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Military Intervention on Request in *Jus ad Bellum* and *Jus in Bello* and the Question of Recognition of Governments

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Abstract

Over the past decades, foreign interventions in internal conflicts upon the request of host governments have turned into a common practice. These instances have proved to be particularly challenging both from a *jus ad bellum* and a *jus in bello* point of view. On the one hand, it is often unclear whether the intervention is lawful; on the other hand, the classification of these armed conflicts is equally problematic. In both cases, the key to answer these questions is the identification of the organ capable of speaking on behalf of the state: who is the government? Considering the pivotal relevance of the identification of the government both in *jus ad bellum* and *jus in bello*, it is crucial to determine the criteria for identifying the authority capable of issuing a valid invitation. This article seeks to clarify these criteria. Ultimately, it will demonstrate that *jus ad bellum* and *jus in bello* reach different conclusions on the matter and it will argue that this should not be the case.

A. Introduction

Over the past decades, foreign interventions in internal conflicts upon the invitation of host governments have become common practice. These instances have proved to be particularly challenging both from a *jus ad bellum* and *jus in bello* point of view. On the one hand, it is often unclear whether the intervention is lawful; on the other hand, the classification of these armed conflicts is equally problematic. In both cases, the key to answering these questions is the identification of the organ capable of speaking on behalf of the state: who is the government? Under *jus ad bellum*, the intervention will be lawful and will not violate the ban on the use of force and the principle of non-intervention in the internal affairs of the state only if the invitation came from the government, i.e. the authority capable of speaking on behalf of the state. Under *jus ad bellum*, whether the intervention took place with the consent of the government determines crucial consequences for the classification of the conflict.

Considering the pivotal relevance of the identification of the government both in *jus ad bellum* and *jus in bello*, it is therefore crucial to determine how to identify the authority capable of issuing a valid invitation. Nevertheless, international law does not provide certain criteria to this end. The overwhelming majority of States follow the Estrada doctrine, an approach propounded by the Mexican Foreign Secretary Genaro Estrada in 1930, whereby States recognize other States, not governments:

> "The Mexican Government shall issue no declaration in the sense of grants of recognition, since that nation considers that such a course is an insulting practice and one which, in addition to the fact that it offends the sovereignty of other nations, implies that judgment of some sort may be passed upon the internal affairs of those nations by other governments, inasmuch as the latter assume, in effect, an attitude of criticism when they decide, favourably or unfavourably, as to the legal qualifications of foreign regimes."[1]

[1] B. R. Roth, *Governmental Illegitimacy in International Law* (1999), 137. See also P. C. Jessup, 'The Estrada Doctrine', 25 *The American Journal of International Law* (1931) 4, 719, 723; S. D. Murphy, 'Democratic Legitimacy and the Recognition of States and Governments,' in G. H. Fox & B. R. Roth (eds), *Democratic Governance and International Law* (2000), 123, 567.

This means that, as soon as an entity is recognized as a State, "it exists regardless of internal changes of power and crises".[2] Nevertheless, there are instances when identifying the *de jure* government is necessary and cannot be avoided, notably when a rebel group takes power, controls most of the country, and proclaims itself as the new government. In light of the central relevance of the identification of the government both in *jus ad bellum* and *jus in bello*, it is therefore essential to determine the criteria to identify the authority capable of issuing a valid invitation.

The aim of this article is to clarify the criteria to identify the entity capable of speaking on behalf of the State. Ultimately, it will demonstrate that *jus ad bellum* and *jus in bello* reach different conclusions as to the criteria for identifying the government capable of issuing an invitation, it will explain why this triggers key challenges, and it will therefore argue that there is a need to have common criteria regarding the identification of the government capable of consenting to a foreign intervention. Notably, Part I will focus on foreign interventions upon invitation from a *jus ad bellum* point of view; Part II will analyze the criteria for the recognition of governments under *jus in bello*; Part III will draw conclusions based on this analysis and will argue in favour of having common criteria.

It is important to remember that *jus ad bellum* and *jus in bello* are traditionally separated and independent under international law. International humanitarian law (IHL) applies regardless of whether the use of force was lawful in the first place. Nevertheless, according to the majoritarian view whether a foreign military intervention in a non-international armed conflict (NIAC) turns the internal conflict into an international armed conflict (IAC) depends on the presence or lack of consent expressed by the government of the inviting State. In other words, the classification under IHL depends on criteria that do not strictly pertain to IHL. However, also due to the separation between *jus ad bellum* and *jus in bello*, the two branches have reached different conclusions and this leads to paradoxical consequences that will be addressed in the last part of this article.

Before delving into this analysis, it is worth clarifying a terminological issue. As is well-known, international law traditionally distinguishes two types of armed conflicts: international and non-international ones, *tertium non datur*. An IAC involves armed confrontations between two States. On the other hand, a NIAC occurs whenever there is protracted armed violence between

[2] C. Redaelli, *Intervention in Civil Wars: Effectiveness, Legitimacy, and Human Rights* (2021), 104.

governmental authorities and organized armed groups, or between such groups.[3] "[B]anditry, unorganized and short-lived insurrections, or terrorist activities"[4] do not amount to armed conflicts.[5]

While this distinction is still of crucial relevance, there are instances that challenge this dichotomy and prompt some question whether there is a need for a third category, namely that of *internationalized armed conflicts*. Notably, in the 1960s, during the Vietnam War, scholars started exploring the idea of the internationalization of NIACs. Dietrich Schindler presented the first systematic study on the issue, where he put forward the idea of "international civil wars", which he defined as NIACs in which a foreign country intervenes in favor of one of the parties to the conflict.[6] Drawing upon his study, other scholars started investigating internationalized armed conflicts, defining them as "a civil war characterized by the intervention of the armed forces of a foreign power".[7] The International Committee of the Red Cross (ICRC) also adopted the term and used it "for many years to refer to situations in which one or more third States intervened in a pre-existing armed conflict affecting all or part of the territory of a given State".[8]

Nevertheless, scholars have increasingly challenged the notion of *internationalized armed conflicts* for two crucial reasons, clearly highlighted by the ICRC. First, Ferraro convincingly explained that the ICRC has abandoned the term because it "quite wrongly suggests a blanket application of the law of IAC in such situations;" furthermore, "[i]t could … give the impression that these situations form a third category of armed conflicts".[9] As aforementioned,

3 *Prosecutor v. Tadić*, Judgment, IT–94–1, 2 October 1995, para. 70. See also A. Cullen, *The Concept of Non-International Armed Conflicts in international Humanitarian Law* (2010), 120.

4 *Prosecutor v. Tadić*, Judgment, IT–94–1, 7 May 1997, para. 562.

5 H. McCoubrey, 'The Qualification Framework of International Humanitarian Law: Too Rigid to Accommodate Contemporary Conflicts?', 34 *Suffolk Transnational Law Review* (2011) 1, 145, 156-157; G. D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (2010), 153.

6 D. Schindler, 'Die Anwendung der Genfer Rotkreuzabkommen seit 1949' 22 ASDI (1965) 75, 93, 98; D. Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols* (1979), 150, 151.

7 See, e.g., H.P. Gasser, 'International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon', 33 *American University Law Review* (1983) 1, 145, 157.

8 T. Ferraro, 'The ICRC's Legal Position on the Notion of Armed Conflict Involving Foreign Intervention and on Determining the IHL Applicable to This Type of Conflict', 97 *International Review of the Red Cross* (2015) 900, 1227, 1230.

9 *Ibid*.

international law recognizes only two types of armed conflicts; introducing a third category could therefore increase confusion with regard to the relevant legal framework.[10] Interestingly, a recent work by Mačak has brought back the term *internationalized armed conflicts*, defined as NIACs that have turned into IACs following a process of internationalization.[11]

It should be noted that part of the scholarship recurs to the term transnational armed conflicts (TAC). At times, this this is intended to refer to instances different from *internationalized armed conflicts*. For instance, Corn and Jensen define TACs as armed conflicts where at least one of the parties is a transnational non-State actor, namely a "foreign-based" armed group.[12] However, other authors use the term as synonymous with internationalized armed conflicts. One clear example is Carron, who distinguishes between two types of transnational armed conflicts, whereby the common denominator is the use of force by one State in another country:

> "On the one hand, there are conflicts between State A and Armed Group C, which start in State A and then spillover into the territory of State B (spillover transnational armed conflicts). This is the case of the operations led by Turkey against the pkk [sic], first in Turkey, then in Iraq. On the other hand, there are conflicts emerging with transnational actions between State A and Armed Group C in the territory of State B (extraterritorial transnational armed conflicts). … The use of force by the United States and by Russia against

10 D. Carron, 'Transnational armed conflicts: An argument for a single classification of non-international armed conflicts', 7 *Journal of International Humanitarian Legal Studies* (2016) 1, 5, 6; ‚Ferraro', *supra* note 8, 1227. It should be noted that similar remarks have been raised against the use of the term *transnational armed conflicts* (TAC), see, e.g., C. Kreß, 'Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts', 15 *Journal of Conflict and Security Law* (2010) 2, 245, 257; M. Milanovic, 'The Applicability of the Conventions to ''Transnational" and "Mixed" Conflicts' in A. Clapham, P. Gaeta & M. Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (2015) 27, 45. See *contra* G. Corn & E. T. Jensen, 'Transnational Armed Conflict: A "Principled" Approach to the Regulation of Counter-Terror Combat Operations', 42 *Israel Law Review* (2009) 1, 46; Roy S. Schondorf, 'Extra-State Armed Conflicts: Is There a Need for a New Legal Regime', 37 *New York University Journal of International Law and Politics* (2004) 1, 1.

