# Notes

# A Rebuttable Presumption Against Consensual Nondemocratic Intervention

## *Columbia Journal of Transnational Law* Writing Prize in Comparative and International Law, Best Note Award

*Since the adoption of the U.N. Charter, the international community has worked tirelessly to prevent conflict through the prohibition on the use of force and the principle of nonintervention. However, the doctrine of intervention by invitation stands in stark contrast to this goal, especially its most recent iteration in Syria. The doctrine relies on the consent of states to determine the lawfulness of intervention. But consent is simply not sufficient to guarantee that the use of force does not transgress self-determination, popular government, human rights, and other international legal values. This Note proposes that a rebuttable presumption against intervention should be imposed against nondemocratic States. Unless a nondemocratic State can affirmatively demonstrate the intervention's compliance with a State's other international legal commitments, the intervention should be presumed unlawful. The rebuttable presumption would serve to discourage use of force, but respect a people's nondemocratic expression of sovereign government. In light of all the alternatives, no rule offers the same inclusivity and flexibility required for action on the international plane. This is demonstrated most clearly by Russia's intervention in Syria, whereby a rebuttable presumption could have prevented this additional military force or induced Syria to better com-*

*ply with its international responsibilities.*



## INTRODUCTION

In 2015, the Russian Federation began a campaign of air strikes against terrorist and rebel groups in Syria pursuant to a request from the Bashar al-Assad government.[1] The Syrian conflict,

1. Indeed, when asked if Russia would expand its anti-terror campaign into northern Iraq, Russian Foreign Minister Sergey Lavrov responded, "We were not invited. We were not asked. We are polite people." Press Conference by the Minister for Foreign Affairs of the Russian Federation, H.E. Mr. Sergey V. Lavrov, UN Web TV (Oct. 1, 2015),

more generally, began in 2011 as a reaction to the Assad regime.[2] Protests in the southern city of Deraa quickly led to armed conflict between the Assad regime and the anti-regime rebels who formed the Free Syrian Army.[3] The conflict was joined by Islamic extremists, also opposed to Assad.[4] Some extremists belonging to Al-Qaeda splintered to form the Islamic State in Iraq and Syria ("Islamic State"). Indeed, the Islamic State proliferated.[5] By September 2015, the Assad regime invited the Russian Federation to begin a military intervention directed against terrorists.[6] News outlets initially reported that the Russian intervention would target the Islamic State.[7] However, these news outlets, nongovernmental organizations, and NATO member States claimed that Russia bombed anti-Assad rebels generally, including moderates.[8] Indeed, several nongovernmental

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http://webtv.un.org/watch/sergey-v.-lavrov-russian-federation-press-conference-1-october-2015/4523954992001 [hereinafter Russian Federation Press Conference].

2. Zack Beauchamp, *Syria's Civil War: A Brief History*, VOX (Oct. 2, 2015), http://www.vox.com/2015/9/14/9319293/syrian-refugees-civil-war; *see also* Kathy Gilsinan, *The Confused Person's Guide to the Syrian Civil War*, ATLANTIC (Oct. 29, 2015), http://www.theatlantic.com/international/archive/2015/10/syrian-civil-war-guide-isis/410746; Lucy Rodgers et al., *Syria: The Story of the Conflict*, BBC (Mar. 11, 2015), http://www.bbc.com/news/world-middle-east-26116868.

3. *See* Beauchamp, *supra* note 2.

4. *Id.*

5. *Id.*

6. Bill Chappell, *Russia Begins Airstrikes in Syria After Assad's Request*, NPR (Sept. 30, 2015), http://www.npr.org/sections/thetwo-way/2015/09/30/444679327/russia-begins-conducting-airstrikes-in-syria-at-assads-request; *see also Updated-Russian Airstrikes Against ISIS Sites in Syric Begin*, SYRIAN ARAB NEWS AGENCY (Sept. 30, 2015), http://sana.sy/en/?p=56330; Russian Federation Press Conference, *supra* note 1 ("If it looks like a terrorist, if it acts like a terrorist, if it walks like a terrorist, if it fights like a terrorist, it's a terrorist, right?").

7. Andrew Roth et al., *Russia Begins Airstrikes in Syria; U.S. Warns of New Concerns in Conflict*, WASH. POST (Sept. 30, 2015), https://www.washingtonpost.com/world/russias-legislature-authorizes-putin-to-use-military-force-in-syria/2015/09/30/f069f752-6749-11e5-9ef3-fde182507eac_story.html ("U.S. officials dispute Moscow's claim that its aircraft targeted the Islamic State . . . .").

8. ISW Research Team, *Russia's First Reported Air Strikes in Syria Assist Regime with Targeting Broader Opposition*, INST. FOR STUDY WAR (Sept. 30, 2015), http://www.iswresearch.blogspot.com/2015/09/russias-first-reported-air-strikes-in.html; *see also* Tim Wallace et al., *The Battle for Syria: Who Has Gained Ground in Syria Since Russia Began Its Airstrike*s, N.Y. TIMES (Oct. 29, 2015), http://www.nytimes.com/interactive/2015/09/30/world/middleeast/syria-control-map-isis-rebels-airstrikes.html; Nataliya Vasilyeva & Jim Heintz, *Russia Begins Airstrikes in Syria, but West Disputes Targets*, ASSOCIATED PRESS (Oct. 1, 2015, 5:16 AM), http://bigstory.ap.org/article/1a98b981b4b941809168324300274980/russian-lawmakers-consider-giving-ok-use-troops-abroad ("French Defense Minister Jean-Yves Le Drian told lawmakers in Paris: 'Curiously,

organizations additionally claimed the Russian military breached international humanitarian law and human rights pursuant to this authority from the Assad government.[9] Human Rights Watch, for example, reported that Russia used "internationally banned cluster munitions" in Syria.[10] Amnesty International reported within three months of the first airstrikes that the Russian military "directly attacked civilians or civilian objects by striking residential areas with no evident military objective and even medical facilities."[11] Importantly, these airstrikes have provided necessary military support to an already violent Syrian regime[12] and may have extended the conflict.[13]

The doctrine of intervention by invitation provided the legal basis for the Russian intervention.[14] Through this doctrine, any State

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they didn't hit Islamic State. I will let you draw a certain number of conclusions yourselves.'").

9. *See Syria and Iraq: ICRC Calls for Better Compliance with Humanitarian Law*, INT'L COMMITTEE RED CROSS (Sept. 26, 2014), https://www.icrc.org/en/document/syria-and-iraq-icrc-calls-better-compliance-humanitarian-law; Miriam Wells, *Russian Bombings Have Killed So Many Syrian Civilians They Could Be a War Crime*, VICE NEWS (Dec. 23 2015), https://news.vice.com/article/russian-bombings-have-killed-so-many-syrian-civilians-they-could-be-a-war-crime; *see also* HUSSAM QATTAN, RUSSIAN STRIKES ON SYRIA'S CIVILIANS: CLUSTER MUNITIONS, VACUUM BOMBS AND LONG-RANGE MISSILES (Nov. 2015), http://www.vdc-sy.info/pdf/reports/1447972413-English.pdf; *Russia/Syria: Possibly Unlawful Russian Air Strikes*, HUM. RTS. WATCH (Oct. 25, 2015), https://www.hrw.org/news/2015/10/25/russia/syria-possibly-unlawful-russian-air-strikes; *Russia/Syria: Widespread New Cluster Munition Use*, HUM. RTS. WATCH (July 28, 2016), https://www.hrw.org/news/2016/07/28/russia/syria-widespread-new-cluster-munition-use.

10. *Russia/Syria: Widespread New Cluster Munition Use*, *supra* note 9.

11. *Syria: Russia's Shameful Failure to Acknowledge Civilian Killings*, AMNESTY INT'L (Dec. 23, 2015), https://www.amnesty.org/en/latest/news/2015/12/syria-russias-shameful-failure-to-acknowledge-civilian-killings.

12. Amnesty International reported that over 17,000 people have died in Syrian prisons and 11 million have been displaced. *End the Horror in Syria's Torture Prisons*, AMNESTY INT'L (Aug. 2016), https://www.amnesty.org/en/latest/campaigns/2016/08/syria-torture-prisons.

13. Max Fisher, *Syria's Paradox: Why the War Only Ever Seems to Get Worse*, N.Y. TIMES (Aug. 26, 2016), http://www.nytimes.com/2016/08/27/world/middleeast/syria-civil-war-why-get-worse.html.

14. *Lawmakers Authorize Use of Russian Military Force for Anti-IS Airstrikes in Syria*, TASS (Sept. 30, 2015), http://tass.ru/en/politics/824795. This is not the only instance of Russian intervention by invitation of another government. *See* Erika de Wet, *From Free Town to Cairo via Kiev: The Unpredictable Road of Democratic Legitimacy in Governmental Recognition*, AJIL UNBOUND (Jan. 16, 2015), https://www.asil.org/blogs/free-town-cairo-kiev-unpredictable-road-democratic-legitimacy-governmental-recognition (discussing "Russia's justifications for its military intervention in Crimea in March 2014 . . . at the request of the democratically elected (although by then ousted) Ukranian President

may invite any other State to use military force in its territory.[15] However, force is otherwise strictly regulated by international law. The U.N. Charter prohibits the use of force by States, with few exceptions.[16] This prohibition is among the most enormous shifts in international law since the Second World War.[17] It stands quite clearly as a singular achievement of the international community.[18] But the doctrine of intervention by invitation serves as a legal panacea to the prohibition on force.[19] States may forgo Security Council approval and a multitude of treaty obligations by simple consent.[20] But if

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Yanukovych").

15. *See infra* Part I.A.

16. U.N. Charter art. 2, ¶ 4 ("All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."); U.N. Charter art. 51 ("Nothing in the present charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations . . . .").

17. Anthony D'Amato, *The Meaning of Article 2(4) in the U.N. Charter* 1 (Nw. Univ. Sch. of Law Pub. Law & Legal Theory Series, No. 13-30, 2013) ("The language of Article 2(4), because it stands alone and is not tied to nor dependent upon any of the other provisions of the UN Charter, is perhaps the most important rule of international law in the modern era.").

18. LOUIS HENKIN, INTERNATIONAL LAW: POLITICS, VALUES AND FUNCTIONS 146 (1994) ("Article 2(4) is the most important norm of international law, the distillation and embodiment of the primary value of the inter-State system, the defence of State independence and State autonomy."); Marc Weller, *Introduction: International Law and the Problem of War*, *in* THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 3, 10 (Marc Weller, Alexia Solomou & Jake W. Rylatt eds., 2015) ("As this volume amply demonstrates, the struggle to give meaning and reality to prohibition of the use of force continues to this day. Yet, the importance of this cultural shift against the normality of war in international law is immense.").

19. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgement, 1986 I.C.J. Rep. 14 (June 27); *see also* Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgement, 2005 I.C.J. Rep. 168, ¶¶ 42–54 (Dec. 19); Christopher J. Le Mon, *Unilateral Intervention by Invitation in Civil Wars: The Effective Control Test Tested*, 35 N.Y.U. J. INT'L L. & POL. 741, 791 (2003) ("The most serious systemic question regarding intervention by invitation, however, is whether it is indeed a stable and beneficial aspect of an advanced international legal order. In making any such determination, one must take into account the intersections of international law and international politics: While the case studies display how state and Charter-body action influences the law, the inverse is also true. International law influences state behavior as well, and given certain normative goals—the non-use of force, the minimization of casualties during conflict, the promotion of human rights—any such laws should be evaluated for their efficacy in promoting these norms.").

