RE-EXAMINING THE DIMENSIONS OF EXTERNAL FORCIBLE INTERVENTIONS IN INTERNAL CONFLICTS*

*Gemmo Bautista Fernandez***

ABSTRACT

The rule concerning the probation against the intervention of states on the territory of others remains one of the most complex and controversial principles of international law. Despite the prohibition, the past years have been marked by an increasing number of cases where states have participated or aided in acts of violence in another state's territory. States have frequently justified these actions on the basis of consent of the territorial state and other substantive grounds. The Article argues that rules on external intervention somehow exist, evinced by the appeal of states to exceptions, but are nebulous as to their nuances. It examines the rules on external interventions conducted upon invitation of a state. It also delves into the other side of the picture and considers interventions done in support of armed opposition groups in conflict with the incumbent government. It covers the instances in which states have used armed force in the territory of another state on the basis of the "unwilling or unable" doctrine. Finally, the Article analyses the observations derived from the first three parts and proposes rudimentary guidelines to remedy the situation.

I. INTRODUCTION

Under current international law, there is a broad prohibition on states against intervening in the territory of other states.[1] The rule is not only

---

* *Cite as* Gemmo Bautista Fernandez, *Re-examining the Dimensions of External Forcible Interventions in Internal Conflicts,* 92 PHIL. L.J. 497, [Pincite] (2019).

** Doctor of Philosophy, Australian National University (Candidate); LL.M., University of Sydney (2019); J.D., University of the Philippines (2016); B.S. Applied Mathematics in Finance, Ateneo de Manila University (2011).

[1] Gregory Fox, *Intervention by Invitation, in* OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 818 (Marc Weller ed., 2015), *citing* Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, U.N. Doc. A/RES/2625(XXV) (1970); Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, U.N. Doc. A/RES/2131(XX) (1965); Draft Declaration on Rights and Duties of States, U.N. Doc. A/RES/375 (1949).

embodied in the United Nations Charter ("Charter") but has also been confirmed as a part of customary international law.[2] However, the prohibition does not pertain to all forms of external involvement in domestic matters but only against matters that international law has reserved to states for their own autonomous decision-making.[3] Accordingly, an important precluding element is that of coercion or the use of force.[4]

The current law on the matter notwithstanding, the prohibition against external forcible interventions in internal conflicts "remains one of the most complex and controversial principles of international law."[5] As a formal matter, international law has long treated these conflicts "as a matter of domestic jurisdiction."[6] Yet, in some cases, international law allows, or is claimed to admit, particular exceptions. Nonetheless, the nuances of these exceptions appear to be unsettled. For one, there exists great difficulty in determining when external assistance to the incumbent government threatens the territorial integrity or political independence of a state.[7] Equally, residual questions remain as to the legality of the assistance given to armed opposition groups.

This complexity is evinced by the fact that despite the prohibition, the past years have been marked by an "increasing number of cases" where states have participated or aided in "acts of violence in another state's territory."[8] Of course, some of these interventions were done under the authorization of the U.N. Security Council ("Council") such as the actions conducted in Haiti,

---

[2] Keith Petty, *Criminalising Force: Resolving the Threshold Question for the Crime of Aggression in the Context of Modern Conflict*, 33 SEATTLE U. L. REV. 105, 121 (2009), *citing* Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 I.C.J. 14 (June 27); Wladyslaw Czaplinski, *Sources of International Law in the Nicaragua Case*, 38 INT'L & COMP. L.Q. 151, 158 (1989); *See* Chris O'Meara, *Should International Law Recognise a Right of Humanitarian Intervention?*, 66 INT'L & COMP L.Q. 441, 445 (2017).

[3] Fox, *supra* note 1, at 819, *citing* Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.) [hereinafter "Military and Paramilitary Activities"], Judgment, 1986 I.C.J. Rep. 14 (June 27).

[4] *Military and Paramilitary Activities*, 1986 I.C.J. Rep. 14, ¶ 205.

[5] HANSPETER NEUHOLD, LAW OF INTERNATIONAL CONFLICT FORCE, INTERVENTION AND PEACEFUL DISPUTE SETTLEMENT 159 (Martinus Nijhof ed., 2015).

[6] David Wippman, *Change and Continuity in Legal Justifications for Military Intervention in Internal Conflict*, 27 COLUM. HUM. RTS. L. REV. 435, 435 (1996), *citing* Oscar Schachter, *Right of States to Use Armed Force*, 82 MICH. L. REV 1620, 1641 (1984).

[7] John Moore, *The Control of Foreign Intervention in Internal Conflict*, 9 VA. J. INT'L L. 205, 211 (1969).

[8] Oliver Dörr & Albrecht Randelzhofer, *Article 2(4) in* I CHARTER OF THE UNITED NATIONS: COMMENTARY 211 (Bruno Simma et al. eds., 2012) (1995).

Cote d'Ivoire, Iraq, Somalia, Bosnia, Libya, and Rwanda.[9] Yet, others were done without such an authorization, although with the invitation of the incumbent government. Examples of such interventions are the actions of the former Soviet Union in Afghanistan,[10] the Economic Community of West African States (ECOWAS) in Liberia and Sierra Leone,[11] France in Mali,[12] and Uganda in South Sudan.[13] However, others were still done unilaterally as in the case of the North Atlantic Treaty Organization (NATO) in Kosovo,[14] the United States in Nicaragua,[15] France in Libya,[16] and that of several states in Syria.[17]

Thus, the need to clarify the rule becomes even more evident considering the growth in the number of external forcible interventions.[18] The bases for such interventions include, but are not limited to, consent,[19] counter-intervention,[20] and humanitarian grounds.[21] However, such are nebulous as to their extent and nuances thereby giving rise to the confusion as to its normative status. This state of the rule is what the Article seeks to delve into. *Part I* examines the rules on external interventions conducted upon invitation of a state. On the other hand, *Part II* delves into the other side of

---

[9] Elkanah Oluwapelumi Babatunde, *ECOWAS and the Maintenance of International Peace and Security: Protecting the Right to Democratic Governance*, 6 UCL J. L. & JURIS. 46, 55 (2017); Kenneth Heath, *Could We Have Armed the Kosovo Liberation Army—New Norms Governing Intervention in Civil War*, 4 UCLA J. INT'L L. & FOREIGN AFF. 251, 296 (1999).

[10] Patrick Terry, *Afghanistan's Civil War: Illegal and Failed Foreign Intervention*, 31 POL. Y.B. INT'L L. 107, 113 (2011).

[11] Christine Chinkin, *Legality of NATO's Action in the Former Republic of Yugoslavia Under International Law*, 49 INT'L & COMP. L.Q. 910, 915 (2000).

[12] *See* Karine Bannelier & Theodore Christakis, *Under the UN Security Council's Watchful Eyes: Military Intervention by Invitation in the Malian Conflict*, 26 LEID. J. INT'L L. 855 (2013).

[13] Erika Wet, *Modern Practice of Intervention by Invitation in Africa and its Implications for the Prohibition of the Use of Force*, 26 EUR. J. INT'L L. 979, 981 (2015).

