doi:10.1017/aju.2017.71

SYMPOSIUM ON UNAUTHORIZED MILITARY INTERVENTIONS FOR THE PUBLIC GOOD

REINTERPRETING EXCEPTIONS TO THE USE OF FORCE IN THE INTEREST OF SECURITY: FORCIBLE INTERVENTION BY INVITATION AND THE DEMISE OF THE NEGATIVE EQUALITY PRINCIPLE

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This essay describes tensions that arise between two types of public goods enshrined in the United Nations Charter—the right to self-determination of people(s) within a territorial state and peace and security—in situations in which recognized governments in conflict-torn countries request military assistance from third states against opposition groups. It illuminates legal challenges in reconciling these public goods in practice, at a time when collective peacekeeping mechanisms appear unable to prevent or terminate civil conflicts and their destabilizing regional impact.

The Proliferation of Forcible Intervention by Invitation in the Middle East and Africa

The controversy surrounding the legality of military intervention by invitation in situations that have escalated into a "civil war" (otherwise referred to as a noninternational armed conflict, or NIAC) has gained new momentum since the airstrikes of the United States-led coalition in Iraq against the Islamic State (IS) since 2014, the Saudi-led intervention against the Houthi rebels in Yemen since 2015, and the Russian intervention against IS and other opposition groups in Syria since 2015. In each of these situations, the respective internationally recognized government requested the direct military assistance by the intervening state(s) in the form of the sending of armed forces and/or military air power. In addition, these invitations were extended by internationally recognized governments embroiled in protracted hostilities with armed groups that were also in control of parts of the respective territory. Stated differently, they were extended (and accepted) at a time when the conflict in the territorial state had crossed the threshold of an armed conflict.

While international attention has focussed on the military interventions by invitation in NIACs in the Middle East, similar interventions have been occurring in Africa. During the Cold War era, such interventions in Africa were typically undertaken by former colonial powers at the invitation of governments of former colonies. However, since the end of the Cold War these invitations are increasingly extended by African states to other African states or subregional organizations. Earlier post-Cold War examples include the intervention by the Southern African Development Community in Lesotho in 1998, and more controversially (in terms of their legal basis), the interventions of the Economic Community of Western African States (ECOWAS) in Liberia in 1990 and Sierra Leone in 1997. More recently, ECOWAS intervened militarily on the invitation of the newly

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https://doi.org/10.1017/aju.2017.71 Published online by Cambridge University Press

elected and sworn in Gambian President Adama Barrow after the previous incumbent refused to hand over power. In his inaugural address on January 19, 2017, President Barrow made a special appeal to ECOWAS, the African Union (AU), and in particular the United Nations Security Council (UNSC) to "support the Government and peoples of The Gambia in enforcing their will, restore their sovereignty and constitutional legitimacy."[1]

The AU's first robust intervention on the invitation of a member state was in the Comoros in 2008. After being elected president of the Comoros in 2007, Abdallah Sambi's government requested AU military assistance when Mohammed Bacar (who had ruled the island of Anjouan since 2001) refused to relinquish power. Since 2011, the AU has also endorsed a military operation against the Lord's Resistance Army (LRA), known as the Regional Cooperation Initiative for the Elimination of the Lord's Resistance Army. This initiative, the military component of which comprises five thousand soldiers, is undertaken in collaboration with the countries most affected by atrocities committed by the LRA, i.e., Uganda, the Central African Republic, the Democratic Republic of Congo, and South Sudan.

The Twenty-First Century has also witnessed several forcible interventions by individual African states on the invitation of other African states. The Kenyan airstrikes in Somalia against Al-Shabaab between October 2011 and February 2012 took place at the invitation of the Somali government, in accordance with a Joint Communiqué that the two countries adopted on October 18, 2011.[2] In South Sudan, conflict broke out between rival factions within the Sudan People's Liberation Movement barely two years after its independence in July 2011. Soon afterwards, the South Sudanese government extended an invitation for military assistance to Uganda, whose troops remained in South Sudan until after the conclusion of the Agreement on the Resolution of the Conflict in the Republic of South Sudan of August 17, 2015.[3] As far as the French military intervention in Mali was concerned, France's official letter of January 11, 2013 to the UNSC stated that its intervention was in response to a request for assistance from the Interim President of the Republic of Mali. Also, in February 2015 the then-recognized Libyan government requested that Egypt conduct military airstrikes against terrorist actors, after an attack by IS on twenty-one Egyptian Christians in Libya.[4] In Paragraph 12 of UNSC Resolution 2259 of December 23, 2015, the UNSC urged member states under Chapter VII of the Charter to support the new Government of National Accord "at its request" in defeating terrorist groups such as IS.

The SADC intervention in Lesotho, the ECOWAS intervention in The Gambia, and the AU intervention in the Comoros were all directed at restoring democracy after internationally recognized elections, and occurred in situations in which the nonacceptance of the results had not yet spiralled into wide-spread and sustained hostilities. In the other situations, notably in those where individual states intervened militarily at governmental request, the hostilities had crossed the threshold of a NIAC.

