labeled as an internal one. See HCJ 769/02 The Pub. Comm. Against Torture in Israel v. The Gov’t of Israel 57(6) IsrSC 285, ¶21 [2006] (Isr.) (holding that the Israeli-Palestinian conflict is closer to one of an *international* character). *But see* Eyal Benvenisti, *The Legal Battle to Define the Law on Transnational Asymmetric Warfare*, 20 DUKE J. COMP. INT’L L. 339, 341-44, 350 (2010) (suggesting the term “transnational warfare” to describe conflicts between states and non-state actors operating across borders). For different accounts of the Gaza conflict, see U.N. Human Rights Council, Report of the United Nations Fact Finding Mission on the Gaza Conflict, A/HRC/12/48 (Sept. 25, 2009), available at [http://www2.ohchr.org/english/bodies/hrcouncil/specialesession/9/docs/UNFFMGC\\_Report.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/specialesession/9/docs/UNFFMGC_Report.pdf); see also THE STATE OF ISRAEL, THE OPERATION IN GAZA—FACTUAL AND LEGAL ASPECTS (2009), available at <http://www.mfa.gov.il/NR/rdonlyres/E89E699D-A435-491B-B2D0-017675DAFEF7/0/GazaOperationLinks.pdf> (last visited Nov. 25, 2010).

<sup>15</sup> *Additional Protocol II*, *supra* note 14, art. 1(2). There is an ongoing debate among political scientists regarding the threshold number of casualties for a conflict to be considered an internal armed conflict. *The COW Dataset*, *supra* note 3, defines “civil war” as a conflict that involves at least 1,000 casualties within a single year; the UCDP/PRIOD Dataset requires a lower threshold: 25 annual battle deaths. While these thresholds are helpful, they do not represent legal norms. See Gleditsch, *supra* note 1, at 616.

<sup>16</sup> Richard A. Falk, *Introduction*, in THE INTERNATIONAL LAW OF CIVIL WARS 11 (Richard A. Falk ed., 1971). Non-recurring or small-scale violence between the state apparatus and civilians is usually dealt with sufficiently through domestic criminal law, and hence is usually of no international concern—assuming that the particular state conforms to international human rights norms in its practice of criminal law.

revolutions, in themselves, amount to an internal armed conflict, as they do not necessarily involve the occurrence of one.<sup>17</sup>

To summarize, in this article, the term internal armed conflict refers to a *violent* dispute, where the violence occurs primarily within the boundaries of a single state.<sup>18</sup> This type of dispute erupts in the form 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.”<sup>19</sup>

#### B. *Intervention in an Internal Armed Conflict—Physical versus Normative*

The term *intervention* is one of the more elusive terms of international law. Two possible explanations for its ambiguity can be found. *First*, this term has both a *physical* and a *normative* meaning—two distinct meanings that are sometimes used interchangeably. *Second*, there is an inherent difficulty in quantifying and establishing when an intervention—in both its *physical* and *normative* senses—occurs.

Intervention in the *physical* (or *descriptive*) sense takes place whenever party C engages in a conflict between opposing parties A and B. Thus, whenever a state engages parties to an internal armed conflict—using forcible or non-forcible measures, legally or illegally—it *intervenes physically* in the conflict. However, the term *intervention* encompasses an additional, separate meaning connoting the unlawful, coercive interference or encroachment upon the territorial integrity or internal political affairs of another state.<sup>20</sup> This meaning refers to the violation of the centuries-old principle of non-intervention entrenched in customary rules of international law and in many historical and contemporary documents,

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<sup>17</sup> A revolution is a “[successful] effort to transform the political institutions and the justifications for political authority in a society, accompanied by formal or informal mass mobilization and non-institutionalized actions that undermine existing authorities.” Jack A. Goldstone, *Toward a Fourth Generation of Revolutionary Theory*, 4 ANN. REV. OF POL. SCI. 139, 142 (2001). Thus, it is a *result* of a process, which does need, in itself, to involve an internal armed conflict. A recent example of a revolution that did not involve an internal armed conflict is the Egyptian revolution of January-February 2011. See Human Rights Watch, *Egypt: Historic Change Brings Hope for Human Rights* (Feb. 11, 2011), available at <http://www.hrw.org/en/news/2011/02/11/egypt-historic-change-brings-hope-human-rights> (last visited Feb. 19, 2011).

<sup>18</sup> See Michael E. Brown, *Introduction*, in THE INTERNATIONAL DIMENSIONS OF INTERNAL CONFLICT 1, 1 (Michael E. Brown ed., 1996).

<sup>19</sup> See Falk, *supra* note 16, at 18; see also Lori Fisler Damrosch, *Introduction*, in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 1, 4-5 (Lori Fisler Damrosch ed., 1993).

<sup>20</sup> See Damrosch, *supra* note 19, at 3.



judgments and treaties.<sup>21</sup> Thus, while every involvement of an external party in an internal armed conflict is *per se* a *physical* intervention, not all are *normative* (or *prescriptive*) interventions. Only the latter violate the principle of non-intervention. In this article, the term *intervention* is used to connote an intervention in the *physical* sense, without prejudice to the action's legitimacy, unless otherwise specified.

The *second* issue in defining an *intervention*—the difficulty of establishing when an intervention takes place—is relatively less acute when addressing the issue of forcible intervention, in comparison to the daunting task of circumscribing when a *non-forcible* intervention takes place.<sup>22</sup> This, it has been argued, is because a *physical intervention* is mainly identified by the fact that it is “convention-breaking,” meaning, it breaks significantly from the *status quo*; and “[m]ilitary interventions are perhaps the most dramatic and clear-cut departures from existing patterns.” Hence, they are more distinctively identifiable than non-forcible interventions.<sup>23</sup> In the *normative* sense, likewise, it is easier to recognize the occurrence of a forcible intervention, while it is intrinsically difficult to determine when a non-forcible intervention amounts to *coercion*—and

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<sup>21</sup> See, e.g., United Nations Vienna Convention on Diplomatic Relations art. 41, ¶ 1, Apr. 18, 1961, 500 U.N.T.S. 95; Charter of Organization of American States art. 15, Apr. 30, 1948, 119 U.N.T.S. 48; Pact of the Arab League of States art. 8, Mar. 22, 1945, 70 U.N.T.S. 237; Seventh International Conference of American States, Convention on Rights and Duties of States art. 8, Dec. 23, 1933, 49 Stat. 3097, 165 L.N.T.S. 19; Treaty of Versailles art. 10, June 28, 1919, 225 Consol. T.S. 188; Treaty of Westphalia art. LXIV, Oct. 24, 1648, 1 Consol. T.S. 319; U.N. Charter art. 2, para. 7 (note, however, that this article is addressed to the U.N. rather than to its member states.); Military Aid and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶¶ 202-09 (June 27) [hereinafter *Nicaragua*]; The Corfu Channel Case (U.K. v. Albania), 1949 I.C.J. 4, 35 (Apr. 9); Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, G.A. Res. 2625 (XXV), U.N. Doc. A/8082 (Oct. 24, 1970) [hereinafter *Declaration on Friendly Relations*]; see also ANTONIO CASSESE, INTERNATIONAL LAW 53-58 (2005).

<sup>22</sup> See, e.g., Lori Fisler Damrosch, *Politics across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs*, 83 AM. J. INT'L L. 1, 5 (1989) (analyzing the question of non-forcible “influence,” and when such actions amount to a breach of the principle of non-intervention); Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1, 6 (2001) (surveying, *inter alia*, the relations between economic sanctions and the principle of non-intervention); see also *Nicaragua*, 1986 I.C.J. 14, ¶ 245 (ruling that non-forcible acts such as the American cessation of economic aid, imposition of quota restrictions on sugar imports and trade embargo relating to Nicaragua are not contrary to the principle of non-intervention).

<sup>23</sup> Rosenau, *supra* note 3, at 163.

thus is in violation of the norm of non-intervention.<sup>24</sup> Forcible actions, when undertaken against the will of the state, are *inherently coercive*.<sup>25</sup>

### C. Acts Constituting Forcible Intervention—Scope, Means, and Attribution

We have argued that forcible interventions are supposedly easier to identify than non-forcible interventions. However, this is only true to the extent that one can easily determine which actions constitute *forcible* ones, and moreover, which actions can be attributed to an alleged intervener. The distinction between forcible and non-forcible intervention is of much legal importance, as the two are controlled by different sets of legal norms. Both types are subject to the principle of non-intervention,<sup>26</sup> however, only the former is also regulated by the laws on the use of force, and, first and foremost, by the prohibition on the use of force entrenched in article 2(4) of the U.N. Charter.<sup>27</sup> In terms of *scope*, for an intervention to be considered forcible, it does not need to amount to a full-scale *war* as the term was historically defined.<sup>28</sup> Thus, forcible acts which are

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<sup>24</sup> As in the classical definition by Oppenheim, an intervention has to be forcible, dictatorial, or coercive in order to constitute a breach of the norm of non-intervention. See LASSA OPPENHEIM, I INTERNATIONAL LAW 221 (1920); see also *Declaration on Friendly Relations*, *supra* note 21, pmbl.

<sup>25</sup> On this difference between non-forcible and forcible interventions, see, e.g., Rep. to the Int'l Comm'n on Intervention and State Sovereignty, *The Responsibility to Protect* 29 (2001) [hereinafter ICISS Report], available at <http://www.iciss.ca/pdf/Commission-Report.pdf> (arguing that in contrast to non-forcible interventions, which do not, in general, physically prevent the state from acting as it pleases, “[m]ilitary intervention . . . directly interferes with the capacity of a domestic authority to operate on its own territory. It effectively displaces the domestic authority . . .”); see also *Nicaragua*, 1986 I.C.J. 14, ¶ 205 (holding that a breach of the norm of non-intervention is “particularly obvious” where force is being used); Dino Kritsiotis, *Topographies of Force*, in INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES: ESSAYS IN HONOUR OF YORAM DINSTEIN 29, 67 (Michael Schmitt & Jelena Pejic eds., 2007).

<sup>26</sup> For instance, in *Nicaragua*, the I.C.J. ruled that supply of arms to opposition forces is a violation of the law of the use of force (albeit not constituting an armed attack) and *also* a violation of the norm of nonintervention. See *Nicaragua*, 1986 I.C.J. 14, ¶ 247.

<sup>27</sup> U.N. Charter art. 2, para. 4, famously prohibits the *use of force* by states (and the threat of use of force), providing that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.”

<sup>28</sup> For the classic definition of war, requiring large-scale use of force, see LASSA OPPENHEIM, INTERNATIONAL LAW 202 (1952). Dinstein, building upon Oppenheim’s definition, proposes that the term “war”—in its “material” sense—be defined as an “actual use of armed force, which must be comprehensive on the part of at least one party to the conflict.” YORAM DINSTEIN, WAR, AGGRESSION AND SELF DEFENSE 15 (2005).

“short-of-war” are also regulated by the international law on the use of force.<sup>29</sup> According to Higgins, it does not matter “how brief, limited or transitory” the act is, and when regarding *means* that are to be considered forcible, even a “simple aerial incursion” suffices to forcefully violate a state’s territorial integrity.<sup>30</sup> Such actions would be seen as forcible actions by the state, whether they are conducted by its regular armed forces, or by other forces *sent* by the state or on *behalf* of it, as long as they are conducted across an international border.<sup>31</sup> Moreover, forcible actions by a state include its *acquiescence* to, or *toleration* of, acts committed by non-state actors operating from that state’s territory, in the context of an internal armed conflict taking place in another state, as well as the arming and training of opposition forces (*indirect forcible actions*).<sup>32</sup>

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<sup>29</sup> See ANTHONY C. AREND & ROBERT J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE U.N. CHARTER PARADIGM* 30-31 (1993).

<sup>30</sup> ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 240 (1994). Higgins demonstrates this principle by referring to the ICJ ruling in *The Corfu Channel Case (U.K. v. Albania)*, 1949 I.C.J. 4, where it was held that minesweeping activities conducted by the UK in Albanian territorial waters, constitute a breach of the law on the use of force. Of course, the twenty-first century brings about a plethora of questions regarding what constitutes an “incursion” and what means are “forceful.” For instance, a perplexing question is whether acts of information warfare and “cyberwars” are controlled by the laws of armed conflicts. See James J. Busuttill, *The Law of Armed Conflict as Applied to Cyberwar*, in *THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE* 37 (Guy S. Goodwin-Gill & Stefan Talmon eds., 1999). See generally MICHAEL N. SCHMITT & BRIAN T. O’DONNELL, *COMPUTER NETWORK ATTACK AND INTERNATIONAL LAW* 5 (2002).

<sup>31</sup> See *Nicaragua*, 1986 I.C.J. 14, ¶195; G.A. Res 3314 (XXIX), annex ¶ 3(g), U.N. Doc. A/9631 (Dec. 14, 1974) [hereinafter *Definition of Aggression*]; see also *Report on Georgia*, *supra* note 9, at 259-60.

<sup>32</sup> It should be noted that the majority opinion in *Nicaragua* held that such actions—as enumerated in the *Declaration of Friendly Relations*, *supra* note 21—constitute “less grave” uses of force, which do not amount to an “armed attack” giving rise to the right of self defense as entrenched in article 51 of the U.N. Charter. Compare *Nicaragua*, 1986 I.C.J. 14, ¶ 195, with *id.* ¶¶ 154-71, 176 (Schwebel, J., dissenting). See also IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE* 373 (1963); *Report on Georgia*, *supra* note 9, at 259. This distinction bares no relevance in our context, as we are concerned with the definition of forcible actions and not with the scope of the right to self defense. Regarding *indirect forcible actions*, see also *The Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations*, G.A. Res. 42/22, annex, ¶6, U.N. Doc. A/RES/42/22 (Nov. 18, 1987); *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, ¶¶ 276-305 (December 19) [hereinafter *DRC v. Uganda*]; CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 79-80 (2008). It is also worthwhile to clarify that the mere transfer of funds to oppose the Contras was not considered an indirect use of force in *Nicaragua* but rather a breach of the norm of non-intervention. See *Nicaragua*, 1986 I.C.J. 14, ¶ 228.

