

# Counterintervention on Behalf of the Syrian Opposition? An Illustration of the Need for Greater Clarity in the Law

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Joseph Klingler\*

## INTRODUCTION

More than two years and over 100,000 deaths after the first overt signs of dissidence,<sup>1</sup> few would deny that the conflict in Syria has escalated into a full-fledged civil war. As reports of atrocities and growing sectarianism mounted, so did calls by many in the West to “do something”<sup>2</sup> to help topple the Assad regime and bring peace to the embattled country. Such appeals peaked following the alleged large-scale use of chemical weapons by the regime,<sup>3</sup> at which point a U.S. military strike appeared imminent despite President Obama’s own doubts as to the legality of unilateral action.<sup>4</sup> Although the prospects of a direct strike were greatly diminished by Assad’s subsequent agreement to dismantle his chemical weapons stock,<sup>5</sup> the U.S.

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\* J.D. Harvard Law School, MALD The Fletcher School of Law and Diplomacy. An unpublished version of this article was presented at the American Society of International Law’s Midyear Meeting and Research Forum in November of 2013. Helpful critiques were also provided by Dean Ian Johnstone at The Fletcher School of Law and Diplomacy, Professor Gabriella Blum at Harvard Law School, and Professor Tom Ginsburg at the University of Chicago. All errors are the author’s alone.

1. See *Syria Death Toll Now Above 100,000, Says UN Chief Ban*, BBC NEWS, July 25, 2013, <http://www.bbc.co.uk/news/world-middle-east-23455760>.

2. See, e.g., *The Security Situation In Syria: Implications For U.S. National Security And Policy Options, Testimony before the House Armed Services Committee*, 113th Cong. 1 (2013) (statement of Mona Yacoubian, Senior Advisor, Middle East, Stimson Center) (“The understandable moral outrage over the suffering of the Syrian people has prompted urgent calls for the United States to ‘do something.’”).

3. See THE WHITE HOUSE OFFICE OF THE PRESS SECRETARY, *Government Assessment of the Syrian Government’s Use of Chemical Weapons on August 21, 2013* (Aug. 30, 2013), <http://www.whitehouse.gov/the-press-office/2013/08/30/government-assessment-syrian-government-s-use-chemical-weapons-august-21>.

4. Alan Silverleib, *Exclusive: Obama Tells CNN Key Decisions Nearing on Syria, Egypt*, CNN (Aug. 23, 2013, 11:01 AM), [http://www.cnn.com/2013/08/23/politics/obama-cnn-new-day-interview/?hpt=po\\_c1](http://www.cnn.com/2013/08/23/politics/obama-cnn-new-day-interview/?hpt=po_c1) (quoting President Obama, who states that “[i]f the U.S. goes in and attacks another country without a U.N. mandate and without clear evidence that can be presented, then there are questions in terms of whether international law supports it.”).

5. Anne Barnard, *Deal Represents Turn for Syria; Rebels Deflated*, N.Y. TIMES, Sept. 15, 2013, [http://www.nytimes.com/2013/09/16/world/middleeast/deal-represents-turn-for-syria-rebels-deflated.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/09/16/world/middleeast/deal-represents-turn-for-syria-rebels-deflated.html?pagewanted=all&_r=0) (“Both sides in Syria’s civil war see the deal to dismantle President Bashar al-Assad’s chemical weapons stockpiles as a major turning point. . . . The agreement between the United

government nonetheless stepped up its efforts against Assad, finally making good on longstanding promises to provide lethal aid to the opposition.<sup>6</sup>

Was this legal? To date, most analyses of the propriety of arming the rebels have emphasized policy over legal considerations.<sup>7</sup> The few legal discussions that have taken place have almost unanimously concluded that intervention—whether in the form of direct military strikes or more indirect military assistance—would likely be illegal.<sup>8</sup> Though one might argue that the downing of a Turkish jet and sporadic cross-border shelling by the Assad regime into Turkey constituted an “armed attack”<sup>9</sup> permitting a forcible response under United Nations Charter Article 51,<sup>10</sup> a response capable of seriously influencing the outcome of the Syrian conflict would be neither proportionate nor necessary.<sup>11</sup> Other mainstream justifications are equally unavailing: Security Council authorization for intervention remains unlikely,<sup>12</sup> and without such authorization, forcible action under the emerging

States and Russia, Mr. Assad’s most powerful backer, ended weeks of tension over the possibility of an imminent American military strike.”).

6. Ernesto Londoño & Greg Miller, *U.S. Weapons Reaching Syrian Rebels*, WASH. POST, Sept. 11, 2013, [http://www.washingtonpost.com/world/national-security/cia-begins-weapons-delivery-to-syrian-rebels/2013/09/11/9fcf2ed8-1b0c-11e3-a628-7e6dde8f889d\\_story\\_1.html](http://www.washingtonpost.com/world/national-security/cia-begins-weapons-delivery-to-syrian-rebels/2013/09/11/9fcf2ed8-1b0c-11e3-a628-7e6dde8f889d_story_1.html) (“The CIA has begun delivering weapons to rebels in Syria, ending months of delay in lethal aid that had been promised by the Obama administration, according to U.S. officials and Syrian figures. The shipments began streaming into the country over the past two weeks, along with separate deliveries by the State Department of vehicles and other gear—a flow of material that marks a major escalation of the U.S. role in Syria’s civil war.”).

7. See, e.g., Jim Zirin, *Are We Crazy To Arm The Syrian Rebels?*, FORBES (June 19, 2013, 3:00 PM), <http://www.forbes.com/sites/jameszirin/2013/06/19/do-we-achieve-anything-by-sending-arms-to-the-syrian-rebels/>.

8. See, e.g., Rosa Brooks, *So You Want to Intervene in Syria Without Breaking the Law? Good Luck with That.*, FOREIGN POLICY, June 20, 2013, [http://www.foreignpolicy.com/articles/2013/06/20/so\\_you\\_want\\_to\\_intervene\\_in\\_syria\\_without\\_breaking\\_the\\_law](http://www.foreignpolicy.com/articles/2013/06/20/so_you_want_to_intervene_in_syria_without_breaking_the_law); Paul Campos, *Striking Syria is Completely Illegal*, TIME (Sept. 5, 2013), <http://ideas.time.com/2013/09/05/obamas-plan-for-intervention-in-syria-is-illegal/>. See also Dapo Akande, *Would It Be Lawful For European (or Other) States to Provide Arms to the Syrian Opposition?*, EJIL: Talk! (Jan. 17, 2013), <http://www.ejiltalk.org/would-it-be-lawful-for-european-or-other-states-to-provide-arms-to-the-syrian-opposition/> (concluding that the provision of arms to the rebels would likely be illegal). *But see generally* Jordan J. Paust, *Use of Military Force in Syria by Turkey, Nato and the United States*, 34 U. PA. J. INT’L L. 431 (2013) (arguing that military action in Syria may be permissible under multiple legal theories).

9. See, e.g., Martin Chulov, *UN Unanimously Condemns Syrian Shelling of Turkish Town*, THE GUARDIAN, Oct. 5, 2012, <http://www.theguardian.com/world/2012/oct/05/un-condemns-syrian-shelling-turkish> (“Erdogan’s motion [in Parliament] said the shelling had been ‘on the threshold of an armed attack’ and was a ‘serious threat to Turkish national security.’”).

10. See Paust, *supra* note 8, at 441–42 (asserting that “Turkey is under a process of armed attacks by Syrian military units and could request assistance from the United States . . .”).

11. As Christine Gray notes, “[n]ecessity is commonly interpreted as the requirement that no alternative response be possible,” whereas “[p]roportionality relates to the size, duration and target of the response.” CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 150 (2008).

12. See, e.g., Michelle Nichols, *Syria Rebels Meet U.N. Security Council, Urge Russia to End Assad Support*, REUTERS, July 26, 2013, available at <http://www.reuters.com/article/2013/07/26/us-syria-crisis-und-USBRE96P11220130726> (“The 15-member Security Council has been deadlocked on Syria. Russia, an ally and arms supplier of Assad, and China have three times blocked action against Assad supported by the remaining veto powers - the United States, Britain and France.”).

doctrine of the “responsibility to protect,” or “R2P,” is unlikely to meet widespread approval.<sup>13</sup>

One possible justification for arming the opposition—that of an alleged right to limited “counterintervention” in the context of a civil war<sup>14</sup>—is one almost entirely absent from public and academic discourse on the subject.<sup>15</sup> Indeed, although a strain in the literature suggests the existence of such a right, there is little sign that the U.S. administration itself has openly considered the argument.<sup>16</sup> This article will attempt to determine why not.

Part I will explain the doctrine of counterintervention and analyze the strengths and weaknesses of the arguments made by those who have asserted the existence of such a right under customary international law. It will be suggested that, although the evidence is ultimately insufficient to establish the existence of a right to counterintervene on behalf of opposition groups, there is more room for making such an argument—under certain very limited circumstances—than many scholars realize.

Part II will apply the doctrine of counterintervention laid out in Part I to the facts on the ground in Syria. It will be argued that, even if a right to counterintervene on behalf of opposition groups could be said to exist in the abstract, it could probably not be lawfully applied in the particular context of the Syrian civil war. Nevertheless, it will be shown that the facts and the law are sufficiently ambiguous that a claim could be made to the contrary. This possibility suggests a need for states to clarify the law through expressions of *opinio juris*—preferably, in the author’s view, by conclusively re-

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13. The most authoritative statement of the international community’s position on R2P can be found in the General Assembly’s World Summit Outcome document of 2005. In pertinent part, the resolution states that the international community is “prepared to take collective action, in a timely and decisive manner, *through the Security Council*, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.” 2005 World Summit Outcome, G.A. Res. 60/1, U.N. Doc. A/RES/60/1, at 139 (Sept. 16, 2005) (emphasis added).

14. Under a theory of counterintervention—which will be discussed in greater depth below—once the civil war threshold has been passed, an incumbent government loses its normal prerogative to receive outside assistance. If the government nonetheless continues to receive such now-illicit support, third states are permitted to proportionately counterintervene, either to restore balance in support of the people’s right to self-determination, or in the name of self-defense from foreign intervention.

15. The one discussion of the subject I have come across can be found in a well-reasoned but brief section of a blog posting by Oxford Lecturer Dapo Akande. See Akande, *supra* note 8.

16. Instead, legal opinions appear to have focused on “justifications” unlikely to carry much weight under the law. See Adam Entous, *Legal Fears Slowed Aid to Syrian Opposition*, WALL ST. J., July 14, 2013, <http://online.wsj.com/article/SB10001424127887323848804578606100558048708.html> (“A string of cautionary opinions from administration lawyers over the last two years sheds new light on President Barack Obama’s halting and ultimately secretive steps to provide military support to rebels in Syria’s deadly civil war. . . . [T]he lawyers sidestepped questions over international law by asserting that supporting the rebels was justified by a number of factors: the humanitarian crisis in Syria, alleged human-rights violations by the regime and Iranian arms shipments that violate U.N. Security Council sanctions.”). It is, however, possible to argue that the reference to illegal Iranian arms shipments might fit within the framework of counterintervention discussed below. See *infra* note 214.

jecting the doctrine of counterintervention on behalf of opposition groups before it is invoked in the future.

## I. THE DOCTRINE OF COUNTERINTERVENTION

### A. *The Principle of Non-Intervention*

The principle of non-intervention is a cornerstone of the international legal order. The term is referenced not only in the United Nations Charter itself,<sup>17</sup> but is also widely recognized in U.N. General Assembly resolutions,<sup>18</sup> judicial opinions,<sup>19</sup> diplomatic correspondence, and legal scholarship more generally. The typical formulation of the prohibition is broad. The U.N. General Assembly, for example, in its 1970 Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States, states,

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State . . . . [N]o State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State . . . . Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State . . . .<sup>20</sup>

While the margins of the prohibition may be subject to debate,<sup>21</sup> the principle clearly encompasses efforts to arm or train members of opposition groups. In its groundbreaking decision in *Military and Paramilitary Activities in and Against Nicaragua*, the International Court of Justice ("ICJ") found

17. See U.N. Charter art. 2, para. 7 ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.")

18. See, e.g., Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, G.A. Res. 20/2131 (XX), U.N. Doc. A/RES/20/2131 (Dec. 21, 1965). See also Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 25/2625 (XXV), Annex, U.N. Doc. A/RES/25/2625 (Oct. 24, 1970).

19. See, e.g., *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

20. See Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States, *supra* note 18, annex ¶ 1.

21. Despite typically broad formulations of the rule, economic coercion, for example, does not constitute a violation of the principle of non-intervention. See, e.g., *Military and Paramilitary Activities in and Against Nicaragua*, *supra* note 19, ¶¶ 244–45 ("[T]he Court has merely to say that it is unable to regard such action on the economic plane as is here complained of [such as, the cessation of economic aid, the reduction in import quotas, and the trade embargo] as a breach of the customary-law principle of non-intervention.")

that the “financial support, training, supply of weapons, intelligence and logistic support” provided to the Nicaraguan contras by the United States “constitute[d] a clear breach of the principle of non-intervention.”<sup>22</sup> Indeed, the Court flatly stated that “if one State, with a view to the coercion of another State, supports and assists armed bands in that State whose purpose is to overthrow the government of that State, that amounts to an intervention by the one State in the internal affairs of the other, whether or not the political objective of the State giving such support and assistance is equally far-reaching.”<sup>23</sup> There is thus little doubt that the provision of military assistance to opposition groups is, at least as a general rule, squarely prohibited.

### B. *The General Right of Governments to Receive External Assistance*

In stark contrast to opposition groups, there is generally no prohibition on assisting recognized governments.<sup>24</sup> In fact, the concept of “intervention by invitation” of a government is, in times of peace, noncontroversial.<sup>25</sup> It is, for example, widely recognized that third parties may provide a recognized, stable government with assistance for a number of activities, which might include disaster relief, anti-narcotics operations, and even general policing.<sup>26</sup> Indeed, subject to applicable laws governing trade in arms,<sup>27</sup> states are generally free to provide and receive weapons without violating the principle of non-intervention.<sup>28</sup> This freedom is unsurprising: at least in times not marked by significant internal civil strife, a government is the sole representative of the state and is presumed to speak on its behalf.<sup>29</sup>

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22. *Id.* ¶ 241. See also Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BRIT. Y.B. INT'L L. 189, 190 (1985) (“[A]ny military aid given to rebels in another State has been unequivocally declared illegal. With the possible exception of aid to groups exercising their right of self-determination . . . there has been no dissent from this view either in case law or in literature.”).

23. Military and Paramilitary Activities in and Against Nicaragua, *supra* note 19, ¶ 241.

24. David Wippman, *Military Intervention, Regional Organizations, and Host-State Consent*, 7 DUKE J. COMP. & INT'L L. 209, 209 (1996) (“That consent may validate an otherwise wrongful military intervention into the territory of the consenting state is a generally accepted principle.”).

25. SHIRLEY V. SCOTT ET AL., INTERNATIONAL LAW AND THE USE OF FORCE: A DOCUMENTARY AND REFERENCE GUIDE 93 (2010) (“It has, however, been uncontroversial since 1945 that a State may intervene militarily in another State if it does so at the request of the government in power . . .”).

