Parliamentary Visits to Places of Armed Conflict and Disputed Territories

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Abstract

This paper explores the international legal dimension of parliamentary visits to places of armed conflict and disputed territories. The analysis takes place against the backdrop of controversial visits by MPs of several states to the occupied territories of eastern Ukraine and by heads of parliament to Taiwan. It argues that the interaction of parliamentary visits with international legal and political norms is greater than so far perceived by academia and parliamentary actors themselves. This underscores the need for an en-

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hanced awareness of existing legal pitfalls when conducting parliamentary visits abroad and suggests more nuanced considerations of international legal aspects in their planning.

The paper first discusses the legality of parliamentary visits through the prism of state responsibility. It scrutinises their attribution under Articles on State Responsibility (ARSIWA). Additionally, it discusses breaches of two international norms that may arise over the course of parliamentary visits, namely the obligations of non-recognition and the prohibition of intervention. In a second step, this paper engages with two international legal-policy implications of parliamentary visits: Firstly, it explores the use of so-called Joint Parliamentary Communiqués to counter undesired visits. Secondly, it discusses how parliamentary visits, particularly in challenging diplomatic contexts, can serve as a tool, (re)opening doors for (re)establishing friendly inter-state relations.

Keywords

armed conflict – parliament – territory – state responsibility – Taiwan – Ukraine

Introduction

In an interview conducted in summer 2023, a journalist asked German Foreign Minister Baerbock whether there might be anything about her current term of office that would be cause for regret. After a brief pause, the Foreign Minister then answered: 'Perhaps we ought to have travelled to Ukraine very early on with several government representatives.'[1] This response by the German Foreign Minister reflects the importance in international politics of visits between states. High-ranking executive officials travel to other states for so-called 'state visits' upon invitation.[2] In light of a diversification of actors on the international plane, non-state actors such as Non-Governmental Organisations (NGOs), corporations, social movements, think tanks, foundations, philanthropists, armed groups, and even cultural

1 ARD and SWR (German Public Broadcast), 'Ernstfall – Regieren am Limit', Folge 1, Minute 33:01-33:31; author's translation.

2 Erik Goldstein, 'The Politics of the State Visit', The Hague Journal of Diplomacy 3 (2008), 153-178; Joanne Foakes, *The Position of Heads of State and Senior Officials in International Law* (Oxford University Press 2014), 6, 26, 73, 117.

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and sport institutions also engage in international exchange.[3] Such diversity, however, extends also to other state actors beyond the executive, such as parliaments and their members, who in addition to the well-established executive diplomatic channels, participate increasingly in international state visits, travels and diplomatic exchanges.[4] Perhaps the most noteworthy visit was that of Speaker of the United States (US) House of Representatives, Nancy Pelosi, in 2022 to Taiwan.[5]

The reasons why parliamentary actors participate in foreign policy may be several: to demonstrate alliances between their state and another state, to promote economic cooperation, or simply to address their own domestic constituents.[6] Visits by parliamentary actors differ with respect to the number of participating Members of Parliament (MPs) and the duration, composition, and topics discussed. Visits signal parliamentary involvement in foreign and international policy decisions and constitute an innovative variant in diplomacy, so-called parliamentary diplomacy.[7] While parliamentary diplomacy and visits have meanwhile become an object of research in social and political

3 Auriane Guilbaud, 'Diplomacy by Non-State Actors' in: Thierry Balzacq, Frédéric Charillon and Frédéric Ramel (eds), *Global Diplomacy – An Introduction to Theory and Practice* (Palgrave Macmillan 2020), 183-194; Geun Lee and Kadir Ayhan, 'Why Do We Need Non-State Actors in Public Diplomacy?: Theoretical Discussion of Relational, Networked and Collaborative Public Diplomacy', Journal of International and Area Studies 22 (2015), 57-77; May Darwich, 'Foreign Policy Analysis and Armed Non-State Actors in World Politics: Lessons from the Middle East', Foreign Policy Analysis 17 (2021); Michał Marcin Kobierecki, *Sports Diplomacy: Sports in the Diplomatic Activities of States and Non-State Actors* (Lexington Books 2020).

4 Stelios Stavridis, 'Conclusions: Parliamentary Diplomacy as a Global Phenomenon' in: Stelios Stavridis and Davor Jančić (eds), *Parliamentary Diplomacy in European and Global Governance* (Brill 2017), 368-387 (377-378, 384).

5 Nancy Pelosi, Congressional Delegation Statement on Visit to Taiwan, Press Release, 2 August 2022.

6 Stavridis 'Conclusions' (n. 4); Wolfgang Wagner, 'Parliaments in Foreign Affairs' in: William R. Thompson et al. (eds), *Oxford Research Encyclopedia of Politics* (online edn, Oxford University Press 2017), 6-7.

7 Stelios Stavridis and Davor Jančić, 'Introduction' in: Stavridis and Jančić (eds), *Parliamentary Diplomacy in European and Global Governance* (Brill 2017), 1-15 (6); Yolanda Kemp Spies, *Global South Perspectives on Diplomacy* (Palgrave Macmillan 2019), 49; Frans W. Weisglas and Gonnie de Boer, 'Parliamentary Diplomacy', The Hague Journal of Diplomacy 2 (2007), 93-99; Geoffrey A. Pigman, *Contemporary Diplomacy. Representation and Communication in a Globalized World* (Polity Press 2010), 46; Stelios Stavridis, 'Parliamentary Diplomacy: A Review Article', International Journal of Parliamentary Studies 1 (2021), 227-269 (235); Michael Giesen and Thomas Malang, 'Legislative Communities. Conceptualising and Mapping International Parliamentary Relations', Journal of International Relations and Development 25 (2022), 523-555, (526); Edvana Tiri and Kristina Jance, 'The Role of Parliamentary Diplomacy', Revue européenne du droit social 38 (2018), 38-43.

science,[8] there remains little if any substantial research on the international legal implications of international parliamentary conduct.[9] The present paper seeks to fill this gap for parliamentary visits in international legal scholarship.

Its aim is twofold: to determine the lawfulness of parliamentary visits to places of armed conflict and disputed territories and, furthermore, to analyse selected legal-policy implications that arise from such visits. Traditionally, parliament is a state actor that is not perceived as representing the state abroad. According to international law, however, in instances in which parliamentary visits are attributable to the state and conflict with existing state obligations, parliaments are awarded representational status. Thereby, such visits entail the potential to foment tensions with that very state's executive, as the executive's entitlement to represent the state and the external perception of the state 'speaking with one voice' might be challenged. It should be noted, furthermore, that increased legalisation of parliamentary action also entails a lessening of flexibility and informality.[10] Where parliamentary conduct becomes part of international legal scrutiny, states lose a degree of their freedom to engage in informal exchange; whereby traditionally, parliamentary diplomacy constitutes a key dimension of these informal contacts. Thus, while dealing with the international legal relevance of parliamentary visits goes beyond mere questions of legality, the engagement with the legality of parliamentary visits does contribute to greater discussions on the role of parliament in foreign policy and international law. The findings should inform legal academics and practitioners, namely executives, parliamentarians, and parliamentary administrations, alike.

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8 Stavridis and Jančić, 'Introduction' (n. 7), 6; Kemp Spies (n. 7), 49; Weisglas and de Boer (n. 7), 93-99; Pigman (n. 7), 46; Stavridis, 'A Review Article' (n. 7), 235; Giesen and Malang (n. 7), 526; Tiri and Jance (n. 7), 38-43; Wagner, 'Parliaments' (n. 6); see also more broadly the research project by Thomas Malang, 'Working Group Legislatures in International Politics', University of Konstanz, <https://www.polver.uni-konstanz.de/en/malang0/>, last access 28 August 2024.

9 This under exploration is also highlighted by the ILA: <https://www.ilaparis2023.org/en/webinars/inaugural-webinar/>, last access 30 July 2024; exceptions taking up this aspect: Heike Krieger, 'Verteidigung in Zeiten des geopolitischen Wandels', JZ 21 (2022), 1013-1021 (1014 f.); Larissa van den Herik, 'Zwischen parlamentarischer Diplomatie und Aktivismus: Über das Gutachten des niederländischen Beirats für Völkerrecht zur Verwendung des Begriffes „Völkermord" im politischen Raum', Zeitschrift für internationale Strafrechtsdogmatik 12 (2017), 724-732 (724); Larissa van den Herik and Rafael Braga da Silva, 'Parliamentary Condemnations of Mass Atrocities and the Obligation to Prevent Genocide and Crimes Against Humanity', Washington University Global Studies Law Review 21 (2022), 113-136.

10 Kenneth W. Abbott et al., 'The Concept of Legalization', IO 53 (2000), 401-419; see for the wider problem in international law: Andreas Zimmermann and Nora Jauer, 'Possible Indirect Legal Effects Under International Law of Non-Legally Binding Instruments', KFG Working Paper Series, No. 48, May 2021, Berlin Potsdam Research Group 'The International Rule of Law – Rise or Decline?'.