In cases when forcible actions are directly or indirectly undertaken by irregular forces, the question of state attribution becomes acute. The level of state-control required over such actions, in order for the actions to be attributed to that state, has been a debated issue in the judgments of international courts. The International Court of Justice held in *Nicaragua* that “effective control” by the state over the specific operation is required.<sup>33</sup> The ICTY, in contrast, applied a more lax standard of “overall control” in the *Tadic* case.<sup>34</sup> Article 8 of the International Law Commission’s (ILC) Draft on State Responsibility does not prefer one standard over the other, stipulating that for state responsibility to exist, “the person or group of persons is in fact acting on the instructions of, or under the direction or control” of the state.<sup>35</sup> The ILC, in its commentary, further noted the conflicting views regarding this issue, but remained neutral.<sup>36</sup> In the 2007 Bosnia Genocide Case, the ICJ once again advanced the “effective control” test as established in *Nicaragua*, critiquing the ruling in *Tadic* and holding that this standard is also compatible with article 8 of the ILC Draft, which, the ICJ explained, reflects customary international law.<sup>37</sup>

Lastly, actions by U.N. mandated forces can also be considered forcible interventions, so long as they conform to the aforementioned characteristics. However, neutral peacekeeping missions, which may involve the deployment of armed forces across a state’s border and are not mandated to actively assist either party, are not forcible interventions.<sup>38</sup>

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<sup>33</sup> *Nicaragua*, 1986 I.C.J. 14, ¶¶ 115-16.

<sup>34</sup> Prosecutor v. Tadic, Case No. IT-94-1-A, Appeals Chambers Judgment ¶¶ 120-21 (Int’l Crim. Trib. For the Former Yugoslavia July 15, 1999), available at <http://www.icty.org/x/cases/tadic/tjug/en/tad-sj970714e.pdf>; see also DINSTEN, *supra* note 28, at 203-04.

<sup>35</sup> *Draft Articles on Responsibility for Internationally Wrongful Acts, with Commentaries*, [2001] 2 Y.B. Int’l L. Comm’n 31, 46, U.N. Doc. A/56/10 [hereinafter *ILC Draft Commentary*], available at [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf); see also *Report on Georgia*, *supra* note 9, at 260-61.

<sup>36</sup> See *ILC Draft Commentary*, *supra* note 35, at 48, ¶ 5 (stating that “it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it.”).

<sup>37</sup> Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz v. Serb. & Montenegro), 2007 I.C.J. 140, ¶ 398, ¶¶ 405-06 [hereinafter *The Bosnia Genocide Case*] (February 26); see also Antonio Cassese, *The Nicaragua and the Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 EUR. J. INT’L L. 649 (2007) (surveying the rulings in the aforementioned cases regarding the “effective” or “overall” control standards, and critiquing the court’s reasoning in the Bosnia Genocide Case).

<sup>38</sup> This is irrespective of the question whether these forces are sent pursuant to U.N. Charter ch. VI or VII. The intervention would be deemed “forcible” once the mandate of the U.N. force includes forcible engagement and would be deemed “non-

Forcible intervention in internal armed conflict—meaning an intervention in the *physical* sense that is pursued through *forcible* methods—can thus be defined as any cross-border act by an external party to an internal conflict, however limited in scope, which involves the mobilization of actors having the potential to apply physical force that does not constitute a pure peacekeeping operation. It can be undertaken either by U.N. authorized forces, regular or irregular armed forces of a state or of a regional organization, non-state actors acting from within a territory of a state, with the acquiescence or toleration of that state, or through training and arming opposition groups which operate in the territory of another state.

### III. THE DYNAMICS OF CONSENSUAL INTERVENTION IN INTERNAL ARMED CONFLICT

#### A. *Consent: Proactive and Retroactive; Explicit and Implicit*

An expression of consent to a forcible intervention can occur on a *proactive* or on a *retroactive* basis. In both cases, it can be expressed either *explicitly* or *implicitly*,<sup>39</sup> and can be addressed to states, regional organizations, non-state actors, or to multinational forces established by a U.N. Security Council resolution. In the latter case, the act of consent supplements a mandate based on Chapter VII of the U.N. Charter that allows the Security Council to authorize forceful enforcement actions.<sup>40</sup> Unsurprisingly, instances in which *ad hoc proactive* and *explicit* consent is expressed between states represent “easy cases,” while other situations

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forcible” when the mandate does not include forcible actions beyond the use of self-defense. *See also Report on Georgia, supra* note 9, at 270.

<sup>39</sup> As Special Rapporteur Roberto Ago noted, consent can be “expressed or tacit, explicit or implicit, provided however that it is clearly established.” Roberto Ago, *Eighth Rep. on State Responsibility*, [1979] 2 Y.B. INT’L L. COMM’N 36, U.N. Doc. A/CN.4/318. *See also* INTERNATIONAL LAW COMMISSION, THE INTERNATIONAL LAW COMMISSION’S DRAFT ARTICLES ON STATE RESPONSIBILITY, PART 1, ARTICLES 1-35, 316–317 (Shabtai Rosenne ed., 1991) (referring to the distinction between *implied* consent and *presumed* consent, which is actually tantamount to no consent at all); *Report on Georgia, supra* note 9, at 281-82 (opining that requests for help in instances of collective self-defense can be informal and implicit. The same logic can be applied in relation to consensual intervention.).

<sup>40</sup> Such was the case of the Iraqi consent to the presence of coalition forces, which supplemented the Security Council’s resolutions that recognized the coalition forces as a Multinational Force under Chapter VII; *see, e.g.*, S.C. Res. 1546, *supra* note 5; TARCISIO GAZZINI, THE CHANGING RULES ON THE USE OF FORCE IN INTERNATIONAL LAW 81 (2005).

raise difficult questions, particularly regarding the question of whether the consent was freely given.<sup>41</sup>

Consent can be also expressed in different forms. As we shall see, the legal effect of the form of the consent determines, in general, the body of law to be applied in specific instances of intervention. However, these effects, at the end of the day, are more technical than substantive. Thus, consent can be expressed in many forms, in different moments along the time continuum, and does not necessarily have to be explicit—as long as it is proven genuine.

Many of the possible forms of consensual interventions can be found in the tragic series of conflicts that have taken place in the Democratic Republic of Congo (DRC) since 1996.<sup>42</sup> In our presentation of this conflict, we will not elaborate upon the legal status of the actions of the various parties or make assumptions regarding their interests; nor, at this stage, will we comment on the controversial question of whether non-state actors have the capacity to express consent to forcible intervention. We will only use this conflict as a factual exemplification of the dynamics of consensual intervention in internal armed conflicts, necessary to the understanding of our legal analysis.

#### B. *The First Congolese Conflict (1996-1997, the Ousting of Mobutu)*

Mobutu Sésé Seko had authoritatively ruled Zaire (today, the DRC) since 1965, in spite of growing opposition among the country's many ethnic and regional groups. In 1994, following the genocide committed by members of the Hutu ethnic group against the Tutsi ethnic group in neighboring Rwanda and the subsequent overthrow of the Hutu regime by Rwandan Tutsi warlord Paul Kagame, Hutu refugees fled to Zaire fearing retaliation by the new Tutsi government. Intermingled with the refugees, were members of the extreme Hutu militias—the *inter-ahamwe*—that played a pivotal role in the Rwandan Genocide. These Hutu militias gained effective control over the refugee camps in East Zaire, and used them as bases to launch attacks against Tutsis in East Zaire (known as the *Banyamulenge*) and across the border into Rwanda. While doing so, they were supported to varying extents by Mobutu's army. In late 1996, some of Mobutu's rivals formed the Alliance of Democratic Forces for the Liberation of Zaire (ADFL)—with encouragement and support from Rwanda, which became increasingly frustrated by the

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<sup>41</sup> See, e.g., Hargrove, *supra* note 11 (outlining briefly a framework of principles for procedural consent and evidentiary factors that should be taken into account while assessing an instance of consensual intervention).

<sup>42</sup> The conflicts in the DRC are revealing examples of contemporary internal armed conflicts where many interests converge and cross-border ethnic identities transcend borders and sovereignty. See Oliver Furley & Roy May, *Introduction*, in *AFRICAN INTERVENTIONIST STATES*, *supra* note 4, at 1, 4-6.

cross-border attacks being launched from East Zaire.<sup>43</sup> Laurent Désiré Kabila, a long time foe of Mobutu, emerged as the ADFL's leader.

Thereafter, the ADFL, supplemented by the Rwandan Patriotic Army (RPA)<sup>44</sup> and Ugandan forces, moved to weaken the *interahamwe* in East Zaire's refugee camps. Capitalizing on their early successes in East Zaire, the opposition forces staged an assault westward toward Kinshasa—Zaire's capital—defeating Mobutu's government forces and the Rwandan Hutu militias supporting him.

In the subsequent months, Angolan troops began to aid the rebels while Angolan dissidents (UNITA) began to support Mobutu.<sup>45</sup> By mid-1997 Kabila's forces were on the outskirts of Kinshasa.<sup>46</sup> Mobutu fled the country and on May 17, 1997, Kabila declared himself president, established an authoritarian regime, and renamed the state the Democratic Republic of Congo (DRC).

The first Congolese Conflict exemplifies some of the complex dynamics prevalent in consensual interventions, whether they are conducted in favor of the government or the opposition. For instance, most of the interventions in this conflict involved *retroactive* consent—instances in which a party's consent is granted *ex post*, after the intervening power has already made forcible moves in the target state's territory. Such cases, naturally, raise grave concerns of coercion. The retroactivity of the opposition's consent, in this stage of the Congolese conflict, is clear from the fact that the intervening powers (except Angola) were actively involved in the formation of the ADFL—the same opposition body that the powers came later to support militarily. Obviously, this raises serious questions regarding the independent capacity of the ADFL to express consent. Retroactive consent can be found also in the relations between the government and the *interahamwe* and UNITA, since these groups were already present in Zaire by the time the conflict started.

Consent may take many forms and can be expressed at various stages of time, provided that it is genuine. Instances of *retroactive consent*, undoubtedly, will require a high threshold of proof that such genuineness exists.

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<sup>43</sup> See Int'l Crisis Group, *supra* note 13, at 4; see also Mel McNulty, *From Intervened to Intervenor: Rwanda and Military Intervention in Zaire/DRC*, in AFRICAN INTERVENTIONIST STATES, *supra* note 4, at 173-74, 179. Kagame's Rwanda had also held a grudge against Mobutu for his forcible support of the Hutu Rwandan regime in the early nineties. See *id.* at 177-78.

<sup>44</sup> The RPA was an organ of Rwandan president Kagame's political party, the Rwandan Patriotic Front. See McNulty, *supra* note 43, at 180-81.

<sup>45</sup> UNITA supported Mobutu since he allowed them to stage attacks against Angola from Zaire's territory. See Norrie McQueen, *Angola*, in AFRICAN INTERVENTIONIST STATES, *supra* note 4, at 93, 104-05.

<sup>46</sup> See Thom, *supra* note 2, at "Phase Three."

C. *The Second Congolese Conflict (1998-2003, Withdrawal of Consent and Invitation of Other Powers)*

At the end of the first Zaire/Congo conflict, Kabila became president of the DRC, though many foreign forces were still present on the DRC's soil. On July 27, 1998, Kabila ordered all foreign forces—with Rwandan forces in particular—to leave the country:

The Supreme Commander of the Congolese National Armed Forces, the Head of State of the Republic of the Congo and the Minister of National Defence, advises the Congolese people that he has just terminated, with effect from this Monday 27 July 1998, the Rwandan military presence which has assisted us during the period of the country's liberation . . . . This marks the end of the presence of all foreign military forces in the Congo.<sup>47</sup>

However, Rwanda and Uganda were reluctant to let go of their influence over the DRC.<sup>48</sup> Uganda, for instance, claimed that Kabila did not actually withdraw his consent, *inter alia*, because Kabila did not mention Uganda explicitly in his statement above.<sup>49</sup> Furthermore, the *withdrawal of consent* by Kabila was perceived by the Tutsis of East Congo—the *Banyamulenge*—as a threat, since they relied on support from Rwanda's Tutsi-controlled government. Soon after, Tutsi groups formed the Rally for Congolese Democracy (RCD) and a renewed armed conflict (both internal and cross-border) erupted on August 1998.<sup>50</sup> With the active participation of Rwanda and Uganda, the rebel forces—comprised mainly of the RCD, the newly-formed and Ugandan-supported Movement for the Liberation of Congo (MLC), and anti-Kabila elements from within the former ADFL—swiftly took over resource-rich areas in Eastern Congo.<sup>51</sup> The DRC, in retaliation, sought the support of Hutu militias (known as the FDLR since 2000)<sup>52</sup>—the same group that supported, in the first conflict, President Kabila's arch-enemy Mobutu—and urged

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<sup>47</sup> Reprinted in DRC v. Uganda, 2005 I.C.J. 168, ¶ 49.

<sup>48</sup> See McNulty, *supra* note 43, at 182-83.

<sup>49</sup> Another claim by Uganda was that the DRC's consent to its intervention was renewed in the Lusaka Agreement of 1999. See DRC v. Uganda, 2005 I.C.J. 168, ¶¶ 92-105.

<sup>50</sup> See McNulty, *supra* note 43, at 183-84.

<sup>51</sup> For a detailed account of the conflict in its initial stages, see Int'l Crisis Group, *Scramble for Congo: Anatomy of an Ugly War*, ICG Report No. 26 (Dec. 20, 2000) (detailing the various parties involved in the conflict and providing a chronology of events).

<sup>52</sup> Briefly on the FDLR, see Int'l Crisis Group, *Congo: A Comprehensive Strategy to Disarm the FDLR* 1-2, Africa Report No. 151 (July 9, 2009) [hereinafter *A Comprehensive Strategy*], available at <http://www.crisisgroup.org/en/regions/africa/central-africa/dr-congo/151-congo-a-comprehensive-strategy-to-disarm-the-fdlr.aspx>.



