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

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

Introduction

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

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

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

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

4 Letter dated 15.10.2015 from the Permanent Representative of the Russian Federation to the United Nations addressed to the President of the Security Council: “I have the honor to inform you that, in response to a request from the President of the Syrian Arab Republic,
tion in Yemen (2015) was invited by the Yemeni President Hadi. Finally, the operation “Restore Democracy” by the Economic Community of West African States (ECOWAS) in Gambia (2017) sought to support a President who had won democratic elections but was prevented from taking office by the former regime.

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

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


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

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

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

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

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

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

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


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

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

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

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

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


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

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

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

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

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

Concomitantly, military assistance is prohibited “when its object is to support an established government against its own population” (Art. 3(1)).

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

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19 T. Ruys/L. Ferro (note 17), 97.
20 Seminally T. Christakis/K. Bannelier (note 18), 102 et seq., esp. at 119; K. Bannelier-Christakis (note 4).
21 Institut de Droit International, Session of Rhodes (note 7), emphasis added.
22 See the letters to the UN SC: UN Doc. S/2014/695 of 23.9.2014 (USA); UN Doc. S/2015/563 of 24.7.2015 (Turkey); UN Doc. S/2015/688 of 7.9.2015 (UK); UN Doc. S/2015/745 of 8.9.2015 (France).
23 Note 3.
24 Note 8. Also, the Syrian Foreign Minister stated in 2014 that Syria was “open towards this cooperation” (for combating terrorism) “including with the United States and Great Britain”, BBC Interview with the Syrian Minister of Foreign Affairs, Walid Muallem, of 25.8.2014, available at<https://www.bbc.com>. See also the identical letters dated 25.5.2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, 1.6.2015 (UN Doc. A/69/912-S/2015/371): “Syria reiterates that it is prepared to cooperate bilaterally and at the regional and international levels to combat terrorism.”
tance would directly or indirectly support international crimes committed by the requester – which is the case in Syria.\textsuperscript{25}

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

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

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

\begin{footnotes}
\item[27] UN SC Res. 2249 of 20.11.2015.
\item[29] See already Art. 4(4) of the IDI Rhodes resolution of 2011 (note 7): “Any request that is followed by military assistance shall be notified to the Secretary-General of the United Nations.”
\end{footnotes}
law applicable to armed conflict (vol. 2), and reparations for victims of armed conflict (vol. 3). The trialogues format responds to the current state of international legal order which seems to be characterised by three factors: first, it is precarious and fragile due to its Eurocentric baggage. Although international law is universal in pretension, it suffers from a parochial heritage. This is no new fact but it is being freshly recognised and acknowledged. Second, we witness a global change of order. The economic, political, military, and ideational dominance of the West is challenged due to a shift of economic and concomitant political power, and due to a changed intellectual climate and new ideas. Third, the international legal order is characterised by a “securitisation” which some call a new cold war.

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

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What is the legal effect of an invitation to intervene? Does it exclude ab initio a military intervention from breaching the prohibition of the use of force in terms of Art. 2 (4) Charter of the United Nations (UNCh) or does it preclude the wrongfulness of an act which in itself violates Art. 2 (4) UNCh?¹

Consistent with the principle volenti non fit iniuria, the majority of commentators² as well as the International Law Association in their 2018 Sydney Resolution³ argue that a valid invitation excludes a military intervention from the normative scope of Art. 2 (4) UNCh. This interpretation draws upon the wording of Art. 2 (4) UNCh, which requires the use of force to be directed “against the territorial integrity or political independence” of a state. The argument is made that foreign troops intervening in response to an invitation by the correct authority, free of coercion, fraud, or error⁴ will subjectively aspire to maintain the integrity of the government. Consequently, the subjective intent of the intervening forces makes Art. 2 (4) UNCh non-applicable to their action to begin with.⁵ Four arguments speak against this prevailing interpretation.

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¹ The terminology to describe the opposing views (exclude ab initio and preclude the wrongfulness) draws upon the terminology employed by the International Law Association (ILA, Sydney Conference 2018, Use of Force, 18.). If consent precludes wrongfulness, a military intervention will in principle violate the prohibition of the use of force. This violation is then however justified by the consent and thus does not constitute a wrongful act. If consent, however, excludes ab initio the breach of Art. 2 (4) UNCh, a military intervention based on the consent of the intervened state will not violate the prohibition of the use of force and, hence, not fall within its normative scope.
² See G. Nolte, Intervention by Invitation, MPEPIL 2010, para. 16, including references.
³ ILA, Sydney Conference 2018 (note 1), 18.
⁵ B. Nußberger (note 4) 2017, 126; see G. Nolte, Eingriff auf Einladung, 1999, 573 et seq.
First, the prevailing interpretation finds no support in international jurisprudence. The International Court of Justice (ICJ) employs the ambivalent term “allowable” with regard to invasions upon invitation in its *Nicaragua* judgment.  

Second, the term “force” in Art. 2 (4) UNCh is strictly objective. The phrase in Art. 2 (4) UNCh which implies that force must be used “against the territorial integrity or political independence” of a state does not constitute an additional requirement in the view of its drafters, but rather serves to exemplify a clear violation of Art. 2 (4) UNCh. At the Dumbarton Oaks Conference, the addition “against the territorial integrity and political independence” was incorporated into Art. 2 (4) UNCh in order to clarify the two gravest cases. However, they do not constitute a general rule for measuring use of force. Any military action on the territory of a foreign state will rather constitute a use of force, independent of the intervening state’s intent. This includes the mere presence of foreign troops on the territory of another state if they are able to exercise military actions and thus employ their power to deter. This restriction of the term “force” to a strictly objective understanding is in line with its *jus cogens* character. A State’s freedom of disposition over *jus cogens* norms is restricted. Therefore, subjective elements on behalf of the recipient state may not determine whether an employment of force occurred. Accordingly, the mere presence of invited troops constitutes a use of force whose wrongfulness can however be precluded.

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10 A. von Arnauld (note 8), Rn. 1037.

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Third, the emerging “purpose-based approach” only works if invitation is seen as a preclusion of wrongfulness. Bannelier/Christakis\textsuperscript{14} and Corten\textsuperscript{15} demonstrate that state practice requires the intervening state to pursue goals that are in accordance with the UNCh and the rules of invitation. These subjective criteria, in general, cannot be considered as prerequisites of a wrongful act.\textsuperscript{16} Otherwise states could argue that their employment of military force is with “good” or “non-aggressive” intentions, thus hollowing out tangible criteria to determine a use of force.\textsuperscript{17} Whether a use of force is illegal or not cannot depend on the intervening state’s intent,\textsuperscript{18} because resulting ambiguities would lead to the disregard, abuse, and erosion of the prohibition of the use of force.\textsuperscript{19} Opening up the determination of “force” to the discretionary element of purpose creates a loophole for intervening states to disregard their obligations under Art. 2 (4) UNCh. Thus, the intent of a state can only come into play on a secondary level when considering whether the wrongfulness of a use of force is precluded.

Apart from maintaining a strict understanding of Art. 2 (4) UNCh, qualifying an invitation as a preclusion of wrongfulness is pivotal for the implementation of restrictions on an intervening state. If military action satisfies the factual elements of the use of force, according to the ICJ it is considered \textit{prima facie} illegal unless justified by the intervening state.\textsuperscript{20} Thus, if a state is under the obligation to justify its intervention, it must consider whether the legal limits that generally govern interventions on invitation are met. These include the prohibition to intervene during a civil war and the obligation to respect the right to self-determination of conflict parties. Without the obligation to justify their behaviour, intervening states will likely disregard these limitations.\textsuperscript{21}

In conclusion, the better arguments speak for qualifying an invitation as \textit{precluding the wrongfulness} of an intervention, not as excluding \textit{ab initio}
that the action breached Art. 2 (4) UNCh. This view consolidates a strict and objective reading of “force” in terms of Art. 2 (4) UNCh. It allows the consideration of the intervening state’s intent and obliges states to consider the legal restrictions of intervention upon invitation. Invitation hence constitutes a third justification to the use of force alongside Art. 51 UNCh and Chapter VII UNCh.\textsuperscript{22}

\textsuperscript{22} See also J. Vidmar, The Use Of Force And Defences In The Law Of State Responsibility, Jean Monnet Working Paper 05/15, 2015, 1, 12.
The Misconception About the Term “Intervention by Invitation”

Agata Kleczkowska*

Legal scholarship may create a terminology which enables easy labelling of States’ actions and facilitates classifying them as legal or illegal. While such terminology is helpful, at times it may also be confusing since it is deemed to be part of international law even though it may be detached from States’ practice. This is true of the term “intervention by invitation”.

The present Impulse argues that the term “intervention by invitation” is purely academic, ungrounded in States’ practice, and confusing for three reasons.

Firstly, while “intervention by invitation” is broadly used in legal scholarship, States do not employ this term. Instead, they use expressions like “appeal for military assistance”\(^1\); “appeal for help”\(^2\); request “to assist in re-establishing order”\(^3\); “request for assistance to restore peace”\(^4\); “request for air and military support”\(^5\); “an urgent plea” to send forces “to maintain security”;\(^6\) or a request to help the army restore order\(^7\). Thus States prefer more flexible and descriptive language to explain their legal positions, which gives them the opportunity to define the circumstances of the intervention.

Secondly, the distinction between “intervention by invitation” and other types of interventions is sometimes unclear and artificial. In 2014 Iraq requested international assistance to fight Islamic State of Iraq and Syria (ISIS), but it did not mention the right to self-defence.\(^8\) Despite that, in ad-

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1 S/PV.831, paras. 28-29.
2 S/PV.2185, para. 17.
3 A/C.4/SR.2185, para. 32.
4 S/PV.7124, 5.
7 A/PV.564, para. 100.
8 Letter dated 25.7.2014 from the Permanent Representative of Iraq to the UN addressed to the Secretary-General, S/2014/440; Letter dated 20.9.2014 from the Permanent Representative of Iraq to the UN addressed to the President of the SC, S/2014/691.
dressing the Iraqi appeal the USA referred to collective self-defence. Likewise, in 1958 Jordan asked the USA and the UK for assistance based on Art. 51 of the United Nations (UN) Charter. In response, the UK did not mention the right to collective self-defence, but instead claimed that nothing inhibits “a Government from asking a friendly Government for military assistance as a defensive measure”, basing its intervention solely on Jordan’s request. Since a “request by the State which regards itself as the victim of an armed attack” is a condition for a lawful collective self-defence, sometimes it may be difficult to clearly distinguish between these two types of interventions. At the same time, as the examples illustrate, the mere use of a different wording in States’ statements justifying their interventions does not influence their legality which depends on the circumstances of the intervention. On the other hand, these different wordings may demonstrate how States’ legal assessment of the situation varies.

Likewise, States do not categorise interventions in the same way as the scholarship. For instance, Louise Doswald-Beck in her article “The Legal Validity of Military Intervention by Invitation of the Government” discusses, inter alia, the cases of the USA interventions in Lebanon and in Grenada, as well as the USSR intervention in Afghanistan. Not only did neither of these intervening States justify their actions as “intervention by invitation”, they did not use the consent for the intervention as their principal legal argument, instead referring to the right to self-defence or collective action by the regional organisation.

Thirdly, “intervention by invitation” suggests that the initiative behind the intervention belonged to the State where the intervention took place, i.e. that it “invited” the intervening State. This implies that it encompasses only those interventions when the request was made voluntarily and before the intervention commenced, and thus excludes those interventions when the

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9 Letter dated 23.9.2014 from the Permanent Representative of the USA to the UN addressed to the Secretary-General, S/2014/695.

10 S/PV.831, para. 24.

11 S/PV.831, para. 29.


13 BYIL 56 (1986), 214 et seq., 230 et seq.

14 Statement by President Eisenhower (note 6), 181; S/PV.2185, para. 17.

15 Letter dated 25.10.1983 from the Permanent Representative of the USA to the UN, addressed to the President of the SC, S/16076. Ultimately the USA did not use the alleged invitation from General-Governor of Grenada as the argument for the legality of the intervention.

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consent was extorted by the intervening State or when it was secondary to the decision to intervene. For instance the USA, in intervening in Panama, claimed that Panama’s legitimate authorities consented to the intervention, arguing that it was “welcomed by the democratically elected government of Panama”.\(^\text{16}\) This suggests that the intervention did not take place upon “invitation” but rather was only subsequently approved. Consequently, this intervention cannot be labelled as having been conducted “by invitation”. Since legal doctrine often applies “intervention by invitation” to any intervention conducted upon consent,\(^\text{17}\) this may lead to erroneous conclusions.