11 K. Mačák, *Internationalized Armed Conflicts in International Law* (2018) 2, 27.

12 ‚Corn & Jensen', *supra* note 10, 49; D. Jinks, 'September 11 and the Laws of War', 28 *Yale Journal of International Law* (2003) 1, 1, 40-41.

> the Islamic State (an armed group) in Iraq and Syria are another example of extraterritorial transnational armed conflicts."[13]

This article agrees with the ICRC view: internationalized or transnational armed conflicts do not amount to a new legal category. Furthermore, as these terms increase confusion as to their meaning, classification, and consequences, it does not seem a useful category. Nevertheless, it will be exceptionally used only when reporting the position of authors that use the term themselves.

B. Intervention by Invitation in *jus ad bellum*

Let us imagine a hypothetical scenario in which State A intervenes in State B to fight the opposition group C. Whether State B consented to the intervention determines the legality of the intervention.[14] Copious *jus ad bellum* literature has addressed the question. Notably, two models have emerged: the effectiveness approach and the democratic entitlement one. They will be analyzed in turn, and then they will be tested against State practice. Ultimately, this will put forward a third approach which appears to be more consistent with State practice.

As we shall see, the criteria to identify the entity capable of representing the State are different in *jus ad bellum* and *jus in bello*. While this will be further explained below, it is worth delineating already the primary contrast. Under *jus ad bellum*, a democratically elected entity is recognized as the new government even when it does not exercise effective control over the territory and population of the State, and even when a competing entity with effective control claims to represent the State. On the other hand, in case of the absence of a democratic alternative, the effective entity will be recognized as the government of the State. On the contrary, the majoritarian view in IHL scholarship posits that the authority capable of speaking on behalf of the State is always the effective one, regardless of the presence of a democratic alternative. This leads to the paradoxical conclusion that, in case competing entities claim to represent the State, one democratically elected and the other exercising effective control, *jus ad bellum* will recognize the democratic government, while IHL will prefer the effective one. The reasons why this is particularly problematic will be addressed in the last part of this work.

13 Carron, *supra* note 10, 10-11.

14 This assuming that no other justifications are present, such as the authorization by the UN Security Council or the right to self-defence.

Before delving into this analysis, it is worth clarifying the role of the recognition of governments in international law. The primary subjects of international law are States. As explained by Roth:

> "International law acknowledges 'States' as bearers of a distinctive package of rights, obligations, powers, and immunities (i.e. 'sovereignty'), and attributes to each state a government' with the legal capacity (for the time being) to assert rights, incur obligations, exercise powers, and confer immunities on the state's behalf."[15]

International law is clear in determining that a State is an entity that "possess[es] the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States".[16] While a government is one of the essential elements of a state, "the latter can endure also in absence of an authority capable to speak on its behalf".[17] The practice related to failed States – whereby the lack of a functioning government does not determine the end of the State – supports this conclusion.[18] Furthermore, the recognition of governments is charged with political value. Against this backdrop, and as aforementioned, the Mexican Foreign Secretary Genaro Estrada posited in 1930 that States should recognize other States, not governments. This approach, which came to be known as the Estrada doctrine, is vastly accepted by the international community. For instance, at the outset of the Libyan armed conflict, the British Foreign Secretary endorsed this approach with regard to the Libyan National Transitional Council:

> "In line with our assessment of the NTC [National Transitional Council] as the legitimate interlocutor in Libya representing the aspirations of the Libyan people, the Government has invited the NTC to establish an office in the UK. This will enhance our existing relationship with the NTC, and better enable us to fulfil

15 B. R. Roth, *Sovereign Equality and Moral Disagreement: Premises of a Pluralist International Legal Order* (2011), 169.

16 Article 1, *Montevideo Convention on the Rights and Duties of States*.

17 *Redaelli*, *supra* note 2, 104.

18 See D. Thürer, 'Failing States,' *Max Planck Encyclopedia of Public International Law* (2009), para. 3: '[a] State is usually considered to have failed when the power structures providing political support for law and order have collapsed or are non-existent to the extent that the State ceases to be an effective member of the international community. This process is generally triggered and accompanied by anarchic forms of internal violence.'

> our commitment to protect civilians under threat of attack from the Qadhafi regime. ... This arrangement does not affect our position on the legal status of the NTC: the British Government will continue to recognise States, not Governments."[19]

While the Estrada doctrine has the merit to prevent States from expressing judgment towards the authority in power in a specific country, this approach fails to consider that there are circumstances when identifying the organ capable of speaking on behalf of the State is inevitable. One of these cases is when two competing authorities claim to be the government of a State.

Before addressing the question of consent, it is worth putting forward a caveat. Non-international armed conflicts are situations of transition, characterized by high volatility, where identifying the authority representing the State is extremely challenging. This circumstance inevitably calls for the necessity to accept that, in times of transition, there are moments when it will not be possible to identify who is the government with absolute certainty. Nevertheless, it is exactly in these grey areas that it is paramount to understand how to identify the organ capable of representing the State. To this end, analyzing state practice will prove decisive.

I. Traditional Approaches

1. Effectiveness Approach

Effective control over the territory and the population has been the traditional criterion to identify the government representing the State for decades. This approach can be found in early arbitral decisions. For instance, in the *Dreyfus* case, the Arbitral Tribunal maintained that:

> "According to a principle of international law … today universally admitted, the capacity of a government to represent the State in its international relations does not depend in any degree upon the legitimacy of its origin, so that … the usurper who in fact holds

[19] Foreign & Commonwealth Office, 'Announcement: Supporting the Libyan National Transitional Council' (2011) available at https://www.gov.uk/government/news/supporting-the-libyan-national-transitional-council (last visited 10 May 2022).

> power with the consent express or tacit of the nation acts … validly in the name of the State."[20]

In a similar vein, in the *Tinoco Concessions* case, the arbiter affirmed that a government exercising effective control should be considered the authority capable of representing the State, regardless of how it obtained power:

> "To hold that a government which establishes itself and maintains a peaceful administration, with the acquiescence of the people for a substantial period of time, does not become a de facto government unless it conforms to a previous constitution would be to hold that within the rules of international law a revolution contrary to the fundamental law of the existing government cannot establish a new government. This cannot be, and is not, true. The change by revolution upsets the rule of the authorities in power under the then existing fundamental law, and sets aside the fundamental law in so far as the change of rule makes it necessary. To speak of a revolution creating a de facto government, which conforms to the limitations of the old constitution, is to use a contradiction in terms."[21]

Kelsen was one of the most vocal supporters of this approach, as he believed that "a national legal order begins to be valid as soon as it has become – on the whole – efficacious; and it ceases to be valid as soon as it loses this efficacy".[22] Similarly, Wippman affirmed that "international law presumes that when a government exercises effective control over the territory and the people

20 *French Claims against Peru*, Award at the Arbitral Tribunal, 11 October 1921, 1 Reports of International Arbitral Awards (1921), 215-221.

21 *Tinoco Concessions Arbitration*, (Great Britain c. Costa Rica), 18 October 1923 (sole arbitrator William R Taft) RSA, vol. 1, p. 28. See H. Lauterpacht, *Recognition in International Law* (1947), 104.

22 H. Kelsen, *General Theory of Law and State* (1961), 220-221. See also B. R. Roth, 'Secessions, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine', 11 *Melbourne Journal of International Law* (2010) 2, 393, 431; A. Tanca, *Foreign Armed Intervention in Internal Conflict* (1993), 48; D. Wippman, 'Military Intervention, Regional Organizations, and Host State Consent', 7 *Duke Journal of Comparative and International Law* (1996) 1, 209, 211-212; L. Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government', 56 *British Yearbook of International Law* (1986) 1, 189, 196.

of the state, the government … possesses the exclusive authority to express the will of the State in its international affairs".[23]

The effectiveness approach has the merit of basing the decision on an objective criterion, namely the control over territory and population. Effectiveness seems therefore more objective and less prone to abuse. Nevertheless, it does raise several challenges. First, it is unclear what threshold is to be considered an effective government. Is it necessary to control the entirety of the territory? Is control over at least 50% of the territory enough? Should it be exercised on key areas, such as the capital and critical infrastructures? What if an entity exercises control over more than 50% of the country, but only on uninhabited areas and not on state infrastructures?[24] Lacking clear and generally accepted criteria on the required threshold, the effectiveness approach ultimately will rest on a discretional analysis of the situation, whereby States might decide whether the entity is sufficiently effective depending on their willingness to recognise it, or lack thereof.

Second, inasmuch as effectiveness is based on *de facto* consideration, it does not consider how the government gained power: "as far as the government can fulfil the functions of the state, it is considered capable of acting on its behalf".[25] In the words of Wright, "the *de facto* situation is presumed to overrule the *de jure* one".[26] Nevertheless, over the past decades this position has been vastly criticized in the literature. As human rights and the emerging right to democratic entitlement have gained momentum, relying on an approach that endorses the principle *ex factis jus oritur* has been increasingly perceived with unease. Notably, some authors have criticized it for being in contrast with the right to self-determination of people, and in particular their right to determine their own political future: "[i]nsofar as it is perceived as little more than an imprimatur for 'might makes right' at the local level, this 'effective control doctrine' is manifestly offensive to a rule-of-law sensitivity".[27] Against this backdrop, the democratic entitlement approach emerged.

