Intervention by Invitation and Its Function: Governance in a Plural Society

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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.[1] 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[2] 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,[3] rebuilding state structures and facilitating the operations of social systems, providing them with "repair services",[4] 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.[5] 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.

[2] See *M. Barkun*, International Law from a Functional Perspective, Ga. J. Int'l & Comp. L. 1 (1970), 19 et seq.

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

[4] *H. Willke*, Smart Governance – Governing the Global Knowledge Society, 2007, 90.

[5] *A. Skordas*, Self-Determination of Peoples and Transnational Regimes: A Foundational Principle of Global Governance, in: N. Tsagourias (ed.), Transnational Constitutionalism – International and European Models, 2007, 207 et seq.

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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 *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 *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] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), Merits, Judgement ICJ Reports 1986, 14, paras. 205, 263.

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" [8] 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".[9] 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".[10] 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.[11] The contras and the United States, in particular, perpetrated guerrilla warfare against the economic infrastructure and the maritime communication lines.[12] 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.[13]

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-

[8] On this concept, see generally *G. Fox/G. Nolte*, Intolerant Democracies, Harv. Int'l L.J. 36 (1995), 1 et seq.

[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.

[13] *N. Casey*, The Venezuela Battle Border, The New York Times, 25.2.2019, available at <https://www.nytimes.com> (last visited on 8.3.2019)

tion of Uganda's obligations as an occupying power.[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 *Congo v. Uganda* case[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.[16] The assessment of legality is limited to the *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

[14] *Armed Activities on the Territory of the Congo* (*DR Congo v. Uganda*), Judgement, ICJ Reports 2005, 168, paras. 42-54, 237-250.

[15] *DR Congo v. Uganda* (note 14), paras. 45-46.

[16] It is noteworthy that the UN Security Council welcomed the killing of *bin Laden* by the Presidential Statement S/PRST/2011/9, 2.5.2011.

Nicaragua case,[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,[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.

[17] *Nicaragua v. United States of America* (note 7), para. 205.

[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.