Hutus to retaliate against Tutsis.<sup>53</sup> Thus, this stage of the Congo conflict involved both a *withdrawal of consent* by the new government of the DRC, which was all but ignored by the already-intervening powers (Rwanda and Uganda), and *retroactive consent* to these powers' continuing intervention, this time by the new rebel groups. Thereafter, when Kabila's government started to lose ground rapidly, it asked for assistance from Namibia, Zimbabwe, Angola and Chad.<sup>54</sup> This prompted a multi-party war by September 1998.<sup>55</sup>

The Lusaka Agreement, reached in 1999 in an attempt to bring about peace, was unsuccessful, notwithstanding the establishment of a U.N. peacekeeping mission pursuant to it (MUNOC).<sup>56</sup> In January 2001, Laurent Kabila was assassinated and replaced by his son Joseph.<sup>57</sup> During 2002, Rwanda's control loosened over the now-split RCD, while Joseph Kabila managed to solidify his rule over the DRC with the help of foreign allies.<sup>58</sup> In July and September 2002, Rwanda and Uganda respectively signed a peace treaty with the DRC. Subsequently, Rwanda withdrew its troops on December 17, 2002, and the various Congolese parties signed an agreement to form a transitional government that brought a *de jure* end to this stage of the Congolese conflict.<sup>59</sup> Uganda withdrew its troops on June 2, 2003, and a transitional government was formed on July 18, 2003. However, parts of the state have remained in varying intensities of conflict ever since.<sup>60</sup>

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<sup>53</sup> See *Scramble for Congo*, *supra* note 51, at 14–15 (regarding the cooperation between Kabila and Hutu militias).

<sup>54</sup> For a detailed survey of the various players in the Second Congolese Conflict and their interests, see Cleaver & Massey, *supra* note 4, at 193.

<sup>55</sup> See Int'l Crisis Group, *Congo At War: A Briefing of the Internal and External Players in the Central African Conflict* 1-3, 14-25, ICG Congo Report No. 2 (Nov. 17, 1998) [hereinafter *Congo at War*], available at <http://www.crisisgroup.org/en/regions/africa/central-africa/dr-congo/002-congo-at-war-a-briefing-of-the-internal-and-external-players-in-the-central-african-conflict.aspx>.

<sup>56</sup> The United Nations Mission in the Democratic Republic of Congo, established in S.C. Res. 1279, U.N. Doc. SC/RES/1279 (Nov. 30, 1999), pursuant to article 11(a) of the Lusaka Agreement. MONUC was renamed MONUSCO on May 28, 2010, with the adoption of S.C. Res. 1925, SC/RES/1925 (May 28, 2010).

<sup>57</sup> Int'l Crisis Group, *From Kabila to Kabila, Prospects for Peace in the Congo* 1, 1, ICG Africa Report No. 27 (Mar. 16, 2001), available at <http://www.grandslacs.net/doc/2250.pdf>.

<sup>58</sup> See McQueen, *supra* note 45, at 107 (arguing that the involvement of Angolan and Zimbabwe saved the Kabila regime from "almost certain defeat"). The RCD split into two factions: RCD Kisangani and RCD Goma. See McNulty, *supra* note 43, at 185.

<sup>59</sup> Int'l Crisis Group, *The Kivus: The Forgotten Crucible of the Congo Conflict* i-ii, Africa Report No.56 (Jan. 24, 2003).

<sup>60</sup> See generally Int'l Crisis Group, *Pulling Back from the Brink in the Congo* 1, 1, ICG Africa Briefing (July 7, 2004).

The pro-government interveners in the Second Congolese Conflict, Namibia, Zimbabwe and Angola, were some of the members of the Southern African Development Community (“SADC”), whose charter contained vague references to collective security at the time.<sup>61</sup> Although a mutual SADC defense pact was only finalized in 2003, however, it can nevertheless be argued that these three parties’ intervention in Congo was based, in part, on *defensive treaty based consent*.<sup>62</sup> In any case, the Zimbabwean and Namibian intervention was based on *proactive consent*, as neither state’s forces were on DRC territory beforehand.<sup>63</sup> The same can be said of Chad’s intervention, though Chad is not an SADC member.<sup>64</sup> Conversely, it is reasonable to argue that Angola’s intervention was based on *retroactive consent*, as Angolan forces had previously assisted Kabila in the overthrow of Mobutu’s regime.<sup>65</sup> All of the aforementioned states, however, were *explicitly* invited to intervene.<sup>66</sup>

D. *The Conflict in the Kivus (2004-2010, Pro-Government Intervention by Rwanda and Consent to Forcible MONUC Operations)*

The conflict in the Kivus (the Kivu Conflict) is essentially a direct continuation of the Second Congolese Conflict, the end of which resolved the main cause of the conflict in East Congo—the ethnic tension between the

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<sup>61</sup> See Declaration and Treaty of the Southern African Development Community art. 5, Aug. 17, 1992, 32 I.L.M. 116 [hereinafter SADC Treaty]. The SADC was amended in 2001, establishing, *inter alia*, an organ on politics, defense and security. See *Agreement Amending the Treaty of the Southern African Development Community*, available at [http://www.waternet.co.za/SADCRBO/docs/SADC\\_Treaty\\_amendment.pdf](http://www.waternet.co.za/SADCRBO/docs/SADC_Treaty_amendment.pdf). A mutual defense pact was concluded on August 27, 2003. See Naison Ngoma, *SADC’s Mutual Defence Pact: A Final Move to a Security Community?*, 93 THE ROUND TABLE 375, 411-23 (2004).

<sup>62</sup> A “purer” case of treaty-based consent might be the U.S. intervention in Vietnam, which was, *inter alia*, justified pursuant to article IV(1) of the Southeast Asia Collective Defense Treaty (SEATO Treaty), which imposed an obligation to “act” when treaty members are under an “armed attack.” See Elliot D. Hawkins, *An Approach to Issues Raised by U.S. Actions in Vietnam*, in 1 VIETNAM WAR AND INT’L LAW 163, 168-73 (1968).

<sup>63</sup> See *Congo at War*, *supra* note 55, at 20-22.

<sup>64</sup> See *id.* at 25.

<sup>65</sup> See *id.* at 22.

<sup>66</sup> See *id.* at 20; see also McQueen, *supra* note 45, at 108. Many of these forces listed additional justifications, other than consent, for their interventions. See *Congo at War*, *supra* note 55, at 14, 16-19 (outlining other justifications by Rwanda and Uganda; see also DRC v. Uganda, 2005 I.C.J. 168, ¶¶ 106-09. It should come as no surprise, however, that none of the intervening parties (pro-rebels or otherwise) admitted that the abundance of natural resources in the DRC had any stake in their decision to intervene. See *Rep. of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Dem. Rep. Congo*, ¶¶ 26-28, delivered to the Security Council, U.N. Doc. S/2001/357 (Apr. 12, 2001).

Rwandan Hutu extremists of the FDLR and the Tutsi groups supported by Rwanda, —supplemented by significant economic interests.<sup>67</sup>

Laurent Nkunda was a commander in the Rwandan-backed RCD during the Second Congolese Conflict. After that conflict ended *de jure* in 2003, Nkunda formed a new force in the Eastern Congo provinces of the Kivus—the National Congress for the Defense of the People (CNDP).<sup>68</sup> The CNDP was comprised largely of former RCD (Goma faction) troops.<sup>69</sup> Nkunda's newly-formed organization, much like the RCD before it, received aid from Rwanda—albeit covertly.<sup>70</sup>

In 2004, after Nkunda claimed that genocide was taking place against the Tutsis in Eastern Congo (an allegation dismissed by the U.N.), Nkunda's forces took control of the city of Bukavu in South Kivu, withdrawing only after the U.N. conducted negotiations and Nkunda faced international pressure.<sup>71</sup> In subsequent years, Nkunda continued building his forces, while occasionally clashing with the DRC's army and calling for the overthrow of the Kabila government and the removal of Hutu FDLR forces from the DRC. In 2007, the conflict intensified and MONUC forces occasionally assisted DRC forces against the CNDP in Kivu.

In 2008, clashes between the CNDP and the FDLR worsened. At the end of the year, when Nkunda's forces took over a strategic area in North Kivu, MONUC forces attacked the CNDP with heavy weaponry.<sup>72</sup> MONUC conducted its operations in support of the government and in “close cooperation” with it,<sup>73</sup> pursuant to the adoption of Security Council Resolution 1856 in which MONUC's mandate was dramatically expanded. The DRC expressed its enthusiastic support for the resolution.<sup>74</sup>

Thus, MONUC's forcible intervention in the DRC was a Chapter VII-based intervention, supplemented by *proactive, explicit* consent on the

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<sup>67</sup> See Int'l Crisis Group, *The Congo's Transition Is Failing: Crisis in the Kivus*, at 8, Africa Report No. 91 (Mar. 30, 2005) [hereinafter *Crisis in the Kivus*], available at <http://www.crisisgroup.org/en/regions/africa/central-africa/dr-congo/091-the-congos-transition-is-failing-crisis-in-the-kivus.aspx>.

<sup>68</sup> See *id.*

<sup>69</sup> See *A Comprehensive Strategy*, *supra* note 52, at 2.

<sup>70</sup> See *id.* at 3-4.

<sup>71</sup> *Crisis in the Kivus*, *supra* note 67, at 6, 11-12, 19-20.

<sup>72</sup> *UN Joins Battle with Congo Rebels*, BBC NEWS, Oct. 27, 2008, <http://news.bbc.co.uk/2/hi/africa/7692932.stm>.

<sup>73</sup> S.C. Res. 1856, ¶ 3, U.N. Doc. S/RES/1856 (Dec. 22, 2008).

<sup>74</sup> MONUC's mandate, as expanded in S.C. Res. 1843, at 2, U.N. Doc. S/RES/1843 (Nov. 20, 2008) and S.C. Res. 1856, at 3, *supra* note 73, required it to protect the civilian population and authorized it to use force for that purpose. See *A Comprehensive Strategy*, *supra* note 52, at 4. Regarding the DRC's support for this expansion, see U.N. SCOR, 63rd Sess., 6055th mtg. at 9-10, U.N. Doc. S/PV.6055 (Dec. 22, 2008).

part of the DRC and traced to the Lusaka Agreement and later declarations. As we shall elaborate,<sup>75</sup> the Security Council had the power to authorize such an intervention even without the DRC's consent. However, doing so would have been far more difficult politically, and to some extent, legally.<sup>76</sup>

With the strengthening of MONUC, and after a series of meetings, the DRC invited Rwanda on December 5, 2008 to intervene on its behalf in the Kivu Conflict.<sup>77</sup> The premise of the surprising deal (surprising, since merely five years before, the DRC fought a bitter war to oust Rwanda from its territory), was that Rwanda would be allowed to act against the Hutu FDLR in the DRC's territory. In return, Rwanda promised to cease its support of Nkunda and assist in removing Nkunda from his influential position in the CNDP.<sup>78</sup> From that point on, the CNDP was effectively neutralized as an opposition force, as Nkunda was officially replaced and CNDP troops started a process of integration into the army of the DRC.<sup>79</sup> On January 20, 2009, joint military operations by Rwanda and the DRC commenced.<sup>80</sup> Two days later, Nkunda was arrested in Rwanda while trying to flee.<sup>81</sup> On February 25, the joint operations officially ended and Rwandan troops subsequently withdrew.<sup>82</sup> These joint operations, conducted by the DRC and Rwanda, represent a *proactive* and *explicit* consensual forcible intervention by a state on behalf of a government (assuming that Rwanda's previous involvement with the CNDP did not serve as coercion).

On March 23 of that year, the CNDP signed a peace treaty with the government.<sup>83</sup> However, the FDLR proved to be only partially weakened by the joint operation.<sup>84</sup> In May 2009, the FDLR launched deadly attacks against civilians,<sup>85</sup> sparking military operations by the DRC and MONUC that ended in December 2009.<sup>86</sup> Joint military action by the DRC and MONUC continued again in 2010. However, in April 2010, Joseph Kabila's government called for the termination of MONUC's mandate and demanded the complete withdrawal of all foreign forces by

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<sup>75</sup> *Infra* Section VIII.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 3.

<sup>78</sup> *Id.* at 3-4.

<sup>79</sup> *Id.* at 3-7.

<sup>80</sup> *Id.* at 5.

<sup>81</sup> *Id.* at 6.

<sup>82</sup> *Id.* at 9.

<sup>83</sup> Peace Agreement between the Government and Le Congres National Pour La Defense Du Peuple (CNDP) (Mar. 23, 2009), *available at* [http://www.iccwomen.org/publications/Peace\\_Agreement\\_between\\_the\\_Government\\_and\\_the\\_CNDP.pdf](http://www.iccwomen.org/publications/Peace_Agreement_between_the_Government_and_the_CNDP.pdf).

<sup>84</sup> *Id.* at 9-13.

<sup>85</sup> *Id.* at 12.

<sup>86</sup> *UN Ends Criticised Congo Campaign*, BBC NEWS, Dec. 16, 2009, *available at* <http://news.bbc.co.uk/2/hi/africa/8417450.stm>.

mid-2011.<sup>87</sup> In May 2010, MONUC's mandate (renamed MONUSCO) has been extended until June 2011.<sup>88</sup>

As we have seen, the DRC conflict, in its various stages, included consensual interventions of many different types and by numerous actors—states, non-states, and multinational forces. The following sections will attempt to place some of these interventions—and others—within the framework of the law of international agreements and the laws on the use of force.

#### IV. CONSENSUAL FORCIBLE INTERVENTION UNDER THE VIENNA CONVENTION ON THE LAW OF TREATIES

In order to identify the body of law that applies to a specific consensual intervention, it should first be established whether the consent is expressed in the form of an *international treaty*, and therefore is subject to the provisions of the 1969 Vienna Convention on the Law of Treaties.<sup>89</sup>

The basic condition for the application of the VCLT, as set forth in article I, is that the treaty must be between *states*. Thus, any agreement that might have been made between the ADFL (an opposition group), Rwanda and Uganda during the First Congolese Conflict,<sup>90</sup> or between these states and the RCD and the MCL in the Second Congolese Conflict,<sup>91</sup> could not have been subject to the provisions of the VCLT. The same conclusion applies to any possible agreement between Zaire (a state) and UNITA (a non-state actor) during the First Congolese Conflict,<sup>92</sup> or an agreement between the DRC (a state) and MONUC (an international force) during the Conflict in the Kivus.<sup>93</sup> However, the agreement at the end of the Kivu conflict, in which the DRC and Rwanda pledged to cooperate, may be potentially covered by the VCLT, as it was conducted between *states*.<sup>94</sup>

Even where consent is expressed between two (or more) states—meaning, a forcible intervention by state(s) in support of a consenting govern-

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<sup>87</sup> See *The United Nations and Congo: Unloved for Trying to Keep the Peace*, *ECONOMIST*, Apr. 17, 2010, at 51.