[14] David Wippman, *Pro-Democratic Intervention*, *in* Fox *supra* note 1, at 799.

[15] *See Military and Paramilitary Activities*, 1986 I.C.J. Rep. 14, ¶ 246.

[16] Brad Roth, *The Virtues of Bright Lines: Self-Determination, Secession, and External Intervention*, 16 GER. L.J. 384, 179 (2015).

[17] Karine Bannelier-Christakis, *Military Interventions against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent*, 29 LEID. J. INT'L L. 743, 745 (2016).

[18] *See* Eliav Lieblich, *Intervention and Consent: Consensual Forcible Interventions in Internal Armed Conflicts as International Agreements*, 29 B.U. INT'L L.J. 337, 339 (2011); ROSALYN HIGGINS, THEMES AND THEORIES: SELECTED ESSAYS, SPEECHES, AND WRITINGS IN INTERNATIONAL LAW 273 (2009); Wolfgang Friedmann, *Intervention, Civil War and the Role of International Law*, 59 AM. SOC'Y INT'L L. PROC. 67, 70 (1965).

[19] Heath, *supra* note 9, at 278.

[20] Tom Ruys & Luca Fero, *Weathering the Storm: Legality and Legal Implications of the Saudi-led Military Intervention in Yemen*, 61 INT'L & COMP L.Q. 61, 89 (2016).

[21] Niki Aloupi, *Right to Non-intervention and Non-interference*, 4 CAM. J. INT'L & COMP. L. 566, 580 (2015).

the picture and considers interventions done in support of armed opposition groups in conflict with the incumbent government. *Part III* covers the instances in which states have used armed force in the territory of another state on the basis of the "unwilling or unable" doctrine. Finally, *Part IV* analyses the observations derived from the first three parts and submits rudimentary guidelines to aid in providing a remedy to the situation.

II. INTERVENTIONS UPON INVITATION OF A STATE

It has long been submitted that there is "generally no prohibition on assisting recognised governments" in internal conflicts. The rule appears fairly straightforward: states are entitled to have their territory free from external interventions and are likewise free to consent to intervention that might otherwise violate that independence in the absence of such consent.[22] Thus, forcible interventions are said to be consistent with the Charter provided that the intervening state stays within the scope of the given consent.[23] Accordingly, cases such as that of the French intervention in Mali in 2013 are generally allowed.[24]

Nevertheless, the rule as forthright as it may seem must be taken with caution. It appears to be an overstatement that may not be true in all cases.[25] The claim does not delve into the nuances of such a right, such as the "government's control over territory, its record in power, or the nature of the opposition it seeks to aid in resisting."[26] Thus, several factors must be considered—the manner in which consent was provided, the legal authority of the government and its control over its territory, and the status of the internal conflict.[27] Simply, the fact that interventions by invitation may be allowed under international law does not mean that it is authorized in all

---

[22] Fox, *supra* note 1, at 821; Babatunde, *supra* note 9, 88, *citing* Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda) [hereinafter "Armed Activities"], Judgement, 2005, I.C.J. Rep. 168, ¶¶ 42–54 (Dec. 19); *Military and Paramilitary Activities,* 1986 I.C.J. Rep. 14, ¶ 205.

[23] Babatunde, *supra* note 9, at 88.

[24] France responded to the request of the government of Mali and launched operations against armed terrorist groups in January 2013. Also present where forces from several African countries pursuant to United Nations Security Council Resolution 2085. Bannelier & Christakis, *supra* note 12, at 856.

[25] Fox, *supra* note 1, at 821.

[26] *Id.*

[27] Aloupi, *supra* note 21, at 578; Bannelier-Christakis, *supra* note 17, at 745.

cases.[28]

From the above, the "legalising effect" of consent to intervention may first depend on its procedural validity. There must be a genuine expression of consent instead of being a result of coercion of any kind.[29] Accordingly, five conditions have been submitted to be fulfilled. *First*, the consent must be clear and express.[30] *Second*, "in light of the impact on the state's territorial integrity or inviolability, consent for the act must emanate from the highest authorities of the state."[31] *Third*, the state's consent must not be vitiated and not be obtained by means of coercing a representative of the state.[32] *Fourth*, "the consent must have been given prior to the intervention" as *ex-post facto* consent may not "serve to expunge the prior breach of the prohibition on the use of force."[33] Following this, "instances of retroactive consent [...] will require a high threshold of proof that such genuineness exists."[34] Finally, "the foreign military assistance needs to remain within the scope of the consent."[35]

It is also worth noting that other means of providing consent to foreign intervention have also been forwarded but have not been without issue. For instance, there is a view that pertains to implied consent.[36] Under the rule, "states could undertake military interventions on foreign territory invoking implied consent or hoping for a retrospective one."[37] This, of course, has been criticized to be open to abuse as weaker states would often have to tolerate forcible interventions as they are not able to challenge the actions of more powerful states to whom they are dependent.[38]

Similarly, "forward-looking intervention treaties," such as that of the Lombe and African Union Protocols,[39] have also been criticized. These

---

[28] Bannelier-Christakis, *supra* note 17, at 746.

[29] Lieblich, *supra* note 18, at 341.

[30] *Id.*

[31] Ruys & Fero, *supra* note 20, at 81, *citing* Dörr & Randelzhofer, *supra* note 8, 214–16.

[32] *Id.*

[33] *Id.*

[34] Lieblich, *supra* note 18, at 351.

[35] Ruys & Fero, *supra* note 20, at 81, *citing* Dörr & Randelzhofer, *supra* note 8, 214–16; Fox, *supra* note 1, at 821.

[36] This flows from the principle *qui tacit consentire*, *see* Bannelier-Christakis, *supra* note 17, at 768.

[37] *Id.*

[38] Bannelier & Christakis, *supra* note 12, at 768; John Hargrove, *Intervention by Invitation and the Politics of the New World Order*, *in* LAW AND THE FORCE IN THE NEW INTERNATIONAL ORDER 119 (Lori Damrosch & David Scheffer eds., 1991).

[39] These two protocols are examples of agreements that provide for states parties to forcibly intervene in the territory of another state party to maintain a particular state of affairs

mechanisms employ consent given in the past to allow other states to forcibly intervene. It has been said that such means may be contrary to the contemporaneous will of the state, and thus, contrary to the law on the use of force.[40] While consent to such an agreement may represent the view of the government at the time of the treaty's execution, such does not guarantee that support exists at the time the intervention occurs.[41]

Aside from its procedural validity, the substantive part or the capacity of the state to provide consent must also be examined. In some cases, "the incumbent government may collapse or be so reduced in stature as to constitute simply another warring faction"[42] as what happened in Somalia.[43] Thus, an analysis of the question "requires the consideration of perplexing legal problems involving the difficulty of specifying which party [...] has the power to invite an external intervention or consent to it."[44] What has been submitted is that the inviting state must meet the test of legitimacy or effectiveness.[45]

Legitimacy is "viewed in terms of how the people perceive their government at a particular moment in its history."[46] At the same time, it is forwarded that it could be determined by whether or not it exercises its power in a manner consistent with "basic political freedoms and the rule of law."[47] However, the problem is that international law does not provide the standards

---

as stipulated in the treaty which may be against the contemporaneous will of the state. Wippman, *supra* note 14, at 809.