26. See, e.g., Doswald-Beck, *supra* note 22, at 189 (“[T]here is certainly no doubt that a State can legally send troops to another State upon invitation for certain limited operations. . . . Examples of such limited operations would include the use of peacekeeping forces which do not become involved with internal affairs, certain rescue operations and help with minor disturbances not aimed at the political organization of the country.”).

27. See, e.g., Arms Trade Treaty, *adopted* Apr. 2, 2013, 52 I.L.M. 988. The convention has not yet entered into force, but had been signed by 83 countries as of August 2013. *The Arms Trade Treaty*, UNITED NATIONS OFFICE FOR DISARMAMENT AFFAIRS, <http://www.un.org/disarmament/ATT/> (last visited Mar. 7, 2014).

28. BRAD R. ROTH, GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW 179 (1999) (“It is clear beyond cavil that arms sales and military assistance to recognized governments are not generally illegal.”).

29. Doswald-Beck, *supra* note 22, at 190 (“The basic principle of State representation in international law is that the government speaks for the State and acts on its behalf.”).

Given the authority of governments to receive outside assistance, it is fair to assert that intervention is only illegal when it may be deemed “dictatorial”;<sup>30</sup> that is, when it runs counter to the will of the state.<sup>31</sup> Alternatively, one might suggest that non-dictatorial intervention is simply not intervention at all.<sup>32</sup> This formulation has the benefit of facial compliance with the General Assembly’s sweeping prohibition of intervention “for any reason whatever.”<sup>33</sup> However characterized, assistance provided to a recognized, unchallenged government cannot be said to run counter to the assisted state’s sovereignty or political independence, and is therefore universally viewed as legal.

### C. Conditions on the Government’s Right to Receive Assistance

Hidden behind the framework described above lies more ambiguity than one might expect. Indeed, the nuances behind the concept of “intervention by invitation” have led to a significant body of literature on the subject.<sup>34</sup> A review of this literature suggests the existence of a number of conditions on the right of the government to request assistance.

It is generally recognized, for example, that a legitimate request for assistance may only be made by a *representative* of government with sufficient authority to make it.<sup>35</sup> Similarly, few would deny that requests for assistance by a government must be “valid” and actually given.<sup>36</sup> A more difficult question—at least from the perspective of the law, rather than the application of the law to the facts—is *which* “government” is entitled to invite assistance.

30. 1 L. OPPENHEIM, INTERNATIONAL LAW 305 (H. Lauterpacht ed., 8th ed. 1955).

31. Wippman, *supra* note 24, at 210 (“[P]rohibited intervention should be understood as intervention against the will of the state.”).

32. *Cf.* 1 L. OPPENHEIM, INTERNATIONAL LAW 432 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

33. Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, *supra* note 18, annex ¶ 1.

34. See generally, e.g., Doswald-Beck, *supra* note 22; Wippman, *supra* note 24; John Norton Moore, *Legal Standards for Intervention in Internal Conflicts*, 13 GA. J. INT’L & COMP. L. 191 (1983); Lloyd N. Cutler, *The Right to Intervene*, FOREIGN AFFAIRS, Fall 1985, 96–112; SCOTT ET AL., *supra* note 25, at 91–96; OLIVIER CORTEN, THE LAW AGAINST WAR 249–310 (2010); CHRISTINE GRAY, *supra* note 11, at 67–113 (2008).

35. CORTEN, *supra* note 34, at 266.

36. See, e.g., Rep. of the Int’l Law Comm’n to the Gen. Assembly, U.N. GAOR, 34th Sess., Supp. No. 10, U.N. Doc. A/34/10 (1979), reprinted in [1979] 2 Y.B. Int’l L. Comm’n, pt. 2, 112, U.N. Doc. A/CN.4/SER.A/1979/Add.1. (“The consent of the state must be valid in international law, clearly established, really expressed (which precludes merely presumed consent) . . . and anterior to the commission of the act to which it refers. Moreover, consent can be invoked as precluding the wrongfulness of the act by another State only within the limits which the State expressing the consent intends with respect to its scope and duration.”) (emphasis omitted). For an excellent discussion of the meaning of “validly given” consent, see generally CORTEN, *supra* note 34 at 266–76.

Under traditional international law, one of the most widely accepted conditions precedent to the recognition of a government is the requirement that it have “effective control” over the state.<sup>37</sup> As Hans Kelsen put it in 1961,

Under what circumstances does a national legal order begin to be valid? The answer, given by international law, is that a national legal order begins to be valid as soon as it has become—on the whole—efficacious; and it ceases to be valid as soon as it loses this efficacy . . . . The government brought into permanent power by a revolution or *coup d'état* is, according to international law, the legitimate government of the State, whose identity is not affected by these events. Hence, according to international law, victorious revolutions or successful *coups d'état* are to be interpreted as procedures by which a national legal order can be changed. Both events are, viewed in the light of international law, law-creating facts.<sup>38</sup>

Thus, under the “effective control” framework, a government “ceases to be valid”<sup>39</sup>—and therefore arguably loses its authority to invite outside assistance—when it no longer has effective control over the state.

On one view, effective control “operates as an implicit indication of, or at least a surrogate for, consent of the governed.”<sup>40</sup> In other words, effective control can be seen as a proxy for consent—the latter of which is the ultimate theoretical fount of legitimacy.<sup>41</sup> However, effective control need not be linked to consent—or even legitimacy more broadly—as a matter of legal theory. Indeed, any assumption that control necessarily corresponds to consent may be more pragmatic than realistic,<sup>42</sup> and is therefore arguably morally problematic.<sup>43</sup> Presumably for this reason, while “effective control” remains an important factor affecting the legality of a government’s receipt of outside assistance in most circumstances, it has “failed to impress advocates of the more express legitimisms that have, from time to time, rivaled the effective control criterion of recognition.”<sup>44</sup>

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37. ROTH, *supra* note 28, at 136 (“Throughout modern times, state practice regarding recognition of governments, whether viewed as dictated by legal principle or by prudential considerations, has been dominated by the application of one variant or another of the *de facto* or effective control test.”).

38. HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 220–21 (Anders Wedberg trans., Russell & Russell eds. 1961).

39. *Id.*

40. ROTH, *supra* note 28, at 139.

41. *Id.* at 2 (“In theory, it is ‘the people,’ not the ruling apparatus, that constitutes the sovereign entity in the international system; the apparatus in effective control is respected because, and only insofar as, it is *presumed* (albeit sometimes irrefutably) to be the expression of ‘the will of the people.’”).

42. *Cf. id.* at 142 (“[E]ffective control as a presumed reflection of popular consent has a certain plausibility, given the frequent *impracticability* of empirical investigation and the presumptuousness of imposing from abroad procedures for gauging the sentiment of the political community.”) (emphasis added).

43. *Id.* at 136 (“[T]he *de facto* test [embodies] the morally troubling and legally disruptive principle that might makes right.”).

44. *Id.* at 142.

Those advocating the abandonment of the effective control criterion—or at least seeking more direct expressions of legitimacy—might argue, as has Thomas Franck, that the international community has seen “the emergence of a community expectation: that those who seek the validation of their empowerment patently govern with the consent of the governed.”<sup>45</sup> If it is true that “democracy is beginning to be seen as the *sine qua non* for validating governance,”<sup>46</sup> then it is not a huge leap to then argue that only democratic governments have the necessary legitimacy to invite outside assistance. While this particular argument would be more aspirational than reflective of existing customary international law, there is some basis in state practice for believing that *legitimacy*—at least where legitimacy is not necessarily equated only with *democracy*—is in certain contexts as important as effective control. Indeed, Christine Gray asserts in the context of intervention by invitation that

writers have divided on the question whether an invitation can only justify intervention if it comes from the effective government or whether it is the legitimate government that has the right to invite assistance to maintain itself in power or to restore it to power when it has been overthrown. Such academic debate has been inconclusive in the light of the diversity of state practice.<sup>47</sup>

Despite this ambiguity, in most cases the law is clear. Few would argue that a so-called “legitimate” *insurgency*—one which has never won elections or seriously challenged the government’s effective control over the state—is entitled to unilaterally invite outside assistance to defeat an authoritarian incumbent regime.<sup>48</sup> Such an insurgency may garner significant rhetorical support,<sup>49</sup> but to argue that the mere *aspiration* to democracy or other forms of legitimacy is sufficient to legitimize requests for assistance would open a Pandora’s box of self-interested interventions, and would be rejected by much of the international community.<sup>50</sup> Instead, it is submitted that a legit-

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45. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46, 46 (1992).

46. *Id.*

47. GRAY, *supra* note 11, at 99. See also Wippman, *supra* note 24, at 238 (“Once we move beyond the paradigm case of a recognized and effective government inviting intervention for sharply limited ends, it is extremely difficult to define precisely the cases in which invited interventions will be generally accepted. . . . In keeping with the traditional approach to intervention in internal conflicts, most states are strongly influenced by the extent to which an inviting authority exercises control of the state at the time an invitation to intervene is issued. Increasingly, however, states are prepared to consider the democratic legitimacy of an inviting authority as a counterbalance to considerations of power and effective control.”).

48. Of course, the calculus changes if the United Nations Security Council authorizes intervention on the basis of a threat to international peace and security.

49. For instance, consider international responses to democratic movements during the recent so-called Arab Spring.

50. There is, however, some precedent to suggest that the international community is willing to turn a blind eye to or even to implicitly condone—at least on a *post hoc* basis—assistance provided to allegedly legitimate insurgencies in certain rare circumstances in which the government is widely seen as “manifestly unrepresentative.” See, ROTH, *supra* note 28, at 297–303 (discussing assistance provided to the Sandinista insurgency against the authoritarian Somoza government in Nicaragua).



imate *government* that is not in effective control of the state may only *possibly* invite outside assistance in response to a purely domestic conflict if it has *previously* established its legitimacy,<sup>51</sup> but has since been deprived of its legitimate right to rule through a coup or other illicit usurpation of power.<sup>52</sup> Thus, while legitimacy has made inroads into the traditional emphasis on effective control, the law has not been so altered so as to justify intervention whenever an allegedly “legitimate” entity has issued an invitation.

At the other end of the spectrum, it is also clear that an authoritarian regime that has long been in effective control over the state *may* invite some level of outside assistance, even to quell small-scale protests of a political nature.<sup>53</sup> In such circumstances, the regime in question is likely to face much stronger political than legal pressures, at least when it comes to the specific rules surrounding the principle of non-intervention.<sup>54</sup>

At what point—if ever—does a longstanding authoritarian regime lose its right to receive external assistance? Under customary international law, there is little support for the proposition that an alleged loss of *legitimacy*—unaccompanied by a corresponding decline in *effective control*—can ever be sufficient. But how much of a decline in “effective control” is enough? At least nominally, a significant strain in the literature appears to provide a relatively uniform answer: the moment an internal conflict rises to the level of a “civil war.”<sup>55</sup>

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51. Cf. *id.* at 188 (asserting that “if effective control’s role is understood not to be determinative *per se*, but only to be presumptive evidence of popular will, it should follow that popular consent to a given government, if empirically manifested to the satisfaction of the international community, should justify a request for foreign troops even to put down a wholly domestic threat”) (emphasis added).

52. Even this may go too far. See GRAY, *supra* note 11, at 59 (“It seems to go too far to argue that [certain] instances of UN and regional action show a right for states unilaterally to use force to restore democratic government.”).

53. There is, however, reason to wonder why a regime would feel the need to request outside assistance if protests were, in fact, truly small-scale. See John Perkins, *The Right of Counterintervention*, 17 GA. J. INT’L & COMP. L. 171, 190 (1987) (“Either external aid is not necessary, or, if it is, the conclusion as to the government’s support by the population must be in doubt. If the recognized government may need external support to survive against purely indigenous opposition, that should be reason enough to insist that a heavy burden properly rest on any foreign government to demonstrate that its aid has not infringed on the right of the people to determine their own government.”).

54. This distinction is important: the fact that such a state would not be violating the principle of non-intervention does not mean that it also would not be contributing, for example, to the violation of *human rights*.

55. Some authors appear to refer instead to terms such as “insurgency” or “civil hostilities,” phrases that could presumably be associated with lower thresholds. For the sake of consistency and because the phrase “civil war” seems more prevalent in the literature, *infra* note 56, this article will refer to that phrase as the relevant trigger. Whatever the term used, however, the appropriate threshold should be tied to the loss of the government’s presumed authority to speak for the state. Cf. AM. BRANCH OF THE INT’L L. ASS’N, *Report of the Committee on Use of Force in Relations Among States*, PROCEEDINGS AND COMMITTEE REPORTS OF THE AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION 188, 210 (1985–86) (stating that “outside military force is not necessarily precluded in all civil conflict situations and, in those which present only law and order implications, is clearly not prohibited by international law. *The test is one of its substantive effect on the political independence of the state*”) (emphasis added). As discussed above, a strong argument can be made that the relevant threshold is best associated with a sufficient loss of “effective control” by the incumbent regime. See, e.g., ROTH, *supra* note 28, at 179 (“At some point in the unraveling of effective control . . . the provision of arms and other military assistance to the estab-

### D. *The Relationship Between Civil Wars and Non-Intervention*

On one common view, once the civil war threshold has been breached, outside assistance to a disputed government must be cut off.<sup>56</sup> In other words, in a civil war, the government loses the advantages over the opposition that normally accrue to it under international law by mere virtue of its incumbency. According to scholars holding this view, this is because, once internal dissent is of sufficient gravity to call the effectiveness of the government into genuine question, the government can no longer be presumed to speak for the state, and assistance to it is therefore no less a form of intervention with the people's right to self-determination than is assistance to the opposition.<sup>57</sup>

Although substantial support may be found for the civil war paradigm of abstention laid out above, it has been rejected or qualified by a number of scholars. First, some scholars have claimed that intervention is so widespread that there is essentially no prohibition against intervening at all.<sup>58</sup> The

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lished government for use against its rival becomes an act of foreign interference with the right of peoples to determine their own form of government.”).

56. See, e.g., *UK Materials on International Law*, 57 BRIT. Y.B. INT'L L. 616 (1986) (“[A]ny form of interference or assistance is prohibited (except possibly of a humanitarian kind) when a civil war is taking place and control of the state’s territory is divided between warring parties.”). See also Rein Mullerson, *Intervention by Invitation*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* 127, 132 (Lori Fisler Damrosch & David J. Scheffer eds., 1991) (“The majority of Western authors consider that international law does not forbid the rendering of military assistance at the request of a legitimate government with the aim of restoring order in the case of internal disorders, but that it is nonetheless impermissible to interfere in a civil war, no matter which side makes the request.”); GRAY, *supra* note 11, at 92 (“If there is a civil war rather than mere internal unrest, it has come to be accepted that there is a duty not to intervene, even at the request of the government, in the absence of UN or regional authorization.”); Inst. de Droit Int’l, *The Principle of Non-Intervention in Civil Wars*, art. 2(1) (1975) (“Third States shall refrain from giving assistance to parties to a civil war which is being fought in the territory of another State.”); Oscar Schachter, *International Law: The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1642 (1984) (“The relevant general principle . . . would be that when an organized insurgency occurs on a large scale involving a substantial number of people or control over significant areas of the country, neither side, government or insurgency, should receive outside military aid.”); R. Higgins, *Internal War and International Law*, in *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER* 81, 94 (C. Black & R. Falk eds., 1971) (“What is less clear—and it has become still more doubtful in recent years—is the legal authority of the government to ask for military assistance during civil hostilities—either of arms or active participation.”); Louis B. Sohn, *Gradations of Intervention in Internal Conflicts*, 13 GA. J. INT’L & COMP. L. 225, 227 (Supp. 1983) (“[T]he point is clear, I hope, that an invitation by one of the parties to an internal conflict is not a sufficient justification for any intervention.”).