23 D. Wippman, *supra* note 22, 211-212.

24 Redaelli, *supra* note 2, 107; E. Lieblich, *International Law and Civil Wars: Intervention and Consent* (2013), 154.

25 Redaelli, *supra* note 2, 107.

26 Q. Wright, 'United States Intervention in the Lebanon', 53 *The American Journal of International Law* (1959) 1, 112, 120.

27 Roth, *supra* note 15, 170. See also Wippman, *supra* note 22, 213; Doswald-Beck, *supra* note 22, 194; G. H. Fox, 'The Right to Political Participation in International Law' in G. H. Fox & B. R. Roth (eds.), *Democratic Governance and International Law* (1992), 539, 595.

2. Democratic Entitlement Approach

In recent years, the right to democracy has gained momentum, hence influencing debates on the recognition of governments. The favor granted to democratic governments over effective ones seems to find support among regional organizations. A clear example comes from the Organization for Security and Co-operation in Europe (OSCE), whose Moscow Document:

> "[C]ondemn[s] unreservedly forces which seek to take power from a representative government of a participating State against the will of the people as expressed in free and fair elections and contrary to the justly established constitutional order; will support vigorously, in accordance with the Charter of the United Nations, in case of overthrow or attempted overthrow of a legitimately elected government of a participating State by undemocratic means, the legitimate organs of that State upholding human rights, democracy and the rule of law, recognizing their common commitment to countering any attempt to curb these basic values."[28]

The African Union (AU)[29] and the Organization of American States (OAS)[30] have been more vocal in taking a position against governments that took power through undemocratic means, such as a coup or elections fraud. Of particular interest is the African Charter on Democracy, Elections, and Governance (2007), which establishes a number of measures to be adopted against effective but undemocratic authorities:

> "4. The perpetrators of unconstitutional change of government shall not be allowed to participate in elections held to restore the

[28] Conference on Security and Cooperation in Europe (CSCE), *Document of the Moscow Meeting on the Human Dimension of the* CSCE, 30 I.L.M. (1991), 1670, 1677, para. 17. See Roth, *supra* note 1, 376; ‚Wippman', *supra* note 22, 219; M. Halberstam, 'The Copenhagen Document: Intervention in Support of Democracy', 34 *Harvard International Law Journal* (1993) 1, 163, 175.

[29] M. Roscini, 'Neighbourhood Watch? The African Great Lakes Pact and *Jus ad Bellum*', 69 *Heidelberg Journal of International Law* (2009) 3, 931, 955–958.

[30] *Roth*, *supra* note 15, 209–211; B. S. Levitt, 'A Desultory Defense of Democracy: OAS Resolution 1080 and the Inter-American Democratic Charter', 48 *Latin American Politics and Society* (2006) 3, 93-123; D. S. Boniface 'Is There a Democratic Norm in the Americas? An Analysis of the Organization of American States', 8 *Global Governance* (2002) 3, 365.

> democratic order or hold any position of responsibility in political institutions of their State.
> 5. Perpetrators of unconstitutional change of government may also be tried before the competent court of the Union.
> 6. The Assembly shall impose sanctions on any Member State that is proved to have instigated or supported unconstitutional change of government in another state in conformity with Article 23 of the Constitutive Act.
> 7. The Assembly may decide to apply other forms of sanctions on perpetrators of unconstitutional change of government including punitive economic measures.
> 8. State Parties shall not harbour or give sanctuary to perpetrators of unconstitutional changes of government."[31]

The OAS has similarly adopted a plethora of instruments which highlight the support for democratic governments overthrown through unconstitutional means, such as coups. Of particular interest is the Resolution *Representative Democracy* (1991),[32] which highlights that "one of the basic purposes of the OAS is to promote and consolidate representative democracy with due respect for the principle of non-intervention"[33] and establishes that:

> "In the event of any occurrences giving rise to the sudden or irregular interruption of the democratic political institutional process or of the legitimate exercise of power by the democratically elected government in any of the Organization's member states, in order, within the framework of the Charter, to examine the situation, decide on and convene an ad hoc meeting of the Ministers of Foreign Affairs, or a special session of the General Assembly."

According to a number of authors, these regional documents all support the emerging right to democratic governance and a general preference for democratic but ineffective governments over undemocratic but effective ones. In other words, these instruments would represent "a net of participatory

31 *Ibid*.
32 *Representative Democracy*, 5 June 1991, AG/RES. 1080 (XXI-0/91).
33 Santiago Commitment, Preamble.

elements"[34] and an unprecedented "initiative to endorse and define a popular right of electoral democracy".[35]

II. Testing Traditional Approaches Against State Practice: The Emergence of a New Trend

Scholars have supported two approaches regarding the recognition of governments. On the one hand, a number of authors posit that effective entities should be preferred over democratic ones. On the other hand, some of the literature supports the idea that democratically elected governments have the authority to speak on behalf of the State, even when they are not effective. Interestingly, State practice seems to support both instances. As a matter of fact, recognition of governments, especially in cases of interventions in NIACs upon the invitation of the government, looks so chaotic that it seems to suggest that pure politics, rather than international law, regulates these instances. Nevertheless, upon closer examination, a pattern emerges and, while it might be early to conclude that it is part and parcel of customary law, practice and *opinio juris* have been consistent enough to suggest that this is the direction international law is taking.

The preference for democratic governments, even when ineffective, is supported by several cases. Among the most emblematic instances of military interventions upon invitation directed at restoring democratic governments ousted by a rebellion, it is worth mentioning Haiti (1990 and 1994),[36] Sierra

[34] T. M Franck, 'The Emerging Right to Democratic Governance', 86 *American Journal of International Law* (1992) 1, 46, 69; L. E. Fielding, 'Taking the Next Step in the Development of New Human Rights: The Emerging Right of Humanitarian Assistance to Restore Democracy', 5 *Duke Journal of Comparative & International Law* (1995) 2, 329, 332-333.

[35] ‚Franck', *supra* note 34, 67.

[36] See Murphy, *supra* note 1, 574; ‚Wippman', *supra* note 22, 218–219; Roth, *supra* note 1, 366–387; W. M. Reisman, 'Why Regime Change is (Almost Always) a Bad Idea', 98 *American Journal of International Law* (2004) 3, 516, 251–252.

Leone (1996),[37] Côte d'Ivoire (2010),[38] Libya (2014),[39] and South Sudan (2014).[40] In all these cases, not only foreign interventions in internal conflicts took place upon the invitation of the ousted, democratically elected governments, but also the overwhelming majority of the international community recognized the ousted government as the organ representing the State. The events that unfolded in 2014 in Yemen seem to confirm this conclusion. In 2014, a non-international armed conflict broke out in Yemen between opposing Houthi forces and governmental troops. In September of that year, the rebel groups entered the capital. Fighting continued for months and, in February 2015, the opposition arrested President Abdrabbuh Mansur Hadi, who managed to flee to Saudi Arabia the following month.[41] As soon as he reached the country, he

37 See J. Levitt, 'Humanitarian Intervention by Regional Actors in Internal Conflicts: The Cases of ECOWAS in Liberia and Siearra Leone', 12 *Temple International and Comparative Law Journal* (1998) 2, 333–377; K. Nowrot & E. W. Schebacker, 'The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone', 14 *American University International Law Review* (1998), 321; K. Samuels, '*Jus Ad Bellum* and Civil Conflicts: A Case Study of the International Community's Approach to Violence in the Conflict in Sierra Leone', 8 *Journal of Conflict & Security Law* (2003) 2, 315; ‚Wippman', *supra* note 22, 303.

38 See IGC, 'Côte d'Ivoire: Is War the Only Option?' Africa Report No. 171, (3 March 2011); J. d'Aspremont, 'Duality of government in Côte d'Ivoire', *EJIL: Talk!* (2011), available at https://www.ejiltalk.org/duality-of-government-in-cote-divoire/; T. F. Bassett & S. Straus, 'Defending Democracy in Côte d'Ivoire: Africa Takes a Stand', 90 *Foreign Affairs* (2011), 130; A. J. Bellamy & P. D. Williams, 'The New Politics of Protection? Côte d'Ivoire, Libya and the Responsibility to Protect', 87 *International Affairs* (2011) 4, 825, 832.

39 Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2012/ 675, 30 August 2012, paras. 2-9; Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc S/2015/624, 13 August 2015, paras. 29 ff.: S. Arraf, 'Libya: Conflict and Instability Continue' in A. Bellal (ed.), *The War Report: Armed Conflicts in 2017* (2018), 70–82; E. de Wet, *Military Assistance on Request and the Use of Force* (2019), 112.

40 See Report of the Secretary-General on South Sudan, UN Doc S/2011/678, 2 November 2011; 'Ugandan army confirms it will leave South Sudan,' BBC (12 October 2015), available at www.bbc.com/news/world-africa-34502524; 'Uganda admits combat role in South Sudan,' Al Jazeera (16 January 2014), available at www.aljazeera.com/news/africa/2014/01/ugandan-troops-battling-south-sudan-rebels-201411683225414894.html (last visited 31 August 2022).

