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To cite this article: Florian Kriener & Leonie Brassat (2023) Quashing protests abroad: The CSTO's intervention in Kazakhstan*, *Journal on the Use of Force and International Law*, 10:2, 271-298, DOI: [10.1080/20531702.2023.2266913](https://doi.org/10.1080/20531702.2023.2266913)

To link to this article: <https://doi.org/10.1080/20531702.2023.2266913>



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Published online: 21 Oct 2023.



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Quashing protests abroad: The CSTO's intervention in Kazakhstan*

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ABSTRACT

The Collective Security Treaty Organization's military intervention in Kazakhstan in January 2022 quashed the unfolding nonviolent protest movement in the country. Nonetheless, the intervention raised few concerns with regard to the prohibition of the use of force in international law. Among states and scholars, the invitation issued by the Kazakh president was regarded as sufficient to justify the intervention. This article critically assesses this understanding. The intervening states limited the Kazakh people's right to self-determination and violated protesters' human rights. Against this backdrop, the authors develop an argument for why international law prohibits states from intervening in another state in order to quash nonviolent protest movements. While the intervention in Kazakhstan serves as the primary example, the argument also applies more broadly and is of particular importance as nonviolent protest movements have a central role in spreading democracy and advancing human rights.

KEYWORDS Use of force in international law; intervention by invitation; protest movements; Kazakhstan; right to protest; Collective Security Treaty Organization

1. Introduction

Only a few days after protests erupted in Kazakhstan in early 2022, the Kazakh president, Kassym-Jomart Tokayev, requested assistance from the Collective Security Treaty Organization (CSTO). Within hours, the CSTO approved Tokayev's request and sent 2500 soldiers to safeguard critical infrastructure throughout Kazakhstan. Thereby, the armed forces of the other five CSTO member states participated in the effort to violently suppress the ongoing nonviolent protests in a foreign state. A week later, the CSTO forces started withdrawing after Kazakh security forces succeeded in

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*All websites accessed 28 June 2023.

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quashing the nationwide protests. The first collective intervention in the CSTO's thirty-year history¹ was over as quickly as it had begun.

With international scholarly attention focusing on the illegal full-scale Russian aggression against Ukraine, the intervention in Kazakhstan only raised a few eyebrows. The few comments on the matter raised little or no doubts regarding the international legality of the CSTO's intervention.² However, the CSTO's intervention gave a decisive blow to the unfolding protest movement in Kazakhstan. Since 2019, protests had increased in frequency and scale throughout Kazakhstan, culminating in the protests of early 2022.³ The intervention ended the protesters' ambition to reform their societal and government structures. In doing so, the radical suppression of the protests contrasted sharply with the overall nonviolent character of the protest movement.

A recent trend in the literature has identified the significance of nonviolent protest movements in international law, in particular with regard to the right of self-determination, democracy, and human rights.⁴ Protests, so it is argued, are the only avenue for popular involvement in public affairs when the institutional participation mechanisms are dysfunctional or shut off.⁵ In these settings, nonviolent protest movements have a significant role in claiming and realising a population's rights to self-determination, democracy and human rights. Against this backdrop, an intervention that supports an embattled government in quashing popular and nonviolent dissent raises questions.

¹Sultan Sakhariyev, 'Collective Security Treaty Organization (CSTO)' in Sergey Sayapin and others (eds), *International Conflict and Security Law* (TMC Asser Press, 2022) 617.

²Seyfullah Hasar, 'Kazakhstan: Another intervention by invitation that played out as expected', *Opinio Juris* (7 February 2022) <https://opiniojuris.org/2022/02/07/kazakhstan-another-intervention-by-invitation-that-played-out-as-expected/>; Julia Emtseva, 'Collective Security Treaty Organization: Why are Russian troops in Kazakhstan?', *EJIL: Talk!* (13 January 2022) www.ejiltalk.org/collective-security-treaty-organization-why-are-russian-troops-in-kazakhstan/.

³Diana Kudaibergenova, 'Art and Protest in Kazakhstan' (2022) 121(837) *Current History* 271, 271–2, 273–5. Kazakhstan had been one of the few states in the post-Soviet space that had not experienced widespread protests after the collapse of the Soviet Union. Some therefore argued that Kazakhstan was immune to 'color revolutions': see generally Nurseit Niyazbekov, 'Is Kazakhstan Immune to Color Revolutions?' (2018) 26(3) *The Social Movements Perspective, Demokratizatsiya: The Journal of Post-Soviet Democratization* 401. This thesis was proven wrong by the increasing protests after 2019, also referred to as the 'Kazakh Spring': see Diana T Kudaibergenova and Marlene Laruelle, 'Making Sense of the January 2022 Protests in Kazakhstan: Failing Legitimacy, Culture of Protests' (2022) 38(6) *Post-Soviet Affairs* 1.

⁴Elizabeth Wilson, 'People Power Movements and International Human Rights: Creating a Legal Framework' in Maciej Bartkowski (ed), *ICNC Monograph Series* (ICNC Press, 2017); Elizabeth Wilson, "'People Power" and the Problem of Sovereignty in International Law' (2016) 26 *Duke Journal of Comparative and International Law* 551; Dorothy Estrada-Tanck, 'Civil Resistance in Public International Law' (2019) 35 *Anuario Español de Derecho Internacional* 373; Danny Auron, 'The Derecognition Approach: Government Illegality, Recognition, and Non-Violent Regime Change' (2013) 45 *George Washington International Law Review* 443; Florian Kriener and Elizabeth Wilson, 'The Rise of Nonviolent Protest Movements and the African Union's Legal Framework' (2021) 10 *ESIL Reflection* 1.

⁵Florian Kriener, 'Gewaltfreie Protestbewegungen als Legitimitätsquelle? Eine Replik' (2020) 80 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 881.

Whereas the International Court of Justice (ICJ) famously stated that interventions upon the invitation of a government are ‘allowable’,⁶ this right is qualified by other rules of international law.⁷ When people resort to nonviolent protests to voice their discontent and demand fundamental changes in their societies against an authoritarian government, they exercise several human rights. Moreover, such nonviolent protests can qualify as a struggle for self-determination. Therefore, an intervention to quash a nonviolent protest movement abroad infringes on the right to self-determination and the international protection of human rights. These rights must, however, be respected even if an intervention is undertaken at the invitation of the respective government. If these rights are violated, which is the case when states quash nonviolent protest movements abroad, the intervention will violate international law. Thus, we argue that international law is a barrier to quashing nonviolent protests abroad.

This argument is developed in three steps. First, the events and justifications for the recent intervention in Kazakhstan are detailed (Section 2). Then, the international legal framework is outlined, suggesting that three fundamental legal principles of international law are violated by an intervention to quash a nonviolent protest movement (Section 3). If a nonviolent protest movement fulfils certain criteria and faces an autocratic government, then that government loses its authority to issue invitations (Section 3.2). Furthermore, an intervention to quash a nonviolent protest movement could violate the population’s right to self-determination (Section 3.3). Additionally, quashing popular and nonviolent dissent abroad is incompatible with international human rights law (Section 3.4). Drawing upon the example of the CSTO intervention in Kazakhstan, the authors demonstrate the practical implications of these limitations. To conclude, the argument against military interventions to quash nonviolent protests is set out and put into context (Section 4).

Despite this article’s focus on the CSTO intervention in Kazakhstan, the argument made is relevant beyond this particular case. Nonviolent protests against authoritarian governments are a widespread phenomenon.⁸ Particularly in the post-Soviet space, so called ‘colour revolutions’, a term used for unarmed, mostly peaceful pro-democracy movements aiming for a change of government,⁹ have been a decisive factor in upending authoritarian

⁶*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (merits) [1986] ICJ Rep 14, para 246.

⁷Institute de Droit International, *Rhodes Resolution* (2011); Eliav Lieblich, ‘Why Can’t We Agree on When Governments Can Consent to External Intervention? A Theoretical Inquiry’ (2020) 7 *Journal on the Use of Force and International Law* 5.

⁸Thomas Carothers and Benjamin Press, ‘Understanding Protests in Authoritarian States’ (2020) 40(2) *SAIS Review of International Affairs* 16.

⁹Susan Stewart, *Democracy Promotion and the ‘Colour Revolutions’* (Routledge, 2012).

governments and initiating democratic transitions.¹⁰ Therefore, authoritarian states have grown wary of popular mobilisation and have united to suppress such tendencies.¹¹ Most prominently, the Sino-Russian Joint Declaration on International Relations of February 2022 places the prevention of colour revolutions as a central foreign policy goal.¹² Accordingly, military interventions in foreign states to quash nonviolent protests can be expected to increase in the future. Nevertheless, this situation has to date never been dealt with in international legal scholarship. Moreover, state practice in this regard is still scarce and does not point to a consolidated legal framework that comprehensively regulates interventions against nonviolent protest movements. It is therefore of particular importance to highlight the international legal regulations that suggest that such interventions violate fundamental principles of international law.

2. Protests in Kazakhstan and the CSTO's intervention

After describing the events of January 2022 in Kazakhstan (Section 2.1) and the intervention by CSTO member states (Section 2.2), this article critically assesses the invocation of Article 4 of the CSTO Treaty (Section 2.3) This lays the groundwork for the argument that an intervention by invitation violates fundamental principles of international law (Section 3).

2.1. The protests in Kazakhstan

Popular protests occurred in Kazakhstan between 2 and 11 January 2022. Initially, the protesters criticised a 50% increase in oil prices resulting from a reduction in government subsidies.¹³ This immediate reaction to the subsidy reduction, however, quickly diversified to other subject matters. Within a few days, demonstrators shifted their focus to a more general critique of their government.¹⁴ They demanded greater political

¹⁰*Ibid*; Michael McFaul, 'Ukraine Imports Democracy: External Influences on the Orange Revolution' (2007) 32(2) *International Security* 45, 48, 51.

¹¹Tom Ginsburg, 'How Authoritarians Use International Law' (2020) 31(4) *Journal of Democracy* 44; Tom Ginsburg, *Democracies and International Law* (Cambridge University Press, 2021) chapter V.

¹²President of Russia, 'Joint Statement of the Russian Federation and the People's Republic of China on the International Relations Entering a New Era and the Global Sustainable Development' (4 February 2022) www.en.kremlin.ru/supplement/5770.

