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Jurisdiction in International Human Rights Law: Application of the European Convention to Soldiers Deployed Overseas

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ABSTRACT: Jurisdiction has a specific meaning in public international law. As an instrument of regulating inter-state relationships, the laws of jurisdiction ensure mutual respect of sovereignty by largely limiting the lawful reach of states' power to their own territories—territory being an important concept in notions of statehood and sovereignty. Jurisdiction also appears in human rights law. However, it has been given an altogether different interpretation by human rights treaty bodies. The European Convention on Human Rights obliges states parties to secure and ensure the Convention rights to everyone within their jurisdiction. But what does jurisdiction mean in this sense? In its jurisprudence, the European Court of Human Rights has adopted a number of different conceptions of jurisdiction, ranging from the position in *Banković* that closely resembled the public international law limitation to territory; to the *Al-Skeini* judgment that a state's jurisdiction for the purposes of the Convention extends to anyone under the authority and control of its agents. In this article, I shall examine the European Court's jurisprudence, exploring the different approaches adopted in a number of key cases. The article also analyses the UK Supreme Court's approach to the meaning of 'authority and control' as it relates to British soldiers deployed overseas. Finally, the article discusses the implications of the human rights notion of jurisdiction without territory.

KEYWORDS: European Convention on Human Rights, jurisdiction, authority and control, extraterritorial application, overseas soldiers

1. Introduction

The relationship between jurisdiction, sovereignty and territory is complicated and has been a topic of debate for many years. Public international law ('PIL') governs the nature and conduct of states and their relationships with one another. In this body of law, jurisdiction defines the limits of a state's

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authority to make and enforce rules of conduct upon individuals.¹ States' powers to prescribe and enforce their will is strongly tied to territory, not least because territory is a prerequisite for statehood (and all the powers that confers) in customary international law.² Limiting states' powers to their own territories also respects the sovereign equality of states, itself an important principle of PIL,³ by preventing states from exercising their own powers on the territories of other states. Though the scope of states' powers is defined primarily in relation to their territories, in certain circumstances states' rights and duties may extend *beyond* those territories. Numerous international human rights instruments require states parties to guarantee the rights detailed therein to all persons within their jurisdiction.⁴ The meaning of jurisdiction in these instruments has been the subject of academic and curial debate.

This article examines the nature and meaning of jurisdiction in international human rights law ('IHRL'), especially in the context of the European Convention on Human Rights ('the ECHR') and how it has been interpreted to subject state agents⁵ to human rights obligations anywhere in the world. International human rights tribunals have adopted an interpretation of jurisdiction with only a tenuous link to territory. IHRL is found in multilateral treaties, which are part of the body of treaties forming one of the main sources of PIL.⁶ This article analyses the implications for PIL of a break in the traditional doctrinal link between territory and jurisdiction. The article presents

1. Vaughan Lowe and Christopher Staker, 'Jurisdiction' in Malcolm D Evans (ed), *International Law*, 3rd edn (Oxford, Oxford University Press, 2010) 313–339, 313.
2. Article 1 (b), Convention on Rights and Duties of States adopted by the Seventh International Conference of American States, 26 December 1933, in force 26 December 1934, 165 LNTS 3802.
3. Though the principle of the equality of states can be traced back to the Peace of Westphalia (1648) and even further back to the Peace of Augsburg (1555), it was formalised in Article 2 (1), Charter of the United Nations, 26 June 1945, in force 24 October 1945, 1 UNTS XVI.
4. Article 1, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), 4 November 1950, in force 3 September 1953, 213 UNTS 222; Article 2 (1), International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, in force 23 March 1976, 999 UNTS 171; Article 1, American Convention on Human Rights (ACHR), 22 November 1969, in force 18 July 1978, 1144 UNTS 123.
5. All references to 'state agents' in this article should be taken to include those bodies and all other individuals authorised to act on a state's behalf, whose actions would be attributable to the state under the provisions in Articles 4–5, International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' UN General Assembly Resolution (UNGA Res) 56/83 (28 January 2002), UN Doc A/Res/56/83.
6. Article 38 (1) (d), Statute of the International Court of Justice, 26 June 1945, in force 24 October 1945, USTS 993.

the hypothesis that jurisdiction in IHRL is a very different concept to that in PIL, and that this is because the nature of states' obligations arising out of IHRL instruments prevents the link between territory and jurisdiction from being replicated in human rights doctrine. Furthermore, this article suggests that there is no need for a territorial notion of jurisdiction in IHRL at all.