[40] Lieblich, *supra* note 18, at 371.

[41] David Wippman, *Pro-Democratic Intervention by Invitation*, *in* DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 315 (Gregory Fox & Brad Roth eds., 2000); *See* Brad Roth, *Illegality of "Pro-Democratic" Invasion Pacts*, *in* Fox & Roth, at 328.

[42] Wippman, *supra* note 6, at 448; QUINCY WRIGHT, ROLE OF INTERNATIONAL LAW IN THE ELIMINATION OF WAR 61 (1961).

[43] Somalia has not had an effective government since the Barrie administration was overthrown in 1991. In the absence of such, various factions have competed within the state; *see* Awol Kassim Allo, *Counter-Intervention, Invitation, Both, or Neither—An Appraisal of the 2006 Ethiopian Military Intervention in Somalia*, 3 MIZAN L. REV. 201, 202 (2009).

[44] Lieblich, *supra* note 18, at 340; OLIVIER CORTEN, LAW AGAINST WAR 249–310 (2010).

[45] *See* Allo, *supra* note 43, at 215 *citing* ROBERT JENNINGS & ARTHUR WATTS, OPPENHEIM'S INTERNATIONAL LAW 435-438 (9th ed., 1992); Ruys & Fero, *supra* note 20, at 81; CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 99 (3rd ed., 2008).

[46] Lawrence Pezzullo, *Intervention in Internal Conflict: Case of Nicaragua*, 13 GA. J. INT'L & COMP. L. 201, 201 (1983); *See* Jean D'Aspermont, *Legitimacy of Governments in the Age of Democracy*, 38 N.Y.U. J. INT'L L. & POL. 877, 880, 888 (2007).

[47] Gregory Fox, *Right to Political Participation in International Law*, 17 YALE J. INT'L L. 543, 596 (1992).

to identify the "legitimate government" or the government which has the "legal authority" to represent the state. This is especially true when there is "no one party that is decisively in control and has visibly greater legitimacy than other warring factions."[48] Further, the international community does not "impose one single framework of governance on states."[49] These considerations make the determination of legitimacy particularly arduous.

Accordingly, the alternative may be the test of effective control which provides that the "sole authority entitled to speak on behalf of a state is the one which has permanent [effective] control over [the] territory and population."[50] It asserts that, as the strength of the opposition to the current government increases, its authority to represent the state also declines.[51] The approach appears to be helpful in situations where there is no "effective central government and multiple factions claim to be the legitimate government of a recognised state."[52] Its viability resides in its ability to provide a reasonably objective and externally verifiable standard to determine the proper governmental authority. In turn, it inhibits the intervention of foreign states.[53] However, notwithstanding these advantages, the test of effective control has been criticized for allowing "any indigenous government in effective control of the state [to be] entitled to grant or withhold consent to intervention, whether or not the government at issue is democratically elected or popularly supported."[54] Thus, it has been claimed that "reliance on effective control preserves few interests other than the integrity of the rule itself."[55]

The issue of the choice between the two tests is far from settled. What may be clear is that when "a government encounters only minor problems in maintaining internal order," then "its relationship with other states continues [to be] unimpaired and any uninvited interference with its domestic political processes constitutes unlawful intervention."[56] The problem begins when the

---

[48] Allo, *supra* note 43, at 216.

[49] Elizabeth Chadwick, *National Liberation in the Context of Post- and Non-Colonial Struggles for Self-Determination*, *in* Fox, *supra* note 1, at 842; D'Aspermont, *supra* note 46.

[50] Alexander Gilder, *Ukrainian Sovereignty and Territorial Integrity—Has It Been Breached?*, 3 LEG. ISSUES J. 23, 30 (2015).

[51] Wippman, *supra* note 41, at 441.

[52] Ahmed Khayre, *Self-defence, Intervention by Invitation, or Proxy War? Legality of the 2006 Ethiopian Invasion of Somalia*, 22 AFR. J. INT'L & COMP. L. 208, 223 (2014); Christopher Le Mon, *Unilateral Intervention by Initiation in Civil Wars: Effective Control Test Tested*, 35 N.Y.U. J. INT'L L. & POL. 741, 745 (2002).

[53] Allo, *supra* note 43, at 222.

[54] Wippman, *supra* note 14, at 805.

[55] *Id.* at 808.

[56] Wippman, *supra* note 41, at 441.

incumbent government has lost substantial control or has been ousted by its opposition. Some forward that "practice indicates a tendency to presume continued effective control by the incumbent government, even in situations where it has lost control over its territory."[57] In contrast, it has also been argued that "effective control has served as the point of departure for identifying" the recognized and incumbent government of a state.[58]

In the latter case, the view is that of "negative equality." The principle dictates that "if groups fighting against the government control large swathes of the country, the notion of political independence would dictate that neither side, government nor insurgency, should receive military aid."[59] Simply, if the status of a "civil war" is reached, "consent by the government for the use of force on its territory ceases to perform its legalising effect."[60] The view is also "supported with reference to the principles of self-determination," the underlying premise of which is that "outside intervention for the benefit of one of the warring parties in a civil war would [. . .] [interfere] with the people's right to decide their own future."[61]

III. INTERVENTIONS SUPPORTING ARMED OPPOSITION GROUPS

Compared to interventions in support of governments, the assistance extended to armed opposition groups partakes of a different matter. The support for these groups may be viewed to constitute the prohibited kind of intervention,[62] in some cases that of aggression,[63] or worse, an armed attack.[64]

---

[57] Wet, *supra* note 13, at 990.

[58] *Id.* at 984.

[59] Schachter, *supra* note 6, at 1641; Gray, *supra* note 45, at 81.

[60] Ruys & Fero, *supra* note 20, at 87; YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE 119 (5th ed., 2011); Christopher Joyner & Michael Grimaldi, *United States and Nicaragua: Reflections on the Lawfulness of Contemporary Intervention*, 25 VA. J. INT'L L. 621, 644 (1984).

[61] *Id.*; Khayre, *supra* note 52, at 224.

[62] *See* G.A. Res 2625, *supra* note 1; Michael Schmitt, *The Syrian Intervention: Assessing the Possible International Law Justifications*, 89 INT'L L. STUD. 744, 751 (2013); *Military and Paramilitary Activities*, 1986 I.C.J. Rep. 14, ¶ 256; Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Rep. 403, ¶ 81 (July 22).

[63] *See* Ruys & Fero, *supra* note 20, at 74; Higgins, *supra* note 18, at 281; Patrycja Grzebyk, *Classification of the Conflict between Ukraine and Russia in International Law (Jus Ad Bellum and Jus in Bello)* 34 POL. Y.B. INT'L L. 39, 45 (2014); Petty, *supra* note 2, at 119.

