

BOOK REVIEW

Military Assistance on Request and the Use of Force, by Erika de Wet, Oxford University Press, Oxford, 2020, xii +258 pp., £80 [hardback], ISBN 9780198784401

The latest book by Professor Erika de Wet examines the issue of military assistance on request.¹ As such, and presumably not by accident, the book's publication has come at the perfect time in terms of catching the academic *ad bellum* zeitgeist. So much so that we are publishing this review of de Wet's contribution to the debates on military assistance on request as part of our series of especially collated work on the topic. The series, of course, itself, stems from the major *JUFIL / Ghent Rolin-Jaequemyns International Law Institute (GRILI)* international conference on the subject held in Ghent in December 2019. Concurrently, as most readers likely will know, the International Law Association's Use of Force Committee is also ramping up its ongoing work on military assistance on request.²

Indeed – after a long period where one might be forgiven for (albeit would be wrong in) thinking that the famous *Institut de droit international (IDI)* resolution from 1975³ and Louise Doswald-Beck's seminal 1985 article⁴ represented pretty much all that international lawyers had to say on military assistance on request⁵ – there has been a proliferation of work on the subject published over the last decade or so.⁶ Military assistance on request may be a 'hot topic' at present, but there remains much work to be done on it. Adding to the recent

¹ In writings on this topic, the term 'intervention by invitation' has been perhaps more traditionally used than 'military assistance on request'. However, in recent years, there has been an increasing preference for the latter, because 'intervention by invitation' is viewed by some as a contradiction-in-terms: if the state has been invited then it is not, in fact, intervening. See Gerhard Hafner, 'Present Problems of the Use of Force in International Law Sub-group: Intervention by Invitation' (2009) 73 *Annuaire de l'Institut de droit international* 299, 309–11. For her part, de Wet makes the same point in relation to her own choice of terminology, although additionally notes the fact that 'intervention' could be seen as a wider concept than 'military assistance', potentially opening up doors beyond the scope of the book (16).

² International Law Association, *Use of Force – Military Assistance on Request*, www.ila-hq.org/index.php/committees (accessed 7 December 2020).

³ 'The Principle of Non-Intervention in Civil Wars', *Institut de droit international*, Session of Wiesbaden, Resolution (1975).

⁴ Louise Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government' (1985) 56 *British Yearbook of International Law* 189.

⁵ Writing a decade ago, Corten noted that '[d]octrine is comparatively underdeveloped on this topic with only a few books and studies dealing specifically with it.' See Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing, 2010) 249.

⁶ To give just a few key contributions: 'Present Problems of the Use of Force in International Law: Military Assistance on Request', *Institut de droit international*, Session of Rhodes, Resolution (2011); Eliav Lieblich, *International Law and Civil Wars: Intervention and Consent* (Routledge, 2013); Karine Bannelier-Christakis, 'Military Interventions against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent' (2016) 29(3) *Leiden Journal of International Law* 743.

scholarship is de Wet's monograph, and there is no question that the book is a hugely important new addition to the burgeoning literature.

The approach taken in *Military Assistance on Request and the Use of Force* is one of '...analytical desk-based research, relying on the traditional sources of international law to be found in article 38(1) of the International Court of Justice (ICJ) Statute' (13). Rigorous, analytical doctrinal work may have, in some quarters, somewhat fallen out of fashion in international legal academia of late.⁷ For those who revel in the sheer lawyerliness of such scholarship, however – at least when it is done well – and especially those who have (perhaps even less fashionably) positivistic leanings, this book will be a joy. Personally, this reviewer values quality doctrinal analysis pretty highly. It is always worth remembering that states and legal advisors do too.

Another thing that states value highly is their power to give or withhold their *consent*. And de Wet places state consent (and the validity thereof) right at the heart of this book. That may not sound surprising, given that military assistance *on request* is defined, more than by anything else, by the issuance of consent. However, much of the recent work on the subject has considered policy or ethical implications, or has rooted its inquiry in critical theory.⁸ Without dismissing the value of such work, the book under review to some extent recalibrates things to focus, again, on consent and sovereignty as the root of legal authority in the context of the use of force. De Wet makes no bones about her goals, which are 'aimed at identifying the *legal conditions* set by the contemporary (post-Cold War) international law for the legal construct of military assistance on request' (1, emphasis added). There are certainly important considerations of policy peppered throughout (e.g. 123–124, 180), but, first and foremost, this is a book about *what the law is*. How much one will value *Military Assistance on Request and the Use of Force* will thus primarily depend on how much one values the answer to that question, to the (comparative) minimalisation of considerations of what the law should be.