To conclude, “intervention by invitation” is a scholarly term that is not confirmed in States’ practice. While it is helpful in academic discussions, it may not aptly convey the circumstances behind the intervention, blurring the assessment of its legality. Currently, the term “military assistance on request” finds support in the doctrine of law as more accurate than “intervention by invitation”.\(^\text{18}\) Likewise, more descriptive terms may also be used, as e.g. “armed action upon invitation or with the consent of the target State”.\(^\text{19}\)


\(^{18}\) E.g. G. Hafner, Present Problems of the Use of Force in International Law. Sub-group: Intervention by Invitation, AIDI 73 (2009), 311.

What’s in a Name? The Terminology of Intervention by Invitation

Laura Visser*

In certain circumstances, an intervention by invitation is legal. That appears to be the premise of most, if not all, scholars working in this field of international law. The subsequent scholarly debate centres on determining those certain circumstances. This paper will not contribute to that particular debate, however. It will demonstrate that a fundamental issue surrounding the concept of intervention by invitation is being overlooked. That issue is its name, and with it, the implied legal classification. Accordingly, this paper focuses on the use of the term “intervention” within the concept of intervention by invitation and it wonders whether the term “use of force” is not the more appropriate idiom to employ.

Using the correct terminology is of vital importance, as the terms intervention and use of force lead to the application of different sets of rules. If an intervention by invitation is classified as an intervention, the principle of non-intervention (or the prohibition of intervention) applies. If one were to speak of a use of force, however, the prohibition of the use of force applies. Hence, these two terms lead to different (yet strongly related) concepts under public international law, to which different rules apply. It is thus crucial to understand the difference between an intervention and a use of force.

The International Court of Justice has provided some clarity in the Nicaragua case. A wrongful intervention is one that uses methods of coercion. These methods are “particularly obvious” with an intervention that uses force. The Court has thus created a clear link between the notions of intervention and use of force. If a State uses force illegally, it violates both the prohibition of intervention and the prohibition of the use of force. Every use of force is therefore classified as an intervention as well, but not every intervention can be classified as a use of force, only those interventions that

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3 Nicaragua v. United States of America (note 2).

use force can be. The question then remains what a use of force actually entails.

The definition of the term use of force has been the subject of recent studies. Olivier Corten and Tom Ruys in particular have published detailed and stimulating works. Both also research the topic of intervention by invitation. However, neither one has created a clear link between the definition of use of force and the terminology of intervention by invitation. For example, Corten spends an entire chapter on defining both threat and use of force, but he does not relate back to it in his chapter on intervention by invitation. It therefore seems that even if scholars are aware of the intricacies surrounding the definition of use of force and even if they work within the area of intervention by invitation, they do not question the name of this concept under public international law.

One factor to define the term use of force is generally accepted: a use of force is limited to armed force, thereby excluding for example economic force. Corten and Ruys have distilled additional factors. Corten focusses on gravity and intent, while Ruys is of the opinion that there is no de minimis (gravity) threshold but he does include intent as a factor to be considered as well.

Notwithstanding these different definitions, an intervention by invitation will always meet these proposed thresholds. The State intervening upon the invitation of another State, will do so by deploying its armed forces to the inviting State’s territory, where they will often engage in combat. As a result, the gravity threshold is met. The intervening State also has the intent to use armed force, which is precisely the reason why its armed forces are now stationed in the inviting State’s territory. Thus, an intervention by invitation will always meet the threshold of a use of force. The correct rule to apply is therefore the prohibition of the use of force. Consequently, it would be more appropriate to refer to a use of force rather than an intervention when discussing military activity in a foreign state upon invitation. Hence, a more fitting name for this concept would be use of force by invitation.

It must be noted that no assertion is hereby made as to the legality of an intervention by invitation (or use of force by invitation, actually). The conclusion is merely that it concerns a use of force rather than an intervention.

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9 O. Corten (note 6), 66 et seq.; T. Ruys (note 7), 171 et seq.
It is an entirely different question whether such a use of force is lawful.\textsuperscript{10} To answer that question, one must look into the prohibition of the use of force as contained in Article 2(4) United Nations Charter. What is prohibited, is force used “within international relations”.\textsuperscript{11} Using force upon the invitation of the territorial state cannot be classified as such: the force is used by the intervening state outside its own borders, but it is not used against the territorial state. In fact, the force is used on the same side as the territorial state, since that state issued the invitation. A use of force by invitation will therefore fall outside the scope of the prohibition and is therefore lawful.\textsuperscript{12}

In conclusion, Shakespeare pondered the importance of a name, as a rose would still smell as sweet if it were called differently. Yet, it was evidently of great significance for Romeo and Juliet, as their surnames prevented them from being together. So too does a name carry weight for legal scholars, as it leads to the application of different sets of rules. Indeed, there is much in a name and the correct terminology must therefore be employed, which in this case is use of force by invitation.

\textsuperscript{10} See the Impulse by Florian Kriener on this question.
\textsuperscript{11} Art. 2(4) UN Charter.
\textsuperscript{12} L. Visser, May the Force Be with You: The Legal Classification of Intervention by Invitation, NILR 66 (2019), 21 et seq.
Assessing Practice on the Use of Force

Michael Wood*

Scholarship on intervention by invitation raises important methodological questions. The papers presented at the Trialogue workshop rightly emphasise practice, chiefly the practice of States, including within the organs of international organisations, such as the Security Council. This is important both for treaty interpretation¹ and as an element, together with acceptance as law (opinio juris), in the formation and identification of rules of customary international law.² The thoroughness with which the Trialogue authors have set about taking account of and assessing practice is admirable.

Sometimes, however, one gets the impression that, in seeking to support a particular thesis, the authors read too much into the materials. This is not new in the field of the law on the use of force. Tom Franck’s “Hersch Lauterpacht Memorial Lectures” on recourse to force, for example, reached some quite surprising conclusions on the international law on the use of force based on a questionable reading of practice.³ Particularly surprising, in my view, is the weight Franck gives to non-condemnation by the Security Council.

The assessment of State practice and of evidence of acceptance as law (opinio juris) is not always an easy task (and determining whether such an assessment has been properly done can itself be quite subjective). There is a particular need for caution when seeking to attribute acceptance as law (opinio juris) to States. When States act, and perhaps especially when they act within a political organ such as the Security Council, or when there is inaction, this is often not out of a sense of legal right or obligation on the part of the State concerned: other motives, such as political expediency, comity or convenience, may well be at play. On the other hand, States cannot simply hide behind motives of political expediency, comity or convenience.

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¹ International Law Commission, 2018 conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, Chapter IV of the ILC Report for 2018. The General Assembly took note of the conclusions and annexed them to GA Res. 73/202 of 20.12.2018.


ience; certain statements or letters by States to the Security Council (for example, on self-defence or on intervention by invitation), as well as reactions by other States in that setting, can amount to evidence of opinio juris (and also shed light on their practice). At the very least, one has to approach such assessments with caution and rigour.

Some practice concerning the use of force may raise particular challenges. This is the case, for example, with military operations on foreign soil for which no State has taken responsibility; or with acts that are not necessarily accepted as a use of force, such as certain cyber operations. Accessing and assessing practice may also prove difficult where proof of the facts would require the disclosure of classified material, intelligence or sources. There may also be difficulties with knowing exactly what happened on the battlefield. On the other hand, military manuals may be a rich source of practice and evidence of opinio juris, as is the International Committee of the Red Cross’ study on customary international humanitarian law. The extent to which the practice of international organisations themselves can assist in identifying rules of customary international law remains somewhat controversial, but this question may in some cases prove to be a rather academic one. To take, as an example, resolutions of the Security Council: they may be regarded as the practice of an organ of the United Nations, or they may be viewed as the practice of member States; either way they can be significant.

The International Law Commission’s conclusions on Identification of customary international law, with their commentaries, offer some pointers which may be helpful. These include the following (in each case the conclusion should be read with the commentary):

- “[…], regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found.” (conclusion 3(1)).
- “In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.” (conclusion 4(2)).
- “Practice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction.” (conclusion 6(1)).


See conclusion 4(2) of the conclusions on Identification of Customary International Law (note 2), and paragraphs (4)-(7) of the commentaries thereto.
The relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent. Provided that the practice is general, no particular duration is required.” (conclusion 8).

“[...], the practice in question must be undertaken with a sense of legal right or obligation.” (conclusion 9(1)).

“Failure to react over time to a practice may serve as evidence of acceptance as law (opinio juris), provided that States were in a position to react and the circumstances called for some reaction.” (conclusion 10(3)).

There are many impressive examples of the treatment of practice among recent writings on the international law on the use of force, most of which have extensive treatment of intervention by invitation. In addition to Olivier Corten, I would point to the latest edition of Christine Gray’s book on the use of force, and to the monograph by Christian Henderson, both published in 2018. The “Case-based Approach” volume is a rich source of materials including chapters directly related to intervention by invitation.

As Michael Byers wrote in his review of Franck’s book: “[i]n an area of international law as disputed and politicised as the rules on the use of force, the line between analysis and advocacy is necessarily fine”. Byers concluded that “the kinds of behaviour that one considers legally relevant [...] are largely determinative of one’s substantive conclusions.” If this is so (and I believe it is), a methodologically sound assessment of practice, and of evidence of opinio juris, is essential in relation to intervention by invitation, as in relation to all aspects of customary international law. A methodologically sound approach to the identification of rules of customary international law is what the International Law Commission has sought to describe in its 16 conclusions, with commentaries, adopted in August 2018 and endorsed by the United Nations General Assembly in December 2018. Different methodologies, while no doubt of interest, are not equally sound. One cannot reach different “correct” positions on the law by adopting different

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6 O. Corten, Le droit contre la guerre, 2rd ed. 2014.
11 M. Byers (note 10).
12 See note 2 above. The commentaries (which were deliberately kept short (and I hope are user-friendly) are here: <http://legal.un.org>.

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“methodologies”; to admit such a possibility is to put in doubt the nature of international law as law.
A “Principle-Based” Approach to Intervention by Invitation in Civil Wars

Antonello Tancredi*

It is rather difficult to accept the existence of a one-size-fits-all rule that always prohibits or permits outside forcible intervention upon the request of a government engaged in a civil war. Civil wars are complex situations. It seems quite unrealistic to make abstractions of the “topography” of the conflict between the legal principles concretely at stake in each case and the purposes they are linked with (i.e., self-determination, sovereignty and territorial integrity, non-use of force and the maintenance of international peace and security, respect for human rights). This “principle-based” approach has consequences.

Firstly, if self-determination is the main rationale behind the thesis of strict abstentionism, an important question to ask is whether self-determination always represents an obstacle to external intervention in civil wars to support the established government. It is certainly so when – to quote Art. 3 of the resolution on “Military Assistance on Request” adopted at Rhodes in 2011 by the Institut de droit international – this government is acting “against its own population”, namely when it is non-representative of the popular will, or illegitimate (for instance, because it has committed massive violation of its population’s human rights). But quid iuris in a situation such as the one regulated by UN Security Council’s (UNSC) Res. 2337 (2017), of 19.1.2017, where the Security Council recognises the elected President of Gambia as “representative of the freely expressed voice of the Gambian people” and urges all parties “to respect the will of the people and the outcome of the election”? Or when, in the case of Yemen, the UNSC explicitly designates president Hadi as “the legitimate authority based on election results”?¹

Secondly, the two more extreme views (negative equality and asymmetrical intervention) are not always mutually irreconcilable. If consent is given outside the realm of ius dispositivum – by infringing self-determination, for instance – it will probably be considered as invalidly given and thus devoid of legal effect. If there is a multiplicity of warring factions, none will be

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deemed to represent the “State” for the purposes of giving a consent validly attributable to a subject of international law.

And what of secessionist conflicts fought for the territory and not for the government? In this regard, the principle of negative equality is subject to even greater tension. Indeed, if the two pillars of the negative equality thesis are self-determination and neutrality, starting with self-determination, the first thing to observe is that there is no general right to secessionist self-determination, with “remedial secession” still being essentially portrayed as a doctrinal proposition or a *lex ferenda* view held by some States and opposed by others, whose empirical basis remains therefore fairly thin.

As regards neutrality, then, the argument is that secession, being neither permitted nor prohibited under international law, is still regulated by the principle of neutrality. It is certainly true that, traditionally, secession is “neither authorised nor prohibited”, even if it must be observed that both parts of this equation are currently open to debate. On the other hand, what I think it is reasonably safe to say is that international law traditionally, and normally, disfavours secession. It disfavours secession when, for instance, it sets a considerably high threshold of effectiveness in order to prove that a separation has occurred: the so-called doctrine of the “ultimate success” according to which effectiveness must be proved “beyond all reasonable doubt”, in the sense that “the parent State must in fact have ceased to make efforts, promising success, to reassert its authority”.  