[64] Christopher Ford, *Syria: Can International Law Cope?*, 92 INT'L L. STUD. 340, 346; Wet, *supra* note 13, at 982; Allo, *supra* note 43; Dino Kritsiotis, *Interrogations of Consent: A Reply to Erika de Wet*, 26 EUR. J. INT'L L. 999, 1000 (2015) ; Schmitt, *supra* note 62, at 751.

It is recognized that "states maintain the sovereign right to suppress challenges to their territorial integrity, and their acknowledged governments are vested with authority on their behalf to use force."[65] Therefore, assistance to the opposition is viewed as "impermissibly interfering with the affected state's ability to control its internal affairs."[66] Notably, the kind of assistance is not limited to military support but includes "financial support, training, supply of weapons, intelligence and logistic support."[67] Thus, the actions of U.S. in Nicaragua and that of Uganda in the DRC were held by the International Court of Justice ("Court") to constitute the prohibited kind of intervention.[68]

From the foregoing, it would seem then that armed opposition groups, unlike the governments they oppose, do not possess a concurrent right to receive external assistance. At most, if these groups are able to succeed to the extent that the incumbent government has lost effective control of the state, it could be claimed that the legalizing effect of the consent that the government provided to an intervening state is likewise lost, thereby forfeiting its right to external assistance. [69]

Nevertheless, some exceptions have been claimed under this rule. First, in contrast with the principle of negative equality, it is forwarded that when an internal conflict passes the level of rebellion and insurgency to that of belligerency,[70] the opposition is "assumed to function like the territorial government of a state" and is granted by international law rights under the

---

[65] Roth, *supra* note 16, at 393.

[66] Wippman, *supra* note 6, at 440, *citing* ANTONIO TANCA, FOREIGN ARMED INTERVENTION IN INTERNAL CONFLICT 18-19 (1st ed., 1993); Louis Henkin, *Use of Force: Law and US Policy, in* RIGHT V MIGHT: INTERNATIONAL LAW AND USE OF FORCE 63 (Louis Henkin et al. eds., 1991).

[67] Maziar Jamnejad & Michael Wood, *The Principle of Non-Intervention*, 22 LEID. J. INT'L L. 345, 361 (2009); Aloupi, *supra* note 21, at 573; *Military and Paramilitary Activities*, 1986 I.C.J. Rep. 14, 124–25.

[68] *Military and Paramilitary Activities*, 1986 I.C.J. Rep. 14, ¶ 246 (the United States, opposing the administration in Nicaragua led by the Sandinista National Liberation Front (FSLN), provided, among others, support to a rebel group called the Contras through financial and material aid); *Armed Activities*, 2005 I.C.J. Rep. 168, ¶ 163 (Uganda was found to have extended military, logistic, economic and financial support to irregular forces having operated in the territory of the Democratic Republic of Congo).

[69] Wippman, *supra* note 6, at 447.

[70] A protracted and intense internal conflict that might affect another state which might need to determine its legal relationship with the warring parties. In this regard, the nationals of the state may find themselves in territory controlled by an insurgent group. Further, a contiguous state might wish to prevent its territory from being used in the fighting; *see* Fox, *supra* note 1, at 822.

law during times of war, thus creating obligations for third parties.[71] As the opposition in such a case may be considered as a *de facto* government, any support given to them by foreign states may be considered to be consistent with the well-established rules of international law and should not contravene the rules prohibiting intervention.[72] Simply, "belligerency [is] equivalent to an interstate war."[73] At this point, states that do not intend to be considered as active participants in the conflict must "assume the legal posture of neutrality."[74] If other states "join with one of the belligerents against the other, [the] intervention on behalf of either the government or the rebel forces constitutes an act of war against the other party."[75]

A similar view is forwarded in relation to self-determination.[76] The opinion states that "in situations where the population has made clear its intent to overthrow the incumbent government through civil war, the incumbent government could not claim popular acceptance."[77] Accordingly, it lacks the "level of representativeness" required "for the purpose of inviting any foreign military assistance."[78] On the other hand, it could be argued that the effective government, having a better claim to representation, may legally invite assistance from foreign states.[79]

On the other hand, a second view accepts the principle of negative equality. If the state is "fully divided about its political future" then "the government [and its opposition] cannot plausibly claim to represent the entire population."[80] Thus, external assistance to the government and its opposition

---

[71] *Id. citing* Yair Lootsteen, *Concept of Belligerency in International Law*, 166 MIL. L. REV. 109, 113–14 (2000); Richard Falk, *Introduction, in* INTERNATIONAL LAW OF CIVIL WAR 12 (1971); HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 176–78 (1947).

[72] Phoebe Okowa, *Case Concerning Armed Activities on the Territory of Congo*, 55 INT'L & COMP. L.Q. 742, 750 (2006); Lieblich, *supra* note 18, at 377.

[73] Heath, *supra* note 9, at 266, *citing* ANN THOMAS & A.J. THOMAS JR, NON-INTERVENTION: LAW AND ITS IMPORT IN THE AMERICAS 219 (1956).

[74] Wippman, *supra* note 6, at 443, *citing* WESTON ET AL., INTERNATIONAL LAW AND WORLD ORDER 858–89 (1990).

[75] *Id.*; J.C. Stassen, *Intervention in Internal Wars: Traditional Norms and Contemporary Trends*, 3 S. AFR. Y.B. INT'L L. 65, 79 (1977), *citing* Rosalyn Higgins, *Internal War and International Law, in* III FUTURE OF INTERNATIONAL LEGAL ORDER 103 (Richard Falk & Cyril Black eds., 1971).

[76] Stassen, *supra* note 75, at 80.

[77] Wet, *supra* note 13, at 995.

[78] *Id.*

[79] *See* Stassen, *supra* note 75, at 81; Aloupi, *supra* note 21, at 578; Terry, *supra* note 10, at 154 *citing* W. Michael Reisman, *The Resistance in Afghanistan is Engaged in a War of National Liberation*, 81 AM. J. INT'L L. 906, 906-09 (1987).

[80] Fox, *supra* note 1, at 827.

"would interfere with the people's right to determine their own future" and by extension, their political independence.[81] The principle of counter-intervention follows from this view. Under this principle, if there exists an unlawful intervention in favor of the incumbent government, it brings about a "right to counter-balance such intervention by assisting the [opposition]."[82] The rationale of the principle aims to "offset the illicit influence of a third state on the outcome of the conflict."[83] It forwards that a limited counter-intervention may be "justified insofar as it can [...] nullify the effects of the original intervention, thereby restoring [...] the internal balance of power."[84] Nevertheless, while the view forwards a pragmatic approach, it has been observed that state practice in support of the principle is somewhat limited.[85]

The view also supports the argument favoring external forcible interventions in support of self-determination. If "self-determination includes freedom to overthrow an unrepresentative government, or to break away from a colonising state," it likewise includes the "freedom from coercive externally sponsored revolutions."[86] It has been noted that the advantage of requiring states to be neutral in cases of conflicts concerning self-determination is that external interference poses a threat to the process and it would be more acceptable to allow the indigenous conflict to complete its development without intrusion.[87]

IV. INTERVENTIONS UNDER THE UNWILLING OR UNABLE DOCTRINE

The third concern pertains to the "unable or unwilling" doctrine. Under this principle, if the territorial state is unwilling or unable to take appropriate steps against non-state armed groups within its territory, the state, who is the victim of an armed attack, may take the necessary and proportional

---

[81] *Id.* at 828; Gray, *supra* note 45, at 81.

