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The (im)permissibility of military assistance on request during a civil war*

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ABSTRACT

This contribution questions the claim often made in scholarship that the right to self-determination would prevent military assistance at the request of the recognised government during a civil war. Specifically, it argues that the absence of any explicit reliance on the right to self-determination in the reactions of states to military assistance on request of the recognised government, suggests that there is no rule in general international law prohibiting such assistance during a civil war. In so doing, the contribution first outlines the implications of such state conduct from the perspective of *opinio juris*. Thereafter it illuminates why this conduct can also not be convincingly explained by the existence of counter-terrorism and counter-intervention exceptions to a general prohibition of military assistance during a civil war.

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KEYWORDS Self-determination; counter-intervention; counter-terrorism; military assistance on request; *opinio juris*

1. Introduction

International scholars often argue that military assistance at the request of the recognised government during a civil war interferes with the political independence of the (people within a) state in a manner that violates the right to self-determination in Articles 1(2) and 55 of the United Nations Charter (the UN Charter).[1] Even though the concept of self-determination remains highly disputed in international law, it is well recognised in scholarship that it implies the right of the people(s) within a state to determine their own government with no outside interference.[2] According to some authors, this implies that the

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*All online resources last accessed 23 March 2020.

[1]Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16 (UN Charter) Article 1 (2), 55.

[2]Louise Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government' (1986) 56 *British Yearbook of International Law* 207; Karine Bannelier and Theodore Christakis, 'Under the UN

government which requests foreign military assistance must be representative of the people(s) on whose behalf it is acting.[3] In situations where the population has made clear its intent to overthrow the incumbent government through civil war, it cannot claim the necessary representativity. This would especially be the case where an incumbent government has lost control over parts of its population and territory. If one accepted this reasoning, military assistance on request under such circumstances would violate the right to self-determination.[4]

Elsewhere, this author has elaborated on the fact that since the end of the Cold War, military assistance on request in civil wars was undertaken predominantly by individual states or coalitions of individual states.[5] Very often, these military interventions occurred at the behest of recognised governments that were embroiled in protracted civil wars. Furthermore, in cases such as the Central African Republic (CAR), Libya, Somalia, Mali and Syria – to name but a few – they occurred at the bequest of transitional (negotiated) governments, the representativeness of which may be highly questionable.[6] Yet, this did not deter the intervening states from accepting the respective requests for military assistance. Moreover, hardly any third state or international organisation suggested that any of these forcible interventions violated the right to self-determination, nor questioned the competence of transitional governments to extend a request for military assistance.[7]

This short contribution argues that this absence of any explicit reliance on the right to self-determination in United Nations Security Council (UNSC) debates or the reactions of states to military assistance on request of the recognised government, suggests that there is no rule in general international law prohibiting such assistance during a civil war. In so doing, the contribution first outlines the implications of such absence from the perspective of *opinio juris*. Thereafter it illuminates why such conduct can also not be convincingly explained by the existence of exceptions to the prohibition of military assistance during a civil war.

Security Council's Watchful Eyes: Military Intervention by Invitation in the Malian Conflict' (2013) 26 Leiden Journal of International Law 861; Georg Nolte, Eingreifen auf Einladung: Zur völkerrechtlichen Zulässigkeit des Einsatzes fremder Truppen im internen Konflikt auf Einladung der Regierung (Springer, 1999) 223; Olivier Corten, The Law Against War: The Prohibition on the Use of Force in Contemporary International Law (Hart Publishing, 2010) 289.

[3]E.g. Karine Bannelier-Christakis, 'Military Interventions Against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent' (2016) 29 *Leiden Journal of International Law* 746.

[4]Erika de Wet, 'Reinterpreting Exceptions to the Use of Force in the Interest of Security: Forcible Intervention by Invitation and the Demise of the Negative Equality Principle' (2017) 111 *American Journal of International Law Unbound* 309.

[5]See extensively Erika de Wet, *Military Assistance on Request and the Use of Force* (Oxford University Press, 2020) chapter 3.

[6]*Ibid*.

[7]*Ibid*.

