Intervention by Invitation: Impulses from the Max Planck Trialogues on the Law of Peace and War

Introduction

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Recent military operations abroad have frequently relied on real or fake "invitations" by the governments or other actors in the territorial state. This was the case for the French operation "Serval" in Mali (2013)[1] and the Russian intervention in Ukraine which resulted in the annexation of Crimea (2014).[2] The US-led coalition "Operation Inherent Resolve" against the Islamic State in Iraq and Syria since 2014 was conducted upon express request by Iraq.[3] At the same time, the Russian intervention in Syria explicitly relied on a Syrian request for military assistance in combatting the terrorist organisation "Islamic State" (IS).[4] The Saudi-Arabian-led military interven-

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[1] Identical letters of 11.1.2013 from the Permanent Representative of France to the UN addressed to the Secretary-General and the President of the Security Council: "France has responded today to a request for assistance from the Interim President of the Republic of Mali, Mr. Dioncounda Traoré. [...]."

[2] The Ukrainian President *Yanukovych* had asked support from Russia on 1.3.2014, as he later confirmed (*C. Kriel/V. Isachenkov*, Associated Press Interview: Yanukovych Admits Mistakes on Crimea, of 2.4.2014, available at: <https://www.apnews.com>, quoted in: *C. Marxsen*, The Crimea Crisis, ZaöRV 74 [2014], 367 [374 and 376]).

[3] See the letter dated 25.6.2014 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General (UN Doc. S/2014/440): "We have previously requested the assistance of the international community. While we are grateful for what has been done to date, it has not been enough. We therefore call on the United Nations and the international community to recognize the serious threat our country and the international order are facing. [...] [T]he Iraqi Government is seeking to avoid falling into a cycle of violence. To that end, we need your support in order to defeat ISIL and protect our territory and people. In particular, we call on Member States to assist us by providing military training, advanced technology and the weapons required to respond to the situation, with a view to denying terrorists staging areas and safe havens." See further the letter dated 20.9.2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council of 22.9.2014 (UN Doc. S/2014/691).

[4] Letter dated 15.10.2015 from the Permanent Representative of the Russian Federation to the United Nations addressed to the President of the Security Council: "I have the honor to inform you that, in response to a request from the President of the Syrian Arab Republic,

tion in Yemen (2015) was invited by the Yemeni President *Hadi*.[5] Finally, the operation "Restore Democracy" by the Economic Community of West African States (ECOWAS) in Gambia (2017) sought to support a President who had won democratic elections but was prevented from taking office by the former regime.[6]

The traditional legal heading for discussing the international lawfulness of such activities was "intervention by invitation". This label has recently been substituted by the expression "military assistance on request".[7] For these Impulses, we stick to the classic title not the least because several of the following contributions critically discuss the terminology. The new label might reflect a new legal constellation and new legal problems.

Indeed, the 20th century debates on the intervention or military assistance took several turns. The 1970s and 1980s were troubled by constant interventions by one of the super powers in localised armed conflicts which thus often became proxy wars. In that era, the doctrine of "negative equality" was born[8] – the idea that no foreign interference should be allowed when an internal conflict surpassed the threshold of "civil war" or non-international armed conflict (NIAC) in the sense of international humanitarian law.[9] The

Bashar al-Asad, to provide military assistance in combating the terrorist group Islamic State in Iraq and the Levant (ISIL) and other terrorist groups operating in Syria, the Russian Federation began launching air and missile strikes against the assets of terrorist formations in the territory of the Syrian Arab Republic on 30 September 2015." (UN Doc. S/2015/792). Identical letters dated 14.10.2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council: "The Russian Federation has taken a number of measures in response to a request from the Government of the Syrian Arab Republic to the Government of the Russian Federation to cooperate in countering terrorism and to provide military support for the counter-terrorism efforts of the Syrian Government and the Syrian Arab Army." (UN Doc. A/70/429-S/2015/789). See in scholarship: *K. Bannelier-Christakis*, Military Interventions against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent, LJIL 29 (2016), 743 et seq.

5 The Yemeni President, *Abdrabbuh Mansur Hadi*, requested support up to military intervention in a text dated 24.3.2015, cited by the intervening governments in: Identical letters dated 26.3.2015 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). See also United Nations Security Council (UN SC), Res. 2140 of 26.2.2014; Res. 2201 of 15.2.2015.

6 The ECOWAS initiative was commended by UN SC Res. 2337 of 19.1.2017.

7 Institut de Droit International, Session of Rhodes, 8.9.2011, "Military Assistance on Request" (Rapporteur: *Gerhard Hafner*). This is also the wording of the mandate of the committee of the International Law Association under the chairmanship of *Claus Kress*, established in 2019, available at <http://www.ila-hq.org>.