<sup>88</sup> S.C. Res. 1925, *supra* note 56, ¶ 1-2.

<sup>89</sup> Vienna Convention on the Law of Treaties May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

<sup>90</sup> See McNulty, *supra* note 43, at 180-81.

<sup>91</sup> See *supra* Section III.C.

<sup>92</sup> See *supra* Section III.B.

<sup>93</sup> See *supra* Section III.D.; see also MALGOSIA FITZMAURICE & OLUFEMI ELIAS, *CONTEMPORARY ISSUES IN THE LAW OF TREATIES* 16–21 (2005). Any agreement between the DRC and MONUC (as a U.N. body) can be potentially regulated by the not-yet-in-force Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, Mar. 21, 1986, U.N. Doc. A/CONF.129/15.

<sup>94</sup> See *A Comprehensive Strategy*, *supra* note 52, at 6.

ment—there are additional conditions that must be fulfilled for the VCLT to apply. In general, the consent-establishing agreements must fall within the ambit of the term *treaty*, as it is defined in article 2(1)(a) of the VCLT:

[A]n *international agreement* concluded between States in *written form* and *governed by international law*, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.<sup>95</sup>

Article 2(1)(a), therefore, sets forth three additional requirements for an agreement to constitute a *treaty*, for the purposes of VCLT applicability.

The *first* basic requirement is the mere existence of an *international agreement*—meaning, the element of consent. Practically, it is of course harder to establish that such *prima facie* consent existed, in cases where the consent was not *explicit*. Such may be the case with the Ugandan intervention in the Second Congolese Conflict.<sup>96</sup> After Laurent Kabila took power with the support of Uganda in May 1997, the latter continued to conduct operations in Eastern Congo with the consent of Kabila, this time in Kabila's capacity as the president of the DRC. Both parties acknowledged this consent, which was not initially expressed in the form of a written treaty.<sup>97</sup> On April 27, 1998, the DRC and Uganda concluded and signed a written "protocol," in which they agreed to "co-operate in order to insure security and peace along the common border," and "to put an end to the existence of the rebel groups."<sup>98</sup> Following the signing of the protocol, Uganda carried on with its operations in the DRC as before.

Later on, after the relations between the DRC and Uganda had soured and the Second Conflict had erupted, the DRC claimed that the words of the protocol did not constitute an "invitation or acceptance" regarding the operations of Ugandan troops in its territory, since the protocol did not *explicitly* refer to such operations.<sup>99</sup> The ICJ, however, held that the protocol can be "reasonably understood" as expressing consent to the presence of Ugandan troops, thereby recognizing that such consensual intervention can be based on *implicit* expressions of consent.<sup>100</sup>

The *second* requirement for an agreement to constitute a *treaty* is that it be in *written form*. In the context of consensual interventions, an example can be found in the U.S.-Iraq SOFA of November 2008, which provides:

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<sup>95</sup> VCLT, *supra* note 89, art. 2(1)(a) (emphasis added).

<sup>96</sup> See DRC v. Uganda, 2005 I.C.J. 168, ¶¶ 92-105.

<sup>97</sup> *Id.* ¶ 45.

<sup>98</sup> *Id.* ¶ 46.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* ¶ 47. It is interesting to note, that the ICJ ruled that, in any case, the *legal basis* for the consent was not the protocol, but the informal agreements between the parties, *antedating* the protocol.

The Government of Iraq requests the temporary assistance of the United States Forces for the purposes of supporting Iraq in its efforts to maintain security and stability in Iraq, *including cooperation in the conduct of operations* against al-Qaeda and other terrorist groups, outlaw groups, and remnants of the former regime.<sup>101</sup>

There can be little doubt that the SOFA, since it has been concluded between states, in a written form, is a *treaty* in the VCLT sense. However, it is reasonable to assume that many consensual forcible interventions are not products of extensive and formal treaties such as the SOFA, or even implicit written protocols such as the one between the DRC and Uganda. Rather, many are based on *ad hoc* agreements of an endless variety which, at the least, raise serious questions whether they amount to *treaties*. These can occur, *inter alia*, in the form of partially written agreements or in the form of an exchange of notes or letters, or, in rare cases, orally.<sup>102</sup> An expression of consent to an intervention of an informal—and potentially *oral*—nature can be found in the U.S. intervention in Lebanon in 1958. As an internal conflict between supporters of Lebanese President Camille Chamoun and the allegedly Nasserite opposition intensified, and was further brought to a boiling point following a brutal military coup in Iraq—on July 14, President Chamoun appealed to the U.S. embassy in Beirut for armed support.<sup>103</sup> Perhaps an indication of the informal nature of President Chamoun's consent was the surprised reaction by the Lebanese Army to U.S. Marines' sudden landing on Lebanon's beaches a day later. Since the Lebanese commanders were not notified of Chamoun's invitation, the U.S. ambassador rushed to the landing zone in order to prevent clashes between the parties.<sup>104</sup>

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<sup>101</sup> *Status of Forces Agreement*, *supra* note 7, art. 4(1) (emphasis added).

<sup>102</sup> Purely oral agreements that are obviously excluded from the application of the VCLT are not common in state practice. For a unique example, see ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 9 (2007).

<sup>103</sup> See Malcom Kerr, *The Lebanese Civil War*, in *INTERNATIONAL REGULATION OF CIVIL WARS* 77 (Evan Luard ed., 1972); see also Telegram from the Embassy in Lebanon to the Department of State (July 14, 1958), Department of State, Central Files, 783A.00/7-1458, available at <http://history.state.gov/historicaldocuments/frus1958-60v11/ch2> (reporting the request by the Lebanese President). In an emergency meeting of the Security Council, that convened by request of the U.S., it was explicitly clarified by the Lebanese representatives that U.S. forces were invited by Lebanon. See 1958 U.N.Y.B. 38, U.N. Sales No. 59.I.1.

<sup>104</sup> See BARRY M. BLECHMAN & STEPHEN S. KAPLAN, *FORCE WITHOUT WAR: U.S. ARMED FORCES AS A POLITICAL INSTRUMENT* 237 (1978); Kerr, *supra* note 103, at 77. It is interesting to note that President Chamoun has said, in the past, that he “did not believe in formal written alliances, but believed firmly in friendship, understanding and cooperation as bonds between peoples.” Telegram from the Embassy in Lebanon to the Secretary of State (Mar. 15, 1957), Department of State, Central Files, 120.1580/3-1557, available at <http://history.state.gov/historicaldocuments/frus1955-57v13/d137>.

Another example of an agreement of an ambiguous nature can be found in the consensual intervention by Rwanda in the Kivus in February 2009.<sup>105</sup> Like the 1958 Lebanon intervention, Rwanda's intervention was not backed by a document similar to the SOFA (or, to be precise, such agreement—if one existed—has not yet been made public), and its terms—namely, that Rwanda would be allowed to act against the FDLR in Eastern Congo, if it supported the DRC against General Nkunda—were not formulated in binding legal language.<sup>106</sup> However, it is clear that the intervention was based on an explicit agreement,<sup>107</sup> although it is unclear to what extent all of its obligations were “written.”

Other *ad hoc* means of expressing consent may include exchanges of letters.<sup>108</sup> While such interactions do not appear in the classic treaty form, they may still have written components. For instance, during the 1957 conflict in the Sultanate of Muscat and Oman, the Sultan of Muscat sent a letter to the British Government requesting “maximum military and air support” in order to subdue the insurrection of the Imamate of Oman against the Sultan.<sup>109</sup> In the Vietnam War (assuming, *arguendo*, that the conflict within South Vietnam itself was an internal one), the U.S. intervention followed a letter by President Diem of South Vietnam, that stated that South Vietnam “must have further assistance from the United States if we are to win the war.”<sup>110</sup> President Kennedy replied, that “in response to your [President Diem's] request, we are prepared to help the Republic of Viet-Nam to protect its people and to preserve its independence.”<sup>111</sup>

Such un-orthodox agreements will be analyzed on a case-by-case basis to determine whether they are covered by the VCLT.<sup>112</sup> In this context, the ICJ has displayed a lenient approach, holding that the nature of an agreement will be determined by its actual terms and the circumstances of the document's drafting, rather than by its pure form.<sup>113</sup> In the *Qatar v. Bahrain* case of 1994, the ICJ specifically addressed the status of meeting minutes, and adopted a pragmatic test, according to which agree-

<sup>105</sup> See *supra* Section III.D.

<sup>106</sup> See *A Comprehensive Strategy*, *supra* note 52, at 4.

<sup>107</sup> See *id.* at 2, 3-6.

<sup>108</sup> On “exchanges of notes,” see AUST, *supra* note 102, at 27.

<sup>109</sup> ANTONIO TANCA, FOREIGN ARMED INTERVENTION IN INTERNAL CONFLICT 150-51 (1993).

<sup>110</sup> Letter from President Diem to President Kennedy (Dec. 7, 1961), reprinted in VIETNAM AND AMERICA: A DOCUMENTED HISTORY 162-63 (Marvin E. Gettleman et al. eds., 1995).

<sup>111</sup> Letter from President Kennedy to President Diem (Dec. 14, 1961), reprinted in VIETNAM AND AMERICA: A DOCUMENTED HISTORY, *supra* note 110, at 164-65.

<sup>112</sup> The VCLT does not specify a particular form that a written argument should take to be considered a treaty. See AUST, *supra* note 102, at 19-20.

<sup>113</sup> The Aegean Sea Continental Shelf Case (Greece v. Turk.), 1978 I.C.J. 3, ¶ 96 (Dec. 19) (*cited in* FITZMAURICE & ELIAS, *supra* note 93, at 11-12).



ments exist where “[t]hey enumerate the commitments to which Parties have consented. They thus create rights and obligations in international law for the Parties.”<sup>114</sup>

While this standard is not easy to apply, it is not unreasonable to suggest that the exchange of letters between President Diem and President Kennedy could be considered a treaty. President Diem asked for assistance in order to win the war, while President Kennedy agreed to intervene for the sake of protecting the people of Vietnam and for the preservation of Vietnam’s independence. If this exchange is interpreted as one that conditions the intervention on its promotion of the goals outlined in the letters, there are grounds to label the letters a treaty.

The *last* of the formal requirements for a consensual intervention agreement to be considered a treaty is that it needs to be “governed by international law.”<sup>115</sup> This is a vague phrase. However, it is rather easy to establish that forcible intervention agreements fall within it, since forcible acts are undoubtedly governed by international law. It is also quite clear that parties to an intervention agreement intend it to be binding,<sup>116</sup>—at least regarding the intervention’s limits, since it would be implausible to interpret a party’s consent as one which grants rights for an open-ended intervention.

Once an intervention agreement is deemed a treaty, two basic provisions contained in the VCLT are of specific interest. The first is *pacta sunt servanda* (agreements must be kept),<sup>117</sup> which places an obligation on the intervening power to limit its intervention to the boundary of the consent. The second important principle is that a treaty based on coerced consent, due to the unlawful threat or use of force, is void.<sup>118</sup> This principle places a heavy burden on intervening powers that legitimize their actions based on retroactive consent. For instance, as aforementioned, one could theoretically argue that the SOFA, which aims to regulate the

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<sup>114</sup> Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.), 1994 I.C.J. 112, ¶¶ 24-25 (July 1), cited in FITZMAURICE & ELIAS, *supra* note 93, at 12-13.

<sup>115</sup> It should be noted that although article 102 of the U.N. Charter requires treaties to be registered, a breach of such a requirement does not result in the invalidation of the treaty and is not a constitutive requirement for the agreement’s status as a treaty. See FITZMAURICE & ELIAS, *supra* note 93, at 21-24.

<sup>116</sup> The term “governed by international law” is seen as encompassing the contractual principle of *intent to create legal obligations*. For the role of intent in treaty law, see *id.* at 26-28; AUST, *supra* note 102, at 20-21.

<sup>117</sup> VCLT, *supra* note 89, art. 26.

<sup>118</sup> See *id.* arts. 51-52. If, conversely, a treaty is a product of forceful coercion against an aggressor, it would be considered a “peace treaty” and article 75 of the VCLT would apply. See DINSTEIN, *supra* note 28, at 40.

presence of foreign forces in a counter-insurgency scenario, had been concluded under coercion.<sup>119</sup>

Whether an instance of consensual intervention is based on a treaty is important for the practical application of international law, as it is determinative of the source of the norms to be invoked in a particular situation. Notably, however, *pacta sunt servanda* and the negation of coerced consent would also apply to intervention agreements that do not constitute treaties in the strict sense.

#### V. CONSENSUAL INTERVENTION AS AN INTERNATIONAL AGREEMENT UNDER CUSTOMARY INTERNATIONAL LAW

Whether an agreement is written or not, and regardless of the form it assumes, the VCLT is not an exhaustive tool of international law. Its preamble explicitly affirms that “the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention.”<sup>120</sup> Furthermore, article 3 of the VCLT provides, *inter alia*, that:

The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:

- (a) the *legal force* of such agreements;
- (b) the *application* to them of any of the rules set forth in the present Convention to which they would be subject under international law *independently* of the Convention . . .<sup>121</sup>

Hence, the VCLT expressly recognizes that agreements that do not conform to its formal requirements may still constitute binding “international agreements.” Such agreements may have been made orally,<sup>122</sup> or implied by acquiescence of the target state in the context of a forcible intervention, or deduced from practice.<sup>123</sup> Article 3, therefore, stipulates that the

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<sup>119</sup> This follows, of course, if we accept the position that the U.S. use of force in Iraq was unlawful. *See generally*, CRIMES OF WAR: IRAQ (Falk et al. eds., 2006). However, it should be noted that the U.N. Security Council did not see the consent of the Iraqi government as invalid, regardless of the legality of the initial U.S. invasion. *See* S.C. Res. 1546, U.N. Doc. S/RES/1546 (June 8, 2004); S.C. Res. 1637, U.N. Doc. S/RES/1637 (Nov. 8, 2005); S.C. Res. 1723, U.N. Doc. S/RES/1723 (Nov. 28, 2006); S.C. Res. 1790, U.N. Doc. S/RES/1790 (Dec. 18, 2007).