57. GRAY, *supra* note 11, at 81 (“The duty of non-intervention and the inalienable right of every state to choose its political, economic, social, and cultural systems have brought with them the duty not to intervene to help a government in a civil war.”). See also David Wippman, *Change and Continuity in Legal Justifications for Military Intervention in Internal Conflict*, 27 COLUM. HUM. RTS. L. REV. 435, 445 (1995–96) (“[A]ssistance to either side in a civil conflict may violate the non-intervention and self-determination principles.”); Schachter, *supra* note 56, at 1641 (“For a foreign state to support, with ‘force,’ one side or the other in an internal conflict, is to deprive the people in some measure of their right to decide the issue by themselves. It is, in terms of article 2(4) [of the U.N. Charter], a use of force against the political independence of the state engaged in civil war.”).

58. See, e.g., WEISBURD, *USE OF FORCE: THE PRACTICE OF STATES SINCE WORLD WAR II* 207 (1997) (“[I]t appears that interventions in civil strife are frequent and that there seems to be a high degree of international acceptance of such interventions. Applying the obey-or-be-sanctioned standard, it would appear that interventions of this type should not be considered unlawful.”). See also Tom Farer, *Interven-*

problem with this view is that it seems to equate customary international law solely with state practice, ignoring the need for the equally important component of *opinio juris*.<sup>59</sup> And as the ICJ has stated, “[e]xpressions of an *opinio juris* regarding the existence of the principle of non-intervention in customary international law are numerous and not difficult to find.”<sup>60</sup> Thus, unless states feel that it is legal to intervene in any situation—which they clearly do not—then the prohibition on intervention remains in effect regardless of the prevalence of state practice to the contrary.<sup>61</sup>

Other scholars have made more compelling claims. Louise Doswald-Beck, for example, agrees with the general proposition that the provision of assistance to either party to a civil war is illegal,<sup>62</sup> but substantially qualifies this position by asserting “that there appears to be no prohibition against States providing governments with *weapons and other military supplies* during a civil war.”<sup>63</sup> Similarly, Brad Roth argues that, “although aid to either faction in an internal armed conflict is illegal in principle, unlimited aid to the recognized government is almost always lawful in practice.”<sup>64</sup> Roth justifies this position by asserting that it is “exceedingly difficult to find examples in which the international community has . . . broadly condemned provision of arms, military training, or logistical support to a recognized government. It might seem,” he continues, “that restrictions on assistance to an established government are mostly a dead letter.”<sup>65</sup>

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*tion in Civil Wars: A Modest Proposal*, 67 COL. L. REV. 266, 272–73 (1967) (“[S]ince in international law, unlike domestic law, the inability of a rule to control conduct reduces it to the status of a non-rule, it seems fair to conclude that our oft-propounded view simply does not reflect the state of the law. Perhaps that is one reason why even we do not take it too seriously. . . . The central truth of the matter is that today there are no real norms governing intervention by third parties in civil wars . . .”).

59. Customary international law is created, according to the Statute of the International Court of Justice, through “general practice *accepted as law*.” Statute of the International Court of Justice, art. 38(1)(b), June 26, 1945, 59 Stat. 1060 (emphasis added).

60. Military and Paramilitary Activities in and Against Nicaragua, *supra* note 19, ¶ 202.

61. *Id.* (“The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law.”).

62. Doswald-Beck, *supra* note 22, at 251 (“[T]here 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.”).

63. *Id.* (emphasis added). Doswald-Beck cites France’s espousal of this view in the context of its provision of military aid to the government of Chad. *Id.* See also CORTEN, *supra* note 34, at 296 (“[I]t does seem that a legal conviction of a general order can be made out, prohibiting direct military intervention in favour of government forces in the context of a conflict against opposition forces—direct military intervention to which one cannot, however, assimilate the simple provision of arms and equipment, even in times of civil war.”).

64. ROTH, *supra* note 28, at 181. See also CHATHAM HOUSE, *The Principle of Non-Intervention in Contemporary International Law: Non-Interference in a State’s Internal Affairs Used to be a Rule of Law: Is it Still?*, Summary of the Chatham House International Law discussion group meeting held on Feb. 28, 2007, <http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/il280207.pdf> (“It is sometimes suggested that intervention in a civil war on the side of the Government and at its request is unlawful, but there is little support for this in practice.”).

65. ROTH, *supra* note 28, at 186.

Despite these assertions, it is possible to argue that such scholars do not succeed in challenging the alleged rule of non-intervention so much as call attention to the practical difficulties of invoking it *in practice*. Roth, for example, notes certain facts which, as a practical matter, make it far easier for states to justify their continued provision of aid to an incumbent government: first, the difficulty of reaching the point at which a conflict is of sufficient gravity to call into question the government's normal prerogatives;<sup>66</sup> and second, the ease with which states may appeal to the right of counterintervention—a theory which will be explored in depth below—in order to justify what would otherwise arguably be illegal post-civil war assistance to the incumbent regime.<sup>67</sup>

However, the fact that the alleged civil war threshold is high should not undermine the *existence* of the threshold as a matter of law. Similarly, the fact that counterintervention might be disingenuously invoked<sup>68</sup> does not necessarily mean that such assistance would be legal even absent a basis for claiming a right to counterintervene. Indeed, unless *opinio juris* exists for the idea that states may provide unlimited assistance to incumbent governments not only where a state of civil war unambiguously exists, but also where the opposition is unambiguously *not* receiving illicit external assistance, then customary international law cannot be said to permit such assistance. Roth might be said to implicitly accept this proposition in noting that the provision of arms “to a recognized government is lawful in unlimited quantities, absent a highly effective *indigenous* challenge to the government's effective control.”<sup>69</sup> Thus, if an internal conflict crosses the civil war threshold without any external support for the opposition, even Roth seems inclined to reject the legality of outside support for the government. This interpretation synthesizes Roth's lamentation that “there does not appear to be any manageable scheme for implementing non-intervention norms in circumstances of internal armed conflict”<sup>70</sup> with his own admissions that “[n]on-intervention alone provides no basis for favoring the established government,”<sup>71</sup> and

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66. *Id.* at 185 (“[R]equests for assistance to maintain order are clearly within the prerogatives of sovereignty prior to a collective recognition by the international community that an opposition armed force has achieved belligerent status . . . such recognition of belligerent status is likely to be slow at best, allowing for the continuation and probable steady increase in foreign aid to the government during the early (rebellion) and intermediate (insurgency) stages of the development of the conflict.”).

67. *Cf. id.* at 185 (“[T]he opposition faction will most likely be unable to survive the early and intermediate stages and to take the conflict to the next level (belligerency) against the foreign-assisted government without illegal foreign assistance, which then taints the opposition faction's challenge to the lawfulness of assistance to the government.”).

68. See Wippman, *supra* note 24, at 221 (“In most such cases, it is difficult to ascertain with any certainty the facts surrounding a government's claim that its internal armed opposition is receiving significant external support.”). See also GRAY, *supra* note 11, at 92 (“[E]ven if there is a civil war, states may justify forcible intervention at the request of the government on the ground that there has been prior foreign intervention against the government. This is the best established exception to the prohibition of intervention *and possibly the most abused.*”) (emphasis added).

69. ROTH, *supra* note 28, at 186 (emphasis added).

70. *Id.* at 179.

71. *Id.* at 183.

that “[a]t some point in the unraveling of effective control . . . the provision of arms and other military assistance to the established government for use against its rival becomes an act of foreign interference . . . .”<sup>72</sup>

One slightly different take on Roth and Doswald-Beck’s positions finds voice in those who believe that, while a state of civil war does generally require abstention from assisting either party to the conflict, it is permissible to maintain, but not increase, assistance to the government at the level at which it existed prior to the outbreak of the conflict.<sup>73</sup> While this view appears to have at least some basis in state practice,<sup>74</sup> its central rationale—that “the danger that cessation of assistance to the government may work as an intervention on behalf of insurgents”<sup>75</sup>—is not convincing. Although the effect of such actions may be the same, their form is not, and it is therefore unclear why cutting off support to a government should be equated with positively supporting an insurgency. Indeed, on such a view, any time a state makes a decision not to assist one party to a conflict it might implicitly be said to simultaneously be making a decision to assist the other. More important, if the existence of a state of civil war calls into question the normal presumption that the incumbent government is entitled to speak for the people, it is unclear why that government should be entitled to continue receiving assistance denied to an opposition group also vying to represent the state.<sup>76</sup> Nevertheless, customary international law contains no implicit rationality requirement, and it is therefore at least arguable that the maintenance of previously existing levels of support is fully legal under international law. Whatever the case may be, as the analysis above indicates, a reasonable argument—even if not the best one—can be made that, at a bare minimum, states may not increase their assistance to an incumbent government following the outbreak of a civil war.

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72. *Id.* at 179. Of course, the fact that Roth might reject as illegal the provision of assistance to a government involved in a *purely indigenous* civil war does not mean that others would do so. There is no indication that Corten, for example, would qualify in any way his assertion that it is legal to provide weapons to an incumbent government “even in times of civil war.” See generally CORTEN, *supra* note 34. Nevertheless, Roth’s understanding of the issues surrounding counterintervention provides a possible way to reconcile the belief that intervention in civil wars on behalf of governments is prohibited with the fact that governments often nevertheless openly continue to receive such assistance in practice.

73. See, e.g., Moore, *supra* note 34, at 196–97 (“The *general consensus* is that military assistance should be frozen at levels approximately equal to what they were at the time the conflict broke out.”) (emphasis added). Note also that Moore refers to “insurgencies,” rather than “civil wars.”

74. See, e.g., *infra* note 210.

75. John Norton Moore, *The Control of Foreign Intervention in Internal Conflict*, 9 VA. J. INT’L L. 209, 334–35 (1969).

76. Schachter, *supra* note 56, at 1641 (“No state today would deny the basic principle that the people of a nation have the right, under international law, to decide for themselves what kind of government they want, and that this includes the right to revolt and to carry on armed conflict between competing groups. For a foreign state to support, with ‘force,’ *one side or the other* in an internal conflict, is to deprive the people in some measure of their right to decide the issue by themselves.”) (emphasis added).

E. *The Definition of a "Civil War"*

If "the categorization of a conflict" really is "crucial in the determination of the legality of forcible intervention,"<sup>77</sup> the question must be asked: what *is* a "civil war"? In practice, use of the term is often controversial<sup>78</sup>: incumbent governments are reluctant to recognize a state of civil war not only because such recognition might legitimate the opposition,<sup>79</sup> but arguably also because it could, at least in theory, deprive the government of its right to receive outside assistance. Whatever the reason, there appears to be no clearly applicable definition of "civil war" in this context, and the question is therefore open to debate.

Several possible definitions could conceivably be appealed to. In the field of political science, for example, a fairly standard definition is that a civil war "refers to a violent conflict between organized groups within a country that are fighting over control of the government, one side's separatist goals, or some divisive government policy."<sup>80</sup> Significantly, most political scientists also include in their definitions of civil war a relatively low minimum threshold of 1,000 deaths.<sup>81</sup>

A more persuasive appeal from a *legal* perspective could be made to the definition of a non-international armed conflict under international humanitarian law. After synthesizing relevant treaty and case law, the International Committee of the Red Cross ("ICRC") proposed the following definition, which it argues "reflect[s] the strong prevailing legal opinion":

Non-international armed conflicts are *protracted armed confrontations* occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State [party to the Geneva Conventions]. The armed confrontation must reach *a minimum level of intensity* and the parties involved in the conflict must show *a minimum of organisation*.<sup>82</sup>

But while ICRC and political science definitions may be helpful guidelines, neither was formulated specifically for the purpose of determining the point at which assistance to the government during a civil war must be cut off (assuming there is such a point). In unique contrast, the influential Institut

77. GRAY, *supra* note 11, at 82.

78. *Id.*

79. *Id.* ("States have not on the whole been willing to admit that the threshold of a civil war has been reached; they see such an acknowledgment as legitimating opposition forces.")

80. James Fearon, *Civil War Definition Transcends Politics*, THE FREEMAN SPOGLI INST. FOR INT'L STUDIES AT STANFORD UNIVERSITY (Apr. 10, 2006), [http://fsi.stanford.edu/news/civil\\_war\\_definition\\_transcends\\_politics\\_20060410](http://fsi.stanford.edu/news/civil_war_definition_transcends_politics_20060410).

81. *Id.* ("[M]ost academics [also] use the threshold of 1,000 dead, which leads to the inclusion of a good number of low-intensity rural insurgencies.")

82. Int'l Comm. of the Red Cross [ICRC], *How is the Term "Armed Conflict" Defined in International Humanitarian Law?*, Opinion Paper, at 5 (Mar. 2008), <http://icrc.org/eng/assets/files/other/opinion-pa-per-armed-conflict.pdf> (emphasis omitted).

de Droit International, a large group of respected scholars,<sup>83</sup> has proposed a formulation directly addressed to the issue in question. According to the Institut,

the term “civil war” shall apply to any armed conflict, not of an international character, which breaks out in the territory of a State and in which there is opposition between . . . the established government and one or more insurgent movements whose aim is to overthrow the government or the political, economic or social order of the State, or to achieve secession or self-government for any part of that State . . . . [T]he term “civil war” shall not cover . . . local disorders or riots . . . .<sup>84</sup>

Interestingly, the Institut does not explicitly link the civil war threshold to a loss of effective control by the government. Such a requirement might, however, be implicit in the Institut’s exclusion of “local disorders or riots.” After all, if, as discussed above, a government may generally invite outside assistance when it has “effective control” over the entire territory, then it makes sense to include in any definition of “civil war” a requirement of a breakdown in such control by the government. Indeed, this requirement is arguably implicit in much of the literature on the subject.<sup>85</sup>

Whatever the state of customary international law, it seems likely that determinations of the status of an internal conflict are likely to be political in practice, with parties bending the facts and rules to suit their own purposes.<sup>86</sup> But while in many cases the side of the line on which a given conflict falls may be open to serious debate, in others the characterization of the conflict may be nearly universally agreed upon by outside observers, even if one party to the conflict continues to refuse to accept it. Thus, the civil war

83. A listing of the Institut’s current membership may be found at the Institut’s website. *Members*, INST. DE DROIT INT’L, [http://www.idi-iil.org/idiE/navig\\_members.html](http://www.idi-iil.org/idiE/navig_members.html) (last modified Mar. 7, 2014). According to the Institut’s website, its founders intended to create “an institution independent of any governmental influence which would be able both to contribute to the *development* of international law and act so that it might be implemented.” *History*, INST. DE DROIT INT’L, [http://www.idi-iil.org/idiE/navig\\_history.html](http://www.idi-iil.org/idiE/navig_history.html) (emphasis added) (last modified Feb. 7, 2006). One might fairly argue, however, that the group’s focus on the *development* of international law makes some of its positions more aspirational than reflective of existing customary law.