A pertinent question that arises is whether these developments are reconcilable with the right to self-determination of peoples. According to, amongst others, the prestigious *Institut de Droit International*,[5] this right does not permit military intervention by invitation once the threshold of a NIAC has been crossed. The principle in accordance with which no side in a civil war may request military assistance is also sometimes referred to as the negative equality principle.

[1] Adama Barrow, *Inaugural address of Adama Barrow, President of the Republic of The Gambia*, THE FATUNETWORK (Jan. 20, 2017).

[2] Joint Communiqué issued at the Conclusion of a Meeting between the Government of Kenya and the Transitional Federal Government of Somalia paras. 1, 2 (Oct. 18, 2011).

[3] The Agreement on the Resolution of the Conflict in the Republic of South Sudan, Aug. 17, 2015.

[4] UN SCOR, 70th Sess., 7397 mtg. at 5, UN Doc. S/PV.7387 (Feb. 18, 2015).

[5] Institut de Droit International, Resolution on Military Assistance on Request art. 2(1) (Sept. 7, 2011).

https://doi.org/10.1017/aju.2017.71 Published online by Cambridge University Press

The Demise of the Negative Equality Principle or the Rise of a Counterterrorism Exception?

There is support in doctrine for the position that military intervention by invitation can be reconcilable with Article 2(4) of the Charter, as long as it does not amount to force "against the territorial integrity or political independence" of the requesting state.[6] Forcible intervention by invitation might violate a state's political independence if it violated the right to self-determination recognized in Articles 1(2) and 55 of the Charter. Stated differently, a violation of the right to self-determination in the form of foreign military assistance during a civil war/NIAC can simultaneously result in a violation of the prohibition of the use of force. In relation to both norms, the protection of the political independence of the state plays a central role.

While the concept of self-determination remains highly disputed in international law, it is well recognized in doctrine that the notion of political independence implies the right of the people(s) within a state to determine their own government with no outside interference. Furthermore, according to one school of thought, the government that invites foreign military assistance must be representative of the people(s) on whose behalf it is acting.[7] In situations where the population has made clear its intent to overthrow the incumbent government through civil war, it cannot claim popular acceptance. Where an incumbent government has lost control over parts of its population and territory, it would lack the level of representativeness required by the right to self-determination for the purpose of inviting any foreign military assistance. If one accepted this reasoning, a military intervention that violates the right to self-determination by preventing a state (and its peoples) from determining its political future independently is bound to constitute a use of force against the political independence of a state.

However, if one applies this logic to the ongoing situations of forcible intervention by invitation in the Middle East and Africa, it is striking that there is hardly any reference to the right to self-determination or the negative equality principle by states in official statements. Some authors have tried to explain this with reference to an emerging counterterrorism exception, since the combatting of terrorism played a prominent role during most of these interventions.[8] The main exceptions concern Yemen and South Sudan. In Yemen the main object of attack was the Houthi militias, while in South Sudan the Ugandan forces were fighting political rivals of the recognized government who formerly formed part of the government.

A counterterrorism exception would imply that forcible intervention by invitation in a NIAC would be permissible if its purpose was to combat terrorism, as opposed to influencing the outcome of a NIAC. The rationale behind this exception is purpose-driven, since the purpose of the forcible intervention (rather than its implications on the ground) is decisive for determining whether the right to self-determination is undermined.[9] This in turn raises the question whether forcible interventions on the side of the government during a NIAC that are not primarily motivated by counterterrorism would be illegal. Stated differently, are the interventions by Uganda in South Sudan and the Saudi-led coalition in Yemen, as well as the Russian military action against "moderate rebels" in Syria, in violation of the right to self-determination and the prohibition of the use of force? If so, how then would one explain the absence of any such claims by other states or international organizations?

Those advocating the existence of a counterterrorism exception to the prohibition of intervention in a NIAC submit that states have never claimed a general right to intervene in a NIAC.[10] Instead, they limit their intervention

[6] *See, e.g.*, Erika de Wet, *The Modern Practice of Intervention by Invitation in Africa and its Implications for the Prohibition of the Use of Force*, 26 Eur. J. Int'l L. 979 (2015).

[7] *See, e.g.*, Karine Bannelier-Christakis, *Military Interventions against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent*, 29 Leiden J. Int'l L. 746 (2016).

[8] *Id.* at 745–48.

[9] *Id.* at 747.

[10] *Id.* at 748.

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to combatting terrorism, while refraining from taking sides in a NIAC. These arguments are based on several false assumptions, however. First, this line of reasoning assumes that state practice indeed supports a rule against intervention by invitation on the side of the government in a NIAC. Second, it assumes that distinguishing between terrorist groups and legitimate opposition groups is a viable option in a NIAC. Third, it also seems to assume that military interventions against terrorism do not impact the outcome of the conflict (between and/or amongst the "legitimate" opposition groups and the government) and therefore do not undermine the right to self-determination and the prohibition of the use of force.

