"Intervention by Invitation" and the Construction of the Authority of the *Effective Control* Test in Legal Argumentation

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The claim of "intervention by invitation" has been increasingly used in international law to assert the legality of interventions (including military) requested by states, e.g. to quell an internal strife.[1] One of the avenues in which the discourse on "intervention by invitation" has unfolded considers that the consent of the state requesting the external intervention operates as a circumstance precluding wrongfulness[2] of the breach of the legal principle of non-intervention.[3] However, during a civil strife, the state authority may face internal challenges, to the extent that doubts arise as to its legal capability to express a valid consent. To obviate this, a pragmatic – and arguably objective – reference is made to the *government* that exercises *effective control* over the state territory as the authority entitled to express a valid consent.[4] The determination of such an entity based on the effective control test plays an important part of the debate on "intervention by invitation".[5] As

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1 Notably, there is "no general right of intervention, in support of an opposition within another State", see *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. US*), Judgment of 27.6.1986, ICJ Reports 1986, 14, § 246.

2 Article 20, Articles of the Responsibility of States for Internationally Wrongful Acts (ARSIWA). See, e.g., *T. Christakis/K. Bannelier*, Volenti non fit injuria? Les effets du consentement à l'intervention militaire, A.F.D.I. 50 (2004), 102; *M. Byrne*, Consent and the Use of Force: An Examination of "Intervention by Invitation" as a Basis for US Drone Strikes in Pakistan, Somalia and Yemen, Journal on the Use of Force and International Law 3 (2016), 97.

3 General Assembly Resolution 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (1970), UN Doc. A/RES/25/2625. For a through discussion on consent as an integral part of the primary rule on the prohibition on the use of force or as a secondary rule for ascertaining state responsibility, see *O. Corten*, The Law Against War – The Prohibition of the Use of Force in Contemporary International Law, 2010, 252 et seq.

4 For a critical account of the effective control test, see *B. R. Roth*, Secessions, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Test, Melbourne Journal of International Law 11 (2010), 393.

5 See, e.g., *L. Doswald-Beck*, The Legal Validity of Military Intervention by Invitation of the Government, BYIL 56 (1985), 189, 190 et seq.; *D. Wippman*, Military Intervention, Regional Organizations, and Host-State Consent, Duke J. Comp. & Int'l L. 7 (1996), 209, 212 and 219; *C. Le Mon*, Unilateral Intervention by Invitation in Civil Wars: The Effective Control Test Tested, N. Y. U. J. Int'l L. & Pol. 35 (2003), 741, 745 et seq.; *J. d'Aspremont*, Legiti-

such, the effective control test over the state territory in the argumentation of the legality of "intervention by invitation" epitomises the way in which the authority of a test is constructed in legal argumentation. Like other tests, the effective control test has a bearing on legal determinations, in the specific case in the ascertainment of who is vested with the authority to express a valid consent to an external intervention.

This short contribution shows that, within the discourse on "intervention by invitation", the effective control test has been constructed and reasserted through judicial decisions and "the teachings of the most highly qualified publicists",[6] i.e. through subsidiary means to determine rules of law.

Arbitral awards rendered in the 1920s in relation to the continuity of states under international law defined the notion of government by reference to the effective control test.[7] Three cases are worth-mentioning to trace the genesis of the effective control test. In the 1923 *Tinoco* case (*Great Britain v. Costa Rica*),[8] the arbitrator purported the relevance of the *de facto* character of the *Tinoco's* government to be "according to the standard set by international law", despite the lack of formal recognition by Great Britain.[9] Similarly, in the 1926 *Hopkins* case (*U.S.A. v. United Mexican States*),[10] the claims commission determined that acts put in place by the *Huerta* government – which gained the power through a coup d'état – legally bound the Mexican state if the government had "real control and paramountcy […] over a major portion of the territory and a majority of the people".[11]

In making such legal determinations, the adjudicators made extensive reference to a panoply of authorities, i.e. scholarly writings and prior arbitral awards. In particular, the *Tinoco* award referred first to *Moore's* "Digest of International Law" (1906), "announc[ing] the general principle [of the continuity of states] which has had such universal acquaintance to become well settled in international law", second to *Borchard's* "The Diplomatic Protection of Citizens Abroad" (1915) citing further subsidiary means including

macy of Governments in the Age of Democracy, , N. Y. U. J. Int'l L. & Pol. 38 (2006), 877, 906 et seq.; *E. de Wet*, The Modern Practice of Intervention by Invitation in Africa and Its Implications for the Prohibition of the Use of Force, EJIL 26 (2016), 979, 981 et seq.; *M. Byrne* (note 2), 107 et seq.