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The author argues that whereas parliamentary conduct enjoys proportionately less legal force than does conduct by heads of state or government,[11] parliamentary visits can have significant legal implications. The first part of the present paper outlines the general legal permissibility of visits upon invitation before going on to defining the term 'parliamentary visit' (I). Part two presents parliamentary visits to the occupied eastern territories of Ukraine (occupied Ukrainian territories)[12] and Taiwan, as exemplary of contentious political and legal debates on parliamentary visits to places of armed conflict and disputed territories (II). Bearing in mind these debates, part three goes on to analyse the legality of parliamentary visits to places of armed conflict and disputed territories in accordance with the Articles on State Responsibility[13] (III). Part four draws attention to two international legal-policy implications of parliamentary visits beyond purely legal questions pertaining to state responsibility (IV). The conclusion underscores that while parliamentary visits remain first and foremost within the political realm, visits can generate certain legal problems to which due regard needs to be paid. The present paper thus argues for more nuanced reflection of international legal aspects in the planning of parliamentary visits.

I. Legality of Visits Upon Invitation

When parliamentary actors are invited by the executive or parliament of another state, the visit usually does not conflict with existing international legal obligations.[14] It is the sovereign right of every state to invite whomso-

11 See Foakes (n. 2), 41-42; ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), preliminary objections (1996), ICJ Report (1996), 4, para. 44: 'According to international law, there is no doubt that every Head of State is presumed to be able to act on behalf of the State in its international relations (see for example the Vienna Convention on the Law of Treaties, Art. 7, para. 2 (a))'.

12 This term refers to Crimea, Luhansk, Donezk, and Saprorischia. These territories belong to Ukraine under international law. Although some of these territories are strictly speaking annexed by Russia, the term 'occupied Ukrainian territories' is used as the wide known term for describing these regions in current debates.

13 ILC, 'Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries', (2001) ILCYB, Vol. II, Part Two.

14 Theoretically such a visit can cause complicity to a breach, in case the inviting state violates *ius cogens* obligations. On complicity, Helmut Philipp Aust, *Complicity and the Law of State Responsibility* (Cambridge University Press 2011); Miles Jackson, *Complicity in International Law* (Oxford University Press 2015).

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ever it sees fit;[15] according to Article 20 ARSIWA, consent for such bilateral visits, as instanced by an invitation, precludes wrongfulness. Hence, Ukraine has the sovereign right to invite German MPs Hofreiter, Strack-Zimmermann and Roth for a visit to Kyiv.[16] When parliament issues such an invitation, visits often comprise part of the work of the respective states' parliamentary friendship groups.[17] Permissible visits upon invitation constitute the vast majority of parliamentary visits, which may be among the reasons why international law, to date, has failed to acknowledge their potential legal relevance.

International law has yet to provide a fixed definition for the term 'parliamentary visit'. For the purposes of this paper the term is used in a broad sense by drawing on definitions of the terms 'parliamentary diplomacy' and 'state visit' as employed in political science.[18] Building mainly on a definition of parliamentary diplomacy put forward by Stavridis, a parliamentary visit is:

> any form of travel to a different state or territory of a diplomatic nature that involves at least one parliamentary actor, and which aims to impact on a particular international issue or an internal issue with international implications.[19]

Not being restricted to formal diplomatic relations, the term 'diplomatic nature' may refer to meetings between visiting MPs and non-internationally recognised governments or states, such as competing governments, *de facto* regimes,[20] *de facto* administrators, officials, or authorities. Hence, the term parliamentary visit is employed descriptively and factually rather than normatively, whereby visits beyond the 'visits upon invitation' fall under this definition. Consequently, some of these parliamentary visits lead to disputes over their legality.

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15 See Samantha Besson, 'Sovereignty' in: Anne Peters and Rüdiger Wolfrum (eds), *MPEPIL* (online edn, Oxford University Press 2011), paras 59-84.

16 https://www.tagesschau.de/ausland/ukraine-besuch-ausschussvorsitzende-bundestag-101.html>, last access 11 September 2024

17 For example: EU Implementing Provisions Governing the Work of Delegations and Missions Outside the European Union, Annex I, 13-14.

18 These terms are defined in different publications, such as, Weisglas and de Boer (n. 7); Pigman (n. 7), 46; Stavridis and Jančić, 'Introduction' (n. 7), 6; Giesen and Malang (n. 7), 526; Matt Malis and Alastair Smith, 'State Visits and Leader Survival', AJPS 65 (2020), 241-256 (242); Goldstein (n. 2).

19 See for the borrowing from the definition of parliamentary diplomacy Stavridis, 'A Review Article' (n. 7), 235.

20 Jochen Abr. Frowein, 'De Facto Regime' in: Anne Peters and Rüdiger Wolfrum (eds), *MPEPIL* (online edn, Oxford University Press 2013).

II. Parliamentary Visits to Occupied Ukrainian Territories and to Taiwan

Legal disputes arise when parliamentary actors travel to places of armed conflict or disputed territories. In such scenarios, competing claims over certain regions or territories are raised by competing states, governments, *de facto* regimes, *de facto* administrators, officials, or authorities – broadly speaking, by competing political entities that are party to the conflict or dispute in question. In such cases, parliamentary visits become contentious insofar as such disputes are often accompanied by competing claims to the 'legitimate authority to rule' over a given region or territory, irrespective of the legal soundness of these claims. This paragraph introduces two situations, namely, the parliamentary visits to the occupied Ukrainian territories and to Taiwan, as exemplary thereof.

Since the Russian Federation's (Russia) annexation of Crimea in 2014, and following its full-scale aggression in eastern Ukraine in 2022, foreign parliamentarians have been visiting the occupied territories without Ukraine's consent. These visits occur in varying constellations and are of varying dimensions, ranging from visits by British,[21] Bulgarian,[22] German,[23] European,[24] Italian,[25] Czech, and Cypriot[26] MPs. The purpose of such visits include what they commonly refer to as 'election monitoring' on Crimea, attending meetings with occupying authorities, or – again in their words – simply 'to obtain a real picture' of Russian actions on the ground, and not one that has been 'faked by Western media'.[27] Notably, the majority of

21 <https://uk.mfa.gov.ua/en/news/64495-open-letter-of-ambassador-ngalibarenko-to-bill-etheridge-mep-with-regard-to-his-recent-visit-to-the-russia-occupied-ukrainian-crimea>, last access 8 August 2024.

22 <https://www.unian.info/politics/10260549-ukrainian-embassy-condemns-visit-of-bulgarian-politicians-to-occupied-crimea-media.html>, last access 8 August 2024 and <https://khpg.org/en/1423879542>, last access 8 August 2024.

23 In 2019 <https://www.dw.com/en/afd-lawmaker-to-travel-to-crimea-despite-international-protest/a-48357923>, last access 8 August 2024; in 2022 <https://www.dw.com/de/protest-gegen-krim-reise-afd-abgeordneter/a-48374803>, last access 8 August 2024.

24 <https://ukraine-eu.mfa.gov.ua/en/news/predstavnik-ukrayini-pri-yes-zvernuvsya-do-kerivnictva-yevroparlamentu-iz-zaklikom-zasuditi-nezakonnij-vizit-francuzkih-yevrodeputativ-do-okupovanogo-krimu>, last access 8 August 2024.

25 <https://archive.kyivpost.com/ukraine-politics/group-italian-lawmakers-businessmen-visit-crimea.html>, last access 8 August 2024.

26 In 2018 <https://www.blackseanews.net/en/read/142853>, last access 8 August 2024; in 2017 <https://archive.kyivpost.com/eastern-europe/meps-visit-crimea-just-russias-invitation-march-19.html>, last access 8 August 2024.

27 Aforementioned links in n. 22-26.

parliamentarians who undertake these visits stand out as particularly pro-Russian or have some affinity to Russian politics and are frequently associated with populist parties to the far-right or far-left of the political spectrum. Occasionally, states' responses to these visits imply their disapproval under international law. Responding to a visit by ten members of the French Assemblée Nationale to Crimea in 2015, the French Ministry of Foreign Affairs spokesperson pointed out the risk of violations of international law.[28] In a press release during French MPs second visit to Crimea in 2016,[29] the Ukrainian Ministry of Foreign Affairs took a similar position by pointing to a potential conflict with international law.[30]

Parliamentary visits to Taiwan frequently trigger tensions with the People's Republic of China (PRC/China) prompted, among other things, by territorial disputes over the respective islands. Parliamentarians from around the world frequently visit Taiwan, namely, from France,[31] Germany,[32] Lithuania,[33] Kosovo, North Macedonia, Romania,[34] the Parliamentary Speaker of Tuvalu,[35] the Parliamentary Speaker of the Czech Republic,[36] and most notably, the Speaker of the US House of Representatives in 2022. Delegations meet parliamentarians from Taiwan, representatives of the government of Taiwan, and on occasion even Taiwan's head of government.[37] The PRC responds to such visits by alleging a violation of the One-China principle and an intervention into the internal affairs of the PRC.[38]

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28 <https://www.bbc.com/news/world-europe-33633874>, last access 8 August 2024.

29 <https://www.dw.com/en/controversial-visit-to-crimea-by-french-politicians/a-19433406>, last access 8 August 2024.