¹³Hanna Duggal and Alia Chughtai, 'Maps and charts to understand Kazakhstan's protests', *Al Jazeera* (7 January 2022) www.aljazeera.com/news/2022/1/7/maps-and-charts-to-understand-the-protests-in-kazakhstan; "Prompt, independent, impartial investigations" needed in Kazakhstan: UN rights office', *UN News* (11 January 2022) <https://news.un.org/en/story/2022/01/1109572>.

¹⁴Valerie Hopkins and Ivan Nechepurenko, 'Russia-allied forces to intervene as unrest sweeps Kazakhstan', *The New York Times* (5 January 2022) www.nytimes.com/2022/01/05/world/europe/kazakhstan-protests-gas-prices.html?searchResultPosition=15.

liberalisation, including increased political representation, an improvement of the civil rights situation¹⁵ and the resignation of the current government, including President Tokayev.¹⁶ Moreover, the protesters took issue with socio-economic disparities and economic stagnation in Kazakhstan and demanded increased social support programmes.¹⁷ These general economic, social, and political grievances addressed one central figure: former President Nursultan Nazarbayev.¹⁸ Nazarbayev had stepped down from office in 2019 after thirty years in power.¹⁹ After his resignation, Nazarbayev's successor, Mr. Tokayev, whose election was predetermined and accompanied by electoral irregularities and popular protests,²⁰ had promised economic and political reforms, including those now demanded by protesters.²¹ However, the Tokayev administration failed to deliver on its promises.²² In the view of the protesters, this was also due to the continuing role of Nazarbayev in Kazakh politics. As chairperson of the National Security Council, his influence on public policies remained significant. Therefore, slogans such as 'Old Man, Out' – asking for the definitive departure of Nazarbayev from Kazakh politics – characterised the demonstrations.²³ These had already been present during prior protests in Kazakhstan from 2014 onwards.²⁴ Although the protests developed without a single and identifiable leader,²⁵ they nevertheless quickly spread from Zhanaozen in western Kazakhstan to most districts of the country.²⁶

¹⁵Emily Couch and Sher Khashimov, 'How Western media framed Kazakhstan's protests', *Foreign Policy* (2 May 2022) <https://foreignpolicy.com/2022/05/02/western-media-kazakhstan-protests/>.

¹⁶Diana T Kudaibergenova and Marlene Laruelle, 'Making Sense of the January 2022 Protests in Kazakhstan: Failing Legitimacy, Culture of Protests' (2022) 38(6) *Post-Soviet Affairs* 8.

¹⁷Dan Bilefsky, 'Revolt in Kazakhstan: What's happening, and why it matters', *The New York Times* (5 January 2022) www.nytimes.com/2022/01/05/world/asia/kazakhstan-protests.html.

¹⁸Agnieszka Pikulicka-Wilczewska, 'What is behind the protests rocking Kazakhstan?', *Al Jazeera* (5 January 2022) www.aljazeera.com/news/2022/1/5/explainer-what-is-behind-the-protests-rocking-kazakhstan.

¹⁹Neil MacFarquhar, 'Longtime president of Kazakhstan surprises region by resigning', *The New York Times* (19 March 2019) www.nytimes.com/2019/03/19/world/asia/kazakhstan-nazarbayev-resigns.html?action=click&module=RelatedCoverage&pgtype=Article®ion=Footer.

²⁰'Freedom in the World 2020 – Kazakhstan', *Freedom House*, <https://freedomhouse.org/country/kazakhstan/freedom-world/2020>.

²¹Kudaibergenova and Laruelle (n 16).

²²Paddy Ryan, 'By intervening in Kazakhstan, Russia strengthens its hand in China's energy market', *Atlantic Council* (20 January 2022) www.atlanticcouncil.org/blogs/energysource/by-intervening-in-kazakhstan-russia-strengthens-its-hand-in-chinas-energy-market/; Pikulicka-Wilczewska (n 18).

²³Valerie Hopkins, 'Kazakhstan's former leader speaks out on unrest that gripped the country', *The New York Times* (18 January 2022) www.nytimes.com/2022/01/18/world/europe/kazakhstan-nursultan-nazarbayev-video.html.

²⁴Kudaibergenova and Laruelle (n 16).

²⁵Crisis Group, 'Behind the Unrest in Kazakhstan' (14 January 2022) www.crisisgroup.org/europe-central-asia/central-asia/kazakhstan/behind-unrest-kazakhstan.

²⁶Pikulicka-Wilczewska (n 18).

2.2. The intervention by the CSTO states

Following the broadening of the protests – both in numbers and scope – the Government of Kazakhstan declared a state of emergency.²⁷ President Tokayev threatened protestors with massive violence and liquidation,²⁸ and enforced an internet blackout for several days.²⁹ Furthermore, authorities carried out mass arrests,³⁰ and used tear gas and stun grenades against the demonstrators.³¹ Following a shoot-to-kill-without-warning order issued by President Tokayev,³² government security forces used considerable and deadly force against protesters.³³

Nevertheless, the Kazakh authorities were unable to end the protests, and the resignation of the prime minister and his government did not appease the protesters.³⁴ This situation can be traced back to internal disagreements over the distribution of power between Tokayev and former President Nazarbayev³⁵ and a defection of officials to the protestors.³⁶ Confronted with this situation, the Kazakh president requested assistance from the CSTO

²⁷Official Website of the President of the Republic of Kazakhstan, 'President Kassym-Jomart Tokayev's Address to the People of Kazakhstan' (7 January 2022) <https://akorda.kz/en/president-kassym-jomart-tokayevs-address-to-the-people-of-kazakhstan-801221>. The state of emergency was declared on 5 January in Kazakhstan's capital Nur-Sultan and Almaty, and extended to the entire country the next day.

²⁸James Marson and Thomas Grove, 'Kazakhstan's president gives security forces order to shoot to kill without warning', *The Wall Street Journal* (7 January 2022) www.wsj.com/articles/kazakhstan-leader-gives-security-forces-order-to-shoot-without-warning-11641548642.

²⁹Hopkins and Nechepurenko (n 14).

³⁰Othmara Glas and Friedrich Schmid, 'Altbekannte Reformversprechen', *Frankfurter Allgemeine Zeitung* (12 January 2022) www.faz-corporate.de/faz-portal/document?uid=FAZ_FD12022011250001180285059&token=32e25d4d-ba67-4566-a321-b33653788941&p_scr=faz-archiv&p.q=Kasachstan±Proteste±Gewalt&p.source=&p.max=10&p.sort=&p.offset=0&p_ts=1653915013684&p.DT_from=01.01.2022&p.DT_to=01.05.2022&p.timeFilterType=0.

³¹Pikulicka-Wilczewska (n 18).

³²'Kazakhstan: President gives shoot-to-kill order against protesters', *Deutsche Welle* (7 January 2022) www.dw.com/en/kazakhstan-president-gives-shoot-to-kill-order-against-protesters/a-60354912.

'Kazakh president orders security forces to shoot to kill after days of violent protests', *NBC News* (8 January 2022) www.nbcnews.com/news/world/kazakhstan-president-shoot-kill-order-protests-violence-rcna11317.

³³Report of the Special Rapporteur on the rights of freedom of peaceful assembly and association; the Working Group on Arbitrary Detention; the Working Group on Enforced or Involuntary Disappearances; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the situation of human rights defenders; the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (18 January 2022) Communication AL KAZ 1/2022, 1; Abdujalil Abdurasulov, 'Kazakhstan unrest: "If you protest again, we'll kill you"', *BBC* (21 January 2022) www.bbc.com/news/world-asia-60058972.

³⁴Shaun Walker, 'Kazakhstan protests: government resigns amid rare outbreak of unrest', *The Guardian* (5 January 2022) www.theguardian.com/world/2022/jan/04/kazakhstan-president-declares-state-of-emergency-in-protest-hit-areas.

³⁵Crisis Group (n 25).

³⁶Twitter (5 January 2022) <https://twitter.com/ThomasVLinge/status/1478728771867918337?s=20>; Crisis Group (n 25).

under Article 4 of the Collective Security Treaty (CST)³⁷ – the first successful request under Article 4 in the CSTO's thirty-year history.³⁸

The CSTO is a military alliance, established in 1992, consisting of Armenia, Kazakhstan, Kyrgyzstan, Russia, Tajikistan and Belarus.³⁹ Its objectives include the 'strengthening of peace, international and regional security and stability, protection of independence on a collective basis, territorial integrity and sovereignty of the Member States'.⁴⁰ The collective defence clause in Article 4 CST – which is comparable to Article 5 of the North Atlantic Treaty⁴¹ – determines that aggression against one of the states 'will be considered by the Member States as aggression to all the Member States'.⁴² President Tokayev held the opinion that Kazakhstan was faced with such an 'act of aggression'. He stated:

[R]elying on the Collective Security Treaty, today I appealed to the heads of the CSTO states to assist Kazakhstan in overcoming this terrorist threat. In fact, this is no longer a threat – it is undermining the state integrity, and most importantly, it is an attack against our citizens ... Almaty was attacked and suffered vandalism. Its residents have become victims of terrorist attacks, bandits. Therefore, it is our duty, including the Security Council members of the Republic of Kazakhstan present here, to take all possible actions to protect our state from an external threat ...⁴³

In response to the request, Russia, Belarus, Armenia, Tajikistan and Kyrgyzstan sent up to 2500 troops to Kazakhstan, the vast majority of them from Russia.⁴⁴ The intervening states deployed soldiers and armoured vehicles, but their troops did not actively participate in combat operations or the confrontation with the protesters themselves. Rather, the foreign troops took over the traditional tasks of the Kazakh security forces, such as guarding state and military facilities, allowing them to focus on quashing the protests.⁴⁵ Moreover, their presence was a considerable sign of support towards President Tokayev.⁴⁶ Accordingly, the CSTO forces had a decisive role in ultimately ending the nonviolent protests in Kazakhstan.

³⁷Official Website of the President of the Republic of Kazakhstan, 'President Kassym-Jomart Tokayev Held a Session of the Security Council' (6 January 2022) <https://akorda.kz/en/president-kassym-jomart-tokayev-held-a-session-of-the-security-council-705318>.