<sup>120</sup> *See* VCLT, *supra* note 89, pmbl.

<sup>121</sup> *Id.* art. 3 (emphasis added).

<sup>122</sup> *See* AUST, *supra* note 102, at 9 (arguing that a “telephone conversation” agreement between Denmark and Finland in 1992 is legally binding).

<sup>123</sup> *See, e.g.*, DRC v. Uganda, *supra* note 32, ¶ 46 (holding that before the Second Congolese Conflict, the DRC’s acquiescence to the presence of Ugandan troops on its territory, and the practice of the two states, leads to an interpretation of a protocol signed by the parties as one permitting the Ugandan intervention).

provisions of the VCLT, so long as they represent international customary law, will still apply to such agreements.

The identification of the norms that constitute such customary law is not an easy task.<sup>124</sup> Nevertheless, even if only two uncontested and universally accepted customary rules exist in this area, one is *pacta sunt servanda*,<sup>125</sup> while the other is—that no agreement can be a product of coercion and duress—unlawful threat or use of force being the obvious example.<sup>126</sup> The rules would mean, in this context, that a forcible intervention—even if not treaty based—cannot exceed the boundaries of the consent extended and that any treaty is nullified if achieved through coercion.<sup>127</sup> These principles are further augmented by different provisions of the ILC Draft, which purports to codify the general conditions under which a state incurs responsibility for any internationally wrongful acts or omissions.<sup>128</sup> Its provisions, therefore, would theoretically apply to all “wrongful acts,” including those which are not related to treaties in the sense of the VCLT. Article 20 of the ILC Draft provides that “[v]alid 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.”<sup>129</sup> The application of this principle to consensual forcible intervention is rather straightforward: since forcible intervention is generally a wrongful act (as it prima facie violates the prohibition on the use of force set forth in the U.N. Charter), “valid consent” by a state (whether in the form of a treaty or otherwise) has the power to preclude this wrongfulness in relation to the consenting state, so long as the intervention is conducted within the limits of consent.<sup>130</sup> When the presence of the intervener becomes unwanted,—such as the case of the presence of Rwandan, Ugandan and

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<sup>124</sup> See Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495, 496 (1970), in *THE LAW OF TREATIES* 3 (Scott Davidson ed., 2004). But see AUST, *supra* note 102, at 13 (claiming that there has been no case in which the ICJ found that the VCLT convention “does not reflect customary law”).

<sup>125</sup> This principle is viewed by some as the “categorical imperative” of international law. See Josef L. Kunz, *The Meaning and the Range of the Norm Pacta Sunt Servanda* 39 AM. J. INT'L L. 180-81 (1945) and sources cited therein.

<sup>126</sup> See DINSTEIN, *supra* note 28, at 40. This principle was applied also in the historical case of alleged Austrian consent to its annexation by Nazi Germany (*Anschluss*). The Nuremberg Tribunal held that such consent did not exist, and even if so—it was coerced and thus invalid. See *International Military Tribunal (Nuremberg), Judgment and Sentences Oct. 1, 1946*, reprinted in 41 AM. J. INT'L L. 172, 192-94 (1947) (cited in *ILC Draft Commentary*, *supra* note 35, n.321).

<sup>127</sup> This principle provides the basis for the cautious approach that should be taken towards interventions that are based on retroactive consent—as the retroactivity may be a possible indication of coercion.

<sup>128</sup> See *ILC Draft Commentary*, *supra* note 35, art 1.

<sup>129</sup> See *id.* art. 20.

<sup>130</sup> See *Military Intervention and Host-State Consent*, *supra* note 9, at 210.

other forces in the territory of the DRC following the first Congolese Conflict,<sup>131</sup> or when the nature of the intervention deviates from what was agreed upon, the intervention might become wrongful and the intervener, accordingly, incurs state responsibility.<sup>132</sup>

Lastly, it is worthwhile to note that international agreements—treaties or otherwise—cannot contradict a peremptory norm of international law (*jus cogens*).<sup>133</sup> Any consent given to an intervention that violates such norms—is void. While technically this can be looked upon as an issue of procedural consent, it is essentially intertwined with the question of substantive consent—since it assesses the merits of the specific intervention itself.<sup>134</sup>

## VI. WITHDRAWAL OF CONSENT AND THE LAW ON THE USE OF FORCE

Article 2(4) of the U.N. Charter prohibits the “use of force against the territorial integrity or political independence of any state.”<sup>135</sup> It is thus clear that, in general, consensual forcible interventions in internal armed conflicts in support of a state are not prohibited.<sup>136</sup> As aforementioned, this principle is supplemented by article 20 of the ILC Draft, which recognizes “valid consent” by a state as precluding the wrongfulness of an act. However, when consent is withdrawn, or is no longer valid, state responsibility exists, and, in the specific context of the law on the use of force, the intervention becomes an aggression (and, accordingly, also an illegal intervention in the normative sense). This consequence is entrenched in article 3(e) of the Definition of Aggression, providing that aggression includes “[t]he use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement.”<sup>137</sup> Acts of aggression spawn consequences in the realm

<sup>131</sup> See *supra* Section III.C.

<sup>132</sup> See *ILC Draft Commentary*, *supra* note 35, at 73-74, ¶ 9.

<sup>133</sup> See VCLT, *supra* note 89, art. 53; *ILC Draft Commentary*, *supra* note 35, arts. 40-41. The VCLT itself does not enumerate which norms constitute *jus cogens*, nor is there any other authoritative list of such norms. Over the years, various sources referred to the prohibitions on aggression, colonialism, slavery, genocide, apartheid, torture, and forms of racial discrimination as *jus cogens*. Violations of general rules of self-determination, fundamental principles of humanitarian law and massive pollution have also been mentioned. See CASSESE, *supra* note 21, at 202-03. *But see ILC Draft Commentary*, *supra* note 35, at 112, ¶¶ 3-4.

<sup>134</sup> Such questions are of acute importance, but, as aforementioned, will not be analyzed in this article.

<sup>135</sup> U.N. Charter art. 2(4).

<sup>136</sup> See DINSTEIN, *supra* note 28, at 112.

<sup>137</sup> *Definition of Aggression*, *supra* note 31. See generally Julius Stone, *Hopes and Loopholes in the 1974 Definition of Aggression*, 71 AM. J. INT'L L. 224 (1977).

of the law on the use of force<sup>138</sup> and such consequences would be incurred in addition to any other remedies that may be available according to the VCLT or the ILC Draft.

An illustrative example is the Second Congolese Conflict. Recall that on July 27, 1998, Laurent Kabila—who assumed the presidency with the armed support of Rwanda and Uganda—“terminated” the presence of Rwandan forces in the DRC, concluding that “[t]his marks the end of the presence of all foreign military forces in the Congo.”<sup>139</sup> Rwanda and Uganda, however, lingered, resulting in the eruption of the Second Conflict.<sup>140</sup> The DRC proceeded to sue Uganda in the ICJ, and claim, *inter alia*, that Uganda’s actions constituted aggression.<sup>141</sup>

It is not contested that Kabila, first as the leader of the rebelling ADFL and, since May 1997, as the President of the DRC, consented to the presence of Rwandan and Ugandan troops.<sup>142</sup> However, the parties were at odds with regard to the question of the existence of consent following the July 27 declaration. Uganda claimed that because Kabila’s statement did not address Ugandan forces explicitly, but only referred to Rwandan forces, the statement did not constitute a withdrawal of the DRC’s consent.<sup>143</sup> The ICJ rejected this claim, holding that absent any specific terms, “no particular formalities” are required for consent to a forcible intervention to be withdrawn.<sup>144</sup> The court also stressed that the original consent given to Uganda was not “open ended” and therefore subject to certain restrictions. The court further held that the DRC’s consent was withdrawn “at the latest” by August 8, 1998 (two weeks after Kabila’s somewhat ambiguous declaration), when the DRC openly accused Uganda of invading its territory.<sup>145</sup> When reading the ICJ ruling, two questions arise: the first is whether consent can ever be “open ended,” while the second is whether (and if so, what) “formalities” are needed for the withdrawal of consent.

The answer to both questions seems to be negative. Dinstein, for instance, opines that even where consent is previously expressed in a formal treaty, it can always be withdrawn—even in cases of breach of the agreement—as long as the state still has a government capable of with-

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<sup>138</sup> These consequences on the law of the use of force include, namely, the right to self defense as entrenched in customary international law and article 51 of the U.N. Charter.

<sup>139</sup> See *supra* note 47 and accompanying text.

<sup>140</sup> See *supra* Section III.C.

<sup>141</sup> DRC v. Uganda, *supra* note 32, ¶¶ 43, 45. For a brief summary of the ruling in this case, see GRAY, *supra* note 32, at 78-80.

<sup>142</sup> DRC v. Uganda, *supra* note 32, ¶ 43.

<sup>143</sup> See *id.* ¶ 50.

<sup>144</sup> *Id.* ¶ 51.

<sup>145</sup> *Id.* ¶¶ 52-53.

drawing its consent.<sup>146</sup> This conclusion is based on the peremptory (*jus cogens*) norm of the prohibition on the use of force, as entrenched in article 2(4) of the U.N. Charter. Once consent is withdrawn, a violation of article 2(4) occurs, notwithstanding any treaty, since, treaty provisions cannot contravene *jus cogens*.<sup>147</sup> Wippman similarly argues that agreements authorizing forcible intervention are of a special type: they address issues that go to the core of a state's sovereignty and independence, as well as being of interest to the international community as a whole, since they deal with issues that may affect international peace. Thus, Wippman concludes, "the will of the State at the moment of intervention should prevail over the will of the State at the moment of treaty formation," and an implicit "right of revocation" should be read into intervention agreements.<sup>148</sup>

Having in mind the conclusions above, subjecting a withdrawal of consent to previously determined "formalities" also seems unreasonable. Considering the fact that the right of withdrawal trumps any treaty provisions to begin with, it is only logical that it also trumps the "formalities" stipulated by such a treaty.

## VII. THE SPECIAL CASE OF FORWARD-LOOKING CONSENT AND REGIONAL ORGANIZATIONS' DEFENSE TREATIES

### A. General

The question of withdrawal of consent is especially challenging in the context of "forward-looking" intervention agreements. Such agreements are those in which states, whether bilaterally or within the framework of a regional organization, grant general forward-looking permission to external parties to intervene forcefully in the states' territories, in the event that certain internal circumstances materialize.<sup>149</sup>

One perplexing scenario arising from forward-looking intervention agreements occurs when a state enters an agreement permitting future interventions for the sake of maintaining its own democratic structure—in essence, an anti-coup d'état arrangement—and following or during an internal armed conflict, a contending government seeks to revoke it.<sup>150</sup> States, undoubtedly, have the power to limit their sovereignty by treaty—

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<sup>146</sup> This capability of a government to withdraw its consent can be contrasted with the extreme case of when a state no longer has any central authority and has instead become a "failed state." DINSTEIN, *supra* note 28, at 116.

<sup>147</sup> *See id.*

<sup>148</sup> *See* Wippman, *Pro-democratic Intervention by Invitation*, *supra* note 9, at 315.

<sup>149</sup> It is important to distinguish between such agreements and collective self-defense agreements, which, conversely, deal strictly with mutual defense in the face of external threats to a member state. *See, e.g.*, North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243 (establishing NATO).

<sup>150</sup> *See* Wippman, *Pro-democratic Intervention by Invitation*, *supra* note 9, at 312. For a critical historical overview of such treaties, see Brad R. Roth, *The Illegality of*

and can even agree to cease to exist as separate entities by merging with other states. Does it follow, then, that states may also limit their sovereignty by granting a forward-looking permit for intervention, irrespective of the will of the later government in real-time?<sup>151</sup> Here, one examines questions of substantive consent, as the answer may depend on substantive analysis of the parties to the conflict.<sup>152</sup> Nevertheless, in order to analyze the main *procedural* aspects of such intervention agreements, and specifically whether a state retains the power to withdraw from them, we shall exemplify the issue through forward-looking intervention agreements in Africa.

### B. *Forward-Looking Intervention Treaties in Africa*

In the past two decades, forward-looking intervention agreements have been prevalent in Africa, on both the bilateral and regional levels. The Nigerian intervention in Sierra Leone in 1997, in favor of the ousted (and democratically-elected) President Ahmed Kabbah, is an example of an intervention based on a bilateral forward-looking agreement.<sup>153</sup> In that year, Sierra Leone and Nigeria signed a Status of Forces Agreement, granting Nigeria the “right” to use force to assist Sierra Leone against “internal or external threats.”<sup>154</sup> On May 26, 1997, one day after a junta forced him to flee to Guinea, President Kabbah requested Nigeria to intervene in his favor. Nigerian forces responded, but when met with stiff resistance by the junta, were forced to retreat.<sup>155</sup>

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“*Pro-Democratic*” *Invasion Pacts*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 9, at 328, 331-34.

<sup>151</sup> See Wippman, *Pro-democratic Intervention by Invitation*, *supra* note 9, at 312-13.

<sup>152</sup> For instance, Wippman argues that in cases where the political community of the state is clearly split, the authority to enter such treaty or revoke it should be divided between the different political communities. See *Who Can Say No*, *supra* note 9, at 612. This is clearly a question of substantive consent, as it assesses the extent to which a states’ government is representative of the political community, and the various parties’ effective control over territory, as preconditions for the validity of forward-looking consent.

<sup>153</sup> Other examples of bilateral forward-looking intervention agreements are those between Senegal, Guinea and Guinea-Bissau, which lead to Senegal’s intervention in Guinea-Bissau in 1998. See Jeremy Levitt, *African Interventionist States and International Law*, in AFRICAN INTERVENTIONIST STATES, *supra* note 4, at 28.

<sup>154</sup> See *id.* at 24 (quoting Status of Forces Agreement Between the Government of the Federal Republic of Nigeria and the Government of the Republic of Sierra Leone Concerning the Provision of Military and Security Assistance to the Republic of Sierra Leone, art. 21.1.1, 1997).