After the Introduction, Chapter 2 (being the first substantive chapter) examines the question of the authority that is entitled to make the request for military assistance. On one level, the answer reached is both simple, and orthodox: the '*de jure* government' (72). De Wet dismisses the idea that external military support for opposition groups can be lawful,⁹ at least

⁷ See, e.g. Adriana Sinclair, 'Why We Should See International Law as a Structure: Unpicking International Law's Ontology and Agency' (2020) *International Relations* 1.

⁸ For an exploration some of these differing approaches, and of the problems arising from the their (in)compatibility, see Eliav Liebllich, 'Why Can't We Agree on When Governments can Consent to External Intervention? A Theoretical Inquiry' (2020) 7(1) *Journal on the Use of Force and International Law* 5.

⁹ See *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (merits) [1986] ICJ Reports 14, para 246 (being the 'classic' dismissal of any such notion).

as a *prima facie* proposition in the vast majority of instances (24–31). The real thrust of the chapter – and, of course, a more pertinent point of contention across the literature¹⁰ – is how one *identifies* the *de jure* government.

In engaging with this question, de Wet undertakes a deep-dive consideration of the practice of states and – more commonly forgotten but just as important, especially in the use of force on request context – of international organisations. The rigour of the engagement with practice in *Military Assistance on Request and the Use of Force*, in keeping with its advertised doctrinal approach, is a *significant* strength throughout, but it is most notably evident in Chapter 2. The whole chapter, 50-odd pages of it, zeros in on *actual practice*, albeit with accompanying analytical commentary throughout (21–73).

This approach means that the chapter’s conclusions feel pretty robustly buttressed. It is perhaps worth noting that the conclusions in this chapter are also strengthened by the author highlighting where uncertainties in the practice (or, at times, doctrine) are apparent (e.g. 34), rather than skirting past them as may have been tempting. The chapter’s ultimate conclusions, in relation to the recognition of governments, include a reiteration of the primacy of effective control,¹¹ but, perhaps more interestingly, also make a case for the growth in importance of a criterion of democratic legitimacy,¹² which de Wet argues now may play a role, albeit not necessarily a determinative one and certainly not to the displacement of effective control as the *prima facie* criterion.¹³

Chapter 3 turns to the question of military assistance on request during civil wars. This is perhaps the most commonly revisited point of divergence amongst commentators on the subject. De Wet starts by laying out the doctrinal debate over the so-called ‘negative equality principle’, but does not, initially, come down on a side. Instead, she concludes that ‘one needs to measure the doctrinal arguments against the state and organisational practice’ (82). The reader is then, again, treated to an in-depth unpicking of relevant practice. This examination – particularly of the practice of coalitions/individual states, which have been the main

¹⁰ See Max Byrne, ‘Consent and the Use of Force: An Examination of “Intervention by Invitation” as a Basis for US Drone Strikes in Pakistan, Somalia and Yemen’ (2016) 3(1) *Journal on the Use of Force and International Law* 97, 100 ([i]t is crucial that a consenting government is legitimate (and that, in turn, consent is given by a requisite official), because it is, in the eyes of international law, the voice of the state’).

¹¹ See, e.g. Stefan Talmon, ‘Recognition of Opposition Groups as the Legitimate Representative of a People’ (2013) 12 *Chinese Journal of International Law* 219, 232 (‘The *main criterion* in international law for government status is that the individual or group of individuals claiming to be the government of a State exercise effective control over the State’s territory’, emphasis added).

¹² See, generally Brad R Roth, *Governmental Illegitimacy in International Law* (Oxford University Press, 2000).

¹³ See also Erika de Wet, ‘The Role of Democratic Legitimacy in the Recognition of Governments in Africa since the End of the Cold War’ (2019) 17 *International Journal of Constitutional Law* 470.

‘interveners’ in civil wars since the Cold War – leads de Wet to conclude that there *is no* negative equality principle as a matter of general international law and that ‘the right of self-determination does not pose any meaningful limitation’ on a state’s right to request military assistance (or other states’ ability to provide it) (123).

Until fairly recently, that conclusion likely would have been very controversial,¹⁴ but there has been increasing academic pushback on the acceptance of the negative equality principle since the end of the Cold War, to the point that rejection (or at least scepticism) of it is probably now the majority view.¹⁵ That view has largely developed based on the same analysis that the author here offers (albeit rarely is it set out in this depth). Simply put: the purported principle is not sufficiently reflected in practice. That conclusion, in itself, is difficult to refute, especially given de Wet’s painstaking deployment of relevant instances of intervention to reach it. How far one will see that conclusion as legally determinative, though, will depend on one’s wider approach to international law in general and military assistance on request in particular. De Wet fully acknowledges that there are both policy and doctrinal reasons that might steer one to support the negative equality principle. However, again, the author is clear about the distinction between *lex lata* on one hand, and matters that (may) inform *lex ferenda* on the other.