30 <https://mfa.gov.ua/en/news/6107-statement-of-the-ministry-of-foreign-affairs-of-ukraine-regarding-the-visit-of-the-french-mps-to-the-temporarily-occupied-autonomous-republic-of-crimea>, last access 8 August 2024.

31 <https://www.dw.com/en/taiwan-french-lawmakers-arrive-amid-escalating-tensions/a-63037555>, last access 8 August 2024.

32 <https://english.president.gov.tw/NEWS/6427?DeteailNo=speaker>, last access 8 August 2024; <https://english.president.gov.tw/News/6360>, last access 8 August 2024; <https://english.president.gov.tw/News/6338>, last access 8 August 2024.

33 <https://english.president.gov.tw/News/6429>, last access 8 August 2024.

34 <https://english.president.gov.tw/NEWS/6455>, last access 8 August 2024.

35 <https://english.president.gov.tw/NEWS/6425?DeteailNo=speaker>, last access 8 August 2024.

36 <https://english.president.gov.tw/NEWS/6465?DeteailNo=speaker>, last access 8 August 2024; in 2020 already the Speaker of the other chamber <https://www.theguardian.com/world/2020/sep/01/taiwan-angry-china-vows-corresponding-measures-over-czech-visit>, last access 8 August 2024.

37 Aforementioned links n. 31-35.

38 E.g. <http://gb.china-embassy.gov.cn/eng/PressandMedia/Spokepersons/202303/t20230319_11044335.htm>, last access 8 August 2024; <http://gb.china-embassy.gov.cn/eng/PressandMedia/Spokepersons/202211/t20221130_10983034.htm>, last access 11 September 2024; <htt

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In response to Pelosi's trip, the Foreign Ministry of the PRC explicitly cited a violation of the rules of international law.[39] In reaction to a visit to Taiwan by a US Senator, the PRC stressed that other states may only use unofficial channels for diplomatic exchanges with Taiwan.[40] The PRC continuously condemns these parliamentary visits; from its perspective thereby deflecting any potentially negative legal consequences regarding the status of Taiwan.

Parliamentary visits to the occupied Ukrainian territories and to Taiwan are an ongoing source of political tension. It should be noted that, politically, the two situations scarcely warrant comparison: The above-mentioned visits to the occupied Ukrainian territories occur by way of support for Russia as an occupying force, while the outlined visits to Taiwan endorse that territory's peaceful and democratic independence. Nevertheless, the two situations raise similar legal questions, namely, if and under which circumstances parliamentary visits might trigger state responsibility. The purpose of the present paper is not to provide a conclusive assessment of the legality of specific visits that fall into the above-outlined category, as this would demand a case-by-case analysis. And yet these examples still serve as a point of reference when elucidating the legal connections between parliamentary visits and questions of state responsibility.

III. State Responsibility and Parliamentary Visits

Part III examines the role of parliamentary visits within the framework of state responsibility; it analyses the circumstances under which parliamentary visits may *prima facie* be attributed to a state (1.), and which primary rules are potentially breached by parliamentary visits (2.).

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p://de.china-embassy.gov.cn/det/sgyw/202301/t20230109_11004167.htm>, last access 11 September 2024; <https://www.rnd.de/politik/taiwan-bundestagsabgeordnete-rechnen-bei-besuch-mit-unfreundlicher-reaktion-chinas-RWSE3CAMXVHPPLUYS2ZW2VSVWQ.html>, last access 8 August 2024.

39 <http://dk.china-embassy.gov.cn/eng/fyrth/202208/t20220804_10733756.htm>, last access 11 September 2024>.

40 <http://dk.china-embassy.gov.cn/eng/fyrth/202208/t20220826_10754487.htm>, last access 11 September 2024; in contrast, the President of the German Bundestag emphasises the informality of visits by MPs and stresses their 'non-institutional connection' (see below n. 72).

1. Attribution of Parliamentary Visits to the State under ARSIWA

Article 4 ARSIWA, a rule of Customary International Law (CIL),[41] stipulates that the action or omission by a state organ is attributable to the state. Conduct by the legislative organ or 'legislative department of government' is generally attributable according to Article 4 ARSIWA.[42] Parliaments embody legislative organs,[43] as evinced by the International Law Commission (ILC) when employing the term legislature to describe parliament.[44] Article 12 ARSIWA Commentary emphasises that 'the legislature [is] itself an organ of the State for the purposes of the attribution of responsibility'.[45] Thus according to the international legal standards of Article 4(1) ARSIWA, parliamentary conduct is attributable to the state. As one of the three constituent branches of government in practically all states (even authoritarian regimes),[46] parliamentary conduct is also attributable by way of Article 4(2) ARSIWA, in that domestic constitutional provisions qualify them as state organs.[47] Article 5 ARSIWA is less likely to be applicable to parliaments, as the

41 ILC, ARSIWA (n. 13), Art. 4, para. 6; Carlo de Stefano, *Attribution in International Law and Arbitration* (Oxford University Press 2020), 22 ff.; Marko Milanović, 'State Responsibility for Genocide', EJIL 17 (2006), 553-604 (561); ICJ, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, advisory opinion of 29 April 1999, ICJ Reports 1999, 62 (87, para. 62); ICJ, *Genocide* (n. 11), judgment of 26 February 2007, ICJ Reports 2007, 43 (para. 401).

42 ILC, ARSIWA (n. 13), Art. 4, paras 1, 6: case cited therein already: Salvador Commercial Company, UNRIAA, 1902, vol. XV (Sales No. 66.V.3), 455 (477); see also James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013), 120 f.; Djamchid Momtaz, 'Chapter 19.1: Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority' in: James Crawford, Alain Pellet, Simon Olleson, and Kate Parlett, *The Law of International Responsibility* (Oxford University Press 2010), 239 f.

43 Shane Martin and Kaare Strøm, *Legislative Assemblies: Voters, Members, and Leaders* (Oxford University Press 2024), 214 ff.; UN, 'Book 25: Materials on the Responsibility of States for Internationally Wrongful Acts' (2nd edn, 2023), ST/LEG/SER.B/25/Rev.1, 79, 89.

44 ILC, 'Draft Articles on Jurisdictional Immunities of States and Their Property with Commentaries', (1991) ILCYB, Vol. II, Part Two, Art. 2 para. 10, p. 16.

45 ILC, ARSIWA (n. 13), Art. 12, para. 12.

46 See <https://www.ipu.org/national-parliaments>, last access 8 August 2024; Paul Schuler and Edmund J. Malesky, 'Authoritarian Legislatures' in: Shane Martin, Thomas Saalfeld and Kaare W. Strøm (eds), *The Oxford Handbook of Legislative Studies* (Oxford University Press 2014).

47 On Article 4(2) ARSIWA see ILC, ARSIWA (n 13), Art. 4, para. 11; Paolo Palchetti, 'From Domestic Law to International Law: the Acceptance of Domestic Legal Rules Between Deference and Autonomy' in: Helmut Aust, Heike Krieger and Felix Lange (eds) *Research Handbook on International Law in Domestic Legal Systems* (Oxford University Press, forthcoming 2024), 99 ff.

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connection of parliament's conduct to the state is one of a *de jure* organ; thus, qualifying it as anything other would appear implausible.[48]

However, this tells us little as to the occurrence of actual conduct by *the parliament*. Identifying the parliamentary visit of a given actor as conduct by parliament – as organ of state – requires that the institution of parliament must first be 'unpacked', comparable in some senses to the more general observation that only one or more natural persons may act as the abstract entity 'state actor'.[49] 'Unpacking' parliament as a state organ is based on the distribution of power within parliament as a state institution. As *Martin* and *Strøm* remark,

> 'Today, very few – if any – legislatures operate in […] the legislative state of nature, in which all members have equal and undifferentiated resources and responsibilities. All members may be equal at the point of election to the chamber, but as soon as the assembly has convened, […] not all members […] enjoy equal parliamentary rights […].'[50]

Thus, the assumption here is that the conduct of some actors is more likely attributable to the state than is the conduct of others, namely, insofar as some parliamentary sub-institutions have greater privileges than others. The further analysis addresses the question as to why MP visits are not *prima facie* attributable to the state (a), while visits by Heads of Parliament (HoPs) are *prima facie* attributable to the state (b). MPs and HoPs are both constituent actors in parliaments, positions similar in parliaments across the world.[51] This makes the legal findings of interest for most parliaments, notwithstanding differences in the details of MPs or HoPs institutional design.

a) Visits by Individual MPs

The above-described visits to the occupied Ukrainian territories are understood as 'visits by individual MPs'. These visits refer to instances in which MPs, either individually or in small informal groups, travel to a foreign

48 See Luigi Condorelli and Claus Kress, 'Chapter 18 The Rules of Attribution: General Considerations' in: James Crawford, Alain Pellet, Simon Olleson, and Kate Parlett, *The Law of International Responsibility* (Oxford University Press 2010), 230 f.

49 Condorelli and Kress (n. 48), 221; Momtaz, (n. 42), 237 f.

50 Martin and Strøm (n. 43), 155.

51 Martin and Strøm (n. 43), 155; for Europe <https://pace.coe.int/en/pages/2021confpres>, last access 8 August 2024; for the P20 <https://www.ipu.org/event/p20-parliamentary-speakers-summit>, last access 8 August 2024; for each state with reference to the respective parliamentary website <https://www.ipu.org/about-ipu/members>, last access 8 August 2024.

territory without being part of an official delegation or institutional framework.