84. Inst. de Droit Int’l, *supra* note 56, art. 1.

85. See, e.g., Wippman, *supra* note 57, at 446 (“Although the non-intervention principle theoretically proscribes aid to either side in a full-scale civil war, it does not purport to bar aid to a recognized government *in control of its territory*”) (emphasis added). See also *UK Materials on International Law*, *supra* note 56 (“[A]ny form of interference or assistance is prohibited (except possibly of a humanitarian kind) when a civil war is taking place and *control of the state’s territory is divided* between warring parties.”) (emphasis added); and Oscar Schachter, *supra* note 56, 1642 (“The relevant general principle . . . would be that when an organized insurgency occurs on a large scale involving a substantial number of people or control over significant areas of the country, neither side, government or insurgency, should receive outside military aid.”).

86. GRAY, *supra* note 11, at 86 (“The case of Sri Lanka demonstrates the reluctance of states to acknowledge the existence of a civil war; states may continue to claim that a conflict is mere internal unrest even when rebels have in fact gained control of territory.”).

threshold could provide at least loose guidance to states seeking to evaluate the permissibility of continued assistance to an incumbent government in any given situation.

Why, then, do states often continue providing such assistance even where a civil war unambiguously exists? The most plausible explanation may be that legal restrictions on assisting the government simply do not exist—or that, if they do, the political costs of breaching them are low enough to be ignored with relative impunity. Alternatively, the provision of assistance to incumbent governments in civil wars might have another explanation: the doctrine of “counterintervention.”<sup>87</sup>

#### F. *The Theory of Counterintervention*

A direct statement of the right to “counterintervention” was made by the British government in its 1986 *United Kingdom Materials on International Law*. In the government’s words,

Any form of interference or assistance is prohibited (except possibly of a humanitarian kind) when a civil war is taking place and control of the state’s territory is divided between warring parties. But it is *widely accepted* that outside interference in favour of one party to the struggle permits counter-intervention on behalf of the other . . . .<sup>88</sup>

A number of scholars have buttressed the British assertion that counterintervention is “widely accepted.” John Perkins, for example, writes that “something approaching a consensus exists among scholars, and certainly *all governments* recognize a right of counterintervention in some terms.”<sup>89</sup> Similarly, Lloyd Cutler has written that “a *majority of scholars* . . . believe that once any state assists either the government side or the insurgent side in a civil war, this is a violation of the charter that entitles any other state to assist the opposite side.”<sup>90</sup> Also worthy of mention is the view of the Institut de Droit International in its 1975 resolution on “The Principle of

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87. Cf. Wippman, *supra* note 24, at 220 (“In practice, most states continue to accord substantial deference to the will of a recognized, incumbent government, even after it arguably lost control of a substantial portion of the state, so long as the government retains control over the capital city and does not appear to be in imminent danger of collapse. In virtually all such cases, however, it is possible for the government to allege that the opposition forces are receiving substantial external assistance from third states in violation of the non-intervention principle.”).

88. *UK Materials on International Law*, *supra* note 56 (emphasis added) (footnote omitted).

89. Perkins, *supra* note 53, at 171 (emphasis added). See also Sohn, *supra* note 56, at 229–30 (“If a state does not comply with its obligations under international law and intervenes illegally in an internal conflict in another state, other states are entitled to remedy this situation by counterintervention. A state violating international law cannot claim that other states, acting collectively to support the victim of intervention, are also violating the basic rule.”). But see Patrick C. R. Terry, *Afghanistan’s Civil War (1979-1989): Illegal and Failed Foreign Interventions*, 31 POLISH Y.B. INT’L L. 107, 128 (2011) (“In contrast to what its supporters argue, state practice does not confirm that a right of counterintervention exists in customary international law. Never has a state officially relied on such a justification.”).

90. Cutler, *supra* note 34, at 101.



Non-Intervention in Civil Wars.” After asserting the general obligation of third parties to refrain from assisting either party to a civil war,<sup>91</sup> the Institut states that

Whenever it appears that intervention has taken place during a civil war in violation of the preceding provisions, third States may give assistance to the other party only in compliance with the Charter and any other relevant rule of international law, subject to any such measures as are prescribed, authorized or recommended by the United Nations.<sup>92</sup>

The justification for a right of counterintervention may not be immediately apparent. After all, why should one breach of international law permit another? In the view of Oscar Schachter, however, “[i]t is not that two wrongs make a right but that the grave violation of one right allows a defensive response.”<sup>93</sup>

On one level, the recognition of a legal right to counterintervention might simply be pragmatic; that is, it might reflect the reality that states cannot be expected to stand idly by as their allies lose a civil war as a result of illegal intervention by another state.<sup>94</sup> On this view, it is better to provide a legal—and therefore restricted—remedy than to guarantee that self-help will operate outside the law.<sup>95</sup>

91. *Inst. de Droit Int'l*, *supra* note 56, art. 2.

92. *Id.* art. 5. The Institut’s statement is, of course, qualified by its assertion that intervention must be in compliance with the Charter and other relevant rules. However, the group’s apparent openness to counterintervention in certain circumstances suggests that the Charter and customary international law may not necessarily forbid counterintervention on behalf of opposition groups in all circumstances. At the same time, however, it is important to reiterate that the group’s emphasis on the *development* of international law might make the resolution in question more aspirational than reflective of customary international law. *History*, *INST. DE DROIT INT’L*, *supra* note 83.

93. Schachter, *supra* note 56, at 1642. See also JOHN STUART MILL, *Few Words on Non-Intervention*, in *ESSAYS ON EQUALITY, LAW, AND EDUCATION* 109, 123 (John M. Robson ed., 1984) (“Intervention to enforce non-intervention is always rightful, always moral, if not always prudent.”).

94. *Cf.* Perkins, *supra* note 53, at 173 (In the context of interventions and counterinterventions “the stakes are high, for interventions often involve the global or regional balance of power; indeed, interventionary actions are often taken precisely to shift the power balance or secure some balance of power advantage. If not checked within the law, it is not realistic to think that the limitations on the use of force in article 2, paragraph 4 of the Charter of the United Nations can be maintained.”). See also *id.* at 205 (“A law which denies even a necessary and proportional response to a violation involving the use of force would be a law which favors those who violate it. It would simply provide a legal sanctuary to the nation which chooses in violation of law to provide the decisive margin of superior force in local contests over authority. It would invite unlawful intervention designed to manipulate the world’s power balance.”).

95. *Id.* at 176 (“The central rationale underlying a right of counterintervention is the need to provide a remedy for another nation’s breach of international law. . . . [T]he justification for self-help lies in the inability to assure an effective remedy through legal process.”). See also *id.* at 224 (“Without such a right providing effective legal remedy for violations of international law, the regime of law itself is put in jeopardy, and nations inevitably will seek recourse in measures and policies outside of law. It should come as no surprise that without an effective remedy, nations will feel free to take actions on grounds transcending law.”); *id.* at 183 (“By recognizing counterintervention as a remedy under law for an international law violation of another nation, and by subjecting it as a remedy to the limitations of law, the legal regime governing the use of force and other foreign coercion is reinforced.”).

The alleged right to counterintervention is not, however, grounded merely in power politics. On the contrary, it has a foundation in principled legal theory.<sup>96</sup> For our purposes, the essence of this theory could be stated as follows: During a civil war, the incumbent government can no longer be presumed to speak for the state.<sup>97</sup> It is this loss of presumptive legitimacy that triggers the requirement that third states abstain from assisting not only the opposition, but also the incumbent government itself.<sup>98</sup> Freed from outside influence, the peoples of the warring state will be free to determine their own future—however brutally—in accordance with the principles sovereignty, self-determination, and political independence.

A people's rights to these principles are, of course, disrupted when one state illegally assists either party to the civil war.<sup>99</sup> A counterintervention, on the other hand, is in theory designed to offset the illicit influence of a third state on the outcome of the conflict. On this view, a limited counterintervention may therefore be justified insofar as it can be said to nullify the effects of the original intervention, thereby restoring not only the internal balance of power, but also the ability of the people to determine their own future.<sup>100</sup>

Perkins provides a helpful summary of some of the primary justifications for the right to counterintervention:

The right of a third state to respond by counterintervention to [a] violation of the rule of nonintervention protects not only the right of self-determination of the people of the offended state, but also the interest of the third state and of all states in maintaining the balance of power against shifts accomplished by violations of the principle of self-determination. The same considerations which dictate a right of collective self-defense under article 51 also dictate a right of counterintervention, subject to applicable limitations, available to all states where illegal intervention occurs and infringes upon rights of independence, sovereignty and self-determination.<sup>101</sup>

As Perkins' reference to "applicable limitations" makes clear, any right to counterintervention would necessarily be restricted. Indeed, the internal logic of the right—that of restoring self-determination and political inde-

96. See generally *id.*, for a thorough defense of the right to counterintervention.

97. See, e.g., Higgins, *supra* note 56; Sohn, *supra* note 56.

98. See, e.g., Wippman, *supra* note 57; Schachter, *supra* note 57.

99. See Perkins, *supra* note 53, at 212 (stating that "[i]llegal intervention in a civil war may infringe upon the people's rights of independence, sovereignty and self-determination").

100. Cf. WILLIAM E. HALL, A TREATISE ON INTERNATIONAL LAW 342 (8th ed. 1924) ("It is incontestable that a grave infraction is committed when the independence of a state is improperly interfered with; and it is consequently evident that another state is at liberty to intervene in order to undo the effects of illegal intervention, and to restore the state subjected to it to freedom of action.").

101. Perkins, *supra* note 53, at 212.

pendence—requires at a minimum that any counterintervention be a necessary and proportionate corrective response to a prior illegal intervention.<sup>102</sup> That being the case, disproportionate or unnecessary counterinterventions—that is, counterinterventions not necessary to restore political independence or self-determination—cannot find justification under the doctrine.

Although there is significant support for the legality of counterintervention subject to certain limitations, the doctrine is far from universally accepted, particularly when used to justify counterinterventions on behalf of opposition groups. The strongest challenges come in three strains.

### *Critique 1: Pragmatic Concerns*

The first strain is pragmatic, focused on the practical implications of condoning intervention on behalf of opposition groups. John Norton Moore, for example, distinguishes between governments and opposition groups even in civil war situations, arguing that counterintervention should be permitted on behalf of the former but not the latter.<sup>103</sup> His justification is largely pragmatic: in Moore's view, permitting counterintervention

in favor of the incumbents [but not the opposition] is strongly called for by the danger of competing *counter-interventions*, the permissibility of preinsurgency assistance to the widely recognized government, the need to preserve the right of collective defense against armed attack, and the generally greater threat to world order of assistance to insurgents.<sup>104</sup>

While it is reasonable to argue that permitting counterintervention on behalf of opposition groups would be harmful to world order, there are, as noted above, also competing pragmatic justifications for *allowing* such counterintervention.<sup>105</sup> Moreover, given the primary rationale in legal theory for requiring non-intervention in civil wars<sup>106</sup>—allowing the people to determine their own future free of outside influence—there is a measure of arbitrariness in privileging an incumbent over an opposition group when neither can be presumed to speak for the state. In such a situation, denying an equal right to counterintervention is arguably tantamount to denying the very “validity of the modern reciprocal rule of nonintervention.”<sup>107</sup> One can

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102. *Id.* at 221 (“A right of counterintervention in support of insurgents is subject to the limitations discussed in the foregoing analysis: there must first be an *illegal* intervention in favor of the government; the response must be necessary and proportional as corrective action reasonably tailored to the need; and force cannot be used unless the illegal intervention itself involved the use of force, either directly or indirectly.”).

103. Moore, *supra* note 75, at 335.

104. *Id.*

105. See, e.g., Perkins *supra* note 53, at 176, 183, 224. For a fuller explication, see generally Perkins, *supra* note 53.

106. Assuming, again, that non-intervention is in fact required.

107. Perkins, *supra* note 53, at 224.

powerfully claim that this imbalance is justified by the need for global stability,<sup>108</sup> but there is still room to argue that a theoretically coherent approach to counterintervention requires its availability to incumbent government and opposition alike.

*Critique 2: The Prohibition on Forcible Countermeasures*

A second critique of the right to counterintervene focuses on the prohibition of forcible countermeasures.<sup>109</sup> The International Law Commission's Articles on State Responsibility, for example, allow countermeasures in certain circumstances,<sup>110</sup> but explicitly state that "[c]ountermeasures shall not effect . . . [t]he obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations."<sup>111</sup> A few responses are possible.

*Response 1:* First, one might argue, as has Oscar Schachter, that counterintervention is rooted in the right of the state involved in the civil war to collective self-defense.<sup>112</sup> Since self-defense itself precludes wrongfulness,<sup>113</sup> it is possible to claim that counterintervention need not be thought of as a countermeasure at all.

Yet while this argument is at least superficially plausible, it should be noted that the right to collective self-defense only arises in the event of an "armed attack."<sup>114</sup> According to the ICJ, the mere provision of weapons, while presumably constituting an illicit intervention and use of force, does not constitute an armed attack, and is therefore insufficient to trigger a right to collective self-defense.<sup>115</sup>

One might attempt to counter this objection by noting that the armed attack threshold set by the ICJ has been criticized. A Chatham House re-

108. Antonio Cassese has written, in discussing a slightly different topic, that "[i]n the current framework of the international community, three sets of values underpin the overarching system of interstate relations: peace, human rights and self-determination. However, any time that conflict or tension arises between two or more of these values, *peace must always constitute the ultimate and prevailing factor.*" Antonio Cassese, *Ex inuria ius oritur: Are We Moving Towards International Legitimation of Forcible Countermeasures in the World Community?*, 10 EUR. J. INT'L L. 23, 24 (1999) (emphasis added).

109. A countermeasure is an act which would otherwise be illegal, but is not considered wrongful because it is in response to a prior wrongful act by another state. See generally Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, at 6, 11–13, U.N. Doc. A/RES/56/83 (Dec. 12, 2001).

110. *Id.*

111. *Id.* art. 50(1)(a).

112. Schachter, *supra* note 56, at 1642 ("[C]ounter-intervention may be justified as a defense of the independence of the state against foreign intervention; it may then be viewed as 'collective self-defense' in response to armed attack.")

113. See Responsibility of States for Internationally Wrongful Acts, *supra* note 109, at 6 ("The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.")

114. See U.N. Charter art. 51.

115. See Military and Paramilitary Activities in and Against Nicaragua, *supra* note 19, ¶ 247 ("[T]he Court has indicated that while the concept of an armed attack includes the despatch by one State of armed bands into the territory of another State, the supply of arms and other support to such bands cannot be equated with armed attack. Nevertheless, such activities may well constitute a breach of the principle of the non-use of force and an intervention in the internal affairs of a State, that is, a form of conduct which is certainly wrongful, but is of lesser gravity than an armed attack.")

port, for example, goes so far as to assert that “[a]n armed attack means *any* use of armed force,”<sup>116</sup> and that the ICJ’s suggestion “that there may be instances of the use of force which” do not rise to the level of an armed attack is not “generally accepted.”<sup>117</sup> Yet even if this is true, it remains possible to ask on *whose* authority the counterintervening state could be invited to assist in the name of collective self-defense. In sum, tying a theory of counterintervention to self-defense is not straightforward.