Many states deploy their armed forces abroad, on peacekeeping missions or active combat operations. There are a number of grounds in PIL that permit states to act outside their own borders. The traditional concept of jurisdiction, closely linked as it is to notions of territory and sovereignty, determines the legality of this deployment and of the soldiers' actions abroad. Do the same principles govern the application of human rights treaties to states' extraterritorial activities? The now-defunct European Commission on Human Rights ('the Commission') said there is no reason that the acts of a state's authorities abroad could not entail liability under the ECHR.⁷ Academics have since argued that 'there is no a priori reason to limit a state's obligation to respect human rights to its national territory'.⁸ In its decided cases, the European Court of Human Rights ('the European Court') has considered the extent of states' extraterritorial obligations under the ECHR and has evinced a number of general principles on the meaning of jurisdiction for the purposes of Article 1 of the ECHR. The treaty bodies of the American Convention on Human Rights ('the ACHR') and the International Covenant on Civil and Political Rights ('the ICCPR') have taken their cues from the European Court in interpreting the relevant treaty provisions. In their judgments, the tribunals have adopted a definition of jurisdiction that has only the most tenuous link to a state's territory. This article analyses the treaty bodies' approaches to jurisdiction and states' obligations to uphold individuals' human rights when acting abroad as well as at home.

The treaty bodies have all examined extraterritorial application of human rights obligations through the lens of state agents as the perpetrators of alleged human rights violations. But the extraterritorial application of human rights obligations also raises the issue of whether those state agents acting abroad are themselves entitled to human rights protection. In *Smith (No 1)*⁹ and *Smith (No 2)*,¹⁰ the Supreme Court of the United Kingdom ('UKSC') dealt

7. *Hess v United Kingdom*, Application no 6231/77, European Commission on Human Rights, Decision (28 May 1975), 2 *Decisions & Reports* (1975) 72, 73.

8. Theodor Meron, 'The Extraterritoriality of Human Rights Treaties' (1995) 89 *American Journal of International Law* 78–82, 80.

9. *R (Smith) v Secretary of State for Defence and Another* (2010) UKSC 29, (2011) 1 AC 1 (hereafter '*Smith (No 1)*').

10. *Smith v Ministry of Defence* (2013) UKSC 41, (2014) AC 52 (hereafter '*Smith (No 2)*').

with the question of whether British soldiers deployed on combat operations to Iraq are ‘within the jurisdiction’ of the United Kingdom for the purposes of the ECHR and therefore whether the United Kingdom was bound by its ECHR obligations in respect of those service personnel during the course of their deployment. These two cases are the only UKSC cases dealing with the issue of extraterritorial application of the ECHR to soldiers. The UKSC’s different approach in *Smith (No 2)* demonstrates some of the conflicting ideas about jurisdiction in IHRL. This article considers the approach of the UKSC and the basis for guaranteeing soldiers’ human rights when deployed abroad.

The next section of this article sets out the normative framework of the scope of obligations under the relevant international human rights treaties and the treaty bodies’ interpretations of the concept of jurisdiction. The UKSC’s application of the European Court’s general principles of jurisdiction are the focus of Section 3. Finally, in Section 4, I set out the implications of these judgments for the relation between territory and jurisdiction in PIL. The European Court and the other treaty bodies that have followed a similar tack, appear to have broken or at least substantially weakened the link between jurisdiction and territory. But arguably what those tribunals have done is developed a whole new concept of jurisdiction to meet the needs of the human rights instruments, rather than adapting the existing doctrine that governs inter-state relationships.

2. Legal Framework

The ECHR, ICCPR and ACHR all impart an obligation on states to guarantee the rights contained therein to individuals within or subject to their jurisdiction, with some important variations in wording. The scope of the rights and freedoms in the ECHR and states parties’ attendant obligations are expressly limited in Article 1. The European Court has confirmed that the ECHR is only binding upon states that consent to be so bound and that contracting states are not required to impose ECHR standards on non-contracting states.¹¹ But it does not necessarily follow that states’ human rights obligations end at their own borders. Article 1 provides thus:

Article 1—Obligation to respect human rights

The High Contracting Parties shall secure to everyone *within their jurisdiction* the rights and freedoms defined in Section I of this Convention.¹²

11. *Soering v United Kingdom*, Application no 14038/88, European Court of Human Rights, Judgment (7 July 1989), para 11.