2. The inaction of third states and *opinio juris*

It is worth recalling that the reactions of third states to state practice, including inaction (in addition to oral and written statements) can amount to *opinio juris*.[8] Whether such inaction or toleration on the part of third states is an indication of their acceptance that the practice engaged in by (an)other state(s) was in accordance with rights and obligations under customary international law will depend on the circumstances of the case.[9] Factors to be taken into account in making this determination will include whether a reaction was called for under the circumstances, as well as whether the silent state(s) was/were deemed to have had knowledge of the conduct at the time and had reasonable time and ability to react.[10]

The extent to which these factors are present will in turn be influenced by others. These notably include the frequency of the disputed practice, the extent to which it was publicised, as well as whether it (adversely) affected the interests of third states.[11] If a particular practice is engaged in by several states on a regular or ongoing basis, it will become more likely that such practice affects the legal interests of other states, thereby also increasing the expectation that they should react.[12] This would be the case even more so where the practice in question was well publicised through letters addressed to UN organs or in statements adopted by these organs.[13] Where in such instances the practice in question is met with the resounding silence of third states, it is fair to conclude that this lack of protest expresses their acceptance of the practice as being in accordance with customary international law.[14]

In the post-Cold War era, military assistance on request has occurred in an increasing number of state actors across regions. In addition, these interventions were of a protracted nature and *inter alia* were announced in letters to and/or statements by the UNSC, as well as press statements.[15] It would

[8]That is, conduct 'undertaken with a sense of legal right or obligation', for the purpose of identifying customary international law. See International Law Commission, Report of the Work of the sixty eighth sess, *Identification of customary international law* (2016) UN Doc A/71/10, chapter V, conclusion 9(1).

[9]See also ILC Report 2016 (n 8) para 7; Paulina Starski, 'Silence Within the Process of Normative Change and Evolution of the Prohibition on the Use of Force: Normative Volatility and Legislative Responsibility' (2017) 4 Journal on the Use of Force and International Law 26.

[10]See also ILC Report 2016 (n 8) para 7; Starski (n 9) 31.

[11]See also ILC Report 2016 (n 8) para 7; Starski (n 9) 31–2.

[12]Starski (n 9) 31. See also ILC Report 2016 (n 8) chapter V, commentary to conclusion 10(1) para 7.

[13]Starski (n 9) 36, 38.

[14]*Ibid*, 38.

[15]Prominent examples of such requests include Afghanistan (Security and Defence Cooperation Agreement Between the Islamic Republic of Afghanistan and the United States of America of 30 September 2014 (Bilateral Security Agreement/BSA) www.state.gov/documents/organization/244487.pdf); Iraq (Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq of 17 November 2008 (Status of Forces Agreement) www.state.gov/documents/organization/122074.pdf); Kenya (Letter dated 17 October 2011 from the Permanent Representative of Kenya to the United Nations Addressed to the President of the Security Council, UN Doc S/2011/646 (18

therefore be difficult to claim that one is dealing with isolated state practice that could have gone unnoticed by other states. If one further considers that the right to self-determination is frequently recognised as a peremptory norm of international law with *erga omnes* effect,[16] as a result of which the legal interests of all states were potentially affected by these interventions on request,[17] it is reasonable to conclude that third states were expected to react to these incidents. The fact that states nonetheless refrained from doing so (and in particular did not express any concerns for the consequences of such assistance for the right to self-determination) justifies the conclusion that they did not regard this right as legally relevant in the circumstances. Stated differently, the virtual absence of protest suggests that there is no rule in customary international law that prohibits military assistance on request during a civil war.

3. Exceptions related to counter-terrorism and counter-intervention?

Yet, several scholars submit that the toleration by third states of military assistance during civil wars does not evince the non-existence of a prohibition in this regard. They point out that states have never claimed a general right to extend military assistance to a recognised government during a civil war, but rather justified such assistance with reference to specific exceptions.[18] According to this line of reasoning, states (implicitly) support the existence of a general prohibition to intervene in a civil war, while recognising that in certain exceptional instances military assistance to the recognised government is permissible, as it is not intended to influence the outcome of the conflict.[19] These exceptions would notably include military assistance for the purpose of counter-terrorism and counter-intervention (i.e. where armed groups on a state's territory have received prior, external military assistance).[20]

October 2011); Mali (Report of the Secretary-General on the Situation in Mali, UN Doc S/2013/189 (26 March 2013) paras 3, 4, 44 ff); Yemen (M Nichols, 'UPDATE 1-Yemen Asks UN to Back Military Action by "Willing Countries"' *Reuters* (24 March 2015) http://uk.reuters.com/article/yemen-security-un-idUKL2N0WQ29620150324); Syria (Letter dated 15 October 2015 from the Permanent Representative of the Russian Federation to the United Nations Addressed to the President of the Security Council, UN Doc S/2015/792 (15 October 2015) 2); Libya (UNSC Verbatim Record, UN Doc S/PV.7387 (18 February 2015) 7 (Egypt)).

