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## Book Reviews

Chiara Redaelli. ***Intervention in Civil Wars: Effectiveness, Legitimacy, and Human Rights***. Oxford: Hart Publishing, 2021. Pp. 344. £85.  
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Chiara Redaelli's book has appeared at a time of transition. It focuses on whether international human rights law (IHRL) has impacted the legal barriers to intervention in civil war. She considers the period from the adoption of the United Nations Charter to the end of the 2010s. The analysis recalls Richard Lillich's work in the 1970s on humanitarian intervention. Reading Redaelli's account decades later during the Coronavirus pandemic, as climate-related catastrophes rage and long-running interventions fail, the book invokes a *fin-de-siècle* feeling. It reflects the best of the arguments for greater rights to intervene, refined over many years. Yet, Redaelli, using positivist legal method, can only see an 'emerging' right of certain government opposition fighters – insurgents – to invite foreign militaries to assist them (at 251). Her careful research indicates serious difficulties in concluding more. She also warns of the very real dangers were such a right to ever become law (at 258–252). This review provides additional reasons to consider the era of pro-intervention arguments at an end.

The place to begin any discussion of armed intervention is with the *jus cogens* prohibition on the use of force. Whether viewed as an aspect of natural law or some special category of customary international law, all agree that no derogation is permitted from *jus cogens* in distinction to positive law rules. Judges and scholars may discern broader application of *jus cogens*, but never narrower. The three exceptions to the prohibition on the use of force for self-defence, United Nations Security Council authorization and consent are, therefore, properly interpreted as limited in scope, not subject to expansion through changes in state practice. As Redaelli points out with respect to consent, these exceptions can be characterized as parameters or outer limits of the prohibition on military force, rather than true exceptions. Whether exception or outer boundary, the legal presumption is in favour of the core or general rule. Where facts or legal developments create uncertainties, actors must err on the side of foregoing resort to force in preference to non-violent alternative action.

The presumption in favour of the prohibition on force applies whether the prohibition is classified as natural law or positive law. Positivists like Redaelli, however, are open to the presumption shifting away from the prohibition given sufficient state practice and *opinio juris*. Natural law scholars consider the presumption durable like the norm itself. Nevertheless, Redaelli is a careful positivist, not inclined to see changes without a reasonable amount of evidence. She does not find evidence to support broader rights to intervene, and her view of current positive law is in line with natural law. Governments are permitted to invite foreign intervention unless a conflict with insurgents reaches the point where the government has a reasonable chance

of losing the military contest. This means that, under international law's abstention rule, 'states must not intervene on behalf of either the government or the insurgents, if the results of the revolt are uncertain. They must not even recognize the insurgents until the insurgents have in fact established themselves as the government of the state or of a revolting community'.<sup>1</sup> Insurgents establish themselves as a government by exercising effective administrative control of most of a state's territory. The government will retain the right to invite intervention, however, in order to counter military intervention in favour of insurgents. Interpreting the law to find a broader right for either governments or insurgents to invite fails to honour the principle of no derogation from *jus cogens*. It also lacks sufficient state practice to support it as a rule from a positivist perspective.

Nevertheless, Redaelli presents examples of state practice at variance with the abstention rule. Since at least Lillich's time, scholars have argued that examples of military interventions in internal crises are changing the law, leading to a right to intervene in the particular circumstances where an outside intervenor deems human rights or democracy are at stake. This pro-intervention analysis is usually accompanied by normative arguments based on sincere beliefs that military force can be effective in protecting and promoting rights and democratic governance. The empirical record says otherwise. Highly regarded studies show that outside intervention in internal conflict does not lead to communities where human rights, democracy and the rule of law flourish.<sup>2</sup> An issue for future international legal scholarship is why advocacy for intervention persists despite the data against it. An answer may lie in the influence of realist-militarist political theory that defies reality and the rule of law.

Even if the reader views the pro-intervention argument favourably, Redaelli's analysis indicates the law is unlikely to change. She sets out three significant developments that must occur before the current rule can accommodate an insurgent right to invite outside military intervention in its support. First, the abstention rule must come to an end (at 151). Second, governments must no longer be identified by a test of effective control but rather by a test of 'legitimacy' based on respect for human rights and democracy. Third, 'illegitimate' governments must lose the right to invite military intervention, at which point 'legitimate' insurgents may possibly gain the right to invite, regardless of the insurgents' chances of success in the armed conflict (ch. 8).