<sup>155</sup> See *id.* at 23. Eventually ECOWAS forces intervened also, by request of Kabbah, and expelled the junta. See *id.* at 23, 25-26. However, at that time, the intervention of ECOWAS was based on “real time” consent, rather than on a forward-looking intervention treaty. The same can be said regarding ECOWAS’s

The Nigerian intervention in Sierra Leone represents the classic dilemma of forward-looking intervention clauses, as it was a pro-democratic intervention undertaken against the will of the ruling junta. However, in terms of procedural consent, it does not represent a particularly hard case: President Kabbah gave *ad hoc* consent to the intervention while he was still the internationally recognized ruler of the state. Moreover, he did not lose control over most of the state, though he was personally forced into exile.<sup>156</sup> A harder case would arise where an established government actively withdraws its consent to a past intervention clause.

Such questions have become acute in the last decade, during which forward-looking intervention clauses have become a central pillar of African regional defense arrangements. The 1999 ECOWAS Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security (The Lomé Protocol) is a prime example.<sup>157</sup> Articles 21 and 22 of the Lomé Protocol permanently establish ECOMOG—The ECOWAS Cease-Fire Monitoring Group—a standing intervention force for immediate deployment. Article 25 stipulates the conditions in which the intervention “mechanism” will apply, and among them are instances of “internal conflict” that “threaten[ ] to trigger a humanitarian disaster,” “pose[ ] serious threat[s] to peace and security in the sub-region,” and threaten “an overthrow or attempted overthrow of a democratically elected government.” Notably, the authority to “initiate” “all forms” of intervention is delegated, in articles 10 and 26, to various ECOWAS organs, but not to the target state itself.<sup>158</sup> Thus, the Lomé

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intervention in Liberia in 1990. See David Wippman, *Enforcing the Peace: ECOWAS and the Liberian Civil War*, in ENFORCING RESTRAINT, *supra* note 19, at 157, 166-67.

<sup>156</sup> See Levitt, *supra* note 153, at 24.

<sup>157</sup> Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security, Dec. 12, 1999, ECOWAS Doc. A/P10/12/99 [hereinafter Lomé Protocol], available at <http://www.oecd.org/dataoecd/55/62/38873520.pdf>; see also DINSTEIN, *supra* note 28, at 115.

<sup>158</sup> In contrast to the Lomé Protocol, which is relatively clear in its provisions, the 2003 South African Development Community’s (SADC) Defense Pact, see SADC Treaty, *supra* note 61, does not include an explicit “forward-looking” intervention mechanism in cases of internal armed conflict and is very ambiguous—almost to the point of being unworkable—in its application. Instead, the SADC Defense Pact’s “Collective Action” mechanism is triggered by an “armed attack,” which is defined in article 1 as “the use of military force in violation of the sovereignty, territorial integrity and independence of a State Party.” It is not clear whether this article also encompasses such use of force from *within* the state’s territory. Internal armed conflict seems to be included in the pact’s definition of “destabilization” (article 1), which does not seem to mandate collective action. Destabilization is not addressed through the collective action mechanism of the Defense Pact (although it is brought under the SADC’s jurisdiction in article 11(2) of the SADC Protocol on Politics, Defense and Security Co-operation [hereinafter SADC Protocol], but only through a



Protocol serves as a forward-looking intervention treaty, as it bases the legality of future interventions on the consent by treaty of a past government, and does not condition intervention on real-time consent by the contemporaneous government. The 2002 Protocol Relating to the Establishment of the Peace and Security of the African Union (The AU Protocol) also constitutes a forward-looking intervention treaty.<sup>159</sup> Article 4(j) of the Protocol recognizes the “right” of the AU to “intervene in a Member State pursuant to a decision by the Assembly,” in “grave circumstances, namely war crimes, genocide and crimes against humanity.”<sup>160</sup> Accordingly, the Peace and Security Council has the power to recommend to the Assembly intervention in such cases.<sup>161</sup> However, forcible intervention strictly on pro-democratic grounds (for instance, when a coup d’état occurs) in absence of “grave circumstances” is not mandated by the Protocol. Rather, in those cases, non-forcible intervention will be applicable.<sup>162</sup> The Peace and Security Council can make decisions without the consent of the target state—hence the Protocol’s forward-looking nature—since a state is not allowed to vote in cases where it is a party to the conflict addressed by the Peace and Security Council.<sup>163</sup> The Peace and Security Council is authorized to “take initiatives and action” regarding potential or “full blown” conflicts,<sup>164</sup> and for that purpose, the Protocol establishes an “African Standby Force” , to be used, *inter alia*, for “intervention in a Member State” in “grave circumstances.”<sup>165</sup>

Of paramount importance is the “cold shoulder” that both Protocols (ECOWAS and AU) give to the U.N. Security Council’s monopoly on the authorization of forcible intervention. Controversially, protocols can be interpreted as providing that in the event of a withdrawal of the forward-looking consent by a Member State, ECOWAS and the AU will still have the power to intervene forcibly, even without Security Council authoriza-

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prohibition on assistance to any entity which “destabilizes” a Party state (article 8). Furthermore, article 7(2) provides that any assistance to a Party state be at its own “request” or “consent,” except where the SADC Summit decides otherwise; however, the Summit can only decide on such measures with Security Council authorization (article 11(3)(d)). The bottom line is that even if the Pact authorizes collective action in cases of internal armed conflict, if such action would be against a Party’s wish, Security Council authorization would be needed. *See generally* Benjamin Sirota, *Sovereignty and the South African Development Community*, 5 *CHI. J. INT’L L.* 343 (2004); *see also* Ngoma, *supra* note 61.

<sup>159</sup> Protocol Relating to the Establishment of the Peace and Security of the African Union, July 9, 2002 [hereinafter AU Protocol], *available at* [http://www.africanunion.org/root/AU/organs/psc/Protocol\\_peace%20and%20security.pdf](http://www.africanunion.org/root/AU/organs/psc/Protocol_peace%20and%20security.pdf).

<sup>160</sup> *Id.* art. 4(j).

<sup>161</sup> *Id.* art. 7(1)(e).

<sup>162</sup> *Id.* art. 7(1)(g).

<sup>163</sup> *Id.* art. 8(9).

<sup>164</sup> *Id.* arts. 9, 15.

<sup>165</sup> *Id.* art. 13(1).

tion. Thus, the Lomé Protocol is “mindful” of the U.N. Charter and namely to chapters V, VI and VII,<sup>166</sup> as it reaffirms the commitment of ECOWAS members to the “principles” of the Charter<sup>167</sup> and pledges to “cooperate” with the U.N.<sup>168</sup> However, the Lomé Protocol does not specify that ECOWAS will only act upon prior Security Council authorization. It merely requires a “report” to be submitted to the United Nations in case of intervention.<sup>169</sup> Elsewhere, it states that “[i]n accordance with Chapters VII and VIII of the United Nations Charter, ECOWAS shall *inform* the United Nations of any military intervention undertaken in pursuit of the objectives of this Mechanism.”<sup>170</sup>

This dramatic statement is echoed also in the AU Protocol. The AU Protocol, much like the Lomé Protocol, acknowledges that the UN Security Council “has the primary responsibility for the maintenance of international peace and security,” but does not explicitly subject AU interventions to Security Council authorization.<sup>171</sup> It merely stipulates that the AU Peace and Security Council shall “cooperate and work closely” with the UN Security Council.<sup>172</sup> Essentially, this can only be understood as a mechanism utilized by the AU to retain for itself the authority to intervene in “grave circumstances,” where the Security Council fails to do so. Much like the similar language in the Lomé Protocol, these provisions can place the AU in direct conflict with the UN, in cases where AU intervention is pursued against the will of the target

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<sup>166</sup> Lomé Protocol, *supra* note 157, pmb1.

<sup>167</sup> *Id.* art. 2.

<sup>168</sup> *Id.* art. 52.

<sup>169</sup> *Id.* art. 27.

<sup>170</sup> *Id.* art. 52 (emphasis added). Essentially, the Lomé Protocol can be understood as “reversing” the presumption of illegality of the use of force embodied in the U.N. Charter. While Chapter VII is understood to require an explicit Security Council authorization prior to the use of force, the Lomé Protocol’s article 52 suggests that by default, ECOWAS will be authorized to intervene forcibly. ECOWAS need only inform the Security Council, which in turn, will choose whether to condone or condemn the intervention. The Protocol does not, however, explicitly state what the reaction of ECOWAS will be in a case where the Security Council demands it to halt its intervention. For an analysis of the Lomé Protocol’s relation to the limitations imposed by the U.N. Charter, see ADEMOLA ABASS, REGIONAL ORGANISATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY: BEYOND CHAPTER VIII OF THE U.N. CHARTER 163 (2004).

<sup>171</sup> See Jean Allain, *The True Challenge to the United Nations System of the Use of Force: The Failures of Kosovo and Iraq and the Emergence of the African Union*, in 2004 MAX PLANCK U.N.Y.B. 237, 265-66, 284-89 (Armin von Bogdandy & Rüdiger Wolfrum eds., 2004) (arguing that the Protocol constitutes a serious challenge to Security Council authority—even to the point of “usurpation” of its power—since it is “unwilling” to subordinate itself to Security Council authorization for the use of force).

<sup>172</sup> AU Protocol, *supra* note 159, art. 17(1).

state—meaning when the state withdraws its forward-looking consent—and Security Council authorization to intervene is absent.

C. *The Prima-Facie Illegality of Forward-Looking Intervention Treaties and the Possible Effect of the Responsibility to Protect Doctrine*

Forward-looking intervention treaties, such as the Lomé and AU Protocols, which utilize past consent to intervene forcibly against the contemporaneous will of the state, are criticized for being contrary to the law on the use of force. Absent real-time consent, according to this reasoning, an intervention constitutes a breach of the prohibition on the use of force entrenched in article 2(4) of the U.N. Charter,<sup>173</sup> regardless of any past consent. Therefore, the treaty itself is void, as it is in contravention of *jus cogens*.<sup>174</sup>

Furthermore, the critics claim, complete subordination of the future “political destiny” of the state to foreign powers is in direct conflict with the principle of self-determination; it must therefore follow that “past consent is no consent.”<sup>175</sup> The fact that the consent is given within the institutional framework of a forward-looking treaty does not in itself change the capacity to withdraw the consent in real time. The discussion thus merges with the one presented in Section VI above, and leads to the same *prima facie* conclusion: in the absence of unique circumstances, which is a question of substantive consent,<sup>176</sup> the traditional understanding of international law leads to the conclusion that the right of with-

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<sup>173</sup> U.N. Charter art. 2(4).

<sup>174</sup> See Wippman, *Pro-Democratic Intervention by Invitation*, *supra* note 9, at 313; DINSTEIN, *supra* note 28, at 116; Roth, *supra* note 150 (criticizing the validity of such agreements). An alternative to the far-reaching conclusion that the Lomé and AU Protocols are void is to utilize purposive interpretation of these Protocols, as this method is enshrined in article 31(3)(c) of the VCLT, in a way that they do not contradict the *jus cogens* provisions of the U.N. Charter. Since both Protocols leave some ambiguity as to their relation with the Charter, this is not an impermissible interpretation.

<sup>175</sup> See Roth, *supra* note 150, at 329, 342.

<sup>176</sup> One possible scenario for such “unique circumstances” can be found in the case of Cyprus, where a 1960 inter-communal, power-sharing agreement (the Treaty of Guarantee) authorized forward-looking intervention by Turkey and the United Kingdom, when it is undertaken to maintain the power-sharing arrangements between Turkish and Greek Cypriots entrenched in the Cypriot Constitution. Wippman argues that absent agreement by both Turkish and Greek communities in Cyprus, the Cypriot Government could not withdraw its forward-looking consent. See Wippman, *Pro-Democratic Intervention by Invitation*, *supra* note 9, at 316-18. Another such scenario may be when the withdrawal of consent is pursued by a non-democratic government subsequent to a revolution. See Tom J. Farer, *A Paradigm of Legitimate Intervention*, in ENFORCING RESTRAINT, *supra* note 19, at 332-33 (addressing the question of a non-democratic government’s power to withdraw the

drawal of consent remains, irrespective of the language in the forward-looking treaty.

It is important to note that this section presented the traditional understanding regarding a state's right to withdraw consent from forward-looking intervention treaties. However, the challenges presented to the Security Council monopoly over the use of force—such as the ones manifested in the AU Protocol and Lomé Protocol—are not to be taken lightly, especially in light of the emerging Responsibility to Protect doctrine (RtoP).<sup>177</sup> These challenges are products of the U.N. Security Council's failure to fulfill its responsibility to act during several humanitarian crises,<sup>178</sup> which was a partial result of states' reluctant attitude towards interventions in Africa.<sup>179</sup> These protocols, therefore, represent a genuine concern, expressed by the states whose peoples have arguably suffered the most from mass atrocities in the past two decades—the African states—that the Security Council might again fail to act.<sup>180</sup>

The nexus between the question of procedural consent and RtoP may have legal effects over the capacity to withdraw consent from forward-looking intervention treaties within the framework of regional organizations. The RtoP doctrine binds sovereignty with responsibility, and thus, it could be argued, that a state may lose its right to withdraw consent to an intervention when it breaches its RtoP obligations.<sup>181</sup> It seems one can draw the logical conclusion that a government that fails to fulfill its responsibility to protect will also lose the capacity to withdraw its past

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consent of an ousted democratic government to external pro-democratic intervention).

<sup>177</sup> See ICISS Report, *supra* note 25. For a recent reference by the Security Council to the RtoP doctrine, see S.C. Res. 1970 U.N. Doc. S/RES/1970 (Feb. 26, 2011), pmb. (imposing sanctions on Libya following the attacks on civilians by the regime, and “recalling” Libya’s responsibility to protect populations).

<sup>178</sup> See Alex J. Bellamy, *Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq*, 19 ETHICS & INT’L AFF. 31 (2005); Nigel S. Rodley & Basak Cali, *Kosovo Revisited: Humanitarian Intervention on the Fault Lines of International Law*, 7 HUM. RTS. L. REV. 275 (2007).