Article 4(2) ARSIWA is pivotal for the attribution of state organs' conduct to the state;[52] for attribution, the domestic structure, design and role of MPs and their respective visits is decisive. Today, the vast majority of MPs are elected to perform a 'free representational mandate'.[53] Aside from minor exceptions, the 'imperative mandate' vanished.[54] The position of an MP is thus designed to be free in how to act while naturally taking into consideration their party affiliation.[55] The domestic law of some states is such that it even ascribes MPs acting 'according to their conscience', as instanced in Article 38(I) German Constitution. In cases in which constitutions affirm such special roles to MPs, one could argue in favour of an attribution of conduct to the state with reference to Article 4(2) ARSIWA, in that the term 'persons or entities' can include individual officer holders.[56] This finding is nevertheless to be rebutted: Firstly, 'internal law will not itself perform the task of classification'[57] as a state organ and, secondly, the described constitutional design of the institution MP as such seeks an unambiguous detachment of the individual MP from 'the state'. An MP, whose position is characterised by a free mandate and free conscience, is not supposed to be the proxy of a state organ: The sum of free mandates only, is meant to constitute the state organ.

The structure of parliament as the sum of single mandates leads to a generally different mode of decision-making and strongly defines parliament's character as a collective entity.[58] As a consequence of differing political interests, parliament is a pluralistic body which achieves the formation of its will through deliberation among MPs; the dynamics of majority-minority or government-backing and government-opposing political groups typify the work of parliament.[59] Thus, the organisational mandate of MPs usually does not include representing parliament as a state institution when traveling.

52 Condorelli and Kress (n. 48), 229-231.

53 Marc Van der Hulst, *The Parliamentary Mandate: A Global Comparative Study* (Inter-Parliamentary Union 2000), 135.

54 van der Hulst (n. 53), 135.

55 Martin and Strøm (n. 43), 86 ff.

56 ILC, ARSIWA (n. 13), Art. 4, para. 12.

57 ILC, ARSIWA (n. 13), Art. 4, para. 11.

58 Philip Sales, 'Legislative Intention, Interpretation, and the Principle of Legality', Stat. L. Rev. 40 (2019), 53-63 (55, 57); Carmen Thiele, *Regeln und Verfahren der Entscheidungsfindung innerhalb von Staaten und Staatenverbindungen* (Springer 2008), 131-156 (esp. 146), 599; for eligibility of collective entities ILC, ARSIWA (n. 13), Art. 4, para. 1.

59 Thiele (n. 58), 599.

In many cases, on such visits, MPs do not even declare that they are travelling in any institutional capacity, or claim to be authorised to represent parliament, pointing out that they travel 'only' in their capacity as MP.[60] The consensus, it would seem, is that visits inherently belong to an MP's mandate. Where this is not the case, MPs apparently emphasise travelling in a different capacity. Accordingly, when planning a trip in his capacity as head of a committee, a German MP was purported to have explicitly announced his intentions to the parliamentary administration, which was allegedly turned down by the HoP, precisely because it may be perceived as official state conduct.[61] Thus, in the absence of any additional qualification, the assumption holds that an MP travels as member of a party or faction rather than in any 'official' representative function.

The funding of visits is liable to impact the assessment of attribution to the state.[62] Where the parliamentary administration funds parliamentary visits directly, attribution is more plausible than it is in situations in which factions, political groups, or political foundations fund such trips; as for the latter, the proximity to parliament as a state institution is usually weaker.[63] Regulations, such as are prescribed in Germany and which resolve that visits funded by the parliamentary administration must be 'in the original parliamentary interest of the entire German Bundestag',[64] are inclined in favour of attribution to the state. Similarly, logistical or organisational support during visits by the embassy of the home state, is apt to favour attribution to the state.[65]

In view of the aforementioned, visits by MPs – either as individuals or in small, informal groups – usually do not constitute conduct by parliament as a

60 E. g. 'Thierry Mariani ajoute que la délégation des dix parlementaires ne parle pas au nom du gouvernement français en Crimée. "Nous avons des positions différentes avec le gouvernement, et en tant que parlementaire, je n'obéis à aucun gouvernement", a déclaré M. Mariani également membre de la delegation': <http://french.xinhuanet.com/2015-07/26/c_134446748.htm>, last access 8 August 2024.

61 <https://www.spiegel.de/spiegel/vorab/bundestagspraesident-stoppt-gauweilers-krim-reise-a-991456.html>, last access 8 August 2024; <https://www.dw.com/de/lammert-njet-zu-gauweilers-krim-trip/a-17920956>, last access 8 August 2024.

62 Stefan Talmon and Hannah Janknecht, 'Legal Consequences of Germany's Non-Recognition of the Russian Annexation of Crimea', GPIL – German Practice in International Law Blog, 27 August 2021, last paragraph of the section 'Visits to Crimea', doi: 10.17176/20220627-172749-0.

63 Talmon and Janknecht (n. 62); Maziar Jamnejad and Michael Wood, 'The Principle of Non-Intervention', LJIL 22 (2009), 345-381 (368); Crawford, *State Responsibility* (n. 42), 125-126 and 144 ff.

64 Point 1 (1) Ausführungsrichtlinien für Reisen gemäß § 17 des Gesetzes über die Rechtsverhältnisse der Mitglieder des Deutschen Bundestages (Abgeordnetengesetz-AbgG) in der Fassung vom 19. Januar 2017.

65 Talmon and Janknecht (n. 62).

state organ, and thus MPs' visits are *prima facie* not attributable. This corresponds to findings on attribution to the state with respect to individual MP's conduct in other areas of international law; one exemplary instance of this is investment law dispute settlement, for which tribunals determined that

> 'the State cannot be liable simply because the investor believes that Congressional debates demonstrate xenophobia or clientelism. Legislators are entitled to express their opinions robustly, […]. For liability to be engaged under the Treaty, there must have been unjustifiable effects attributable to the State itself.'[66]

Further, that

> '[a] State cannot be held liable under international law for the fact that a national legislative assembly comprised of representatives elected from the ranks of a variety of political movements frequently, as a function of the democratic process, raise harsh criticisms of the actions of executive and administrative officials.'[67]

The idea behind this argument goes beyond parliamentary plenary debates or inquiries, and holds no less for parliamentary visits by MPs. Visits by MPs aptly illustrate that not every action in the broader sphere of parliamentary work constitutes conduct by parliament as a state organ.

b) Visits by the Head of Parliament

Visits by a HoP – a term here used synonymous with a speaker, chairperson, or the president of parliament – refer to situations in which, in their official capacity, HoPs travel to a foreign territory. Visits to Taiwan by the US, Tuvaluan, and Czech HoPs exemplify such visits. Foreshadowing the outcome, there are good reasons why such HoP visits are *prima facie* attributable under Article 4 ARSIWA.

Domestic legal orders usually assign prominent roles to HoPs within the context of parliamentary work, which results in their potential qualification as conduct attributable according to Article 4(2) ARSIWA.[68] The US Speaker of the House of Representatives holds the third-highest office in the US after the President and Vice-President; furthermore, the office's function includes representing parliament.[69] Similarly, the Speaker of the Czech Chamber of

66 ICSID, *Lidercón v. Peru*, award of 6 March 2020, case no. ARB/17/9, para. 244.

67 ICSID, *Lidercón* (n. 66), para. 274; see also for the reflection of the idea ICSID, *Burlington v. Ecuador*, Decision on Liability, 14 December 2012, case no. ARB/08/5, para. 305.

68 Condorelli and Kress (n. 48), 230 f.

69 <https://www.govinfo.gov/content/pkg/GPO-HPRACTICE-108/pdf/GPO-HPRACTICE-108-35.pdf>, last access 8 August 2024.

Deputies performs the task of representing parliament.[70] When reading the 'protocol ranking' or 'order of precedence' in many states, the HoP often holds higher office than do heads of the executive; in Germany, for example, the head of the Bundestag occupies a higher rank with respect to protocol than does the chancellor.[71] The German HoP even explicitly referred to herself as a state representative when declaring, 'When I travel on behalf of the German Bundestag, I represent Germany. […] By the way, everything I say during those trips ends up in a confidential report of the Foreign Office';[72] she also referred to her office as an 'office relevant to questions of sovereignty.'[73] This understanding is supported by the inclusion of the HoP in the constitution's article on parliament, namely, Article 40(II) of the German Constitution. In that the HoP's function in representing parliament follows directly from the domestic legal order in the form of written law or as constitutional practice, attribution to the state by way of Article 4(2) ARSIWA appears reasonable.

Because Article 4(2) ARSIWA uses the term 'includes' in its wording, it leaves scope for an interpretation of attribution of conduct to the state from a solely international perspective according to Article 4(1) ARSIWA.[74] The organisational position of the HoP is understood by other states as having the institutional function of representing parliament.[75] In international fora, such as the P7 and P20 summits, HoPs are the representatives of their parliament.[76] Furthermore, the parliamentary administration, for the most part funds HoP visits, which speaks in favour of attribution to the state. Lastly, a HoP is commonly elected by a majority of the plenary and by this is

70 <https://pspen.psp.cz/chamber-members/members/>, last access 8 August 2024.