6 Article 38(1)(d) Statute of the International Court of Justice.

7 For a more extensive review of relevant judicial decisions, see *L. Doswald-Beck* (note 5), 192 et seq.

8 *Aguilar-Amory and Royal Bank of Canada Claims* (*Great Britain v. Costa Rica*), Reports of International Arbitral Awards, 18.10.1923, Vol. I, 369 et seq.

9 *Great Britain v. Costa Rica* (note 8), 381.

10 *George W. Hopkins (U.S.A.) v. United Mexican States*, Reports of International Arbitral Awards, 31.3.1926, Vol. IV, 41 et seq.

11 *George W. Hopkins (U.S.A.) v. United Mexican States* (note 10), 45.

an arbitral award, to Chancellor *Kent*, *Wheaton's* "International Law" (1836), *Hall's* "International Law" (1909), and third to *Woosley's* "Introduction to the Study of International Law" (1873).[12] Instead, the claims commission in the *Hopkins* case made reference to the 1901 *Dreyfus* case (*France v. Chile*), to reassert that

> "the illegal origin of a government [does] not defeat the binding force of its executive acts. […] Once it had lost this control, even though it had not been actually overthrown, it would not be more than one among two or more factions wrestling for power as between themselves."[13]

Although the above mentioned cases pertain to issues of recognition of governments under international law, a number of scholarly writings have reasserted ever since the notion that only governments having effective control over the territory can act on behalf of the state, and thus express a valid consent to an external intervention. In 1947, *Hersch Lauterpacht* maintained that

> "the principle of effectiveness […] conceived as the test of recognition of governments must be regarded as expressing most accurately the general practices of States […] which emerges as the predominant and governing principle."[14]

Yet – and this is material for the argument of this reflection – *Lauterpacht* traces "the *foundations* of the principle of effectiveness in the seventeenth century *in the writings of the founders of international law*,"[15] and reaffirms the same *de facto* principle drawing from the pronouncements in the *Dreyfus* as well as in the *Tinoco* cases.[16] A cursory inquiry into scholarly sources dealing with "intervention by invitation" shows that the *Tinoco* case is often cited in contemporary literature, too.[17]

This leads us to derive an important consideration. Determining who is entitled to express a valid consent to a military intervention in the state ter-

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[12] *Great Britain v. Costa Rica* (note 8), 377 et seq.

[13] *George W. Hopkins (U.S.A.) v. United Mexican States* (note 10), 45. The *Dreyfus* case affirmed that the acts performed by the government exerting *de facto* authority bound the state (Peru) irrespective of its legitimacy.

[14] *H. Lauterpacht*, Recognition in International Law, 1947, 98.

[15] *Hersch Lauterpacht* cites *Grotius*, *Pufendorf*, *Bynkershoek* and *Vattel* in support of the *de facto* principle. See *H. Lauterpacht* (note 14), 99 et seq. [*emphasis* added]. *Brad Roth* posited that "the effective control doctrine is rooted in Kelsenian positivism". See *B. R. Roth* (note 4), 423.

[16] *H. Lauterpacht* (note 14), 103 et seq.

[17] *L. Doswald-Beck* (note 5), 193; *S. Talmon*, Recognition of Governments in International Law, 2001, 34; *M. Zamani/M. Nikouei*, Intervention by Invitation, Collective Self-Defense and the Enigma of Effective Control, Chinese Journal of International Law 16 (2017), 633, 668 et seq.; *E. de Wet* (note 5), 983.

ritory is operated on the basis of tests which bear authority in the argumentation of international law thanks to the iterative reference to it by scholarly writings and judicial decisions. The reference to state practice (see *Lauterpacht* in the cited excerpt) allows an essentially doctrinal test, such as the effective control, to be "validated" as a limb of the law. Similarly, the appeal to the democratic legitimacy of the government, which is gaining terrain in scholarly writings,[18] is finding correspondence in some state practice.[19] As such, the democratic legitimacy test may in due course be "validated" as a plausible and correct test to determine the government entitled to express a valid consent to intervention.

This is not to support the necessity or the desirability of such a test, rather to stress that changes in *doctrinal* tests evidenced via the iterative citation of judicial decisions and scholarly writings materially bear on the outcomes of *legal* determinations.

[18] A number of scholars have claimed that an additional test of democratic legitimacy shall be considered for the purposes of identifying such a government. See, *inter alios*, *G. H. Fox*, Democracy, Right to, International Protection, in: R. Wolfrum (ed.), MPEPIL (2008), 773. Other scholars take the view that such a democratic legitimacy test is conducive to the identification of the government that can validly consent to an intervention, even when the effective control test is not met. See e.g. *J. Levitt*, Pro-Democratic Intervention in Africa, Wis. Int'l L.J. 24 (2006), 758.

[19] See e.g. the cases of *Haiti* (1991) and of *Sierra Leone* (1997), in *B. R. Roth* (note 4), 427 et seq.