20. *See* Le Mon, *supra* note 19, at 742 ("Unilateral intervention by invitation is fundamentally different from endeavors undertaken by alliances or coalitions of states, for only the inviting state's sovereign authority—the very quality that is challenged when civil

force is so strictly regulated elsewhere, why is it not so here? Is it simply for the sake of state authority?[21] Can two States operating out of self-interest be trusted to make the right decision concerning intervention? If so, why has the Russian intervention led to civilian deaths and bombing of medical infrastructure?[22] International law implicates more values than just "sovereignty."[23] International law also values peace, human rights, and legal compliance.[24] Rules concerning military intervention should reasonably reflect those values as well.

This Note proposes a revision to the doctrine of intervention by invitation to better comply with peace, human rights, and international law generally. The Note argues that, in order to better reflect these values, a nondemocratic State should face a rebuttable presumption before it may legally invite another State to intervene on its behalf. If the inviting State is nondemocratic, both participating States must be required to rebut the presumption (i) that the use of force will not meet the doctrinal requirements of intervention by invitation;[25] and (ii) that the use of force would otherwise violate international law, such as human rights, humanitarian law, or individual treaty obligations. In this instance, because Syria is nondemocratic,[26] Syria and Russia would have needed to offer evidence to rebut this presumption before Russia could lawfully use force in Syrian territory.

Part I examines the current doctrine of intervention by invitation. Part II considers scholarly proposals to reform the doctrine of intervention thus far, including those that use a democratic requirement. Part III examines the value of adding a democratic requirement and proposes a presumption against nondemocratic intervention.

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war breaks out—can legally justify such intervention.").

21. *See* Gregory H. Fox, *Intervention by Invitation*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW *supra* note 18, at 816, 839 ("Traditional rules on intervention by invitation reflected 19th-century international law in all its statist glory.").

22. *See supra* notes 9–12 and accompanying text.

23. Or, more specifically, the idea that international law emanates from the voluntary consent of States because they are sovereign. *See, e.g.*, S.S. "Lotus" (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7) ("International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will . . . .").

24. U.N. Charter arts. 1–2.

25. *See infra* Part I.A.

26. *See infra* Part III.A.

## I. THE LAW OF INTERVENTION BY INVITATION

Part I begins with an outline of the modern doctrine of intervention by invitation. The doctrine requires "legitimate consent," namely, consent (i) offered by a lawful government, (ii) offered through the highest available office, (iii) negotiated without duress, and (iv) offered by a government displaying a minimum amount of effective control.[27] The Part then discusses limits to consent, such as consent to violate international law. Finally, the Part ends with an analysis of the Syrian conflict, against the modern doctrine.

### *A. Intervention by Invitation Requires Consent*

International law prohibits the use of force against another State.[28] As a corollary, international law also generally provides that States may not intervene in other States.[29] There are some exceptions to the prohibition on the use of force and principle of non-intervention, such as Security Council approval, self-defense, and collective self-defense.[30] The prohibition on the use of force also exempts agreements between two States to allow force where the intervening State is not necessarily acting in self-defense, as demonstrated by rulings from the International Court of Justice ("ICJ"), including *Military and Paramilitary Activities in and Against Nicaragua*.[31] In that case, "the Court seems to have enunciated a clear rule of nonin-

27. *See generally* Georg Nolte, *Intervention by Invitation*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2010), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1702?prd=EPIL.

28. U.N. Charter art. 2, ¶ 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations"); G.A. Res. 3314 (XXIX), annex, art. 5 (Dec. 14, 1974) ("No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.").

29. *See, e.g.*, G.A. Res. 2625 (XXV), annex, at 5 (Oct. 24, 1970) ("No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.").

30. U.N. Charter art. 51.

31. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgement, 1986 I.C.J. Rep. 14 (June 27); *see also* Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgement, 2005 I.C.J. Rep. 168, ¶¶ 42–54 (Dec. 19).

tervention except by invitation of the legally-recognized government."[32] Facing insurrection or invasion, State A might invite State B to do what would otherwise be illegal: use military force within A's borders.[33] This rule is in line with the Draft Articles of State Responsibility which state, "Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent."[34] An otherwise unlawful act by one State against another is lawful, vis-à-vis each other, provided the other State gives consent.[35] Meaning if intervention is unlawful because it would violate State A's rights, State B no longer violates those rights if there is consent. In such a scenario, intervention is therefore lawful.

States seeking to make use of the doctrine of intervention by invitation must meet certain requirements. First, the inviting State must give "legitimate consent."[36] To give legitimate consent, it is

32. Le Mon, *supra* note 19, at 751; *see also* Nicar. v. U.S., 1986 I.C.J. ¶ 199 ("[T]he Court finds that in customary international law, whether of a general kind or that particular to the inter-American legal system, there is no rule permitting the exercise of collective self-defence in the absence of a request by the State which regards itself as the victim of an armed attack. The Court concludes that the requirement of a request by the State which is the victim of the alleged attack is additional to the requirement that such a State should have declared itself to have been attacked.").

33. *See* Erika de Wet, *The Modern Practice of Intervention by Invitation in Africa and Its Implications for the Prohibition of the Use of Force*, 26 EUR. J. INT'L L. 979 (2015); Fox, *supra* note 21, at 816 ("Such mitigation through consent is consistent with principles of state responsibility, which provide that consent to an otherwise unlawful act precludes the wrongfulness of that act."); David Wippman, *Military Intervention, Regional Organizations, and Host-State Consent*, 7 DUKE J. COMP. & INT'L L. 209 (1996).

34. Draft Articles on Responsibility of States for Internationally Wrongful Acts, Int'l Law Comm'n, Rep on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, art. 20 (2001).

35. *See generally id.*; *cf.* Ademola Abass, *Consent Precluding State Responsibility: A Critical Analysis*, 53 INT'L & COMP. L.Q. 211, 213 (2004) ("Although it is true that consent is a well-established principle of international law, its pedigree, so simplistically expressed, may very well be misleading in reality, at least insofar as its application to daily intercourse amongst States is concerned. There are no given rules of international law governing consent and international tribunals always treat the matter on the basis of facts and materials of cases appearing before them.").

36. *See* Le Mon, *supra* note 19, at 742 ("Invited military intervention focuses on the consent of the inviting state to justify action that would, absent such consent, constitute an illegal use of force by one state within the territory of another."); Laura Visser, *Russia's Intervention in Syria*, EJIL: TALK! (Nov. 25, 2015), http://www.ejiltalk.org/russias-intervention-in-syria ("[I]ntervention by invitation falls outside the scope of article 2(4) [of the United Nations Charter], as long as the consent is valid.").

most important that the inviting government expresses the State's authority.[37] Generally, determining whether a government expresses the State's authority is a simple matter. This determination usually does not stand in the way of its ability to interact with other States, like General Assembly Resolutions or treaty ratifications. In those instances, authority is clear enough that one would not even question it, except for a small number of States in political disagreement.[38] But intervention by invitation doctrine takes place in the context of an armed challenge to the government allegedly expressing state authority. In nearly every instance then, the question of authority is essential to determine whether a State has given proper consent. This requirement prevents situations like that of the Soviet invasion of Afghanistan in 1979, whereby the invitation was given "from a prime minister whom the Soviets themselves essentially crowned."[39] There are no requirements dictating the manner in which consent must be given.[40] Sometimes countries will have already negotiated defense treaties that provide a framework, such as the treaties that France had

37. Le Mon, *supra* note 19, at 754 ("An inviting party lacking legal recognition as the legitimate government can confer no rights upon the invited state, as it lacks such rights itself."); Sean Lynch, *An Invitation to Meddle: The International Community's Intervention in Libya and the Doctrine of Intervention by Invitation*, 2 CREIGHTON INT'L & COMP. L.J. 173, 184 (2012) ("Only where the inviting government is recognized as embodying the sovereign rights of the state will an invitation therefrom provide a legal basis, in and of itself, for military action according to the terms of the invitation.").

38. For example, the objections by Arab States to international acts by Israel or objections by Argentina to acts of the United Kingdom regarding the Falkland Islands (Malvinas). Even then, however, a challenge by Argentina to the actions of the U.K. is specific to the territorial application of the U.K.'s actions vis-à-vis the islands, not the authority of the U.K. to bind itself. *See, e.g.*, United Nations Convention on the Law of the Sea, Reservation by Argentina, Oct. 5, 1984, 1994 U.N.T.S. 54 ("In this connection, and bearing in mind that the Malvinas and the South Sandwich and South Georgia Islands form an integral part of Argentine territory, the Argentine Government declares that it neither recognizes nor will it recognize the title of any other State, community or entity or the exercise by it of any right of maritime jurisdiction which is claimed to be protected under any interpretation of resolution III that violates the rights of Argentina over the Malvinas and the South Sandwich and South Georgia Islands and their respective maritime zones. Consequently, it likewise neither recognizes nor will recognize and will consider null and void any activity or measure that may be carried out or adopted without its consent with regard to this question, which the Argentine Government considers to be of major importance.").

39. Le Mon, *supra* note 19, at 778 ("[T]here was extensive condemnation at the United Nations of what many states viewed as an illegal Soviet invasion. The Afghans themselves seemed to share this disparaging view of their Soviet-imposed government.").

40. Nolte, *supra* note 27, ¶ 23 ("There are no particular requirements as to the form of an invitation and its withdrawal.").

with its former West African colonies, though this is not the norm.[41]

Second, the person (or perhaps more accurately, "the office") offering consent must be qualified to do so.[42] Georg Nolte, a German jurist, explains that invitation must be given by the highest available state official or organ similar to the international law of treaties.[43] Though, the doctrine of intervention by invitation is not quite as stringent as treaty law because the practical effects of conflict may prevent the head of state from partaking in formalities. Whereas the Head of State, Head of Government, or Minister of Foreign Affairs is ordinarily necessary to legally bind the country in an international agreement, only the highest-ranking official available is required for intervention by invitation.[44]

Third, Nolte states that consent cannot be given under duress from the invited party.[45] Similar to contract law or treaty law, this precludes agreements that are not truly bargains between States.[46] If a State is under pressure to invite another State to use military force, the agreement was not made between two equal parties. Rather, the agreement would be little more than a pretense. This rule, in particular, reflects international law's presumption that States are co-equal.[47] While any State requesting intervention is likely under the "duress" of a military conflict, this rule only prohibits the invited State from using force to create a sham invitation.

Fourth, Nolte also explains that the requesting government

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41. Nolte, *supra* note 27, ¶ 7.

42. Wippman, *supra* note 33, at 211–12 ("In general, international law presumes that when a government exercises effective control over the territory and people of the state, the government (and more particularly, the authorized officials of that government) possesses the exclusive authority to express the will of the state in its international affairs.").

43. Nolte, *supra* note 27, ¶ 12.

44. *Id.* ¶ 23 ("The author of an invitation, however, must be the highest available State organ in order to ensure that the State speaks with one voice."); *cf.* Vienna Convention on the Law of Treaties, art. 7, May 23, 1969, 1155 U.N.T.S. 331.

45. Nolte, *supra* note 27, ¶ 18 ("Invitations which are issued under duress cannot justify a military intervention.").

46. *See, e.g.*, Vienna Convention on the Law of Treaties, *supra* note 44, art. 52 ("A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations."); RESTATEMENT (SECOND) OF CONTRACTS § 175 (AM. LAW INST. 1981) ("If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.").