8 The term seems to have been coined by the Independent International Fact-Finding Mission on the Conflict in Georgia (IFFMCG), Report Vol. II, chap. 6 (2009), 278.

9 See the seminal contribution by *L. Doswald-Beck*, The Legal Validity of Military Intervention by Invitation of the Government, BYIL 56 (1985), 189 et seq., submitting "that there

purpose of this doctrine was to prevent further military escalation and ultimately a nuclear world war.[10] The Wiesbaden Resolution of the Institut de Droit International of 1975 manifests this spirit.[11] It is however doubtful whether this doctrine ever properly reflected the law as it stands although some state practice in that direction could be found.[12]

In any case, current interventions in full-fledged civil wars in Syria and in Yemen have not attracted any legal objection to military assistance on the ground that the threshold to NIAC was surpassed and would demand abstention. This silence in the world of states is in line with the International Court of Justice's (ICJ) *Nicaragua* judgment which espoused the asymmetrical view on the legality of military assistance. It held that intervention is "*allowable at the request of the government of a State*", but not upon re-

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is, at the least, a very serious doubt whether a State may validly aid another government to suppress a rebellion, particularly if the rebellion is widespread and seriously aimed at the overthrow of the incumbent regime" (*L. Doswald-Beck*, 251). See also Art. 3(2) of Protocol Additional to the Geneva Conventions of 12.8.1949, and relating to the protection of victims in non-international armed conflicts (Protocol II), of 8.6.1977: "Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs."

[10] IFFMCG, Vol. II (note 8), 277: "To avoid undesirable consequences, the most recent trend in scholarship is to acknowledge that in a state of civil war, none of the competing fractions can be said to be effective, stable, and legitimate. Therefore, it is argued that the principle of non-intervention and respect of the international right to self-determination renders inadmissible any type of foreign intervention, be it upon invitation of the previous 'old' government or of the rebels."

[11] Institut de Droit International, Session of Wiesbaden 1975, "The Principle of Non-Intervention in Civil Wars" (Rapporteur: *Dietrich Schindler*).

[12] A document by the UK Foreign and Commonwealth Office mentions as "one of two major restrictions on the lawfulness of states providing outside assistance to other states" a rule that "any form of interference or assistance is prohibited (except possibly of a humanitarian kind) *at a time of civil war and control of the State's territory is divided between parties at war*. However, it is widely accepted that outside interference in favour of one party to the struggle permits counter-intervention on behalf of the other, as happened in the Spanish Civil War and, more recently, in Angola." Planning Staff of the Foreign and Commonwealth Office, "Is Intervention ever Justified?". Document for Internal Use of July 1984, released to the public in 1986 as Foreign Policy Document No. 148, repr. in United Kingdom Materials on International Law, BYIL 57 (1986), 615 (616, para. II.7, emphasis added), text provided by the Foreign and Commonwealth Office. French President *Mitterrand* stated in 1990: "Chaque fois qu'une menace extérieure poindra qui pourrait attenter à votre indépendance, la France sera présente à vos côtes. Elle l'a déjà démontré plusieurs fois et parfois dans des circonstances très difficiles. Mais notre rôle à nous, pays étranger, fut-il ami, *n'est pas d'intervenir dans des conflits intérieurs*. Dans ce cas-là, la France en accord avec les dirigeants, veillera à protéger ses concitoyens, ses ressortissants; mais elle n'entend pas arbitrer les conflits." (Declaration of the President of the French Republic at the occasion of the 16th conference of Heads of State of France and Africa, La Baule, 19.-21.6.1990, emphasis added).

quest by the armed opposition.[13] This view privileges the government, even in the midst of a civil war.[14]

After the demise of the socialist block, in the happy 1990s, the question was whether the effectiveness of the inviting government really suffices.[15] A key enquiry seemed to be whether a government forfeits its power to invite foreign assistance when it lacks legitimacy, either because it clearly lost popular support or because it commits international crimes (Apartheid or genocide), or both.[16] Or, effectiveness and legitimacy of a government could be seen as communicating vessels, so that a lack of effectiveness might be compensated by factors of legitimacy.[17] This discussion breathed the hopes for a new international order in which the principles of self-determination of peoples and its twin, democracy, would govern the world. Besides, the doctrinal question whether the "invitation" plays out on the level of primary international law or only serves as a ground precluding wrongfulness lingered unresolved.[18]

After the terrorist attacks of 9/11 in 2001, the need to combat global terrorism moved to the foreground and seems there to stay. Besides, the current phase is characterised by a renewed polarisation in the United Nations (UN) Security Council and the resulting blockage which prevents the

[13] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*) (merits), ICJ Rep. 1986, 14, para. 246: "As the Court has stated, the principle of non-intervention derives from customary international law. It would certainly lose its effectiveness as a principle of law if intervention were to be justified by a mere request for assistance made by an opposition group in another State – supposing such a request to have actually been made by an opposition to the regime in Nicaragua in this instance. Indeed, it is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition."