41 See 'Yemen Crisis: Houthi Rebels Announce Takeover' BBC (6 February 2015), available at http://www.bbc.com/news/world-middle-east-31169773; 'Yemen's Hadi Seeks UN Military Support to Deter Houthis,' Al Jazeera (25 March 2015), http://www.aljazeera.com/news/middleeast/2015/03/yemen-hadi-seeks-military-support-deter-houthis-150324223355704.html (last visited 31 August 2022).

asked for a foreign intervention in order to fight against the rebels, a request that was accepted. In late March 2015, the United Arab Emirates, Bahrain, Qatar, and Kuwait engaged in airstrikes against the Houthi opposition forces.[42] While President Hadi did not exercise effective control over the country anymore, he was still deemed capable of issuing an invitation for a foreign intervention.

Another more recent example concerns the elections that took place in The Gambia in 2016-2017. On December 1, 2016, Adama Barrow won the presidential elections, defeating the long-term President Yahya Jammeh. However, on December 9, the incumbent announced that he did not recognize the results of the elections due to alleged fraud and he thus refused to step down and to hand power to Barrow. The international community nearly unanimously recognized the latter as the President of The Gambia. For instance, the UNSC affirmed that:

> "[A]ll Gambian parties and stakeholders to r*espect the will of the people* and the outcome of the election which recognized Adama Barrow as President-elect of The Gambia and *representative of the freely expressed voice of the Gambian people* as proclaimed by the Independent Electoral Commission."[43]

In a similar vein, the Economic Community of West African States (ECOWAS) adopted a communiqué in which it recognized the results of the elections and that it stands ready to "take all necessary measures to strictly enforce the results of the elections",[44] while the Peace and Security Council of

42 See *ibid*. See also 'Egypt defense minister in Riyadh to discuss operation in Yemen,' Al Araibiya (10 April 2015), available at http://english.alarabiya.net/en/News/middle-east/2015/04/10/Egypt-defense-minister-in-Riyadh-to-discuss-operation-in-Yemen.html; 'Communiqué: Morocco decides to provide all forms of support to the coalition for support of legitimacy in Yemen', Ministry of Foreign Affairs and International Cooperation of the Kingdom of Morocco (26 March 2015), available at https://www.diplomatie.ma/en/Politiqueétrangère/MondeArabe/tabid/2810/vw/1/ItemID/11926/language/en-US/Default.aspx; M. Ghaza, 'Jordan "Fully Committed to Defending Yemen's legitimacy, Fighting Foreign Interference",' Jordan Times (2015), available at http://www.jordanembassyus.org/news/jordan-fully-committed-defending-yemen-s-legitimacy-fighting-foreign-interference; 'Sudanese Planes Pound Houthi Targets in Yemen', Sudan Tribune (1 April 2015), available at http://www.sudantribune.com/spip.php?article5448 (all last visited 31 August 2022).

43 SC Res. 2337, UN Doc. S/RES/2337, 19 January 2017, paras. 1, emphasis added.

44 ECOWAS, Fiftieth Ordinary Session of the ECOWAS Authority of heads of State and Government, Final Communiqué, 17 December 2016. See also A. Hallo de Wolf, 'Rattling

the African Union condemned the coup and affirmed that Jammeh was not recognized as the authority representing the Gambian State any longer.[45]

The aforementioned cases demonstrate the emergence of a new trend, whereby the international community prefers democratically elected governments over effective ones, even when they are not effective. This is the case not only when the democratic governments have been in power before being ousted, but also when it had never exercised effective control over the country, such as in the case of The Gambia. This conclusion is not only supported by State practice, but it seems also to respect crucial norms, notably the right to self-determination of people. Accordingly, "this would prove that effective control principle is not the pivotal criterion to identify the government capable of consenting to foreign interventions".[46] However, we should not forget that several governments are undemocratic in nature, and yet they are recognized by the international community and sit at international and regional organizations. How can this circumstance be reconciled with the conclusions just reached about democratic governments?

Examples of undemocratic but effective entities that have been recognized as the organ capable of speaking on behalf of the State and so are also capable of issuing an invitation for foreign intervention are not scant. A clear example is provided by the Libyan government. In 1969, Muammar Gaddafi took power through a coup against the incumbent, monarchical government. At the time, he was recognized by the international community and his authority was questioned only when the population started demonstrating against him in 2011. This led to the outbreak of a NIAC and to the end of Gaddafi's regime.[47] Similarly, the way in which Bashar al-Assad reached power was not democratic. In 2000, he succeeded his father as President of Syria and his role was endorsed by a referendum, in which the Syrian population was called to decide whether they wanted to confirm the parliament's choice to designate Assad as the new president.[48] The results showed that Assad had the support of the 99.7% of the

Sabers to Save Democracy in the Gambia,' *EJIL: Talk!*, (2017), available at www.ejiltalk.org/rattling-sabers-to-save-democracy-in-the-gambia/ (last visited 31 August 2022).

45 *AU Peace and Security Council*, Communiqué, PSC/PR/COMM. (DCXLVII), 13 January 2017.

46 *Redaelli*, *supra* note 2, 131.

47 'Libya profile – Timeline,' BBC (19 April 2019), available at www.bbc.com/news/world-africa-13755445 (last visited 31 August 2022).

48 Immigration and Refugee Board of Canada, Syria: 'Syrian presidential election in 2000; confirmation of whether businessmen and/or other influential people in the community were pressured by security officers to collect other people's identity cards for the security

Syrian population. However, it is at least questionable whether the elections were free and fair.[49] Nevertheless, Assad was recognized as the authority representing Syria and, just like for Gaddafi, his authority would have been questioned only years later during the NIAC that started in 2012.

One last, more recent example relates to the events that unfolded in Chad. In 1990, a coup brought to power President Idriss Deby, whose authority was not questioned in spite of the undemocratic way in which he secured power. In 2019, as rebel forces were advancing towards the capital, the president invited France to intervene and help fight against the rebels. France accepted the invitation and launched Operation Barkhane. "While the democratic legitimacy of President Deby could be questioned, the intervention upon invitation was not criticised by the international community".[50]

The aforementioned cases are just a few of many examples of governments that achieved power in an undemocratic fashion and that were nonetheless recognized as representing the State. How can one reconcile these instances with the conclusions reached in the previous paragraph, which show a preference for democratic governments, even if not effective? The key criterion is the presence or absence of a democratic alternative. Indeed, in all cases when undemocratic governments were recognized as capable of representing the State, no democratic alternative was present. The choice was therefore between recognizing the undemocratic but effective government or not recognizing any entity. While the latter remains a possibility, for practical reasons it is often necessary to make such recognition in order to have a relationship with the government. On the other hand,

officer's use in the election (June–July 2001)' (24 March 2003), SYR41225.E, available at www.refworld.org/docid/3f7d4e22e.html. See also J. Kifner, 'Syrians Vote to Confirm Assad's Son as President', The New York Times (11 July 2000), available at www.nytimes.com/2000/07/11/world/syrians-vote-to-confirm-assad-s-son-as-president.html. A similar referendum took place in 2007, when Assad received 97.6% support. See I. Black, 'Democracy Damascus style: Assad the only choice in referendum', The Guardian (28 May 2007), available at www.theguardian.com/world/2007/may/28/syria.ianblack (all last visited 31 August 2022).

49 Immigration and Refugee Board of Canada, Syria: 'Syrian presidential election in 2000; confirmation of whether businessmen and/or other influential people in the community were pressured by security officers to collect other people's identity cards for the security officer's use in the election (June–July 2001)' (24 March 2003), SYR41225.E, available at www.refworld.org/docid/3f7d4e22e.html (last visited 31 August 2022).

50 *Redaelli*, *supra* note 2, 140; 'Rebel Incursion Exposes Chad's Weaknesses,' *International Crisis Group* (17 February 2019).

> "Democratic governments – i.e. endorsed by free and fair elections – are recognised even if they do not exercise effective control over the territory and population, and even when an effective but undemocratic alternative is available. This conclusion is valid in cases when the democratic government has exercised power for some time before being overthrown (e.g. Sierra Leone, 1997; Haiti, 1990-1994; Honduras, 2009) as well as when the government has never been in power (e.g. Côte d'Ivoire, 2010, and The Gambia, 2017). … Accordingly, democratic but ineffective governments are deemed to have the capacity to consent to foreign interventions in their favour."[51]

C. Foreign Interventions in *jus in bello*

Foreign interventions in internal conflicts are an increasingly common phenomenon. Yet, there is still uncertainty surrounding their legal qualification. As aforementioned, a number of scholars attempted to consider them as a new category of armed conflicts and defined them as internationalized or transnational conflicts. On the other hand, the majoritarian view, shared by the author of this article, is that international law recognizes only two types of armed conflicts: NIACs and IACs. While foreign interventions in internal conflicts do not create a third, new kind of conflict, such circumstances still raise crucial challenges, in particular for classification purposes.

Let us imagine another hypothetical scenario, in which State A intervenes in State B to fight against rebel group C. Let us also assume that there is a NIAC between State B and group C. Under IHL, there are several theories as to whether the foreign intervention changes the classification of the conflict and, in the case of a positive answer, how. Notably, three approaches have been put forward in the scholarship. Some authors are in favour of a single classification approach. In their view, the foreign intervention would turn the conflict into an IAC (single IAC approach), while others propound that the situation should be classified as a NIAC (single NIAC approach). At the other end of the spectrum, some scholars embrace the fragmented approach and classify the conflict depending on the presence of the consent by the territorial state. In the aforementioned case, if State B consents to State A's intervention to fight against rebel group C, there is a NIAC between State A and the opposition group. However, if there is a lack

[51] *Redaelli*, *supra* note 2, 250.

of consent by State A, there would also be an IAC between State A and State B. These positions will be analyzed in turn.