*Response 2:* A second rebuttal to the argument that the prohibition on forcible countermeasures forbids counterintervention might claim that, even if the arming of one party to a civil war does not constitute an “armed attack,” it permits a forcible response where that response is limited to the territory of the state embroiled in the civil war.<sup>118</sup> On such a view, proportionate counterintervention helps *restore* political independence, and therefore does not fall within article 2(4)’s prohibition of uses of force “against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”<sup>119</sup>

For the same reason, it could be argued that a counterintervention should not be thought of as a countermeasure<sup>120</sup> at all, let alone a forcible one. As defined by Article 22 of the ILC Draft Articles, a countermeasure involves the *preclusion* of “wrongfulness of an act of a State not in conformity with an

116. Elizabeth Wilmschurst, *Principles of International Law on the Use of Force by States in Self-Defense* 6 (Chatham House, ILP WP No. 05/01, Oct. 2005) (emphasis added).

117. *Id.* at 6 n.9.

118. Perkins argues that “[w]here an illegal intervention does not involve an ‘armed attack,’ a right to counterintervention involving a necessary and proportional use of force [on the territory of the state involved in the civil war] is not created by article 51, is not dependent on it, and is not expanded by it . . . .” Perkins, *supra* note 53, at 209. Noting language in the ICJ’s *Nicaragua* opinion which would seem to prohibit any forcible countermeasures by third states—including on the victim state—Perkins argues that, “[t]o the extent that paragraph 249 [of the *Nicaragua* opinion] purports to . . . restrict third states from taking *any* counter-measures to intervention by Nicaragua in El Salvador short of armed attack, even in response to intervention involving a violation of article 2(4), it is dictum only, stated without explanation or foundation.” *Id.* at 212 n.134. Thus, Perkins draws a distinction between forcible countermeasures conducted in the victim state, and those conducted against the aggressor.

119. Perkins, *supra* note 53, at 212 (“One would have to strain the limitation language on the use of force in article 2, paragraph 4 to deny a right of necessary and proportionate use of force in counterintervention opposing an intervention involving the use of force. Such use of force in counterintervention cannot be regarded as ‘against the territorial integrity or political independence of any state.’ Such force is in defense of these principles. Nor can it be regarded as ‘inconsistent with the Purposes of the United Nations.’ It is in support of them.”) (citing U.N. Charter art. 2, para. 4).

120. Although Perkins characterizes counterintervention as a countermeasure, Perkins, *supra* note 53 at section I, making such an argument based on the ILC’s Draft Articles is not straightforward. For one, article 54 explicitly omits from its general countermeasures framework “[m]easures taken by States other than an injured State.” Responsibility of States for Internationally Wrongful Acts, *supra* note 109. If, however, a state seeking to counterintervene may be considered an injured state under Article 42(b)(ii), or if the commentary to Article 22 is any indication by analogy, “[a]n act directed against a third State [cannot] be justified as a countermeasure.” *Commentary to the Draft Arts. on Responsibility of States for Internationally Wrongful Acts*, [2001], 2 Y.B. Int’l L. Comm’n 75, U.N. Doc. A/56/10/2001. If this language applies to states seeking to counterintervene, such states would presumably need to argue that their actions were directed “against” the initial intervenor—as opposed to the state embroiled in the civil war—despite taking place on the territory of the latter.

international obligation towards another State.”<sup>121</sup> If counterintervention aims to restore the political independence of a state and does not violate article 2(4) or constitute illicit intervention, there is arguably no wrongfulness to be precluded. On this view, the key fact is the political imbalance in the victim state—not the fact that the initial intervenor brought that imbalance about through an illegal act. None of these responses are entirely satisfactory, and most rely on thinly sliced nuances and subtleties. Nevertheless, it is not beyond question that counterintervention constitutes a prohibited forcible countermeasure. In any event, if counterintervention is prohibited on this basis, the doctrine would presumably be unavailable to government and opposition alike.

### *Critique 3: The Shortage of Opinio Juris*

The third—and most compelling—critique of the right to counterintervene in support of the opposition focuses attention on an alleged lack of the relevant *opinio juris*. On this view, while there may well be a general practice of intervening<sup>122</sup> on behalf of opposition groups, unless such practice is also accepted as law, it is illegal under customary international law.<sup>123</sup>

The reason for the dearth of *opinio juris* is the fact that states have not generally openly proclaimed the existence of such a right in specific situations. Although the principle has been mentioned as a justification by those seeking to counterintervene on behalf of *governments*,<sup>124</sup> I am aware of no case in which a state openly sought to justify intervention on behalf of an *opposition* group on the basis of prior illegal support for the government. Neither is Patrick C. R. Terry, who, in a sweeping condemnation of the alleged right to counterintervene, asserts that

no state has ever intervened on behalf of rebel groups and *legally* justified this on the basis of prior foreign support of *the government* . . . [W]hen states have in practice resorted to supporting rebel movements, they have never justified their actions on the basis of a foreign state's support of a government. Most often such support for rebels has been offered only covertly, in an attempt to avoid having to provide a legal justification at all . . . There is therefore

121. Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 109, at 6.

122. *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua*, *supra* note 19, at 202. (“[E]xamples of trespass against [the principle of non-intervention] are not infrequent . . .”).

123. See Statute of the International Court of Justice, *supra* note 59, art. 38.

124. See GRAY, *supra* note 11, at 84 (“Many states have relied on an invitation by a government to justify their use of force; they have claimed that their intervention was lawful because they were merely dealing with limited internal unrest or, at the other end of the spectrum, because they were helping the government respond to prior intervention by other states.”) (emphasis added); *id.* at 94 (“[S]tates making forcible interventions in civil wars have almost invariably argued that they did so in response to a prior outside intervention against the government.”). *But see* Terry, *supra* note 89, at 128 (“In contrast to what its supporters argue, state practice does not confirm that a right of counter-intervention exists in customary international law. *Never has a state officially relied on such a justification.*”) (emphasis added).

no compelling evidence of a customary international law right of counter-intervention, distinct from Article 51, nor should there be.<sup>125</sup>

The lack of precedent proclaiming such a right in specific situations is powerful evidence that no such right has crystallized. After all, one would expect a state to marshal all the support it can in justifying a legally questionable intervention. Nevertheless, a few considerations caution against drawing this conclusion.

First, as noted above, Britain *has* asserted that the existence of a right to counterintervene—apparently on behalf of opposition groups no less than governments—is “widely accepted,” and I am aware of no states that have explicitly rebutted this claim.<sup>126</sup> The fact that there appears to have been no immediately self-serving purpose behind Britain’s statement—indeed, it was made relatively casually in the context of an exposition of the status of customary international law on a variety of subjects<sup>127</sup>—lends it credibility.<sup>128</sup> After all, one might be more suspicious if Britain were to make such a claim while simultaneously attempting to justify a particular, arguably illicit intervention.<sup>129</sup>

An alternative explanation—even if not the best one—for the lack of expressions of *opinio juris* in specific conflicts may simply be that, in the vast majority of circumstances, the facts place those intervening on behalf of opposition groups on the wrong side of the law. As discussed above, there is no question that opposition groups are, legally speaking, at a severe disadvantage before an internal conflict reaches the civil war threshold: Any intervention in such circumstances is unambiguously illegal. The problem for opposition groups is that, absent significant external (and illegal) support, the opposition will almost certainly be crushed, and the civil war threshold arguably leveling the playing field will never be reached.<sup>130</sup> If, on the other hand, the civil war threshold is reached thanks to illicit outside assistance to the opposition, other states would presumably be legally entitled to counter-

125. Terry, *supra* note 53, at 130.

126. UK Materials on International Law, *supra* note 56, at 616.

127. *Id.*

128. At the same time, the very casualness of the statement could suggest that the statement should *not* be taken at face value.

129. Britain has not shied away from making controversial legal arguments in the past. Indeed, it not only attempted to justify NATO action in Kosovo on the basis of the legally questionable doctrine of humanitarian intervention, but it is also *currently* attempting to justify military intervention in Syria on the same basis. See Prime Minister’s Office, *Chemical weapons use by Syrian regime: UK government legal position* (Aug. 29, 2013), <https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/html-version>. As noted above, however, these arguments are unlikely to be met with widespread approval.

130. ROTH, *supra* note 28, at 180 (“[A]n incipient insurgent movement is unlikely to grow to present a serious challenge to an established government legally privileged to import foreign military supplies unless that insurgency has access to an illegal supply of military assistance from abroad.”).

intervene on behalf of the incumbent government.<sup>131</sup> Thus, it is only where an indigenous insurgency succeeds in reaching the civil war threshold *on its own*—perhaps as a result of large-scale military defections<sup>132</sup>—that the right to counterintervene on behalf of the insurgency could conceivably be invoked.<sup>133</sup> This, of course, would require not only plausibly claiming that the conflict has reached the civil war threshold, but also that other states are continuing to provide now-illicit assistance to the incumbent government. Even then, any assistance provided to the opposition to offset that illegally provided to the government would need to be necessary and proportionate.

The difficulty of satisfying all of these conditions precedent is one possible explanation for why states have not openly asserted the existence of a right to counterintervene on behalf of opposition groups on specific occasions. In other words, while it is conceivable that states may “widely accept” that such a right exists as a general proposition,<sup>134</sup> rarely, if ever, could they plausibly argue that the law as applied to the facts of a particular situation justifies intervention on behalf of the opposition. Thus, because states seeking to assist opposition groups are usually in the legal wrong *even if* a right to counterintervention exists under limited circumstances, it is unsurprising that such states tend to provide support only covertly.<sup>135</sup>

In sum, while the author does not believe that the weight of the evidence supports the existence of a right to counterintervene on behalf of opposition groups—there are simply too many legal obstacles to be overcome—the status of the law is not definitively settled, in part due to a shortage of direct expressions of *opinio juris* on the subject. Indeed, the justification of counterintervention—traditionally invoked on behalf of incumbent governments rather than opposition groups—has been called upon even less today than it was during the Cold War.<sup>136</sup> In theory, however, there is no reason why a right to counterintervene would disappear with the Soviet Union. Accordingly, it is possible to argue that “counterintervention remains readily available as a legal justification for states prepared to invoke it.”<sup>137</sup> And while

131. *Id.* at 180 (An illegal “supply to the insurgent forces . . . vitiates the claim of a purely indigenous challenge to effective control, thereby rendering inapplicable the basis for restrictions on foreign assistance to the government forces.”).

132. *Id.* at 186 (noting the theoretically possible existence of a civil war predicated upon a purely indigenous challenge arising as a result of “a constitutional crisis or failed military *coup* [that] triggers a split within the national armed forces.”).

133. *Id.* (“The counterintervention principle can be marshalled quite easily in support of the mere provision of war *matériel*. Such a provision to a recognized government is lawful . . . absent a highly effective indigenous challenge to the government’s effective control.”).

134. *UK Materials on International Law*, *supra* note 56, at 616.

135. Terry, *supra* note 89, at 130 (“Most often . . . support for rebels has been offered only covertly . . .”).

136. Wippman, *supra* note 57, at 452 (“The competitive, ideologically motivated interventions that characterized the Cold War are less common today. As a result, we do not hear the justification of counterintervention as frequently as we did in the past. Outside states continue to intervene in internal conflicts, of course, but they usually take pains to conceal their involvement.”).

137. *Id.*



one could argue that the right to counterintervene is limited to support of an incumbent government, such a distinction faces difficulties in legal theory. An alternative explanation for the seeming preference of incumbent governments over rebel groups emphasizes the difficulty of meeting the factual predicates necessary to legally justify counterintervention on behalf the latter. That being the case, it is possible to argue that, at least as a matter of principle, “counterintervention on behalf of *either party* to a civil war is probably lawful, provided that it is limited to neutralizing a prior illegal intervention by another state.”<sup>138</sup> And if that is in fact the case, it is also reasonable to ask the following question: In the context of the ongoing civil war in Syria, why hasn’t the United States invoked a right to counterintervene to justify its otherwise illicit support for the opposition? The second half of this article will explore this question.

## II. COUNTERINTERVENTION IN SYRIA: ARMING THE OPPOSITION

By August or early September of 2013 at the latest, the United States began providing lethal aid to Syrian opposition forces.<sup>139</sup> While this support is apparently being “covertly” provided by the C.I.A.,<sup>140</sup> in reality, U.S. military support for the rebels is an open secret, if it can be said to be a secret at all. A few months earlier, the Obama administration publicly announced its intention to arm the rebels in the wake of the alleged use of chemical weapons by the Assad regime.<sup>141</sup>

Earlier reports indicated that the United States struggled to find legal justifications for such action.<sup>142</sup> And while the alleged use of chemical weap-

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138. Wippman, *supra* note 57, at 451 (emphasis added); *see also* Thilo Marauhn & Zacharie F. Ntoubandi, *Armed Conflict, Non-International* in MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW (2011), at 41 (“If, however, the government receives foreign help [in a non-international armed conflict], a right of counter-intervention may be argued in favour of supporting the rebels.”).

139. Londoño and Miller, *supra* note 6 (“The CIA has begun delivering weapons to rebels in Syria, ending months of delay in lethal aid that had been promised by the Obama administration, according to U.S. officials and Syrian figures. The shipments began streaming into the country over the past two weeks, along with separate deliveries by the State Department of vehicles and other gear—a flow of material that marks a major escalation of the U.S. role in Syria’s civil war.”).

140. *Id.* (“While the State Department is coordinating nonlethal aid, the CIA is overseeing the delivery of weaponry and other lethal equipment to the rebels. An opposition official, speaking on the condition of anonymity to discuss covert arms transfers, said U.S. intelligence personnel have begun delivering long-promised light weapons and ammunition to rebel groups in the past couple of weeks.”).

141. *US says it will give military aid to Syria rebels*, BBC NEWS, June 14, 2013, <http://www.bbc.co.uk/news/world-us-canada-22899289> (“The US is to supply direct military aid to the Syrian opposition for the first time, the White House has announced. President Obama made the decision after his administration concluded Syrian forces under Bashar al-Assad were using chemical weapons, a spokesman said.”).

142. Entous, *supra* note 16 (“A string of cautionary opinions from administration lawyers over the last two years sheds new light on President Barack Obama’s halting and ultimately secretive steps to provide military support to rebels in Syria’s deadly civil war. Members of the so-called Lawyers Group of top legal advisers from across the administration argued that Mr. Obama risked violating international law and giving Syrian President Bashar al-Assad the legal grounds—and motivation—to retaliate against Americans, said current and former officials.”).

ons by the Assad regime on August 21, 2013<sup>143</sup> could be appealed to,<sup>144</sup> such a position finds little support in existing customary international law. At best, such a rationale might provide an *excuse* for the United States to intervene, but it almost certainly could not render otherwise illegal intervention legal.<sup>145</sup>

The fact that the government has not yet provided a solid legal justification for its decision to intervene begs the question: Why hasn't it asserted a right to counterintervene? Two explanations seem most plausible: either the government does not believe in such a right as a general matter of law, or it does not believe that the right—though it exists as a general matter—can justify counterintervention in these particular circumstances. The remainder of this article will attempt to test the latter proposition—that is, it will attempt to determine whether, *assuming a right to counterintervention exists*, the U.S. government could plausibly justify its actions in Syria on such a basis. Evidence that it could justify intervention might be seen as evidence that the government simply does not believe in the existence of such a right at all.

