

Reflections on the Purpose-Based Approach

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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.