47. Christoph Schreuer, *The Waning of the Sovereign State: Towards a New Paradigm for International Law?*, 4 EUR. J. INT'L L. 447, 448 (1993) ("Contemporary international law presupposes this structure of co-equal sovereign States.").

must be able to display a minimum amount of effective control.[48] This is a difficult standard to measure, but "[t]his minimum is normally present in cases of internal conflict as long as a government that is challenged by rebellion has not lost control of a sufficiently representative part of the State territory."[49] That is to say, for example, that control of large swaths of uninhabited desert by rebel groups would not mean that the *de jure* government has lost its *de facto* authority. This minimum amount of effective control is still a low standard and refers to situations like Somalia where "law and order has at times completely broken down."[50] That scenario "remain[s] the exception."[51]

### *B. Limits to Consent*

There are currently two limits on intervention by invitation that prohibit military force notwithstanding consent. First, States cannot consent to violate international law. As demonstrated by Article 16 of the 2001 Draft Articles on State Responsibility, collusion to commit an unlawful act does not make the act lawful.[52] For example, "interventions by invitation must not lead to the removal of the political control of the inviting government,"[53] which would violate the principle of non-intervention.[54] Similarly, there is strong evidence that it is unlawful to provide invited military assistance to apartheid regimes.[55] Even when a State provides legitimate consent, it cannot be done for the sake of violating international law.[56] These two scenarios, however, provide extreme examples (indeed, the prac-

48. Nolte, *supra* note 27, ¶ 18 ("A government must display a minimum of effectiveness to have international legal authority to invite foreign troops."); *see also* Le Mon, *supra* note 19.

49. Nolte, *supra* note 27, ¶ 18.

50. *Id.*

51. *Id.*

52. Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 34, art. 16 ("A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (*a*) That State does so with knowledge of the circumstances of the internationally wrongful act; and (*b*) The act would be internationally wrongful if committed by that State.").

53. Nolte, *supra* note 27, ¶ 20.

54. *Id.* ¶¶ 19–20.

55. *Id.* ¶ 17 ("[A]partheid governments were considered legally incapable to invite foreign troops.").

56. *See id.* ¶ 22.

tice of apartheid may even be a violation of *jus cogens*)[57] so they are not as helpful in determining if less serious violations would also preclude legitimate invitations to intervene.

Second, the ICJ has also held that a State may not intervene on behalf of an uprising.[58] This is distinct from the scenarios discussed so far, in that it considers military aid in favor of rebels, not the government. States have nonetheless been tempted to intervene at the request of these groups.[59] But, in the words of the International Court, the doctrine "would certainly lose its effectiveness as a principle of law if intervention were to be justified by a mere request for assistance made by an opposition group in another State"; "[i]ndeed, it is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition."[60] These limits expose the inherent tension in this doctrine between international law's aspiration to promote peace[61] and the extensive freedom international law gives to States to consent.[62]

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57. Vienna Convention on the Law of Treaties, *supra* note 44, art. 53; John Tasioulas, *Custom,* Jus Cogens, *and Human Rights*, *in* CUSTOM'S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD 95, 107 (Curtis A. Bradley ed., 2016) (arguing that apartheid is a violation of *jus cogens*).

58. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgement, 1986 I.C.J. Rep. 14, ¶ 246 (June 27).

59. *See, e.g.*, Jeremy Levitt, *Pro-Democratic Intervention in Africa*, 24 WIS. INT'L L.J. 785, 787 (2006) (providing a list of pro-democratic interventions in Africa: "Economic Community of West African States (ECOWAS) in Liberia, Sierra Leone, Guinea-Bissau, Guinea, Côte d' Ivoire, and Togo; the Mission for the Implementation of the Bangui Agreement (MISAB) in the Central African Republic (CAR); Southern African Development Community (SADC) operation in Lesotho; and African Union (AU) action in São Tomé and Príncipe").

60. Nicar. v. U.S., 1986 I.C.J. ¶ 246.

61. U.N. Charter art. 1, ¶ 1 ("The Purposes of the United Nations are: 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace . . . .").

62. *See* S.S. "Lotus" (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 18; Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 173–77 (2001) ("Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.").

### *C. The Doctrine Applied to Russian Intervention in Syria*

There is a strong argument that the current Russian intervention is lawful pursuant to the modern doctrine of intervention by invitation.[63] First, the Assad regime may legitimately represent the authority of the Syrian State.[64] For example, the Assad regime has governed Syria for nearly fifty years.[65] Even now, the Assad regime represents Syria at the United Nations.[66] More circumstantially, the American position at peace talks has been premised on the assumption that Assad "must go"[67] and should "step down,"[68] suggesting that Assad is legally entitled to the Presidency. The United States has a clear incentive to argue Assad is not a legitimate president given its hope that another regime will someday govern Syria.[69] Yet, even the United States does not take the position that the Assad regime is illegitimate. Considering this, it would be difficult to argue the Assad regime does *not* represent the authority of the Syrian State. Second, the head of state, Bashar al-Assad, gave consent to the Russian Federation. Not only is Assad the highest available official, he is simply the highest official within the Syrian government. Third, as of yet, no evidence of duress has been identified as created by Russia. This argument is supported by the fact that no government questioned the legality of the Russian intervention, only its policy merits.[70]

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63. Visser, *supra* note 36. *But see* Nick Robins-Early, *Russia Says Its Airstrikes in Syria Are Perfectly Legal. Are They?*, HUFFINGTON POST: THE WORLDPOST (Oct. 1, 2015, 5:33 PM), http://www.huffingtonpost.com/entry/russia-airstrikes-syria-international-law_us_560d6448e4b0dd85030b0c08.

64. Spyridon Plakoudas, *Putin, Assad, and Geopolitics*, MIDDLE E. REV. INT'L AFF., Fall 2015, at 34, 35.

65. *Syria: The Reckoning*, AL JAZEERA (Mar. 15, 2016), http://www.aljazeera.com/programmes/aljazeeraworld/2013/04/2013415114923968435.html.

66. Plakoudas, *supra* note 64, at 35 (referring to the Assad regime as "the state authority still recognized as legitimate by the UN").

67. Steven Mufson, *'Assad Must Go': These 3 Little Words Are Huge Obstacle for Obama on Syria*, WASH. POST (Oct. 19, 2015), https://www.washingtonpost.com/business/economy/assad-must-go-these-three-little-words-present-a-huge-obstacle-for-obama-on-syria/2015/10/19/6a76baba-71ec-11e5-9cbb-790369643cf9_story.html.

68. Max Fisher, *No, Obama Did Not Just Confer International Legitimacy on Assad*, WASH. POST (Sept. 12, 2013), https://www.washingtonpost.com/news/worldviews/wp/2013/09/12/no-obama-did-not-just-confer-international-legitimacy-on-assad ("[President Obama] has consistently acknowledged [Assad] as Syria's head of state.").

69. Mufson, *supra* note 67.

70. Visser, *supra* note 36 ("A joint statement by several governments and a statement by NATO expressed deep concern about the intervention. Their concern, however, was

However, there are two issues that put the legality of Russian intervention into question. First, it is not clear whether the Assad regime maintains the minimum control necessary to offer legitimate consent. While rebels and extremists do control a sizable part of the country, the Assad regime does still hold the capital and much of the most populated territory.[71] Indeed, rebels lost territory during 2016.[72] Some commentators have pointed out that Assad had become increasingly marginalized during the initial years of the conflict, though this does not quite speak to control of the regime as a whole.[73] All this said, it is reasonable to argue that the regime has at least a minimum amount of effective control considering that the regime probably still controls about half of Syrian territory, including the capital.[74] Syria appears dissimilar to the complete loss of law and order found in Somalia.[75] Though the concept of minimum effective control, as it concerns intervention by invitation, is poorly developed, in this case there is a strong argument that Assad's control of much of the populated territory and his demonstrated ability to regain territory previously lost indicates that he meets the minimum threshold.[76] Secondly, Syria may have invited Russia for the purpose of violating international law. This argument much more plausibly negates the

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directed to the fact that Russia was not exclusively attacking IS, but also the Syrian opposition. President Obama described the actions as leading to a quagmire. Yet no state disputed intervention by invitation as a valid legal basis for the intervention in this particular situation.").

71. *See Islamic State and the Crisis in Iraq and Syria in Maps*, BBC (Nov. 2, 2016), http://www.bbc.com/news/world-middle-east-27838034.

72. Though this is, in part, due to the Russian airstrikes themselves—to use this as evidence of their legality would be circular. *As a Big Conference on Aid for Syrian Refugees Gets Under Way in London, Peace Talks in Geneva Stall*, ECONOMIST (Feb. 4, 2016), http://www.economist.com/news/middle-east-and-africa/21690110-big-conference-aid-syrian-refugees-gets-under-way-london-peace-talks?fsrc=scn/tw/te/bl/ed/asabigconferenceonaidforsyrianrefugeesgetsunderwayinlondonpeacetalksingenevastall; Alison Meuse, *Backed by Russia, Syrian Troops Advance in a Major Battle for Aleppo*, NPR: PARALLELS (Feb. 6, 2016, 2:05 PM), http://www.npr.org/sections/parallels/2016/02/06/465407798/backed-by-russia-syrian-troops-advance-in-a-major-battle-for-aleppo.

73. James Denselow, *Assad's Crumbling Presidency,* AL JAZEERA (Jan. 13, 2015), http://www.aljazeera.com/indepth/opinion/2015/01/assad-president-syria-20151117456677191.html.

74. It is exceedingly difficult to accurately measure the control of the various factions. *See id.*; *see generally Syria: Mapping the Conflict*, BBC (July 10, 2015), http://www.bbc.com/news/world-middle-east-22798391; Wallace et al., *supra* note 8.

75. Nolte, *supra* note 27.

76. For an overview of effective control as it concerns occupying military forces, see Elizabeth Samson, *Is Gaza Occupied?: Redefining the Status of Gaza Under International Law*, 25 AM. U. INT'L L. REV. 915, 923–26 (2010).

lawfulness of the intervention. But the ostensible reason for the intervention (to provide air strikes against terrorist targets)[77] does not appear inconsistent with international law. In order to establish that the intervention is unlawful, it would be necessary to argue that the purpose of the intervention is to support the Assad regime's unlawful actions, especially ones that may violate *jus cogens*, such as systematic torture.[78]

The Assad regime has been able to reasonably claim international legal compliance with the doctrine of intervention by invitation while working against peace, social progress, international obligations, and human rights.[79] Russian involvement has led to an extended conflict,[80] authoritarian entrenchment, and devastating loss of life.[81] The doctrine of intervention by invitation has allowed devastating force under the guise of law. It is true that Russia is still subject to humanitarian and human rights law, regardless of how the doctrine of intervention by invitation is formulated. However, the current doctrine has facilitated Russia's devastating actions by allowing conflict in the first place. A more rigorous standard for the doctrine of intervention may be able to prevent States from engaging in conflicts and, therefore, prevent such atrocities. Simply, the doctrine of intervention by invitation has facilitated death, violations of rights, and breach of international law. The doctrine needs revision.

## II. PROPOSED SOLUTIONS AND THE DEMOCRATIC REQUIREMENT

Part II introduces the current scholarly debate concerning the merits of military intervention generally and intervention by invitation specifically. The Part discusses the benefits and challenges of inserting democratic values into the current law.

### *A. Critiques of Intervention and Intervention by Invitation*

A scholarly divide has emerged questioning the merits of in-

77. *See supra* note 6 and accompanying text.