It also disfavours secession when, unlike struggles for decolonisation characterised as international conflicts, it does not seem to prevent a government using internal force to quell attempted secession, obviously with all due respect to fundamental human rights and humanitarian law. Indeed, the protection of territorial integrity is sometimes characterised in international legal texts (for instance, Art. 3, para. 1 of the Additional Protocol II to the Geneva Conventions, or the germane provision contained in Art. 8, para. 3 of the Rome Statute of the International Criminal Court), and in the case-law of the European Court on Human Rights (in cases such as *Ilașcu*, 3 and *Ivăntoș* 4) not only as a right, but as a duty, a “responsibility”. A “primary responsibility” that has, for instance, been evoked by the UNSC with regard to Mali in its Res. 2071 (2012), of 12.10.2012.

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And what about practice? A case in point is the French intervention upon request of the interim government of Mali. In this regard, the prevailing view is that the Malian precedent exclusively supports the existence of an anti-terrorism exception to the prohibition of external intervention in civil wars, even if the UNSC, in Res. 2100 (2013), of 25.4.2103, speaks of a country facing “interlinked challenges”, and in the same resolution it commends “the efforts to restore the territorial integrity of Mali by the Malian Defence and Security Forces, with the support of French forces and the troops of the African-led International Support Mission in Mali (AFISMA)”.

More generally, in a typical example of multiple justifications, the anti-secessionist objective has always been maintained as a relevant, even if not the sole or pre-eminent, element of the legal discourse justifying French intervention in Mali: before Operation Serval (in the statements of the Economic Community of West African States (ECOWAS) and the African Union at the time of the declaration of independence of Azawad, in the request for assistance issued by the Malian President ad interim on September 2012, in the mandate attributed by the UNSC with Res. 2085 (2012), of 20.12.2012, to the African-led International Support Mission in Mali); after the operation (see again UNSC’s Res. 2100 (2013) and the mandate attributed to the UN Multidimensional Integrated Stabilization Mission in Mali to give “support for the reestablishment of State authority throughout the country”); and during the French intervention. In this regard, not only does the French communication of 11.1.2013 to the UN Secretary-General and the President of the UNSC contain a reference to the existence of an ongoing threat to the territorial integrity of Mali, but in the subsequent statement pronounced before the French Parliament on 16.1.2013, the French Minister of Foreign Affairs, Laurent Fabius, on behalf of the Government, thus explained the objectives pursued in Operation Serval:

“[…] La France poursuit des objectifs clairs: arrêter l’avancée terroriste; préserver l’Etat malien et l’aider à recouvrer son intégrité territoriale; favoriser l’application des résolutions internationales avec le déploiement de la force africaine et appui aux forces maliennes dans la reconquête du nord du Mali.”

In Mali, the fighting against a secessionist coup was certainly not the sole objective, but it was an objective evoked autonomously and directly. And if

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5 UN Doc. S/2013/17.
the anti-secessionist purpose alone was not sufficient, the same could also be said of the other goals.

To conclude, I do not believe in negative equality as a principle generally applicable to all instances of internal conflicts and to all cases, as I also do not believe that consent always justifies, or presumptively justifies, external intervention. A “principle-based” approach, to be applied on a case-to-case basis, may well provide more balanced legal solutions.
“Intervention by Invitation” and the Construction of the Authority of the Effective Control Test in Legal Argumentation

Letizia Lo Giacco*

The claim of “intervention by invitation” has been increasingly used in international law to assert the legality of interventions (including military) requested by states, e.g. to quell an internal strife. One of the avenues in which the discourse on “intervention by invitation” has unfolded considers that the consent of the state requesting the external intervention operates as a circumstance precluding wrongfulness of the breach of the legal principle of non-intervention. However, during a civil strife, the state authority may face internal challenges, to the extent that doubts arise as to its legal capability to express a valid consent. To obviate this, a pragmatic – and arguably objective – reference is made to the government that exercises effective control over the state territory as the authority entitled to express a valid consent. The determination of such an entity based on the effective control test plays an important part of the debate on “intervention by invitation”. As

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1 Notably, there is “no general right of intervention, in support of an opposition within another State”, see Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US), Judgment of 27.6.1986, ICJ Reports 1986, 14, § 246.


4 For a critical account of the effective control test, see B. R. Roth, Secessions, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Test, Melbourne Journal of International Law 11 (2010), 393.

such, the effective control test over the state territory in the argumentation of the legality of “intervention by invitation” epitomises the way in which the authority of a test is constructed in legal argumentation. Like other tests, the effective control test has a bearing on legal determinations, in the specific case in the ascertainment of who is vested with the authority to express a valid consent to an external intervention.

This short contribution shows that, within the discourse on “intervention by invitation”, the effective control test has been constructed and reasserted through judicial decisions and “the teachings of the most highly qualified publicists”, i.e. through subsidiary means to determine rules of law.

Arbitral awards rendered in the 1920s in relation to the continuity of states under international law defined the notion of government by reference to the effective control test. Three cases are worth-mentioning to trace the genesis of the effective control test. In the 1923 Tinoco case (Great Britain v. Costa Rica), the arbitrator purported the relevance of the de facto character of the Tinoco’s government to be “according to the standard set by international law”, despite the lack of formal recognition by Great Britain.

Similarly, in the 1926 Hopkins case (U.S.A. v. United Mexican States), the claims commission determined that acts put in place by the Huerta government – which gained the power through a coup d’état – legally bound the Mexican state if the government had “real control and paramountcy […] over a major portion of the territory and a majority of the people”.

In making such legal determinations, the adjudicators made extensive reference to a panoply of authorities, i.e. scholarly writings and prior arbitral awards. In particular, the Tinoco award referred first to Moore’s “Digest of International Law” (1906), “announc[ing] the general principle [of the continuity of states] which has had such universal acquaintance to become well settled in international law”, second to Borchard’s “The Diplomatic Protection of Citizens Abroad” (1915) citing further subsidiary means including
an arbitral award, to Chancellor Kent, Wheaton’s “International Law” (1836), Hall’s “International Law” (1909), and third to Woosley’s “Introduction to the Study of International Law” (1873). Instead, the claims commission in the Hopkins case made reference to the 1901 Dreyfus case (France v. Chile), to reassert that

“the illegal origin of a government [does] not defeat the binding force of its executive acts. [...] Once it had lost this control, even though it had not been actually overthrown, it would not be more than one among two or more factions wrestling for power as between themselves.”

Although the above mentioned cases pertain to issues of recognition of governments under international law, a number of scholarly writings have reasserted ever since the notion that only governments having effective control over the territory can act on behalf of the state, and thus express a valid consent to an external intervention. In 1947, Hersch Lauterpacht maintained that

“the principle of effectiveness [...] conceived as the test of recognition of governments must be regarded as expressing most accurately the general practices of States [...] which emerges as the predominant and governing principle.”

Yet – and this is material for the argument of this reflection – Lauterpacht traces “the foundations of the principle of effectiveness in the seventeenth century in the writings of the founders of international law,” and reafirms the same de facto principle drawing from the pronouncements in the Dreyfus as well as in the Tinoco cases. A cursory inquiry into scholarly sources dealing with “intervention by invitation” shows that the Tinoco case is often cited in contemporary literature, too.

This leads us to derive an important consideration. Determining who is entitled to express a valid consent to a military intervention in the state ter-

12 Great Britain v. Costa Rica (note 8), 377 et seq.
13 George W. Hopkins (U.S.A.) v. United Mexican States (note 10), 45. The Dreyfus case affirmed that the acts performed by the government exerting de facto authority bound the state (Peru) irrespective of its legitimacy.
14 H. Lauterpacht, Recognition in International Law, 1947, 98.
15 Hersch Lauterpacht cites Grotius, Pufendorf, Bynkershoek and Vattel in support of the de facto principle. See H. Lauterpacht (note 14), 99 et seq. [emphasis added]. Brad Roth posited that “the effective control doctrine is rooted in Kelsenian positivism”. See B. R. Roth (note 4), 423.
16 H. Lauterpacht (note 14), 103 et seq.
ritory is operated on the basis of tests which bear authority in the argumentation of international law thanks to the iterative reference to it by scholarly writings and judicial decisions. The reference to state practice (see Lauterpacht in the cited excerpt) allows an essentially doctrinal test, such as the effective control, to be “validated” as a limb of the law. Similarly, the appeal to the democratic legitimacy of the government, which is gaining terrain in scholarly writings, is finding correspondence in some state practice. As such, the democratic legitimacy test may in due course be “validated” as a plausible and correct test to determine the government entitled to express a valid consent to intervention.

This is not to support the necessity or the desirability of such a test, rather to stress that changes in doctrinal tests evidenced via the iterative citation of judicial decisions and scholarly writings materially bear on the outcomes of legal determinations.

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18 A number of scholars have claimed that an additional test of democratic legitimacy shall be considered for the purposes of identifying such a government. See, inter alios, G. H. Fox, Democracy, Right to, International Protection, in: R. Wolfrum (ed.), MPEPIL (2008), 773. Other scholars take the view that such a democratic legitimacy test is conducive to the identification of the government that can validly consent to an intervention, even when the effective control test is not met. See e.g. J. Levitt, Pro-Democratic Intervention in Africa, Wis. Int’l L.J. 24 (2006), 758.

19 See e.g. the cases of Haiti (1991) and of Sierra Leone (1997), in B. R. Roth (note 4), 427 et seq.
The International Wrongfulness of Unlawful Consensual Interventions

Eliav Lieblich*

Recent years have witnessed an upsurge in the literature on the lawfulness of forcible interventions upon governmental consent in internal armed conflicts. The contemporary discussion correlates, to an extent, with the classic debate between those that view such interventions, at least when a certain level of conflict is reached, as strictly prohibited (which I call “strict-abstentionists”), and those that proceed from the presumption that in general, governments possess the power to invite external intervention, subject to certain limitations.

In this brief contribution, rather, I will address a question which is frequently glossed over in the discussion: on either approach, what do we mean when we say that in a certain situation, a consensual intervention is unlawful? Or, in other words, what international norm is violated when a consensual intervention is wrongful? Answering this question is necessary for the purpose of properly assigning international responsibility, and also when determining individual criminal liability for the crime of aggression.

The key issue here is to determine whether consent is void ab initio (or is otherwise devoid of any legal meaning), or rather, the consent itself is valid, but the actions committed pursuant to it are unlawful. This is crucial since if consent lacks any legal effect, it could be said that the intervention is against the will of the state, and consequently, is a violation of jus ad bellum.† If consent cannot be said to be void, then it seems that jus ad bellum is not implicated; but the intervention can still be unlawful in light of other legal frameworks.

There are several scenarios in which we may conclude that consent is void. To understand this, a helpful point of departure is to view interventions upon consent as forms of international agreements, whether in the form of treaties or other agreements under customary international law.‡

First, expression of consent may be void when it is a product of coercion,

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† This is because the force can be said to be against the state, as prohibited by Art. 2(4) of the UN Charter.
either through threats directed against a representative of the state, or against the state itself.\textsuperscript{3} A classic example that comes to mind, in this context, is the consent extracted from Hungarian Prime Minister \textit{Imre Nagy} by the USSR, allegedly under personal threats, during the latter’s 1956 intervention in the country.\textsuperscript{4}

Second, arguably, consent can be void when it conflicts with peremptory norms of general international law (\textit{jus cogens}). For instance, if a government is engaged in mass atrocities, and invites another state to assist it to defeat its internal enemies, then the invited state – in its actions – would be assisting in maintaining a violation of \textit{jus cogens}. As per the law on state responsibility, such situations cannot be recognised as lawful.\textsuperscript{5} Admittedly, it is difficult to delineate exactly when the inviting government’s actions would be so egregious to merit the conclusion that any request for assistance is null and void. For instance, it is clear that if the inviting government has violated a peremptory norm at some point of the conflict (for example, its forces have violated a norm of International Humanitarian Law [IHL] which constitutes \textit{jus cogens}, such as the prohibition on torture), this would not, in and of itself, render any assistance to the government a maintenance of a \textit{jus cogens} violation. Yet, when violations are continuous, gross, and systemic, this might implicate the entire governmental effort and render any assistance to the government a violation of peremptory norms. Arguably, this might be the case in the conflict in Syria.\textsuperscript{6}

In this context, if we assume that strict abstentionists are correct, and consensual intervention is never permitted once a significant conflict erupts because it would violate the principle of self-determination, then perhaps, owing to the \textit{jus cogens} status of self-determination, that consent would be void.\textsuperscript{7} Yet, to emphasise, such consequence must assume that such interventions are indeed violations of self-determination \textit{per se}, which is a contested issue.

A third case in which consent would be void – or to be more precise, would lack any legal meaning to begin with – is when the inviting party is a state organ, but not competent to extend the invitation (and the intervener

\textsuperscript{4} See UNGA, Report of the Special Committee on the Problem of Hungary, UN GAOR 11\textsuperscript{th} Session Supp. No. 18 UN Doc. A/ 3592 (1957), 24.
\textsuperscript{5} Articles on Responsibility of States for Internationally Wrongful Acts (2011), Art. 41 (hereinafter, ARSIWA), Art. 53 VCLT.
\textsuperscript{7} See e.g. ILC, Third Report on Peremptory Norms of General International Law (\textit{Jus Cogens}), by Dire Tladi, Special Rapporteur (12.2.2018), UN Doc. A/CN.4/714.
knew, or should have known that); or, if the inviting party was competent in the past but is no longer the state’s government (in accordance with any standard for government recognition); or when premature recognition is afforded to an opposition group. For instance, if, in the 2019 constitutional crisis in Venezuela, Juan Guaidó – the president of the National Assembly and self-proclaimed President of Venezuela – would invite a third party to intervene forcibly in the state, then – to the extent that Guaidó cannot be said to be the country’s lawful president – such an invitation would have no legal effect.