The need for the first change – an end to the abstention rule – is obvious. Since the rule holds that no party may request outside intervention once a conflict reaches civil war, in order for insurgents to gain the right to invite military intervention, abstention must go. Yet, the abstention rule (also referred to as 'negative equality') is well supported. Redaelli presents impressive evidence of official government policies that favour it, as well as the conclusions of the Institut de droit international, and the

<sup>1</sup> Wright, 'International Law and Civil Strife', *Proceedings American Society of International Law* 53 (1959) 145, at 149. Cf. Redaelli, at 85–99.

<sup>2</sup> See, e.g., E. Chenoweth and M.J. Stephan, *Why Civil Resistance Works: The Strategic Logic of Nonviolent Conflict* (2011).

analysis of leading scholars, such as Christine Gray and Tom Ruys who specialize in the international law on the use of force. She acknowledges that abstentionism aligns with the *jus cogens* prohibition on the use of force as well as the principles of non-intervention and self-determination. Still, she appears persuaded that it is fading as a viable rule. She catalogues multiple cases of intervention undertaken in apparent defiance of the abstention rule. Yet, these, on close examination, are equivocal because of the precise practice and *opinio juris* that must be shown to prove the rule is no longer viable as customary law. The practice must involve governments receiving foreign assistance after fighting escalates to civil war. It must also occur where there is no United Nations Security Council authorization and where there is no outside intervention on behalf of the insurgents. The few, if any, cases with all of these features do not amount to the 'general practice' required. With many military interventions coming to an end, future cases look set to be just as rare.

While state practice is insufficient to end the abstention rule, Redaelli adds a normative argument for doing so. She says the rule is currently justified as a normative matter because it supports self-determination. It stands against foreign fighters determining the outcome of internal conflicts. This, however, she finds to be an insufficient basis to support abstention because the rule applies only to intervention in civil war and not to conflicts below the civil-war threshold (at 95–96). She is correct that as a normative matter the rule should apply to conflicts above and below the threshold. Yet, if the abstention rule supports self-determination to some extent, why is it not worthy of retention? Is it not preferable to advocate for a wider rule against intervention than to do away with the limited protection the current rule provides?

Promotion of self-determination is, at any rate, only an added benefit of abstention, not the rationale for the rule. The abstention rule is derived from the concept of consent. Intervention by invitation is permitted as one of the three exceptions to the prohibition on force because a party with authority consents to the presence of a foreign military. Without it, the foreign military would in most cases lack the legal basis for its presence on another state's territory and would violate the prohibition on the use of force or the principle of non-intervention. Under current law, only the UN Security Council and a government in effective control can provide the requisite consent to military intervention. The only exception, discussed below, is for governments forced out of their territories by an act of aggression. Without the effective control test, the international community loses a relatively objective standard for determining the party with authority to consent.

Redaelli devotes considerable critical attention to the *second* rule that must change before the right to intervene can expand, which is the effective control. She acknowledges that state practice supports the test, so she again turns to normative grounds for rejecting it. She says 'might' should not make 'right' (at 229). By this she means that simply because a party is able to administer most of a state's territory, it does not necessarily possess a moral right to do so. As a practical matter, however, international relations must function on the basis of some recognition of accomplished administrative acts regardless of who carries them out. The *Tinoco Claims* rationale explains

persuasively the need for such a pragmatic rule.<sup>3</sup> Costa Rica incurred debts and made concessions under a government that took power in violation of the constitution. The arbitrator ruled that under international law it was the exercise of administration, not the details of the national constitution, that determined the identity of the government in international relations.

The *Tinoco* decision also explained that the effective control rule does not mean states must formally recognize an entity as the government that they find objectionable. Formal recognition is a political preference. A number of judicial decisions in addition to *Tinoco Claims* have held that even where a state withholds recognition, the lawful activities of a party in effective control, such as maintaining international borders or issuing birth certificates, must be respected.<sup>4</sup>

It is, of course, possible to retain the effective control rule for most purposes and still endorse Redaelli's legitimacy test for intervention. Redaelli does not seem to focus on this possibility but rather on the weakness of effective control as a normative matter for identifying governments. Brad Roth, a leading authority on the issue of governmental legitimacy, provides a counterpoint to her critique. He indicates that effective control reflects popular will to some extent, making it a preferable alternative to the judgments of foreign military intervenors. For a government to be able to exercise effective control provides some indication of a community's position respecting its leadership, if only acquiescence in strongman rule. Substituting a legitimacy test for control shifts the determination to an outsider. Intervenors are more likely to have their own interests in mind when undertaking the use of force, not the wishes of the community in conflict. As Roth cogently points out, too many cases demonstrate good reasons not 'to trust foreign intentions, [or] to prefer that foreigners bring on the very crisis that the people itself decided not to initiate'.<sup>5</sup>