78. *See* Ben Taub, *The Assad Files*, NEW YORKER (Apr. 18, 2016), http://www.newyorker.com/magazine/2016/04/18/bashar-al-assads-war-crimes-exposed; Siobhán O'Grady, *How Assad's Prisoners Die*, FOREIGN POLICY: PASSPORT (Feb. 8, 2016, 1:03 PM), http://foreignpolicy.com/2016/02/08/how-assads-prisoners-die-syria-torture.

79. *See supra* note 9 and accompanying text.

80. Fisher, *supra* note 13.

81. *See supra* note 9 and accompanying text.

tervention generally. But a critical perspective demands that "[intervention] always has to be justified."[82] In particular, scholars have chosen to focus on the risks to "human rights and fundamental freedoms" inherent in intervention.[83] More specifically, the doctrine of intervention by invitation has itself been critiqued by several scholars on many accounts. As discussed above, the current doctrine allows for any two States to negotiate a military agreement by their status as sovereigns, so long as the agreement meets the minimum standards of the doctrine.[84] But this may cause politically and morally undesirable results. The doctrine places immense trust in the decision-making of States to create outcomes consistent with international law's values.

First, the doctrine allows military force where it otherwise would be prohibited.[85] Though intervention may sometimes help resolve internal conflicts,[86] examples such as Libya and Iraq show that this is not always the case.[87] Yet, the doctrine of intervention by invitation provides a powerful tool for engaging in military conflict regardless of its merits. Second, the doctrine may allow military action by an invited State where the same action by the inviting State would have been unlawful under domestic law.[88] Scholarship has referred

82. MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 86 (1977).

83. Inst. of Int'l Law, *Present Problems of the Use of Force in International Law: Sub-Group C—Military Assistance on Request*, art. 2(2) (Sept. 8, 2011), http://www.justitiaetpace.org/idiE/resolutionsE/2011_rhodes_10_C_en.pdf.

84. Fox, *supra* note 21, at 817 ("International law traditionally had no qualitative criteria on questions of national governance and the legitimate acquisition of political power.").

85. *See, e.g.*, Le Mon, *supra* note 19, at 791 ("The most serious systemic question regarding intervention by invitation, however, is whether it is indeed a stable and beneficial aspect of an advanced international legal order. In making any such determination, one must take into account the intersections of international law and international politics: While the case studies display how state and Charter-body action influences the law, the inverse is also true. International law influences state behavior as well, and given certain normative goals—the non-use of force, the minimization of casualties during conflict, the promotion of human rights—any such laws should be evaluated for their efficacy in promoting these norms.").

86. *See Intervention that Worked*, ECONOMIST (May 15, 2002), http://www.economist.com/node/1131038.

87. *See* Simon Henderson, *The Battle for Iraq is a Saudi War on Iran*, FOREIGN POLICY (June 12, 2014), http://foreignpolicy.com/2014/06/12/the-battle-for-iraq-is-a-saudi-war-on-iran; *see also* Dominic Tierney, *The Legacy of Obama's 'Worst Mistake'*, ATLANTIC (Apr. 15, 2015), http://www.theatlantic.com/international/archive/2016/04/obamas-worst-mistake-libya/478461.

88. Ashley S. Deeks, *Consent to the Use of Force and International Law Supremacy*,

to this phenomenon as "unreconciled consent."[89] The argument goes: because a State is bound to its international obligations notwithstanding domestic law, a State can lawfully use force prohibited by domestic law because the consent agreement is binding.[90] Third, the rule may encourage authoritarian entrenchment.[91] For example, under the rule as it stands, Russia is empowered to intervene in Syria,[92] possibly to quash a popular, democratic movement.[93] The doctrine thus provides *de jure* regimes a unique tool to combat rebel forces because the ICJ has held that international law does not allow intervention by invitation on behalf of rebel movements.[94]

One example is the negative equality principle,[95] a focus of recent scholarship, which prohibits a State from intervening on behalf of any belligerent when the conflict has risen to the level of civil war, otherwise known as a non-international armed conflict.[96] The rule hopes to offer States the room to determine their own political future domestically without international pressures. Essentially, the negative equality principle reflects "[t]he view . . . that where a society is fully divided about its political future, meaning the government cannot plausibly claim to represent the entire population, external assistance on the government's behalf would interfere with the people's right to determine their own future."[97]

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54 HARV. INT'L L.J. 1, 27, 27–30 (2013).

89. *Id.* at 20–21.

90. *Id*. at 25–26.

91. Editorial, *What Russia and Turkey Bring to Syria*, N.Y. TIMES (Aug. 11, 2016), http://www.nytimes.com/2016/08/11/opinion/what-russia-and-turkey-bring-to-syria.html ("Mr. Putin has provided the crucial military support that is keeping Syria's president, Bashar al-Assad, in power . . . .").

92. *See supra* Part I.C; *supra* note 63 and accompany text.

93. *See, e.g.*, Human Rights Council, Rep. of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/21/50, ¶ 20 (Aug. 16, 2012) ("[T]he Syrian opposition issued a common vision of a political transition and a national pact establishing justice, democracy and pluralism as the constitutional foundations of the future Syria.").

94. *See supra* Part I.B.

95. It is so called because each side to the conflict is "equally unable to invite outside assistance." Fox, *supra* note 21, at 827.

96. *Id.*; *see also Internal Conflicts or Other Situations of Violence—What is the Difference for Victims?*, INT'L COMMITTEE RED CROSS (Dec. 10, 2012), https://www.icrc.org/eng/resources/documents/interview/2012/12-10-niac-non-international-armed-conflict.htm; Marco Sassòli et al., *Non-International Armed Conflict*, INT'L COMMITTEE RED CROSS: HOW DOES LAW PROTECT IN WAR? (May 30, 2012), https://casebook.icrc.org/casebook/doc/glossary/non-international-armed-conflict-glossary.htm.

97. Fox, *supra* note 21, at 827; *see also* CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 81 (3rd ed. 2008).

However, civil war is an unclear threshold that is difficult to practically apply.[98] Identifying civil war is dependent upon subjective measurements of violence and objective measures, like extent of infrastructure damage or number of casualties, that may be hard to retrieve during conflict.[99] The negative equality principle relies upon the determination that a conflict has reached a level of violence that passes some sort of threshold from insurrection to civil war.[100] But that depends on a very complicated evaluation because not only may it be hard to determine the "success" of any one rebel group, but also there are commonly a multitude of groups, just as there are in Syria.[101] Moreover, the ability of a rebel group to wage a violent war does not necessarily reveal much about whether it can "plausibly claim to represent the entire population"[102] as the government allegedly cannot. A small rebel group may be able to create negative equality, a balance of power between the two sides, simply by virtue of strong financing and military capacity. Indeed, instead of discouraging use of force, the principle simply encourages rebel movements to reach the threshold of violence as soon as possible.

A sliding scale has also been suggested, whereby a State's

98. Fox, *supra* note 21, at 827 ("Whether a conflict has become a 'civil war' is as difficult a question as identifying the difference between an insurgency and a belligerency. No generally accepted definition exists, largely because 'civil war' is not a critical term of art in international instruments.").

99. *See generally How is the Term "Armed Conflict" Defined in International Humanitarian Law?*, INT'L COMMITTEE RED CROSS (Mar. 2008), https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf; *see also Internal Conflicts or Other Situations of Violence—What is the Difference for Victims?*, *supra* note 96 ("IHL requires that two criteria be met for there to be a non-international armed conflict: the armed groups involved must show a minimum degree of organization and the armed confrontations must reach a minimum level of intensity. The fulfilment of these criteria is determined on a case-by-case basis, by weighing up a number of factual indicators. The level of intensity of the violence is determined in light of indicators such as the duration and gravity of the armed clashes, the type of government forces involved, the number of fighters and troops involved, the types of weapons used, the number of casualties and the extent of the damage caused by the fighting. The level of organization of the armed group is assessed by looking at factors such as the existence of a chain of command, the capacity to transmit and enforce orders, the ability to plan and launch coordinated military operations, and the capacity to recruit, train and equip new fighters.").

100. Fox, *supra* note 21, at 827.

101. James D. Fearon, *Iraq's Civil War*, FOREIGN AFF., Mar./Apr. 2007, at 2, 3, 5 (describing civil war in Turkey and Iraq as "highly local and factionalized" and suggesting that "[f]actionalism among the Sunnis and the Shiites approaches levels seen in Somalia, and multiple armed groups on both sides appear to believe that they could wrest control of the government if U.S. forces left").

102. Fox, *supra* note 21, at 827.

capacity to issue invitations will gradually terminate as it loses control over its territory and population.[103] Such a rule, it is argued, would accurately track the legitimacy of the invitation according to the legitimacy of the regime.[104] Were this the case, illegitimate regimes would be unable to issue invitations, thereby precluding unlawful interventions. But the sliding scale is not actually a more precise marker of when States should be able to issue invitations. Though legitimacy may exist along a spectrum, the right to offer invitation is a dichotomy—a State may be legally entitled to do so or it may not. Because of this, the sliding scale is simply a truism: of course States which have lost control of their territory and population are less legitimate than States which have not. For that reason, the sliding scale does not sufficiently demonstrate when a government has lost legitimacy such that it cannot issue invitations.

Some scholars have argued in favor of a rule against any intervention by invitation in internal conflict, be that a non-international armed conflict or less intense forms of internal violence.[105] Indeed, dispensing with the doctrine altogether has been suggested.[106] This rule encounters one problem in principle and one in practice. In principle, the rule greatly restricts state autonomy to control use of force in their territory. A blanket prohibition subverts autonomy in a way that States themselves may find undesirable. If States do not desire such a rule, it may not be followed.[107] In practice, this rule would be overly restrictive because it would prohibit force when it may be useful or essential—such as during internal anti-terrorism campaigns—since a State could not call on others to combat terrorists.[108] If international law is to facilitate States'

103. *Id.* at 818.

104. *Id.*

105. Karine Bannelier & Theodore Christakis, *Under the UN Security Council's Watchful Eyes: Military Intervention by Invitation in the Malian Conflict*, 26 LEIDEN J. INT'L L. 855, 860 (2013) ("[T]he principle of self-determination imposes important limits to the principle *volenti non fit injuria*. The criterion of the purpose of the foreign military operations is thus decisive and external intervention by invitation should be deemed in principle unlawful when the objective of this intervention is to settle an exclusively internal political strife in favour of the established government which launched the invitation.").

106. Le Mon, *supra* note 19, at 749.

107. Oscar Schachter, *Towards a Theory of International Obligation*, 8 VA. J. INT'L L. 300, 319 (1968) ("The whole process [of creating international legal obligations] is purposive, directed to the satisfaction of interests and demands, hence pervasively 'value-oriented.'").

108. For example, Nigeria has invited Benin, Chad, Cameroon, and Niger to combat Boko Haram in Nigeria. Dan De Luce & Siobhán O'Grady, *U.S. to Boost Military Aid to Nigeria for Boko Haram Fight*, FOREIGN POL'Y (July 16, 2015), http://foreignpolicy.com/

needs,[109] then it must include mechanisms for combatting what is among the most concerning international problems in the modern world.[110] Otherwise, States would need to solve their problems outside the scope of international law or, possibly, in violation of it. The argument does include discrete exceptions to the general rule (i.e. rescuing hostages), which could presumably include anti-terrorism efforts, but even its proponents concede that it would be difficult to identify who is in a position to determine those exceptions.[111] Use of the label "terrorism," as an example, is often exploited in the context of short-term political thinking because the fluid term is easy to co-opt.[112] It is less plausible to falsely identify a democratic regime because that identification can be measured against discernible standards by the international community.