[14] The Court had qualified the situation (the conflict between the government of Nicaragua and the *contras*) as a NIAC, in: *Nicaragua v. United States of America* (note 13), para. 219.

[15] See comprehensively *G. Nolte*, Eingreifen auf Einladung, 1999.

[16] *G. Nolte*, Intervention by Invitation, in: R. Wolfrum (ed.), MPEPIL (last updated 2010), para. 22, argued: "Just as the principle of self-determination prohibited the Apartheid government of South Africa to invite foreign troops, today any government which practices genocide or is confronted with a manifest and comprehensive popular uprising is prevented by the principle of self-determination to invite foreign troops."

[17] See with a view to the Yemeni case *T. Ruys/L. Ferro*, Weathering the Storm: Legality and Legal Implications of the Saudi-Led Military Intervention in Yemen, ICLQ 65 (2016), 61 (97), arguing that "for purposes of assessing the validity of a request for military assistance, the degree of international recognition can compensate for substantial loss of control over territory."

[18] See for the former conceptualisation: *T. Christakis/K. Bannelier*, *Volenti non fit inuiria?* Les effets du consentement à l'intervention militaire, A.F.D.I. 50 (2004), 102 et seq.

Council from effectively reacting to threats to the peace and from authorising military measures under Chapter VII of the UN-Charter.

Given that the recent military interventions in full-fledged civil wars did not attract any critique, the "negative equality" doctrine (if it was ever viable) seems to be dead.[19] In contrast, motives seem to matter. It has been suggested that the "*finalités*", "purposes", "objectives", or "functions" of the military intervention should play a crucial role for the assessment of its legality.[20] This scholarly assessment can point to the wording of the ICJ's dictum in *Nicaragua*. After all, the Court there had said that an invitation by the government was "allowable" (not "allowed") – which suggests that the invitation is only a necessary but not sufficient condition of legality. Also, the Institut de Droit International in its Rhodes resolution of 2011 focused on the intervention's "objective" and "object" (which is arguably very similar to motives, purposes, and ends) by stating in Art. 2(2):

> "The *objective* of military assistance is to assist the requesting State in its struggle against non-State actors or individual persons within its territory, with full respect for human rights and fundamental freedom."

Concomitantly, military assistance is prohibited "when its *object* is to support an established government against its own population" (Art. 3(1)).[21]

Finally, a striking feature of the recent interventions is that the acting states invoke a multiplicity of titles of which only one is the invitation. For example, the operations by the United States and its allies on the one side and Russia on the other in Iraq and Syria were explained both as collective self-defence[22] and as following the requests by Iraq[23] and by Syria.[24] At this point, it has been argued that the title of invitation should be preferred over the subsidiary title of collective self-defence, except when the military assis-

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19 *T. Ruys/L. Ferro* (note 17), 97.

20 Seminally *T. Christakis/K. Bannelier* (note 18), 102 et seq., esp. at 119; *K. Bannelier-Christakis* (note 4).

21 Institut de Droit International, Session of Rhodes (note 7), emphasis added.

22 See the letters to the UN SC: UN Doc. S/2014/695 of 23.9.2014 (USA); UN Doc. S/2015/563 of 24.7.2015 (Turkey); UN Doc. S/2015/688 of 7.9.2015 (UK); UN Doc. S/2015/745 of 8.9.2015 (France).