12. Article 1, ECHR (emphasis added).

In common parlance, the territory within which a state exercises its authority may be referred to as a jurisdiction. The use of the 'within' preposition in the English-language version of Article 1 could suggest, at first glance, that the obligation to respect ECHR rights extends to everyone within the state's territory. But the French-language version of Article 1 (which is of equal authoritative value) requires states to secure the Convention rights to everyone '*relevant de leur juridiction*'.¹³ In French, '*juridiction*' does not have the same territorial connotations, unless qualified as '*juridiction territoriale*'. '*Juridiction*' relates to the power or right to exercise legal authority, it does not denote the territory to which that power or right is limited. '*Relevant*' means under or subject to. One can be under or subject to legal authority, but not to territory. As such, the initial interpretation of Article 1 jurisdiction as coterminous with a state's territory is clearly wrong.

The ACHR similarly limits the scope of states parties' obligations:

Article 1

The States Parties to this Convention undertake to respect the rights and freedoms recognised herein and to ensure to all persons *subject to their jurisdiction* the free and full exercise of those rights and freedoms ...¹⁴

Just as under the ECHR, the scope of rights and freedoms in the ACHR is limited according to states parties' jurisdiction, but there is no explicit mention of territory. An individual cannot be subject to a territory, so obviously the application of the ACHR is not limited to states parties' national territories either.

The ICCPR contains a similar clause, although it does make reference to territory in its delimitation of states' obligations:

Article 2

(1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant ...¹⁵

The ICCPR explicitly provides that states parties must secure the Covenant rights to everyone within their national territories, but it is unclear whether 'and subject to its jurisdiction' merely describes individuals within a state's territory or creates a separate category of individuals who are outside the state's territory but who still have enforceable rights against the state under the Covenant. The Human Rights Committee confirmed in its General

13. Article 1, ECHR (Official French version, emphasis added).

14. Article 1, ACHR (emphasis added).

15. Article 2(1), ICCPR (emphasis added).

Comment No 31 that Article 2(1) of the ICCPR binds states to ensure the Covenant rights to those individuals ‘within the power or effective control’ of the state’s forces acting outside its territory.¹⁶ As such, the IHRL instruments limit the scope of the obligations arising under their terms to states’ jurisdiction but not to their territories. Therefore, the meaning given to jurisdiction in this context is extremely important.

The Inter-American Commission on Human Rights has decided to adopt the meaning of jurisdiction as arrived at by the European treaty bodies.¹⁷ The UN Human Rights Committee’s General Comments also support the approach taken by the European Court. The European Court’s general position has been that the ECHR is usually applicable throughout a contracting state’s territory.¹⁸ Jurisdiction for the purposes of the ECHR includes a state’s own territory. This accords with the PIL sense of states’ right to prescribe and enforce their will over their own national territories, but is meant in the sense that states owe an obligation to respect the human rights of individuals within that territory. There is a presumption that states are responsible for guaranteeing the rights of individuals within their own territories because they exercise control over those individuals. This is a rebuttable presumption.¹⁹ Where a state has lost control of portions of its territory it may be unable to fulfil some²⁰ or indeed all of its ECHR obligations in those territories over which control has been lost.²¹ True enough, that control embodies the PIL understanding of jurisdiction, but it is based on more than states’ rights vis-à-vis *other states* to control their own internal affairs free of external interference.

The European Court has judged that

The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of the rights and freedoms set forth in the Convention.²²

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16. UNCHR, ‘General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (2004) UN Doc CCPR/C/21/Rev.1/Add.1326, para 10.
 17. *Coard et al v United States*, Case No 10.951, Inter-American Commission on Human Rights, Report (29 September 1999); *Alejandro et al v Cuba*, Case No 11.589, Inter-American Commission on Human Rights, Report (29 September 1999).
 18. *Ilaşcu and others v Moldova and Russia*, Application no 58787/99, European Court of Human Rights, Judgment (8 July 2004) para 113.
 19. *Assanidzé v Georgia*, Application no 71503/01, European Court of Human Rights, Judgment (8 April 2004) para 139.
 20. *Ilaşcu* (n 18) para 311.
 21. *Cyprus v Turkey (No 2)*, Application no 8007/77, European Court of Human Rights, Judgment (2 April 1992) para 63.
 22. *Ilaşcu* (n 18) para 311.