71 <https://www.protokoll-inland.de/Webs/PI/DE/rang-titulierung/rangfragen/protokollarische-rangfragen-node.html>, last access 8 August 2024.

72 Interview Rheinische Post, 'Ein Besuch in Taiwan würde auch den Kanzler in Zugzwang bringen', 26. August 2022 <https://rp-online.de/nrw/staedte/duisburg/bundestagspraesidentin-baerbel-bas-werde-nicht-nach-taiwan-reisen_aid-75699729>, last access 8 August 2024, title in the print version 'Ich empfehle eine gewisse Gelassenheit' (translated from German by the author).

73 <https://www.zeit.de/politik/ausland/2022-08/bundestag-abgeordnete-taiwan-reise-china>, last access 8 August 2024; <https://www.fr.de/politik/us-aussenminister-blinken-ruft-china-zur-deeskalation-mit-taiwan-auf-zr-91706769.html>, last access 8 August 2024.

74 Palchetti (n. 47); see also Condorelli and Kress (n. 48), 229.

75 Mikel Urquijo Goitia, 'Parliamentary Speakership: from Individual Speakership to the Collective Direction of Parliamentary Work', Spanish Journal of Legislative Studies 2 (2020), 1-17.

76 'The 21st G7 Speakers' Meeting to be held in Japan' <https://www.shugiin.go.jp/internet/itdb_english.nsf/html/statics/english/G7_202309_e.html>, last access 8 August 2024; 'G20 Parliamentary Speakers' Summit (P20)' <https://www.ipu.org/about-ipu/strategic-partnerships/g20-parliamentary-speakers-summit-p20>, last access 8 August 2024.

given a mandate to represent parliament. In cases in which the majority disagrees with representation by a given HoP, they may vote in favour of ousting the HoP from office.

By way of responses referred to as 'countermeasures', China reacted to the US HoP visit by blocking discussion channels, meetings, and agreements.[77] In response to the visit by the Czech Parliamentary Speaker, the Chinese Embassy in Prague also cautioned other states to abstain from 'official contact'.[78] Such legally framed state reactions may indicate a classification as attributable state conduct.[79] This distinguishes HoP visits from other parliamentary visits, which are challenged mainly by way of political and not legal rhetoric.

Although the role of HoPs is so distinguished and significant that their visits are usually classified as representational and official parliamentary action, there are, of course, exceptions, such as when HoPs travel in a private capacity, or go on holiday with family or friends. In borderline cases, it would thus be advisable for a HoP to announce in advance whether travelling is undertaken in a representative or private capacity.

c) Conclusion

MPs and HoPs are only two actors within the broader field of parliamentary activity. Parliamentary visits also take place in other constellations and formats, such as visits by committees, heads of committees, friendship groups, or delegations of parliamentary organisations. In cases of visits by these latter actors, which again differ greatly from state to state, the circumstances and constellations determine the question of attribution to the state. To infer that the visits to the occupied Ukrainian territories are unlikely to be attributable, while visits by HoPs to Taiwan most likely are, might seem counterintuitive. It should be stressed, however, that the legal assessment of attribution to the state is a separate legal question, which must be distinguished from breaches of primary norms of international law.

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77 PRC, 'The Ministry of Foreign Affairs Announces Countermeasures in Response to Nancy Pelosi's Visit to Taiwan', 5 August 2022, 18:10, <http://dk.china-embassy.gov.cn/eng/fyrth/202208/t20220805_10735706.htm> last access 11 September 2024.

78 <http://cz.china-embassy.gov.cn/cze/xwdt/202303/t20230325_11049033.htm>, last access 8 August 2024, translated with Chat GPT, Google Translate, and DeepL.

79 See with regard to the claim of immunities: Condorelli and Kress (n. 48), 228, with further references therein in footnote 33.

2. Breach of International Obligations by Parliamentary Visits

For a parliamentary visit to constitute an international wrongful act, Article 2(b) ARSIWA requires the breach of an international obligation. Following from Article 12 ARSIWA, this would occur 'when an act of that State is not in conformity with what that obligation requires of it, regardless of its origin or character.' More so than attribution to the state, the question of a breach of a primary norm can be answered only in due consideration of the given circumstances. Focussing on visits to places of armed conflict and disputed territories, the analysis centres on violations of two central norms of international law in this context, namely, the obligation of non-recognition (a) and the prohibition of intervention (b).

a) Non-recognition of an Illegal Annexation

Where a parliamentary visit to an illegally annexed territory is attributable to the state, it may well conflict with the international obligation not to recognise an illegal annexation, a topical scenario in view of recent visits to occupied Ukrainian territories. The legal basis for this obligation is contested. While some claim that the obligation is enshrined in Article 41(2) ARSIWA,[80] others tend to see the source for the obligation not to recognise an annexation as being part of CIL,[81] or else deem it a general principle of international law,[82] though all agree on the same requirements. The first requirement would be that the annexation must constitute a serious breach of international law, which the ILC and other bodies deem as such.[83] The second requirement would be that the visit must amount to a recognition of the

80 ILC, ARSIWA (n. 13), Art. 41, para. 4.

81 Martin Dawidowicz, 'Chapter 46: The Obligation of Non-Recognition of an Unlawful Situation' in: James Crawford, Alain Pellet, Simon Olleson, and Kate Parlett, *The Law of International Responsibility* (Oxford University Press 2010), 677-686 (678 f.); James Crawford, *The Creation of States in International Law* (Oxford University Press 2007), 160; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory opinion of 9 July 2004, ICJ Reports 2004, 136 (para. 87).

82 Milena Sterio, 'Power Politics and State Recognition' in: Gëzim Visoka, John Doyle and Edward Newman (eds) *Routledge Handbook of State Recognition* (Routledge 2019), 82-98, (91); Jochen Abr. Frowein, 'Non-Recognition' in: Anne Peters and Rüdiger Wolfrum (eds), *MPEPIL* (online edn, Oxford University Press 2011), para. 3; Jochen Abr. Frowein, 'Collective Enforcement of International Obligations', HJIL 47 (1987), 67-79 (77).

83 ILC, ARSIWA (n. 13), Art. 41, para. 7; Kirsten Schmalenbach, 'Article 53' in: Oliver Dörr and Kirsten Schmalenbach (eds.), *Vienna Convention on the Law of Treaties* (2nd edn, Springer 2018), 997 (para. 71).

annexation in question. The norm relies on the notion of international solidarity between states in connection with *ius cogens* violations[84] and its existence is reaffirmed by the International Court of Justice (ICJ).[85] General Assembly Resolution E.11.1 explicitly stipulates this obligation with respect to the occupied Ukrainian territories when it, '*Reaffirms its commitment* to the sovereignty, independence, unity and territorial integrity of Ukraine within its internationally recognised borders, extending to its territorial waters'.[86]

Unlike recognition of a state, the obligation of non-recognition is a strictly legal obligation.[87] According to the prevailing declaratory theory of statehood recognition, a state exists even where other states have made no status-based decision to recognise it as such.[88] In Brownlie's precise formulation: 'Recognition, *as a public act of state*, is an optional and political act and there is no legal duty in this regard.'[89] Failure to recognise a new state is a status-based decision normally determined by a head of state or foreign minister, as one core competence of the executive.[90] Recognition of a new state complies with international law to the extent that the prerequisites of statehood are met, or else are illegal where premature recognition interferes in a state's domestic affairs.[91] However, as the obligation not to recognise an illegal annexation is not a purely status-based decision, conduct causing a breach is thus not limited to status-based political recognition, and so may also occur by other means.[92] Crawford highlights this by writing that although

> 'non-recognition is in the first place enjoined by the status – or lack of it – of the entity in question. However, the importance of a collective duty of non-

84 Stefan Talmon, 'The Duty Not to "Recognize as Lawful" a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?' in: Christian Tomuschat and Jean-Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order Jus Cogens and Obligations Erga Omnes* (Martinus Nijhoff 2005), 99-125 (121).

85 ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, advisory opinion of 21 June 1971, ICJ Reports 1971, 16 (para. 126); ICJ, Wall Opinion (n. 81), para. 87.

86 UNGA Res A/ES-11/L.1 and A/ES-11/L.1/Add.1 of 2 March 2022, para. 1.

87 Crawford, *Creation of States* (n. 81), 22, 157-158; Aust (n. 14), 330.

88 Crawford, *Creation of States* (n. 81), 22, 157-158.

89 Crawford, *Creation of States* (n. 81), 25; Ian Brownlie, *Principles of Public International Law* (2nd edn, Clarendon Press 1973), 94; (6th edn, Clarendon Press 2003), 89-90.

90 Foakes (n. 2), 41 ff.

91 Christian Tomuschat, 'Recognition of New States – The Case of Premature Recognition' in: Peter Hilpold (ed.), *Kosovo and International Law* (Martinus Nijhoff 2012), 31-46 (35).