[16]See *Inter Alia Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (advisory opinion) [2019] ICJ Rep, para 180.

[17]See ILC Report 2016 (n 8) para 7, footnote 316, which underscores that certain practices could be regarded as impacting almost all states.

[18]Tom Ruys and Luca Ferro, 'Weathering the Storm: Legality and Legal Implications of the Saudi-Led Military Intervention in Yemen' (2016) 65 International and Comparative Law Quarterly 88; Bannelier-Christakis (n 3) 748.

[19]Ruys and Ferro (n 18) 90, 92; Bannelier-Christakis (n 3) 745, 748. See also De Wet (n 4) 309.

[20]Ruys and Ferro (n 18) 88, 90, 92; Bannelier-Christakis (n 3) 745, 748; Christakis and Bannelier (n 2) 124 ff.

At first sight, the narrative used by states when invoking or applauding direct military assistance on request does provide some support for this reasoning. For example, the Bilateral Security Agreement between the United States and Afghanistan explicitly mentioned the countering of terrorism as one of its purposes.[21] Similarly, when Iraq requested military assistance from the international community in 2014, its letter to the UNSC specifically referred to 'the need for support in order to defeat ISIL and protect our territory and people',[22] while France invoked counter-terrorism rhetoric in responding to the request for military assistance by Mali.[23]

In other instances, the narrative referred to external interference on the side of armed groups, thereby alluding to counter-intervention. For example, in the case of Yemen this notably concerned references to Iranian support for the Houthi rebels.[24] In Syria several Western and Middle Eastern states have openly conceded military support to so-called moderate rebels.[25] The claim that states therefore are 'merely' intervening in order to counter terrorism and/or for the purpose of counter-intervention – without any intention of undermining the right to self-determination can come across as credible at first sight. In addition, it could be interpreted as *opinio juris* supporting a practice aimed at developing narrowly defined exceptions to the prohibition of intervention in a civil war.[26]

However, closer scrutiny reveals that claims that these references to counter-terrorism and counter-intervention would merely confirm the existence of certain exceptions to a general prohibition to intervene in a civil war are open to question. First, general international law does not oblige states to make legal claims explicitly. Instead, their right to engage in a particular conduct, such as to provide military assistance to a recognised government on request, can also be implied by or inferred from the context.[27] In this context it is noteworthy that the previously mentioned 'purposive rhetoric' has been embedded in statements that tend to recognise the rights of

[21] Bilateral Security Agreement (n 15) Article 2(1).
[22] Letter dated 25 June 2014 from the Permanent Representative of Iraq to the United Nations Addressed to the Secretary-General, UN Doc S/2014/440 (24 June 2014).
[23] See Identical letters dated 11 January 2013 from the Permanent Representative of France to the UN Addressed to the Secretary-General and the President of the Security Council, UN Doc S/1013/17 (11 January 2013). Russia, during the early stages of its direct military assistance to Syria, also relied on counter-terrorism rethoric. See UNSC Verbatim Record, UN Doc S/PV.7527 (30 September 2015) 4 (Russia). See also Ruys and Ferro (n 18) 90.
[24] See Statement issued by the Kingdom of Saudi Arabia, the United Arab Emirates, the Kingdom of Bahrain, the State of Qatar and the State of Kuwait, enclosure to annex of identical letters dated 26 March 2015 from the Permanent Representative of Qatar to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2015/217 (27 March 2015).
[25] De Wet (n 4) 310.
[26] See *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States*) (merits) [1986] ICJ Rep 14, paras 206–7. See also Tom Ruys and Luca Ferro, 'The Enemy of My Enemy: Dutch Non-Lethal Assistance for 'Moderate' Syrian Rebels and the Multilevel Violation of International Law' (2019) 50 *Netherlands Yearbook of International Law*, section 2.1 (forthcoming, on file with author).
[27] See also Starski (n 9) 32.

governments to request military assistance in rather broad terms. For example, the United States justified the French intervention in Mali in 2013 with reference to the right of the Malian authorities to seek 'what assistance they can receive'.[28] Also, in relation to Iraq's request for military assistance in 2014, Australia, France, and the United Kingdom argued that the prohibition of the use of force does not apply where a state is using force on the territory of another, if this was requested by the territorial state.[29] These justifications were not qualified by any reference to a general prohibition against military intervention on the side of the government during a civil war, nor the need to protect the right to self-determination.