I. Single IAC Approach

In 1971, the ICRC submitted a draft to the first Conference of Government Experts for the Reaffirmation and Development of International Law, where it suggested that, in case of foreign intervention in a NIAC, the internal conflict should be regulated by IHL applicable to IACs. The rationale underpinning this position is that foreign interventions "widened the scope of the hostilities and increased the number of victims".[52] Accordingly, the law of armed conflict regulating IACs seem to better respond to such circumstances. However, the government experts rejected this proposal, as they feared that non-State actors would have asked for foreign help to enhance their legal status.[53] The following year, the ICRC submitted a similar, albeit more subtle, proposition to the Conference, which was again unsuccessful. Since then, the ICRC has abandoned the idea of treating these instances as IACs.[54]

Nevertheless, a minority of scholars still support this approach. In their opinion, foreign interventions in NIACs turn these situations into IACs, hence the corresponding legal framework would also regulate the armed confrontations between the intervening State and the armed group.[55] Several factors have led authors to reach this conclusion. For Aldrich, whenever there is an intervention in a NIAC, the nature of the conflict changes fundamentally. Drawing conclusions from his experience during the Vietnam War, he noted that "the armed conflict will certainly have become international" because "it will be practically impossible to apply both the rules on international armed conflict and those on non-international armed conflict to what, in fact, is a single armed conflict with two warring sides".[56] According to others, a foreign intervention would determine the qualification of the conflict as IAC due to the cross-border nature of the use of force. Since NIACs are internal in nature, a

52 ‚Gasser', *supra* note 7, 146.

53 *Ibid*.

54 D. Akande, 'International Law and the Classification of Conflicts', in E Wilmshurst (ed.), *International Law and the Classification of Conflicts* (2012) 32, 73.

55 ‚Carron', *supra* note 10, 13.

56 G. Aldrich, 'The Laws of War on Land', 94 *American Journal of International Law* (2000) 1, 42, 62-63.

foreign intervention would introduce an international element and would thus change the classification.[57]

While it is tempting to conclude that a foreign intervention in a NIAC would turn the conflict into an international one, this approach raises important concerns. First, claiming that a NIAC becomes an IAC following a foreign intervention, even if one of the parties to the conflict is a non-State actor, would lead to the application of an inappropriate set of rules to the situation. Indeed, IHL regulating IACs has been designed specifically for States and there are challenges in extending its application to opposition groups.[58] Second, and on a related note, "the link between the applicable rules and the likelihood of their implementation" should not be underestimated.[59] Extending the application of the rules regulating IACs to rebel groups would mean imposing on them a set of rules that they might be unable to comply with. Lastly, there does not seem to be State practice or *opinio juris* supporting this approach.[60]

II. Single NIAC Approach

A number of authors support the view that foreign interventions in internal conflicts lead to a single classification of the conflict. Nevertheless, unlike the approach presented above, they posit that these instances should be considered as single NIAC.[61] Scholars supporting this view base their conclusions on the identity of the parties. While foreign interventions introduce an international element, armed confrontations still take place between a State and a non-State actor. Accordingly, it seems only natural that the conflict should be considered as a NIAC, notwithstanding the fact that fighting takes place between a foreign country and a rebel group based in another State, where fighting is taking place.[62] Furthermore, as long as the intervening country targets only the rebel group and not assets and organs of the territorial State, the question as to whether the government has consented to the foreign intervention would not be relevant.[63]

57 ‚Carron', *supra* note 10, 13.

58 *Ibid*., 15.

59 N. Lubell, *Extraterritorial Use of Force against Non-State Actors* (2010), 104.

60 A. Paulus & M. Vashakmadze, 'Asymmetrical war and the notion of armed conflict – a tentative conceptualization', 91 *International Review of the Red Cross* (2009) 873, 95, 112.

61 ‚Carron', *supra* note 10, 13.

62 *Ibid*., 13-15; ‚Kreß', *supra* note 10, 255-256; ‚Paulus', *supra* note 60, 112.

63 T. D. Gill, 'Classifying the Conflict in Syria', 92 *International Law Studies* (2016) 353, 367.

This approach has the merit of classifying the conflict based on the identity of the parties, and it seems therefore preferable to the "single IAC" model. Nevertheless, concluding that there is a NIAC between the intervening State and the rebel forces does not address the question of the relationship between the foreign country and the territorial one. Kreß, who supports the single NIAC approach, has acknowledged this challenge:

> "[T]he 'pure non-international armed conflict model' will necessarily reach its limits in the following three situations which all go beyond our hypothetical (failed State) case scenario: in the case of an armed confrontation between the armed forces of the State acting in self-defence (here: Utopia) and the armed forces of the host State (here: Arcadia); in the case of capture and detention of armed forces of the State acting in self-defence by the host State; and in the case of an occupation of a part of the host State's territory by the State acting in self-defence. In all three cases the law of international armed conflict must apply and thereby 'the pure non-international armed conflict model' would be replaced by a model under which the laws of international and non-international armed conflict apply concurrently ('concurrency model')."[64]

In other words, should there be armed confrontations between the armed forces of the two States, there would also be a parallel IAC between them. As we shall see, this is in line with the fragmentation approach propounded by the ICRC and supported by the majority of scholars. Nevertheless, it does not consider one specific case: what if a foreign country intervenes against a rebel group without the consent of the host State? Does the lack of consent bear consequences for the classification of the conflict, regardless of whether armed confrontations take place between the two States? These questions will be addressed in the next section.

III. The Consent-Based Approach

In a seminal article published in 2015, Ferraro presented the fragmented approach, which has been adopted by the ICRC ever since. According to this model, the classification of an armed conflict and the determination of the applicable legal framework should be determined by looking at the bilateral

64 ‚Kreß', *supra* note 10, 256.

relationship between the parties.[65] This approach was endorsed by a number of international courts. Notably, the International Court of Justice (ICJ) adopted this model in the *Nicaragua* case, where it clarified that:

> "The conflict between the *contras*' forces and those of the Government of Nicaragua is an armed conflict which is 'not of an international character'. The acts of the *contras* towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts."[66]

Furthermore, the Pre-Trial Chamber of the ICC affirmed that:

> "[A]n internal armed conflict that breaks out on the territory of a State may become international – or, depending on the circumstances, be international in character alongside an internal armed conflict – if i) another State intervenes in that conflict through its troops (direct intervention) or if ii) some of the participants in the internal armed conflict act on behalf of that other State (indirect intervention)."[67]

The overwhelming majority of the scholarship has endorsed this approach.[68]

Applying the fragmented approach to foreign interventions in pre-existing NIACs means that it is necessary to analyze the bilateral relationships between each party. In the aforementioned example, State A intervenes in State B to fight against rebel group C, while there is an ongoing NIAC between State B and State C. As explained above, the supporters of the single IAC approach would

65 ‚Ferraro', *supra* note 8, 1241.

66 ICJ, *Military and Paramilitary Activities in and against Nicaragua*, (Nicaragua v. United States of America), Judgment (Merits), 27 June 1986 (hereinafter *Nicaragua* case), paras. 219.

67 *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the confirmation of charges, ICC-01/04-01/06, 29 January 2007, paras. 209. See also *Tadić*, *supra* note 3, paras. 77: 'the conflicts in the former Yugoslavia have both internal and international aspects.'

68 See, e.g., M. Sassòli, 'The Legal Qualification of the Conflict in the Former Yugoslavia: Double Standards or New Horizons for International Humanitarian Law?', in S. Yee & T. Wang (eds), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei* (2001); Gasser, *supra* note 7; James G. Stewart, 'Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict', 85 *International Review of the Red Cross* (2003) 850.

conclude that there is an IAC between State A and rebel group C due to the transnational nature of the armed confrontations. On the other hand, those in favour of the single NIAC model conclude that the fighting between the foreign country and opposition forces amount to an internal conflict because the classification should be conducted based on the identity of the parties, regardless of whether the State party corresponds to the territorial State where the armed group is based. The latter approach should be preferred, as it is in line with the reality on the ground. Nevertheless, the single NIAC approach does not solve a crucial issue, namely the relationship between the intervening State and the territorial one.

To address this problem, some scholars have elaborated on the consent-based approach, whereby the presence or lack of consent to a foreign intervention plays a crucial role in the classification of the conflict. If we refer back to our illustrative example, this would mean that, if State B has consented to the intervention of State A against the rebels, there is going to be a NIAC between State B and rebel group C, parallel to the pre-existing NIAC between State A and the opposition group. However, if State B has not consented to the foreign intervention, there will be three armed conflicts: (i) a NIAC between State A and rebels C; (ii) a NIAC between State B and rebels C; (iii) and an IAC between State A and State B, regardless as to whether there are armed confrontations between the two countries. These two instances will be analyzed in turn.