In sum, it seems that in cases where there is coercion, assistance in widespread *jus cogens* violations, or consent by entities that are not governments, consent is deemed void or otherwise meaningless, and accordingly interventions which rely on such “consent” might be a violation of the prohibition on the use of force. Whether such interventions would also constitute crimes of aggression depends on the circumstances. While intervention upon coerced consent seems a classic case of aggression, interventions in the other situations mentioned above might or might not amount to aggression, in accordance with the facts of the case.

Yet, there might be cases in which consent would be valid, and therefore an intervention would not be a violation of *jus ad bellum*, but it would still be unlawful by violating other normative frameworks. One obvious case is when the inviting state is requesting the intervener to participate directly in a violation of *jus in bello*. For instance, if State A requests State B to conduct an attack against a civilian object, then the intervention might be lawful *ad bellum*, but would still be internationally wrongful as a violation of international humanitarian law. Similarly, outside the context of hostilities, if State A invites State B to attack any person in circumstances where lethal force would be prohibited by international human rights law, then the in-

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8 Compare Art. 46 VCLT. Such was the case in Hungary, 1956, when the initial invitation to the USSR was extended by the head of the local communist party. See E. Lieblich, The 1956 Soviet Intervention in Hungary, in: T. Ruys/Olivier Corten (eds.), International Law on the Use of Force: A Case-Based Approach, 2018, 48, 60 et seq. Another doubtful case was the 1983 US invasion of Grenada, where consent was expressed by the state’s Governor General. See J. N. Moore, Grenada and the International Double Standard, AJIL 78 (1984), 131, 148 et seq.

9 And I do not express any opinion on this question here.

10 Chiefly, because crimes of aggression require that a threshold of gravity be crossed. Rome Statute of the International Criminal Court (1999), Art. 8 bis (1).

tervening state would commit a wrongful extrajudicial killing even if it would not be in violation of *jus ad bellum*.

Last, there might be situations where the invited state would be rendering aid to unlawful acts, even if not committing them itself. For instance, assume that State A invites State B to assist in its struggle against rebel group C. Assume further that while State A constantly violates IHL, State B conducts its operations in perfect conformity with IHL. But to the extent that B is aware of this, and by its actions it in fact perpetuates A’s violations, it might be said that by its intervention, it assists in the commission of an internationally wrongful act. Admittedly, the line between such situations and cases in which the consent would be void due to violations of *jus cogens* is blurry. For the purpose of this brief contribution, it suffices to say that the difference between the situations is probably one of degree.

In sum, for the sake of legal clarity, it is necessary to outline precisely which form of illegality we are referring to when discussing the possible wrongfulness of consensual interventions. This is not merely an exercise in formalism; with the recent acquisition of jurisdiction by the International Criminal Court over the crime of aggression, this determination becomes crucial.

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12 This would be true both if international human rights law would apply to the attack extraterritorially, or if the attacker would accrue the human rights obligations of the territorial state.

Purpose-Based Regulation of Consent to Non-Forcible Operations

Alexander Wentker*

Determining the operation, modalities, and effects of consent is the key challenge for international law on intervention by invitation. This is the case regardless of whether an intervention which is invited to be carried out on the host State’s territory would involve the use of force or would be a non-forcible operation. This contribution focuses on a particularly relevant form of non-forcible interventions or operations, namely relief offered by States or international organisations as humanitarian assistance in situations of armed conflict and as disaster relief in situations of calamitous events. It analyses recent developments in the increasingly dense regulation of consent in this field and shows that these developments reflect a broader trend in international practice and legal scholarship towards a purpose-based approach to intervention by invitation.

In principle, relief operations require an invitation. When the International Court of Justice (ICJ) in its Nicaragua judgment held “that the provision of strictly humanitarian aid […] cannot be regarded as unlawful intervention”,¹ it left open the issue of consent and how, absent such consent, relief operations into another State’s territory are to be reconciled with the international law rule protecting that State’s territorial integrity.² Indeed, even if the exact scope of the principle of non-intervention remains unclear in this respect, non-consensual cross-border operations in principle violate the affected State’s territorial integrity, and, more generally, its sovereignty.³

This concern is also reflected in specific rules both in the context of armed

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² In the case, the ICJ was addressing relief supplied to actors at the borders. For a discussion see E.-C. Gillard, The Law Regulating Cross-Border Relief Operations, Int’l Rev. of the Red Cross 95 (2013), 351, 370.
conflicts\(^4\) and disasters,\(^5\) which explicitly require the affected States’ consent to relief operations.

By definition, consent to relief operations is given for the specific purpose served by these operations, i.e. addressing the needs of the affected population. It is thus naturally in line with the “purpose-based” approach to intervention by invitation that has been discerned in State practice with respect to invited forcible interventions.\(^6\) In that context, consent is increasingly connected to a specific purpose on which an intervention’s lawfulness in part depends, and to which States refer when relying on an invitation by the territorial State.\(^7\) Under this emerging practice, consent is thus not relied upon as a free-standing ground for intervention. This would mean that both forcible interventions and non-forcible operations by invitation need to be “purpose-based”, that is, both consent and purpose need to be present.

Yet, the developments in the regulation of relief operations take the purpose-based approach a crucial step further. In light of the needs of the affected population, it is increasingly accepted that the affected State must not arbitrarily withhold its consent.\(^8\) There is a discernible convergence towards such an obligation in different areas of relief operations; in particular, when the International Law Commission (ILC) elaborated its recent draft articles on the protection of persons in the event of disasters, it explicitly built its approach to arbitrary withholding of consent on developments on humanitarian assistance in armed conflict.\(^9\) Many States welcomed and endorsed

\(^4\) Art. 70 of Additional Protocol I to the Geneva Conventions, Art. 18 of Additional Protocol II.


Purpose-Based Regulation of Consent to Non-Forcible Operations

this approach, while others expressed doubts that a duty not to arbitrarily withhold consent existed under customary international law.\(^\text{10}\)

According to the ILC, the obligation not to arbitrarily withhold consent, which necessarily limits the affected State’s right to refuse an offer of assistance, “reflects the dual nature of sovereignty as entailing both rights and obligations”.\(^\text{11}\) In particular, it referred to “the duty to ensure the protection of persons and disaster relief assistance in its territory or in territory under its jurisdiction or control”\(^\text{12}\) as well as the duty to seek assistance if a disaster “manifestly exceeds its national response capacity”.\(^\text{13}\) While this conception of sovereignty could be seen as reminiscent of the debates on “responsibility to protect”\(^\text{14}\) the ILC deliberately refrained from any reference to this doctrine in its study on disasters.\(^\text{15}\) It also took great care to emphasise the primary role of the affected State in the direction, control, coordination and supervision of such relief assistance,\(^\text{16}\) thus reaffirming the importance of sovereignty in this area. Moreover, even if a violation by the affected State of the obligation not to arbitrarily withhold consent could be established, this would not automatically make a non-consensual relief operation


\(^{\text{11}}\) ILC, Comments and Observations Received … (note 10), para. 3. See also Art. 12(1) of the Draft Articles on the Protection of Persons in the Event of Disasters, as adopted on first reading: “The affected State, by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory.” (ILC Report 2014, UN Doc. A/69/10, 88).

\(^{\text{12}}\) Art. 10(1) of the ILC Draft Articles on the Protection of Persons in the Event of Disasters (note 5).

\(^{\text{13}}\) Art. 11 of the ILC Draft Articles on the Protection of Persons in the Event of Disasters (note 5).

\(^{\text{14}}\) See for example the 2001 Report of the International Commission on Intervention and State Sovereignty; see also A. Peters, Humanity as the A and Ω of Sovereignty, EJIL 20 (2009), 513, 522 et seq.

\(^{\text{15}}\) See ILC Report 2008, UN Doc. A/63/10, 313, para. 222; see also UN Secretary General, Implementing the Responsibility to Protect – Report (2009), UN Doc. A/63/677, 8, para. 10b.

\(^{\text{16}}\) Art. 10(2) of the ILC Draft Articles on the Protection of Persons in the Event of Disasters (note 5).


\(^{\text{11}}\) ILC, Comments and Observations Received … (note 10), para. 3. See also Art. 12(1) of the Draft Articles on the Protection of Persons in the Event of Disasters, as adopted on first reading: “The affected State, by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory.” (ILC Report 2014, UN Doc. A/69/10, 88).

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\(^{\text{15}}\) See ILC Report 2008, UN Doc. A/63/10, 313, para. 222; see also UN Secretary General, Implementing the Responsibility to Protect – Report (2009), UN Doc. A/63/677, 8, para. 10b.

\(^{\text{16}}\) Art. 10(2) of the ILC Draft Articles on the Protection of Persons in the Event of Disasters (note 5).
lawful.\textsuperscript{17} Yet, the ILC’s approach appears to allow the integration of both the purposes of the operations and the right to consent or not to consent to them into the concept of sovereignty.

Although much uncertainty remains surrounding the meaning of “arbitrary”, an increasingly fine-grained understanding of the concept is developing.\textsuperscript{18} Different aspects of these developments clarify and intensify the connection between consent and an intervention’s purpose. In particular, reasons must be provided if consent is withheld: whether this withholding has been arbitrary can only be assessed against the background of the reasons put forward to justify it.\textsuperscript{19} In other words, it is necessary to give reasons to show that the purpose of the relief that was refused would be better served in some other way (for example by accepting a different offer of assistance), or that it is outweighed by other purposes served by the refusal of consent.

Connecting consent to purposes and requiring reasons for the denial of consent inevitably raises questions as to who assesses the purposes and reasons. In this respect, the United Nations Security Council has taken on an active role in recent practice. In the realm of forcible interventions by invitation, the Security Council has engaged in what has been described as validating interventions and their purposes.\textsuperscript{20} As regards relief operations, the Security Council has pointed out that arbitrary denial of humanitarian access can constitute a violation of international humanitarian law,\textsuperscript{21} has condemned the withholding of consent to relief operations in Syria as arbitrary,\textsuperscript{22} and has even, in that case, authorised the delivery of aid, overriding the consent requirement.\textsuperscript{23} Thus both of these fields of invited interventions or operations have seen instances suggesting a development towards an increasing, if still modest, centralisation and institutionalisation of decisions

\textsuperscript{17} The wrongfulness of such operations could, however, be precluded in narrowly confined circumstances under the law of international responsibility if they are justified by necessity or as counter-measures, see \textit{D. Akande/E.-C. Gillard} (note 3), 51 et seq.


\textsuperscript{19} \textit{S. Sivakumaran} (note 18), 519.

\textsuperscript{20} For a detailed analysis see \textit{O. Corten} (note 7).

\textsuperscript{21} See, e.g., UNSC Res. 2139 (22.2.2014) UN Doc. S/Res/2139, PP 10.

\textsuperscript{22} UNSC Res. 2165 (14.7.2014) UN Doc. S/Res/2165, PP 15.

appraising the objectives of an intervention and the reasons for refusing consent.

Despite these parallels, States are unlikely to accept similarly far-reaching obligations restricting their sovereign decision to consent to forcible interventions than for non-forcible relief operations. This reveals the careful balancing process between the purpose served by an intervention and the infringement of the host State’s territorial integrity which underlies the regulation of intervention by invitation. Given the severity of this infringement if force is used, the balance is struck differently in such a case.

Giving due effect to the requirement of consent by the affected State whose territorial integrity and sovereign decision-making are at stake while adequately taking account of the purpose of these interventions remains a crucial tension within the international law framework of interventions by invitation. The developments in the realm of relief operations illustrate this balancing process, and show that both of these elements can be interwoven in an even denser purpose-based regulation of consent to which many States, though not all, have shown themselves to be increasingly willing to subject their sovereign decisions.
Is an Intervention at the Request of a Government Always Allowed? From a “Purpose-Based Approach” to the Respect of Self-Determination

Olivier Corten*

In the Military and Paramilitary Activities Case, the International Court of Justice (ICJ) observed that

“it is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition”.1

This famous dictum leaves one question open: if an intervention at the request of a government is “allowable”, what does it mean in practice? Following the works of some famous authors,2 Karine Bannelier and Théodore Christakis have answered the question by using a “purpose-based approach”, defined in the following terms:

“The criterion of the purpose of the foreign military operations is thus decisive and external intervention by invitation should be deemed in principle unlawful when the objective of this intervention is to settle an exclusively internal political strife in favour of the established government which launched the invitation.”3

This approach has been strongly criticised by several participants to the Max Planck Trialogues workshop that took place in November 2018. Four main objections have been expressed during the debates.