92 For the meaning of status based and the problems that may be accompanied by this, see Aust (n. 14), 332.

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> recognition goes beyond this in that it reinforces the legal position, and helps to prevent the consolidation of unlawful situations.'[93]

The obligation of non-recognition 'not only refers to the formal recognition of these situations, but also prohibits acts which would imply such recognition.'[94] The ICJ emphasised that any dealings which *imply the legality* of the illegal annexation are prohibited.[95] Hence, *implied* legality is enough for the obligation to be violated.[96] The ILC refers to a 'duty of abstention',[97] and Talmon even to a 'duty of active abstention'.[98] As Aust concludes:

> 'It is even imaginable to conceive of a general duty of isolation which comprises roughly all channels of communication and interaction between the non-recognising States and the wrongdoer.'[99]

According to the above-described *telos* of the obligation, parliamentary visits apparently also have the potential to conflict with this obligation. The purpose of the norm is to deny illegal or occupying states the rights and privileges arising from (claimed) statehood or that are inherent to (claimed) statehood.[100] Interactions with an illegal regime, which consolidate or extend the regime's exercise of power over a certain territory should be prevented.[101] Dealings with the government of an occupying state or puppet regime in the territories it occupies may imply recognition of the latter's sovereign status.[102]

Parliamentary visits may possess substantial political authority and embody a close connotation to sovereign and official conduct. This assumed authority may reflect positively on the entity visited, thus providing it with a degree of 'stateness'. In particular, meetings with political actors of the annexing power or puppet regime without prior consent of the territorial state lend political legitimacy to the illegal regime, as these contribute to the

93 Crawford, *Creation of States* (n. 81), 159.

94 ILC, ARSIWA (n. 13), Art. 41, para. 5.

95 Talmon, 'Duty Not to "Recognize as Lawful"' (n. 84), 114; ICJ, *Namibia Opinion* (n. 85), para. 133.

96 Crawford, *Creation of States* (n. 81), 163; Talmon, 'Duty Not to "Recognize as Lawful"' (n. 84), 112.

97 ILC, ARSIWA (n. 13), Art. 41, para. 4.

98 Talmon, 'Duty Not to "Recognize as Lawful"' (n. 84), 112.

99 Aust (n. 14), 330.

100 Talmon, 'Duty Not to "Recognize as Lawful"' (n. 84), 117.

101 Aust (n. 14), 330.

102 Talmon, 'Duty Not to "Recognize as Lawful"' (n. 84), 113; UNSC Res 276 of 30 January 1970, S/RES/276(1970); ICJ, *Namibia Opinion* (n. 85).

impression of the existence of state institutions.[103] Such public and prominent conduct implies the legitimation of such situations, above all when compared to 'technical' arrangements such as aviation or customs.[104] Parliamentary visits are thus capable of indicating implicit recognition of an annexation.

The two limits to the duty of non-recognition, namely, the threat to human rights – as based on the ICJ's Namibia exception ruling[105] – and the risk of transforming the norm into a positive duty,[106] are unlikely to become relevant in the context of parliamentary visits. Commonly, parliamentary visits, the purpose of which is exchanges with occupying political figures, do not concern human rights, or their connection is, if at all, only approximate and indirect. Furthermore, the obligation not to visit an annexed territory is conceivable only as a negative obligation to refrain from traveling. Consequently, a parliamentary visit may meet the threshold of constituting an illegal recognition. With respect to the occupied Ukrainian territories, under international law, an attributable parliamentary visit without Ukraine's consent may thus well be in violation of the visiting state's obligations.

b) Prohibition of Intervention

A breach of the prohibition of intervention is claimed in various situations, albeit that the precise contours remain disputed, something which is also reflected in diverging state practice on this norm.[107] The prohibition of

103 Ukraine stresses this aspect: 'Head of Ukraine's Mission to the EU called on European Parliament leadership to condemn illegal visit of French MEPs to occupied Crimea' 30 June 2020, 16:24, <https://ukraine-eu.mfa.gov.ua/en/news/predstavnik-ukrayini-pri-yes-zvernuvsya-do-kerivnictva-yevroparlamentu-iz-zaklikom-zasuditi-nezakonnij-vizit-francuzkih-yevrodeputativ-do-okupovanogo-krimu>, last access 13 August 2024.

104 Leaning towards a restrictive approach: Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press 2008), 386 ff.; leaning towards a less restrictive approach: Stefan Talmon, 'The Cyrus Question Before the European Court of Justice', EJIL 12 (2001), 727-750 (743); Stefan Talmon, 'Luftverkehr mit nicht anerkannten Staaten: Der Fall Nordzypern', AVR 43 (2005), 1-42.

105 ICJ, *Namibia Opinion* (n. 85), para. 126; Enrico Milano, *Unlawful Territorial Situations in International Law – Reconciling Effectiveness, Legality and Legitimacy* (Martinus Nijhoff 2006) 138, 184; ILC, ARSIWA (n. 13), Art. 41, para. 10.

106 Aust (n. 14), 330.

107 Florian Kriener, 'Intervention, Prohibition of' in: Anne Peters and Rüdiger Wolfrum (eds), *MPEPIL* (online edn, Oxford University Press 2023), para. 3; Alexandra Hofer, 'The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?', Chinese Journal of International Law 16 (2017), 175-214; Philip Kunig, 'Intervention, Prohibition of' in: Anne Peters and Rüdiger Wolfrum (eds), *MPEPIL* (online edn, Oxford University Press 2008), paras 1, 6, 14-21.

intervention is an international rule the legal basis of which is found in different sources in different contexts.[108] Two requirements are commonly acknowledged: Firstly, the interference in a given state's *domaine réservé*, and secondly, the element of coercion.[109] The issue as to whether parliamentary visits are in possible breach of the prohibition of intervention becomes topical in the context of the PRC's reactions to parliamentary visits to Taiwan.

Territorial disputes involve a core element of statehood, as territory delineates jurisdictions, sovereignty, and sovereign rights, and is thus a constituent factor for statehood.[110] A parliamentary visit to a contested territory and meetings with political actors who are part of the dispute, may question the sovereign status of this territory. A parliamentary visit can thus express a state's position on questions pertaining to a territorial dispute. Hence, a visit to places of armed conflict or disputed territories is likely to impact upon the *domaine réservé* of the respective state.

The more challenging factor, after all, is the assessment of coerciveness of visits. What amounts to coercion in a form other than the use of force and support of armed groups has, as yet, to reach clear consensus.[111] Parliamentary visits are civilian and not military acts, something which speaks in favour of limited coercive power. As for the prohibition of intervention, however, the element of coercion must be conceptualised more broadly than it is for the use of force, since the prohibition of intervention would otherwise have barely any scope when juxtaposed with Article 2(4) United Nations (UN) Charter; furthermore, the wording of the *Friendly Relations Declaration* describes other conduct as being possibly coercive.[112] Political support, economic influence, election interreference, contributions to regime change,

108 Kriener (n. 107), paras 1-3; Jamnejad and Wood (n. 63), 351.

109 ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), merits, judgment of 27 June 1986, ICJ Reports 1986, 14 (para. 205); Kunig (n. 107), paras 1-6; Jamnejad and Wood (n. 63), 345-381, 347-348; Andreas von Arnauld, *Völkerrecht* (4th edn, C. F. Müller 2019), 155, para. 351.

110 Katja Ziegler, 'Domaine réservé' in: Anne Peters and Rüdiger Wolfrum (eds,), *MPEPIL* (online edn, Oxford University Press 2013), para. 1; Samuel Blay, 'Territorial Integrity and Political Independence' in: Anne Peters and Rüdiger Wolfrum (eds), *MPEPIL* (online edn, Oxford University Press 2010), para. 1.

111 Kriener (n. 107), para. 27; Ori Pomson, 'The Prohibition on Intervention Under International Law and Cyber Operations', International Law Studies 99 (2022), 180-219 (193 ff.).

112 Marko Milanović, 'Revisiting Coercion as an Element of Prohibited Intervention in International Law', AJIL 117 (2023), 601-650 (612-617); Dire Tladi 'The Duty Not to Intervene in Matters within Domestic Jurisdiction' in: Jorge E. Viñuales (ed.), *The UN Friendly Relations Declaration at 50* (Cambridge University Press 2020), 87-104 (91); Jamnejad and Wood (n. 63), 348-349; von Arnauld (n. 109), 157, para. 358.

extraterritorial legislation, broadcasting, propaganda, and diplomatic means are discussed as breaching the prohibition of intervention; having said that, the threshold and density of such conduct must meet a rather high standard for it to have coercive force – above all to avoid all critique as being coercive, and consequently as breaching the prohibition of intervention.[113] Although '[t]here is no intrinsic point at which non-forcible pressure amounts to coercion, [but rather where] […] [the] threshold is variable and contextual',[114] the coercive power of other types of conduct remains vague and is to be treated with caution.

