

Invitation – Excluding *ab initio* a Breach of Art. 2 (4) UNCh or a Preclusion of Wrongfulness?

Florian Kriener*

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.

* Cand. iur., Student Assistant with the “Shades of Illegality in International Peace and Security Law” Research Group at the Max Planck Institute for Comparative Public and International Law, Heidelberg. The author would like to thank *Christian Marxsen* and *Anne Peters* for their valuable comments and input in drafting this article.

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.

⁴ *B. Nußberger*, Military Strikes in Yemen in 2015: Intervention by Invitation and Self-Defence in the Course of Yemen’s “Model Transitional Process”, *Journal on the Use of Force in International Law*, 2017, 126.

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.⁶

Second, the term “force” in Art. 2 (4) UNCh is strictly objective.⁷ 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.⁸ 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.⁹ 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.¹⁰ 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.¹¹ 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.¹² 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.¹³

⁶ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* (merits) [1986] ICJ Rep. 14, para. 246. Implicitly confirmed in *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)* (merits) [2005] ICJ Rep. 168, paras. 42–54; *B. Nußberger* (note 4), 126.

⁷ *M. Bothe*, in: W. Graf Vitzthum (ed.), *Völkerrecht*, 5th ed. 2010, 649.

⁸ *Y. Dinstein*, *War, Aggression and Self-Defence*, 6th ed. 2018, 93, para. 256; *A. von Arnould*, *Völkerrecht*, 3rd ed. 2016, para. 1037; *T. Stein/C. von Buttlar/M. Kotzur*, *Völkerrecht*, 14th ed. 2017, para. 776.

⁹ See Australia’s amendment and further discussion in United Nations Conference on International Organization, Documents, Volume VI, Commission I, 1945, 557.

¹⁰ *A. von Arnould* (note 8), Rn. 1037.

¹¹ See UNGA, Resolution 3314 (XXIX), Art. 3 (e); *M. Bothe* (note 7), 649; *C. Kreß/B. Nußberger*, *Pro-Democratic Intervention in Current International Law: The Case of The Gambia in January 2017*, *Journal on the Use of Force in International Law*, 2017, 242.

¹² *M. Bothe* (note 7), 664; *S. Kadelbach*, *Zwingendes Völkerrecht*, 1992, 226 et seq., 237.

¹³ See *E. De Wet*, *The Modern Practice of Intervention by Invitation in Africa*, *EJIL* 26 (2015), 980.

Third, the emerging “purpose-based approach” only works if invitation is seen as a preclusion of wrongfulness. *Bannelier/Christakis*¹⁴ and *Corten*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.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.¹⁷ Whether a use of force is illegal or not cannot depend on the intervening state’s intent,¹⁸ because resulting ambiguities would lead to the disregard, abuse, and erosion of the prohibition of the use of force.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 *prima facie* illegal unless justified by the intervening state.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.²¹

In conclusion, the better arguments speak for qualifying an invitation as *precluding the wrongfulness* of an intervention, not as excluding *ab initio*

¹⁴ *K. Bannelier/T. Christakis*, Under the UN Security Council’s Watchful Eyes, LJIL 26 (2013), 860.

¹⁵ To be published in *O. Corten/G. Fox/D. Kritsiotis*, Intervention by Invitation, Max Planck Trialogues, Vol. 4, Cambridge University Press (forthcoming).

¹⁶ *O. Schachter*, The Legality of Pro-Democratic Invasion, AJIL 78 (1984), 649; *T. Stein/C. von Buttlar/M. Kotzur* (note 8), 776.

¹⁷ *T. Stein/C. von Buttlar/M. Kotzur* (note 8), para. 776; see *M. Herdegen*, Völkerrecht, 17th ed. 2018, § 34, Rn. 19.

¹⁸ *M. Herdegen* (note 17), § 34, Rn. 19.

¹⁹ See *T. M. Franck*, Who killed Art. 2 (4) UNCh? or: Changing Norms Governing the Use of Force by States, AJIL 64 (1970), 809.

²⁰ *Nicaragua v. United States of America* (note 6), Rn. 207.

²¹ See in general, *M. Shapiro*, The Giving Reasons Requirement, University of Chicago Legal Forum 179 (1992), 184.

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.²²

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.