- First, it would be difficult, if not impossible, to identify precisely what the “legitimate objectives” justifying an intervention in an internal conflict could be. To protect its nationals, to riposte to an outside interference or to fight

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1 Italics added; ICJ, Military and Paramilitary Activities, Rep. 1986, 126, para. 246.


terrorism, can undoubtedly be characterised as legitimate. But what about, for example, the fight against an internal secession?

- Second, to prove the genuine purpose of an intervention appears extremely difficult, not to say illusory. Governments often label all rebels or opponents as “terrorists”, but it seems excessive to make an outside intervention to crush them on the sole basis of this qualification legal.

- Third, the “purpose-based approach” gives the biased impression that it would be for the State that intervenes on the basis of an invitation validly given by an established government to prove that it pursues a legitimate objective. Yet, and this can be clearly deduced from the ICJ’s dictum mentioned above, this kind of intervention is presumed to be legal.

- Fourth, practice would not confirm this “purpose-based approach”. If some “purposes” are occasionally advanced by the intervening States, their discourses would not reveal any legal conviction. They, in fact, rather seem to be the reflection of mere political considerations.

Those critics highlight the difficulties surrounding the determination of the legality of an intervention by invitation. At the same time, however, they seem to forget about the right of peoples to self-determination, which has been recognised as fundamental principle of international law. In this respect, certain basic elements must be kept in mind when appraising the critics evoked above.

- First, according to Article 2.4 of the United Nations (UN) Charter, “All Members shall refrain […], from the threat or use of force […] in any […] manner inconsistent with the Purposes of the United Nations.” Yet, one of the purposes of the United Nations is to “develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples […]”. It is, therefore, inconceivable to ignore the principle of self-determination when assessing the legality of a use of force.

- Second, beyond the right for colonial peoples (or peoples submitted to a foreign occupation or to a racist regime) to create a new State, self-determination guarantees the right to the population of existing States to “freely […] determine, without external interference, their political status […].” Resolution 2625 (XXV) moreover specifies that: “no State shall […] interfere in civil strife in another State.” These texts, together with several human rights treaties, clearly show that a State cannot be reduced to the will or the “consent” of its government.

4 Italics added.
5 Art. 1.2 of the UN Charter.
8 See e.g. Common Art. 1 to the 1966 UN Covenants.
Third, considering that all States have recognised self-determination as an *erga omnes* principle (if not a peremptory rule of international law),\(^9\) the role of practice must be correctly understood. It is for those who consider that self-determination does *not* limit the possibility to intervene in an internal conflict (a limit that can be deduced from the texts just cited) to show that a customary norm has emerged in support of their thesis. And this task will be difficult to accomplish, as States systematically deny interfering in an internal conflict when they are invited by a government of another State.

It remains that the notion of “purpose” is probably not the best suited to express the current state of international law. According to Article 3.1 of the Rhodes resolution adopted by the Institut de droit international in 2011,

> “Military assistance is prohibited when it is exercised in violation of the Charter of the United Nations, of the principles of non-intervention, of equal rights and self-determination of peoples [...] in particular when its *object* is to support an established government against its own population.”\(^10\)

The notion of “object” appears more appropriate, as it suggest that, whatever the intention or objectives, the intervention (envisaged by reference to its concrete effects) must remain within the limits of the principle of self-determination. That would not be the case if, in fact (and the facts have to be established objectively, on the basis of the factual elements on the ground), the intervening State has given militarily support to a government against its own population. To examine the “object” and to assess the “effects” of the intervention would be more appropriate than to speculate about its purpose and, consequently, about the (subjective) intention(s) of the intervening State.

Of course, this change of terminology does not elude all the difficulties, notably with respect to proof. But, at least, it seems to reflect both the presumption of legality stated by the *dictum* of the ICJ quoted in the introduction (a presumption that reflects the existing practice), and the necessity to maintain some limits to intervention by invitation as deduced from basic principles of international law, especially the principle of self-determination of peoples.

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\(^9\) See e.g. ICJ, Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, A.O. of 25.2.2019, para. 180.

\(^10\) Italics added; Military Assistance on Request, 2011.
Reflections on the Purpose-Based Approach

Veronika Bílková*

International law scholars disagree over the criteria that determine the legality of intervention by invitation. One strand of scholarship, represented by Olivier Corten, Théodore Christakis or Karine Bannelier, promotes the so-called purpose-based approach. Under this approach, an intervention by invitation is only lawful if it pursues certain purposes, such as the fight against terrorism, the protection of nationals abroad, or the protection of human rights of the local inhabitants. Or, put negatively, an intervention is only lawful, if it does not pursue purposes that would interfere with certain fundamental norms of international law, especially the right of peoples to self-determination. The purpose-based approach is inspired by the International Court of Justice (ICJ) dictum in the Nicaragua case which described intervention by invitation as “allowable at the request of the government of a State” (at p. 246). Allowable, as the proponents of the purpose-based approach argue, does not mean allowed in all circumstances. What matters, setting the line between lawful and unlawful interventions, is the purpose of the military action. Some instances of recent international practice (Mali 2013-2014, Syria/Iraq 2014-2018, Yemen 2015-2019, Gambia 2017, etc.) are conventionally invoked to back up this view.

The purpose-based approach is not implausible. Yet, it suffers of two shortcomings that its proponents would do well to consider, and elaborate upon, in more depth.

The first shortcoming relates to the very notion of *purpose*. The authors writing in favour of the purpose-based approach do not provide any definition of this notion. The texts however suggest that purpose refers to intended goals/consequences of the military action as those are officially declared by the intervening State. If this is so, however, it is hard to imagine a situation in which an intervention could, realistically speaking, be unlawful. It is not likely that a State intervening in the territory of another State would openly declare that its action is meant to interfere with the right of peoples to self-determination or with any other fundamental norm of international law. Such a State is much more likely to invoke one of the grounds that are, at the moment, accepted as lawful, legitimate or simply noble. Identifying

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purpose with declared intention thus risks turning the purpose-based approach into a self-defeating theory.

The second shortcoming pertains to the alternatives to the purpose-based approach. When suggesting a certain reading of the recent practice, the proponents of the purpose-based approach do not pay sufficient attention to other, alternative readings which are not necessarily less plausible. Some of these readings are less ambitious than that embraced within the purpose-based approach, in that they do not postulate any change in the legal regulation. Others are more ambitious in that they postulate that such a change has indeed occurred, positing however that it has been more substantive than the purpose-based approach would make us believe.

The less ambitious readings assert that the fact that States usually give certain reasons for their intervention in the territory of another State, rather than reflecting the adherence to the purpose-based approach, may result from: a) the uncertainty as to the legal grounds of the intervention, b) concerns over the legitimacy of the intervention, c) an effort to show that the intervention has remained within the confines of the invitation.

Ad a) The practice shows that States rarely rely on one legal justification of their military action only. They “put all the cards on the table” hoping that at least some of the legal grounds they invoke, or the combination thereof, will persuade the international community about the legality of their action. For instance, in the Yemeni context, Saudi Arabia and the Saudi-led coalition have repeatedly invoked “external acts of aggression”. They have also referred to the political stability in Yemen and in the region. They may have done so not out of the belief in the purpose-based theory, but in an attempt to set the scene for the invocation of the right to self-defence under Art. 51 of the United Nations (UN) Charter (requiring the presence of an armed attack) and/or in the hope to get some involvement of, or the authorisation from, the UN Security Council (dealing with situations that threaten/breach international peace and security).

Ad b) Military actions tend to be scrutinised both from the perspective of their legality and their legitimacy. The criteria to assess legality and legitimacy are not fully identical. An intervention can thus be unlawful but legitimate as well as illegitimate but lawful. When issuing statements related to their interventions abroad, States seek to demonstrate that their action is both lawful and legitimate. The arguments used in support of legality on the one hand and of legitimacy on the other hand are thus mixed and it is not always easy to tell them apart. The fact that States justifying their action often focus on the nature of the enemy rather than on the legal title, seeking to show that the one they fight against is an outlaw of the international system.
(labelled as terrorist, imperialist, communist, etc.) might suggest that the purpose is indicated in support of legitimacy, rather than legality of the action.

Ad c) Finally, by stating the goals of their action, the intervening States may simply intend to demonstrate that they have acted within the confines of the invitation issued by the national authorities. Statements by intervening States conventionally echo the invitation letters as to the reasons for the intervention. For instance, in the conflict against the Islamic State of Iraq and Syria (ISIS) in Syria/Iraq, both the Russia-led and the US-led coalitions relied on letters of invitation issued by the government of Syria and Iraq, respectively. When criticised for waging attacks against non-ISIS groups, Russia responded by referring to the invitation issued by Syria which had allegedly requested the Russian support in dismantling all non-state armed groups.

The more ambitious reading of the practice, on the contrary, postulates that there are certain additional criteria for the legality of intervention by invitation. It does not however limit, or even link, these criteria to the purpose of the action. This reading is largely inspired by the travaux préparatoires of the 2011 IDI Rhodes Resolution on the Military Assistance on Request and especially by the report prepared in this context by Gerhard Hafner. This report suggests that “military assistance, even if performed with the valid consent of the target State, is limited by international law insofar as the request for such assistance does not relieve the assisting State from its international obligations except those owed to the requesting State and affected by the request” (p. 333). The limits primarily relate to the need to respect peremptory norms of international law, such as human rights, fundamental norms of international humanitarian law or the right to self-determination. Unlike the purpose-based approach, this reading does not focus on the purpose (declared intention) of the intervention but, rather, on its actual effects. Such an effect-based approach may offer a more realistic way to assess the legality of intervention by invitation and, as such, it would deserve close scrutiny.
Intervention by Invitation and Its Function: Governance in a Plural Society

Achilles Skordas*

1. The Function

The intervention by invitation as legal-social institution in world society fulfils a unique function. An institution is built on legal rules and international relations practices that attribute roles to the participants and establish factual expectations. Legal-doctrinal rules and function are separate, but interlinked, thus mutually reinforcing, features of an institution. The rules that create the particular form of the institution should be interpreted in view of its function, and therefore a functional approach is the appropriate method for determining the content and scope of the pertinent rules.

The function of the intervention by invitation is not merely to strengthen or secure the sovereignty or territorial integrity of a State. Its function is to support the inviting State’s authority, if it is in the process of disintegration. Restoration of authority means that the inviting government aims at preventing collapse and systemic exclusion, rebuilding state structures and facilitating the operations of social systems, providing them with “repair services”, and guaranteeing societal pluralism. The function is not to impose any specific political or economic system on the inviting state, but to facilitate a process of gradual restoration of systemic order and re-integration in the international community. Ultimately, intervention by invitation preserves world order, by enabling territorial governance, self-determination and autonomy of social systems, and network-building across borders. In other words, the intervention as a principle of international legal relations is

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1 N. Luhmann, Grundrechte als Institution – Ein Beitrag zur politischen Soziologie, 2nd ed. 1986, 12 et seq.


3 From a sociological perspective, see generally R. Stichweh, Inklusion und Exklusion – Studien zur Gesellschaftstheorie, 2nd ed. 2016.


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part of a process towards the stabilisation or formation of plural society. It should be emphasised here that the jurisprudence of the International Court of Justice (ICJ) has not gone as far as suggested here.

Self-determination is a constituent component of intervention by invitation and not a mere limit to its scope. Self-determination is not restricted in the area of the “political” (external and internal self-determination), but extends to the economic and the cultural, as well.\(^6\) Economic and cultural self-determination guarantee the right to create institutions and organisations and participate in activities within the autonomous spheres of the economy, mass media, religion, research and education. An intervention by invitation fulfils its function, if the intervening Power and the inviting government cooperate in view of restoring conditions conducive to the achievement of systemic “normality” and long-term stability, even if, in the short-term, their purpose is to fight an insurgency and prevent systemic collapse.

Therefore, the assessment of legality of an intervention by invitation under the \textit{jus ad bellum} depends more on context than normally assumed. Instead of two main normative factors – capacity to invite and validity of consent –, there are four: self-determination depicts the ultimate purpose of systemic integration of the country in world societal structures, and necessity/proportionality are customary law principles for the assessment of legality of the use of force.

2. Social Systems and Intervention in the ICJ

Jurisprudence

In the \textit{Nicaragua} case, the ICJ linked the principle of non-intervention with the right of self-determination, even as it dressed the latter as “state sovereignty”. The Court stated that “intervention is wrongful, when it uses methods of coercion in regard to such choices, which must remain free”, including in particular the right of a State to choose its political, economic, social and cultural system, or even a “totalitarian Communist dictatorship”\(^7\) (equivalence of regimes).