The unlikeliness of the existence of a prohibition against intervention by invitation in a NIAC is evidenced by the absence of references to self-determination or the negative equality principle in debates within international fora such as the UNSC. After all, in order to establish an exception, states first need to explain the rule, before indicating why their behavior would constitute an accepted exception to the rule.[11] However, the legal justifications put forward by states for intervening by invitation do not contain any references to such a rule, suggesting that it does not exist. In fact, in the case of South Sudan, where the intervention by Uganda on the side of the government had the clear objective of neutralizing political rivals (as opposed to combatting terrorism), states made no reference to the potential illegality of the Ugandan presence in South Sudan.

Furthermore, even if one accepted for the sake of argument that the negative equality principle was supported by state practice, the terrorism exception is likely to erode the principle entirely. This is due to the fact that many definitions of terrorism include references to the use of violence by nonstate actors for political ends at the expense of civilian lives. As many opposition groups would fulfil these criteria, the recognized government of the state requesting military assistance and its allies could argue that all opposition groups are terrorist movements. Other states that are politically backing (some of the) opposition groups may come to a different conclusion.

These competing positions are very visible in Syria, where there is only limited agreement about which armed groups qualify as terrorists. While states and the UNSC agree on the terrorist nature of some groups such as IS, divisions remain about other opposition groups. The Syrian government (supported by Russia) seems to consider all groups opposing government forces as terrorist, while Western countries are opposed to classifying moderate rebel groups as terrorists. However, it is entirely unclear 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 (the military wing of the Syrian Opposition Coalition, which has been supported by states opposing the Assad regime) has worked with the Al-Nusrah Front, which was subsequently designated as an Al Qaeda affiliate by the UNSC.[12] Would this collaboration not justify designating all members of the Free Syrian Army as terrorists and if not, why not? Such uncertainties make it difficult, if not impossible, to classify a particular opposition group as "legitimate" in the sense of being nonterrorist.

Moreover, even in situations in which the UNSC has provided certainty by classifying groups such as Al Qaeda, IS, or the Al-Nusrah Front as terrorist movements, this is not the end of the matter. Not one of these resolutions granted the UNSC the exclusive right to identify terrorist groups in relation to the conflict in question or suggested that states may not make such determinations for themselves as well. In fact, Paragraph 12 of UNSC Resolution 2259 (2015) pertaining to Libya may even be read as encouraging states to do so, when urging them to assist "the Government of National Accord in responding to threats to Libyan security and to support the new government in defeating IS, groups that have pledged allegiance to IS, Ansar Al Sharia *and all other individuals, groups, undertakings and entities associated with Al Qaeda* operating in Libya, upon its request."[13] The sweeping references to groups and or

[11] Laura Visser, *Russia's Intervention in Syria*, EJIL:TALK! (Nov. 25, 2015).

[12] SC Res. 2170 Annex (Aug. 15, 2014).

[13] SC Res. 2259 para. 12 (Dec. 23, 2015) (emphasis added).

https://doi.org/10.1017/aju.2017.71 Published online by Cambridge University Press

individuals in alliance with terrorist groups give the Libyan government and its allies very broad discretion in identifying terrorist groups, which may effectively result in classifying all opposition groups as such.

Finally, it is difficult to see how military intervention aimed at combatting terrorism does not affect the outcome of a NIAC. The fact that the recognized government receives external military support for combatting so-called terrorist groups necessarily strengthens its position vis-à-vis all other opposition groups participating in the NIAC, regardless of whether the incumbent government is indeed representative of the population as a whole.

The Demise of Self-Determination and Collective Security?

The fact that states have raised few concerns about these realities in post-Cold War forcible interventions during NIACs supports the conclusion that the existence of a NIAC as such does not limit the right of the recognized government to invite military assistance by third states for the purpose of suppressing opposition movements. This further implies that forcible intervention by invitation of the incumbent government in a NIAC would not amount to force used against the "political independence" of the territorial state: it would therefore neither violate the right to self-determination nor the prohibition of the use of force in Article 2(4) of the Charter. This does, however, raise the question of whether the notion of "political independence" and by extension the right to self-determination have any meaningful content in the postcolonial era (insofar as it concerns situations involving the use of armed force). If the incumbent government has the right to request military assistance from other states during a NIAC for as long as it remains the internationally recognized government—which in practice seems to be the case—it is not the people(s) in a state as whole who determine their future government, but the state as represented by the incumbent government and its military allies.

Moreover, the erosion of the right to self-determination in the context of military intervention by invitation illustrates how an expansive application of an exception to the prohibition of the use of force in Article 2(4) can erode the scope of the prohibition itself. In addition, the notion of the centralization of the use of force that underpins the Charter is systematically weakened, given the absence of any supervisory role for the UNSC during these interventions. It is arguable that the proliferation of military intervention by invitation (and its eroding impact on the right to self-determination) resulted from the inability of the UNSC and regional organizations such as the AU to establish effective collective peacekeeping measures in conflict-ridden countries. The expansive interpretation of this exception to the use of force can therefore be presented as serving "the public good" of international peace and security. It provides for a legal and practical avenue to use force in the interest of regional stability and security, at a time when collective peacekeeping mechanisms are perceived as increasingly paralyzed or even failing. While this argument may prove to be convincing in the short-term, the jury is still out on the mid- and long-term security impact of forcible interventions by invitation, carried out by regional hegemons outside of the checks and balances of any collective security system.

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