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

* Dr. iur., Senior Researcher at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg.

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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.

2 <https://undocs.org>.

3 S. *B. Nussberger*, The Post-Election Crisis in The Gambia: An Interplay of a Security Council "Non-Authorization" and Intervention by Invitation, <http://opiniojuris.org>.

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 Guaidò* openly talked about the possibility of inviting foreign troops, although he did not exercise any effective power.[4] 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

[4] *S. Smith*, Guaidó busca comunicación directa con militares de EEUU, <www.apnews.com>.

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 interna1 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."[5]

[5] ICJ Reports (1986), 14 et seq. § 246.