The Gentle Legitimiser of the Action of Others

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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-

sistency 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 unilateralisation 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.