In general, a state may criticise the domestic politics of another state, such as its human rights record.[115] Should, however, the measure or critique indicate the use of force or threat of the use of force implicitly or explicitly, the conduct goes beyond what is permitted under the prohibition of intervention.[116] However, assuming this to be the case with respects to visits, the hurdles are somewhat high. A visit may be coercive only in cases in which it expresses strong support for a party involved in the conflict such that it develops a density or intensity, which signals military threats or robust economic pressure. Although initially being a non-military means, possessing the capacity to enter the disputed territory (where the complaintive state is unable to prevent such a visit) might demonstrate or signal an implicit threat by additional coercive means; this might especially hold true in conjunction with other state measures, as exemplified by one US policy, which if taken together with the introduced US Taiwan Policy Act (2022),

> '[e]stablish […] objectives to support the security of Taiwan and its democratic, economic, and military institutions, promote stability in cross-strait relations, support Taiwan's inclusion in the Indo-Pacific Economic Framework, and deter the PRC's aggression towards Taiwan' (2022).[117]

The permissible level may also be exceeded where such visits attempt to destabilise the internal order, one such example being the calls for secession which accompanied Charles de Gaulle's visit to Canada in 1967.[118] Similarly, the prohibition of intervention may be violated, namely, where a visit contributes to the rise of a separation movement or rebel group, fuels

113 Kriener (n. 107); Jamnejad and Wood (n. 63); see also Kunig (n. 107), paras 22-27.
114 Milanović, 'Revisiting Coercion' (n. 112), 616-617.
115 Kriener (n. 107), para. 45; Kunig (n. 107), paras 24 und 27.
116 Kriener (n. 107), paras 19 ff.; Kunig (n. 107), para. 27.
117 United States, 117th Congress (2021-2022), S.4428 – Taiwan Policy Act of 2022.
118 United States, 117th Congress (2021-2022), S.4428 – Taiwan Policy Act of 2022; Foakes (n. 2), 61.

violent internal conflicts, or is part of an action prompting regime change.[119] Thus, a visit does indeed have the potential to bring about significant political, communicative, and social empowerment for a party during an internal dispute; taking sides by way of a visit may be a great source of support. However, the accusation of a violation by parliamentary visits should be responded to with caution: Other than in the case of military measures, a coercive element cannot be presumed, but must be proven for civilian measures.

Due to the singularity and complexity of the situation in Taiwan, an assessment of the legality of single visits to Taiwan would extend the scope of the present paper. Taiwan's status as state or territory *sui generis*, as well as its legal and political relations to the PRC, are only some aspects of ongoing discussions.[120] A more detailed analysis of a given visit to Taiwan would require an assessment as to whether the visit has led to military or economic pressure resulting in destabilisation, civil unrest, or contribution to regime change (in the PRC), or whether a visit still constitutes permissible political support. The power of the visiting state might also shape the existence of coercion.[121] Moreover the possibility of a justification of an intervention is to be considered with respect to the situation in Taiwan.[122]

c) Conclusion

There are more potential legal pitfalls for parliamentary visits than have been outlined in this part. One may think of a violation of Common Article

119 von Arnauld (n. 109), 158; Kerstin Odendahl, 'Regimewechsel und Interventionsverbot: die Elfenbeinküste und Libyen als Fallstudien', AVR 50 (2012), 318-347 (333); however, regime change is nowadays a contested aspect: Kriener (n. 107), para. 48; Tladi (n. 112), 99; Jamnejad and Wood (n. 63), 368; Ralph Janik 'Das Interventionsverbot im Zeitalter der Demokratie: Zwischen Obsoleszenz und Wiederauferstehung' in: Andrea Bockley, Ursula Kriebaum and August Reinisch (eds) *Nichtstaatliche Akteure und Interventionsverbot* (Peter Lang 2015), 107-129 (119); Marco Athen, *Der Tatbestand des völkerrechtlichen Interventionsverbots* (Nomos 2017), 248.

120 In Crawford, *Creation of States* (n. 81), Taiwan has an own chapter (198-219); James Crawford, *Brownlie's Principles of Public International Law* (9th edn, Oxford University Press 2019) deals with Taiwan in the chapter 'Entities sui generis' (115 ff.); for recent blogposts on Taiwan see <https://voelkerrechtsblog.org/just-like-ukraine-but-worse/>, last access 13 August 2024; <https://verfassungsblog.de/is-taiwan-a-state/>, last access 13 August 2024; <https://verfassungsblog.de/context-is-open-to-interpretation-too/>, last access 13 August 2024.

121 Kriener (n. 107), para. 50.

122 Kriener (n. 107), paras 51-56; Milanović, 'Revisiting Coercion' (n. 112), 620 ff.; Odendahl (n. 119), 338-345; Kunig (n. 107), paras 28-47.

1 Geneva Conventions resulting from a visit in support of a government that structurally and gravely disregards the rules of humanitarian law. Questions of immunity may also gain relevance in cases of parliamentary visits, such as under the 1969 Convention on Special Missions.[123] With respect to non-recognition and prohibition of intervention as two provisions to which all states are bound, the present paper has shown that when planning visits to situations of armed conflict and disputed territories parliaments must account for certain core norms of international law.

IV. Legal-Policy Reactions to and Implications of Parliamentary Visits

Parliamentary visits may have greater implications for the international legal order than the mere legality or illegality of a visit. The present section seeks to shed light on two implications of parliamentary visits with respect to the international legal order beyond purely doctrinal consequences of state responsibility. Firstly, the idea and practice of Joint Parliamentary Communiqués as responses to undesired, albeit legal visits, is presented (1.). Secondly, parliamentary visits may serve as a door-opener for establishing or re-establishing friendly relations among states (2.).

1. Joint Parliamentary Communiqués in Response to Undesired Parliamentary Visits

Whereas, owing to a lack of attribution to the state, the above-described visits by individual MPs are not *prima facie* illegal under international law (although they may entail personal criminal liability),[124] they are by no means harmless or indifferent to the international legal order. Such visits still challenge international law insofar as they are a communicative tool used by political parties or movements as part of a greater populist agenda to destabilise established legal understandings and conceptions of international law.

123 For executive officials see Foakes (n. 2).

124 E. g. indicated by Ukraine, 'Statement of the Ministry of Foreign Affairs of Ukraine regarding the visit of the French MPs to the temporarily occupied Autonomous Republic of Crimea', 29 July 2016, 17:49, <https://mfa.gov.ua/en/news/6107-statement-of-the-ministry-of-foreign-affairs-of-ukraine-regarding-the-visit-of-the-french-mps-to-the-temporarily-occupied-autonomous-republic-of-crimea>, last access 13 August 2024.

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Some of these visits appear like 'pieces of the puzzle' in acts by populist movements throughout Europe in their endeavours to rhetorically and strategically threaten or delegitimise the rules-based international order.[125] Not only do such visits threaten Ukraine's territorial integrity and sovereignty; they potentially challenge the understanding of accepted values in international law.[126] Thus, although strictly speaking these visits may not constitute a breach of a state's obligations, they nevertheless warrant further reflection on how best to respond to them.

One approach to countering such visits by individual MPs is to contradict them. Replies and contradictions engender a counterbalancing force in political debates,[127] and in international law public statements may even impact norms by way of state practice and *opino iuris.*[128] Thus, countering such visits by individual MPs has a legal and legal-policy value. One way of replying or contradicting such undesired visits is the release of what the author refers to as a 'joint parliamentary communiqué'. This is understood as a tool by means of which the domestic parliaments of different states sign and jointly publish an agreed-upon statement. Presumably, the parliaments in question have some kind of political or legal interest therein, since they would otherwise not participate. By communicating opposition to a given visit, parliaments can collectively articulate their condemnation of it as running counter to the combined will and legal opinion of these parliaments. By way of a joint communiqué, parliaments may stress adherence to the rules of international law, assert their endorsement of a rules-based international order, and – in the specific context of Ukraine – emphasise support for the rule of non-recognition of an illegal annexation. The precise modalities of such a communiqué may be adapted to the needs of the individual situation.

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125 See Heike Krieger, 'Populist Governments and International Law', EJIL 30 (2019), 971-996 (996); Tom Ginsburg, 'Authoritarian International Law?', AJIL 114 (2020), 221-260; Paul Blokker, 'International Law and Populist Ccritique' in: Helmut Aust, Heike Krieger and Felix Lange (eds) *Research Handbook on International Law in Domestic Legal Systems* (Oxford University Press, forthcoming 2024), 333 ff.; Tamar Hostovsky Brandes, 'International Law in Domestic Courts in an Era of Populism', I.CON 17 (2019), 576-596; Janne E. Nijman and Wouter G. Werner (eds), 'Populism and International Law', NYIL 49 (2018).

126 For value change in international law: Heike Krieger and Andrea Liese, *Tracing Value Change in the International Legal Order* (Oxford University Press 2023).

127 See Silvia Donzelli, 'Gegenrede', Zeitschrift für Praktische Philosophie 9 (2022), 303-332; Bianca Cepollaro, Maxime Lepoutre and Robert Mark Simpson, 'Counterspeech', Philosophy Compass 18 (2023).

128 Michael Wood and Omri Sender, 'State Practice' in: Anne Peters and Rüdiger Wolfrum (eds), *MPEPIL* (online edn, Oxford University Press 2020), paras 7, 15; ILC, 'Draft Conclusions on the Identification of Customary International Law', (2018) ILCYB, Vol. II, Part Two.