Jurisdiction has thus been called a ‘threshold criterion’,²³ according to which the state’s liability is determined. But the European Court did not say that the necessary condition was exercise of PIL jurisdiction *over territory*. Instead jurisdiction should be viewed as a *prima facie* link between the state and an individual. When the state exercises jurisdiction over an *individual* it may be held responsible for the acts or omissions of its agents imputable to it which might infringe that individual’s ECHR rights. It should be noted that jurisdiction for the purposes of Article 1 is not the same as attribution and responsibility.²⁴ Attribution of conduct to a state is a different legal question. Whereas attribution determines that the state had control over the perpetrators of an alleged human rights violation, jurisdiction is concerned with the state’s control over the *victims*.²⁵

The European Court has repeatedly ruled that ‘the term “jurisdiction” is not limited to the national territory of the High Contracting Parties; their responsibility can be involved because of acts of their authorities producing effects outside their own territory’.²⁶ Jurisdiction in IHRL is not a set of rules governing when states may lawfully act outside their own territory. Rather it denotes the circumstances in which states owe human rights obligations to individuals. Two main approaches to jurisdiction are discernible in the European Court’s case law. In the first, an individual is within a state’s jurisdiction (and therefore entitled to ECHR rights) when the agents of that state exercise power and authority over him. These agents may be soldiers, diplomats, police or other individuals acting with state authority. The power exercised may be physical or legal. This is called the personal model. In the second approach an individual is within the state’s jurisdiction when he is in a territory over which that state has effective control. The territory is not necessarily a legal part of the controlling state but is under that state’s control as a matter of fact. This is called the spatial model. In both of these approaches jurisdiction means the factual relationship between a state and an individual, rather than the legality of a state’s actions for the purposes of PIL and interstate relationships.

23. Samantha Besson, ‘The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To’ (2012) 25 (4) *Leiden Journal of International Law* 857–84, 857.

24. *Loizidou v Turkey (Preliminary Objections)*, Application no 15318/89, European Court of Human Rights, Judgment (23 March 1995) para 61.

25. Marko Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford, Oxford University Press, 2011) 51.

26. *Drozd and Janousek v France and Spain*, Application no 12747/87, European Court of Human Rights, Judgment (26 June 1992) para 91.

Intervention by Invitation and the Principle of Self-Determination in the Crimean Crisis

Heini Tuura*

ABSTRACT: The backdrop of this article is Russia's argumentation for its annexation of the Ukrainian peninsula of Crimea in March 2014. This annexation, unrecognised by Ukraine and most members of the international community, took place following a Russian armed intervention at the behest of the previously ousted President Yanukovich. Moreover, Russia claims that the secession itself is legitimised by the Crimean people's right to self-determination. This argumentation marks a simultaneous appearance of the doctrines of armed intervention by invitation and the self-determination of peoples as legal justifications. This can be regarded as surprising, as traditionally these two norms have been quite mis-matched due to their starkly different positions and goals. The purpose of this article is to first examine the relation between these two doctrines, and then analyse how this relation has panned out in the question of Crimea. In the final analysis the relationship between intervention by invitation and the external tier of self-determination will be projected against the concept of territorial sovereignty in order to see if and how the co-application of these norms is plausible.

KEYWORDS: intervention by invitation, use of force, self-determination, secession, sovereignty, territory

1. Introduction

The crisis in Ukraine has captured the world's attention for over two years. What first emerged as an internal unrest has escalated into an international crisis—legally, politically and most importantly, humanly. Examining the matter has proven to be difficult for many reasons. The situation has evolved sporadically, there have been many unexpected elements involved,¹ and

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1. Helen Davidson and Alan Yuhas, 'Malaysia Airlines Plane MH17 "Shot Down" in Ukraine—As It Happened', *The Guardian*, 18 July 2014, <www.theguardian.com/world/2014/jul/17/malaysia-airlines-plane-crashes-ukraine-live> (last visited 19 July 2017).

finding objective information has at times been a nearly impossible task.² At this stage the overall conflict is still on-going, which naturally means that no definite analysis can be made. Still, it is possible and pertinent to focus on a particular aspect that took place in the spring of 2014: the Russian armed intervention in Ukraine which resulted in the annexation of the Crimean peninsula. The annexation executed by Russia has divided the international community to the point where relations between the East and the West have been compared to the icy decades of the Cold War.³ Russia has insisted that the secession was concluded in accordance with international law, but most states have refuted this point and denounced the annexation and Russia's military activities in Ukraine.⁴

