The Alleged Prohibition on Intervening in Civil Wars Is Still Alive after the Airstrikes against Islamic State in Iraq: A Response to Dapo Akande and Zachary Vermeer

In a recent post on ‘The Airstrikes against Islamic State in Iraq’ (hereafter “the post”), Dapo Akande and Zachary Vermeer argue that the legal justifications given by the states intervening in Iraq “seem to count against the existence of [a prohibition on intervening in civil wars] as part of contemporary international law”. The aim of this post is to question such a conclusion. It will deal with three main issues: the alleged generality of those legal justifications (1); their ability to reveal the opinio juris of the intervening states (2); and the situation in Iraq as a “civil war” in the sense of the 1975 resolution of the Institut de Droit International (IDI), which prohibits any intervention in civil wars (3).

Generality of the legal justifications

Dapo Akande and Zachary Vermeer’s above-mentioned conclusion is based notably on the alleged “generality” of the legal justifications given by the intervening states in Iraq. After positing that Iraq is engaged in a civil war under the 1975 IDI resolution (an assumption I challenge below), they conclude that the “general” justifications offered for intervention imply that states consider that it is always legal under international law to intervene at the request of a government during a civil war. However, a closer look at the legal justifications offered, including those not mentioned in the post, reveals that, when justifying their intervention, all the states expressly referred to the objective of fighting against the Islamic State (ISIL) as the specific purpose of the consent given by the Iraqi authorities for their intervention. In other words, in the Iraqi case, the consent given by Iraq to intervene on its territory was generally considered only in relation to this specific purpose.

In the declaration of the senior US administration official quoted in the post, as in President Obama’s notification to Congress (also and only partially quoted), “[the] actions” that the United States had been invited to take at the request of the Iraqi government were clearly actions against ISIL. More precisely, in Obama’s words, they were the “necessary actions against these terrorists in Iraq and Syria”. With regard to the declaration of France, in particular the speech by the French Minister for Defence before the French Senate, the French Minister clearly stated (after the passage reproduced in the post): “I remind you: we are responding to the request for support of the Iraqi authorities to weaken the terrorist organization Daesh.” (translated from French, emphasis added). Moreover, on 19 September 2014, the French President expressly stated in an official declaration: “Yesterday . . . I announced my decision to respond to the request of the Iraqi authorities and to grant them the support necessary to fight against terrorism.” (translated from French, emphasis added).
Concerning statements of Canada, “the support” to which the Canadian Foreign Minister referred in his declaration quoted in the post consisted of the support to help Iraq to fight against ISIL. This is in line with the text of the resolution adopted by the Canadian House of Commons on the subject, which expressly “acknowledge[s] the request from the government of Iraq for military support against ISIL from members of the international community, including from the Government of Canada” (emphasis added). The same may be said about the notion of “support” used by the Australian Prime Minister in his declaration referred to in the post, which is confirmed by other declarations of the Prime Minister, such as the one made before the UN Security Council on 24 September 2014, in which he stated that “[o]ur combat aircraft and special forces are now in the Middle East preparing to join the international coalition to disrupt and degrade ISIL at the request of the Iraqi Government” (emphasis added). As far as the position of the Dutch government is concerned, no clear statement was actually made on this issue by any member of this government during the discussions before the Parliament. Those discussions mainly concentrated on the question of extending the military operations to Syria. However, the Dutch Foreign Minister expressly stated before the Committee for Foreign Affairs that “[t]he legal basis for the Dutch contribution to the fight [against the Islamic State] derives from the consent of the Iraqi authorities to that contribution” (translated from Dutch, emphasis added).

One must admit that parts of the summary of the UK legal position on the Iraqi case seem to be formulated in general terms. Yet, both this document and the motion passed by the House of Commons authorizing UK’s participation in the airstrikes in Iraq also expressly refer to the request by the Iraqi government for the purpose “to defend itself against [the threat] ISIL”. In addition, one must look to legal justifications given by the other states participating in the airstrikes in Iraq, which are not mentioned in the post, such as the justification contained in the resolution adopted by the Belgian House of Representatives on the subject. That resolution expressly refers to “the Iraqi request for assistance – which is enough in international law to justify a military action against ISIL” (translated from French, emphasis added). Such legal justification again clearly links the request of the Iraqi government to the purpose of the requested intervention, i.e. the fight against ISIL.