A final alternative would be to take an *ad hoc* approach to legal intervention based on broad standards rather than strict rules. For example, instead of prohibiting intervention altogether, it would be possible to opt for a less specific principle to regulate intervention, such as a prohibition on "unjust" intervention. A standard might better reflect the complexity of determining what interventions are or are not desirable and allow international actors the room to judge situations better on the margins. For instance, it has been proposed that

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2015/07/16/u-s-to-boost-military-aid-to-nigeria-for-boko-haram-fight.

109. JAMES. C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 20 n.14 (2005) (quoting Anthony D'Amato, On the Sources of International Law 68 (Jan. 18, 1996) (unpublished manuscript)) ("The rules of international law derive from the behavior (or practice) of states as they interact with each other within the international system. Both the states, and the system itself, have an overarching goal: to persist through time. Rules of law, accordingly, play a role in facilitating this persistence, primarily by signaling to states a class of prohibited behaviors. If a state ignores a prohibitory rule, it risks creating friction with other states that could lead to a rupture of systemic equilibrium.").

110. *Id.*

111. Bannelier & Christakis, *supra* note 105, at 864.

112. Théodore Christakis & Karine Bannelier, Volenti Non Fit Injuria*? Les Effets Du Consentement À L'intervention Militaire* [Volenti Non Fit Injuria*? The Effects of Consent for Military Intervention*], 50 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 102, 121 (2004) ("L'histoire montre en effet que les positions des États ne sont pas toujours guidées par des motivations juridiques. C'est ainsi par exemple que des États ont pu *refuser* de répondre à une invitation d'intervention sur la base de considérations exclusivement politiques ou économiques.") ("History shows that the positions of States are not always guided by legal motives. For example, States have been able to *refuse* to respond to an invitation to intervene on the basis of exclusively political or economic considerations."); Tom Ruys, *The Syrian Civil War and the Achilles' Heel of the Law of Non-International Armed Conflict*, 50 STAN. J. INT'L L. 247, 255 (2014) ("[T]he [Assad] Regime has chosen to treat all rebels—whether foreign jihadists or 'native' [Free Syrian Army] militias—as 'terrorists.'").

"intervention by invitation should be deemed in principle unlawful when the objective of this intervention is to settle an exclusively internal political strife in favour of the established government which launched the invitation."[113] This proposal may be able to precisely identify undesirable interventions.

However, a rule has several benefits. Since States would be applying the new doctrine on their own, and on the international stage, simplicity is key.[114] The international political process is not set up to test complex arguments and, importantly, it is significantly simpler to determine how a rule is to be applied.[115] This means that it is less plausible for States to reasonably disagree in application since the rule plainly does or does not apply. If a State is evidently wrong, it is less likely to take a position in its own immediate interest, which would be blatantly invalid. There would also be too much ground to argue on either side because there is no neutral arbiter to apply the facts to a standard. Without such a judge, States would have less constructive guidance to interpret the standards so there may be fewer clear outcomes. And, finally, attempting to make the standard more concrete by adding factors or tests, would not improve its practicality. The tradeoff inherent in a standard seems to be that, the less abstract it is, the more complex it is.[116] So simply adding criteria to the standard does not solve the problem because simplicity is necessary. Faced with several criteria, States can argue the outcome of each criterion and their relationships to one another. This effectively reduces the standard's predictability and practicability at the same time. For these reasons, a standard is not suitable to the doctrine of intervention by invitation.

### *B. Reforming the Law of Intervention by Adding a "Democratic Requirement"*

Some proposals to reform the doctrine of intervention by invitation have adopted a democratic requirement. In particular, academ-

113. Christakis & Bannelier, *supra* note 105, at 860.

114. Lawrence B. Solum, *Legal Theory Lexicon 026: Rules, Standards, and Principles*, LEGAL THEORY LEXICON (May 29, 2016), http://lsolum.typepad.com/legal_theory_lexicon/2004/03/legal_theory_le_3.html ("If your goal is ex ante predictability and certainty, then rules are usually the way to go.").

115. *Id.* ("Some standards give the decision maker substantial guidance, by specifying relatively specific and concrete factors the decision maker should consider and the relative weight or importance of those factors. Other standards are much more open ended, requiring consideration of factors that are general and abstract.").

116. *Id.*

ics[117] and certain States[118] have questioned whether or not a nondemocratic State can be recognized as legitimate at all, which would preclude compliance with the traditional doctrine.[119] Generally speaking, this line of thinking suggests that a nondemocratic government does not legitimately represent a State's authority and therefore cannot offer consent on behalf of the State.[120] This would be true if, for example, populations had a right to democratic government.[121] However, this has also been applied specifically to the doctrine of intervention by invitation. For example, the *Institut de Droit International* considered democratic factors when evaluating a State's ability to properly consent when inviting another State to use force.[122] And the Max Planck Encyclopedia of Public International Law states that "invitations by freely and fairly elected governments carry a presumption of legal authority."[123] The debate whether state authority can be represented by a nondemocratic government is unsettled, but it has profound implications for the doctrine of intervention by invitation. But without an answer, there is a gap in international law which does not clearly address whether or not a nondemocratic State can invite other States to intervene in its territory. This being the case, there is a need to evaluate democracy's value specifically within the context of intervention by invitation and consider whether it should be used as a factor to improve upon the doctrine of intervention by invitation. The use of a "democratic requirement" may be able to reconcile the current doctrine of intervention by invitation with the values embodied in the U.N. Charter.

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117. Le Mon, *supra* note 19, at 745 ("Academics have suggested that internal democratic legitimacy does play a role in the legal question of external legitimacy."). For a thorough review, see de Wet, *supra* note 14.

118. Declaration on Yugoslavia and on the Guidelines on the Recognition of New States, Dec. 16, 1991, 31 I.L.M. 1485 [hereinafter Declaration on Yugoslavia].

119. Awol K. Allo, *Counter-Intervention, Invitation, Both, or Neither?*, 3 MIZAN L. REV. 201, 224 (2009) (arguing that "[i]n the aftermath of the cold-war ideological confrontation between the East and West, democracy has become the 'touchstone of legitimacy'"); Fox, *supra* note 21, at 833. ("[S]ince the end of the Cold War, questions of recognition have increasingly revolved around democratic criteria.").

120. Nolte, *supra* note 27, ¶ 17 ("Since the end of the Cold War the democratic legitimacy of a government has been emphasized more strongly concerning the determination of the legality of an invitation to intervene.").

121. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992).

122. Inst. of Int'l Law, *supra* note 83.

123. Nolte, *supra* note 27, ¶ 17.

## III. THE PRESUMPTION AGAINST NONDEMOCRATIC STATES

Part III argues for a rebuttable presumption against allowing nondemocratic States to invite other countries to intervene in their territory. The Part begins with a defense of democracy as a proxy for compliance with other parts of international law. The Part then discusses the rebuttable presumption, addresses concerns that arise from it, and compares it to other alternatives. The Part analyzes how the presumption may be satisfied. Finally, the Part ends with an analysis of the Syrian conflict under the rebuttable presumption.

### *A. Democracy as a Proxy for Legality*

Faith in democracy as an efficient proxy for compliance with international law provides the foundation for the revised doctrine proposed by this Note.[124] For the purposes of this discussion, democracy will be defined broadly as a form of participatory government whereby political decisions are made by a majority of eligible citizens, for example through representative elections.[125] This definition may be overly broad, however, it would include all varieties of democracy. Therefore, the revised doctrine can apply to all situations. Of course, the existence of democratic governance does not guarantee that a State is in compliance with the international law relevant to intervention by invitation.[126] That said, aside from the value of de-

124. One difficulty of a discussion of this size is that there is insufficient room to debate the moral or political value of a democracy relative to other political systems. So, it is necessary here to make the assumption that democracy is a valuable, desirable, and realizable form of government. The value of democracy is often taken for granted, but is no less deserving of scrutiny. Still, law makes assumptions regularly. Unfortunately, practical considerations impose restrictions on this discussion's theoretical breadth. Therefore, this discussion continues in recognition of the basic premise that democracy is valuable.

125. This is similar to the position taken by Thomas M. Franck in *The Emerging Right to Democratic Governance*. JURE VIDMAR, DEMOCRATIC STATEHOOD IN INTERNATIONAL LAW 23 (2013), citing Franck, *supra* note 121, at 52, 90 ("Thomas Franck derived the right to governance from the right of self-determination, freedom of expression and the right to political participation. He remained aware that this was a rather narrow concept of democracy; however, he was prepared to accept it in order to find the lowest common denominator in the politically and culturally diverse world."). For more discussion, see Tom Christiano, *Democracy*, STAN. ENCYCLOPEDIA PHIL. (July 27, 2006), http://plato.stanford.edu/entries/democracy.

126. *See supra* Part I.

mocracy itself (which is not to be disregarded),[127] there is reason to believe that democratic governance *correlates* to both the traditional doctrinal requirement for intervention by invitation—legitimate consent—as well as other international legal values not currently considered in intervention by invitation jurisprudence: peace, human rights, and international legal compliance.[128]

First, there is a correlation between democracy and doctrinal compliance because democracies transform the popular will into a system of governance.[129] At a minimum, democracies provide a medium by which citizens can affect their legal regime.[130] In principle, this should create a government that can meet the traditional requirements for an invitation. For example, a democratic State presumably can offer consent that reflects the authority of the State because the government was given power by a majority of its constituents. Though there are many ways to consider "legitimacy,"[131] one would be hard pressed to argue that governments which are popularly and properly elected by their constituents are illegitimate.[132] It is not the case that elections *per se* equate to democratic governance, for that one may point to Syria itself.[133] However, fairly

127. International Covenant on Civil and Political Rights art. 25(b), Dec. 16, 1966, 999 U.N.T.S. 171; Thomas M. Franck, *Democracy as a Human Right*, 26 STUD. TRANSNAT'L LEGAL POL'Y 73 (1994); *Democracy*, UNITED NATIONS, http://www.un.org/en/sections/issues-depth/democracy/index.html (last visited Nov. 28, 2016).

128. *See infra* Part III.A.

129. This is true whether one conceives of democracy in broad terms, such as Rousseau's "general will" or in its narrow terms, such as Locke's "consent of the governed." *See generally* JOHN LOCKE, ESSAY CONCERNING HUMAN UNDERSTANDING (Roger Woolhouse ed., Penguin Books 1997) (1690); JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT (Maurice Cranston trans., Penguin Books 1968) (1762).

130. G.A. Res. 64/155, at 1 (Mar. 8, 2010) ("[D]emocracy is a universal value based on the freely expressed will of the people to determine their own political, economic, social and cultural systems . . . .").

131. *See generally* Rüdiger Wolfrum, *Legitimacy in International Law from a Legal Perspective: Some Introductory Considerations*, *in* LEGITIMACY IN INTERNATIONAL LAW 1 (Rüdiger Wolfrum & Volker Röben eds., 2008).

132. *Cf.* Editorial, *Assad Engineers His Re-election*, N.Y. TIMES (June 4, 2014), http://www.nytimes.com/2014/06/05/opinion/assad-engineers-his-re-election.html ("Syrians dutifully went to the polls this week to vote for a president in what was anything but an exercise in free and fair democracy."); Anne Barnard, *Assad's Win Is Assured, but Limits Are Exposed*, N.Y. TIMES (June 3, 2014), http://www.nytimes.com/2014/06/04/world/middleeast/amid-fear-and-pressure-syrians-vote-for-president.html (raising questions about the legitimacy of the democratic elections in Syria).