³⁸Sakhariyev (n 1).

³⁹The Treaty entered into force on 20 April 1994. See 'Collective Security Treaty Organization: 2002–2021' (2023) <https://en.odkb-csto.org/25years/>.

⁴⁰Treaty on Collective Security (1992) 1894 UNTS 309, Article 3.

⁴¹North Atlantic Treaty (1949) 34 UNTS 243.

⁴²Treaty on Collective Security (n 40) Article 4.

⁴³Official Website of the President of the Republic of Kazakhstan (n 37).

⁴⁴Bruce Pannier, 'How the Intervention in Kazakhstan Revitalized the Russian-led CSTO' (2022) *Foreign Policy Research Institute* 16; Crisis Group (n 25).

⁴⁵Pannier (n 44) 11; Kudaibergenova and Laruelle (n 16) 13.

⁴⁶Crisis Group (n 25).

2.3. Invocation of Article 4 CST

The deployment of military forces to the territory of another state will in principle contravene Article 2(4) UN Charter.⁴⁷ Therefore, states frequently advance *jus ad bellum* justifications to justify such deployments. The CSTO states justified their intervention in Kazakhstan with reference to Article 4 CST⁴⁸ and held that the ‘operation was carried out on a sound international legal basis’.⁴⁹ Although the legality of the military intervention in Kazakhstan was not questioned on the international level by states, this reasoning merits further scrutiny. Article 4 CST reads:

If one of the Member States undergoes aggression (armed attack menacing to safety, stability, territorial integrity and sovereignty), it will be considered by the Member States as aggression (armed attack menacing to safety, stability, territorial integrity and sovereignty) to all the Member States of this Treaty. In case of aggression commission (armed attack menacing to safety, stability, territorial integrity and sovereignty) to any of the Member States, all the Member States at request of this Member State shall immediately provide the latter with the necessary help, including military one, as well as provide support by the means at their disposal in accordance with the right to collective self-defence pursuant to article 51 of the UN Charter. The Member States shall immediately inform the United Nations Security Council on the measures taken on the basis of this article. When implementing these measures, the Member States shall adhere to the relevant provisions of the UN Charter.⁵⁰

Accordingly, two lines of justification can be derived from an invocation of Article 4 CST: the invocation of collective self-defence (Section 2.3(a)) and an intervention by invitation (Section 2.3(b)). Both justifications, however, are legally unsound, as will be explained subsequently.

2.3(a) Collective self-defence

Article 4 CST refers to the right of collective self-defence under Article 51 of the UN Charter. According to Article 4 CST, such right to collective self-defence arises when one state is subject to aggression, which is defined as an ‘armed attack menacing to safety, stability, territorial integrity and sovereignty’. The Kazakh president precisely claimed that Kazakhstan was subject

⁴⁷Florian Kriener, ‘Invitation – Excluding *ab initio* a Breach of Art. 2 (4) UNCh or a Preclusion of Wrongfulness?’ (2020) 79(3) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 643, 643–6.

⁴⁸Chairman of the Collective Security Council of the CSTO Mr. Pashinyan, Facebook (5 January 2022) www.facebook.com/nikol.pashinyan/posts/470296684451638.

⁴⁹UNSC Verbatim Record, UN Doc S/PV.8967 (16 February 2022) 6 (Deputy Minister for Foreign Affairs of the Russian Federation, Mr. Vershinin); Statement by Putin, President of Russia: ‘peacekeepers’, cited in Valerie Hopkins, ‘Russian troops will stay to finish job in Kazakhstan, Putin says’, *The New York Times* (10 January 2022) www.nytimes.com/2022/01/10/world/europe/putin-russia-kazakhstan.html?searchResultPosition=1; UNSC Verbatim Record, UN Doc S/PV.8967 (16 February 2022) 20 (Armenia: ‘organization’s collective peacekeeping forces’, Ambassador of Armenia, Mr. Margaryan), 23 (Belarus: ‘collective peacekeeping forces of the CSTO’, Ambassador of Belarus, Mr. Rybakov).

⁵⁰Treaty on Collective Security (n 40) Article 4.

to such an attack.⁵¹ However, it is doubtful whether the requirements for exercising collective self-defence were met in the case of Kazakhstan.

First, the protests in Kazakhstan did not cross the threshold of an armed attack. In the *Nicaragua* judgment, the ICJ held that armed attacks are ‘the most grave forms of the use of force’.⁵² Therefore, an armed attack can only be assumed when an act of armed force of considerable magnitude and intensity significantly impacts another state.⁵³

With regard to the January 2022 protests, no evidence was presented that Kazakhstan was the target of such an act of armed force of considerable magnitude and intensity. According to the *Armed Conflict Location & Event Data Project*, 95% (and thus the vast majority) of the 80 demonstration events in the January protests remained peaceful.⁵⁴ Violent events occurred only in the cities of Almaty, Shymkent and Aktobe. In Almaty, Kazakhstan’s largest city and former capital, the city hall was seized and set on fire, and the international airport was occupied on 5 January.⁵⁵ Furthermore, anti-government protestors directed their anger against the government by storming government buildings and businesses in Almaty,⁵⁶ and seizing large infrastructure facilities.⁵⁷ In Shymkent and Aktobe, the peaceful demonstrations also turned into riots with violence directed against police forces.⁵⁸ However, these events were isolated from the generally peaceful overall dynamics of the protests,⁵⁹ and the sporadic acts of violence were attributed to a subset of actors that did not mix with the peaceful protests.⁶⁰ Moreover, the demonstrators proclaimed through slogans that they were carrying out a peaceful protest and carried protest signs confirming this purpose.⁶¹ Furthermore, the organisations calling for protests, such as Oyan, Qazaqstan (‘Wake Up, Kazakhstan!’), only called for peaceful assemblies throughout the protests.⁶² Therefore, no armed force of considerable magnitude and intensity, as required for an armed attack under international law, was present in

⁵¹Official Website of the President of the Republic of Kazakhstan (n 37).

⁵²*Nicaragua* (merits) (n 6) para 191.

⁵³Karl Zemanek, ‘Armed Attack’ (October 2013) *Max Planck Encyclopedia of Public International Law*, para 10.

⁵⁴Josh Satre and Ryskeldi Satke, ‘Demonstrations in Kazakhstan: From Energy Price Hike to Political Crisis, Armed Conflict Location & Event Data Project’, *ACLEDA* (13 January 2022) <https://acleddata.com/2022/01/13/demonstrations-in-kazakhstan-from-energy-price-hike-to-political-crisis/>.

⁵⁵Pikulicka-Wilczewska (n 18).

⁵⁶Hopkins and Nechepurenko (n 14).

⁵⁷‘Kazakhstan president confirms takeover of Almaty airport’, *Deutsche Welle* (5 January 2022) www.dw.com/en/kazakhstan-president-confirms-takeover-of-almaty-airport/a-60335623.

⁵⁸Zholdas Orisbayev, ‘Piecing together the unrest in Kazakhstan’s third-largest city’, *Eurasianet* (19 January 2022) <https://eurasianet.org/piecing-together-the-unrest-in-kazakhstans-third-largest-city>.

⁵⁹Special rapporteur on the rights to freedom of peaceful assembly and of association and others (n 33) 7.

⁶⁰Cf Kudaibergenova and Laruelle (n 16) 9.

⁶¹Emily Couch and Sher Khashimov, ‘How Western media framed Kazakhstan’s protests’, *Foreign Policy* (2 May 2022) <https://foreignpolicy.com/2022/05/02/western-media-kazakhstan-protests/>; Kudaibergenova, ‘Art and Protest’ (n 3).

⁶²Kudaibergenova and Laruelle (n 16) 8.

Kazakhstan. In contrast, references to an armed attack in terms of Article 4 CST seem purely pretextual.⁶³ This is particularly evident in view of a statement by the Russian Federation's President Vladimir Putin, who explicitly stated that he wanted to prevent a 'color revolution' in Kazakhstan.⁶⁴ Colour revolutions generally do not entail widespread uses of violence that would amount to an 'armed attack'.⁶⁵ Therefore, in the absence of an armed attack, collective self-defence pursuant to Article 4 CST, in connection with Article 51 UN Charter, cannot serve as a legal justification.

Second, an armed attack must originate from the territory of another state. According to the ICJ, an armed attack entails

action by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to" (*inter alia*) an actual armed attack conducted by regular forces.⁶⁶

This definition borrows from Article 3(g) of the 1974 UN General Assembly Definition of Aggression,⁶⁷ which was the basis for the ICJ's understanding of 'armed attack' in the *Nicaragua* and *Armed Activities* judgments.⁶⁸

Even if one assumes, as has been argued frequently in recent years in the literature and state practice, that non-state actors can be the authors of armed attacks,⁶⁹ their military actions must likewise cross international borders.⁷⁰ An operation by a non-state actor within the state's own territory does not trigger the right to collective self-defence.⁷¹

The protests in Kazakhstan only took place in Kazakhstan, did not cross borders, and had no foreign backing.⁷² Therefore, they were

⁶³George Krol and Anoushka Ramesh, 'Russia, China, and Protests: Caught Between Two Powers, Kazakhstan Navigates Internal Dissent' (2022) 23(1) *Georgetown Journal of International Affairs* 65, 65–6.

⁶⁴Hopkins (n 49); Oliver Hegglin, 'The CSTO and its Deployment in Kazakhstan', *Human Security Centre* (8 February 2022) www.hscentre.org/asia-and-pacific/csto-deployment-kazakhstan/.

⁶⁵See Stewart (n 9).

⁶⁶Charter of the United Nations and Statute of the International Court of Justice (1945) 1 UNTS 16, Article 51; *Nicaragua* (merits) (n 6) para 195.

⁶⁷UNGA Res 3314 (XXIX), UN Doc A/RES/3314(XXIX) (14 December 1974) annex.

⁶⁸*Nicaragua* (merits) (n 6) para 195; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (merits) [2005] ICJ Rep 168, para 146. See also, in its advisory opinion on the construction of a wall, the ICJ builds on the understanding that an armed attack must originate from outside the state's territory: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (advisory opinion) [2004] ICJ Rep 136, para 139.