Roth does seem to agree with Redaelli on one case in which a government was recognized because of success in elections, not effective control. This is the case of the purported intervention in Gambia, following the 2016 election, which Roth and Redaelli view as an exception. An exception, as the old saying goes, only proves the rule; but this case may not even be an exception. In 2016, the long-time dictator of Gambia, Yahya Jammeh, unexpectedly lost an election. At first, he conceded, then reversed his position. His opponent, Adama Barrow, together with many other Gambians, the African Union, the Economic Community of West African States (ECOWAS) and neighbouring states, put pressure on Jammeh to leave office, drawing a UN Security Council resolution supporting their efforts. The Council also urged the use of peaceful means only. Senegalese troops crossed into Gambia but did not engage in fighting with Gambian forces. Those forces soon abandoned Jammeh. It was that factor that

<sup>3</sup> *Tinoco Claims Arbitration* (Great Britain v. Costa Rica) 1 UN Rep. Int'l Arb. Awards 369 (1923).

<sup>4</sup> See, e.g., *Madzimbamuto v. Lardner-Burke*, [1969] 1 A.C. 645 and other cases discussed in Brad Roth, *Governmental Illegitimacy in International Law* (2000) 155–159.

<sup>5</sup> Roth, 'Intervention in Civil Wars Symposium: Intervention and Emerging Popular Sovereignty Norms', *Opinio Juris*, 13 July 2021, <http://opiniojuris.org/2021/07/13/intervention-in-civil-wars-symposium-intervention-and-emerging-popular-sovereignty-norms/>.

triggered his departure.<sup>6</sup> Jammeh would not have been able to maintain effective control without the military; so, it is unconvincing to view this case (as Roth and Redaelli seem to do) as an instance of intervention against a government exercising effective control – especially as the events unfolded over the course of a few weeks. If Jammeh had kept the loyalty of the military and states had continued to recognize Barrow for months or years after the election, the case would have constituted a clearer contrast to the effective control test. As things stand, it tends to support the test.

The one situation where effective control is not used to evaluate the lawfulness of foreign interventions are instances of conquest. When a state invades another state – as Turkey invaded Cyprus in 1974, Iraq Kuwait in 1990 and Russia Ukraine in 2014, to name three straightforward cases, replacing the government with its own puppet rulers – the ousted government retains its legal status in exile, despite the loss of control. In this situation, it is generally accepted that the abstention rule does not protect the conqueror, even where it exercises effective control. These rare interstate cases are quite different from internal conflict. The foreign occupier has certain duties based on effective control, but *de jure* recognition belongs only to the exiled government, regardless of how many years the occupier remains.

In light of international practice, as well as normative considerations, and contrary to Redaelli's argument, the effective control test looks set to remain the determinant of rights in internal conflict. Redaelli's understandable concerns respecting 'might' over 'right' are adequately addressed by another existing rule, which she acknowledges (at 161): namely, no state with a right to intervene may do so to commit or aid in the commission of human rights violations. This rule achieves the critical goal of suppressing human rights violations by oppressive regimes without ending the effective control test for identifying governments. Add to this the abstention rule, and the law effectively limits the ability of oppressive regimes to receive assistance during armed conflict. The abstention rule prevents intervention in situations that cause the most harm to human beings, armed conflict. The prohibition on participating in human rights violations achieves the goal of Redaelli's proposed rule change in all other situations.

What the law does not do, and this is the real interest of many pro-intervention scholars, is permit insurgents to receive the support of a foreign intervenor. This is Redaelli's *third* required change to the existing international legal framework. The support she presents for this modification of the abstention rule may be the weakest of the three components needed to alter the current rule. Consider the rarity of a case where a civil war is occurring, a government is deemed 'illegitimate', insurgents are deemed 'legitimate' and an outside military intervenor is invited by the insurgents to fight in the interest of human rights and democracy, and doing so is justified because there is no alternative to using force. Evidence of governments losing the right to invite is hard to substantiate, as just discussed. Redaelli acknowledges that some insurgent groups also commit human rights violations and may not be worthy of military assistance. It is closer to reality to say that most insurgents commit human rights violations.

<sup>6</sup> See Helal, 'ECOWAS Intervention in The Gambia – 2016', in T. Ruys, O. Corten and A. Hofer (eds), *The Use of Force in International Law: A Case-Based Approach* (2018) 912.

Insurgents take up weapons to kill police, soldiers and other government officials, not because their own lives are immediately threatened. They kill to take power, often in dire situations, but how often do they do so invoking an exception to the right to life of those whom they kill? Organized killing of this kind violates national criminal codes prohibiting murder. It may also violate international law, as will be discussed next.