133. Editorial, *supra* note 132; Barnard, *supra* note 132; *see also* John Davison & Laila Bassam, *Assad Holds Parliamentary Election as Syrian Peace Talks Resume*, REUTERS, Apr. 13, 2016, http://www.reuters.com/article/us-mideast-crisis-syria-idUSKCN0XA2C5.

contested elections with reasonable participation do strongly suggest the existence of democracy.[134] Indeed, the ability to conduct national elections may necessarily require the government to have met minimum effective control of the territory, another requirement of the traditional doctrine.[135] Democratic government is also more likely to be transparent, meaning it would be less difficult to know if the proper officials have given full consent before intervention has taken place because information has been disseminated.[136]

Second, the accountability of a democracy would presumably ensure protection of the international legal values not currently considered by doctrine. As discussed above, the current doctrine places state authority above essentially all other considerations.[137] By adding some sort of democratic component, a new rule could more properly reflect the demands of human rights such as self-determination. For example, a new rule could help prevent aid to nondemocratic regimes which abuse their population, much like Assad's.[138] It could also encourage democratic government. Indeed, there is evidence to suggest that democracy is correlated with strong protection of human rights.[139] In fact, the U.N. considers democracy a foundational principle of the entire modern human rights framework because democracy's essential elements—such as civil liberties—are themselves human rights.[140]

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134. Bernard Manin et al., *Elections and Representation*, *in* DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 29 (Adam Przeworski, Susan C. Stokes & Bernard Manin eds., 1999) ("The claim connecting democracy and representation is that under democracy governments are representative because they are elected: if elections are freely contested, if participation is widespread, and if citizens enjoy political liberties, then governments will act in the best interest of the people.").

135. This is simply because of the difficulty of protecting voters and the necessity of voting areas all over a country's territory. A government must have control of sufficient areas to enable voting.

136. James R. Hollyer et al., *Democracy and Transparency*, 73 J. POL. 1191, 1191 (2011) ("[W]e ask a basic question: do electoral politics provide incentives for governments to disseminate data? . . . Democracies are indeed more transparent.").

137. *See supra* Introduction.

138. *See Democracy*, *supra* note 127.

139. *See* Bruce Bueno De Mesquita et al., *Thinking Inside the Box: A Closer Look at Democracy and Human* Rights, 49 INT'L STUD. Q. 439 (2005); David L. Cingranelli & David L. Richards, *Respect for Human Rights After the End of the Cold War*, 36 J. PEACE RES. 511 (1999); Christian Davenport & David A. Armstrong II, *Democracy and the Violation of Human Rights: A Statistical Analysis from 1976 to 1996*, 48 AM. J. POL. SCI. 538 (2004).

140. *See Democracy*, *supra* note 127 ("The values of freedom, respect for human rights and the principle of holding periodic and genuine elections by universal suffrage are essential elements of democracy. In turn, democracy provides the natural environment for

This is confirmed by strong political science scholarship that evidences the correlation between democratic governance and compliance with international law.[141] So-called liberal States, for example, have been shown to comply with international law vis-à-vis each other.[142] It also appears less likely that a democracy will violate the international law of conduct during war than would a nondemocratic State.[143] This is evidenced, in part, by James Morrow's survey of the laws of conduct during war, otherwise known as international humanitarian law or *jus in bello*, which shows greater compliance by democratic States.[144] The survey reveals that democracies which ratify a treaty concerning *jus in bello* intend to comply with its requirements, whereas ratification of treaties does not affect the behavior of nondemocratic States.[145] Given such tendencies, it is reasonable to demand stronger commitments from nondemocratic States than from democratic States because the latter desires compliance itself, whereas the former may need to be induced to comply. While it would be rash to suggest the relationship between democratic States and international legal compliance is definitively known, it is nonetheless reasonable to consider the evidence, which suggests this is the case.[146]

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the protection and effective realization of human rights."); *see also* Franck, *supra* note 121, at 91 ("Both textually and in practice, the international system is moving toward a clearly designated democratic entitlement, with national governance validated by international standards and systematic monitoring of compliance. The task is to perfect what has been so wondrously begun.").

141. For a helpful, brief survey of relevant literature, see Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, *in* HANDBOOK OF INTERNATIONAL RELATIONS 538, 547–48 (Walter Carlsnaes et al. eds., 1st ed. 2002).

142. Kal Raustiala, *Compliance & Effectiveness in International Regulatory Cooperation*, 32 CASE W. RES. J. INT'L L. 387, 410 ("[P]roponents of liberal theory have suggested that liberal states—generally, states with representative governments, constitutional protections for individual rights, and market economies—operate in an international 'zone of law' rather than a 'zone of politics.' International law, and correspondingly compliance with international commitments, is qualitatively distinct within the community of liberal states. The presence of domestic liberal and/or democratic institutions thus may promote compliance with international legal rules, just as it has promoted the development of 'complex interdependence' among the nations of the West.").

143. *See generally* James D. Morrow, *When Do States Follow the Laws of War?*, 101 AM. POL. SCI. REV. 559 (2007).

144. *Id.*

145. *Id.* at 559 ("Ratification by a democracy is a signal that it intends to abide by the treaty standard; those that ratify are more likely to comply. Ratification does not effect the behavior of nondemocracies, however.").

146. For a critique of this position, see José E. Alvarez, *Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory,* 12 EUR. J. INT'L L. 183 (2001).

*B. Identifying Democracy*

The obvious difficulty for a democratic requirement is the identification of democratic governance. Beyond assuming its desirability, the discussion thus far has assumed that one can know what is a democracy and what is not. A natural critique, then, is that such measures are not so easily determined and that, even if one could measure certain aspects of democracy, the aspects of democratic governance are themselves debatable.[147] In other words, we do not know what democracy is nor how to identify it with any sort of accuracy.[148] This being the case, the rebuttable presumption would quickly become an inadequate political tool, with no legal value. Countries could pick and choose which are democracies and which are not. This would leave the rule with the same, or perhaps less, value than as it stands currently. A few responses are in order.

"First, law is politics."[149] It may be true that the presumption would be used for political means, but that is not unique to the presumption. Any rule of international law can be used for political means, so this critique is not unique to the rebuttable presumption. States can presently use intervention to increase influence in a region at a cost to the self-determination of peoples.[150] Really, the rule as it stands places so few legal limits that it is even more prone to politicking. Debates concerning a government's status as democratic are more objective and substantive than debates concerning the use of force to jockey for influence in developing regions. Moreover, the rebuttable presumption would not be the first rule of international law to favor democratic government. Consider the "democratic requirements" imposed on new States emerging from the former Soviet Union and Yugoslavia—in order to be recognized by the European Community, governments had to be founded upon democratic princi-

147. Christian Caryl, *The Full Measure of Freedom*, FOREIGN POL'Y (July 25, 2012 9:07 PM), http://foreignpolicy.com/2012/07/25/the-full-measure-of-freedom; Jon Custer, *Measuring Democracy*, CIPE DEV. BLOG (Aug. 22, 2012), http://www.cipe.org/blog/2012/08/22/measuring-democracy.

148. Custer, *supra* note 147 ("Economists can measure in great detail whether a country is getting richer or poorer, but measuring whether it is becoming more or less democratic is sketchy at best.").

149. HENKIN, *supra* note 18, at 4 (italics omitted).

150. Jeff McMahan, *Intervention and Collective Self-Determination*, 10 ETHICS & INT'L AFF. 1, 2 (1996) ("[Intervention] violates the right to self-determination of the citizens of the state that is the target of the intervention. Intervention—whether military or nonmilitary—has been thought to involve an imposition of an external will on those subject to it, a usurping of the people's right to shape and direct their own collective life.").

ples.[151]

Next, it is certainly true that measuring democracy is an inherently difficult task, but the amount of resources already dedicated to it significantly mitigates the problem. There are a multitude of both non-governmental organizations and international organizations which measure and support democracy, both directly and indirectly. For example, despite methodological differences between democracy indexes,[152] the indexes have nonetheless reached consensus on Syria. In fact, it is almost incontestable that Syria is nondemocratic.[153] Syria has received a "not free" designation by Freedom House,[154] it received a polity score of -7, a democracy score of 0 and an autocracy score of 7 by Polity IV,[155] and received a 1.43 out of 10 by the Democracy Index (ranking 166th of 167 countries).[156] Examples such as Syria demonstrate that measuring democracy will not in practice suffer from potential theoretical difficulties. That is to say, while the academic debate defining democracy might be unsettled, it is nonetheless clear in practice whether most countries are or are not democratic. According to Democracy Index, just under fifty percent of the world's countries qualify as some sort of democracy, meaning the world is experienced in practicing democracy, in a variety of forms, such that it may be easier to compare countries to others in order to determine its democratic value.[157] It is indeed difficult to measure democracy on the margins and there are even competing opinions as to what factors should properly be considered.[158] But these problems

151. Declaration on Yugoslavia *supra* note 118; *see generally* James Crawford, *Democracy and International Law*, 64 BRIT. Y.B. INT'L L. 113 (1993).

152. MICHAEL COPPEDGE ET AL., V-DEM VARIETIES OF DEMOCRACY: COMPARISONS AND CONTRASTS 8–18 (Dec. 2015), https://www.v-dem.net/media/filer_public/e7/a6/e7a638e3-358c-4b96-9197-e1496775d280/comparisons_and_contrasts_v5.pdf.

153. CTR. FOR SYSTEMIC PEACE, POLITY IV COUNTRY REPORT 2010: SYRIA (2010), http://www.systemicpeace.org/polity/Syria2010.pdf; THE ECONOMIST INTELLIGENCE UNIT, DEMOCRACY INDEX 2015: DEMOCRACY IN AN AGE OF ANXIETY (2016), http://www.eiu.com/public/thankyou_download.aspx?activity=download&campaignid=DemocracyIndex2015; John Davison & Laila Bassam, *Assad Holds Parliamentary Election as Syrian Peace Talks Resume*, REUTERS, Apr. 13, 2013, http://www.reuters.com/article/us-mideast-crisis-syria-idUSKCN0XA2C5 (calling recent parliamentary elections a "flimsy facade"); *Syria*, FREEDOM HOUSE (2016), https://freedomhouse.org/country/syria.

154. *Syria*, *supra* note 153.

155. CTR. FOR SYSTEMIC PEACE, *supra* note 153.

156. THE ECONOMIST INTELLIGENCE UNIT, *supra* note 153.

157. *Id.*

158. *But see* Seva Gunitsky, *How Do You Measure 'Democracy'?*, WASH. POST: MONKEY CAGE (June 23, 2015), https://www.washingtonpost.com/blogs/monkey-cage/wp/2015/06/23/how-do-you-measure-democracy.

should not be thought of as preclusive in light of the wealth of resources available for identifying democracies. Not only does the international community have the tools to identify democracy, it will often not need to make extensive use of them because so many countries are so clearly nondemocratic. Certainly, the difficulty is not sufficient to outweigh the benefits of a new rule.