Seen in this light, the invocation of the 'purposive rhetoric' by states and the UNSC may be interpreted as having a political purpose rather than a legal one. It does not affirm any *legal* limitations to (or exceptions to the prohibition of) the right of a recognised government to request military assistance during a civil war (or the right of third states to provide such assistance). Instead, the purposive rhetoric underscores the *political* urgency for the need to provide military assistance to a recognised government in a certain context. This submission is also supported by the fact that there are hardly any statements by third states condemning the legality of forcible intervention on the side of a recognised government during a civil war in situations where counter-terrorism or counter-intervention were not at issue. The most prominent example in this regard is that of the Ugandan military assistance to the government of South Sudan at the latter's request between 2014 and 2015.[30] In this instance, the Ugandan forces were first and foremost fighting political rivals of the recognised South Sudanese government that formerly formed part of the government. Yet, no state (or international organisation) objected on the basis that the Ugandan intervention was as such illegal and/or that it violated the right of the South Sudanese people to self-determination.

Second, even if one accepted for the sake of argument that states (implicitly) supported a general prohibition of intervention on the side of the government during a civil war, the application of the counter-terrorism and counter-intervention exceptions is likely to entirely erode the prohibition in practice. As far as the counter-terrorism exception is concerned, this first and foremost exception is due to the non-viability of any distinction

[28]Susan E Rice, 'Remarks at a Press Gaggle Following UN Security Council Consultations on Mali' (10 January 2013), https://2009-2017-usun.state.gov/remarks/5641.

[29]Prime Minister's Office (United Kingdom), 'Summary of the Government Legal Position on Military Action in Iraq Against ISIL', Policy Paper (25 September 2015), www.gov.uk/government/publications/military-action-in-iraq-against-isil-government-legal-position/summary-of-the-government-legal-position-on-military-action-in-iraq-against-isil; Tony Abbott (Australian Prime Minister), 'Interview with F Kelly', ABC Radio National (16 September 2014), http://pmtranscripts.pmc.gov.au/release/transcript-23831.

[30]See Status of Forces Agreement between the Government of the Republic of Uganda and the Government of the Republic of South Sudan of 10 January 2014 (Republic of Uganda – Republic of South Sudan) (10 January 2014).

between terrorist and 'other' opposition groups. A viable distinction in this regard depends on the existence of an agreed definition of terrorism, as well as a minimum consensus on how to apply the benchmarks of such a definition in practice. However, such consensus has yet to emerge in a decentralised international order where it first and foremost is up to states (represented by their recognised governments) to determine what constitutes terrorism.[31] As a result, it is highly likely that the recognised government of the state requesting military assistance and its allies will regard all opposition groups as terrorist movements.[32] In the absence of clear criteria of why this classification is inaccurate, it becomes very difficult to counter from a legal perspective.

This reality is particularly visible in Syria, where the Syrian government (supported by Russia) seems to consider all groups opposing government forces as terrorists.[33] Western countries for their part have been opposed to classifying so-called moderate rebel groups as terrorists.[34] However, thus far they have been unable to explain how the notion of 'moderate' is defined and which particular group would fulfil these criteria at any given point in time. For example, the Free Syrian Army (FSA), the military wing of the Syrian Opposition Coalition which has been supported by states opposing the Assad regime, have worked with al-Nusrah which was subsequently designated as an Al Qaida affiliate by the UNSC.[35] Would this collaboration not justify elevating all members of the FSA to terrorists and if not, why not? Such uncertainties make it difficult, if not impossible, to classify a particular opposition group as 'legitimate' or 'moderate' in the sense of being non-terrorist.[36]

Furthermore, even in situations where the UNSC has provided certainty by classifying groups such as Al Qaida, ISIL, or the al-Nusrah Front as terrorist movements, this is not the end of the matter.[37] None of these resolutions granted the UNSC the exclusive right to identify terrorist groups in relation to the conflict in question. Stated differently, it has not denied the respective recognised government or third states the right to identify additional terrorist groups as a manifestation of their sovereignty.