[82] Stassen, *supra* note 75, at 79; Allo, *supra* note 43, at 230 *citing* TIMOTHY THRILLER, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 247 (1999); Jennings & Watts, *supra* note 45, at 438.

[83] Joseph Klinger, *Counterintervention on Behalf of the Syrian Opposition? An Illustration of the Need for Greater Clarity in the Law,* 55 HARV. INT'L L.J 483, 500 (2014).

[84] *Id. citing* WILLIAM HALL, TREATISE ON INTERNATIONAL LAW 342 (1924); British Foreign Office, *Foreign Policy Document No 148,* 57 BRIT Y.B. INT'L L. 616 (1986); John Perkins, *Right of Counter-intervention*, 17 GA. J. INT'L & COMP. L. 171, 171 (1987); Louis Sohn, *Gradations of Intervention in Internal Conflicts*, 13 GA. J. INT'L & COMP. L. 225, 229–30 (1983).

[85] Terry, *supra* note 10, at 129.

[86] Moore, *supra* note 7, at 315.

[87] *Id.* at 317.

steps to suppress the threats posed by such an armed group.[88] There exists a semblance of state practice to support this claim. A number of states such as the United States, Israel, Russia, and Turkey have relied on this doctrine to justify their operations against terrorist groups when territorial states have been unwilling or unable to suppress the activity of armed groups.[89] Nevertheless, the acceptance of the doctrine by the international community remains mixed.[90]

The doctrine recognizes that non-state armed groups tend to carry out attacks on victim states but "operate from or take sanctuary" in the territory of another.[91] While such a state did not carry out the attack, it may also be unable to suppress the activities of non-state armed groups that reside within its territory. Worse, it may be unwilling to act against these groups.[92] In these cases, the suppression of armed groups by the victim state "collides with two fundamental principles of international law" which are the protection of the territorial sovereignty of the territorial state and the prohibition on the use of force embodied in the Charter.[93] The "unable [or] unwilling" doctrine thus attempts to validate the use of force against these armed groups under the concept of self-defense.[94]

The doctrine has also been forwarded in view of the ineffective remedies present under international law. Where the territorial state tolerates, intentionally or not, the actions of non-state armed groups without providing support, the victim state has the option of imposing sanctions, taking

---

[88] Ashley Deeks, *Unwilling or Unable: Towards a Normative Framework for Extraterritorial Self-Defence,* 52 VA J. INT'L L. 483, 487 (2012); Dinstein, *supra* note 60, at 21; Elizabeth Wilmshurst, *The Chatham House Principles of International Law on the Use of Force in Self-Defence*, 55 INT'L & COMP. L.Q. 963, 969 (2006).

[89] Monica Hakimi, *Defensive Force Against Non-State Actors: The State of Play*, 91 INT'L L. STUD. 1, 13 (2015), *citing* W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Pre-emptive Self-Defence*, 100 AM. J. INT'L L. 525, 540 (2006); Lewis Mills, *Bereft of Life?: The Character Prohibition on the Use of Force, Non-State Actors, and the Place of the International Court of Justice,* 9 N.Z. Y.B. INT'L L. 35, 46 (2011).

[90] Gareth Williams, *Piercing the Shield of Sovereignty: An Assessment of the Legal Status of the Unwilling or Unable Test,* 36 UNSW L.J. 619, 637 (2013); Oren Gross, *Unresolved Legal Questions Concerning Operation Inherent Resolve*, 52 TEX. INT'L L.J. 221, 249, 252 (2017).

[91] Brent Michael, *Responding to Attacks by Non-State Actors: The Attribution Requirement of Self-Defence,* 16 AUS. INT'L L.J. 133, 133 (2009); Dawood Ahmed, *Defending Weak States Against the "Unwilling or Unable" Doctrine of Self-Defence,* 9 J. INT'L L. & INT'L REL. 1, 13 (2013); *See* Abraham Sofaer, *On the Necessity of Pre-Emption*, 14 EUR. J. INT'L L. 209, 209–10 (2003).

[92] Michael, *supra* note 91, at 133.

[93] *Id.* at 134.

[94] *Id.*

countermeasures,[95] or lodging a complaint with the Council.[96] Nevertheless, these options have been viewed to be problematic. Sanctions are only effective "if the sanctuary state is economically vulnerable to them."[97] On the other hand, "countermeasures do not affect obligations to refrain from the threat or use of force."[98] Lastly, the "collective security mechanisms of the Council are often unreliable, uncertain, delayed, and ineffective."[99]

The primary justification for the doctrine then appeals to practical necessity. It balances the interests of the victim state in protecting itself and that of the territorial state in safeguarding its territorial integrity.[100] Thus, while international law safeguards the territory of states and imposes a correlative obligation on other states not to use armed force, it equally imposes a positive obligation on states "to restrain any non-state actor from carrying out any armed activities using that state's territory."[101] This relationship is evident in the decisions of the Court and the resolutions of the General Assembly. For instance, in *Corfu Channel*, the Court noted that states are under an "obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states."[102] More specifically, the *Friendly Relations Declaration* requires states to "refrain from acquiescing in organised activities within its territory directed towards the commission of such acts, when the acts [...] involve a threat or use of force."[103]

Accordingly, if the territorial state is unable or unwilling to curtail the actions of the armed group, it would be nonsensical to require the victim state to be powerless in the face of such conduct and sacrifice the integrity of its own territorial sovereignty.[104] Not allowing the victim state to respond to such attack leads to a highly unsatisfactory situation where the non-state armed group that carries out an attack would effectively be protected by the

---

[95] *Id.*; *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries,* 2 Y.B. Int'l L. Comm'n 31, 75. (2001). Countermeasures are acts, otherwise unlawful, but not including forcible actions, taken against a state responsibility for an internationally wrongful act in order to induce such a state to comply with its obligations.

[96] Michael, *supra* note 91, at 156.

[97] *Id.*

[98] Michael, *supra* note 91, at 156.

[99] *Id.*; Moore, *supra* note 7, at 211.

[100] Michael Glennon, *The Fog of Law: Self-Defence, Inherence, and Incoherence in Article 51 Control Standard of the United Nations Charter,* 25 HARV. J. L. & PUB. POL'Y 539, 550 (2002).

[101] Michal Kowalski, *Armed Attack, Non-State Actors and a Quest for the Attribution Standard,* 30 POLISH Y.B. INT'L L. 101, 128 (2010).

[102] The Corfu Channel Case (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 4, 22 (April 9).

[103] G.A. Res. 2625, *supra* note 1.

