A "Principle-Based" Approach to Intervention by Invitation in Civil Wars

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It is rather difficult to accept the existence of a one-size-fits-all rule that always prohibits or permits outside forcible intervention upon the request of a government engaged in a civil war. Civil wars are complex situations. It seems quite unrealistic to make abstractions of the "topography" of the conflict between the legal principles concretely at stake in each case and the purposes they are linked with (i.e., self-determination, sovereignty and territorial integrity, non-use of force and the maintenance of international peace and security, respect for human rights). This "principle-based" approach has consequences.

Firstly, if self-determination is the main rationale behind the thesis of strict abstentionism, an important question to ask is whether self-determination always represents an obstacle to external intervention in civil wars to support the established government. It is certainly so when – to quote Art. 3 of the resolution on "Military Assistance on Request" adopted at Rhodes in 2011 by the *Institut de droit international* – this government is acting "against its own population", namely when it is non-representative of the popular will, or illegitimate (for instance, because it has committed massive violation of its population's human rights). But *quid iuris* in a situation such as the one regulated by UN Security Council's (UNSC) Res. 2337 (2017), of 19.1.2017, where the Security Council recognises the elected President of Gambia as "representative of the freely expressed voice of the Gambian people" and urges all parties "to respect the will of the people and the outcome of the election"? Or when, in the case of Yemen, the UNSC explicitly designates president *Hadi* as "the legitimate authority based on election results"?[1]

Secondly, the two more extreme views (negative equality and asymmetrical intervention) are not always mutually irreconcilable. If consent is given outside the realm of *ius dispositivum* – by infringing self-determination, for instance – it will probably be considered as invalidly given and thus devoid of legal effect. If there is a multiplicity of warring factions, none will be

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1 Security Council Press Statement on Yemen, SC/11578 of 23.9.2014. See also UNSC Res. 2216 (2015) of 14.4.2015, where the Security Council reaffirms "its support for the legitimacy" of President *Hadi*.

deemed to represent the "State" for the purposes of giving a consent validly attributable to a subject of international law.

And what of secessionist conflicts fought for the territory and not for the government? In this regard, the principle of negative equality is subject to even greater tension. Indeed, if the two pillars of the negative equality thesis are self-determination and neutrality, starting with self-determination, the first thing to observe is that there is no general right to secessionist self-determination, with "remedial secession" still being essentially portrayed as a doctrinal proposition or a *lex ferenda* view held by some States and opposed by others, whose empirical basis remains therefore fairly thin.

As regards neutrality, then, the argument is that secession, being neither permitted nor prohibited under international law, is still regulated by the principle of neutrality. It is certainly true that, traditionally, secession is "neither authorised nor prohibited", even if it must be observed that both parts of this equation are currently open to debate. On the other hand, what I think it is reasonably safe to say is that international law traditionally, and normally, disfavours secession. It disfavours secession when, for instance, it sets a considerably high threshold of effectiveness in order to prove that a separation has occurred: the so-called doctrine of the "ultimate success" according to which effectiveness must be proved "beyond all reasonable doubt", in the sense that "the parent State must in fact have ceased to make efforts, promising success, to reassert its authority".[2]

It also disfavours secession when, unlike struggles for decolonisation characterised as international conflicts, it does not seem to prevent a government using internal force to quell attempted secession, obviously with all due respect to fundamental human rights and humanitarian law. Indeed, the protection of territorial integrity is sometimes characterised in international legal texts (for instance, Art. 3, para. 1 of the Additional Protocol II to the Geneva Conventions, or the germane provision contained in Art. 8, para. 3 of the Rome Statute of the International Criminal Court), and in the case-law of the European Court on Human Rights (in cases such as *Ilaşcu*,[3] and *Ivanţoc*[4]) not only as a right, but as a duty, a "responsibility". A "primary responsibility" that has, for instance, been evoked by the UNSC with regard to Mali in its Res. 2071 (2012), of 12.10.2012.

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[2] *H. Lauterpacht*, Recognition in International Law, 1947, 8.

[3] *Ilaşcu and Others v. Moldova and Russia*, Judgment of 8.7.2004 (GC), Application No. 48787/99, para. 340.

[4] *Ivanţoc and Others v. Moldova and Russia*, Judgment of 15.11.2011, Application No. 23687/05, para. 106.

And what about practice? A case in point is the French intervention upon request of the interim government of Mali. In this regard, the prevailing view is that the Malian precedent exclusively supports the existence of an anti-terrorism exception to the prohibition of external intervention in civil wars, even if the UNSC, in Res. 2100 (2013), of 25.4.2103, speaks of a country facing "interlinked challenges", and in the same resolution it commends

> "the efforts to restore the territorial integrity of Mali by the Malian Defence and Security Forces, with the support of French forces and the troops of the African-led International Support Mission in Mali (AFISMA)".

More generally, in a typical example of multiple justifications, the anti-secessionist objective has always been maintained as a relevant, even if not the sole or pre-eminent, element of the legal discourse justifying French intervention in Mali: *before Operation Serval* (in the statements of the Economic Community of West African States (ECOWAS) and the African Union at the time of the declaration of independence of Azawad, in the request for assistance issued by the Malian President *ad interim* on September 2012, in the mandate attributed by the UNSC with Res. 2085 (2012), of 20.12.2012, to the African-led International Support Mission in Mali); *after* the operation (see again UNSC's Res. 2100 (2013) and the mandate attributed to the UN Multidimensional Integrated Stabilization Mission in Mali to give "support for the reestablishment of State authority throughout the country"); and *during* the French intervention. In this regard, not only does the French communication of 11.1.2013 to the UN Secretary-General and the President of the UNSC contain a reference to the existence of an ongoing threat to the territorial integrity of Mali,[5] but in the subsequent statement pronounced before the French Parliament on 16.1.2013, the French Minister of Foreign Affairs, *Laurent Fabius*, on behalf of the Government, thus explained the objectives pursued in *Operation Serval*:

> "[…] La France poursuit des objectifs clairs: arrêter l'avancée terroriste; préserver l'Etat malien et l'aider à recouvrer son intégrité territorial; favoriser l'application des résolutions internationales avec le déploiement de la force africaine et appui aux forces maliennes dans la reconquête du nord du Mali."[6]

In Mali, the fighting against a secessionist coup was certainly not the sole objective, but it was an objective evoked autonomously and directly. And if

[5] UN Doc. S/2013/17.

[6] Déclaration du Gouvernement sur l'intervention militaire au Mali, text available at <https://www.senat.fr>, 1.

the anti-secessionist purpose alone was not sufficient, the same could also be said of the other goals.

To conclude, I do not believe in negative equality as a principle generally applicable to all instances of internal conflicts and to all cases, as I also do not believe that consent always justifies, or presumptively justifies, external intervention. A "principle-based" approach, to be applied on a case-to-case basis, may well provide more balanced legal solutions.