⁶⁹Christian Marxsen and Anne Peters, 'Dilution of Self-Defence and its Discontents' in Christian Marxsen and Anne Peters (eds), *Self-Defence against Non-State Actors* (Cambridge University Press, 2019) 1, 2.

⁷⁰Laura Visser, 'Intervention by Invitation and Collective Self-Defence: Two Sides of the Same Coin' (2020) 7 *Journal on the Use of Force and International Law* 309; Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, 2017) 244–5.

⁷¹Visser (n 70).

⁷²Joshua Kucera, 'CSTO agrees to intervene in Kazakhstan unrest', *Eurasianet* (5 January 2022) <https://eurasianet.org/csto-agrees-to-intervene-in-kazakhstan-unrest>; Hegglin (n 64). The Kazakh government and the CSTO argued that the protests were directed from abroad and involved cross-border

neither attributable to another State, nor conducted by a non-state actor from outside of the Kazakh territory. The requirements for the invocation of collective self-defence under Article 4 CST were therefore not met. Accordingly, collective self-defence cannot serve as a justification for the deployment of the CSTO troops. Therefore, the question whether the invitation by the Kazakh president justified the intervention is decisive (Section 2.3(b)).

2.3(b) *Intervention by invitation*

Alongside their reliance on collective self-defence, the CSTO member states relied on an invitation issued by the Kazakh president.⁷³ The Chairman of the Collective Security Council, Armenian Prime Minister Nikol Pashinyan, explicitly made reference to President Tokayev's request when justifying the intervention.⁷⁴

Invitations can justify the deployment of military forces on the territory of another state.⁷⁵ This effect derives from the sovereignty of the inviting state. As the sovereign over the territory, the inviting state can in principle decide freely for which purposes and by whom the territory is used. Therefore, there is a strong presumption in favour of the legality of an intervention undertaken at the invitation of an official government.⁷⁶ Concurring with this finding, Julia Emtseva has pointed out that under the current CSTO framework, foreign military support can be dispatched 'for basically any purpose'.⁷⁷ A particular reason, i.e. to defend against an armed attack or aggression, is not required by the general doctrine. Therefore, it seems particularly difficult for someone claiming the illegality of an intervention by invitation to prove why the legality of an intervention is unfounded.⁷⁸

operations. However, the states did not substantiate this claim or present any evidence thereof. Their argument stands in contrast to the proclamations of the protest movement and the assessment of international observers.

⁷³Chairman of the Collective Security Council of the CSTO Mr. Pashinyan (n 48); UN Doc S/PV.8967 (n 49), p. 5 (Secretary General of the CSTO Mr Zas), p. 20 (Representative of Armenia), p. 6 (Representative of Russia); Statement by Putin, President of Russia cited in Hopkins (n 49).

⁷⁴The Chairman of the CSTO referenced the address by the President of Kazakhstan and referred to a threat to the national security and sovereignty of the Republic of Kazakhstan when arguing why the CSTO decided to send its forces to Kazakhstan in accordance with Article 4 Collective Security Treaty (Chairman of the Collective Security Council of the CSTO Mr. Pashinyan (n 48)).

⁷⁵There is an ongoing debate whether an invitation qualifies as a legal justification or whether an invitation excludes a use of force from the scope of Article 2 para 4 of the UN Charter: see Federica Paddeu, 'Military Assistance on Request and General Reasons against Force: Consent as a Defence to the Prohibition of Force' (2020) 7 *Journal on the Use of Force and International Law* 227–69; Patrick M Butchard, 'Territorial Integrity, Political Independence, and Consent: The Limitations of Military Assistance on Request under the Prohibition of Force' (2020) 7 *Journal on the Use of Force and International Law* 35–73; International Law Association, *Final Report on Aggression and the Use of Force* (2018) 18.

⁷⁶Olivier Corten, 'Intervention by Invitation: The Expanding Role of the UN Security Council' in Christian Marxsen and Anne Peters (eds), *Armed Intervention and Consent* (Cambridge University Press, 2023) 109.

⁷⁷Emtseva (n 2).

⁷⁸Corten (n 76) 110.

With regard to the intervention of the CSTO states in Kazakhstan, one would thus assume at first glance that the intervention was lawful. This assessment also seems reasonable if one considers the lack of state reactions to the intervention in Kazakhstan. The CSTO's intervention was neither commented upon nor condemned internationally.

Nevertheless, there are certain circumstances which can render an intervention by invitation illegal. As mentioned previously, in its *Nicaragua* judgment, the ICJ held that a military operation in another state, undertaken at the invitation of that state and therefore with its consent, is 'allowable'.⁷⁹ The wording 'allowable' (and not allowed) leaves room for various conditions of an invitation, including in connection with its objectives and effects.⁸⁰ In this respect, an intervention undertaken with a state's consent is valid only if certain legal conditions are met.⁸¹ The observance of a people's right to self-determination during a foreign intervention has been the most frequently discussed issue in this area throughout recent decades.⁸² However, beyond self-determination, other fundamental principles of international law, including human rights, must likewise be observed.

In line with this reasoning, some authors have formulated a so-called purpose-based approach.⁸³ Under this approach, an intervention by invitation is only lawful if it pursues certain purposes that are compatible with the fundamental principles of international law.⁸⁴ The fight against terrorism, the rescue of nationals, and the fight against transnational criminal groups are qualified as a permitted purpose.⁸⁵ In turn, proponents of this approach consider an intervention illegal if it solely aims at undermining a fundamental principle of international law.⁸⁶

This approach, however, has received criticism due to its limited support in state practice.⁸⁷ Furthermore, the notion of 'purpose' remains indefinite,

⁷⁹*Nicaragua* (merits) (n 6) para 246.

⁸⁰Corten (n 76) 104.

⁸¹Benjamin Nußberger, 'Military Strikes in Yemen in 2015: Intervention by Invitation and Self-Defence in the Course of Yemen's "Model Transitional Process"' (2017) 4(1) *Journal on the Use of Force and International Law* 126.

⁸²See, e.g. the discussion regarding the right to self-determination during a foreign intervention in Georg Nolte, *Eingreifen auf Einladung* (Springer, 1999) 221–60.

⁸³Karine Bannelier and Theodore Christakis, 'Under the UN Security Council's Watchful Eyes: Military Intervention by Invitation in the Malian Conflict' (2013) 26(4) *Leiden Journal of International Law* 860; Theodore Christakis and Karine Mollard-Bannelier, 'Volenti non fit injuria? Les effets du consentement à l'intervention militaire' (2005) 50 *Annuaire français de droit international* 102.

⁸⁴Olivier Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (Bloomsbury Publishing, 2nd edn 2021) 291; Bannelier and Christakis, 'Under the UN Security Council's Watchful Eyes' (n 83) 860; Christakis and Mollard-Bannelier, 'Volenti non fit injuria?' (n 83).

⁸⁵Cf Chiara Redaelli, *Intervention in Civil Wars* (Bloomsbury Publishing, 2021) 99–103.

⁸⁶See n 83.

⁸⁷A close reading of state practice in this regard suggests that there are certain additional criteria for the legality of intervention by invitation. It does not, however, limit or even link these criteria to the purpose of the action: see Veronika Bilkova, 'Reflections on the Purpose-Based Approach' (2019) 79 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 681, 682. For an overview of the state practice in regard to the purpose-based approach, see also Gregory H Fox, 'Invitations to Intervene

as the authors of the purpose-based approach themselves do not provide a concrete definition.⁸⁸ Therefore, the dividing line between a permissible and impermissible purpose is difficult to draw, as the assessment of an intervening state's 'real' purpose and intention proves difficult in practice.⁸⁹ Taking the intervention in Kazakhstan as an example, the official purposes of fighting terrorism and aggression would constitute legitimate purposes. However, if one examines these purposes for their plausibility, the purposes appear questionable: According to President Putin's statements, preventing a colour revolution was at least one of the central purposes of the intervention.⁹⁰ Thus, identifying the purpose by means of the stated intention risks turning the purpose-based approach into a 'self-defeating theory'.⁹¹

Therefore, it seems preferable to observe the effects of an intervention rather than its motives. The effects of an intervention must not conflict with fundamental principles of international law, such as human rights and the right to self-determination.⁹² In the words of Olivier Corten, 'what matters most is determining whether or not this right has been respected considering the effects of the intervention, whatever the intentions of the intervening state may have been'.⁹³ If an intervention by invitation violates fundamental principles of international law, it will therefore be illegal under the *jus ad bellum*.

In light of the foresaid, it is questionable whether the intervention by invitation in Kazakhstan can still be considered lawful. Quashing a nationwide nonviolent protest movement through foreign military forces has severe adverse effects on the human rights of the protesters and their self-determination ambitions. Therefore, the next section details the effects of a foreign intervention on these fundamental principles of international law and details why they bar invitations to quash nonviolent protests abroad.

3. International law as a barrier to quashing protests abroad

This section outlines the arguments against the legality of an intervention by invitation to quash a nonviolent protest movement. As the protests in Kazakhstan serve as the example for these arguments, the section will first outline why the protests in Kazakhstan qualify as a nonviolent protest movement (Section 3.1).

after the Cold War' in Christian Marxsen and Anne Peters (eds), *Armed Intervention and Consent* (Cambridge University Press, 2023) 256.

⁸⁸Bilkova (n 87) 682.

⁸⁹Christian Marxsen, 'Conclusion: Half-Hearted Multilateralisation of a Unilateral Doctrine' in Christian Marxsen and Anne Peters (eds), *Armed Intervention and Consent* (Cambridge University Press, 2023) 322; Bilkova (n 87) 682.

⁹⁰Hopkins (n 49).

⁹¹Bilkova (n 87) 682.

⁹²Corten (n 76) 107; Bilkova (n 87) 683.

⁹³Corten (n 76) 107.

Subsequently, three conditions for an intervention by invitation to be legal are assessed. First, a government must have the authority to invite foreign military assistance. This authority is put into question when an authoritarian government is confronted with a nonviolent protest movement (Section 3.2). Second, an intervening state must not violate a population's right to self-determination. Yet, under certain circumstances, a nonviolent protest movement embodies a popular struggle for self-determination. Its quashing through foreign military troops would therefore violate the right to self-determination (Section 3.3). Third, an intervention must not violate human rights. As protest movements acquire manifold protections under international human rights law, an intervention that undermines the exercise of human rights stands in contrast to fundamental principles of international law (Section 3.4).