[104] Glennon, *supra* note 100, at 550.

sovereignty of the territorial state while the victim state is deprived of the possibility of an armed response.[105] Considering the balance of obligations, the victim state should be allowed to respond to the armed group without the territorial state's consent as a measure of last resort.[106]

Notwithstanding its justification, the doctrine presents issues concerning its standards.[107] For instance, the criteria appear to be vague. Questions remain as to when a territorial state may be considered unable or unwilling to respond to the acts of armed groups operating within its borders.[108] Without an adequate threshold, the doctrine may allow states to abuse the alleged right to suppress non-stated armed groups and use force in the territory of that state without reprimand.[109] The doctrine logically requires the victim state to undertake an examination of the status of the territorial state and whether it is in fact "unable" or "unwilling."[110] The "unable" criteria remains a subjective one which must consider the totality of circumstances including the capacity of the territorial state and the capability of the non-state armed group. On the other hand, the "unwilling" standard should involve requiring the victim state to at least request the territorial state to intervene and quell the non-state armed group's activities and allow the territorial state a reasonable time to do so.[111]

To this end, the key principles that have been forwarded involve the requirement for the victim state to prioritize consent or cooperation with the territorial state; undertake a reasonable assessment of the territorial state's capacity and control; and request the territorial state to address the threat within a reasonable time.[112] Further, the requirements of self-defense should be observed. The force employed must be reactive and not anticipatory; the

---

[105] Kowalski, *supra* note 101, at 116; *Armed Activities*, 2005 I.C.J. Rep. 168, 372 (Kateka, *J., dissenting*); *Armed Activities*, 2005 I.C.J. Rep. 168 at 334 (separate opinion by Simma, *J.*).

[106] Williams, *supra* note 90, at 628, *citing* Carsten Stahn, *Terrorist Acts as "Armed Attack": The Right to Self-Defence, Article 51(1/2) of the UN Charter, and International Terrorism*, FLETCHER F. WORLD AFF., Summer/Fall 2003, at 35, 47.

[107] Elizabeth Campbell, *Self-Defence and the International Court of Justice: A Review of Recent ICJ Case Law and Opinions Concerning Article 51 of the UN Charter*, 24 HAGUE Y.B. INT'L L. 193, 208 (2011).

[108] *Id.*

[109] *Id.*; Noam Lubell, *The Problem of Imminence in an Uncertain World*, *in* Fox, *supra* note 1, at 42.

[110] Anders Henricksen, *Jus ad Bellum and American Targeted Use of Force to Fight Terrorism around the World*, 19 J. CONFLICT & SEC. L. 211, 230 (2014).

[111] *Id. citing* Deeks, *supra* note 88, at 531; Hakimi, *supra* note 89, at 17.

[112] *See* Deeks, *supra* note 88, at 492.

force used must be proportional; and the use of force must be the last resort.[113]

Finally, there is also concern as to the legal status of the doctrine.[114] Simply put, the issue is whether the self-defense exception to the prohibition on the use of armed force against the territorial integrity of states admits the doctrine.[115] While international law imposes a positive duty on the part of the territorial state to prevent harm caused by non-state armed groups operating within its territory, the breach of such an obligation only gives rise to an internationally wrongful act. The victim state does not have a right to violate the territorial integrity of the territorial state if the latter did not commit the attack itself.[116] A different justification is then required for violating the territorial state's territory as "self-defence justifies the action against the non-state actor and not against the territorial state which is a third party in the self-defence relationship."[117] The reason for this appears to be fairly straightforward. Even if the territorial state knowingly allows its territory to be used by non-state armed groups to the detriment of victim states, there is no rule present under international law that permits the use of armed force against a state if it breaches its duty of due diligence.[118]

V. COMMENTARY

From the foregoing, it could be claimed that there is a general rule that deals with external interventions in internal conflicts. Broadly, it could be said that there exists a rule prohibiting intervention in the internal affairs of states. The decisions of tribunals and resolutions of the General Assembly appear to support this broad view.[119] Nevertheless, exceptions to the rule are

---

[113] *See* Dinstein, *supra* note 60, at 257.

[114] Olivier Corten, *The "Unwilling or Unable" Test: Has It Been, and Could It Be Accepted?*, 29 LEID. J. INT'L. L. 777, 779 (2016).

[115] Nicholas Tsagourias, *Self-Defence Against Non-State Actors: The Interaction Between Self-Defence as a Primary Rule and Self-Defence as a Secondary Rule*, 29 LEID. J. INT'L L. 801, 810 (2016).

[116] Kowalski, *supra* note 101, at 127; Rüdiger Wolfrum, *State Responsibility for Private Actors: An Old Problem of Renewed Relevance, in* INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER 425 (Maurizio Ragazzi ed., 2005).

[117] Tsagourias, *supra* note 115, at 811; *Report on the Work of its Thirty-Second Session,* II Y.B. Int'l L. Comm'n 1, 54, U.N. Doc. A/35/10 (1980).

[118] Antonio Cassese, *The International Community's "Legal" Response to Terrorism*, 38 INT'L COMP. L.Q. 589, 597 (1989).

[119] Fox, *supra* note 1, at 818 *citing* G.A. Res. 2625 (1970); G.A. Res 2131 (1965); G.A. Res 375 (1949); *Military and Paramilitary Activities*, 1986 I.C.J. Rep. 14, ¶ 205; *Armed Activities*, 2005 I.C.J. Rep. 168, ¶¶ 42–54.

also recognized or forwarded, such as that of the intervention done under the authority of the Council; upon invitation of the incumbent government; in recognition of belligerency or counter-intervention in the case of armed opposition groups; or in self-defense pursuant to the 'unwilling or unable' doctrine.

The question then turns to the effect of the deviations that appeal to the exceptions to the general rule. On the one hand, it could be claimed that repeated deviations from the principle "can be regarded either as evidence of the lack of unanimous practice" or as "symptomatic of the crisis" that serve to weaken the existence of the rule.[120] Further, while there exists a rule against external forcible interventions, the decision of states not to intervene in internal conflicts have been, more often than not, based on considerations of their respective foreign policy or that of self-interest rather than in consideration of international norms.[121] On the other hand, it could also be said that "if [states act] in a way *prima facie* incompatible with a recognised rule, but defend [their] conduct by appealing to exceptions or justifications" then "the significance of that attribute is to confirm rather than to weaken the rule."[122] The latter view is submitted to be applicable. It has been observed that state practice demonstrates "that states have never asserted a [general] right to intervene militarily" but "have rather sought to defend their conduct by relying upon exceptions to a general prohibition of such interference in [internal conflicts]."[123]

The problem lies in the lack of clarity of the claimed exceptions and the context upon which the rule is hinged. In the first case, "in addition to the vagueness, incompleteness, and complementarity of such authoritative pronouncements on intervention," there is also a "lack of agreement among publicists as to what the norms are or ought to be."[124] For instance, with

---

[120] Czaplinski, *supra* note 2, at 159, *citing* Rosalyn Higgins, *Identity of International Law, in* INTERNATIONAL LAW, TEACHING AND PRACTICE 35 (Bin Cheng ed., 1982).