Following the bankruptcy of “real socialism”, self-determination means now that every people has the right to choose its own variation of capitalism. This concept contains a wide range of alternatives, from a neoliberal model, to systems with strong involvement of the State in the steering of the

\(^{6}\) See the common Art. 1 (1) of the two human rights Covenants (ICCPR, ICESC).

\(^{7}\) \textit{Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)}, Merits, Judgement ICJ Reports 1986, 14, paras. 205, 263.
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Economy, excluding only situations where the economy has been deprived of its operational code. Intervention by invitation on behalf of totalitarian rule falls therefore under the general prohibition of intervention, as it interferes with the right of self-determination. The intervention is permissible, when it supports an “intolerant democracy” against subversive forces.

In the same judgement, the Court made a prima facie paradoxical interpretation of humanitarian assistance, by stating that it “must [...] be given without discrimination to all in need in Nicaragua, not merely to the contras and their dependents”. The paradox is that if that statement refers to the humanitarian assistance in general terms, it has to be distributed without discrimination even if it is channelled via the government, despite the principle that intervention on behalf of the government is “allowable”. The explanation is that the function of humanitarian assistance is not to strengthen the government’s hand, but to mitigate the consequences of the instrumentalisation of the economic system by the parties to the conflict. The contras and the United States, in particular, perpetrated guerrilla warfare against the economic infrastructure and the maritime communication lines. Generally available assistance, as suggested by the Court, would enable the population to survive, restart economic activities and prevent a total economic collapse that would exacerbate the conflict. The Court did not prohibit the distribution of humanitarian assistance via the opposition, and this is pertinent for the current crisis in Venezuela.

The preservation of the economic system and of the natural resources is even more pronounced in the ICJ DR Congo v. Uganda case that also dealt with the question of intervention by invitation. The presence of Ugandan troops in Congolese territory had taken place initially with the authorisation of President Kabila, in order to help stabilise the situation in the country and put an end to the activities of rebel troupes operating in the Congolese-Ugandan border area. The consent of Congo was withdrawn on 2.8.1998, when Uganda’s international responsibility arose for the looting, plundering, and illegal exploitation of natural resources of Congo, in viola-

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9 Nicaragua v. United States of America (note 7), para. 243.
10 Nicaragua v. United States of America (note 7), para. 246.
11 On this term, see B. Kuchler, Kriege – Eine Gesellschaftstheorie gewaltsamer Konflikte, 2013, 189 et seq.
12 Nicaragua v. United States of America (note 7), paras. 75-86.
tion of Uganda’s obligations as an occupying power.\textsuperscript{14} It is therefore clear that the purpose of the intervention by invitation was to help stabilise Congo’s statehood, and the consent was withdrawn as soon as organs of the Ugandan State embarked on looting and plundering of Congo’s resources and destruction of its economic potential. Even without the formal withdrawal of consent, the continuing presence of Ugandan troops in the Congo would have become unlawful as the result of belligerent extractivism.

3. The Hard Cases

The principle of preservation of plural social order as function of the intervention by invitation has wide-ranging consequences that cannot be dealt with here. Three “hard cases” should be briefly mentioned: the facilitation of targeted killings, the invitation by a competing governmental authority, and the significance of proportionality in the interventions in Syria and Yemen.

First, the recognition of the informality of invitation in the \textit{Congo v. Uganda} case\textsuperscript{15} facilitates the policy of targeted killings in the fight against terrorism from the standpoint of the law of force. In the current state of world society, a huge geographical space, extending from Afghanistan to Mali, is under the constant threat of disintegration into zones of exclusion. Targeted killing is not a panacea against such disintegration, but causes less damage than regular military operations, and can be exercised even without the explicit authorisation of the territorial government as long as it does not object.\textsuperscript{16} The assessment of legality is limited to the \textit{jus ad bellum}, because questions relating to human rights law and the law of armed conflict are more complex and cannot be explored here. Apart from this dimension, the main problem is whether a sustained air campaign over an extended period of time would damage the infrastructure of the inviting country and strengthen the forces of subversion and terrorism.

Second, an invitation to intervene can be arguably extended by civilian authorities competing against the government. This is different from the case of “terrorist armed activities” of opposition groups, disapproved in the

\textsuperscript{14} \textit{Armored Activities on the Territory of the Congo (DR Congo v. Uganda)}, Judgement, ICJ Reports 2005, 168, paras. 42-54, 237-250.

\textsuperscript{15} \textit{DR Congo v. Uganda} (note 14), paras. 45-46.

\textsuperscript{16} It is noteworthy that the UN Security Council welcomed the killing of \textit{bin Laden} by the Presidential Statement S/PRST/2011/9, 2.5.2011.
Nicaragua case,\textsuperscript{17} and should be assessed in view of a revised criterion of government effectiveness. A government that cannot take any meaningful measures to repair a fully collapsed economy loses the presumption of effectiveness. If the opposition enjoys a certain constitutional legitimacy and struggles for a peaceful change with a stabilisation programme, then the battle for self-determination, recognition, and eventually an undesirable but perhaps necessary invitation to third States to intervene, or threaten to intervene, is open. Similarities to the current situation in Venezuela are accidental.

Third, interventions by invitation that lack any prospect of (re)construction of plural society may be legal with regard to the consent of the inviting government. However, taking into account that necessity and proportionality are customary principles of the law of force,\textsuperscript{18} such interventions should be qualified as disproportionate as the result of the balancing between the damage they cause and (the lack of) stabilisation targets. The interventions of Russia in Syria and of Saudi Arabia in Yemen fall into this category.

4. Conclusion

The function of the intervention by invitation is to help secure stable governance in a State or territory under heavy stress. This can only be done in a society offering a plurality of systems and roles, and therefore freedom, to the individuals. The interpretation of the legal rules should follow the function.

\textsuperscript{17} Nicaragua v. United States of America (note 7), para. 205.
\textsuperscript{18} See Nicaragua v. United States of America (note 7), para. 176. There the Court refers specifically to the right of self-defence, but there is no reason not to apply the principles in any other instance of use of force, in particular where a balancing exercise is inherent to the assessment of legality.
On the Matter of Multiple Legal Justifications for Military Action

*Dino Kritsiotis*

The phenomenon of multiple legal justifications for a given military action – the threat or use of force or armed intervention taken by one State against another State – is not an unknown or an uncommon occurrence within public international law, and it is one that may be said to have acute bearing in contexts where the “consent” of the host State through its government has been pleaded or raised. By way of striking example is the American intervention in Panama in December 1989, which, apparently, had occurred on the basis of “[General Noriega’s illegitimacy, and President [Guillermo] Endara’s approval and cooperation”.

This was but one of the “several compelling and legitimate reasons” that quickly came to be associated with the intervention, no doubt deduced from the “goals” that President *George H. W. Bush* had identified in the televised address he delivered soon after the commencement of Operation Just Cause – namely,

> “to safeguard the lives of American citizens, to help restore democracy, to protect the integrity of the Panama Canal Treaties, and to bring General Manuel Noriega to justice”.

In presenting these goals to his national audience, President *Bush* claimed that General Noriega’s “reckless threats and attacks upon Americans in Panama” – including an apparent declaration of war issued upon the United States – “created an eminent danger to the 35,000 American citizens in Panama,” and that, as President, he had “no higher obligation than to safeguard the lives of American citizens”.

This really does suggest that a hierarchy of imperatives existed within the mind of the President before he elected his

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1 Or so it was put by *A. D. Sofaer*, the then Legal Adviser to the State Department, in his remarks to the American Society of International Law in March 1990, ASIL Proceedings 84 (1990), 182, 184.

2 *A. D. Sofaer* (note 1), 183.


4 Statement by President *Bush* (note 3).
ultimate course of action, reaffirmed by President Bush’s admission that he had “directed our armed forces to protect the lives of American citizens in Panama, and to bring to General Noriega to justice in the United States.”

Notice the gentle, effortless seguing of considerations that is being undertaken with these very words, together with the subsequent reference made in the same speech to being “fully committed to implement the Panama Canal Treaties and turn over the Canal to Panama in the year 2000.” And, among this medley of considerations, we find mentioned – and mentioned repeatedly – the “formal welcoming of the United States” when its armed forces entered Panama in December 1989.

Three observations would seem to be in order from these events:

The first point to emphasise in this synopsis is the danger in assuming that every official pronouncement made is also setting out the justifications – and, specifically, the legal justifications – for military action. It is notable that when President Bush itemised the considerations for military action, he did so by saying that “[f]or nearly two years, the United States, nations of Latin America and the Caribbean have worked together to resolve the crisis in Panama”. This is the context – the very specific context – in which he came to frame the four “goals” of the action. It is perhaps telling that President Bush repeated these four goals as the “objectives” of Operation Just Cause in a speech given on 3.1.1990, after General Noriega had been taken into custody, when he announced that the United States had “used its resources in a manner consistent with political, diplomatic and moral princi-

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5 Note, too, his remark at the very end of his speech, that “I took this action only after reaching the conclusion that every other avenue was closed and the lives of American citizens were in grave danger.”, Statement by President Bush (note 3).
6 Statement by President Bush (note 3).
7 In a section of the speech devoted to “reasons for military action”, Statement by President Bush (note 3).
8 A. D. Sofaer (note 1), 187.
9 L. Henkin has observed that “[f]or a student of international law it is not easy to disentangle the web of claims and justifications, to isolate text from pretext, or to distinguish the legal grounds on which the United States seeks to stand from rhetorical flourishes”, in L. Henkin, The Invasion of Panama under International Law: A Gross Violation, Colum. J. Transnat’l L. 29 (1991), 293, 294.
10 See A. D. Sofaer (note 1).
As it happens, when U.S. Ambassador Thomas R. Pickering wrote a letter to the Security Council on 20.12.1989, he advised the Council that

“United States forces have exercised their inherent right of self-defence under international law by taking action in Panama in response to armed attacks by forces under the direction of Manuel Noriega”.

but he also stated that the United States had engaged in its action

“after consultation with the democratically-elected leaders of Panama – President Endara and Vice Presidents Arias Calderon and Ford – who have been sworn in and have assumed their rightful positions. They welcome and support our actions and have stated their intention to institute a democratic Government immediately”.

This leads us onto our second observation: while it might be thought that the United States was involved in empanelling a separate and additional claim of an intervention underwritten by the consent of the Government of Panama, its representation to the Security Council made abundantly clear that its action occurred with the “consultation” – note: this is not necessarily the same as saying the consent – of the Government of Panama. Indeed, the precise nature of the formulations made to the Council – regarding “the democratically-elected leaders of Panama” as well as “their intention to institute a democratic Government” – are indicative of the serial fragilities of régime transition and suggest the need for enormous caution in accepting who constitutes the “Government” of a State at any given moment in time, such that any consent issued within these precarious conditions

12 Remarks Announcing the Surrender of General Manuel Noriega in Panama (3.1.1990), in: Public Papers of the Presidents of the United States (note 11), 8, (though “[t]he failure to include ‘legal’ among the other principles […] may have been inadvertent”, see V. P. Nanda, The Validity of United States Intervention in Panama under International Law, AJIL 84 (1990), 494).
13 U.N. Doc. S/21035 (20.12.1989), an action “designed to protect American lives and our obligations to defend the integrity of the Panama Canal treaties”.
16 Emphasis added.
could not reasonably have been said to have manifested the valid consent of Panama. This conclusion is certainly borne out by a closer inspection of the facts of the “hurried, furtive nature” of the swearing-in ceremony convened for Guillermo Endara – at the very time, let it be noted, that “American troops were launching their military drive against Noriega”.\textsuperscript{18} It is these facts that perhaps help explain why the United States had instead resorted to the rhetoric of the restoration of democracy in Panama, which followed the annulment of the election of May 1989 by the Government of General Noriega – an election that, by all accounts, it had stood to lose by a 3-to-1 margin. However, as we have seen all too clearly, the components and implications of such a claim were only ever given the barest of expressions before the Security Council.

Our third and final observation: there is and must remain a place for multiple legal justifications in any normative framework or adversarial proceeding: arguments are often developed in the alternative, forming part of an intricate strategy of persuasion and rebuttal by one side against another. These arguments, too, may be summoned to complement one another as has been said for Operation Allied Force in the spring of 1999 – where there was “no shortage of theories to legitimate the Kosovo campaign”, with

> “the legal scholar fac[ing] a paradox reminiscent of Justice Cardozo’s famously maddening opinions [where] no single argument quite carries the day, even while the ensemble seems sufficient”.\textsuperscript{19}

This is surely one way of looking at things. Another is to regard each justification independently and to assess each on its own terms or merits; for this to occur, it is probably best if there is a clear and detailed articulation of the claim – of the “novel right” or “unprecedented exception” – that is being made, which would be by way of preface to ascertaining whether that claim is “shared in principle by other States” so as to “tend towards a modification of customary international law”.\textsuperscript{20}

\textsuperscript{18} J. Mann, Combat in Panama: Finally, Opposition’s Endara Gets His Chance: Panama: The New President, Who Won by 3-1 Margin, has Little Government Experience, L.A. Times, 21.12.1989. Note, especially, A. D. Sofaer (note 1), 187 (“[t]his [welcoming] came very close to the intervention, it is true, but it was not a bolt out of the blue. We were well aware of his attitude and well aware that it was inconceivable politically to ask him to take a stand on what his position would be formally before we were committed to act.”).