As a result, the supposed “generality” of the legal justifications given by the intervening states in Iraq may certainly be called into question. These justifications – and more generally the Iraqi case – may hardly be interpreted as evidencing the opinio juris of those states that any intervention requested by the government of a state on its territory is normally legal under international law regardless of the purpose of this intervention. The mere lesson that can be drawn from such justifications is that, in those states’ view, intervention by invitation is clearly legal under international law at least when its purpose is to fight against terrorism – which does not necessarily mean that it is legal only when pursuing such objective. Given that ISIL is unanimously qualified as a terrorist organization and if one considers (contrary to my view – infra 3) that the situation in Iraq amounted to a civil war at the time of the interventions, the Iraqi case could be invoked.
to support the position upheld by some scholars, such as T. Christakis and K. Bannelier, who argue for an exception to the prohibition on intervening in civil wars when intervention is only directed against universally recognized terrorist groups.

**Opinio juris from state declarations**

That having been said, one must be cautious when inferring the *opinio juris* of states from declarations of their political leaders, since one should not always expect that they give detailed and comprehensive legal explanations. One must admit that the two UK documents quoted in the post, i.e. the *summary of the UK legal position* and the *motion passed by the House of Commons* to authorize the UK’s participation in the airstrikes on Iraq, must be given particular weight in that respect. However, one may hardly infer the “true” *opinio juris* of a state on the basis of one declaration made by one of its political leaders, especially when such declaration (like the one made by the Australian Prime Minister, reproduced in the post) is a response given to an interview. Such *opinio juris* must be sought through a range of declarations. The declarations quoted in the post must therefore be considered alongside other declarations (such as those discussed above) to construct a more precise picture of the states’ opinion. Moreover, among several declarations, priority must be given to some of them and, for example, to those made before international fora, such as the UN Security Council.

The case of Mali clearly evidences the need for such a cautious approach. As the French Minister for Foreign Affairs evoked the right of collective self-defense in a press conference and *before the French Senate* to justify the intervention of France in Mali, some authors considered that the intervention was legally based on such a right – and that the *opinio juris* of France was that self-defence could be exercised in reaction to attacks by non-state actors. However, the true *opinio juris* of France could not be inferred from those declarations. Priority had to be given to a more trustworthy verbal state practice, the letter sent by France to the President of the UN Security Council just after the intervention. In this letter, the argument put forward by France was not collective self-defense but the request made by the Malian authorities to help Mali to repel the terrorist groups from the North of its territory.

More particularly, very strong, clear and abundant statements (rather than only a few declarations or other limited verbal state practice) would have been needed in the Iraqi case to conclude that France and UK had recognized that it was not prohibited under international law to intervene in civil wars, as it is well-known that both states have long espoused a clear policy not to intervene in such situations ([here and [1986] BYIL 616], respectively).

**The Iraqi situation as a “civil war”**

More fundamentally, the foreign interventions in Iraq should not be seen as interventions in a civil war in the sense of the 1975 IDI resolution. As a result, the legal justifications given by the intervening states do not seem to constitute relevant state practice for assessing the existence (or maintenance) of a prohibition on intervening in
such situations. This is not so much because, as considered by Dapo Akande and Zachary Vermeer in the last part of their post, the conflict between Iraq and ISIL could plausibly be seen as not of a pure internal nature. This is rather because, even qualified as internal (which seems to be the case at least under international humanitarian law), this conflict does not properly fall within the scope of the notion of civil war under the 1975 IDI resolution.

Indeed, it is clearly apparent from its *travaux préparatoires* (see e.g. [1973] *IDI Yearbook* 443-445; 452-454; 468 and 518; [1975] *IDI Yearbook* 125; 127; 129; 138 and 151) that the general prohibition on interventions in civil wars contained in the resolution mainly resulted from the assumption that such interventions would violate the right of peoples to self-determination. In that sense, the notion of “insurgent movements” whose fighting against the established government is considered as a civil war according to Article 1, 1), a) of the resolution actually refers to movements exercising their right of self-determination and being, therefore, supported by a significant part of the population. The view expressed by M. Dietrich Schindler in his interim report presented at the 1973 IDI session in Rome, which seems to have prevailed over contrary views held by other IDI members, is particularly illustrative in that respect ([1973] *IDI Yearbook* 468) : “assistance to the established government in case of civil wars ... is illegal ... when the insurgents, without having received any substantial assistance from abroad, succeed in establishing their control over a significant part of the territory and are supported by a large part of the population” (translated from French, emphasis added). I do not think that ISIL benefits from any wide popular support, most of the Syrian and Iraqi population actually fearing the terrorist organization. It could not be seen as exercising any right of self-determination on behalf of such population.