This polarisation should come as no surprise. The forceful annexation of a region from one state to another is by its nature a controversial matter that concerns many legal norms, which the on-going Crimean debacle exemplifies well: while most have viewed Crimea's annexation as an infringement upon the territorial integrity of Ukraine, Russia has held that the secession was necessary to protect the self-determination of Crimea's people.⁵ The situation is further complicated by the Russian armed intervention that has taken place on Ukrainian soil since the conflict's escalation in 2014. Russia has argued that its use of force is *inter alia* validated by the consent of the territorial sovereign, commonly known as armed intervention by invitation, a claim that Ukraine and many Western States have denied.⁶ The use of force is almost as infamous as unilateral secession, and when put together these ingredients form a conundrum that is difficult to comprehend from any standpoint.

From the perspective of legal argumentation, the crisis has dealt with the foundation that many view as most crucial in all international relations: the sovereignty and territorial integrity of independent states.⁷ Both legal rules invoked in the case, intervention by invitation and the self-determination of peoples, are norms of international law that have grown to accommodate the notion of state sovereignty, but in different ways. Intervention by invitation is

2. Alan Yuhas, 'Russian Propaganda over Crimea and the Ukraine: How Does It Work?', *The Guardian*, 17 March 2014, <www.theguardian.com/world/2014/mar/17/crimea-crisis-russia-propaganda-media> (last visited 19 July 2017).

3. Robert Legvold, 'Managing the New Cold War' (2014) 93 *Foreign Affairs* 74–84.

4. Territorial Integrity of Ukraine, GA Res 68/262, 27 March 2014, paras 1–6.

5. Record of the Security Council's 7144th Meeting, UN Doc S/PV/7144 (19 March 2014) 8–10.

6. Record of the Security Council's 7125th Meeting, UN Doc S/PV.7125 (3 March 2014) 3–15; GA Res 68/262, Preamble.

7. Record of the Security Council's 7125th Meeting, *ibid*, 4–14.

a doctrine that relies upon the sovereignty of a state to invite a foreign military intervention into its territory; the right to self-determination is a norm that imposes obligations on states which, if breached, may in the most exceptional circumstances lead to the territorial break-up of the country. Given their different standpoints and goals, intervention by invitation and the right to self-determination have often clashed in past practice.⁸ Nevertheless, during the Ukrainian crisis and especially in the question of Crimea, they have been invoked by Russia simultaneously as a justification for its actions. This begs the question: is such co-application of these concepts possible? If so, was that effectively achieved in the case of Crimea?

The two-point purpose of this article is therefore to first discuss the relation between intervention by invitation and the self-determination of peoples, and then analyse how these two norms have played out in the on-going Crimean crisis. I will in particular attempt to find out if Russia's legal argumentation on the annexation has marked the rise of a new relationship between the two concepts, where they can be applied alongside each other in order to reach a common goal. The analysis of both concepts will be set against the canvas of territorial sovereignty, where intervention by invitation has traditionally been pledged as its proponent, while the right to self-determination has posed a possible threat. The notions described here will be analysed from the perspective of critical international law, which acknowledges the entangled connection between law and politics in international relations. Towards these objectives, the article has been structured as follows: first, in section 2, I shall lay out the legal basis by discussing the norms of intervention by invitation and self-determination. I will then proceed to discuss the historic overlap and compatibility of the two norms in section 3, after which I shall explain how they have been presented and perceived in the Crimean question in section 4. The article will close with some final conclusions in section 5.

Mention should be made of the theoretical approaches, omissions and assumptions of this article. As the situation in Ukraine has evolved, Russia has invoked a wide spectrum of arguments in order to defend its actions on the matter. Aside from intervention by invitation and the right to self-determination, the Russian legal claims have *inter alia* touched upon the protection of nationals abroad.⁹ Yet out of these propositions only intervention

8. Antonio Tanca, *Foreign Armed Intervention in Internal Conflict* (Dordrecht, Kluwer Academic Publishers, 1993) 24, 160–61 and 176–77.