3.1. Protests in Kazakhstan as a nonviolent protest movement

The protests in Kazakhstan qualify as a nonviolent protest. A nonviolent protest movement is an association of a large number of people that seek profound changes in their system of government through extra-institutional avenues by repeatedly exercising different forms of nonviolent action.⁹⁴ A protest movement is nonviolent when it refrains from using physical force against people or objects in the vast majority of incidents.⁹⁵ The Kazakh protesters pursued the extra-institutional resignation of key government figures and a profound reform of political institutions in a countrywide manner, with over 80 protest events in a few days.⁹⁶ The vast majority (95%) of these protests remained peaceful, despite repeated violence from government forces.⁹⁷ Moreover, organisations calling for protests urged protesters to remain nonviolent, which protesters repeated through verbal slogans and signs brought to assemblies.⁹⁸ Their protests were therefore nonviolent and due to their widespread character formed a nonviolent protest movement. This qualification is of relevance when arguing, in the next sections, about the (il)legality of the intervention. As Section 3.4 will highlight, nonviolent protest movements exercise a wide array of human rights and are protected by several human rights provision. In turn, violent actors are not protected by the same human rights provisions – most importantly, they do not retain the protection under freedom of assembly (Article 21 of the International Covenant on Civil and Political Rights). Therefore, the

⁹⁴Kriener (n 5) 886–7.

⁹⁵Florian Kriener, *State Support to Nonviolent Protest Movements in International Law* (Nomos, forthcoming 2024).

⁹⁶Satre and Satke (n 54).

⁹⁷Special rapporteur on the rights to freedom of peaceful assembly and of association and others (n 33) 7.

⁹⁸Kudaibergenova, 'Art and Protest' (n 3).

argument made subsequently only applies to struggles led by nonviolent movements.⁹⁹

3.2. Authority to invite

The first requirement for the legality of an intervention by invitation is that the invitation must emanate from the highest available governmental body in a state, is given free of error, fraud or coercion, and is clear and certain in content.¹⁰⁰ Moreover, the body issuing an invitation must have the authority to grant an invitation. This will generally be the case if the invitation originates from the government of a state.¹⁰¹ Therefore, international law has, broadly speaking, developed two approaches to determine the government of a state, which can accordingly issue invitations.¹⁰² On the one hand, the *effective* government that controls the territory of a state and its security forces can be considered the pertinent body. As the arbitrator in the *Tinoco Arbitration* (1923) argued, a sovereign government could establish itself through the control of a territory despite its anti-constitutional origins and lack of international recognition.¹⁰³ Even though this ruling dates back approximately 100 years, in current literature the arbitrational ruling is still cited by some scholars as a reference for the limited relevance of the recognition of governments by other states.¹⁰⁴ In line with this, some contemporary scholars continue to apply the effectiveness criteria when assessing which institution represents a state.¹⁰⁵ On the other hand, the *legitimate* governing body can be considered as the government that represents a state, even if it is not effectively in control of the territory of a state.¹⁰⁶ A government is legitimate if it represents the people of a state and governs with their consent, and not alone by brute force.¹⁰⁷ Recent state and UN Security

⁹⁹Accordingly, military operations by invitation of another state with the purpose of fighting an armed insurgency cannot serve as precedent for the question analysed in this article. The legal framework regulating those operations is different from the framework for quashing nonviolent protests abroad, and, thus, the situations are not comparable.

¹⁰⁰Nußberger (n 81).

¹⁰¹Georg Nolte, 'Intervention by Invitation' (October 2010) *Max Planck Encyclopedia of Public International Law*, para 17.

¹⁰²Helmut Philipp Aust, 'Die Anerkennung von Regierungen: Völkerrechtliche Grundlagen und Grenzen im Lichte des Falls Venezuela' (2020) 80 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 73.

¹⁰³*Aguilar-Amory and Royal Bank of Canada Claims (Great Britain v Costa Rica)* (award) [18 October 1923] RIAA, vol I, 369–99, 380.

¹⁰⁴Cornelia Hagedorn, 'Tinoco Concessions Arbitration' in Rüdiger Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2006), para 11.

¹⁰⁵Jochen A Frowein, 'Recognition' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2010), para 5; Aust (n 102) 85 footnote 44.

¹⁰⁶Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (Clarendon Press, 1998).

¹⁰⁷Brad R Roth, *Governmental Illegitimacy in International Law* (Clarendon Press, 1999) 38.

Council practice has been strongly inclined towards this approach.¹⁰⁸ In particular, invitations relying on an invitation by a legitimate but not effective government were widely accepted by the international community during the Economic Community of West African States (ECOWAS) intervention in the Gambia in 2017,¹⁰⁹ the Gulf Cooperation Council (GCC) intervention in Yemen from 2015,¹¹⁰ and the ECOWAS intervention in Cote d'Ivoire in 2011.¹¹¹ Moreover, the ICJ did not question the effectiveness of the government of the Democratic Republic of the Congo in the *Armed Activities* case, despite serious doubts as to its effectiveness in several parts of the country during the civil war.¹¹² Rather, the ICJ continuously assumed that the central government in Kinshasa had the sole authority to issue invitations to intervene. Although the ICJ did not elaborate on the government's effectiveness or legitimacy, the Court's treatment shows that the effectiveness of a government throughout its territory is not the stand-alone criterion for issuing a valid invitation. Accordingly, a government's legitimacy is central to the question whether it can issue an invitation.

The legitimacy of a government is dependent on its origin and the exercise of its governmental power.¹¹³ First and foremost, governmental legitimacy is a question of internal (constitutional) law. Most states have constitutions that detail the conditions for governmental ascension and succession.¹¹⁴ Constitutions set out the process through which a state organ acquires the consent of the people, and define how this consent can be renewed (i.e. through elections).¹¹⁵ Accordingly, constitutional legality will entail international legitimacy.¹¹⁶ However, this conception reaches its limits when constitutional systems are barred from popular participation.¹¹⁷ As Tom Ginsburg has set out, constitutional systems have been exploited by

¹⁰⁸Fox (n 87) 207; Anne Peters, 'Introduction' in Dino Kritsiotis, Olivier Corten and Gregory H Fox (eds), *Max Planck Trialogues on the Law of Peace and War Vol. IV* (Cambridge University Press, 2023) 7; Nußberger (n 81) 141–2.

¹⁰⁹Claus Kreß and Benjamin Nußberger, 'Pro-Democratic Intervention in Current International Law: The Case of The Gambia in January 2017' (2017) 4(2) *Journal on the Use of Force and International Law* 239.

¹¹⁰With regard to the legitimacy of President Hadi in Yemen, Nußberger argues: 'over time, this rather uncontested (internal) legitimacy has become more open to question; nonetheless, it is beyond controversy that, compared to other conflicting parties, he remains the "most legitimate": see Nußberger (n 81) 142.

¹¹¹See Julie Dubé Gagnon, 'ECOWAS's Right to Intervene in Cote d'Ivoire to Install Alassane Ouattara as President-Elect' (2013) 3 *Notre Dame Journal of International and Comparative Law* 66–8.

¹¹²*Armed Activities* (merits) (n 68) 168, para 92–105.

¹¹³Jean D'Aspremont, 'Legitimacy of Governments in the Age of Democracy' (2006) 38 *New York University Journal of International Law and Politics* 877, 894–908.

¹¹⁴Susan Marks, *The Riddle of all Constitutions: International Law, Democracy and the Critique of Ideology* (Oxford University Press, 2000).

¹¹⁵Some constitutions also provide for other processes through which a state organ acquires the consent of the people. These can be dependent on various factors, including historic and cultural elements. However, elections and referenda are the most common types of acquiring people's consent.

¹¹⁶Aust (n 102).

¹¹⁷Kriener (n 5) 883–4, 901–9.

authoritarian governments to create the image of popular legitimacy.¹¹⁸ In these contexts, popular participation mechanisms are frequently inaccessible to public participation and ineffective in legitimising the exercise of power. Elections are frequently rigged, the political opposition is persecuted or marginalised, and civil and political rights severely undermined.¹¹⁹ If this is the case, the constitutional system of a state does not guarantee the consent of the governed. Accordingly, the origin of its governmental power is tarnished. In addition, specific exercises of governmental power can tarnish a government's legitimacy, which includes severe human rights violations and *jus cogens* breaches.¹²⁰ Furthermore, the deliberate exclusion of its population from the political decision-making is an illegitimate exercise of governmental power. Therefore, the international legitimacy of governments that base their legitimacy on exclusionary constitutional systems, bar popular participation from public affairs, and commit grave human rights violations, is severely diminished.

Under these circumstances, protests can amount to the only form through which the population of a state can participate in public affairs.¹²¹ By exercising their 'back-end people power',¹²² they demonstrate that they do not consider themselves represented by the government and reject its authority. Nonviolent protests thus constitute a further challenge to the international legitimacy of a government.¹²³ A government cannot claim to represent the people of a state if its constitutional system does not allow for effective public participation and the people are massively requesting its removal through protests. This will be the case when protests are sufficiently inclusive, persistent, responsive and comprehensive.¹²⁴ They must unite a state's principal political and ethnic groups and engage collectively in nonviolent action methods directed against a government's authority. This struggle must expand over an extended timeframe, in order to ensure sufficient perseverance and not just an immediate reaction against a particular issue. Furthermore, the protest movement must react and accord to demands and

¹¹⁸Tom Ginsburg, 'How Authoritarians Use International Law' (2020) 31(4) *Journal of Democracy* 44; Tom Ginsburg, *Democracies and International Law* (Cambridge University Press, 2021) chap 5.

¹¹⁹For detailed analysis, see Nic Cheeseman and Brian Klaas, *How to Rig an Election* (Yale University Press, 2019).