<sup>179</sup> Following the military failure of American Led UNITAF forces in Somalia in 1994, President Clinton adopted the policy of “African solutions for African problems.” See Furley & May, *supra* note 42, at 7-9.

<sup>180</sup> In this sense, the protocols may be looked upon as fulfilling the role potentially reserved to regional organizations in the RtoP doctrine, according to some understandings of this doctrine. See ICISS Report, *supra* note 25, at 53-55 (suggesting that regional organizations have the authority to intervene within their “defining boundaries,” where the Security Council fails to act in the face of atrocities). *But see* 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 138-39 U.N. Doc. A60A/RES/60/1 (Oct. 24, 2005) (subjecting the authority to intervene based on the RtoP doctrine to Chapter VII of the U.N. Charter). See also *Report on Georgia*, *supra* note 9, at 284 (arguing that RtoP was “quickly limited” to U.N. authorized operations).

<sup>181</sup> See ICISS Report, *supra* note 25, at 12-16.

consent given to a forward-looking intervention treaty.<sup>182</sup> This notion, worthy of further exploration, is beyond the scope of this article.

### VIII. CONSENT AND CHAPTER VII FORCIBLE INTERVENTIONS

#### A. *Is Consent a Constitutive Legal Requirement for a U.N. Forcible Intervention?*

As mentioned above in Section III.D., during the Kivu Conflict of 2009 and 2010, the DRC explicitly consented to the intervention of MONUC forces on its territory to assist the DRC against FDLR and CNDP forces.<sup>183</sup> Had the DRC objected to the expansion of MONUC's mandate, would the legal situation have been necessarily different? As we shall see, consent by governments to a Chapter VII intervention has a mainly political significance. This is because Chapter VII does not require government consent as a legal precondition for enforcement measures to be applied, once a threat to peace, breach of peace or aggression has occurred.<sup>184</sup> Practically, it would be wise of the Security Council to ask for the consent of the "target" state in order to facilitate the operation of a Chapter VII authorized U.N. force and to bolster the political legitimacy of the force. Indeed, Bowett identified such a "tendency" to seek consent, and explained it as "political wisdom" rather than on "legal necessity."<sup>185</sup> However, consent might also increase the legal legitimacy of the intervention in two respects. First, it may quash questions arising from any potential obligations the Security Council owes to the principle of non-intervention.<sup>186</sup> Second, consent expressed by the "target" state

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<sup>182</sup> See, e.g., PHILLIP BOBBITT, *TERROR AND CONSENT* 233 (2008) (arguing that "there can be no tolerance for No-Go areas allegedly rendered off-limits by the sovereignty of regimes that have demonstrated no desire or capability to protect their own people . . .").

<sup>183</sup> See *supra* Section III.D.

<sup>184</sup> See U.N. Charter art. 39. In general, Chapter VII enforcement measures override state consent, whether the relevant government is a potential beneficiary of the intervention (host state) or a target of it (target state). However, Security Council "recommendations" under Chapter VI, naturally, require consent to materialize. See D.W. BOWETT, *UNITED NATIONS FORCES: A LEGAL STUDY* 412-13 (1964). Some might express the view that the sending of neutral peacekeeping forces—whether through Chapter VI or VII—always requires consent by all relevant parties, since these forces, by their very nature, cannot enter a state's territory forcibly. See Levitt, *supra* note 153, at 21; see also *Report on Georgia*, *supra* note 9, at 270 (arguing that peacekeeping forces, in general, have two "special attributes": their operation requires consent, and they are not mandated to use force).

<sup>185</sup> BOWETT, *supra* note 184, at 412.

<sup>186</sup> It could be argued that the presence of consent preempts an argument according to which the U.N. is violating the principle of non-intervention entrenched in Article 2(7) of the Charter. Granted, Article 2(7) provides that the principle of non-intervention "shall not prejudice" enforcement actions taken pursuant to a Chapter VII resolution. However, it is not mandated that the principle ceases to

can also grant the Security Council immunity from claims that it is legitimizing an illegal situation *ex post*. Such might be the case with Resolution 1546, in which the Security Council adopted a text that all but conditioned the presence of a multinational force (effectively, the coalition forces) in Iraq on the consent of the Interim Government of Iraq:

[The Security Council] [*n*]otes that the presence of the multinational force in Iraq is *at the request* of the incoming Interim Government of Iraq and *therefore reaffirms* the authorization for the multinational force under unified command established under resolution 1511 (2003), having regard to the letters annexed to this resolution.<sup>187</sup>

Assuming *arguendo* that the 2003 invasion of Iraq was a breach of the law on the use of force, it might be that the Security Council used deliberate wording, and in particular, the highlighting of the consent given, to distance itself from what it saw as a previously illegal act. Nevertheless, while consent may add to the political and legal legitimacy of a Chapter VII intervention, the lack of consent is not *solely* sufficient to annul the Security Council's authority to take such action.<sup>188</sup>

B. *Does a Withdrawal of Consent Have Legal Implications over a Forcible U.N. Intervention?*

Keeping in mind the above conclusions, is there any effect to a state's withdrawal of consent to a Chapter VII intervention? Withdrawal of consent to a forcible intervention by a state is all but an absolute right. Does the same rule apply when the intervening force is mandated by the U.N.? Returning to the Kivu Conflict, in April 2010 Joseph Kabila's government

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apply—as a whole—where Chapter VII is invoked. It is reasonable to interpret this reservation as stating that the principle of non-intervention cannot, in itself, preclude a Chapter VII intervention; however, this does not mean that the principle can be disregarded entirely by the Council when acting through Chapter VII. This interpretation is also reflected in Security Council practice: many Chapter VII resolutions affirm the “sovereignty” and “independence” of target states, notwithstanding the interventions authorized by these resolutions. This is true to non-forcible interventions as well as regarding forcible ones. *See, e.g.*, S.C. Res. 1511, U.N. Doc. S/RES/1511 (Oct. 16, 2003) (“authorizing” a multinational force in Iraq, while reaffirming “the sovereignty and territorial integrity of Iraq”); S.C. Res. 1843, *supra* note 74 (expanding the mandate of MONUC and reaffirming “its commitment to respect the sovereignty, territorial integrity and political independence of the Democratic Republic of the Congo”). For a similar argument, see DJURA NINËIÆ, *THE PROBLEM OF SOVEREIGNTY IN THE CHARTER AND IN THE PRACTICE OF THE UNITED NATIONS* 175-76 (1970) (exemplifying that in its resolutions regarding the Katanga affair in 1960, the Security Council did not claim an exemption from Article 2(7), but endeavored to show that it acts in accordance with that article); *see also* BOWETT, *supra* note 184, at 423-24.

<sup>187</sup> S.C. Res. 1546, ¶ 9, U.N. Doc. S/RES/1546 (Jun. 8, 2004) (emphasis on “at the request” and “therefore” added).

<sup>188</sup> BOWETT, *supra* note 184, at 414-15.

called for the termination of MONUC and asked for the complete withdrawal of all foreign forces by mid-2011.<sup>189</sup> Does this alter the legal position of MONUC? Recall, that the establishment of a U.N. peacekeeping force in the DRC was requested explicitly by the parties to the Lusaka Agreement of 1999.<sup>190</sup> Accordingly, Security Council Resolution 1279 noted this request and established MONUC, mainly mandating it to conduct missions of liaison, observation, and information gathering.<sup>191</sup> Resolution 1279 was adopted based on Chapter VI of the Charter, which authorizes the Security Council to make recommendations; thus, it could be reasonably argued that in this initial stage the DRC's consent was indeed constitutive with regards to MONUC's mandate (since Chapter VI recommendations, by nature, require the consent of those to whom the recommendation is addressed.)<sup>192</sup> However, since 2003, MONUC has been operating under Chapter VII resolutions,<sup>193</sup> and its mandate was expanded dramatically in 2008 to include forcible interventions, when Resolution 1843 called for "robust rules of engagement" and stressed MONUC's role in the protection of civilians.<sup>194</sup> Thus, once a threat to international peace and security was established, the DRC's consent was not legally necessary for MONUC's forcible intervention. Therefore, a withdrawal of such consent does not preempt the authority of the Security Council, irrespective of the fact that the initial establishment of the force was done pursuant to that state's consent following the Lusaka Agreement.<sup>195</sup> Nevertheless, the situation regarding the DRC's consent, and the possible implications of its withdrawal, is further complicated by Security Council Resolution 1856.<sup>196</sup> The text of this Resolution provides that the expanded mandate of MONUC will be exercised, "from

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<sup>189</sup> See *The United Nations and Congo: Unloved for Trying to Keep the Peace*, *supra* note 88.

<sup>190</sup> Article 3 of the Lusaka Agreement provides that "[t]he United Nations Security Council, acting under Chapter VII of the UN Charter and in collaboration with the OAU, shall be requested to constitute, facilitate and deploy an appropriate peacekeeping force in the DRC to ensure implementation of this Agreement." Dem. Rep. Congo: Lusaka Agreement art. 3, ¶ 11, U.N. Doc. S/1999/815. Although the agreement asked for a Chapter VII resolution, peacekeeping forces are usually operating under Chapter VI, and this is indeed the chapter according to which MONUC was initially founded.

<sup>191</sup> S.C. Res. 1279, ¶¶ 4-5, U.N. Doc. S/RES/1279 (Nov. 30, 1999).

<sup>192</sup> U.N. Charter ch. VI.

<sup>193</sup> MONUC's mandate was revised to a Chapter VII one in S.C. Res. 1484, U.N. Doc. S/RES/1484 (May 30, 2003). Substantively, MONUC's powers were not altered in this resolution. It seems that the DRC did not object to this change in MONUC's status. See U.N. SCOR, 58th Sess., 4784th mtg. at 21-22, U.N. Doc. S/PV.4784 (July 7, 2003) (highlighting comments by the permanent representative of the DRC).

<sup>194</sup> S.C. Res. 1843, *supra* note 74, ¶ 3-4.

<sup>195</sup> For a similar view, see BOWETT, *supra* note 184, at 421-22.

<sup>196</sup> S.C. Res. 1856, *supra* note 73.

the adoption of this resolution” in “close cooperation” with the government of the DRC.<sup>197</sup> Therefore, it seems that the Security Council has bound itself, and accordingly MONUC’s mandate, to the consent of the DRC. It is therefore a reasonable conclusion that a withdrawal of consent by the DRC could effectively end MONUC’s mandate. However, should the Security Council adopt a new resolution, which does not require “close cooperation” with the DRC, the Security Council would be authorized to extend MONUC’s presence—even against the DRC’s will.

In Resolution 1925 of May 28, 2010, the Security Council extended the mandate of MONUC—renamed MONUSCO (United Nations Organization Stabilization Mission in the Democratic Republic of the Congo)—until June 30, 2011.<sup>198</sup> The name change constituted recognition of the existence of a “new phase” in the DRC, which also prompted the Security Council to authorize the withdrawal of up to 2000 troops, where “the security situation permits.”<sup>199</sup> Furthermore, the Security Council called for “enhanced dialogue and partnership” with the DRC and decided “to keep under continuous review the strength of MONUSCO on the basis of assessments from the Secretary-General and the Government of the Democratic Republic of the Congo.” However, currently, the mandate of MONUSCO to use force has not been modified, in comparison with the force’s previous mandate under MONUC.<sup>200</sup> It thus seems that while Kabila’s aspiration to have all foreign forces withdrawn by mid-2011 will not be fulfilled, his threat to withdraw his government’s consent brought some changes—at least in rhetoric—to the operation of the U.N. forces in the DRC.

## IX. CONSENT BY NON-STATE ACTORS

### A. *The Potential of Non-State Actors to Acquire an International Legal Personality*

If and when non-state actors and opposition forces have the power to consent to external forcible interventions is a controversial question that goes to the core of the issue of substantive consent. As aforementioned, substantive consent questions are not addressed in this article. On the procedural level, we ask a more basic question: do these actors<sup>201</sup> have at least the potential to acquire an international legal personality enabling

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<sup>197</sup> *Id.* ¶ 3.

<sup>198</sup> S.C. Res. 1925, *supra* note 56.

<sup>199</sup> *Id.* ¶¶ 1-3.

<sup>200</sup> *Id.* ¶¶ 7, 12.

<sup>201</sup> It is crucial to distinguish between non-state actors and inter-governmental organizations. The latter’s powers, as opposed to any putative powers of non-state actors, are an extension of the sovereign power of their member states, delegated to them through state consent.



them to express consent?<sup>202</sup> As we shall see, the international community might recognize the international legal personality of such actors, when it reaches the conclusion that it is just to do so.<sup>203</sup> As one commentator remarked, “if states accept a non-state entity as a new international legal person there are no obstacles inherent in international law itself to prevent such a development.”<sup>204</sup>

Thus, while it is true that agreements between states, individuals and corporations are generally not regulated by international law,<sup>205</sup> there is a growing recognition that in some instances non-state actors might acquire an international legal personality—thereby also acquiring the power to conclude agreements governed by international law.<sup>206</sup> This position was expressed, for instance, in a commentary by the International Law Commission, in which it acknowledged the possible international legal status of “entities which are *neither* states nor international organizations.”<sup>207</sup>

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<sup>202</sup> “International legal personality” means, in general, the recognition of a party as a separate entity under international law, where the party is entitled to rights and is capable of undertaking obligations. See JANNE ELISABETH NIJMAN, *THE CONCEPT OF INTERNATIONAL LEGAL PERSONALITY: AN INQUIRY INTO THE HISTORY AND THEORY OF INTERNATIONAL LAW* 3 (2004) (defining international legal personality and providing an extensive theoretical overview of this concept).

<sup>203</sup> For a comprehensive analysis of the status of non-state actors in international law, both in theory and in practice (albeit less in the context of the use of force), see generally ANNA-KARIN LINDBLOM, *NON-GOVERNMENTAL ORGANIZATIONS IN INTERNATIONAL LAW* (2005).

<sup>204</sup> See *id.* at 63.

<sup>205</sup> Such was the case, for instance, in the Anglo-Iranian Oil Case, where the ICJ ruled that an agreement between the Iranian government and a British oil company was not subject to international law. See *Anglo-Iranian Oil Company (U.K. v. Iran)*, 1952 I.C.J. 20 (July 22); see also FITZMAURICE & ELIAS, *supra* note 93, at 18-20.