23 Note 3.

24 Note 8. Also, the Syrian Foreign Minister stated in 2014 that Syria was "open towards this cooperation" (for combating terrorism) "including with the United States and Great Britain", BBC Interview with the Syrian Minister of Foreign Affairs, *Walid Muallem*, of 25.8.2014, available at<https://www.bbc.com>. See also the identical letters dated 25.5.2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, 1.6.2015 (UN Doc. A/69/912-S/2015/371): "Syria reiterates that it is prepared to cooperate bilaterally and at the regional and international levels to combat terrorism."

tance would directly or indirectly support international crimes committed by the requester – which is the case in Syria.[25]

Most conspicuously, the Security Council was engaged in the recent events as well, by either authorising or commending the military activity, or by pronouncing itself on the legitimacy of the requesting actors.[26] Often, neither the invitation, nor the Security Council, nor any other ground offered unequivocal legal bases for a use of force in foreign territory. For example, the Syrian dictator's invitations are tainted by his crimes; the Security Council Resolution 2249 is not based on Chapter VII and uses only weak language: it does not "authorise" member states but only "calls upon" them to take measures;[27] and finally self-defence is controversial when directed – as here – only against non-state armed attacks (by the IS). But can two or three weak and dubious justifications in combination form a good and solid legal basis that is apt to legalise activity which *prima facie* violates the prohibition on the use of force? This is one of the troubling questions discussed in the following contributions.

The Impulses in this issue accompany the fourth volume of the Max Planck Trialogues on the Law of Peace and War.[28] Sixteen impulses zoom in on specific legal challenges of military assistance on request and seek to identify possible ways ahead. In the following, they cluster around terminology, methods, and principles, examine the authority to invite, analyse the purposes and functions of intervention, and highlight the phenomenon of multiple grounds for intervening. Finally, a group of impulses focus on the role of the Security Council, and on notification, proceduralisation, or bureaucratisation of the intervention.[29]

The Impulses continue the work of three volumes of the Max Planck Trialogues which deal with self-defence against non-state actors (vol. 1), the

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[25] *C. Kreß*, The Fine Line Between Collective Self-Defense and Intervention by Invitation: Reflections on the Use of Force against "IS" in Syria, Just Security, 17.2.2015.

[26] See, e.g., on Mali: UN SC Res. 2056 (2012) and 2071 (2012), Presidential Statements of 26.3.2012 (S/PRST/2012/7), 4.4.2012 (S/PRST/2012/9); and UN SC Res. 2085 of 20.12.2012. See in scholarship *K. Bannelier/T. Christakis*, Under the UN Security Council's Watchful Eyes: Military Intervention by Invitation in the Malian Conflict, LJIL 26 (2013), 855 et seq.

[27] UN SC Res. 2249 of 20.11.2015.

[28] *G. Fox*, Invitations to Intervene After the Cold War: Toward a New Collective Model; *O. Corten*, Intervention by Invitation: The Expanding Role of the Security Council; *D. Kritsiotis*, International Law and the Problem of Intervention on Request, in: Max Planck Trialogues on the Law of Peace and War Vol. 4: Intervention by Invitation, (A. Peters/C. Marxsen (series eds.), 2020 forthcoming).

[29] See already Art. 4(4) of the IDI Rhodes resolution of 2011 (note 7): "Any request that is followed by military assistance shall be notified to the Secretary-General of the United Nations."

law applicable to armed conflict (vol. 2), and reparations for victims of armed conflict (vol. 3). The trialogues format responds to the current state of international legal order which seems to be characterised by three factors: first, it is precarious and fragile due to its Eurocentric baggage. Although international law is universal in pretension, it suffers from a parochial heritage. This is no new fact but it is being freshly recognised and acknowledged. Second, we witness a global change of order. The economic, political, military, and ideational dominance of the West is challenged due to a shift of economic and concomitant political power, and due to a changed intellectual climate and new ideas. Third, the international legal order is characterised by a "securitisation" which some call a new cold war.

All this has an impact on the international law governing the use of force and surrounding armed conflict. In that field of the law, deep-seated differences in the legal assessment of problems, for example intervention with consent of the territorial state, arise. This is understandable because states must take existential decisions, and the issue is highly value loaded. That means that "correct" solutions through purely doctrinal scholarship are not easy, maybe impossible to find. Such state of affairs warrants more reflection on our scholarly premises and methods. And that is exactly the job of the Max Planck Trialogues. The trialogue format accommodates the pluralism and values changes of the current era, a shifting world order with a rise in nationalism and populism. It brings to light the cultural, professional and political pluralism which characterises international legal scholarship and exploits this pluralism as a heuristic device. Multiperspectivism exposes how political factors and intellectual styles influence the scholarly approaches and legal answers. The trialogical structure encourages its participants to decentre their perspectives. By explicitly focussing on the authors' divergence and disagreement, we hope to achieve a richer understanding of the issue at hand.[30]

[30] *A. Peters*, Introduction to the Series: Trialogical International Law, in: M.-E. O'Connell/C. Tams/D. Tladi, Max Planck Trialogues on the Law of Peace and War, Vol. 1: A. Peters/C. Marxsen (series eds.), 2019, XI-XXV.