In chapter 4, de Wet directly engages with Article 3 of the 2011 resolution of the *IDI*, which *inter alia* asserts:

Military assistance is prohibited when it is exercised in violation of ... generally accepted standards of human rights and in particular when its object is to support an established government against its own population.

In response, de Wet argues that is difficult to identify such a prohibition as extending to military support that ‘aids or assists’ such violations by the requesting government. This argument is based on, again, analysis of practice, but also a close reading of Article 16 of the Articles on

¹⁴ See Christine Gray, *International Law and the Use of Force* (Oxford University Press, 4th edn 2018) 85 (referring to the negative equality principle as the ‘generally accepted position during the Cold War’).

¹⁵ See, e.g. Gregory H Fox, ‘Intervention by Invitation’, in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015) 816; Dapo Akande and Zachary Vermeer, ‘The Airstrikes against Islamic State in Iraq and the Alleged Prohibition on Military Assistance to Governments in Civil Wars’, *EJIL: Talk!* (2 February 2015) www.ejiltalk.org/the-airstrikes-against-islamic-state-in-iraq-and-the-alleged-prohibition-on-military-assistance-to-governments-in-civil-wars/; Yoram Dinstein, *War, Aggression, and Self Defence* (Cambridge University Press, 6th edn 2017) 125–7.

State Responsibility (and commentaries),¹⁶ and the application of the high threshold that the law of state responsibility sets in this regard. It is worth noting that, while well developed, this conclusion is certainly not straightforward – particularly in relation to the ongoing debate over the extent to which true *intent* is/may be required to establish responsibility.¹⁷

The book's fifth chapter is focused on the formal requirements for valid consent. For example, de Wet considers the organs that are competent to consent, and fairly uncontroversially identifies those who, by their function, would be expected to be able so to authorise: heads of state *et al.*¹⁸ The author's view of the need for the free (i.e. non-coerced) nature of the request is perhaps more a point of distinction from orthodox writings on the subject.¹⁹ She concludes that

there is nothing in current state practice to suggest that the requirements pertaining to coercion in the context of military assistance on request would deviate from those generally applicable in accordance with customary international law (160).

Whether framing things that way offers clarity or not is debatable. De Wet is certainly not saying that truly coerced 'consent' can form the basis of a lawful military intervention, only that the standard of what *amounts to* coercion remains narrow, and no broader in regard to military assistance than it is when found elsewhere in general international law. This, based on state practice, is likely correct. However, as a matter of perception, framed this way it could act to obscure the criterion of non-coercion from the list of 'formal requirements', when instead there is such a criterion: what is excluded is a *unique* or bespoke requirement of non-coercion.

Chapter 5 gets even more interesting when the author examines the timing of consent. *Ex ante* consent is examined through the lens of the AU and the ECOWAS frameworks (and its absence from the SADC framework). The author highlights a notable reluctance on the part of states in these contexts to rely on *ex ante* consent clauses without also reinforcing those clauses with ad hoc consent in each case. Here, one might take the view that (in arguably a rare

¹⁶ *Text of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, Report of the International Law Commission, 53rd session, UN Doc A/56/10 (2001).

¹⁷ See, e.g. John Hursh, 'International Humanitarian Law Violations, Legal Responsibility, and US Military Support to the Saudi Coalition in Yemen: A Cautionary Tale' (2020) 7(1) *Journal on the Use of Force and International Law* 122, 142–5; Ryan Goodman, 'Legal Limits on Military Assistance to Proxy Forces: Pathways for State and Official Responsibility', *Just Security* (14 May 2018) www.justsecurity.org/56272/legal-limits-military-assistance-proxy-forces-pathways-state-official-responsibility/.

¹⁸ See Isabella Wong, 'Authority to Consent to the Use of Force in Contemporary International Law: The Crimean and Yemeni Conflicts' (2019) 6(1) *Journal on the Use of Force and International Law* 52, 57.

¹⁹ See Stuart Casey-Maslen, *Jus ad Bellum* (Hart Publishing, 2020) 51–2.

overstep) – the author’s ultimate conclusion that there is a customary international law ‘requirement that *ex ante* consent... *must* be accompanied by ad hoc consent at the time of forcible measures’ (179, emphasis added) – goes further than what the practice she deploys to support it can confirm. There is certainly evidence that additional ad hoc consent is common in practice, and the conclusion reached tallies with the oft-raised policy objection to such blanket ‘permissions’ to use force absent of context, which is that they are open to abuse (in perpetuity).²⁰ But whether there is sufficient *opinio juris* to identify a binding requirement of additional ad hoc consent amongst the (notably limited, as de Wet concedes) practice, remains – this reviewer would contend – at least open to debate.