Redaelli understands international law to be silent respecting the right of insurgents to resort to armed conflict against a government. She is correct that the drafters of the UN Charter did not have such groups in mind when drafting the Article 2(4) prohibition on the use of force or the Article 51 provision for self-defence. Article 2(4) is, however, not the only consideration. Human rights law clearly restricts such killing as it does the excessive use of force by governments. The *jus cogens* prohibition on the use of force also restricts all resort to organized, significant force, regardless of the party initiating it. As a possible *de lege ferenda* exception to the rule, Jan Arno Hessbruegge has argued that insurgents should, as a normative matter, have a right to resort to armed force against governments as an act of self-defence under the *jus ad bellum* when faced with widespread human rights violations, in particular genocide.<sup>7</sup> Yet, Hessbruegge opposes outside assistance to insurgents out of concern for self-determination and to limit the escalation of conflict.

Even with these limitations, his argument is unpersuasive. It rests entirely on the assumption that killing members of the armed forces and other government agencies, as well as many bystanders, in an attempt to secure the insurgents' own human rights should be lawful, because it might be necessary. Such violence is never 'necessary'; nor do we have cases demonstrating it produces the benefits the instigators seek. Persistent campaigns of non-violence by oppressed people may take time, but they are effective. Civil wars also take time – they drag on for years, but rarely work out the way oppressed people hope they will when they take up arms, even when foreign states intervene to assist them.

Redaelli draws heavily on the example of national liberation movements (NLMs) of the 1960s and 1970s to support the right of today's insurgents to receive military assistance in order to throw off home-grown oppressors. Her choice of analogy is intriguing but ultimately fails to persuade. National liberation movements fought conquering foreign armies. The old colonial powers had more in common with invaders like Turkey, Iraq and Russia. As in the case of unlawful conquest (the accepted exception to contemporary international law's abstention rule), the lines of demarcation were clear as to who should or should not be in control of territory and people. Redaelli even acknowledges that with respect to NLMs, many United Nations members took the view that that support must be restricted to non-lethal aid to comply with the prohibition on the use of force. The national liberation movements that remain the touchstones for struggles against oppression are those led by Gandhi, Martin Luther King and Nelson Mandela – non-violent movements opposed to outside military assistance.

<sup>7</sup> J.A. Hessbruegge, *Human Rights and Personal Self-Defense in International Law* (2017).

Redaelli has written a sophisticated account of the international law on intervention in civil war. She has presented a marvel of analytic clarity and integrity regarding the many interrelated changes that must take place for the established rule on intervention to expand to non-state actors: the abstention rule must end; the effective-control rule must end; a government must be illegitimate, and a non-state actor opposing it must be legitimate. Despite these hurdles, she indicates her own support for such an expansion, yet avoids finding evidence where it does not exist. She can foresee a time when the necessary changes will occur, but acknowledges they had not happened when she concluded her book. In the meantime, the pandemic struck and long-running interventions in Afghanistan and elsewhere have come to an end. The possibility that there will be sufficient state practice to change even a positive law version of the rule on intervention in civil war appears remote.

Instead, the book supports drawing the pro-intervention era to a close. Redaelli's effort marks a watershed moment for scholarship aimed at expanding the right to resort to war. Legal research, long conducted in support of expanding military conflicts, can now focus on imperative challenges such as climate change and racism. Post-mortems will be written on why post-Cold War interventions, from Afghanistan to Yemen, have failed, spurring, we can hope, a new interest in work on peaceful resolution of disputes and promotion of the human right to peace. The human right to peace supports all other rights, including the rights to life, equality, health and a healthy planet. It is a right to prioritize in a post-pandemic, post-intervention world.

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Stefano Ponte. **Business, Power and Sustainability in a World of Global Value Chains**. London: Zed Books, 2019. Pp. 273. £19.99. ISBN: 9781786992604.

Conveying an aspiration to marry the competing logics of economic growth and environmental protection, sustainability has come to function as both an objective and a source of legitimacy of international law. Anchored in multilateral environmental agreements and customary international environmental law,<sup>1</sup> sustainability finds its most pronounced expression in the UN sustainable development goals (SDGs), which are presented as a *telos* of the international legal system. At the same time, sustainability's definitional vagueness has sustained the notion that it captures the 'global public interest'.<sup>2</sup> This elevates sustainability to a justification of the system of international law.

<sup>1</sup> Viñuales, 'Sustainable Development', in L. Rajamani and J. Peel (eds), *The Oxford Handbook of International Environmental Law* (2021).

<sup>2</sup> Schill and Djanic, 'Wherefore Art Thou? Toward a Public Interest-based Justification of International Investment Law', 33 *ICSID Review – Foreign Investment Law Journal* (2018) 29, at 29.