1. Foreign Intervention With the Consent of the State

As is well-known, Syria has been engaged in parallel non-international armed conflicts against several rebel groups for years.[69] As the Islamic State of Iraq and Syria (ISIS) gained control over a growing segment of Syrian territory, the Syrian government affirmed in August 2014 that:

> "Syria is ready to cooperate and coordinate with regional and international efforts to combat terror … everyone is welcomed, including Britain and the United States, to take action against ISIS and Nusra with a prior full coordination with the Syrian government."[70]

[69] See the Rule of law in Armed Conflicts (RULAC), 'Non-international Armed Conflicts in Syria', available at https://www.rulac.org/browse/conflicts/international-armed-conflict-in-syria (last visited 31 August 2022).

[70] G. Baghdadi, 'Syria welcomes U.S. strikes against ISIS there, with conditions', CBS News (25 August 2014), available at https://www.cbsnews.com/news/syria-welcomes-u-s-

Russia answered positively to this request and intervened in September 2015:

> "[I]n response to a request from the President of the Syrian Arab Republic, Bashar al-Asad [sic], to provide military assistance in combating the terrorist group Islamic State in Iraq and the Levant (ISIL) and other terrorist groups operating in Syria, the Russian Federation began launching air and missile strikes against the assets of terrorist formations in the territory of the Syrian Arab Republic on 30 September 2015."[71]

In a letter to the UNSC, Syria confirmed its consent to the Russian intervention:

> "The Russian Federation has taken a number of measures in response to a request from the Government of the Syrian Arab Republic to the Government of the Russian Federation to cooperate in countering terrorism and to provide military support for the counter-terrorism efforts of the Syrian Government and the Syrian Arab Army."[72]

Pursuant to the fragmented approach, in order to determine the number and nature of armed conflicts taking place in Syria at the time, it is necessary to look at the bilateral relationships between the parties. As specified in the *Tadić* case, a NIAC occurs whenever there is protracted armed violence between governmental authorities and organized armed groups or between such groups.[73] Notably, the International Criminal Tribunal for the former Yugoslavia (ICTY) identified a test to determine whether there is a NIAC based on two cumulative criteria: "the intensity of the conflict and the organization of the parties to the

strikes-against-isis-there-with-conditions/ (last visited 31 August 2022).

71 Letter dated 15 October 2015 from the Permanent Representative of the Russian Federation to the United Nations addressed to the President of the Security Council, UN Doc. S/2015/792, 2015.

72 Identical letters dated 14 October 2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2015/789, 2015.

73 *Tadić*, *supra* note 3, paras. 70. See also ‚Cullen', *supra* note 3, 120.

conflict".[74] Accordingly, Syria was engaging in parallel NIACs against a number of armed non-State actors, ISIS included. This conclusion is based on the fact that (i) the threshold of violence between Syria and each armed group was met, and (ii) each group was sufficiently organized.[75] As Russia intervened upon the invitation of Syria, there was no IAC between the two countries. Following its intervention, Russia was party to a separate NIAC against ISIS because the intensity of violence between the two parties met the intensity requirement.[76] If the threshold of violence was not met, Russia would have been party to the pre-existing NIAC opposing Syria and ISIS, on the side of the government (support-based approach). As explained by Ferraro:

> "[A] third power supporting one of the belligerents can be regarded as a party to the pre-existing NIAC when the following conditions are met: (1) there is a pre-existing NIAC taking place on the territory where the third power intervenes; (2) actions related to the conduct of hostilities are undertaken by the intervening power in the context of that pre-existing conflict; (3) the military operations of the intervening power are carried out in support of one of the parties to the pre-existing NIAC; and (4) the action in question is undertaken pursuant to an official decision by the intervening power to support a party involved in the pre-existing conflict."[77]

2. Foreign Intervention Without the Consent of the State

Over the past years, there have been several cases in which a foreign country used force in another State against a non-State actor without the consent of the territorial State. One notorious example is the US intervention in Syria against the Islamic State. As aforementioned, the Syrian government issued an invitation to fight against ISIS. Nevertheless, a number of countries did not want to cooperate with Assad and did not intend to accept his invitation due to the widespread and systematic violations of human rights and humanitarian law that the Syrian government was committing against the population. For instance, then-President Barack Obama affirmed that: "[i]n the fight against

74 *Prosecutor v. Rutaganda*, Judgment, ICTR–96–3, 6 December 1999, paras. 93. See also International Committee of the Red Cross (ICRC) Opinion Paper, 'How is the Term "Armed Conflict" Defined in International Humanitarian Law?' (2008), 3.

75 See RULAC, *supra* note 69.

76 *Ibid*.

77 ‚Ferraro', *supra* note 8, 1231.

ISIL, we cannot rely on an Assad regime that terrorizes its own people".[78] Albeit the lack of (acceptance of) consent, in September 2014, a US-led coalition launched airstrikes against ISIS on Syrian territory.[79] Did the intervention trigger an IAC between the States party to the coalition and Syria? Is the simple lack of consent – armed clashes between the States regardless – sufficient to conclude that there is an IAC between the intervening country and the territorial State?

According to the ICRC, this is indeed the case:

> "In some cases, the intervening State may claim that the violence is not directed against the government or the State's infrastructure but, for instance, only at another Party it is fighting within the framework of a transnational, cross-border or spillover non-international armed conflict. Even in such cases, however, that intervention constitutes an unconsented-to armed intrusion into the territorial State's sphere of sovereignty, amounting to an international armed conflict within the meaning of common Article 2(1)."[80]

This position finds support in in the *Congo* case, where the ICJ held that:

78 See B. Obama, 'Address to the Nation on United States Strategy to Combat the Islamic State of Iraq and the Levant Terrorist Organization (ISIL)', Daily Comp Press Docs, 2014 DCPD No 00654. It should be recalled that at the time the Syrian government was defined as 'not the legitimate representative of its own people', while this qualification was attributed to the opposition groups.

79 At first the intervention was conducted by the US, Bahrain, Jordan, Qatar, Saudi Arabia, and the United Arab Emirates. Albeit initially reluctant, Australia, Canada, France, and the UK, among others, eventually joined the US-led coalition intervening in Syria. As is well-known , the US justified the intervention on the base of the unwilling or unable doctrine. However, it is beyond the scope of this article to engage with this problematic issue. See O. Corten, 'Military Operations against 'Islamic State' (ISIL or Dae'sh) – 2014', in T. Ruys, O. Corten & A. Hofer (eds.), *The Use of Force in International Law: A Case-based Approach* (2018), 873, 875-876; O. Flasch, 'The Legality of the Air Strikes against ISIL in Syria: New Insights on the Extraterritorial Use of Force against Non-State Actors', 3 *Journal on the Use of Force and International Law* (2016) 37, 38; V. Koutroulis, 'The Fight against the Islamic State and *Jus in Bello*', 29 *Leiden Journal of International Law* (2016) 3, 827.

80 ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (2016), paras. 261-263.

> "The Court considers that the obligations arising under the principles of non-use of force and non-intervention were violated by Uganda even if the objectives of Uganda were not to overthrow President Kabila, and were directed to securing towns and airports for reason of its perceived security needs, and in support of the parallel activity of those engaged in civil war."[81]

While the overwhelming majority of the scholarship supports the consent-based approach, the rationale underpinning this position might be unclear in certain circumstances. It is not uncommon that foreign interventions crucially affect the population and the territorial State. For instance, while Israel targeted mainly Hezbollah, the Lebanese civilian population and state infrastructures were also exposed to the attacks. However, there might be cases where the need to classify the relationship between the two countries as an IAC might be less apparent. One example is the Colombian intervention in Ecuador in order to target members of the FARC in 2008. Unlike the Israeli intervention in Lebanon, which significantly affected the territorial State, the incursion of Colombia did not seem to have any negative effects on Ecuador.[82] After all, the military operations took place in the remote jungle and did not have consequences on the civilian population. In such cases, affirming that there is an IAC between the intervening State and the territorial one might seem artificial.[83] What is the practical relevance of qualifying cases such as the Ecuador/Colombia/FARC one as an IAC?

The consent-based model has the merit of reflecting the reality on the ground, even if *prima facie* this might not seem the case. Even if the intervening State is only targeting a non-State actor, its intervention is unlawful inasmuch as it amounts to a use of force "against the territorial integrity or political independence" of the state where the rebels are based. The consent-based approach is grounded on the pivotal precondition for the existence of an IAC, namely the resort to force between two States. Nevertheless, IHL does not require that both States engage in armed confrontation against each other in order to have an IAC. Instead, it is sufficient that one country uses force against

81 ICJ, *Armed Activities in the Congo* (Democratic Republic of Congo v. Uganda), Judgment (Merits), 19 December 2005, paras. 163.

82 T. Waisberg, 'Colombia's Use of Force in Ecuador Against a Terrorist Organization: International Law and the Use of Force Against Non-State Actors', 12 *ASIL InSight* (2008) 17.