9. James A Green, 'Editorial Comment—The Annexation of Crimea: Russia, Passportation and the Protection of Nationals Revisited' (2014) 1 *Journal on the Use of Force and International Law* 3–10, 7.

by invitation and the right to self-determination are concepts that have crystallised as theoretically accepted norms of international law.¹⁰ Although the norms are far from flawless and clear-cut pieces of legal regulation, their core legitimacy is not seriously questioned, much unlike the prospects of protecting nationals abroad and other more dubious forms of armed force. Hence I believe that the most pertinent research results on Russia's position can be achieved by examining intervention upon request and the self-determination of peoples.

It should be further noted that due to the final analysis of this article being set in the context of the Ukrainian crisis, I will specifically focus on the invited interventions executed by the Soviet Union and subsequently Russia. The reader should understand that there have been various states that have more or less questionably relied on the doctrine of intervention by invitation, and that it is not suggested that Russia is the only—or even the most prominent—violator of international law in this field.

2. The Legal Basis: From Politics to Law

2.1. Armed Intervention by Invitation

2.1.1. *In Theory*

With the use of force tightly regulated by the United Nations Charter, theoretically there is little room left for states to pursue their military ventures. The prohibition on the use of force by states found in Article 2(4) of the Charter bans all forms of armed force between states: this means that armed activities ranging from full-scale military invasions to merely providing smaller armed support to rebel forces are not allowable under the current system.¹¹ The Charter itself knows only two clear exceptions, self-defence against an armed attack and the collective use of force in order to restore international peace.¹² This rather utopian plan came to be due to the aftermath

10. For the general debate about the legality of the protection of nationals abroad, see Mathias Forteau, 'Rescuing Nationals Abroad' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford, Oxford University Press, 2015) 947–61.

11. *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) (hereinafter '*Nicaragua*') ICJ Reports (1986) 14, para 195; Christine Gray, *International Law and the Use of Force*, 3rd edn (New York, Oxford University Press, 2008) 30.

12. The Charter of the United Nations, 26 June 1945, in force 24 October 1945, 1 UNTS 26, Articles 2(4), 39, 42, 51 and 53.

of the two World Wars, which had made the international community recognise the need to limit the right of states to resort to force as they saw fit. In order to ensure that no such catastrophes would take place ever again, it was agreed that the use of force should primarily be left at the discretion of the United Nations and its chief political organ, the Security Council.¹³ However, practice has been vastly different. The scheme on the use of force was not wholly implemented in the decades of the Cold War, as political impasses between the members of the Security Council prevented collective security from coming into full fruition outside theory.¹⁴ With the planned centralisation of the use of force having failed, states began to test the theoretical limits of the regulation on unilateral military activities.

Thus, numerous forms of armed interventions not specifically described in the Charter have been put into practice since 1945, with the ventures meeting varying responses.¹⁵ These ventures include armed intervention by invitation of the host state, which has arguably been the most successful in solidifying its position as an acceptable form of armed intervention.¹⁶ Initially fuelled by the tensions of the Cold War, intervention by invitation emerged as a prominent but also highly erratic doctrine of international law, which was in particular used by the most powerful countries in the world, including the United States and the Soviet Union (and subsequently Russia). While the concept has been highly controversial in practice, intervention by invitation has also been accepted as a form of armed force that is theoretically allowable in today's international law.¹⁷ Moreover, it has been established that when truly executed in perfect accordance with the host state's will, armed intervention by invitation does not by default violate the customary rule of non-intervention, which is in place to ensure that states do not intervene—militarily or non-militarily—in the affairs of others.¹⁸ This is due to the notion that an invited intervention does not constitute a dictatorial

13. Tarcisio Gazzini, *The Changing Rules on the Use of Force in International Law* (Manchester, Manchester University Press, 2005) 22.

14. Thomas M Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (New York, Cambridge University Press, 2009) 3–4.

15. Gazzini (n 13) 170–79; Gray (n 11) 30–66; The Situation in Grenada, GA Res 38/7, 2 November 1983, paras 1–6; Effects of the Military Intervention by the United States of America in Panama on the Situation in Central America, GA Res 44/240, 29 December 1989, paras 1–5.

16. Tanca (n 8) 19, 111 and 117–19.

17. Antonio Cassese, *International Law*, 2nd edn (New York, Oxford University Press, 2005) 369–71; Tanca (n 8) 17–22.

18. Tanca (n 8) 17–19.

interference into the host state's internal matters, leaving the norm intact.¹⁹ However, the duty of non-intervention does impose many limitations on the doctrine's applicability, especially under certain circumstances. Some of these restrictions will be discussed later in this article.