¹²⁰Anne Peters, 'Introduction' in Dino Kritsiotis, Olivier Corten and Gregory H Fox (eds), *Max Planck Triangles on the Law of Peace and War* (Cambridge University Press, vol IV 2023) 9; Jure Vidmar, 'Human Rights, Democracy and the Legitimacy of Governments in International Law: Practice of States and UN Organs' in Carlo Wilson and Gary Wilson (eds), *The Arab Spring: New Patterns for Democracy and International Law* (Martinus Nijhoff Publishers, 2013) 62–8; D'Aspremont (n 113) 907; Niels Petersen, *Demokratie als teleologisches Prinzip – Zur Legitimität von Staatsgewalt im Völkerrecht* (Springer, 2009) 56–8.

¹²¹Kriener (n 5); Solomon A Dersso, 'The Status and Legitimacy of Popular Uprisings in the AU Norms on Democracy and Constitutional Governance' (2019) 63 *Journal of African Law* 107.

¹²²Elizabeth A Wilson, "'People Power' and the Problem of Sovereignty in International Law' (2016) 26 *Duke Journal of Comparative and International Law* 551, 583.

¹²³Kriener (n 5) 905.

¹²⁴*Ibid*, 905–7.

wishes from the public opinion, which ensures its responsiveness towards the population's wishes. The individual criteria are detailed thoroughly elsewhere.¹²⁵ Some state practice confirming this assumption has already emerged in the context of protests in Venezuela and Sudan in 2019 and Belarus in 2020.¹²⁶ However, state practice remains underdeveloped on this issue to date. Nonetheless, protest movements must be considered when assessing the legitimacy of a government; it is the consequence of the assumption that only governments that rule with the consent of their population are legitimate. Thus, when a protest movement arises against an illegitimate government, the government's authority to invite foreign forces for their quashing is precluded.

This applies to the invitation issued by Kassym-Jomart Tokayev. Tokayev was the president of Kazakhstan (the highest body of government) and was not under coercion or threat when issuing the clear and concise invitation towards the CSTO to intervene. However, Tokayev had ascended to power after the resignation of Nazarbayev amidst popular protests. His subsequent election was marred with election fraud¹²⁷ and, in the words of the *Election Observation Mission of the Organization for Security and Cooperation in Europe*, 'tarnished by clear violations of fundamental freedoms'.¹²⁸ Kazakhstan ranks 129th on the 2021 *Economist Intelligence Unit's* democracy ranking and is considered an 'authoritarian regime'.¹²⁹ Accordingly, popular participation mechanisms and election integrity are minimal. Moreover, international observers have accused the Tokayev regime of committing serious violations of international human rights law and prosecuting the internal opposition consistently,¹³⁰ which likewise tarnishes the government's legitimacy. Furthermore, the government faced widespread nonviolent protests demanding fundamental changes in the system of governance and the government's and president's resignation.¹³¹ Large portions of the population protested the

¹²⁵*Ibid.*

¹²⁶*Ibid.* See further Florian Kriener, *Die staatliche Unterstützung gewaltfreier Protestbewegungen im Völkerrecht* (Nomos, forthcoming 2024) section III. For Belarus, see Florian Kriener, 'Recognition of Protest Movements, What Implications for International Law?', *Minds of the Movement* (2 March 2021) www.nonviolent-conflict.org/blog_post/nonviolent-movements-and-the-recognition-of-governments-what-implications-for-international-law/.

¹²⁷Freedom in the World 2020 (n 20).

¹²⁸International Election Observation Mission, 'Republic of Kazakhstan – Early Presidential Election' (9 June 2019), 'Statement of Preliminary Findings and Conclusions' (10 June 2019). For further analysis, see Christian W Haerperfer and Ksenija Kizilova, 'Values and Transformation in Central Asia in Transformation and Development – Studies in the Organization for Security and Cooperation in Europe (OSCE) Member States' in Anja Mihr (ed), *Transformation and Development* (Springer, 2020) 7, 11.

¹²⁹Economist Intelligence Unit, 'Democracy Index 2021, The China Challenge' (2022) <https://www.eiu.com/n/campaigns/democracy-index-2021/>, 15 (accessed date?); Freedom in the World 2020 (n 20) qualifies the Kazakh government as a 'consolidated authoritarian regime'.

¹³⁰Amnesty International, 'Kazakhstan: Widespread Violation of Basic Rights Spurred Unprecedented Protests' (5 January 2022) www.amnesty.org/en/latest/news/2022/01/repression-kazakhstan-basic-rights-spurred-protests/ (accessed 16 August 2022).

¹³¹Kudaibergenova and Laruelle (n 16) 8.

government as a last resort due to non-existent participation mechanisms. The Tokayev government's legitimacy was accordingly severely tarnished before the protests, and then actively withdrawn by the country-wide protesters that demanded fundamental changes and a resignation of the government. Therefore, it is submitted here that President Tokayev did not have the necessary authority to extend a valid invitation to the CSTO states.

3.3. Self-determination

Second, quashing a nonviolent protest movement in a foreign state conflicts with the right to self-determination.

As outlined previously, the ICJ's ruling in the *Nicaragua* judgment implies that other conditions, besides a government's authority, must be met for intervention by invitation to be legal. In this regard, respect for the right to self-determination is often mentioned.¹³²

Despite its deep historical roots, the principle only emerged as a rule of customary international law during the decolonisation period.¹³³ In modern international law, the principle of self-determination is firmly rooted in customary international law and set out in Common Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). It enables peoples to freely determine their political, economic, cultural and social order 'without external interference'.¹³⁴ According to the UNGA's 1974 Definition of Aggression,¹³⁵ the 1970 Friendly Relations Declaration, and the African Charter on Human and Peoples' Rights,¹³⁶ the principle of self-determination also guarantees self-determination struggles. These resolutions and treaties argue that international law recognises a right to self-government and freedom from colonial oppression.¹³⁷ To enforce and assure this right, forcible oppression of a people's self-determination is prohibited and the people are accorded a right to take action against such forcible oppression. In this regard, the Friendly Relations Declaration states:

Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to

¹³²Corten (n 76) 104; Nolte (n 82) 221–60.

¹³³For an extensive review, see Tom Sparks, *Self-Determination in the International Legal System: Whose Claim, to What Right* (Bloomsbury, 2023) chapters II–III.

¹³⁴UNGA Res 2625 (XXV), UN Doc A/RES/2625 (24 October 1970) annex, 123.

¹³⁵UNGA Res 3314 (XXIX), UN Doc A/RES/3314 (14 December 1974) Article 7.

¹³⁶African Charter on Human and Peoples' Rights (1981) Article 20.

¹³⁷UN Doc A/RES/2625 (n 133) principle e.

receive support in accordance with the purposes and principles of the Charter.¹³⁸

The Friendly Relations Declaration further underlines that no state ‘*shall ... interfere in civil strife in another State*’.¹³⁹ This wording confirms that the principle of non-intervention, which significantly relies on the principle of self-determination,¹⁴⁰ may prohibit foreign military support in favour of the governmental authorities in some circumstances.¹⁴¹ In this sense, a state must not be reduced to its government, but rather taken as the sum of its constituent parts, which, importantly, includes its population.¹⁴² Therefore, people’s self-determination struggles must be taken into account when assessing the legality of an intervention by invitation.

Drawing thereon, the Institute de Droit International (IDI) in 1975 posited a prohibition of military assistance to ‘parties to a civil war which is being fought in the territory of another State’,¹⁴³ and argued that, in any case, when it appears that intervention has taken place during a civil war in violation of the preceding provision, ‘third states may give assistance to the other party only in compliance with the Charter and any other relevant rule of international law’.¹⁴⁴ Thus, respect for the rules of international law must be given. These rules include – even though not yet explicitly mentioned in the 1975 resolution – the right to self-determination. This so-called doctrine of ‘negative equality’ or ‘strict abstentionism’¹⁴⁵ has since gained the support of a multitude of authors.¹⁴⁶

In 2011, the IDI expanded the scope of the doctrine and explicitly referred to the right of self-determination. Considering that not all self-determination struggles reach the threshold of a civil war, and given the pervasive application of the principle of self-determination,¹⁴⁷ the resolution stipulates that interventions by invitation are likewise outlawed below the threshold

¹³⁸*Ibid*, 123.

¹³⁹*Ibid* (emphasis added).

¹⁴⁰Sparks (n 133) 21.

¹⁴¹Corten (n 76) 104.

¹⁴²*Ibid*, 104; Louise Doswald-Beck, ‘The Legal Validity of Military Intervention by Invitation of the Government’ (1985) 56 *British Yearbook of International Law* 243.

¹⁴³Institut de Droit International, *Wiesbaden Resolution* (1975) Article 2(1).

¹⁴⁴*Ibid*, Article 5.

¹⁴⁵The term ‘doctrine of negative equality’ was first used in the Report of the Independent International Fact Finding Mission on the Conflict in Georgia (25 September 2009) vol II, 277 www.mpil.de/files/pdf4/IIFFMCG_Volume_II1.pdf.

¹⁴⁶Doswald-Beck (n 142) 189; Redaelli (n 85) 92; Bannelier and Christakis, ‘Under the UN Security Council’s Watchful Eyes’ (n 83) 862–5; Nußberger (n 81) 130; Erika De Wet, *Military Assistance on Request and the Use of Force* (Oxford University Press, 2020) 81; Tom Ruys, ‘Of Arms, Funding and “Non-Lethal Assistance” – Issues Surrounding Third State Intervention in the Syrian Civil War’ (2014) 13(1) *Chinese Journal of International Law* 21; Corten (n 84) 302. Note that the support for the doctrine by some authors was also influenced by geopolitical reasons: Anne Peters, ‘Intervention by Invitation: Impulses from the Max Planck Dialogues on the Law of Peace and War’ (2019) 79 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 636.

¹⁴⁷Corten (n 76) 106.

of a civil war if they violate a people's right to self-determination.¹⁴⁸ The IDI resolution lists 'internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature'¹⁴⁹ as examples where the doctrine can apply and reiterates that military assistance is prohibited 'in particular when its object is to support an established government against its own population'.¹⁵⁰ This reasoning is in line with the premise espoused in the Friendly Relations Declaration. If international law permits struggles for self-determination, foreign interference with such struggles is impermissible even if the struggle does not reach the threshold of a civil war – or remains nonviolent in the first place.