83 ‚Kreß', *supra* note 10, 253-254.; Lubell, *supra* note 59, 110-111.

the other. It might be objected that, in the aforementioned cases, the use of force was directed against the non-State actor, not against the State. Nevertheless, Article 2(4) of the UN Charter is violated whenever force is used on the territory of another State without its consent, regardless of whether the objective of the attack is an armed non-State actor.[84] To affirm otherwise would mean to accept the paradoxical conclusion that there might be cases in which a State uses force on the territory of another country without its consent and that the attack might even amount to an act of aggression, and yet the rules designed to address these instances – namely *IHL* applicable to IACs – would not be applicable.[85]

3. Whose Consent?

Based on these aspects, the consent-based model appears to be legally sound and to reflect the reality on the ground, and it should therefore be preferred. Nevertheless, a crucial question remains. If the classification of the conflict depends on the consent of the State, it is necessary to understand if it was indeed the government who issued such an invitation. One challenge lies in the fact that sometimes consent might not be public, such as in the case of the US intervention against the Taliban in Pakistan, which the Pakistani government did not endorse but did not criticize either.[86] Another, more challenging question regards the validity of the consent *per se*. NIACs are typically situations in which at least part of the population challenges the authority of the *de jure* government and when the opposition forces might control parts of state territory. Furthermore, it is not uncommon that more than one entity claims to be the government and to represent the State. How can the authority capable of speaking on behalf of the state be identified and therefore issue a valid invitation? As Brian Egan, US State Legal Advisor, correctly highlighted: "the concept of consent can pose challenges in a world in which governments are rapidly changing, *or have lost control of significant parts of their territory*, or have shown no desire to address the threat".[87] What does IHL have to say about the recognition of governments?

84 *Mačák*, *supra* note 11, 38-39; M. Milanovic & V. Hadzi-vidanovic, 'A Taxonomy of Armed Conflict', in N. White & C. Henderson (eds.), *Research Handbook on International Conflict and Security Law: "jus ad bellum, jus in bello," and "jus post bellum"* (2012), 256.

85 *Akande*, *supra* note 54, 74-75.

86 See, e.g., S. D. Murphy, 'The International Legality of US Military Cross-Border Operations from Afghanistan into Pakistan', 85 *International Law Studies* (2015) 109.

87 M. Lederman, 'ASIL Speech by State Legal Adviser Egan on international law and the use of force against ISIL', Just Security, (4 April 2016), available at https://www.justsecurity.org/30377/asil-speech-state-legal-adviser-international-law-basis-for-limits-on-force-isil/.

Does it provide criteria as to how to identify the organ capable of consenting to a foreign intervention?

In order to answer this fascinating albeit challenging question, we should start our analysis with the Geneva Conventions. While the consent-based approach is not mentioned in IHL treaties, Article 4(A)(3) of the Geneva Convention III (GCIII)[88] is particularly relevant for our discussion when it affirms that:

> "Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy: … (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power."

The rationale underpinning this article draws back to the Second World War, when a number of States refused to grant Prisoner of War (PoW) status to members of the armed forces of another State due to the fact that they did not recognize the government. Originally, the provision was specifically intended to address the issue of Germany refusing PoW status to French troops operating under the command of General Charles de Gaulle and to southern Italian forces.[89] However, it does not answer the question of our investigation, namely the identification of the government capable of issuing an invitation. The ICRC Commentary to GCIII mentions a few instances when the Article would be applicable, namely:

> "Article 4A(3) covers armed forces that continue operations under the orders of a government in exile that is not recognized by the adversary but has been given hospitality by another State. … It can also apply where a State exists but where the government in power may not be recognized as the legitimate government of the territory by other States that are party to the conflict."[90]

Nevertheless, this does not clarify what happens when two entities claim to be the new government representing the State. The events that unfolded in

88 Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949.

89 ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War* (2020), paras. 1041.

90 *Ibid*., para. 1042.

Yemen clarify the importance of addressing this conundrum. How can the armed conflict(s) taking place in the country following the coalition's intervention be classified? If Hadi was still the President, we would have two parallel NIACs: one opposing the troops of Yemen and the rebels, and the other opposing the coalition forces and the rebels.[91] On the other hand, should we consider that the Houthi forces were the new government, then the consent expressed by Hadi to the intervention would not be valid, which in turn would imply that there would be one NIAC between Hadi rebel forces and Houthi state forces, and one IAC between the intervening foreign countries and Houthi troops.

The ICRC Commentary to the Geneva Conventions posit that the government capable of speaking on behalf of the State should be the effective one, namely the government capable "to exert State functions internally and externally, i.e. in relations with other States".[92]

> "Under international law, the key condition for the existence of a government is its effectiveness, that is, its ability to exercise effectively functions usually assigned to a government within the confines of a State's territory, including the maintenance of law and order."[93]

The Commentary specifically addresses the situation when two competing governments claim to represent the State, such as Côte d'Ivoire (2011) and Libya (2011 and 2014). These cases highlight the crucial need to determine who is the government, for classification purposes among others. In these circumstances, the ICRC concludes that:

> "In this regard, it does not matter that a government failed to gain recognition by the international community at large. The very fact that the said government is effective and in control of most of the territory of the State concerned means that it is the *de facto* government and its actions have to be treated as the actions

91 This is assuming that the intensity of violence between the intervening states and the rebels met the intensity requirement.

92 ICRC Commentary to GC I, *supra* note 80, paras. 234. See, e.g., J. Serralvo, 'Government Recognition and International Humanitarian Law Applicability in Post-Gaddafi Libya', 18 *Yearbook of International Humanitarian Law* (2016), 3, 15.

93 ICRC Commentary to GC I, *supra* note 80, paras. 234.

> of the State it represents with all the consequences this entails for determining the existence of an international armed conflict."[94]

The ICRC position is supported by several IHL scholars. For instance, for Serralvo, a government "must be independent and effective. Effectiveness includes not only the possibility to operate inside the territory, but also the capacity to represent the State outside its own borders *vis-à-vis* other States."[95] On the other hand, other authors require additional elements together with effectiveness and believe that the new government must have "established control over a significant part of the country, and is legitimized in an inclusive process that makes it broadly representative of the people (positive element)".[96] Interestingly, outside the IHL realm, a number of studies have shown that other criteria have emerged in State practice. It is therefore worth analysing the debates on recognition of governments in international law in general, and in *jus ad bellum* in particular.

D. Concluding Remarks

I. Challenging the Absolute Separation Between Jus ad Bellum and Jus in Bello?

The separation between the legality of war and the conduct of hostilities is one of the central pillars of IHL, which prides itself on applying equally to both parties, *jus ad bellum* considerations regardless.[97] As noted by Sassòli, "determining when IHL … applies requires an assessment of the factual situation on the ground. … Justifications underlying the resort to violence are wholly irrelevant".[98] To be sure, the specificities of IHL require that the criteria to determine its application be certain and easily verifiable. It would not be feasible to expect combatants on the ground to engage in *jus ad bellum* debates as to whether the use of force is lawful or not under *jus ad bellum*. This is particularly true considering that the legality of the international use of force is often controversial. It seems therefore crucial to keep the two branches of law separated. Furthermore, it is worth recalling that the separation between the

94 *Ibid*., para. 235
95 ‚Serralvo', *supra* note 92, 17.
96 ‚Milanovic', *supra* note 10, 34.
97 M. Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (2019), para. 3.10.
98 *Ibid*., para. 3.12.

two branches of international law provides protection to combatants and fighters taking part in hostilities, as well as to civilians.[99] While some scholars have suggested that *jus ad bellum* could override *jus in bello* in certain circumstances, this position has never been embraced by most authors.[100]

One of the key consequences of the absolute separation between *jus ad bellum* and *jus in bello* is that the first should not be used to interpret the latter. Nevertheless, the consent-based approach seems to suggest exactly that, as highlighted by its critics. For instance, according to Carron:

> "[W]e have to distinguish what is relevant to *ius ad bellum* and what pertains to *ius in bello*. The classification exercise, a *ius in bello* question, cannot depend on *ius ad bellum* elements such as the violation of sovereignty of the territorial State."[101]

Similarly, Gill has observed that:

> "[T]here is no reason to assume that the classification of an armed conflict is dependent upon— or even influenced by—the question of whether a violation of the *ius ad bellum* has occurred. … Moreover, if neither the intervening State nor the territorial State are engaged in hostilities or are supporting a party to an armed conflict, there is no presumption that they are belligerent parties vis-à-vis each other."[102]

It might be counterargued that the issue concerning the recognition of governments pertains to public international law, not to *jus ad bellum*. Accordingly, the consent approach would not be in contrast with the strict separation between *jus ad bellum* and *jus in bello*. However, the rationale underpinning the consent approach has a lot to do with the legality of the use of force. For instance, Mačak explains that:

99 See, e.g., *Legality of the Threat or Use of Nuclear Weapons*, Separate Opinion of Judge Fleischhauer, 1996, 35 ILM, p. 834, paras. 4. See also T. Christakis, '*De maximis non curat praetor? L'affaire de la licéité de la menace ou de l'emploi d'armes nucléaires*',49 *Revue Hellénique de Droit International* (1996), 355–399.

100 J. Moussa, 'Can *jus ad bellum* override *jus in bello*? Reaffirming the separation of the two bodies of law', 90 *International Review of the Red Cross* (2008), 963–990.

101 ‚Carron', *supra* note 10, 17.

102 ‚Gill', *supra* note 63, 369.