\textsuperscript{19} R. Wedgwood, NATO’s Campaign in Yugoslavia, AJIL 93 (1999), 828, 829. See, further, C. Scott, Interpreting Intervention, CYIL 39 (2001), 333, 355 (on “the cumulative persuasive force of the totality of arguments […] assessed in terms of the aesthetics of the ensemble.”).

Respect for State Sovereignty: Primacy of Intervention by Invitation over the Right to Self-Defence

Irène Couzigou*

The “Islamic State” (IS), a terrorist organisation acting independently of any State, controlled large portions of territory in Iraq and Syria. In June 2014 Iraq asked for international assistance in its fight against the IS on the Iraqi territory. Then, in September 2014, Iraq asked the United States (US) and its allies to help it in defending itself against the IS in Syria as well. However, Iraq could not invite States for intervention outside its territory. The only legal ground Iraq could refer to here was the right to collective self-defence of that State in reaction to armed attacks by the IS.

Syria also invited the United States and other States to combat the IS, but only in the form of coordinated action. The regime of al-Assad, contrary to the opposition, the Syrian National Coalition, could be regarded as the most effective authority able to represent the Syrian State and thus able to invite other States to intervene militarily on the Syrian territory. Moreover, it was entitled to set limits for its invitation. Only Russia and Iran inter-

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1 It is also referred to as the “Islamic State of Iraq and the Levant” (“ISIL”), the “Islamic State of Iraq and Syria” (“ISIS”), or with its Arabic acronym, “Daesh” or “Da’esh”.
2 There is an international consensus that the IS is a terrorist organisation. It has been designated as such by the United Nations, the European Union, the United States and the United Kingdom, among others. None of the attribution’s criteria of the conduct of a non-State actor to a State could be applied to the IS. Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001 <http://legal.un.org>, 38 et seq.
3 See <http://www.bbc.co.uk>.
8 O. Corten, The Law against War, 2010, 274 et seq.
vened in Syria with the consent of President al-Assad. Their military presence was considered to be legal, as long as it was directed against the IS and not against the opposition of the regime of al-Assad. Other States that intervened in Syria rejected its invitation for coordinated action. The reason for this seems to be their refusal to be associated with a regime engaged in severe infringements of international law that had crossed the threshold of war crimes and crimes against humanity. Coordination with President al-Assad would have strengthened his political position. The question arises as to whether the political reason for refusing the Syrian conditional invitation for intervention can be translated into a legal consideration. A State should not accept an intervention by invitation when by so doing it violates its duty not to assist another State in the commission of serious violations of international law. Indeed, in accordance with a rule that is consolidating in customary international law, a State should not aid or assist another State in the commission of an internationally wrongful act by another State if the State providing the aid or assistance is aware of the circumstances making the conduct of the assisted State internationally wrongful and if the act would be considered to be internationally wrongful had it been perpetrated by the assisting State itself. However, it cannot be convincingly argued that, had the States that intervened in Syria without its consent accepted Syria’s invitation for coordinated intervention, they would automatically have engaged themselves in a conduct amounting to assistance to serious violations of international law. Indeed, under international law, Syria had the right to defend its territory against the occupation by the IS. Other States could not assume that Syria would have necessarily perpetrated a se-

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10 Iranian President, H. Rohani, explained that Iranian “military advisers” are present in Syria on the invitation of the governments of that State. See his interview in Le Monde, 30.1.2016.
11 External intervention is unlawful when it aims to settle an internal political conflict in favour of the established government. See K. Bannelier/T. Christakis, Under the UN Security Council's Watchful Eyes: Military Intervention by Invitation in the Malian Conflict, LJIL 26 (2003), 855.
rious violation of international law in doing so, such as a grave breach of the Geneva Conventions or of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction. Moreover, it cannot be demonstrated that coordinated action with Syria would have prevented efficient action against the IS. To our knowledge, no State challenged the legality of the military action of Russia and Iran against the IS on the ground of intervention by invitation. Thus, it is here submitted that there was no legal obligation to reject Syria’s conditional offer for intervention.

Bahrain, Qatar, Jordan, Saudi Arabia and the United Arab Emirates did not give any justification for their participation in the US-led airstrikes against the IS in Syria. The other 11 States that intervened in Syria justified their military presence in Syria on the ground of the right to self-defence against the IS. The right to self-defence invoked was the right to collective self-defence of Iraq, and, after the terror attacks of the IS in Paris and in Saint-Denis in November 2015, of France, or the right to individual self-defence. Some of the intervening States advanced another reason, other than the need to react to an (ongoing, imminent or threat of) armed attack, to justify entering into Syria’s territory without its consent. The United States, Canada, Australia, Turkey and the United Kingdom stated that Syria was “unwilling or unable” to prevent attacks emanating from the IS from its territory.

The customary nature of the right to self-defence against non-State actors is contested, even if circumscribed by the “unwilling or unable” test. If the position is taken that such a right to self-defence exists or is crystallising in customary international law, the question arises as to whether States enjoyed a discretionary choice between intervening in Syria on the basis of intervention by invitation or on the ground of the right to self-defence. In-

15 Art. 3 of the four Geneva Conventions applies to non-international armed conflicts. See for instance Art. 3 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12.8.1949, 75 UNTS 32-34.
16 1974 UNTS 45.
18 While some of those States participated in the airstrikes against the IS, others simply provided military assistance, like Germany.
20 O. Corten, The “Unwilling or Unable” Test: Has It Been, and Could It Be, Accepted?, LJI, 29 (2016), 791.
Intervening States may be tempted to rely on the right to self-defence rather than on a conditional invitation for intervention. Indeed, a seeming advantage of this legal foundation would be that their presence then would not depend on the will of the territorial State. Furthermore, the unwillingness or inability of the territorial State would exonerate the intervening States of any responsibility for the incidental breach of the territorial State’s sovereignty in the course of self-defence. However, given the fundamental importance of the sovereignty of States under international law, priority should be given in principle to the legal justification for the use of force that is respectful of the sovereignty of the territorial State. Intervention with the agreement of Syria would have respected the sovereignty of that State. Concerning the unilateral exercise of the right to self-defence against the IS, it infringed the sovereignty of Syria. Therefore, the military action against the IS in Syria could only be justified by the Syrian conditional invitation for intervention, as the sole legal ground respectful of the sovereignty of Syria. It is therefore concluded that, should the right to self-defence against non-State actors be or become customary, it is of a subsidiary nature to intervention by consent by the territorial State, unless cooperation with the territorial State in repelling non-State armed attacks amounts to a violation of the duty not to assist it in serious violations of international law or unless such cooperation were obviously inefficient to counter those armed attacks.

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22 The consent for invention can be amended or withdrawn at any time. Case Concerning Armed Activities on the Territory of the Congo, ICJ Reports 2005, para. 51.
24 Syria qualified the military action against the IS on its territory without its agreement as “a violation of Syrian sovereignty”. See for instance Identical letters dated 17.9.2015 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2015/719 (2015).
In the context of intervention by invitation the question of the role of the United Nations (UN) Security Council soon comes up since it has been involved in one way or another in a large number of cases of intervention by invitation after the end of the Cold War.

In one way, the mere fact that the instances of intervention by invitation pass through the Security Council at all, could be said to be a sign of the centralisation and multilateralisation of such interventions, something which would typically tend to appeal to international lawyers. Looked at in another way, however, the actual centralisation and multilateralisation of the use of force achieved could be said to be apparent only. In actual fact the Security Council follows the designs of other actors and contributes little independent input into a decision or a course of action that would have taken place anyway.

This need not be a problem if the invitation as such is already a valid ground for states to intervene militarily in other states. Then there is no need for the extra justification in the form of a decision by the UN Security Council for the intervention to be lawful. As far as the current content of the substantive law on this issue is concerned, it is arguably so undecided that it might be questioned whether there exists any *lex lata* on the intervention by invitation at all at this point. The prohibition against the international use of force is still valid but to what extent the invitation by someone representing a state may constitute a valid justification of the military intervention by someone representing another state, or perhaps just someone else, to intervene in the former state, is arguably highly uncertain. Questions such as who may invite and who may intervene, to fight whom, and for what purpose largely remain unanswered, or rather, there are so many answers to each of these questions that there would seem to be a justification to intervene, or not, at every point in turn.

In the view of this author at least, there is little settled law and a lot of *de lege ferenda* proposals in the area of intervention by invitation. This does not need to be a problem because this situation gives room for argumentation and potential influence on the part of different hopefully well-

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intentioned international actors on the course of the future development of the law.

In the search for an answer, and only one answer, to the question what the law says about intervention by invitation it would seem unlikely that there is much help to get from the UN Security Council. It is true, that there is by now a substantial amount of Security Council practice of relevance to the issue of the content of the law on intervention by invitation. It is also true, that we have seen some apparently regular normative patterns emerge in the practice of the Security Council on intervention by invitation from the 1990s until today. However, given the unavoidable inconsistencies in Security Council practice – both in substance and procedure (the latter primarily referring to whether the Council takes up a case or not) – and or perhaps due to, the big power politics often involved, the pronouncements of the Security Council have to be handled with care and discernment especially perhaps as far as their presumptive normative implications are concerned.

The fact that we might not find a clear answer in the practice of the Security Council, however ample, to the many normative questions surrounding intervention by invitation need not necessarily be a problem (except perhaps for international lawyers who would like there to be more clout and consistency in Security Council decision-making generally). The task of the Security Council is not to be a law-maker, but to take prompt and effective action in particular cases presumably within the legal framework that already exists. There are plenty of other international actors who may make or contribute to the making of international law, most importantly of course the states themselves. The development of the content of the law on intervention by invitation is not dependent on the practice of the Security Council, even if in the best of worlds it might help.

What might be a problem in the way the UN Security Council handles instances of intervention by invitation, however, is the way in which the Security Council has gone from authorising action to merely legitimising action in these as well as other kinds of cases involving the use of armed force. This is a problem perhaps not so much for the substantive law on intervention by invitation as for the system of collective security more generally under the UN Charter, which is no small thing. Gradually, the collective security system is transformed from a tightly-knit vertical normative structure to a loose horizontal balance of power structure where the Security Council ends up almost on a par with the member states. Indirectly, this might be a problem also for the content of the law on intervention by invitation since the looser the collective security system the less normative con-
Consistency can be expected to prevail in the justificatory reasoning of the Security Council.

For quite some time already the tendency of the Security Council has been perceptible to abandon outright authorisation (which in itself is already a “looser” version of decision-making about military enforcement measures than originally laid down in the Charter) and go for legitimation instead. There may be several reasons for this tendency, one of which surely is the difficulty to agree among the members of the Security Council, a difficulty which moreover would seem to have grown over the years, but there may be other reasons as well. For reasons of politics, economy and even law there might be gains involved for the members of the Security Council of loosening the grip of the Council on different situations – however not entirely letting go – and delegating the action and all that might come with it to others. Issues of responsibility in different respects might be easier to diffuse that way or even dispel, for instance. Also, legitimation is flexible from the point of view of the UN Security Council in that it may come before (mostly), or after the event.

The practice of the Security Council to legitimise rather than to authorise enforcement action tends to contribute to the decentralisation and unilaterisation of the collective security system rather than its centralisation and multilateralisation. As long as the other potential actors – individual member states, ad hoc coalitions, regional organisations, sub-regional organisations – for whatever reason continue to feel the need for the legitimation by the Security Council in order for them to be willing to undertake the intervention by invitation (or an international military intervention under some other justification) the partial dissolution of the collective security system might not be a problem. Furthermore, some action may strengthen the legitimacy of the Security Council itself even if the action is based on very far-reaching delegation of powers by the Council.

If the Security Council, states and other international actors continue to strive for the legitimacy of their interventions, and if they consider themselves mutually dependent on each other for claiming such legitimacy, then for the sake of the preservation of something at least slightly resembling global collective security perhaps a merely legitimising Security Council is better than none.
Who Is the Host? – Invasion by Invitation

Matthias Hartwig*

If one were to identify the main objective of the United Nations (UN) Charter, it would be the prohibition of the use of force. Furthermore, and risking only a slight simplification, one may say that there are only two exceptions to this general prohibition of the use of force: (1) self-defence according to Article 51 of the UN Charter and (2) in the event of authorisation by the UN Security Council according to chapter VII of the UN Charter. States, however, have been known to try to get more leeway to this end, especially those that are always keen to keep open the option of the use of armed forces. The recent extension of the notion of self-defence by broadening what might be covered by the concept of an “armed attack” is just one example. Another example is the concept of “invasion by invitation”. If a State can claim that an invasion has been undertaken upon invitation, it may hold that the invasion as such does not fall under the rules pertaining to the use of force. Use of force always implies an undertaking against the will of the affected State. The invitation is not only a justification for the use of force but it immediately excludes the qualification of the action in this sense. A different question would be the legitimacy of the use of force in an internal conflict, whereby some authors hold that it would be an interference if an external State were to participate in the conflict.