#### A. Application of the Law to the Facts

The most direct<sup>146</sup> legal justification for the right to counterintervene would require meeting the following four conditions:

1. Syria is in a state of civil war, nullifying the presumed authority of the incumbent government to speak for the state, and triggering a duty of strict non-intervention on behalf of the Assad regime and the opposition alike.
2. The opposition did not receive illicit external assistance from any state<sup>147</sup> prior to the point at which the civil war threshold was reached.<sup>148</sup>

143. See THE WHITE HOUSE OFFICE OF THE PRESS SECRETARY, *supra* note 3.

144. The British advocate the legality of military intervention in Syria in response to the use of chemical weapons under a theory of humanitarian intervention. See Prime Minister's Office, *supra* note 129.

145. See generally Ian Johnstone, *The Plea of 'Necessity' in International Legal Discourse: Humanitarian Intervention and Counter-Terrorism*, 43 COLUM. J. TRANSNAT'L L. 337 (2005).

146. It should be emphasized that these four conditions do not provide the only conceivable justification for counterintervening, but rather the most straightforward and easiest to defend. See, e.g., *infra* note 148.

147. Since counterintervention is designed to restore the natural internal political balance of the state embroiled in a civil war, it should be irrelevant *which* foreign state provided illegal assistance prior to the crossing of the civil war threshold. Thus, in determining whether the United States could conceivably invoke the theory of counterintervention after the civil war threshold was crossed, the question is not simply whether the *United States* provided illicit pre-civil war assistance, but whether *any* state did so.

148. One could still argue that the illicit provision of a small amount of assistance to the rebels *prior* to the crossing of the civil war threshold should not eviscerate the right to arm the opposition *after* the civil war threshold has been crossed. The difficulty with this argument is that, without initial illicit assistance to the opposition, the conflict may never have risen to the level of a civil war in the first place. To permit continued post-civil war assistance to the opposition in such circumstances would not only

3. After the point at which the civil war threshold was reached, the Assad regime continued to receive now-illicit assistance from foreign entities, including Russia, Iran, and Hezbollah.
4. All assistance provided to the opposition by the United States has been proportionate and necessary to offset the illicit assistance first provided by third parties to the Assad regime.

The difficulty, of course, lies not in articulating the rules, but rather in applying those rules to a set of often-shadowy facts. The following paragraphs attempt to take up this challenge.

1. *Syria is in a state of civil war triggering a universal duty of non-intervention.*

Although the Assad regime has continued to use the language of terrorism and criminality to describe the opposition,<sup>149</sup> few would deny that Syria is now in a state of full-blown civil war under any conventional understanding of the term. Indeed, the casual nature with which the phrase “civil war” is invoked by the United Nations<sup>150</sup> and in public discourse<sup>151</sup> to describe the conflict suggests that its status as such is no longer open to serious question. That being the case, absent some other legal justification—such as counterintervention—the current state of civil war arguably triggers an obligation on the part of states to refrain from intervening not only on behalf of the opposition, but also on behalf of the Assad regime itself.<sup>152</sup>

A more difficult question than *whether* a civil war now exists is *at what point* that critical threshold was reached. Without making such a determination it becomes impossible to fix the point at which outside assistance to the regime might have transitioned from legal to illegal—and, correspondingly,

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incentivize illicit pre-civil war assistance, but would also work to undermine, rather than restore, the political independence of the divided state. It would, of course, remain possible for a state seeking to arm the opposition to argue that the conflict would have crossed the civil war threshold with or without its illicit support. However, the complexity of such an argument—and the unlikelihood that it would be accepted—make it reasonable to place great weight on the question of whether illicit support was provided to the opposition prior to the crossing of the civil war threshold.

149. See, e.g., *Identical letters dated 13 June 2013 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*, U.N. Doc. A/67/893-S/2013/348 (June 17, 2013) (“In a series of letters addressed to you, the Syrian Arab Republic has assiduously sought to draw your attention the danger posed by the spread of extremism and terrorism, and has documented the crimes committed by the armed groups.”).

150. See, e.g., *Security Council warns of Syrian civil war's impact on UN force in Golan Heights*, UN NEWS CENTRE (Dec. 18, 2013), <http://www.un.org/apps/news/story.asp?NewsID=46771&Cr=golan&Cr1=#.UuaZ1WQo44c>.

151. See, e.g., Alisa Wiersema, *Everything You Need to Know About the Syrian Civil War*, ABC NEWS, Aug. 31, 2013, <http://abcnews.go.com/Politics/syrian-civil-war/story?id=20112311>; *How Syria's civil war is spilling over*, ALJAZEERA, Nov. 12, 2012, <http://www.aljazeera.com/news/middleeast/2012/11/20121112193038751565.html>; and Jeremy Bowen, *Syria's civil war far from over despite Russia-US deal*, BBC NEWS, Sept. 16, 2013, <http://www.bbc.co.uk/news/world-middle-east-24114746>.

152. As the discussion in Part I indicates, this formulation of the law is open to serious debate.

the point at which a right to counterintervene on behalf of the opposition might possibly be said to have first existed.

Part I established that there is no universally accepted definition of “civil war” in the context in question. Further, it should be emphasized that the phrase “civil war” may be best seen not so much as a set of magic words, but as a proxy for the point at which the government can no longer be presumed to speak for the state. Where that threshold has been crossed, the continued provision of assistance to the government arguably constitutes an infringement on the state’s political independence and the people’s right to self-determination.<sup>153</sup> In sum, the precise point at which the scale of an internal conflict rebuts the presumption that the government may speak for the state and invite outside assistance is open to debate. Nevertheless, while the facts may be opaque, their presentation is not infinitely elastic, and certain developments in a given conflict can serve as important guideposts in applying the law.

From the beginning, Syria’s unrest was rooted in deep political disaffection with the Assad regime’s longstanding Ba’ath party rule.<sup>154</sup> Following the seminal March 2011 arrest and abuse of several youth by security forces for anti-regime graffiti scrawled on a school wall, discontent with the Assad regime quickly snowballed from local calls for the youths’ release<sup>155</sup> to, within weeks, nationwide protests of “[t]ens of thousands” of Syrians around the country.<sup>156</sup> While not yet widely demanding regime change, the protests were unambiguously political in nature.<sup>157</sup> Reacting to—and presumably thereby helping to create—what represented the most serious threat to Assad’s rule since his coming to power, the regime used lethal force, killing at least 38 protesters within the first week.<sup>158</sup> In the wake of widespread calls from the international community for Assad to refrain from using violence and “listen to the voices of [his] people,”<sup>159</sup> the regime began to make certain conciliatory gestures—such as lifting its longstanding and

153. See *supra* note 57.

154. For a discussion of the Ba’ath party, see *Profile: Syria’s ruling Baath Party*, BBC NEWS, July 9, 2012, <http://www.bbc.co.uk/news/world-middle-east-18582755>.

155. Kareem Fahim & Hwaida Saada, *Faceless Teenage Refugee Who Helped Ignite Syria’s War*, N.Y. TIMES, Feb. 8, 2013, [http://www.nytimes.com/2013/02/09/world/middleeast/a-faceless-teenage-refugee-who-helped-ignite-syrias-war.html?\\_r=1&](http://www.nytimes.com/2013/02/09/world/middleeast/a-faceless-teenage-refugee-who-helped-ignite-syrias-war.html?_r=1&).

156. Michael Slackman, *Syrian Troops Open Fire on Protesters in Several Cities*, N.Y. TIMES, Mar. 25, 2011, <http://www.nytimes.com/2011/03/26/world/middleeast/26syria.html?pagewanted=all>.

157. Leila Fadel, *Protesters shot as demonstrations expand across Syria*, WASH. POST, Mar. 25, 2011, [http://articles.washingtonpost.com/2011-03-25/world/35261439\\_1\\_sanamein-security-forces-protesters-shot](http://articles.washingtonpost.com/2011-03-25/world/35261439_1_sanamein-security-forces-protesters-shot) (“Activists rejected a government promise Thursday to consider political reforms, calling it inadequate. They said significant changes, including the lifting of a 48-year-old emergency law, must be implemented immediately or their goals could expand to include President Bashar al-Assad’s ouster.”).

158. Slackman, *supra* note 156.

159. *Syria’s violent repression of protests risks fuelling further anger - UN official*, UNITED NATIONS NEWS CENTRE (Mar. 26, 2011), [http://www.un.org/apps/news/story.asp?NewsID=37905&Cr=Syria&Cr1=#.Uj7\\_w2SZ0eU](http://www.un.org/apps/news/story.asp?NewsID=37905&Cr=Syria&Cr1=#.Uj7_w2SZ0eU).

widely criticized “emergency law” in April of 2011.<sup>160</sup> At the same time, however, the regime continued to characterize its military efforts as being directed against “armed gangs and Islamist terrorists.”<sup>161</sup>

Despite Assad’s resort to the use of military force and signs of some organization among the opposition,<sup>162</sup> any attempt to characterize the situation before June of 2011 as a civil war would be premature. A contemporaneous application of the framework proposed by the Institut de Droit International,<sup>163</sup> for example, would lead to the conclusion that the protests, although occurring in different parts of the country, could not yet be described as comprising an “insurgent movement” as opposed to mere “local disorders or riots.”<sup>164</sup> Along similar lines, it would be a stretch to argue that the regime had already lost “effective control” over any portion of the state.

On June 3, 2011, United Nations Secretary-General Ban Ki-moon announced the reaching of a grim milestone: the 1,000th death since the outbreak of conflict. Yet although this figure has some significance in political science definitions of civil war,<sup>165</sup> under most such frameworks, the 1,000 deaths must be, at a minimum, battle-related,<sup>166</sup> and it is unlikely that this requirement could fairly be said to have been met at this point even if political science definitions of civil war are assumed to be relevant.

Early June of 2011 saw another development with potential significance for categorizing the conflict. At around the same time as the Secretary-General was announcing the 1,000-death figure, “[t]he first instance of armed rebellion” took place.<sup>167</sup> According to the Institute for the Study of War,

On June 4, 2011, regime security forces fired at an unruly demonstration [in Jisr al-Shughour], leading angry mourners to sack a local police station, seize weapons, and kill local security forces. When army units accompanied by secret police and intelligence

160. *Syria protests: Bashar al-Assad lifts emergency law*, BBC NEWS, Apr. 21, 2011, <http://www.bbc.co.uk/news/world-middle-east-13161329>.

161. Katherine Marsh, *Syrian government forces launch fresh attacks against Deraa protesters*, THE GUARDIAN, Apr. 30, 2011, <http://www.theguardian.com/world/2011/apr/30/deraa-faces-fresh-attacks>.

162. *Id.*

163. See Institut de Droit International, *supra* note 84.

164. *Id.* art. 1 (“[T]he term ‘civil war’ shall not cover . . . local disorders or riots. . . .”).

165. See Fearon, *supra* note 80 (“[M]ost academics [also] use the threshold of 1,000 dead, which leads to the inclusion of a good number of low-intensity rural insurgencies.”).

166. See, e.g., Joe Sterling, *Is Syria in a Civil War?*, CNN (June 14, 2012), <http://www.cnn.com/2012/06/13/world/meast/syria-civil-war/index.html> (quoting Stephen Biddle, Roger Hertog Senior Fellow for Defense Policy at the Council on Foreign Relations, defining civil war as “a conflict in which at least one side is a non-state actor, with at least 1,000 total *battle deaths* and at least 100 on each side.”) (emphasis added).

167. Joseph Holliday, *Syria’s Armed Opposition*, Middle East Security Report 3, INST. FOR THE STUDY OF WAR, Mar. 2012, at 11. See also, Thilo Maruhn, *Sailing Close to the Wind: Human Rights Council Fact-Finding in Situations of Armed Conflict - The Case of Syria*, 43 CAL. W. INT’L L.J. 401, 404-05 (“Political opposition began to turn into armed insurrection in early June 2011, with rebel attacks on security forces in Jisr ash-Shugur on the Syrian-Turkish border and the government sending troops to respond.”).

officers arrived on the scene the next day, a portion of the army unit refused to assault the town and defected. Shortly afterward, twenty soldiers were killed in an ambush en route to reinforce beleaguered security forces in the city, and the local security headquarters was overrun. Reports on the final body count vary, but in the end the regime had to contend with its first armed resistance.<sup>168</sup>

A significant blow had been inflicted against the regime. Nevertheless, those responsible for the attack were unable to resist the government's forceful response and were ultimately forced to flee the town along with up to 10,000 of its residents.<sup>169</sup> While towards the end of June there was still "no sign of the protests withering," analysts widely "agree[d] that the regime [was] not in imminent danger of falling."<sup>170</sup>

July and August of 2011 also saw potentially significant developments. These included the July 29 establishment of the Free Syrian Army ("FSA") and the August 23 formation of the Syrian National Council ("SNC"), "a political coalition of anti-government groups."<sup>171</sup> Pointing to such developments, a colorable but probably losing argument could be made that the relevant threshold had been reached, and that assistance to the government was therefore now prohibited. One might, for example, suggest that the formation of the SNC further called into question the regime's already weakened claims to legitimacy. Alternatively, the formation of the FSA could be seen as underscoring the growing ineffectiveness of government military control.<sup>172</sup> If, as is suggested in Part I above, the legal authority of the government to invite outside assistance is contingent upon its maintenance of legitimacy and/or effective control,<sup>173</sup> the developments in question could be seen as having some legal relevance.

Nevertheless, there is reason to believe that the use of the "civil war" label at this point would still be premature.<sup>174</sup> First, it is unlikely that a legally defined "armed conflict"—as that term is referenced in both the ICRC and Institut de Droit International definitions of civil war—yet existed. The ICRC definition of non-international armed conflicts, for example, refers to "*protracted armed confrontations*" meeting a certain "*minimum*

168. *Id.* (citing Joseph Holliday, *The Struggle for Syria in 2011*, INST. FOR THE STUDY OF WAR, Dec. 2011, at 21).

169. *Id.*

170. Tim Lister, *Al-Assad's speech: Rebeated promises salted with threats*, CNN (June 21, 2011, 7:12 AM), <http://www.cnn.com/2011/WORLD/asiapcf/06/20/syria.assad/index.html>.

171. Maruhn, *supra* note 167, at 404.

172. *But see* Liz Sly, *In Syria, defectors form dissident army in sign uprising may be entering new phase*, WASH. POST, Sept. 25, 2011, [http://articles.washingtonpost.com/2011-09-25/world/35273494\\_1\\_jabal-zawiya-free-syrian-army-syria-turkey](http://articles.washingtonpost.com/2011-09-25/world/35273494_1_jabal-zawiya-free-syrian-army-syria-turkey) ("There is still scant evidence that the defectors are anywhere close to presenting a serious threat to Assad.")

173. *See supra* note 47.