Crucially, it is not necessary to measure democracy precisely, assuaging the pressure imposed by this critique. This is so because it is unlikely that a court will be adjudicating the matter, even though the rebuttable presumption borrows from a procedural stance in litigation. It is sufficient for observing States to plausibly assert by a preponderance of the evidence that the inviting government is nondemocratic because the costs of improper designation are low. For example, if a democratic State is improperly designated as nondemocratic by other States and therefore must comply with the presumption, it simply needs to offer evidence of compliance with international laws with which it should already be in compliance. If two States were to adjudicate the matter at the ICJ, then precision would be necessary because the costs of improper designation are relatively high.[159] Otherwise, the procedural stance of an invited or inviting country may be overly burdensome and could change the outcome of litigation, which renders a binding decision on the parties.[160]

However, the doctrine of intervention by invitation is likely to be played out on the international plane outside of a court, just as the Russian intervention is at the moment. Initially, it may sound troublesome to have no formal procedure or arbiter to determine such an important matter. But international law is regularly enforced outside of courts.[161] In fact, to some extent, evaluating democratic governance is already in practice by the Security Council when deliberating on whether to use military force. Fox writes that, "in three cases [Haiti, Sierra Leone and Côte D'Ivoire] the Security Council has applied democratic criteria in responding to requests for assistance from elected leaders to depose factions that refused to honour election re-

159. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgement, 1986 I.C.J. Rep. 14 (June 27); *see also* Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgement, 2005 I.C.J. Rep. 168 (Dec. 19).

160. Statute of the International Court of Justice, art. 59, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933 ("The decision of the Court has no binding force except between the parties and in respect of that particular case.").

161. Lori Fisler Damrosch, *Enforcing International Law Through Non-Forcible Measures*, *in* 269 RECUEIL DES COURS, COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 19–154 (1997).

sults."[162] Because States are not bound to their determinations, the magnitude of the risk of making the wrong determination is much smaller. Regardless, any State that has been wrongly designated nondemocratic may simply rebut the presumption anyway. The State should be in compliance with international law and values regardless, without respect to their status as a democracy. Ultimately, the risk of misidentifying a State as nondemocratic is additional information about its plans to comply with international law during an intervention. This is a slight cost for preventing even one devastating intervention.

Measuring democracy also avoids the more difficult and contentious method of determining regime legitimacy, which the rule currently attempts to do. That measurement is arguably much more political and suffers from a lack of objective measures or developed body of law. One commentator writes that "[t]here is no objective method for determining the legitimacy of a government. As a result, each State enjoys comfortable leeway in deciding to recognize the legitimacy of a foreign power according to factors that it subjectively determines."[163] Democratic measurements can, at the very least, depend on the outward and transparent activities that are essential to democratic governance such as elections and transitions of power. These are discrete, perceptible markers that correlate very strongly with a government that is legitimate, even though some elected governments may not be legitimate and some unelected governments may be legitimate.[164] Determinations on the margins of legitimacy during a possibly existential conflict are so difficult to make that it is more reasonable to simply depend on measuring democracy as a proxy for legitimacy, putting the onus on nondemocratic States to prove their legitimacy. There are no resources for measuring legitimacy similar to those for democracy, which use objective measures to establish comparable measurements of different States. Instead, evaluating legitimacy depends on subjective perceptions and evaluations by other political actors. The rebuttable presumption assures that either the government is democratic, and therefore likely legitimate, or that a nondemocratic government provides affirmative evidence of its legitimacy.

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162. Fox, *supra* note 21, at 835.

163. Lynch, *supra* note 37, at 183.

164. Nolte, *supra* note 27, ¶ 18 ("[The] relevance of democratic legitimacy does not mean, however, that other ('non-democratic') governments are generally incapable of inviting foreign troops.").

### *C. The Limited Value of Democracy*

But the problem is more nuanced than simply supporting democratic movements and prejudicing authoritarians because international law, as the Note will argue, must be inclusive of different government regimes. Of course, there may be many reasons to prejudice nondemocratic regimes. But these reasons are ultimately political judgments about how society is best governed. If international law is to be inclusive it must respect the fact, or at least the logical possibility, that some peoples want alternatives to democracy and those peoples may find themselves in need of military aid. Many non-Western perspectives may be critical of rules that prefer Western values over their own.

A foundational principle of this argument, and of international law generally, is stated best in the preamble of President Wilson's Fourteen Points:

> It is that the world be made fit and safe to live in; and particularly that it be made safe for every peace-loving nation which, like our own, wishes to live its own life, determine its own institutions, be assured of justice and fair dealing by the other peoples of the world as against force and selfish aggression."[165]

A State should not be left without all the tools of international law simply because its constituents have chosen one form of government and not another. What of the situation where such a peace-loving, compliant State faces internal unrest by a violent minority group? Peace is no less important than democratic governance. For that reason, it cannot impose a clear bias against those States which govern in nondemocratic ways. Furthermore, international law must have means of addressing the problems of every State, or it faces rejection from those it does not include.[166] Consider, as an example, how opinions of international criminal law were affected in Kenya by the prosecution of its President and Deputy President by the International Criminal Court.[167] Among the worst possible outcomes would be to incentivize States to take means outside of the law in order to protect

165. Woodrow Wilson, President of the U.S., Fourteen Points (Jan. 8, 1918), http://avalon.law.yale.edu/20th_century/wilson14.asp.

166. *See, e.g.*, J.J.G. SYATAUW, SOME NEWLY ESTABLISHED ASIAN STATES AND THE DEVELOPMENT OF INTERNATIONAL LAW 230–34 (1961) (discussing the conditions under which Asian States have rejected principles of international law).

167. *See* Justus Wanga, *Kenya Issues Threat to Pull Out of ICC*, DAILY NATION (Nov. 22, 2015), http://www.nation.co.ke/news/politics/Kenya-issues-threat-to-pull-out-of-ICC/-/1064/2966586/-/d3d06g/-/index.html.

such a basic interest as territorial integrity or even its existence. Instead, the law should, in part, facilitate solutions to States' needs, which may include requesting intervention.[168] So the problem is finding the proper relationship between respecting the sovereign authority of nondemocratic States and supporting popular democratic movements.

This problem comes to a head in Syria.[169] On the one hand, the Assad regime is a government willing to commit atrocities against its nationals.[170] It is difficult to justify a rule which would support that regime. On the other, one may question whether the West has authority to dictate the affairs of Syria by encouraging a certain type of government. A shift in the doctrine to consider the democratic credentials of the inviting State may be able to strike such a balance and improve the rule to be both inclusive and progressive.

### *D. A Rebuttable Presumption Against Consensual Nondemocratic Intervention*

The initial difficulty of reforming the current doctrine is determining the appropriate legal tool, in light of the substantive goals already established. How does one weigh democracy relative to autonomy, especially in the context of a conflict like Syria? How can the international community provide support for democracy, self-determination, and human rights without marginalizing nondemocratic States? *Per se* prohibitions, value-based standards, sliding scales, etc. are all possibilities. Inasmuch as the correct tool can lead to efficient results (i.e. results which correspond to the underlying intent of the rule), the wrong tool can preclude such efficiency. So it is not just a matter of imposing a democratic factor within the traditional test, but a matter of designing the proper legal structure. This analysis will establish that the rebuttable presumption against nondemocratic States is most attractive for several reasons.

First, a presumption is necessarily supportive of the essential values of international law without being strongly biased. As established above, the presumption favors democracy because democracy's presence correlates with regime legitimacy, peace, compliance with international law including the law of war, and human rights.[171] At the same time, if the presumption can be rebutted, it logically still

168. *See, e.g.*, Schachter, *supra* note 107, at 307–08.

169. *See supra* Introduction.

170. *See End the Horror in Syria's Torture Prisons*, *supra* note 12.

171. *See supra* Part II.B.

allows for the possibility of intervention on behalf of nondemocratic regimes. In that way, the rebuttal presumption is both partial to democratic value and still inclusive of alternative forms of government. This is the sort of counterbalance necessary in international law to encourage progress towards democratic governance and, at the same time, respect the autonomy of nondemocratic governments. International law protects both democratic values as well as state autonomy,[172] but these two values often compete and may even be mutually exclusive in certain cases. So it is better to establish and recognize a bias in the law that supports desirable governance norms, rather than to suppose there are ways for the two not to conflict without international law remaining stagnant.

Second, a rebuttable presumption recognizes that the "burden of proof falls on any political leader who tries to shape the domestic arrangements or alter the conditions of life in a foreign country."[173] States who wish to impose on others, even with their consent, must provide strong reasons for doing so. Imposing a rebuttable presumption is one manner of exposing the rationale for conflict. This can more clearly expose which conflicts are a result of legitimate concerns and which are simply pretext. And because democratic governance correlates with international legal compliance,[174] it is necessary to demand that nondemocratic regimes confirm an intervention's lawfulness.

Third, the rebuttable presumption scrutinizes discernible governments instead of opaque rebel movements. That is to say, instead of facilitating democratic government by supporting questionable rebel movements, it does so by setting an additional burden upon nondemocratic regimes. Popular military movements can be incredibly difficult to evaluate and the beliefs of the group, indeed the beliefs of its individual members, may not be clear. The Syrian conflict evidences how difficult it can be to distinguish rebel groups and understand their political values. The Free Syrian Army, and other opposition forces, are not clearly recognizable as "politically moderate"

172. *See* Michael Dusche, *Human Rights, Autonomy and National Sovereignty*, 7 ETHICAL PERSP. 24 (2000); Gregory H. Fox & Brad R. Roth, *Democracy and International Law*, 27 REV. INT'L STUD. 327 (2001); Jason Riegert, *The Irony of International Law; How International Law Limits State Sovereignty*, ALB. GOV'T L. REV. FIREPLACE BLOG (Apr. 5, 2010, 10:55 AM), https://aglr.wordpress.com/2010/04/05/the-irony-of-international-law-how-international-law-limits-state-sovereignty.

173. WALZER, *supra* note 82, at 86.

174. *See supra* Part III.A.

groups.[175] While many have made the assumption that the group is moderate, that is not necessarily true.[176] The army has engaged in questionable sieges, akin to government forces.[177] The Free Syrian Army has even been described as "simply a loose network of brigades rather than a unified fighting force," meaning that there is no singular moderate influence on the army.[178] This is not to say there are no moderate rebels in Syria, but rather, they cannot be so certainly described with such an uncertain term. Instead, it would be much simpler to scrutinize the actual Assad regime, which interacts regularly with the international community and takes public actions that can be observed by media, academia, and other governments, even if not perfectly. And, as will be seen next, the regime can be evaluated in more holistic and rigorous terms than just "moderate." The Assad regime is clearly nondemocratic, whereas the Free Syrian Army is not clearly democratic or moderate. At the very least, the success of the Free Syrian Army will not clearly lead to democratic governance, as evidenced by the revolution and new government in Egypt whereby a seemingly pro-democratic revolution led to nondemocratic governance.[179]

175. David Bromwich, *Syria, the Times and the Mystery of the "Moderate Rebels,"* HUFFINGTON POST (Oct. 2, 2015, 9:32 PM), http://www.huffingtonpost.com/david-bromwich/syria-the-times-and-myste_b_8236164.html; Vera Mironova et al., *Syria's Democracy Jihad*, FOREIGN AFF.: SNAPSHOT, (Jan. 13, 2015), https://www.foreignaffairs.com/articles/middle-east/2015-01-13/syrias-democracy-jihad ("Over the past year, the Free Syrian Army (FSA), once regarded as a force of moderate, secular democratic reformers, has partnered with—some members have even defected to—various moderate and radical Islamist groups, including the al Qaeda-linked al-Nusra Front and the Islamic State of Iraq and al-Sham (ISIS).").

176. Bromwich, *supra* note 175.

177. *See* Anne Barnard & Hwaida Saad, *In Syrian Town Cut Off from the World, Glimpses of Deprivation*, N.Y. TIMES (Jan. 14, 2016), http://www.nytimes.com/2016/01/15/world/middleeast/madaya-syria.html.