Whereas intervention by invitation is generally accepted as an expression of the sovereign will of the inviting State, it is much more difficult to decide who can extend such an invitation. There is no doubt that a legitimate and effective government in power – as the organ representing the State’s will – may do so. However, the invitation is most often expressed in situations of political conflict, and the question is whether a government may invite the armed forces of another State if it has either lost power or has been elected but not yet successfully taken office. Neither recent state practice nor current legal scholarship offer a coherent approach to this problem. When the Ukrainian President Viktor Yanukovich, having fled Ukraine in the wake of the 2014 Maidan Revolution, wrote a letter to the Russian President Vladimir Putin inviting Russian troops to re-establish order in Ukraine, there was a widespread opinion that he was not entitled to do so. Russia made

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this letter available to the Security Council, but when defending its case Russia claimed to be first and foremost protecting its own citizens.¹

This is in stark contrast to the case of Yemen. Common to both cases is that the president fled the country and sought safety in a neighbouring State; opposition forces did not recognise the legitimacy of the fleeing president; and the president no longer exercised any effective power in the country. However, in the case of Yemen the UN Security Council adopted Resolution 2216 of 14.4.2015 under chapter VII of the UN Charter, in which it underlined the legitimacy of President Abdrabbuh Mansur Hadi and referred to his letter in which he requested “from the Cooperation Council for the Arab States of the Gulf and the League of Arab States to immediately provide support, by all necessary means and measures, including military intervention, to protect Yemen and its people from the continuing aggression by the Houthis”.² By uncritically mentioning the request for military intervention, the UN Security Council gave its blessing to this invitation of armed force despite Hadi being at that time in exile and not exercising effective control over the country. Hadi’s legitimacy was further questionable as he had stepped down as President and only afterwards revoked his resignation; one may reasonably wonder, therefore, if he could unilaterally regain power. The difference in the UN Security Council’s handling of the Ukrainian and the Yemeni cases lies in their particular intervention regarding the latter case: in Yemen, the Security Council – so to say by ordre du Mufti – recognised Hadi as the legitimate president; Yanukovich was not so fortunate.

A more recent case is the sending of troops by the Economic Community of West African States (ECOWAS) to the Gambia in 2016 after the “outgoing” President Yahya Jammeh refused to hand over his functions to his newly elected successor Adama Barrow. The latter had invited the ECOWAS forces not only while abroad but having not properly been sworn into office. Though the Security Council did not authorise an armed intervention, it did not prohibit it. Resolution 2337 of 19.1.2017 declared that the Security Council

“Expresses its full support to the ECOWAS in its commitment to ensure, by political means first, the respect of the will of the people of The Gambia as expressed in the results of 1st December elections”.³

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¹ UN Doc. S/2014/146; S/PV.7124, 5.
There was no explicit reference to the invitation by the newly elected president, but the Security Council must have known about the circumstances of the armed intervention, including the invitation by Barrow. The British and the Russian ambassadors to the UN declared that the newly elected president would be entitled to request military assistance from abroad, if diplomacy should fail. Another recent case was discussed in the context of the internal conflict in Venezuela, where the self-declared “interim President” Juan Guaidó openly talked about the possibility of inviting foreign troops, although he did not exercise any effective power. However, as no armed forces were sent to Venezuela, no conclusions can be drawn from this case with regard to State practice.

State practice is inconsistent. The original criterion requiring the exercise of effective power by the inviting organ still plays a role, as the case of Ukraine shows. In cases of democratic elections where the results are not recognised by the current incumbent, the legitimising effect of the electoral process may prevail over the exercise of effective power, thereby vesting the newly elected figure with the power to invite foreign troops. The UN Security Council seems to take a more pragmatic approach by often weighing in behind the person who seems to offer the best prospects for solving the conflict and thus allowing this person to invite foreign troops irrespective of the effectiveness of the power they exercise.

In all, the picture is certainly confusing and, due to a lack of well-established and generally recognised principles, it remains difficult to decide “who might be the host”. As this question is related to one of the most sensitive issues in international law and politics, that is, the prohibition of the use of force, all international actors are invited to help establish criteria that could provide better guidance when it comes to the necessity of answering this question in real time. What should be avoided, however, are decisions based on political opportunism. The effectiveness of the exercise of power will always play a crucial role when deciding on who is empowered to invite foreign armed forces; in international law – as a rule – it is the effective government that represents a State in international relations including in regard to military cooperation. Much more difficult is the integration of the concept of legitimacy. States differ in their understanding of the legitimacy of power. The question of who enjoys legitimacy in the exercise of State power most often comes up during moments of political change. In times of civil war, legitimacy could be attached to opposition movements simply because their demands that the government step down seem legitimate, as was

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the case in Libya where some States militarily supported the opposition at a moment when it did not yet possess effective control. However, it later turned out that none of the groups in opposition to Gaddafi had sufficient legitimacy to construct a new State order. In Yemen, most States decided against considering the opposition legitimate; instead, the President in exile – and without effective power – was regarded as Yemen’s sole legitimate representative. In cases of democratic elections there is a certain tendency to attach legitimacy to the newly elected President, even if they have not gained effective power or if the legality of the elections is in doubt. However, most of the decisions regarding legitimacy are arbitrary. Providing support to one of the parties to a conflict can easily result in the interference in the internal affairs of another State. For the same reasons that humanitarian interventions have been ruled out in international law, a military intervention resting on an invitation from a legitimate but ineffective government should be rejected. In such a situation the power to authorise a military intervention lies exclusively with the UN Security Council, which should rely on chapter VII of the UN Charter and, in order to avoid any confusion in the terms of international law, must not refer to an invitation by an organ whose power is in doubt. One should therefore remember the warning of the International Court of Justice against a too generous attribution of the power to invite the armed forces of another State to intervene:

“It is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition. This would permit any State to intervene at any moment in the internal affairs of another State, whether at the request of the government or at the request of its opposition. Such a situation does not in the Court’s view correspond to the present state of international law.”

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5 ICJ Reports (1986), 14 et seq. § 246.
Replicating Article 51

A Reporting Requirement for Consent-Based Use of Force?

Larissa van den Herik*

Unlike self-defence, intervention by invitation is not anchored in the United Nations (UN) Charter. The requirements governing this legal basis to use force can thus not be derived from a concrete provision and there is no treaty obligation to report similar to Art. 51, second sentence. This Impulse considers a reporting requirement for consent-based use of force. It discusses the function of Art. 51’s reporting requirement in light of current Security Council practices and it examines the potential to construe a parallel reporting requirement, or at least a practice, for consent-based use of force.

The initial rationale of Art. 51’s reporting requirement was to alert the Security Council that force in self-defence had been used and to place the matter on the international agenda with a view to enabling the Council to exercise its primary responsibility to maintain peace and security.1 As the system of collective security is becoming more decentralised and as the Security Council has been adopting a new role recently whereby it condones and/or blesses non-authorised uses of force rather than authorising use of force itself,2 the reporting requirement has taken on new meaning. In such a constellation, the purpose of the reporting requirement is not mainly to notify or alert so that the Council can take over, but rather to report in the ordinary sense, namely to offer information and to account so as to enable the Security Council and the international community at large to discuss whether the use of force was in accordance with the applicable rules and requirements.

In addition to self-defence as an exception, consent is also relied on to justify the use of force and it has increasingly been invoked as an additional

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2 As also discussed by M. Hakimi, The Jus Ad Bellum’s Regulatory Form, AJIL 112 (2018), 151 et seq.
basis for counter-terrorism operations. Also in the context of consent-situations, a practice has emerged whereby the Security Council refrains from authorising use of force itself, and instead it may appraise the circumstances surrounding the formulation of the invitation thereby endorsing the consent. Whether the Security Council makes such appraisal in concrete situations depends, *inter alia*, on whether the use of force is reported and whether the matter is placed on the Security Council’s agenda. This raises the question regarding the existence of a reporting requirement for consent-based use of force.

Since the UN Charter is silent on intervention by invitation, any legally binding reporting requirement would have to be construed under customary international law. Scholarly arguments have been made in this respect, proposing that Art. 51’s reporting requirement should be applied *mutatis mutandis* to consent-based use of force.\(^3\) In its Resolution on military assistance on request, the *Institut de Droit International* also stated that “any request that is followed by military assistance shall be notified to the Secretary-General of the United Nations”.\(^4\) Suggesting the Secretary-General as recipient of notifications rather than the Security Council might be explained by political sensitivities and reluctance of States to accept any hard core reporting obligation. In this vein, the following US statement may be noted when reporting on missile strikes in Houthi-controlled territory in Yemen in 2016,

> “These actions were taken with the consent of the Government of Yemen. Although the United States therefore does not believe notification pursuant to Article 51 of the Charter of the United Nations is necessary in these circumstances, the United States nevertheless wishes to inform the Council that these actions were taken consistent with international law.”\(^5\)

This can be read as implying that no reporting requirement exists at all, or that Article 51 cannot serve as a legal basis for a reporting requirement on consent-based use of force. It is, in any event, not self-evident to construe a legally binding reporting requirement for consent-based use of force

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4 IDI, Present Problems of the Use of Force in International Law, Sub-Group C - Military Assistance on Request, Rhodes, 2011, Rapporteur: M. Gerhard Hafner.


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under customary international law. Even if there is a certain practice of informing the Security Council of forceful action taken pursuant to an invitation,\(^6\) there are also clear examples of non-reporting.\(^7\) Reporting on consent-based use of force may be sensitive in particular when the consent is not public. Moreover, to construe a customary reporting rule for consent-based use of force, there also needs to be opinio iuris which at this point in time does not necessarily seem to clearly exist (yet). States outside the Security Council as well as non-permanent members could perhaps play a role in contributing to the expression and formation of such opinio iuris. In this regard, Brazil’s statements in 2018 are noteworthy as they insisted on a more meaningful reporting requirement for Art. 51,\(^8\) as well on the need for periodic reporting on military operations pursuant to Art. 42 of the UN Charter,\(^9\) thus suggesting a more holistic reporting requirement.

In considering a reporting requirement for consent-based use of force specifically, complex questions arise on timing and modalities as well as on when and how consent-based use of force that is very temporary or that involves a one off action must be reported, and on what exactly must be reported under this heading, i.e., whether a reporting requirement would also cover pure aiding.

Absent a clear requirement thus far, States nonetheless tend to rely on multiple justifications including consent and they have reported on this to the Security Council. Given this existing practice, the issue whether a perceived duty to explain translates into a hard legal obligation to report and whether this obligation extends to consent-based use of force in addition to

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\(^8\) Statement by Brazil in the UN General Assembly (Sixth Committee) debate on the report of the Special Committee on the Charter of the United Nations, 15.10.2018, available at <http://statements.unmeetings.org>.

self-defence is perhaps not the most pressing one. Even absent overall agreement that reporting on all uses of force is legally required, States have in fact reported beyond Art. 51’s requirement or at least they are often inclined to make statements that are meant to be explanatory. The bigger problem is that the reporting and related discourse is not always centralised and sometimes done at other venues such as the Human Rights Council, the European Union, domestic parliaments, or the media. A second bigger problem concerns ambiguous and/or superficial language and absence of reasoning, legal argument and failure to adduce any supporting factual material and evidence. This raises the question how States may be persuaded to engage in more structured and meaningful reporting and use of force discourse. In a previous Impulse, suggestions have been made for holding routine debates, the setting up of an official database collecting Art. 51 and other reporting letters, and the development of best practices on when exactly and how often letters should be submitted and on what they should contain. Inspired by the UN sanctions architecture, some thinking may also go into the creation of a subsidiary body that collects and monitors submission of Art. 51 and other letters as well as the creation of panels of experts to gather, examine and analyse relevant information from States, including from third States, and possibly to make prima facie evaluations. Such structures could offer a space that encourages and facilitates all States, including third States, to be explicit in their position on unilateral uses of force, including intervention by invitation. A modest role for independent panels of experts would reflect the interests that the entire international community has in upholding the prohibition of the use of force as a central norm.

Broad participation in use of force discourse is essential precisely because of the centrality of Art. 2(4) of the UN Charter and it being a cornerstone of our international legal order. As noted by Oona Hathaway,

“States that do not use force need to be more active in voicing their legal positions. If the only States that take legal positions on the use of force are those using force, the exceptions will continue to expand until they swallow the rule.”

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As there is a shared interest that Art. 2(4) is not swallowed, some consideration of countervailing structures at Security Council level might not be superfluous.