These arguments were developed against the backdrop of a colonial right to self-determination. However, the scope of the principle of self-determination has expanded throughout recent decades to include an internal dimension.¹⁵¹ Accordingly, the right to self-determination does not only guarantee the *pouvoir constituant* of a people to self-governance but continues to guarantee self-determination within independent states. Thus, the right to self-determination guarantees the continued right of a population to choose its own political organisation. That choice can only be made in systems that allow for popular participation in political decision-making.¹⁵² Therefore, the internal right to self-determination guarantees the removal of an oppressive government within a state that severely undermines the people's will.¹⁵³ If an oppressive government violently suppresses all forms of public participation and thereby withdraws the choice of political order from its population, the population may engage in nonviolent struggle for their internal (political) self-determination. Following this argument, more recent peaceful protest movements have been qualified as struggles for self-determination by some authors.¹⁵⁴ This includes the protests during the so-called Arab Spring.¹⁵⁵

Therefore, the principle of self-determination allows people to take up a nonviolent struggle against oppressive governments that bar all forms of

¹⁴⁸Institute de Droit International, *Rhodes Resolution* (2011) Article.3.

¹⁴⁹*Ibid*, Article 2, para 1.

¹⁵⁰*Ibid*, Article 3.

¹⁵¹Olena Sihvo, *The Right to Democracy in the Age of Global Constitutionalism* (Åbo Akademi University Press 2019) 67–8; Frithjof Ehm, *Das Völkerrechtliche Demokratiegebot* (Mohr Siebeck, 2013); Kalana Senaratne, *Internal Self-Determination in International Law – History, Theory, and Practice* (Cambridge University Press, 2021) 54; Thomas Franck, 'The Emerging Right to Democratic Governance' (1992) *American Journal of International Law* 52; Patrick Thornberry, 'The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism' in Christian Tomuschat (ed), *The Modern Law of Self-Determination* (Martinus Nijhoff, 1993) 101.

¹⁵²Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press, 1995) 305.

¹⁵³Senaratne (n 151) 54.

¹⁵⁴Jordan J Paust, 'International Law, Dignity, Democracy, and the Arab Spring' (2013) 46 *Cornell International Law Journal* 1; Dersso (n 121) 107.

¹⁵⁵*Ibid*.

political participation and accordingly inhibit the free choice of political order. Correspondingly, states may not support such a government in quashing these struggles.

This reasoning is particularly striking in the case of the protest movement in Kazakhstan. The protests pursued a profound change in the political system and the removal of a repressive government. They occurred nationwide and included a large number of participants that repeatedly protested until their movement was violently repressed. The intervention, however, ended the protests violently and quashed the Kazakh peoples' intentions to free themselves from an oppressive government. The intervention therefore interfered with the self-determination struggle of the Kazakh people and thus violated the principle of self-determination.

3.4. Human rights

Thirdly, quashing nonviolent protest movements abroad by military means undermines international human rights law (IHRL), as IHRL entails several guarantees to protest (Section 3.4(a)) and generally prohibits their suppression through domestic or foreign military forces (Section 3.4(b)).

3.4(a) Protest in international human rights law

The protection of human rights during peaceful protests is currently at the forefront of several human rights institutions' agendas. The Human Rights Council's Special Rapporteur on Freedom of Assembly and Freedom of Association centred his 2022 thematic report on the issue.¹⁵⁶ Likewise, the Human Rights Committee (HRC) issued its first General Comment on Freedom of Assembly in 2020.¹⁵⁷ This surge in activity on the matter is a response to the increasing occurrence and importance of protests. The 2010s have been deemed the decade of protests, with 2019 being the year of most protests recorded worldwide.¹⁵⁸ In recent years, significant anti-government protests have erupted frequently, numbering over 400 since 2017.¹⁵⁹ Protests have particularly affected authoritarian states, with half of all authoritarian governments confronted with protests since 2015.¹⁶⁰

¹⁵⁶UN Human Rights Council, 'Protection of Human Rights in the Context of Peaceful Protests during Crisis Situations – Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Clément Nyaletsossi Voule' (16 May 2022) UN Doc A/HRC/50/42.

¹⁵⁷UN Human Rights Committee, 'General Comment 37' (17 September 2020) UN Doc CCPR/C/GC/37. Furthermore, the issue also concerns the European Court of Human Rights, which recently published the first guide on its case law concerning the protection of human rights during 'mass protests': see ECtHR, *Guide on the Case-Law of the European Convention on Human Rights – Mass Protests* (2020).

¹⁵⁸Erica Chenoweth, 'The Future of Nonviolent Resistance' (2020) 31(3) *Journal of Democracy* 31/3, 2020, 69.

¹⁵⁹Carnegie Endowment for International Peace, 'Global Protest Tracker' (7 September 2023) <https://carnegieendowment.org/publications/interactive/protest-tracker>.

¹⁶⁰Carothers and Press (n 8) 20.

Therefore, the question frequently arose whether protests receive protection through human rights treaties and to what extent they can be restricted. This question is likewise of relevance to the protests in Kazakhstan, as Kazakhstan has been a member state of the ICCPR since 2006.¹⁶¹

The term 'protest' is not mentioned in any of the regional or universal human rights treaties. However, important elements of protest are guaranteed in international human rights treaties. Most importantly, freedom of expression (Article 19 ICCPR) and peaceful assembly (Article 21 ICCPR) guarantee the public and collective communication of dissent.¹⁶² Moreover, freedom of association (Article 22 ICCPR) ensures that people can gather to pursue long-term political goals, including repeated peaceful assemblies.¹⁶³ Furthermore, assemblies and expressions of dissent are important elements of the right to participate in public affairs enshrined in Article 25 ICCPR.¹⁶⁴ Ultimately, individual methods of protest besides peaceful assemblies are guaranteed. The freedom of association entails a right to strike (Article 8 (1)(d) ICESCR) and freedom of expression protects single-person protests. The most important aspects of protests are accordingly under protection by IHRL.

Nonetheless, governments frequently suppress protests, particularly if they transform from single and dispersed assemblies to fully-fledged protest movements that seek profound political changes.¹⁶⁵ As justification for their suppression, governments will frequently raise three arguments.

First, governments frequently argue that the protests are subversive.¹⁶⁶ However, such suppression contradicts IHRL, as protesters are allowed to demand a democratic change in government under Article 19 ICCPR, even if this entails advocacy against an undemocratic government. The HRC rejected Cameroon's argument that it could censor such 'subversive' calls for a change in government and democratisation in order to ensure national unity.¹⁶⁷ It argued that the ICCPR is based on a democratic

¹⁶¹Office of the High Commissioner on Human Rights, 'Ratification Status for CCPR', https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR&Lang=en.

¹⁶²Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, 3rd edn 2013) para 18.09.

¹⁶³William A Schabas, *Nowak's CCPR Commentary* (N P Engel, 3rd edn 2019) Article 22, para 8.

¹⁶⁴UN Human Rights Committee, General Comment 25, CCPR/C/21/Rev.1/Add.7, para 8.

¹⁶⁵Carothers and Press (n 8) 21.

¹⁶⁶UNGA Verbatim Record, UN Doc A/68/PV.80 (27 March 2014) 3 (Russia); Delegation of Ukraine to the OSCE, 'Statement in Response to the Statements on Current Political Situation in Ukraine' (23 January 2014) PC.DEL/24/14; Delegation of the Russian Federation to the OSCE, 'Statement by Mr. Andrey Kelin, Permanent Representative of the Russian Federation, at the 981st Meeting of the OSCE Permanent Council' (27 January 2014) PC.DEL/42/14; National Security Law for Hong Kong (2020) Article XX. On the HK protests, see KCNA Watch, 'Stand of Chinese Party and Government Supported: Rodong Sinmun' (13 August 2019) <https://kcnawatch.org/newstream/1565764212-956751434/stand-of-chinese-party-and-government-supported-rodong-sinmun/>.

¹⁶⁷UN Human Rights Committee, 'Womah Mukong v Cameroon', Communication No 458/1991 (21 July 1994) UN Doc CCPR/C/51/D/458/1991.

system wherefore advocacy in favour of democracy is generally allowed. Drawing on this case, the HRC's General Comment 34 states:

Paragraph 3 [of Article 19 ICCPR] may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights.¹⁶⁸

Calls for a democratic change in government are likewise not considered an abuse of rights in terms of Article 5 ICCPR. Article 5 ICCPR has only been applied very narrowly to fascist or totalitarian parties.¹⁶⁹ Advocacy for democracy is thus protected by the freedom of expression under Article 19 ICCPR, even if this implies a change in government. The reasoning that protests are 'subversive' accordingly does not justify their quashing.

Second, governments will frequently argue that the protests are violent or likely to turn violent.¹⁷⁰ This justification for quashing the protests likewise contradicts IHRL, in particular Article 21 ICCPR. Protesters may assemble peacefully pursuant to Article 21 ICCPR. The HRC's General Comment 37 stipulates that assemblies are peaceful if they refrain from employing physical force that damages or is likely to damage other people or property.¹⁷¹ Accordingly, simple shoving or temporary street blockades are considered peaceful.¹⁷² Moreover, isolated incidents of violence do not affect the peacefulness of the assembly as a whole.¹⁷³ Therefore, governments must generally assume assemblies to be peaceful even if sporadic incidents of physical force occur.¹⁷⁴ Accordingly, the speculation that the protests are *likely* to turn violent cannot serve as a justification for their suppression if there is no concrete evidence to support this forecast. Comprehensive bans on protests under the mere pretext of the likelihood of violence, as set in place by the Kazakh government after 3 January 2022, are in clear violation of Article 21 ICCPR.

Third, governments will frequently rely on Article 4 ICCPR by declaring a state of emergency, as was the case in Kazakhstan.¹⁷⁵ However, the presence of nonviolent protest movements does not provoke a 'public emergency' in terms of Article 4 ICCPR that permits a derogation. Moreover, even if a

¹⁶⁸UN Human Rights Committee, 'General Comment 34' (12 September 2011) UN Doc CCPR/C/GC/34, para 23.

¹⁶⁹UN Human Rights Committee, 'M.A. v Italy', Communication No. 117/1981 (10 April 1984) UN Doc A/39/40, 190; for the ECHR's equivalent Article 5, see European Commission of Human Rights, 'Decision by the Commission on the Admissibility of Application No. 250/57' (20 July 1957).