174. It could still, however, be argued that the relevant threshold is actually lower than that of a full-blown civil war, and that this lower threshold *had* been met.

level of intensity,” and in which both parties “show a minimum of organization.”<sup>175</sup> While the formation of the SNC and FSA certainly evinced a growing level of organization, the ICRC explicitly referred to the opposition’s lack of organization in a December 2011 determination that the conflict had not yet met the civil war threshold.<sup>176</sup> Even if the organizational threshold could be deemed to have been met at this point, it is unlikely that armed confrontations then taking place between the government and opposition could yet be considered “protracted” or of the requisite level of “intensity.” Indeed, the ICRC did not announce the existence of a non-international armed conflict in Syria until nearly a full year later.<sup>177</sup>

However characterized, the conflict escalated throughout 2011. In late September, the regime faced its next “significant instance of armed resistance,” in Rastan, considered to be at “the center of armed resistance against the regime” at the time.<sup>178</sup> But while “insurgents were able to resist the security forces’ assault for four days,” the town was ultimately retaken by the regime.<sup>179</sup> Similarly, although the end of November saw rebel attacks an average of once per day in Idlib province in northwestern Syria, the opposition proved unable to “hold its ground against the security forces for extended periods of time.”<sup>180</sup>

Although the opposition had arguably not yet challenged the effective control of the armed forces, the early November 2011 agreement of the regime to an Arab League-proposed ceasefire<sup>181</sup> is powerful evidence of the growing recognition of the opposition’s power and legitimacy both domestically and within the international community. A similar indication of the conflict’s escalation came on December 1, 2011, when United Nations High Commissioner for Human Rights Navi Pillay intimated that the conflict in Syria could soon escalate—or perhaps already had escalated—to the point of

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175. International Committee of the Red Cross, *supra* note 82, at 5 (some emphasis omitted; remaining emphasis in original).

176. Stephanie Nebehay, *Syria not in civil war but situation grave: ICRC*, REUTERS (Dec. 8, 2011, 5:20 PM), <http://www.reuters.com/article/2011/12/08/us-syria-aid-idUSTRE7B727C20111208> (“The humanitarian situation in Syria is serious but the country does not qualify as being involved in a civil war as the armed resistance lacks organization, the International Committee of the Red Cross (ICRC) said on Thursday.”).

177. Stephanie Nebehay, *Exclusive: Red Cross ruling raises questions of Syrian war crimes*, REUTERS (July 14, 2012, 3:42 PM), <http://www.reuters.com/article/2012/07/14/us-syria-crisis-icrc-idUSBRE86D09H20120714>. *But see id.* (“The independent humanitarian agency had previously classed the violence in Syria as localized civil wars between government forces and armed opposition groups in three flashpoints - Homs, Hama and Idlib.”). Further, the ICRC’s institutional mission gives it an incentive to delay recognition of a non-international armed conflict so as to ensure the continued applicability of the greater protections of the human rights regime.

178. Holliday, *supra* note 167, at 11.

179. *Id.* at 12.

180. *Id.*

181. Sarah Moughty, *Syria Agrees to Cease-Fire Proposal*, PBS (Nov. 3, 2011, 11:46 AM), <http://www.pbs.org/wgbh/pages/frontline/foreign-affairs-defense/syria-undercover/syria-agrees-to-cess-fire-proposal/>.

civil war.<sup>182</sup> In Commissioner Pillay's words, "[a]s soon as there were more and more defectors threatening to take up arms, I said this in August before the Security Council, that there's going to be a civil war. *And at the moment that's how I am characterizing this.*"<sup>183</sup> However, the Commissioner qualified this assertion, arguing that "[t]he Syrian authorities' continual ruthless repression, *if not stopped now*, can drive the country into a *full-fledged* civil war."<sup>184</sup> One way to reconcile these statements is to understand the Commissioner to have been asserting that, while she believed the conflict to be a civil war, it was not yet a *full-fledged* civil war.<sup>185</sup>

The implications of a distinction between full and partial civil wars on the duty of non-intervention are unclear. More importantly, it seems unlikely that the Commissioner's evaluation was predicated on *legal* definitions of the concept of civil war. After all, "[t]he Assad regime clearly demonstrated its desire and its capability to prevent the armed opposition from holding terrain throughout 2011."<sup>186</sup> Nevertheless, the statement provides some ammunition for arguing that the civil war threshold—at least in some form—had been reached by early December of 2011.

Whatever its status at the end of 2011, the conflict significantly escalated in 2012. In January, the opposition made inroads close to Damascus, making it difficult for the regime to focus its efforts on quickly regaining territory elsewhere.<sup>187</sup> The rebels' successful defense of Zabadani—a valley a mere 30 kilometers from downtown Damascus—"marked the first time in the Syrian uprising that rebels repelled a major regime offensive."<sup>188</sup> Such developments made it possible for the rebels to begin controlling pockets of territory for growing periods of time.<sup>189</sup>

On April 10, 2012, a United Nations-sponsored ceasefire went into effect at a point at which "[n]either side had the strength to defeat the other," with the regime controlling key urban areas and the rebels moving "freely around the Syrian countryside."<sup>190</sup> By the end of May, the opposition had

182. Nada Bakri, *United Nations Unrest in Syria Amounts to Civil War*, N.Y. TIMES, Dec. 1, 2011, <http://www.nytimes.com/2011/12/02/world/middleeast/united-nations-says-syrian-unrest-amounts-to-civil-war.html>.

183. *Id.* (emphasis added).

184. Nada Bakri, *U.N. says action needed to prevent civil war in Syria*, N.Y. TIMES, Dec. 2, 2011, [www.nytimes.com/2011/12/03/world/middleeast/un-says-action-needed-to-prevent-civil-war-in-syria.html](http://www.nytimes.com/2011/12/03/world/middleeast/un-says-action-needed-to-prevent-civil-war-in-syria.html) (emphasis added).

185. This possibility fits with the distinction between "localized" and full civil wars drawn by the ICRC at certain points in the conflict. See Nebhay, *supra* note 177 ("The independent humanitarian agency had previously classed the violence in Syria as localized civil wars between government forces and armed opposition groups in three flashpoints - Homs, Hama and Idlib.")

186. Holliday, *supra* note 167, at 11.

187. *Id.* at 12–13.

188. *Id.* at 25–26.

189. *Id.* at 13 (noting in a March 2012 report that "the growth of the armed opposition movement in 2012 stretched the security forces thin, allowing the rebels defend [sic] pockets of control for increasing periods of time").

190. Joseph Holliday, *Syria's Maturing Insurgency*, Middle East Security Report 5, INST. FOR THE STUDY OF WAR, June 2012, at 11.



increased to 40,000 fighters, and rebel leaders were claiming, among other things, “effective control of 90 percent of [the province of Aleppo’s] countryside.”<sup>191</sup> A month later, rebels controlled significant portions of the countryside in Syria’s northern and central regions,<sup>192</sup> and it appeared to some that the conflict was “approaching a tipping point at which the insurgency [would] control more territory than the regime.”<sup>193</sup> While Secretary-General Ki-moon stated in early June that the risk of civil war was “imminent and real,”<sup>194</sup> within days of that assessment, his Under-Secretary-General for Peacekeeping Operations asserted that the conflict had already reached that threshold.<sup>195</sup> The following month, the ICRC announced that it had come to the same determination.<sup>196</sup>

The fog of war renders the precise point at which an internal conflict becomes a civil war open to debate even under relatively well-settled definitions of the term under international humanitarian law.<sup>197</sup> The civil war threshold becomes even murkier when the issue is not whether the laws of war apply, but instead whether assistance to the incumbent government is no longer permissible (assuming it ever becomes impermissible). Is the primary issue one of the government’s loss of effective control over territory? If so, how much loss is required, and for how long? Might more direct manifestations of the government’s loss of legitimacy also be relevant? Borrowing from the laws of war, must the opposition be sufficiently organized, and the conflict sufficiently protracted and intense? Might even more demanding thresholds be required, such that the existence of a non-international armed conflict would not necessarily entail the existence of a civil war in the context in question?

Due to a shortage of scholarly discussion and a complete lack of case law on the subject, there are no clear answers to these questions. The purpose of the discussion above is therefore not to pinpoint the precise date on which the Syrian civil war crystallized as such, so much as to describe certain major developments that could be pointed to by parties seeking to emphasize that the principle of non-intervention had become applicable to the Assad regime

191. *Id.* at 16, 18.

192. *Id.* at 7.

193. *Id.*

194. *Ban Ki-moon increases pressure on Syria*, BBC NEWS, June 8, 2012, <http://www.bbc.co.uk/news/world-middle-east-18363286>.

195. Louis Charbonneau, *Syria conflict now a civil war*, U.N. peacekeeping chief says, REUTERS (June 12, 2012, 4:30 PM), <http://www.reuters.com/article/2012/06/12/us-syria-crisis-un-idUSBRE85B1BI20120612>. However, one could also argue that the relevant civil war threshold should be *higher* than that of an ordinary non-international armed conflict. For example, one could argue that the link to control over territory mentioned in Additional Protocol II makes the threshold set in that document more appropriate.

196. Nebehay, *supra* note 177. See also Joseph Holliday, *The Assad Regime: From Counterinsurgency to Civil War*, Middle East Security Report 8, INST. FOR THE STUDY OF WAR, Mar. 2013, at 7 (“The conflict in Syria transitioned from an insurgency to a civil war during the summer of 2012.”).

197. See International Committee of the Red Cross, *supra* note 82 (explaining the ICRC’s definition of non-international armed conflicts).

no less than the opposition. After all, if a right to counterintervention on behalf of an opposition group can be said to exist at all, it can only be invoked where the government has lost its presumed privilege to speak for the state—and therefore to receive assistance on its behalf.

2. *The opposition probably received illicit external assistance prior to the point at which the civil war threshold was reached.*

Just as it is difficult to determine the precise point at which the conflict became a civil war, it is also difficult to determine the precise point at which the Syrian opposition first began receiving assistance from third-party states. This problem is compounded by the fact that most support—at least of a lethal sort—has been offered covertly, and public awareness of its existence has therefore depended upon leaks, accidental discovery, or the work of investigative journalists. Nevertheless, despite the murkiness surrounding such aid, a survey of open-source information can provide a fair amount of guidance as to the likely points at which external assistance first began to be offered.

By early June of 2011, officials in Syria were blaming the Turkish government for the appearance of Turkish weapons in rebel hands, although perhaps more for allowing the rebels to acquire arms than for directly providing them.<sup>198</sup> By October of the same year, Turkey's support of the opposition—at least of an indirect nature—had become more overt.<sup>199</sup> According to an October 27 *New York Times* report,

Turkey is hosting an armed opposition group waging an insurgency against the government of President Bashar al-Assad, providing shelter to the commander and dozens of members of the group, the Free Syrian Army, and allowing them to orchestrate attacks across the border from inside a camp guarded by the Turkish military.<sup>200</sup>

Despite such reports, Turkey continued to deny having armed or provided other military support to the rebels, asserting instead that its relationship to the Free Syrian Army was purely humanitarian in nature.<sup>201</sup>

At roughly the same time, the new leadership in Libya became the first to recognize the Syrian opposition, claiming that it was “more representative” than was the Assad regime.<sup>202</sup> A month later, reports emerged suggesting

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198. See, e.g., *Syria's Assad accuses Turkey of arming rebels*, TR DEFENSE (June 25, 2011), <http://www.trdefence.com/2011/06/25/syrias-assad-accuses-turkey-of-arming-rebels/>.

199. Liam Stack, *In Slap at Syria, Turkey shelters Anti-Assad fighters*, N.Y. TIMES, Oct. 27, 2011, <http://www.nytimes.com/2011/10/28/world/europe/turkey-is-sheltering-antigovernment-syrian-militia.html>.

200. *Id.*

201. *Id.*

202. Martin Chulov & Matthew Weaver, *Libya leads world in recognising Syrian opposition's right to rule*, THE GUARDIAN, Oct. 19, 2011, <http://www.theguardian.com/world/2011/oct/19/libya-recognises-syrian-opposition-right-rule>.

that Libyan authorities had taken their country's recognition to a new level, meeting covertly with rebel leaders and promising weapons and possibly also "volunteers."<sup>203</sup> It is unclear whether or how quickly such assistance materialized. Whatever the case may be, one could make a strong argument that at least some of the support provided to the opposition by November of 2011 was, given how broadly the prohibition on "intervention" has been construed in the past<sup>204</sup> and the unlikelihood that the conflict could yet be considered a civil war, necessarily illegal.

As the conflict escalated, so did outside assistance to the opposition. By early 2012, the Central Intelligence Agency had begun playing a role in facilitating the delivery of "military material" into Turkey by Qatar.<sup>205</sup> Reports suggest that Saudi Arabia may have also begun arming the rebels by around the same time.<sup>206</sup> Between then and the point at which American arms finally began appearing in rebel hands,<sup>207</sup> assistance provided to the opposition had clearly substantially increased.<sup>208</sup>

Did some or all of this assistance constitute illegal intervention? Probably. But at least in theory, a country would be free to argue that a civil war existed by the time states began providing non-humanitarian support to the opposition. Even assuming such a claim is plausible, however, it would still be incumbent upon the country seeking to make it to prove not only that its subsequent material support was offered to neutralize prior illegal intervention offered to the Assad regime, but also that such counterintervention was strictly necessary and proportionate.

### 3. *The Assad regime continued to receive support from Russia, Iran and Hezbollah after the civil war threshold had been crossed.*

As discussed in Part I above, a recognized government in effective control of its territory may legally invite outside assistance.<sup>209</sup> In other words, it is only once the civil war threshold has been reached that the state's political independence and the people's right to self-determination can be said to demand non-intervention on behalf of the incumbent government and oppo-

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203. Ruth Sherlock, *Libya's new rulers offer weapons to Syrian rebels*, TELEGRAPH, Nov. 25, 2011, <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/8917265/Libyas-new-rulers-offer-weapons-to-Syrian-rebels.html>.

204. See, e.g., Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States, *supra* note 18.

205. C. J. Chivers & Eric Schmitt, *Arms Airlift to Syria Rebels Expands, With Aid From C.I.A.*, N.Y. TIMES, Mar. 24, 2013, <http://www.nytimes.com/2013/03/25/world/middleeast/arms-airlift-to-syrian-rebels-expands-with-cia-aid.html>.

206. Jonathan Schanzer, *Saudi Arabia is Arming the Syrian Opposition*, FOREIGN POL'Y, Feb. 12, 2012, [http://www.foreignpolicy.com/articles/2012/02/27/saudi\\_arabia\\_is\\_arming\\_the\\_syrian\\_opposition](http://www.foreignpolicy.com/articles/2012/02/27/saudi_arabia_is_arming_the_syrian_opposition).

207. See Londoño and Miller, *supra* note 6.

208. Chivers & Schmitt, *supra* note 205.

209. See, e.g., Wippman, *supra* note 24, at 238 (referring to the "paradigm case of a recognized and effective government inviting intervention for sharply limited ends . . .").

sition alike. Prior to that point, there is little basis for questioning assistance to Assad as a matter of international law.

Did such assistance continue after the conflict had unambiguously crossed the civil war threshold? Almost certainly. In November of 2012—likely well after a state of civil war existed—Russian Foreign Minister Lavrov defended his country’s continued military support of the regime, pointing to the fact that Russia was fulfilling old contracts. The purpose of the aid, Lavrov argued, was not to take sides in the conflict, but rather to protect Syria from “external threats.”<sup>210</sup> While some would reject such a justification altogether, there is, as noted in Part I above, an argument to be made that states are permitted to maintain assistance at pre-insurgency levels.<sup>211</sup> One could similarly argue that it is permissible to provide military aid not directed at influencing the outcome of an internal conflict,<sup>212</sup> although it certainly seems unlikely that Russian military aid has been so narrowly tailored.