> "[When a] third state is operating militarily in another state's territory without that state's consent to do so, it should be seen as using force against that state. The resulting situation would once again qualify as an IAC. This is because the key condition for the existence of an IAC, ie, the resort to force between states, does not require that both states must actually use force; instead, it is sufficient that one state uses force against another state."[103]

Akande developed this point further:

> "Given that a use of force by one State on the territory of another, without the consent of the latter, is a use of force by the foreign State against the territorial State, a situation of armed conflict between the two automatically arises. An international armed conflict is no more than the use of armed force by one State against another. … To state otherwise is to assert that there can be an armed contention between States, possibly even an act of aggression by one State against another but that this is not covered by the rules which international law has designed to regulate such contentions between States."[104]

In sum, the consent-based approach has been developed stemming from the consideration that, whenever a state uses force against another, IHL should be applicable. To avoid IHL's inapplicability in situations when a state intervenes in another without its consent, inflating *jus ad bellum* considerations into *jus ad bellum* is inevitable.[105] Nevertheless, this would be contrary to the principle of absolute separation between the two branches of law. How can this conundrum be resolved? One possibility would be to refuse the consent-based approach and recur to the single conflict ones. Our analysis, however, demonstrates how these models raise more questions than they answer. Therefore, they would not ultimately make the classification exercise less problematic. Another option would simply be to accept that, despite the importance of separation between *jus ad bellum* and IHL, there are instances in which some degree of interference

103 *Mačák*, *supra* note 11, 38-39.

104 *Akande*, *supra* note 54, 74-75.

105 M. O'Connell, 'Saving Lives through a Definition of International Armed Conflict', 40 *Proceedings of the Bruges Colloquium, Armed Conflicts and Parties to Armed Conflicts under IHL: Confronting Legal Categories to Contemporary Realities* (2010), 68

between the two is inevitable. Military interventions in NIACs without the consent of the territorial state would be one such case. While this conclusion might seem unreasonable to those who abide by the absolute separation of the two branches of law, in the case under consideration it seems the most reasonable conclusion. It should also be recalled that, although the consent-based approach recurs to *jus ad bellum*, it does not require a complete legal analysis as to whether the intervention is lawful or not.[106] For example, we could imagine the intervention of a State in another country without the consent of the latter but with the authorization of the UN Security Council (UNSC). The UNSC resolution would make the intervention lawful under *jus ad bellum*, yet the absence of consent would still determine the international nature of the conflict.

II. Who is the Government? The Need for Common Criteria

Under *jus in bello*, the consent-based approach posits that the lack of consent to a foreign intervention would trigger an IAC between the two countries. As explained above, IHL scholarship claims that the government capable of speaking on behalf of the state should be the effective one. On the other hand, under *jus ad bellum*, State practice shows that democratic legitimacy is emerging as a crucial parameter for the recognition of governments. Before addressing this conundrum, a clarification is in order. Most State practice concerning the recognition of governments has emerged with regard to *jus ad bellum*. The reason is intuitive: when a state intervenes in a NIAC upon the invitation of the territorial country, it is necessary to understand whether the entity claiming to represent the State is indeed the government and can therefore speak on its behalf. Nevertheless, this does not imply that the recognition of government falls within *jus ad bellum*. Instead, it is part of general international law.

To be sure, this is not the first case in which IHL and general international law recur to two different criteria to analyze the same situation. Indeed, a similar challenge emerged with regard to the attribution of the actions of rebels to a State that is assisting them. In 1986, the US intervened in Nicaragua and provided assistance to the *contras*, who were engaging in a NIAC against the government. In order to determine whether the US was responsible for the violations of IHL committed by the *contras*, it was necessary to determine whether the provision of assistance was enough to conclude that the opposition group was acting as a

[106] *M. Milanovic & V. Hadzi-vidanovic*, *supra* note 84, 293.

de facto organ of the US.[107] As it is well-known, the ICJ put forward the effective control test and concluded that the US was not responsible for the actions of the rebel groups:

> "All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed."[108]

A few years later, the ICTY was called upon to answer the same question, albeit for different reasons. Notably, the Tribunal had to decide whether the Bosnian Serb military and paramilitary units were acting as *de facto* organs of Serbia. In case of a positive answer, the conflict would have been international in nature. Just like for the question of recognition of governments, IHL must recur to general international law criteria in order to classify the conflict.

The analysis conducted by the ICTY and its conclusions are particularly interesting for our discussion. Notably, the ICTY clarified that it believed that general international law and IHL should use the same criteria to determine the attribution of the actions of non-State actors to the State:

> "What is at issue is not the distinction between the two classes of responsibility. What is at issue is a preliminary question: that of the conditions on which under international law an individual may be held to act as a *de facto* organ of a State. Logically these conditions must be the same both in the case: (i) where the court's task is to ascertain whether an act performed by an individual may be attributed to a State, thereby generating the international responsibility of that State; and (ii) where the court must instead determine whether individuals are acting as de facto State officials,

107 ICJ, *Nicaragua* case, *supra* note 66, paras. 113.
108 *Ibid*., para. 115.

> thereby rendering the conflict international and thus setting the necessary precondition for the 'grave breaches' regime to apply. In both cases, what is at issue is not the distinction between State responsibility and individual criminal responsibility. Rather, the question is that of establishing the criteria for the legal imputability to a State of acts performed by individuals not having the status of State officials. In the one case these acts, if they prove to be attributable to a State, will give rise to the international responsibility of that State; in the other case, they will ensure that the armed conflict must be classified as international."[109]

In other words, the Tribunal acknowledged that the same question should have the same answer in international law, even if its effects bear consequences on different branches of the law. While the ICTY eventually chose a different test than the one suggested by the ICJ, it did so by explaining why it believed that the effective control test should be abandoned:

> "States are not allowed on the one hand to act *de facto* through individuals and on the other to disassociate themselves from such conduct when these individuals breach international law. … Consequently, for the attribution to a State of acts of these groups it is sufficient to require that the group as a whole be under the overall control of the State."[110]

As is well-known, the ICJ had to address the question of attribution again in the *Genocide* case. Here, the Court concluded that, while the overall control test might well be used for classification purposes, it is not convincing when called to solve issues related to the responsibility of States, as it would excessively broaden such responsibility:[111]

> "Insofar as the "overall control" test is employed to determine whether or not an armed conflict is international, which was the sole question which the Appeals Chamber was called upon to decide, it may well be that the test is applicable and suitable; the Court does

109 *Prosecutor v. Tadić*, Judgment, IT–94–1, 15 July 1999, paras. 104.

110 *Ibid*., paras. 117-120.

111 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment (Merits), 26 February 2007, paras. 406. (see above)

> not however think it appropriate to take a position on the point in the present case, as there is no need to resolve it for purposes of the present Judgment. On the other hand, the ICTY presented the "overall control" test as equally applicable under the law of State responsibility for the purpose of determining – as the Court is required to do in the present case – when a State is responsible for acts committed by paramilitary units, armed forces which are not among its official organs. In this context, the argument in favour of that test is unpersuasive."[112]

It is beyond the scope of this article to engage in the substance of this debate. What is of particular interest is that the ICTY has made clear that, whenever the classification exercise has to rely on issues pertaining to general international law, IHL should not have different, *ad hoc* criteria. This is particularly true in the case under examination in this article. Indeed, here the consequences of using two different criteria to identify the government might be far more problematic than in the case of attribution of acts of rebels to an intervening State.

Referring to the intervention in Yemen on behalf of President Hadi could clarify this point. As previously mentioned, when he asked foreign countries to intervene in Yemen to fight against the rebels, he was in exile in Saudi Arabia, while the opposition groups were in control of most of Yemen and of the capital. Accordingly, under IHL, the rebels should have been considered the new government insofar as they had effective control over most of Yemen. On the other hand, under general international law, President Hadi was still the authority capable of speaking on behalf of the state. This circumstance creates major problems for the application of IHL.

Jus in bello has its own specificities due to the peculiarity of the situations it must regulate. This branch of international law developed as an attempt to make war more humane, while also acknowledging that armed conflicts ultimately and inevitably cause death and destruction. Accordingly, one of the main objectives of IHL is to provide for clear rules that can be easily applied by combatants amid the fog of war. Determining that the authority capable of speaking on behalf of the State is the one that exercises effective control over most of the territory and the bulk of the population is in line with the objective of IHL: insofar as effectiveness is based on objective criteria, the classification of the conflict and the rules applicable could be assessed with a certain ease and would not depend on more sophisticated criteria, such as the democratic nature

[112] *Ibid*., para. 404.

of the government or recognition by the international community. Nevertheless, while the effective control test seems easier to ascertain and apply, the fact that general international law developed different criteria creates more confusion.

If we refer to the intervention in Yemen, applying two different criteria for *jus ad bellum* – is the foreign intervention upon invitation lawful? – and *jus in bell*o – is the conflict between the rebel forces and the intervening countries international or internal in nature? – would be especially problematic. Indeed, the Saudi-led coalition intervened on the invitation of President Hadi and the intervention was lawful under international law for the reasons explained above. However, in determining the law applicable, they would have had to conclude that, for IHL purposes, the rebels were the new government and, therefore, that the conflict was international. Nevertheless, if the foreign countries intervene in favour of the government, it would then be unreasonable to expect that they would proceed to a different assessment only for classification purposes. After all, as explained above, the rationale underpinning the consent-based approach is to avoid a situation in which an unlawful use of force between two States would not be covered by IHL.

In sum, it is submitted that, when a foreign country intervenes in a NIAC in order to fight against the rebels but without the consent of the government, the relationship between the territorial and the intervening States should be classified as an IAC. As for the criteria to identify the organ capable of consenting to the intervention, the author believes that IHL should use the criteria developed under general international law. This is not only legally sound and supported by State practice, but it also has the advantage of rendering the classification exercise more straightforward and less artificial.