178. *Guide to the Syrian Rebels*, BBC (Dec. 13, 2013), http://www.bbc.com/news/world-middle-east-24403003; *see also* Ben Hubbard & Maher Samaan, *Rebel Offensive in Syria Challenges Government Siege of Allepo*, N.Y. TIMES (Aug. 7, 2016), http://www.nytimes.com/2016/08/08/world/middleeast/rebel-offensive-in-syria-challenges-government-siege-of-aleppo.html?rref=collection%2Ftimestopic%2FSyria&_r=0 (discussing "[r]ebel forces and their jihadist allies").

179. *See, e.g.*, Mohamed Soltan, *Egypt's System of Injustice*, AL JAZEERA (Feb. 7, 2016), http://www.aljazeera.com/news/2016/02/egypt-system-injustice-160205071542277.html.

### *E. A Prima Facie Case of Compliance*

But the matter of satisfaction still remains—what is sufficient to rebut the presumption? If the rebuttable presumption is necessary to ensure legitimate consent, peace, protection of human rights, and compliance with international law, then, logically, the nondemocratic State must provide evidence of just that on the international plane. It is not necessary to be absolutely certain of their satisfaction; rather the State must meet a preponderance of the evidence standard. One may desire a higher standard than a preponderance to ensure lawfulness if, for example, the consequences of improper adjudication are significant. It is, of course, important to give the rule weight, but because there is no adjudicator it cannot be too taxing; otherwise it risks being ignored altogether.

The question of what form the evidence must take (e.g., international investigations, self-produced reports, affirmation by high-ranking officials, etc.) is too large for a discussion this size to consider in detail. But, much like international law itself, the allowable sources will be diverse. For example, States may produce reports documenting their plans for compliance or allow nongovernmental organizations to develop plans for them. States may present national legislation that requires the State to comply with international law. Whatever persuades other international actors is an allowable form of evidence. And it is up to other international actors to accept or reject the evidence themselves. There is no necessary forum for presenting such evidence, either. It may be the case that the Security Council serves as a common setting for dispute over the intervention by invitation, but it may just as well take place on a State-to-State basis. Much more important is the ability of the inviting and invited States to plausibly assert that their military action is in accordance with international law because, currently, there is little accountability for even the minimum standards present.

### *F. Consequences of the Rebuttable Presumption*

Ultimately, a rebuttable presumption will only shift the burden of justification in diplomatic rhetoric. That is, it will put responsibility on inviting States to legally justify their actions rather than third-party States to establish why the intervention is politically and morally objectionable. It may only change public discourse, but this is a powerful political tool. In Syria, Bashar al-Assad can plausibly claim the benefit of international law, while other powers are resigned to condemning the intervention's policy, not its legality. In a recent meeting in Moscow, Assad stated that "[m]ost important of all

is that [Russia's intervention] is being done within the framework of international law."[180] By burdening the participating States with additional requirements for international legal compliance, other States are empowered to criticize on the basis of law. This may well legitimize certain forms of international legal penalties. For example, the rebuttable presumption could lend the necessary language to future Security Councils and General Assemblies to argue that an intervention by consent is unlawful. More importantly, it offers the chance for a Security Council resolution requiring two States to justify their intervention and, absent such a justification, a resolution to condemn the intervention on the basis of law.

But, by taking a larger perspective of compliance in international law, there may be several other positive consequences beyond immediate rhetoric. Importantly, in the long term, the emergence of a norm may create compliance by habit.[181] As will be considered below, nondemocratic States have reason to reject the emergence of such a norm. However, were such a norm established, international organizations and even the State itself may develop mechanisms that naturally create compliance. For example, a competent organ of the United Nations may develop standards on how to present evidence and what sort of evidence is acceptable.[182] Or, in order to ensure relief from political pressure, nondemocratic States may use foreign ministries to maintain and prepare necessary arguments for rebutting the presumption. There is also reason to believe the assumption would codify States' desires, which would induce compliance.[183] If States could manage a change to adopt the presumption, the very nature of it being a rule would pull States to comply with it.[184] So, even

180. *Putin and Assad Hold Talks on Syria*, N.Y. TIMES: TIMES VIDEO (Oct. 21, 2015, 1:56 AM), http://www.nytimes.com/video/world/europe/100000003990050/putin-and-assad-hold-talks-on-syria.html (quote starts at 1:11 in the video).

181. Harold H. Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2634 (1997) ("Nations thus obey international rules not just because of sophisticated calculations about how compliance or noncompliance will affect their interests, but because a repeated habit of obedience remakes their interests so that they come to value rule compliance.").

182. For example, the Human Rights Commission has developed standards pursuant to the Universal Periodic Review and Complaint Procedure. *Welcome to the Human Rights Council*, U.N. HUM. RTS. OFF. HIGH COMMISSIONER, http://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx (last visited Nov. 28, 2016).

183. *See, e.g.*, Schachter, *supra* note 107, at 307–08.

184. Koh, *supra* note 181, at 2654; *see generally* Thomas Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 712 (1988) (arguing that compliance is created through legitimate rules—as defined by "determinacy, symbolic validation, coherence, and adherence").

if the immediate impact would only be rhetorical, the long-term impact could guarantee that interventions are compliant with international law's essential values.

### *G. Applying the Rebuttable Presumption to Russian Intervention in Syria*

The matter of employing the rebuttable presumption to Russian participation in the Syrian conflict still remains. By demonstrating how the rebuttable presumption would apply in Syria, one can glean how the rule functions and why it can create better outcomes than the traditional doctrine. It is important to emphasize that the rebuttable presumption would not have the power to preclude Syria from inviting an intervention simply because it maintains a minority-led government with a strong executive. But it would require that government to argue that its use of force is lawful.

In order to apply the rebuttable presumption, the first step is to determine the democratic status of Syria. As was discussed above, multiple indexes strongly suggest that Syria is not a democracy[185] and therefore subject to the presumption that any intervention was or would be (i) given illegitimately in violation of the traditional doctrine of intervention by invitation; and (ii) inconsistent with Syria or Russia's international obligations, including humanitarian law and human rights.

Regarding the first factor, the Assad regime could very simply prove the legitimacy of the invitation by pointing to the fact that the head of state, Bashar al-Assad, offered the invitation himself.[186] There is no evidence to suggest that Russia placed Syria under duress, nor that Russian intervention began before Syrian invitation. At a basic level, invitation was given from one head of state to another in recognition of full consent between both parties.[187] As discussed above, it may be more difficult to establish that the Assad regime maintains a minimum amount of effective control within Syria, but there is still strong evidence to conclude so.[188] Presuming Assad could provide evidence of effective control, the test moves forward.

Regarding the second factor, it seems that the Russian intervention could only comply with international law inasmuch as both States intend to comply with their obligations under international

185. *See supra* notes 153–56 and accompanying text.

186. Chappell, *supra* note 6.

187. *See infra* Part I.C.

188. *See supra* notes 71–75 and accompanying text.

humanitarian law. There is clear evidence, *ex post*, that Syria and Russia have both violated such laws.[189] The difficulty of applying the rebuttable presumption at this point, even theoretically, is that it should ideally be applied before invitation. Much of the available evidence tends to show that Syria would not have been able to provide evidence it would comply, but that is not certain. Importantly, the rebuttable presumption does not serve to enforce international humanitarian law, but instead to make compliance with it more likely by engaging with the relevant parties beforehand.

Next, Syria and Russia would need to offer evidence of human rights protection. First, considering the amount of civilian casualties, it is difficult to argue (again, albeit after the fact) that Syria would have been able to offer evidence that human rights would be actively considered and protected.[190] Really, such evidence exposes the importance of the rebuttable presumption. Requiring a plan for compliance *ex ante* may not necessarily be followed, but it would, at the very least, offer third-party States a standard against which to judge those active in the conflict. If nothing else, this is an added liability for the regime, exposing it to further international sanctions because, not only did it violate the law, it did so after assuring its compliance. And it is certainly possible, even if it is unlikely, that States which would not have ordinarily complied with human rights standards would do so because the incentive of military aid within a clearly lawful framework is strong enough to induce compliance.

It would also be exceptionally difficult for the Assad government to make a case, at this point, that military aid would not interfere with the self-determination of the Syrian people, which is often considered a human right.[191] Full consideration to self-determination cannot be given here. But for the purposes of the rebuttable pre-

189. *See* sources cited *supra* note 9; *see also supra* Introduction.

190. *See* Wells, *supra* note 9 ("Russian airstrikes in Syria have indiscriminately killed hundreds of civilians and may constitute a war crime . . . .").

191. Franck, *supra* note 121 at 52, 52 ("Self-determination postulates the right of a people organized in an established territory to determine its collective political destiny in a democratic fashion and is therefore at the core of the democratic entitlement."); *Self-Determination*, ENCYCLOPEDIA PRINCETONIENSIS: PRINCETON ENCYCLOPEDIA SELF-DETERMINATION, https://pesd.princeton.edu/?q=node/266 (last visited Nov. 27, 2016); Dapo Akande, *Self Determination and the Syrian Conflict—Recognition of Syrian Opposition as Sole Legitimate Representative of the Syrian People: What Does This Mean and What Implications Does It Have?*, EJIL: TALK! (Dec. 6, 2012), http://www.ejiltalk.org/self-determination-and-the-syrian-conflict-recognition-of-syrian-opposition-as-sole-legitimate-representative-of-the-syrian-people-what-does-this-mean-and-what-implications-does-it-have.

sumption, one need not take on such thorough discussions.[192] The political process only requires for the requesting State to plausibly assert that the military action is more necessary to the integrity of the State than the apparent goals of the military action. For example, it seems apparent that receiving military aid to fight foreign extremist factions would, or at least could, be consistent with the self-determination of the Syrian people. This sort of action protects the integrity of a State in which the Syrian people participate and which offers them at least basic rights. It is not, however, consistent with self-determination to say that a government may employ the military aid of other States to perpetuate itself as an authoritarian, minority regime. The Syrian civil war is much too complex to fit into either the previous two scenarios; it has elements of both. Indeed, the matter of identifying authoritarianism and terrorism is not so easy as Sergey Lavrov would make it seem.[193] But the issue here is not the conflict *per se*; rather it is the intervention, which is more specific. From that perspective, Russian intervention to combat the Islamic State would be consistent with Syrian self-determination because its objective and effect is to prevent the disintegration of the State itself. However, Russian attacks on the moderate rebel groups would be more questionable because, though they are armed opponents, they may reflect the legitimate desire of Syria's population for political reform.

## CONCLUSION

Forceful intervention is an exceptional response to national instability and one that the international community has worked tirelessly to prevent. Considering the stakes, consent between States is simply not sufficient to guarantee that the use of force does not transgress self-determination, popular government, human rights, and many other international legal values. A democracy presumption can serve as such a guarantee. That said, international law cannot be biased against those peoples choosing alternatives to democratic governance. A rebuttable presumption against intervention in nondemocratic States would then serve to discourage use of force, but respect a people's nondemocratic expression of sovereign government. In light of all the alternatives, no rule offers the same inclusivity and

192. *See, e.g.*, Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (Can.).

193. Russian Federation Press Conference, *supra* note 1 ("If it looks like a terrorist, if it acts like a terrorist, if it walks like a terrorist, if it fights like a terrorist, it's a terrorist, right?").

flexibility required for action on the international plane. This is demonstrated most clearly by Russia's intervention in Syria, whereby a rebuttable presumption could have prevented this additional military force or induced Syria to better comply with its international responsibilities.

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