There are some precedents of such a tool being put to use, in the form of so-called 'Joint Statements' or 'Joint Declarations'.[129] The Speakers of the Polish, Lithuanian, Estonian, and Latvian Parliament published a co-signed statement on Lukashenko's government in Belarus.[130] A joint statement by committee chairs of nineteen states called for a tribunal to investigate Russian war crimes in Ukraine.[131] Joint statements by committee chairs call for the release of Russian opposition figures,[132] or protest against the Georgian 'foreign agents' law.[133] Interestingly, these statements were co-signed on behalf of parliament by various actors, among them the head of parliament, a chair of a committee, or a person appointed by the plenary. The various signatories, structures, and names given to these statements may lower the communicative value and force of such a statement. Thus, for such statements to gain more weight and to demonstrate their official parliamentary nature in the future, it may be desirable to structure and designate them as 'joint parliamentary communiqué'.

Generally speaking, one of the advantages of a joint communiqué – as opposed to unilateral declarations of condemnation – would be its 'elevation' to the international sphere. In contrast to a domestic unilateral condemnation, which is more inclined towards a domestic audience, the locus of a bilateral or multilateral condemnation is rather in the international sphere and most likely directed at an international audience. By dint of its positioning within the international sphere, condemnation of the visit becomes more visible and serves to uphold the legal conceptions challenged

129 E. g. 'Joint Declaration by the Speakers of Parliaments of Armenia, Azerbaijan and Georgia' COE, 15 March 1999, <https://reliefweb.int/report/armenia/joint-declaration-speakers-parliaments-armenia-azerbaijan-and-georgia>, last access 13 August 2024; 'Joint Statement by the Speakers of the Sejm of the Republic of Poland, the Riigikogu of the Republic of Estonia, the Seimas of the Republic of Lithuania and the Saeima of the Republic of Latvia', 23 November 2021, <https://www.sejm.gov.pl/media9.nsf/files/MPRA-C92J4C/%24File/Joint%20Statement%20by%20the%20Speakers%20of%20the%20Sejm%2C%20the%20Riigikogu%2C%20the%20Seimas%20and%20the%20Saeima.pdf>, last access 13 August 2024.

130 'Joint Statement by Speakers of the Sejm' (n. 129).

131 'Joint Statement on the Need to Prosecute Russia's International Crimes in Ukraine', 30 January 2023, <https://www.riigikogu.ee/wpcms/wp-content/uploads/2023/01/CFA-chairs-statement-on-Russia-crimes-in-Ukraine-30.1.2023-1.pdf>, last access 13 August 2024.

132 'Statement by Chairs of Foreign Affairs Committees Calling for the Immediate Release of Vladimir Kara-Murza', 27 April 2022, <https://www.riigikogu.ee/wpcms/wp-content/uploads/2022/04/Statement-on-release-of-Mr-Kara-Murza-27.04-FINAL.pdf>, last access 13 August 2024.

133 'Chairs of Foreign Affairs Committees: Passage of 'Foreign Agent' Law in Georgia Undermines Democracy', 15 May 2024, <https://www.foreign.senate.gov/press/dem/release/chair-cardin-leads-trans-atlantic-foreign-affairs-committee-chairs-in-joint-statement-on-georgian-parliaments-passage-of-russian-style-foreign-agent-law>, last access 13 August 2024.

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by the visit. Lastly, the advantage of such a joint parliamentary communiqué would be that it aligns the legal positions of different states on a specific legal matter, thereby possibly providing a source for the interpretation of legal questions.

2. Parliamentary Visits as a Door-Opener for Cordial Inter-State Relations: German-Ukrainian Relations

The shifting and confrontational ground of geopolitics influence the international legal order.[134] Friendly and cordial relations among allies, but also a minimum degree of common ground among states otherwise perceived as rivals, opponents, or competitors,[135] is required for an international system to solve geopolitical challenges. Parliaments can contribute to such relations by initiating, reopening, strengthening, or stabilising cordial inter-state relations. For the most part, this is achieved by means of parliamentary visits following prior invitation, as discussed at the outset. This section discusses the ways in which visits upon invitation may function as door-openers in sensitive diplomatic situations.

With the full-scale invasion of Ukraine in February 2022, Ukrainian-German bilateral relations had for various reasons reached an historic and unpleasant nadir. Parliamentary visits to Kyiv and Lviv were undertaken in the midst of such dissonant relations. Initially, a Ukrainian parliamentarian extended an invitation to three German MPs, all members of the German Foreign Affairs Committee, to visit Ukraine.[136] Following this initial visit, the German HoP visited Ukraine upon invitation,[137] after which Ukraine then invited the German Foreign Minister as member of the executive[138]

134 See Malcolm Jorgensen, 'Equilibrium & Fragmentation in the International Rule of Law: The Rising Chinese Geolegal Order', KFG Working Paper Series, No. 21, Berlin Potsdam Research Group 'The International Rule of Law – Rise or Decline?', Berlin, November 2018, available at SSRN: https://ssrn.com/abstract=3283626.

135 See for these terms e. g. Bundesrepublik Deutschland, Chinastrategie der Bundesregierung, 2023, 8.

136 <https://www.tagesschau.de/ausland/ukraine-besuch-ausschussvorsitzende-bundestag-101.html>, last access 13 August 2024.

137 <https://www.zeit.de/news/2022-05/08/bundestagspraesidentin-bas-in-kiew-eingetroffen?utm_referrer=https%3A%2F%2Fwww.google.com%2F>, last access 13 August 2024; <https://www.zdf.de/nachrichten/politik/bas-kiew-reise-ukraine-krieg-russland-100.html>, last access .

138 <https://www.bundesregierung.de/breg-de/themen/krieg-in-der-ukraine/baerbock-in-der-ukraine-2038180>, last access 13 August 2024.

prior to Chancellor Scholz's visit to Ukraine.[139] Due to a lack of public information, there is no evidence of a causal link between these visits, although there are some plausible grounds pointing to a connection between the respective visits. In an interview about an envisaged visit to Taiwan, the President of the Bundestag emphasised the connection between her visits and those of executive representatives, something which may be taken to be generally applicable to other situations. She said that 'a visit [by the German HoP] is of a dimension such as would put the chancellor on the spot. The next thing you know, Olaf Scholz would be under the political obligation to travel to Taiwan.'[140] She went on to add that 'trips [by the HoP] are well prepared and coordinated with the Chancellor and the Federal President'.[141] Consequently, her visit to Ukraine may have at least served to thaw relations and pave the way for an executive visit. This suggests that visits by MPs and especially by HoPs can be preparatory for an executive visit, and are thus a door-opener for the initial establishment or re-establishment of intergovernmental consultations and friendly and cordial relations among states.

Conclusion – A Political Environment Spiked with Legal Risks

The paper mapped out the manner in which parliamentary visits engage in international law, above all in the laws governing state responsibility. The attribution of parliamentary visits to the state as an international legal person relies on nuanced considerations on the institutional roles of parliamentary actors and the specific function a given visit serves. While visits by individual MPs are often not attributable to the state, visits by the HoP signify higher degrees of representational authority and are thus more likely to be attributable to the state. Visits that remain 'unattributable' and thus fall outside the legal sphere maintain or create space for parliamentary diplomacy, as legalisation through attribution also leads to less emphasis on informality.[142] Visits attributable to the state enable the international community to hold a state legally accountable for its conduct. Visits, above all, to places of armed conflict and disputed territory, such as Ukraine and Taiwan require careful

139 <https://www.tagesschau.de/ausland/europa/scholz-besuch-ukraine-103.html>, last access 13 August 2024.

140 Interview Rheinische Post (n. 72).

141 Interview Rheinische Post (n. 72).

142 Kenneth W Abbott et al. (n. 10); see for the wider problem in international law: Zimmermann and Jauer (n. 10).

prior consideration and deliberation on the legal risks relating to the obligation of non-recognition and the prohibition of intervention. The above analysis seeks to provide a yardstick for separating the legal dimensions of parliamentary visits from their political dimension.

The second aspect of this paper developed two legal-policy implications of parliamentary visits. Although visits may take place for domestic political reasons, such as indicating to constituents that they take a position in domestic power rivalries, or to support or oppose the executive,[143] international legal and legal-policy considerations should play an equal role in the decision-making and planning of such visits. Through joint parliamentary communiqués and acting as a door-opener for intergovernmental exchange, parliaments may establish themselves as considerate and deliberative actors on the international plane and develop the competences necessary for acting with greater prominence on the international stage. To do this, parliaments should develop greater awareness of the legal and legal-policy risks and opportunities for their conduct.

143 Tapio Raunio and Wolfgang Wagner, 'Towards Parliamentarisation of Foreign and Security Policy?', W. Eur. Pol. (40) 2017, 1-19 (10-11); Tapio Raunio, 'Legislatures and Foreign Policy' in: Shane Martin, Thomas Saalfeld and Kaare W. Strøm (eds), *The Oxford Handbook of Legislative Studies* (Oxford University Press 2014) 549-551; Wagner 'Parliaments'(n. 6), 6-7; Stavridis, 'Conclusions' (n. 4), 377-378.