Legally speaking, Iranian assistance to Assad is on far more tenuous grounds. While it is difficult to determine the precise pre- and post-civil war levels of assistance provided by Iran, assistance related to the provision of “arms and related material” would violate United Nations Security Council sanctions against Iran<sup>213</sup> no matter the point in the conflict at which it first occurred. Indeed, the Wall Street Journal has suggested that the United States has considered pointing to this fact to justify support for the Syrian opposition.<sup>214</sup>

Sanctions aside, Iranian assistance to Assad seems likely to have increased following the outbreak of the civil war, and is in any event substantial. According to the Institute for the Study of War, “[t]he Islamic Republic of

210. *Russia’s Lavrov says supplying arms to Syria under old contracts*, REUTERS (Nov. 5, 2013), <http://www.todayzaman.com/news-297162-russias-lavrov-says-supplying-arms-to-syria-under-old-contracts.html>.

211. See, e.g., Moore, *supra* note 34, at 196–97 (“The *general consensus* is that military assistance should be frozen at levels approximately equal to what they were at the time the conflict broke out.”) (emphasis added).

212. Perkins, *supra* note 53, at 196 (“It should be noted that the alternative to restricting assistance to the pre-insurgency level will not be a withdrawal of all assistance to the government. The purposes of the rule of nonintervention are equally served by imposing on the state which provides the military assistance the burden of insisting on appropriate measures to assure that the aid will not be used to support the government in the internal civil strife. This burden would apply equally to the pre-insurgency assistance and to assistance furnished after the outbreak of civil strife. Only if such arrangements cannot be made should it be necessary under the nonintervention rule to require a termination of assistance.”).

213. S.C. Res. 1929, ¶ 8, U.N. Doc. S/Res/1929 (June 9, 2010).

214. See Entous, *supra* note 16. Such a justification fits, albeit imperfectly, within a counterintervention framework. The fit is not perfect because, although Iran is not entitled to provide arms, the Assad regime would normally be entitled to receive them (from other entities) prior to the crossing of the civil war threshold. Nevertheless, a reasonable argument could be made that the effect is the same: The regime is receiving weapons it is not entitled to receive under international law. Perhaps most significantly, the violation of the sanctions regime could allow the U.S. to argue—however weakly—that it is entitled to assist the opposition on a theory of counterintervention *prior* to the outbreak of a civil war.

Iran has conducted an extensive, expensive, and integrated effort to keep President Bashar al-Assad in power as long as possible. . . .”<sup>215</sup> These efforts have included, among other things, the provision of military supplies and intelligence, the assistance of pro-regime militias and the recruitment of Iraqi Shia’as, and the deployment of Iranian Revolutionary Guard Corps Ground Forces to provide coordination and advice.<sup>216</sup> Indeed, Iranian assistance to Assad is significant enough to have prompted the now-defected, former Prime Minister of Syria to claim that “Syria is occupied by the Iranian regime. The person who runs the country is not Bashar al-Assad but Qassem Suleimani, the head of Iranian regime’s Quds Force.”<sup>217</sup> While this assertion is almost certainly an exaggeration, it nonetheless provides some sense of the scope of Iran’s involvement.<sup>218</sup>

However significant the scale of Iran’s participation, it has been outdone by its ally and proxy: Hezbollah. Not only has Hezbollah increased its support for Assad over the course of the conflict,<sup>219</sup> but its support has been extraordinarily direct and critical. Again according to the Institute for the Study of War,

[Hezbollah] militants participate in a number of direct support activities in Syria, including sniper and counter-sniper operations, facility and route protection, joint clearing operations, and direct engagement with opposition forces, often in coordination with Syrian forces and pro-government militias. . . . Hezbollah escalated its combat role in mid-February 2013 when [its] fighters, supported by Syrian air support and pro-Assad militias, launched a coordinated ground offensive against rebel-held villages near al-Qusayr. . . . According to rebel groups, Hezbollah controls at least eight Syrian villages near the north Lebanese border and is attempting to secure more in an effort to disrupt rebel supply lines to Homs.<sup>220</sup>

Notwithstanding its extraordinary and unparalleled post-civil war levels of assistance, one could argue that Hezbollah’s status as a non-state actor makes its support of Assad irrelevant from a legal perspective. After all, states seeking to point to Hezbollah to justify their counterintervention would need to overlook or distinguish the fact that the opposition itself has long been assisted by non-state actors.<sup>221</sup> A reasonable response might be

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215. Fulton et al., *Iranian Strategy in Syria*, INST. FOR THE STUDY OF WAR, May 2013, at 6.

216. *See generally id.*

217. *Id.* at 10.

218. *Id.*

219. *Id.* at 21.

220. *Id.* at 22–23.

221. *See, e.g., Who is supplying weapons to the warring sides in Syria?*, BBC NEWS, June 14, 2013, <http://www.bbc.co.uk/news/world-middle-east-22906965> (“Syria’s rebels, who are drawn mostly from the country’s majority Sunni community, are said to have acquired weapons, ammunition and explosives from Sunni tribesmen and militants in neighbouring Iraq.”).

that Hezbollah's extraordinary level of organization, regional influence, and primary role within Lebanese politics make it plausible to treat its participation, unlike that of individual smugglers, as equivalent to that of any other state actor.

4. *Post-civil war assistance provided to the opposition has probably been proportionate, and was arguably necessary to offset illicit assistance first provided by third parties to the Assad regime.*

Given that much, if not most, of the support provided to either side has been provided covertly, it is difficult to definitively conclude whether assistance to the opposition has been proportionate. Nevertheless, three facts suggest that it has. First, as a historical matter, support of insurgents has generally faced larger logistical<sup>222</sup> and legal challenges, which have undoubtedly had some effect on the amount of assistance they receive. Second, Russian assistance to Assad has not only included far more sophisticated weaponry,<sup>223</sup> but its military contracts with the regime as of 2012 were noted by Human Rights First to be valued at approximately \$4 billion.<sup>224</sup> Third, Hezbollah's active participation in *combat* operations is almost certainly unparalleled. During the summer of 2013, for example, the Meir Amit Intelligence and Terrorism Information Center reported that "[t]housands of Hezbollah fighters [were] taking part in the Syrian civil war. . . ."<sup>225</sup> Once Iran's own substantial support for the regime<sup>226</sup> is added to the calculus, it would be difficult to argue that support for the opposition has been disproportionate.<sup>227</sup> A more difficult question is whether support for the opposition is *necessary*; that is, whether arming the opposition is nec-

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222. Cf. ROTH, *supra* note 28, at 187 (noting that, even if rebel "efficacy has been achieved with unlawful foreign assistance, the assistance received by the opposition is likely to have been less than that received by the government, given the logistical difficulties normally attending the supply of insurgents."). Although Roth appears to be referring primarily to pre-civil war assistance, the point does not seem likely to be any less valid in the context of a civil war.

223. For example, in June of 2012, around the same time the conflict was unambiguously crystallizing into a full-fledged civil war, "a Russian-operated ship carrying helicopter gunships and air defense missiles was forced to turn back to Russia . . ." *Russia to keep supplying Syria leader Bashar Assad's regime with "defensive" weapons*, CBS NEWS (Feb. 13, 2013, 5:46 AM), [http://www.cbsnews.com/8301-202\\_162-57569113/russia-to-keep-supplying-syria-leader-bashar-assads-regime-with-defensive-weapons/](http://www.cbsnews.com/8301-202_162-57569113/russia-to-keep-supplying-syria-leader-bashar-assads-regime-with-defensive-weapons/).

224. *Enablers of the Syrian Conflict: How Targeting Third Parties Can Slow the Atrocities in Syria*, HUMAN RIGHTS FIRST, Mar. 2013, at 7.

225. Gili Cohen, *Thousands of Hezbollah troops fighting, hundred killed in Syria, study confirms*, HAARETZ, June 5, 2013, <http://www.haaretz.com/news/middle-east/1.528004>.

226. See generally HUMAN RIGHTS FIRST, *supra* note 224.

227. Reflecting this sentiment, a spokesman for the Syrian Opposition Coalition is reported in a September 11, 2013 *Washington Post* article having stated that "[t]he Syrian Military Council is receiving so little support that any support we receive is a relief," and that "if you compare what we are getting compared to the assistance Assad receives from Iran and Russia, we have a long battle ahead of us." Londoño & Miller, *supra* note 6.

essary to restore Syrian political independence and the capacity of the Syrian people to determine their own future.<sup>228</sup>

As non-representative as the Assad regime may be, there is reason to caution against assuming that the opposition is any *more* representative. To begin with, it is difficult to answer the question of *who* the opposition is. Although much of the opposition was at least for a time nominally associated with the Syrian Opposition Coalition and Supreme Joint Military Command,<sup>229</sup> in reality it is comprised of hundreds, if not “more than a thousand”<sup>230</sup> disparate groups. As the Center for American Progress has written,

The Syrian armed rebellion, often discussed as a singular movement working in unity to overthrow President Assad, is more accurately described as an array of ideologically diverse and uncoordinated brigades and battalions with limited areas of operation. . . . Despite the unifying goal of ousting President Assad, these alliances and their subunits have a range of tactics, constituencies, and *visions of what a post-Assad Syria should look like*.<sup>231</sup>

Indeed, while the Supreme Joint Military Command and Syrian Opposition Coalition “aim to coordinate a cohesive, national, and democratic opposition that could fill the potential power vacuum following President Assad’s fall,”<sup>232</sup> the latter entity, comprised as it is primarily of Syrian exiles and others outside the country, “is frequently criticized by rebel groups for being out of touch with the in-country rebellion.”<sup>233</sup> Given such questions of credibility, it is perhaps unsurprising that foreign state support for the rebels has often gone to different political and military entities operating within the country.<sup>234</sup>

Does supporting a particular faction give voice to the Syrian people, such that it might plausibly be said to counterbalance illegal assistance allegedly provided to the Assad regime? The point is not to provide a definitive answer in any particular case, but rather to suggest the sort of analysis that

228. Cf. Perkins, *supra* note 53, at 227 (“The law of remedies is a part of law. Serving an essential role in giving force to the rule of law, it allows remedies by state action where countermeasures are *necessary* to oppose and redress violations of the law.”) (emphasis added).

229. See generally Ken Sofer & Juliana Shafroth, *The Structure and Organization of the Syrian Opposition*, CENTER FOR AMERICAN PROGRESS, May 14, 2013, <http://www.americanprogress.org/wp-content/uploads/2013/05/StructureAndOrganizationSyrianOpposition-copy.pdf>.

230. Valerie Amos, United Nations Under-Secretary-General and Emergency Relief Coordinator, Remarks at the Middle East Institute’s Symposium “The International Response to Syria’s Humanitarian Catastrophe,” (May 7, 2013) (video available at <http://www.mei.edu/video/international-response-syrias-humanitarian-catastrophe>).

231. Sofer & Shafroth, *supra* note 229, at 5–6 (emphasis added).

232. *Id.* at 2.

233. *Id.* at 4.

234. *Id.* at 9 (noting that “several of the most important foreign-government funders of the opposition support specific factions within the rebellion, with Qatar, Turkey, Saudi Arabia, and the United Arab Emirates each backing different political and armed groups.”).

would—at least in legal theory—need to be undertaken by those seeking to justify their support to a rebel group on the basis of a theory of counter-intervention. Different states will often have different views about which groups most speak “for the people,” but the spectrum of possibilities has limits: it would be absurd, for example, to argue that the theory of counter-intervention permits arming random criminals with rocket launchers.<sup>235</sup> Ultimately, whether a given counterintervention was permissible would depend upon the plausibility of claiming that the assistance was directed at neutralizing illicit foreign intervention in recognition of the people’s right to determine their own future.

### CONCLUSION

Could the United States’ recent decision to arm the Syrian opposition be justified on a theory of counterintervention? An affirmative answer would require proof of two conditions precedent: first, the general validity of the theory under customary international law; and second, the validity of the application of that theory in the particular context of Syria.

On the one hand, the theory’s general validity faces a number of serious obstacles. Most critically, there are significant questions about whether the widespread state practice of intervening on behalf of opposition groups is accompanied by the requisite *opinio juris*. The fact that there are no historical precedents of states openly appealing to the theory to justify their actions in particular cases is powerful evidence that no such right exists. Yet it is also possible to argue that the absence of such precedent does not indicate a lack of *opinio juris* as to the theory’s *general* validity so much as a recognition that the theory’s strict limitations render its application in the vast majority of *particular* circumstances inappropriate.

Whatever the case may be, the availability of the theory as a general matter is only half the battle. To justify its actions, the U.S. would also need to prove that the theory is *appropriately* invoked in the particular context of Syria. The most straightforward means of doing so would require arguing that the opposition did not receive any assistance until *after* the conflict had crossed the civil war threshold, and *after* the Assad regime had already received illicit assistance from its benefactors. It would also require proving that the assistance provided to the opposition was both proportionate and necessary.

Could the U.S. meet such a burden? Probably not, if only because media and think tank reports suggest that assistance to the opposition likely began *prior* to the crossing of the civil war threshold. Yet given the lack of clarity both as to the meaning of “civil war” and the precise point at which assis-

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235. Still, the inherent subjectivity that would inhere in determinations of legitimacy and representativeness is yet another cause for concern with regard to the theory as a whole.



tance to the opposition began, there is some room for debate. The fact that no states have chosen to justify their otherwise highly questionable support for the opposition by pointing to these ambiguities might suggest that states simply do not see them as relevant. In other words, the fact that the theory of counterintervention has not been openly invoked—even though it possibly could be—might suggest that states simply do not “widely accept”<sup>236</sup> the right to counterintervene on behalf of opposition groups after all.

This, in the author’s view, would be a good thing. But it is submitted that greater clarity—preferably through expressions of *opinio juris*—is very much needed to help definitively settle a number of outstanding questions related to the law surrounding counterintervention. Is there a duty of non-intervention in civil wars, and if so, does it extend to the government and the opposition alike? If not, how can support of the government be reconciled with the loss of effective control and legitimacy a civil war entails? If there *is* a duty of non-intervention, is there any remedy—such as that of counterintervention—for breaches of it? Do such remedies extend to opposition groups and governments alike?

In the author’s view, it should be impermissible to assist opposition groups—for any reason whatsoever<sup>237</sup>—at *least* until the point at which the opposition has *itself* established effective control or clearly established its legitimacy through an *unambiguous*, genuine electoral victory. Thus, assistance to the opposition should remain prohibited even if the government loses effective control, and even if the government continues to receive assistance after that point—whether or not that assistance is deemed illegal.

While supportable in legal theory, the proposed framework is, at bottom, pragmatic and stability-oriented. There is, of course, little doubt that such a rule could help despots remain in power despite their having lost both effective control and legitimacy—the two grounds upon which interventions by invitation are typically justified.<sup>238</sup> Nevertheless, a contrary rule—such as one allowing counterintervention on behalf of opposition groups in certain limited circumstances—would leave too much room for manipulation of the facts, and would thereby present too great a threat to the stability upon which the international legal order is predicated. Whatever the case may be, however, it is submitted that settling upon *a* rule—even if not the one proposed above—is preferable to living with any ambiguity in the status of the law.

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236. *UK Materials on International Law*, *supra* note 56, at 616.

237. This excludes, of course, situations in which the Security Council authorizes action to the contrary.

238. GRAY, *supra* note 11, at 81 (“[W]riters have divided on the question whether an invitation can only justify intervention if it comes from the effective government or whether it is the legitimate government that has the right to invite assistance to maintain itself in power or to restore it to power when it has been overthrown. Such academic debate has been inconclusive in the light of the diversity of state practice.”).