<sup>206</sup> LINDBLOM, *supra* note 203, at 487-89. In parallel to the growing recognition of the role of non-state actors in international law, the scrutiny of their actions has also increased. See George J. Andreopoulos, *Non-State Armed Groups*, in *NON-STATE ACTORS IN THE HUMAN RIGHTS UNIVERSE* 141 (George J. Andreopoulos et al. eds., 2006); see also *Report on Georgia*, *supra* note 9, at 313 (arguing that non-state actors are obligated to comply with human rights standards). Regarding the necessity of such increased scrutiny in order to fortify compliance with international law, see James R. Katalikawe et al., *Crises and Conflicts in the African Great Lakes Regions: The Problem of Non-Compliance with Humanitarian Law*, in *INTERNATIONAL LAW AND ORGANIZATION: CLOSING THE COMPLIANCE GAP* 121, 138-43 (Michael W. Doyle & Edward C. Luck eds., 2004).

<sup>207</sup> *Draft Articles on the Law of Treaties between States and International Organizations or Between International Organizations*, [1981] 2 Y.B. Int'l L. Comm'n 22, U.N. Doc. A/CN.4/SER.A/1981/Add.1, quoted in LINDBLOM, *supra* note 203, at 489 (emphasis added). Judge Kooijmans of the ICJ has also acknowledged the growing role of non-state actors in international law, and specifically, in the context of their role in international dispute-settlement systems. See Peter H. Kooijmans, *The Role of Non-State Actors and International Dispute Settlement*, in *FROM*

This notion was demonstrated in as early as 1974, when article 7 of the Definition of Aggression ambiguously stated that “peoples under colonial and racist regimes or other forms of alien domination” have the right to “to seek and receive support.”<sup>208</sup> Arguably, if such “peoples”—not constituting states per se—have rights to seek support, in whatever form, it follows that they must have the personality and the power to express consent to such support. Once a non-state actor’s international legal personality is recognized, the question of which rules govern the agreements to which the actor is a party, can be addressed.

B. *The Israel-P.L.O. Agreements as Instances of Consent by a Non-State Actor Recognized in International Law*

An informative example of a non-state actor that has gained an international legal personality—including in matters usually reserved for sovereigns—can be found in the development of the international status of the Palestine Liberation Organization (“P.L.O.”). Founded in 1964, the P.L.O. has endeavored, since its inception, to gain recognition as the exclusive political representative of the Palestinian people, even when it could not claim any *de facto* control over any territory.<sup>209</sup> The Arab states, challenged by the revolutionary fervor of the Palestinian militant groups, sought to “institutionalize” the P.L.O. and subject it—sometimes by force—to predictable and controllable norms of international relations.<sup>210</sup> It is possible to identify several milestones in this process.

In November 1969, after facing immense political and forcible pressure from the P.L.O., the Lebanese government agreed to sign the Cairo Agreement with P.L.O. chairman Yasser Arafat.<sup>211</sup> This agreement granted the P.L.O. *de facto* sovereignty over Palestinian refugee camps in Lebanon, and also permitted the P.L.O.’s burgeoning armed forces to use some Lebanese territory to stage attacks against Israel.<sup>212</sup> The agreement

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GOVERNMENT TO GOVERNANCE, 2003 HAGUE JOINT CONFERENCE ON CONTEMPORARY ISSUES OF INTERNATIONAL LAW 21, 24-27 (Wybo P. Heere ed., 2004).

<sup>208</sup> *Definition of Aggression*, *supra* note 31, art. 7.

<sup>209</sup> Initially, the P.L.O.’s founding was a project of Egypt’s Nasser, seeking to incorporate the Palestinian cause into his Pan-Arab vision. Simultaneously, the Syrian Ba’ath regime supported Fatah, an armed Palestinian group led by Yasser Arafat, as an answer to Nasser’s “annexation” of the Palestinian struggle. See Avraham Sela & Moshe Ma’oz, *The PLO in Regional Arab Politics: Taming a Non-State Actor*, in *PLO AND ISRAEL: FROM ARMED CONFLICT TO POLITICAL SOLUTION, 1964–1994*, 97-101, 103 (Avraham Sela & Moshe Ma’oz eds., 1997). Fatah took control over the P.L.O.’s institutions in 1968. See HELENA COBBAN, *THE PALESTINIAN LIBERATION ORGANIZATION: PEOPLE, POWER AND POLITICS* 43 (1984).

<sup>210</sup> Sela & Ma’oz, *supra* note 209, at 103.

<sup>211</sup> See FARID ELKHAZEN, *THE BREAKDOWN OF THE STATE IN LEBANON, 1967–1976*, 148, 161 (2000).

<sup>212</sup> See *id.* at 148, 161-65.

was never enforced, and the P.L.O. ended up exercising much more power in Lebanon than was agreed upon under the terms of the agreement. However, the Cairo Agreement was nevertheless important for being the first agreement that the P.L.O. signed with a sovereign state.<sup>213</sup> Thereafter, and through years of tumultuous events, the P.L.O. has gained more recognition as an international legal entity. For instance, the P.L.O. was recognized as the sole representative of the Palestinian people by the Arab League of States in October 1974,<sup>214</sup> and by the U.N. in November of that year when it also received observer status.<sup>215</sup> The P.L.O. also participated in important international conferences in the late 1970s<sup>216</sup> and was finally recognized by Israel in 1993, following the P.L.O.'s recognition of Israel.<sup>217</sup> The mutual recognition preceded the negotiation of a series of detailed operational agreements.<sup>218</sup>

It seems that the agreements between the P.L.O. and Israel must be governed by international law, albeit not by the VCLT.<sup>219</sup> Thus, it comes as no surprise that the ICJ has addressed the Israel-P.L.O. agreements as having international-legal implications without much deliberation.<sup>220</sup> This conclusion also appears correct when analyzing these agreements

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<sup>213</sup> *Id.* at 162.

<sup>214</sup> This recognition was given in the Rabat Summit. See Nur Masalha, *Jordan—History, in THE MIDDLE EAST AND NORTH AFRICA* 609, 613 (Lucy Dean ed., 50th ed. 2004).

<sup>215</sup> G.A. Res. 3236 (XXIX), U.N. Doc. A/RES/3236 (Nov. 22, 1974); G.A. Res. 3237 (XXIX) U.N. Doc. A/RES/3237 (Nov. 22, 1974).

<sup>216</sup> G.A. Res. 3237, *supra* note 215. Also note that the P.L.O. has participated as the representative of the Palestinian people in several international conferences, among them the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. The presence of the P.L.O. mission on U.S. territory sparked a controversy between the U.S. and the U.N., when the former sought to limit the P.L.O.'s presence. The matter eventually found its way to the ICJ in *Applicability of the Obligation to Arbitrate under Section 21 of the U.N. Headquarters Agreement of 26 June 1947*, Advisory Opinion, 1988 I.C.J. 12 (Apr. 26). For many other milestones of the relations between the P.L.O. and the United Nations, see PERMANENT OBSERVER MISSION OF PALESTINE TO THE U.N., STATUS OF PALESTINE AT THE UNITED NATIONS, available at <http://www.un.int/wcm/content/site/palestine/pid/11532>.

<sup>217</sup> Letter from Prime Minister Yitzhak Rabin to Chairman Yasser Arafat (Sept. 9, 1993), reprinted in Ruth Lapidoth, *The Peace Process—Introduction* 28 *ISR. L. REV.* 207, 207-08, 440-41 (1994). The letter was received following the P.L.O.'s recognition of Israel and renunciation of terrorism and violence.

<sup>218</sup> Namely, the Palestinian-Israeli Liberation Organization: Interim Agreement on the West Bank and Gaza Strip, *Isr.-P.L.O.*, Sept. 28, 1995, 36 *I.L.M.* 551.

<sup>219</sup> See FITZMAURICE & ELIAS, *supra* note 93, at 20 (addressing the Israel-P.L.O. agreements as those of “quasi-international character” which are not covered by the VCLT).

<sup>220</sup> See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, 2004 I.C.J. 136, ¶ 118 (July 9); *id.* at 120, ¶

through a substantive prism; since they address issues of *de facto* sovereignty, security, and (temporary) borders—clearly subjects of international law—it is logical that norms of international law would govern them.

The P.L.O. has consented to interventions in internal armed conflicts in the past<sup>221</sup> and has also been requested to intervene in such conflicts.<sup>222</sup> However, the discussion above does not purport to judge these interventions. It merely serves to demonstrate that there are indeed cases in which non-state actors may be recognized as international legal entities, and therefore as possessing the general power to express consent in international law. Once we agree that there is at least one case where this assumption is correct, then we must recognize that such potential may theoretically exist in other non-state actors as well.<sup>223</sup>

### C. *A Brief Survey of Rules Governing Procedural Consent by Non-State Actors*

If we accept that in some cases non-state actors may have the international legal power to express consent, the question becomes which rules govern the agreements to which these actors are parties. Although there are no international legal tools that explicitly regulate such agreements, the basic rules applicable to agreements between states should also apply when one party is a non-state actor that possesses an international legal personality. Indeed, it is implausible that in relations between a state and a non-state actor on the international level, one of the parties will have the *legal* power to disregard an agreement or to coerce the other party to consent to one, simply because the agreement is not between *states*. Therefore, once we recognize that a certain non-state actor gains an international legal personality, it is reasonable to accept that agreements to which a non-state actor is a party, would be at least subject to the basic and universally accepted norms of customary international law. In the context of interventions, the main relevant principles would be the aforementioned norms of *pacta sunt servanda* and the invalidity of consent gained through coercion.

This conclusion is embodied by article 3 of the VCLT, which reaffirms that agreements “between states and *other* subjects of international

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2.4 (separate opinion of Judge Elaraby) (opining that these arguments were “contractual” and “legally binding”).

<sup>221</sup> Namely, the Syrian intervention in Jordan (1970) and Lebanon (1975–1976). See Sela & Ma’oz, *supra* note 209, at 108; NAOMI JOY WEINBERGER, SYRIAN INTERVENTION IN LEBANON: THE 1975–1976 CIVIL WAR 130, 142 (1986).

<sup>222</sup> For example, the P.L.O. was notably requested by Idi Amin’s Uganda to intervene and to oppose the 1979 Tanzanian attack and internal mutineers. See Oliver Furlley & Roy May, *Tanzania’s Military Intervention in Uganda*, in AFRICAN INTERVENTIONIST STATES, *supra* note 4, at 69, 83–84.

<sup>223</sup> See LINDBLOM, *supra* note 203, at 63.

law”<sup>224</sup> are still subject to laws of international agreements (entrenched in customary international laws), although they are not treaties *stricto sensu*. This notion is also fortified by articles 9 and 10 of the ILC Draft. Article 9 of the Draft provides that in exceptional situations, where there is an “absence or default” of official authority, an act committed by a person or group exercising “in fact” elements of governmental authority can be attributable to the defaulting state.<sup>225</sup> This provision applies where a recognized government still exists, and it thus concerns non-state actors directly—as opposed to a new *de facto* government.<sup>226</sup> Article 10 of the ILC Draft provides that acts of an “insurrectional movement” become acts of the state, should the movement succeed in replacing the government, or in establishing a government in a separate territory. For instance, the consent given by the ADFL as an opposition movement, to the forcible intervention by Rwanda and Uganda in the First Congolese Conflict, could constitute retroactive state consent by the DRC after Kabila assumed power—even if no further agreements regarding the issue would have been made.<sup>227</sup>

With respect to forcible interventions, articles 9 and 10 of the ILC Draft bear another meaning that is relevant to the rules governing non-state actors’ consent. If we are willing to attribute acts by non-state actors to states under some circumstances, it follows that the validity and legality of such acts are also determined and controlled by the same rules that control state actions. Thus, when a non-state actor expresses consent in situations governed by articles 9 or 10, this consent will be subject to the aforementioned rules regarding procedural consent by states.

## X. CONCLUSION

This article addressed various aspects of procedural consent to forcible intervention, or the process of the expression of consent from a party to an internal armed conflict to an external element, independent of the considerations of the party’s internal legitimacy (otherwise known as substantive consent). Using the conflicts in Zaire/DRC between 1996–2010 as an example, we discussed the complex dynamics of consent, demonstrating that such consent can be explicit or implicit, proactive or retroactive, and may be expressed in forcible interventions by states (and regional organizations), U.N. Forces, or non-state actors.

Then, we analyzed the application of the VCLT to consensual interventions, and deduced that the main “contractual” principles that affect such consent are *pacta sunt servanda*—meaning that an intervention cannot exceed the terms of consent, and that the rule invalidating consent that is

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<sup>224</sup> VCLT, *supra* note 89, art. 3 (emphasis added).

<sup>225</sup> See *ILC Draft Commentary*, *supra* note 35, at 49, ¶¶ 1-3.

<sup>226</sup> See *id.* ¶¶ 4-5.

<sup>227</sup> For the development of this rule in international law, see *ILC Draft Commentary*, *supra* note 35, at 51-52, ¶¶ 12-14 and the sources cited therein.

given under coercion. We concluded that since these principles are basic tenets of customary international law, they must also apply to intervention agreements which are not expressed in the form of a treaty.

Addressing the issue of the withdrawal of consent, we also argued that such withdrawal is always permissible, regardless of the language of the initial consent. Furthermore, when such withdrawal is not respected by the intervener, the intervener effectively becomes an aggressor. However, we also discussed the issue of forward-looking intervention agreements and concluded that although a state's withdrawal of consent generally trumps the provisions of such agreements, the emerging doctrine of the Responsibility to Protect may affect the scope of this right of withdrawal.

Regarding the question of consent and Chapter VII forcible interventions, it seems that while consent in such situations plays mainly a political role, it also has some secondary legal implications—namely, potentially invalidating claims of a violation of the norm of non-intervention by the Security Council, and allowing the Security Council to regulate illegal uses of force *ex post*.

Lastly, we demonstrated that contemporary international law recognizes, in some instances, the international legal personality of non-state actors—and thus, potentially, their power to express procedural consent. This possibility was exemplified through the development of the legal status of the P.L.O. We then claimed that if such status exists, the consent expressed by non-state actors must be controlled by the same basic customary rules of international law that regulate state consent.