The final substantive chapter, Chapter 6, sets out to examine the relationship between military assistance on request and the right of self-defence. Unfortunately, this reviewer found the chapter somewhat disappointing, at least when compared to the rest of the book. Perhaps that disappointment in part stems from the fact that there remains a need for significant work still to be done on the relationship between military assistance on request and collective self-defence,²¹ which have been unhelpfully blended into each other in both theory and practice. As such, and given the excellent quality of this book as a whole, expectations were high for a careful unpicking of that confusion.

It is, of course, rather unfair to criticise a book (or in this case, a chapter within a book) for what it does *not do*. So, it is important to note that the chapter is relatively successful in exploring an aspect of the relationship between self-defence and military assistance on request, which is whether the purported expansion of self-defence to allow more flexibility for forcible responses to attacks perpetrated by non-state actors, may reduce the *ad bellum* role of consent. In other words, de Wet effectively asks whether self-defence is now ‘intervening in the territory’, as it were, of military assistance on request.

This is an interesting line of inquiry, but it only engages one aspect of the relationship between self-defence and military assistance on request. The chapter never convincingly distinguishes these two bases for the use of force, or fully maps their (inter)relationship. It is also disappointing that the chapter’s ultimate conclusion effectively is that it is too early to tell: ‘it would be premature to conclude that the legal construct of military assistance on request is

²⁰ David Wippman, ‘Treaty-Based Intervention: Who Can Say No?’ (1995) 62 *The University of Chicago Law Review* 607, 615; Agata Kleczkowska, ‘The Meaning of Treaty Authorisation and Ad Hoc Consent for the Legality of Military Assistance on Request’ (2020) 7(2) *Journal on the Use of Force and International Law* 270.

²¹ Although see Laura Visser, ‘Intervention by Invitation and Collective Self-Defence: Two Sides of the Same Coin?’ (2020) 7(2) *Journal on the Use of Force and International Law* 292.

likely to be displaced or eclipsed by the right to individual or collective self-defence in the near future' (217).

This reviewer hungered for a more comparative analysis in the chapter. For example, a deconstruction of the requirement of 'request' in practice, for example (a fundamental feature both of collective self-defence and military assistance on request). Or, perhaps, a more robust defence of the distinction between the two justifications, which is said by de Wet to be based primarily on the respective territories on which the military action is undertaken (214),²² a means of distinction that can be questioned.²³

Instead, much of the chapter was given over to exploring the current 'unwilling or unable' debate in relation to self-defence. It did so perfectly well, but there is much work on this elsewhere,²⁴ and it was neither clear how much this discussion added to that larger debate, nor to the debates on military assistance on request. This point of analysis – the possible implications of debatable shifts in the right of self-defence for military assistance on request – also meant a focus on the right of self-defence as a whole, rather than zeroing in on collective self-defence. This acted to dilute the core issue that, this reviewer at least felt, should have been at the heart of the chapter. Again, it is somewhat unfair to criticise a work for not doing something you hoped it would, but it nonetheless was the case that this reviewer saw the final substantive chapter as the book's weakest.

That view should not detract from the fact that, overall, *Military Assistance on Request and the Use of Force* is an extremely impressive addition to the literature. Its key strength lies in its meticulous consideration of practice. All five of its substantive chapters engage meaningfully with a wide range of state and organisational practice examples, and not just as illustrations, but as the bedrocks of the arguments that each chapter advances. As such, it is compelling.

Military Assistance on Request and the Use of Force is a supreme example of doctrinal *ad bellum* research. It is a must-read for anyone interested in the *jus ad bellum*, and is undoubtedly now one of the leading works on military assistance on request.

²² See also *ibid.*

²³ See, e.g. Claus Kreß, 'The Fine Line between Collective Self-Defense and Intervention by Invitation: Reflections on the Use of Force against "IS" in Syria', *Just Security* (17 February 2015) www.justsecurity.org/2015/02/17/clauss-krebs-force-isil-syria/ (exploring more contextual distinctions than simply territorial location).

²⁴ See, e.g. Ashley S Deeks, "'Unwilling or Unable': Toward a Normative Framework for Extraterritorial Self-Defense' (2012) 52 *Virginia Journal of International Law* 483; Craig Martin, 'Challenging and Refining the "Unwilling or Unable" Doctrine' (2019) 52 *Vanderbilt Journal of Transnational Law* 387.

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