[121] Stassen, *supra* note 75, at 65; *See* Friedmann, *supra* note 18, 68, 74, *noting* MYRES MCDOUGAL ET AL, STUDIES IN WORLD PUBLIC ORDER 817 (1960); Terry, *supra* note 10, at 123, *noting* John Perkins, *The Right of Counterintervention,* 17 GA. J. INT'L & COMP. L. 171, 195–96 (1987); Tom Farer, *Intervention in Civil Wars: A Modest Proposal,* 67 COLUM. L. REV. 266, 274–75 (1967).

[122] ROSALYN HIGGINS, PROBLEMS AND PROCESSES: INTERNATIONAL LAW AND HOW WE USE IT 20 (1995), *citing* Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 98 (June 27).

[123] Ruys & Fero, *supra* note 20, at 89, *citing* Gray, *supra* note 45, at 81, 92, 94; *See* Aloupi, *supra* note 21, at 580; Heath, *supra* note 9, at 278; Bannelier & Christakis, *supra* note 12, at 863; Terry, *supra* note 10, at 125.

[124] Moore, *supra* note 7, at 245; *See* Stassen, *supra* note 75, at 65.

regard to the substantive validity of consent to intervention, it has not yet been settled whether it should be evaluated based on the legitimacy of the incumbent government or on the effective control over its territory.[125] In the case of intervention in favor of opposing armed groups, the question of the applicability of the doctrine of belligerency continues to persist. While there exist arguments for its continued application, another view maintains that the doctrine has fallen out of practice.[126]

As to the second case, it has been submitted that the rule on non-intervention was designed to meet the "perceived kind of violence of the day."[127] For the Charter, the context was that of the prevalence of "war across international boundaries."[128] At present, the conflicts to confront are different. The years after its adoption saw the rise of intra-state wars, insurgencies, wars of unification, liberation, or succession.[129] Moreover, the prohibition "was historically and politically contingent on a collective security system that never functioned as hoped."[130] In the absence of such a working system, states have resorted to unilateral uses of force determined by two criteria: whether it "enhances or undermines world order," and whether it "serves, in terms of aggregate consequences, to increase the probability of the free choice of peoples about their government and political structure."[131]

Based on these observations, the proposal forwarded is to first maintain the general rule against non-intervention in internal conflicts. Such a rule is in recognition of the view that these matters are to be decided solely by the people of the affected state as they see fit.[132] There would of course be instances where the situation may constitute a threat to international peace and security. In such a case, preference should be made to intervention as authorized by the Council.[133] Nevertheless, such a reliance avoids the "auto-interpretation problem" that arrogates the determination of the legality of its action to the states individually.[134] Similarly, the reliance on community decisions "reduces the risk of major power involvement on opposing

---

[125] Allo, *supra* note 43, at 216; Roth, *supra* note 16, at 393.

[126] Wippman, *supra* note 6, at 443, *citing* Weston, *supra* note 74, at 858–59; Stassen, *supra* note 76, at 79.

[127] John Moore, *Legal Standards for Intervention in Internal Conflicts*, 13 GA. J. INT'L & COMP. L. 191, 194 (1983).

[128] *Id.*

[129] Wippman, *supra* note 6, at 435; Moore, *supra* note 127, at 194.

[130] Wippman, *supra* note 14, at 798.

[131] *Id.*, *citing* W. Michael Reisman, *Coercion and Self-Determination: Construing Article 2(4)*, 78 AM. J. INT'L L. 642, 644 (1983).

[132] Wippman, *supra* note 6, at 435, *citing* Schachter, *supra* note 6, at 1641.

[133] Babatunde, *supra* note 9, at 55.

[134] Moore, *supra* note 7, at 316.

sides."[135]

Nevertheless, recognizing the problems inherent in the collective system embodied in the Charter,[136] the second part of the proposal recommends allowing intervention in the absence of an authorization from the Council. In the case of assistance in favor of the incumbent government, it is suggested that unilateral interventions may be permissible. This is prior to the conflict passing the level of rebellion or insurgency, to the legitimate government that has the ability to maintain effective control.[137] On the other hand, assistance in favor of the government or the opposing armed group may be allowed under the principle of counter-intervention.[138] However, because the principle hinges on the aim of offsetting a prior unlawful assistance, the subsequent aid extended should be proportional considering "the balance of forces required in an [internal] conflict and the difficulty of estimating the covert assistance to [the other party]."[139] Notably, the prohibition against unilateral intervention in favor of the government once the conflict passes the level of rebellion or insurgency stems from the recognition of the principle of negative equality. The same goes for allowing assistance to opposing armed groups only in cases of counter-intervention.

With regard to interventions pursuant to the unwilling or unable doctrine, it is submitted that the doctrine cannot be justified based on the failure of the territorial state to perform due diligence. However, refuge may be sought in attributing the acts of the non-state actor to the territorial state.[140] The view submits that the rule on attribution may be extended or adapted to cover situations of attacks committed by non-state actors where the territorial state has been unwilling or unable.[141] This extended standard "closely [resembles] international rules against 'aiding and abetting' illegal conduct."[142]

---

[135] *Id.*; O'Meara, *supra* note 2, at 464.

[136] Moore, *supra* note 128, at 194.

[137] Moore, *supra* note 7, at 337; *See* Wippman, *supra* note 14, at 811; Allo, *supra* note 43, at 215.

[138] *See* Ruys & Fero, *supra* note 20, at 93.

[139] Moore, *supra* note 7, at 335.

[140] Kowalski, *supra* note 101, at 125, *citing* NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 36–42 (2010).

[141] *See* Raphaël van Steenberghe, *Self-Defence in Response to Attacks by Non-state Actors in the Light of Recent State Practice: A Step Forward?* 23 LEID. J. INT'L L. 183, 194–95 (2010); "Attribution is the process by which international law establishes whether the conduct of a natural person or other such intermediary can be considered an 'act of state', and thus be capable of giving rise to state responsibility." JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART 113 (2013).

[142] Kowalski, *supra* note 101, at 127, *citing* Christian Tams, *The Use of Force against*

This approach allows the attribution of a non-state actor's armed activities to the territorial state thus providing a basis for their classification as an armed attack within the meaning of Article 51 of the Charter.[143] In the alternative, the framework of state responsibility may apply.[144] Where the territorial state is unable to prevent attacks committed by non-state armed groups emanating from its territory or is unwilling to consent to foreign intervention, "the customary international law plea of necessity [...] provides a [...] more coherent basis upon which to justify the use of force rather than self-defence."[145] Simply, the concept of necessity,[146] under the framework of state responsibility, "introduces the possibility of extending a lawful remedy to the victim state of an armed attack by a non-state actor without requiring it to attribute the wrongdoing to [...] [the territorial] State [especially] in circumstances where there is clearly no such involvement on the part of territorial state."[147] Nevertheless, a possible problem with this approach remains. The plea of necessity cannot be used to justify the preclusion of a wrongful act if the obligation is a *jus cogens* norm.[148] Should the prohibition on the use of force be considered a peremptory norm, the proposed approach would fail.[149] Nonetheless, in the absence of a definite pronouncement on this matter, it is submitted that the approach holds.