As it has been quite widely established that the doctrine is in accordance with both the prohibition on the use of force and the duty of non-intervention, one might at first glance deem the theoretical foundation of these kinds of armed interventions to be sound. Still, closer inspection allows us to see that intervention by invitation's legal position remains somewhat of an oddity, since its exact justification in relation to the current system on the use of force has been left unidentified.²⁰ This premise has remained despite the fact that all major UN organs have in one way or another expressed their acceptance of armed intervention at the request of the host state's legitimate representative. This acceptance has been perhaps most prominently headed by the International Court of Justice (ICJ), which noted intervention by invitation to be 'allowable' in *Nicaragua* (1986),²¹ and later upheld the same finding in *Congo v Uganda* (2005) by accepting consent as a valid legal basis for the use of force.²² The General Assembly has also recognised the practice in the *Definition on Aggression* (1974),²³ while the Security Council has issued its approval of specific cases of intervention by invitation, with a notable modern example being the French military intervention in Mali in 2013.²⁴

However, in none of these instances have the UN organs taken time to elaborate upon the precise legal justification of the doctrine. In *Nicaragua* (1986), the ICJ's findings on the matter were very short, as the Court only quickly established the practice to be in accordance with international law. In *Democratic Republic of Congo v Uganda* (2005) it simply invoked the legal basis previously discussed in *Nicaragua*, offering no new notions on the theoretical

19. Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law: Volume 1 Peace*, 9th edn (London, Longman, 1996) 435.

20. Erika de Wet, 'The Modern Practice of Intervention by Invitation in Africa and Its Implications for the Prohibition of the Use of Force' (2015) 26 *European Journal of International Law* 979–98, 980–81.

21. *Nicaragua* (n 11) para 246.

22. *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* (Merits) (hereinafter '*Democratic Republic of Congo v Uganda*') ICJ Reports (2005) 168, para 45.

23. Definition of Aggression, GA Res 3314 (XXIX), 14 December 1974, Article 3e.

24. Mali, SC Res 2100, 25 April 2013, Preamble.

sphere and legality of intervention by invitation.²⁵ The statements made by the General Assembly and the Security Council are of little help either. The Assembly's recognition of intervention by invitation in the *Definition of Aggression* was not only brief but also indirect, and the Security Council has only tended to discuss the matter in reference to individual incidents.²⁶ This leaves the doctrine situated in a unique place in the field of armed force. It cannot be immediately compared to self-defence or collective use of force, as both of these forms have a clearly defined legal basis. However, comparisons to other uses of armed force not spelled out in the UN Charter, such as unilateral humanitarian intervention, are also pointless: these ventures have to constantly find legal validation, a battle that the idea behind intervention by invitation is spared from.

With the UN practice on the theory behind intervention by invitation remaining both scattered and incomplete, the debate on the matter has been left in the hands of scholars. No general consensus on the precise justification of intervention by invitation is yet to be achieved, but two theories have gained mainstream support among commentators. Scholars have been divided on whether intervention by invitation is allowable because it has emerged as a new exception to Article 2(4) of the UN Charter, or if the Charter was always intended to allow the practice.²⁷ If one still wants to believe in the strictest interpretation of all the norms involved, both options have certain issues. The exception approach, which is based upon the doctrine of state responsibility and the principle of *volenti non fit iniuria* (an illegal act is no longer such if the injured party consents), suggests that the Charter's scheme is incomplete as other exceptions to Article 2(4) may be formulated beyond it. However, the outlook that Article 2(4) was never meant to ban invited interventions is dangerous as well, as it may leave the door open for any form of armed force not explicitly prohibited in the Charter. Moreover, it fails to take into account the planned—and spectacularly failed—grand plan of the Charter. Its idea was not to simply ban the use of force by individual states, but also to centralise it to the Security Council.²⁸

25. For the Court's general examination of the doctrine in the case, see *Democratic Republic of Congo v Uganda* (n 22) paras 42–54 and 92–105.

26. Definition of Aggression, Article 3e; SC Res 2100, Preamble; Record of the Security Council's 7125th Meeting (n 6) 3–18.

27. de Wet (n 20) 980–81.

28. The UN Charter, Preamble and Article 1(1).