[31]De Wet (n 4) 310.
[32]Also conceded by Bannelier-Christakis (n 3) 747.
[33]See Identical letters dated 26 January 2016 from the Chargé d'Affaires of the Permanent Mission of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc /S2016/80 (28 January 2016); Bannelier-Christakis (n 3) 764, 747.
[34]See, e.g. Council of the European Union (EU), 'Council Conclusion on Syria' (12 October 2015) para 10.
[35]UNSC Press Release, UN Doc SC/11010 (30 May 2013).
[36]In fact, even within different branches of government within the same state there may be different views on the definition of terrorism. For example, in the Netherlands the Ministry of Foreign Affairs had provided so-called non-lethal aid to 'moderate' rebel groups in Syria. Subsequently in 2019 the Public Prosecution Service prosecuted members of these vary same groups for terrorist offences. See Ruys and Ferro (n 26) section 1.1.
[37]See Bannelier-Christakis (n 3) 748.

If one now turns to the counter-intervention exception, it transpires that it is equally likely to erode any general prohibition of military intervention on the side of the recognised government. Those supporting this exception claim that where armed groups on a state's territory have received prior, external military assistance during a civil war, this undermines the ability of the people of the state to determine their political future without external interference. In consequence, the recognised government may request military assistance in an attempt to uphold or restore the right to self-determination by requesting military assistance from third states.[38]

Supporters of the counter-intervention exception further distinguish between external military assistance to armed groups that would trigger the right to individual or collective self-defence in Article 51 of the UN Charter, on the one hand, and foreign support to such groups that remains below this threshold, on the other.[39] In the latter instance (so the argument goes), the external support to armed opposition groups may nonetheless justify a request by the recognised government for military assistance in order to restore the rights of the people to determine their political future without external interference.[40]

As is well known, there is an extensive ongoing debate amongst international law scholars about the extent of foreign involvement required for triggering Article 51 of the UN Charter. However, assuming there (still) is an identifiable category of foreign support to armed groups that remains below the threshold of Article 51 of the UN Charter, it would be highly unlikely that any request by the recognised government for military assistance to counter such assistance will have the effect of upholding or restoring the right to self-determination of the people of that state.

First, it is very difficult to verify whether claims of prior intervention on the side of armed groups is accurate or fabricated by governments in order to justify requests for military assistance.[41] Recognised governments could therefore easily abuse the counter-intervention argument to gain the upper hand in a civil war. Second, if the purpose of the counter-intervention is to restore the rights of the people within a state to determine their political future without external interference, the extent of the military support provided to the recognised government arguably has to remain proportionate to external support received by the armed groups.[42] Stated differently, in order for counter-intervention to uphold or restore the right to self-determination, it should not go beyond neutralising the impact of the prior external intervention on the side

[38]Ruys and Ferro (n 18) 93. See 'United Kingdom Foreign Policy Document No 148' (1986) 57 *British Yearbook of International Law* 616.
[39]Ruys and Ferro (n 18) 92.
[40]Corten (n 7) 301; Ruys and Ferro (n 18) 92–3.
[41]Ruys and Ferro (n 18) 93.
[42]*Ibid*.

of the armed opposition groups.[43] Anything else would facilitate the shifting of the balance of the conflict towards the recognised government, thereby eroding the general prohibition of intervention in a civil war of all meaning.[44]

Yet, in practice it will be very difficult to identify any limits to the permissible (proportionate) assistance to the recognised government, as the extent of the prior, external assistance to armed groups is likely to remain covert and very difficult to measure. This in turn makes it very difficult to determine whether the scope of military assistance provided to the recognised government has become disproportionate, in the sense that it has upset the balance of the conflict. In consequence and as amply demonstrated in the case of Yemen, governments would be provided with an open door to abuse the counter-intervention exception in a manner that erodes any general prohibition to receive military assistance during a civil war.

4. Conclusion

This analysis has shown that Post-Cold War state and organisational practice does not convincingly support the claim that direct military assistance at the request of a recognised government is prohibited during a civil war. Attempts to explain current state practice by means of counter-terrorism and counter-intervention exceptions to a general prohibition of such assistance are not viable in practice. Instead, state practice seems to confirm the right of recognised governments to request military assistance from third states, also during civil wars as long as they retain their recognised, *de jure* status. Even though one may find it regrettable, the right to self-determination does not pose any meaningful limitation to the right of the recognised government to request military assistance as such, nor to third states for providing such assistance.

Disclosure statement

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

[43] *Ibid*.
[44] Ruys and Ferro (n 18) 94.