Finally, the proposal is about the lawfulness of interventions not covered in the first two parts and for limited purposes like human rights,[150]

Terrorists 20(2) EUR. J. INT'L L. 359, 384–87 (2009).

[143] *Id.* at 128.

[144] *See* Louise Arimatsu, *The Law of State Responsibility in Relation to Border Crossings: An Ignored Legal Paradigm,* 89 INT'L L. STUD. 21 (2013).

[145] *Id.* at 37; Steenberghe, *supra* note 141, at 196.

[146] The concept of necessity is one of the instances that precludes the wrongfulness of an act of a state. It involves a choice by a state to act inconsistently with an international obligation to protect some other interest. Three requirements must be met an "essential interest," a "grave and imminent peril" and that the act be the "only means," *see* Crawford, *supra* note 141, at 307.

[147] Louise Arimatsu, *The Law of State Responsibility in Relation to Border Crossings: An Ignored Legal Paradigm,* 89 INT'L L. STUD. 21, 39–40 (2013).

[148] United Nations, Draft Articles on Responsibility of States for Internationally Wrongful Acts, II Y.B. Int'l L. Comm'n 31 at 84, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) (2001).

[149] *See* Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 190 (June 27).

[150] *See* Bannelier-Christakis, *supra* note 17, at 747; Chinkin, *supra* note 11, at 917–18, 920. Babatunde, *supra* note 9, at 68; SEAN MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER 147–49 (1996); NEIL FENTON, UNDERSTANDING THE UN SECURITY COUNCIL 14 (2004); Michael Burton, *Legalising the Sublegal. A Proposal for Codifying a Doctrine of Unilateral Humanitarian Intervention,* 85 GA. L.J. 427 (1996); Paul Williams & Meghan Stewart, *Humanitarian Intervention: The New Missing Link in the Fight to Prevent Crimes Against Humanity and Genocide?*, 40 CASE W. RES. INT'L L. 97, 105 (2008);

prevention of terrorism,[151] or promotion of democratic ideals.[152] If external intervention may normally be unlawful when its "objective is to settle an exclusively internal political strife in favor of the established government," the conclusion may be otherwise "when the purpose of the intervention is different."[153] Much ink has been spilt as to the justification for the intervention for these purposes and a detailed analysis of the arguments forwarded may well be outside the constraints of the present article. However, what is submitted is that the third part does not provide states *carte blanche* authorization to intervene.[154] Thus, it forwards that aside from limiting the purposes for which it may be invoked, this "purpose-based" intervention has to comply with particular requirements. First, it is submitted that the situation must be sufficiently grave such as the existence of an immediate and extensive threat to fundamental rights and paralysis on the part of the Council.[155] Second, the level of force used must be at the minimum necessary to achieve the goal of the intervention.[156] Third, as a consequence of the second requirement, there must be a prompt disengagement after the accomplishment of the purpose.[157] Lastly, to foster accountability, there must be "immediate full reporting to the Council and appropriate regional organisations."[158]

INGRID LUPIS, THE LAW OF WAR 79-80 (1987); Leslie Green, *International Law Challenge: Homeland Security and Combating Terrorism*, 81 INT'L L. STUD. 167, 173 (2006); Marcelo Kohen, *The Principle of Non-intervention 25 Years after the Nicaragua Judgment*, 25 LEID. J. INT'L L. 157, 162–23 (2012); *Compare with* Ian Brownlie & C.J. Apperley, *Kosovo Crisis Inquiry: Memorandum on the International Law Aspects*, INT'L & COMP. L.Q. 878, 886, 888 (2000); British Foreign Office, *supra* note 84, at 619; W. Michael Reisman, *Acting Before Victims Become Victims: Preventing and Arresting Mass Murder*, 40 CASE W. RES. J. INT'L 57, 78 (2009); Schmitt, *supra* note 62, at 753–54; Roger Clark, *Humanitarian Intervention: Help to Your Friends and State Practice*, 13 GA. J. INT'L & COMP. L. 211, 213 (1983).

[151] Oyeniyi Ajigboye, *International Law and Responsibility to Protect: Legal and Theoretical Basis for International Intervention in Nigeria*, 3 J. SUSTAINABLE DEV. L. & POL'Y 87, 91 (2014).

[152] *See* Babatunde, *supra* note 9, at 62, 64; *Compare with* Hannah Woolaver, *Pro-democratic Intervention in Africa and the "Arab Spring,"* 22 AFR. J. INT'L & COMP. L. 161, 162 (2014), *citing* Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 263 (June 27).

[153] Bannelier & Christakis, *supra* note 12, at 864.

[154] *See* Nicholas Wheeler, *Legitimating Humanitarian Intervention: Principles and Procedures*, 2 MELB. J. INT'L L. 550, 560 (2001).

[155] Moore, *supra* note 7, at 338; Nigel Rodley, *Humanitarian Intervention, in* OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 788, 790–91 (Marc Weller ed., 2015).

[156] Rodley, *supra* note 155, at 791, *citing* Franck, *Proportionality of Countermeasures in International Law* 102 ASIAN J. INT'L L. 715, 719 (2008).

[157] Moore, *supra* note 7, at 338.

[158] *Id.*; Rodley, *supra* note 155, at 792.

VI. CONCLUSION

The question regarding the rule on external interventions in internal conflicts is fraught with complexities. The past years evince a marked increase in the number of cases where states have participated or aided in actions in the context of internal conflicts either in favor of the incumbent government or armed opposition groups. There definitely exists a semblance of a rule to which states adhere to. The fact that states appeal to the exceptions or justifications of the rule confirms this view. Nevertheless, the rule appears to fail at its outer fringes leaving certain areas unregulated where states have to navigate through competing doctrines and principles.

Thus, the rule covering external interventions needs to be developed in more detail considering its nuances. However, competing views have to be resolved or at least assigned some level of precedence before any rule may be adopted. The first is that internal matters must be left solely to the "people of the affected state in keeping with their right to order their own affairs as they see it fit."[159] The second is that there are instances where the situation may constitute a threat to international peace and security and thus resort to collective action must be made. The third recognizes the capacity of widely recognized incumbent governments to seek assistance from the international community to quell strife within their borders. Nonetheless, the fourth recognizes the limits of the third such that if the state is "fully divided about its political future" then external assistance may "interfere with the people's right to determine their own future."[160] Fifth, the value of state responsibility in issues of external forcible interventions must be considered. Finally, there are situations that are sufficiently grave. For instance, humanity and conscience dictate that states must necessarily intervene. These are the principles that the proposal seeks to uphold.

-o0o-

[159] Wippman, *supra* note 6, at 435, *citing* Schachter, *supra* note 6, at 1641.
[160] Fox, *supra* note 1, at 828; Gray, *supra* note 45, at 81.