¹⁷⁰UN Doc A/68/PV.80 (n 166) 3 (Russia); Delegation of Ukraine to the OSCE (n 166); Delegation of the Russian Federation to the OSCE (n 166); National Security Law for Hong Kong (n 166) Article XX; KCNA Watch (n 166).

¹⁷¹UN Doc CCPR/C/GC/37 (n 157) para 15.

¹⁷²*Ibid.*

¹⁷³*Ibid.*, para 17.

¹⁷⁴*Ibid.*

¹⁷⁵Official Website of the President of the Republic of Kazakhstan (n 27).

‘public emergency’ is accepted in these circumstances, states are still bound to a minimum human rights standard, which excludes the quashing of protests through military means. Pursuant to Article 4 ICCPR, states are allowed to derogate from some of the human rights protected by the Covenant, including the right to peaceful assembly enshrined in Article 21 ICCPR. However, derogations to this right are subject to strict limitations even in the event of mass demonstrations that include acts of violence.¹⁷⁶ Restrictions need to be necessary, proportionate, non-discriminatory, limited in duration and comprise key safeguards against excesses.¹⁷⁷ Using excessive, systematic, and indiscriminate violence, as used in Kazakhstan by the security forces,¹⁷⁸ exceeds these limits of a lawful derogation pursuant to Article 4 ICCPR. Furthermore, a state must not rely on a derogation from the right of peaceful assembly if it can attain its objectives by imposing lesser restrictions in line with the provisions of Article 21 ICCPR.¹⁷⁹ Moreover, the Special Rapporteur on Freedom of Assembly and Association’s 2022 report highlights that even during a state of emergency, other rights and principles relevant to peaceful protests, such as the right to life, are non-derogable in all circumstances.¹⁸⁰ A shoot-to-kill order, as issued by President Tokayev, thus exceeds the limits of a lawful derogation all the more. To conclude, quashing nonviolent protest movements by using excessive force cannot be considered a lawful derogation in terms of Article 4 ICCPR.

As outlined previously, the three frequently used justifications for the comprehensive prohibition and suppression of peaceful mass protests are not valid under international law. Thus, the prohibition and suppression of the protests under these pretexts violates the human rights of protesters in general, as was the case for the human rights of protesters in Kazakhstan.

3.4(b) Military suppression of protests

Additionally, Article 21 ICCPR will in principle be violated if protests are suppressed by military forces. Pursuant to Article 21 ICCPR, restrictions upon the freedom of assembly must be necessary, which requires all measures directed against protests to be proportionate.¹⁸¹ The employment

¹⁷⁶UN Doc CCPR/C/GC/37 (n 157) para 96.

¹⁷⁷Special rapporteur on the rights to freedom of peaceful assembly and of association and others (n 33) 8.

¹⁷⁸*Ibid*, 7.

¹⁷⁹UN Doc CCPR/C/GC/37 (n 157) para 96; Special rapporteur on the rights to freedom of peaceful assembly and of association and others (n 33) 8.

¹⁸⁰UN Doc A/HRC/50/42 (n 156) para 8; Special rapporteur on the rights to freedom of peaceful assembly and of association and others (n 33) 8.

¹⁸¹*Ibid*, para 40.

of military forces to suppress protests will in the majority of cases not meet these requirements.

Military forces are equipped and trained to combat military threats.¹⁸² Their responses are accordingly more severe than regular police forces, and military forces are more prone to use armed force.¹⁸³ Therefore, the HRC's General Comment 37 asserts that military forces should not be used to police assemblies.¹⁸⁴ Furthermore, lethal force against individuals may only be deployed in exceptional circumstances when there is an imminent threat of death or serious injury.¹⁸⁵ Unarmed protesters, however, do not pose such a threat in a way that 'excessive, systematic and indiscriminate violence', as used in Kazakhstan by the security forces,¹⁸⁶ would be necessary or permissible. The Special Rapporteur on Freedom of Association and Assembly therefore asserts that the use of the military in these circumstances will almost always be disproportionate.¹⁸⁷ This is certainly the case if a shoot-to-kill order is given, as was the case in Kazakhstan. The use of force in Kazakhstan to disperse the nonviolent protests therefore exceeds the permissible legal framework of Article 21 ICCPR.

This reasoning applies even more strongly when foreign forces are sent to a different state to quash nonviolent protests. This was highlighted explicitly by the Special Rapporteur in his 2022 thematic report:

The deployment of foreign military forces to police protests is of even greater concern, such as in Kazakhstan where troops from the Collective Security Treaty Organization were brought in to suppress large-scale protests. Deployment of external forces increases the potential of violations and impunity. In all circumstances, the deployment of military or militarized forces to police protests tends to undermine efforts to build community trust and create the potential for the escalation of violence.¹⁸⁸

Thus, the suppression of peaceful mass protests by military force will – in principle – not be necessary within the meaning of Article 21 ICCPR, and thus cannot justify an infringement of the freedom to assemble peacefully.

In summary, the suppression of protests through the military will generally constitute a violation of international human rights law. When military forces intervene in a different state to quash protests, the effects of the intervention are incompatible with IHRL.

¹⁸²Cf UN Doc A/HRC/50/42 (n 156) para 31.

¹⁸³*Ibid*, para 31.

¹⁸⁴UN Doc CCPR/C/GC/37 (n 157) para 80.

¹⁸⁵Special rapporteur on the rights to freedom of peaceful assembly and of association and others (n 33) 7.

¹⁸⁶*Ibid*, 7.

¹⁸⁷UN Doc A/HRC/50/42 (n 156) para 31.

¹⁸⁸*Ibid*, para 32.

4. Quashing foreign protests in international law

The previous sections have outlined the international legal framework which suggests that three fundamental principles of international law are violated by an intervention to quash a nonviolent protest movement. First, states faced with mass protests lack the authority to issue valid invitations. As the citizens withdraw their consent to the government, its legitimacy likewise diminishes. Invitations issued under these circumstances therefore do not justify an intervention. Second, states interfere with a people's right to self-determination if they undermine peaceful self-determination struggles that take the form of protests. Third, military interventions to suppress peaceful protests undermine international human rights law. The effects of an intervention by invitation on these fundamental principles of international law were exemplified against the backdrop of the CSTO intervention in Kazakhstan. Therefore, it is submitted here that the intervention was illegal despite the invitation issued by President Tokayev.

This is particularly important against the backdrop of current international developments. Nonviolent protest movements are indispensable for strengthening human rights and democracy throughout the world. In recent decades, they have been a key driver of democratisation¹⁸⁹ and securing human rights.¹⁹⁰ Moreover, they have been instrumental in advancing other social issues and the rights of marginalised communities.¹⁹¹ Effective protection of protest movements is essential.

Therefore, it is particularly concerning to see authoritarian states intervening to crush nonviolent protest movements in recent years. Autocratic regimes have learned lessons from each other on how to effectively quash dissent. Moreover, they have aided each other in suppressing protests,¹⁹² with Kazakhstan being only one of the latest examples. Russia sent military forces to Venezuela at the height of protests in 2019.¹⁹³ Moreover, Russia concluded a security agreement with Nicaragua in 2022 allowing for the dispatch of armed forces in the case of protests.¹⁹⁴ China concluded a security treaty with the Solomon Islands in 2022, which likewise allows for the dispatch of troops when protests arise.¹⁹⁵ Saudi Arabia already displayed the

¹⁸⁹Jonathan C Pinckney, *From Dissent to Democracy: The Promise and Perils of Civil Resistance Transitions* (Oxford University Press, 2020).

¹⁹⁰UN Doc A/HRC/50/42 (n 156) paras 4, 7.

¹⁹¹*Ibid*, para 4.

¹⁹²Tom Ginsburg, 'Article 2(4) and Authoritarian International Law' (2022) 116 *American Journal of International Law Unbound* 130.

¹⁹³Russia defends troops in Venezuela', *Deutsche Welle* (26 March 2019) www.dw.com/en/russia-defends-troops-in-venezuela/a-48070760

¹⁹⁴William Loughridge, 'Nicaragua: Putin's new client state', *Brown Political Review* (14 November 2022) <https://brownpoliticalreview.org/2022/11/nicaragua-russias-new-client-state/>.

¹⁹⁵Patricia M Kim, 'Does the China-Solomon Islands security pact portend a more interventionist Beijing?', *Brookings* (6 May 2022) www.brookings.edu/blog/order-from-chaos/2022/05/06/does-the-china-solomon-islands-security-pact-portend-a-more-interventionist-beijing/.

efficacy of such dispatches when it quashed protests in Bahrain in 2011.¹⁹⁶ State practice is still limited in this regard, and the reactions to these interventions from the international community has not, to date, shown whether such interventions are generally accepted as legal or rejected as illegal. In response to the mentioned interventions, states remained silent and have not expressed opinions concerning their legality – similarly as in response to the intervention in Kazakhstan. The practice and *opinio juris* of states is currently developing in this field.

However, if the practice of intervening abroad to quash violent protests entrenches itself and starts to be recognised as lawful by the international community, the effectiveness and important role of protest could suffer significant losses. The positive effects associated with successful protest movements would decline further. Therefore, it remains essential to highlight the legal framework that suggests that such interventions violate the basic principles of international law. Interventions to suppress nonviolent protest movements therefore must not be accepted without comment by other states.¹⁹⁷

Acknowledgements

The authors thank Julius Bayón, Julia Emtseva, Felix Herbert, Daniel-Erasmus Khan, Christian Marxsen, Alvaro Paúl, Cindy Wittke, and two anonymous peer-reviewers for helpful comments on an earlier draft. An earlier draft was presented at the Research Forum of the European Society of International Law in Tartu, Estonia, on 28 April 2023.

Disclosure statement

No potential conflict of interest was reported by the author(s).

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¹⁹⁶Ethan Bronner and Michael Slackman, 'Saudi Troops Enter Bahrain to Help Put Down Unrest', *The New York Times* (14 March 2011) www.nytimes.com/2011/03/15/world/middleeast/15bahrain.html.

¹⁹⁷As consent in principle can also be expressed through acquiescence, states should not accept the suppression of nonviolent protest movements without comment in order to avoid a behavior that would imply their tacit recognition of such an act: *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)* (judgment) [1984] ICJ Rep 246, para 130.