

## 10<sup>th</sup> Commission

### Present Problems of the Use of Force in International Law

D. Sub-group on Intervention by Invitation\*

*Problèmes actuels du recours à la force en droit  
international*

*D. Sous-groupe sur l'intervention sur invitation\**

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25 July 2007

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## Table of Contents

### I. Preliminary Draft

Part I. Introduction.....	229
1. The work of the IDI.....	229
2. Writers and practice.....	231
Part II. The parameters of the subject under discussion .....	235
1. Definitions and scope of activities .....	235
a. Character of Activities .....	236
(i) From “intervention” to “military assistance” .....	236
(ii) Different types of assistance.....	238
(iii) Should peace-keeping operations be included ?.....	240
b. Scope of application <i>ratione temporis</i> .....	241
2. Request (invitation/consent).....	245
a. Author .....	246
(i) Effectiveness .....	246
(ii) Recognition .....	248
(iii) Democratic legitimacy .....	249
(iv) Organs competent to issue a request .....	250
b. The form of the request.....	251
(i) General .....	251
(ii) Treaties .....	252
(iii) Revocability of consent .....	253
(iv) Content of the request,.....	255
3. The legality of military assistance upon request .....	255
a. The legal basis .....	255
b. The limits to assistance under international law .....	258
(i) The principle of non-intervention.....	259
(ii) The principle of self-determination.....	259
(iii) Other legal impediments .....	261
aa. Human Rights.....	261
bb. Terms and conditions of request .....	262
cc. Other legal conditions .....	262

**II. Conclusions : Possible issues to be addressed in recommended principles:.....263**

**III. Comments of the members of the sub-group**

Comments by Professor Vladimir-Djuro Degan .....265

Comments by Dr Abdulqawi a Yusuf .....266

## I. Preliminary Draft

This paper aims at presenting a preliminary report with the particular purpose of clarifying the main elements of this topic.

### Part I. Introduction

“Intervention by invitation” in the broadest sense has frequently been conducted from ancient up to recent times<sup>1</sup>. Experience since the end of the Second World War has shown an increased number of non-international armed conflicts of the most different kinds in which activities of this kind occurred<sup>2</sup>. Governments legally exercising authority over a territory are, as a result of their sovereignty, undoubtedly entitled, if not obliged, to defend themselves against armed opposition within that territory<sup>3</sup>. Such activities are, however, subject to certain legal constraints resulting either from international<sup>4</sup> as well as national law<sup>5</sup>. The problem under discussion in this report is to discuss the extent to which they are entitled under international law to seek assistance from foreign States for this purpose and to which foreign States may render such assistance.

#### *The work of the IDI*

The IDI already had opportunities to deal with the issue of “Intervention by invitation” (in the broadest meaning) in situations of non-international military confrontation within a State<sup>6</sup>. On the basis of a report by M. Schindler, it adopted a resolution on “The Principle of Non-Intervention in Civil Wars” at

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<sup>1</sup> As to the history of scientific views on this topic and recent cases see in particular GEORG NOLTE, *EINGREIFEN AUF EINLADUNG* (1999), 29 ; Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BYIL 1985, 189.

<sup>2</sup> Doswald-Beck, *op. cit.*, 189 ; Nolte, *op. cit.*, 65.

<sup>3</sup> This right flows from the territorial sovereignty of a State over a territory and finds its reflection e.g. in the Declaration of the Principles, A/RES/2625 (XXV).

<sup>4</sup> These restrictions can flow from principles such as the self-determination of peoples according to which States are precluded from taking forcible actions against the exercise of the right of self-determination ; see Declaration A/RES/2625 (XXV):

“Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.”

<sup>5</sup> It is a matter of a State’s discretion whether it restricts the exercise of its own power by its legal order such as human rights based on national law.

<sup>6</sup> See in particular the reports of the Rome Session 1973 (Annuaire 1973, 416) and the Wiesbaden Session (Annuaire 1975, 119)

the session of Wiesbaden in 1975<sup>7</sup>. This resolution<sup>8</sup> did not rule out altogether any such intervention : it did so only insofar as third States were called to “refrain from giving assistance to parties to a civil war which is being fought in the territory of another State”. According to its article on definitions, the resolution did not apply to :

- “ a) local disorders or riots ;
- b) armed conflicts between political entities which are separated by an international demarcation line or which have existed de facto as States over a prolonged period of time, or conflicts between any such entity and a State ;
- c) conflicts arising from decolonization”<sup>9</sup>.

This resolution permits an interpretation according to which military intervention by invitation is not outlawed in situations short off a civil war in the sense of the definition article of this resolution. However, one must not lose sight of the fact that the report clearly demonstrates a substantial divergence of views on this issue<sup>10</sup> so that there was no certainty on whether the resolution reflected *lex lata* or proposed articles de *lege ferenda*<sup>11</sup>.

The discussions revealed a certain tendency to an almost complete ban of such military intervention although several members of the commission explicitly recognized that the legitimacy of an intervention or of military assistance to a foreign government “à la demande expresse” of the latter was undisputed<sup>12</sup>.

<sup>7</sup> Already in 1900 the IDI adopted a resolution on “Droits et devoirs des Puissances étrangères, au cas de mouvement insurrectionnel, envers les gouvernements établis et reconnus qui sont aux prises avec l’insurrection“. However, the main gist of these articles was considered as no longer reflecting the state of affairs in 1973. It mainly dealt with the issue of the recognition of belligerency and the legal consequences ensuing therefrom.

<sup>8</sup> *Annuaire* 1975, 474

<sup>9</sup> *Ibid.*

<sup>10</sup> The divergence of views was reflected in particular in the voting results : 16 members voted in favour, 6 against and 16 members abstained ; *Annuaire* 1975 Report, 474. See also Nolte, *op.cit.*, 117 ; HANSPETER NEUHOLD, *INTERNATIONALE KONFLIKTE* (1977), 101.

<sup>11</sup> Nolte, *op. cit.*, 117 ; according to Schindler the resolution could only be seen as *de lege ferenda*, *Annuaire* 1973, 413. According to Schachter the declarations of the IDI, while it cannot be said that they “are clearly existing law in every detail, they are a persuasive interpretation of the general rule against nonintervention and should influence state practice”, *Oscar Schachter, International Law: The Right of States to Use Armed Forces*, 82 *Michigan Law Review* (1984), 1620.

<sup>12</sup> *Annuaire* 1975, 126.

The Resolution adopted at the session in Berlin in 1999 again referred indirectly to the principle of non-intervention and reiterated the 1975 resolution<sup>13</sup>.

Irrespective of the discussion of this characterization and despite the fact that this resolution has been adopted thirty years ago before the end of the cold war, the situation has not changed to warrant a substantially different solution although a slightly different approach might be advisable.

### *Writers and practice*

The question whether or not States may seek assistance from other States, or whether other States are entitled to comply with such a request, has always been disputed among writers as well as in practice<sup>14</sup>. As yet, the only matter that is undisputed is that present international law does not provide an unequivocal answer to the question of the rules governing such activities<sup>15</sup>. Doctrine is divided into a wide variety of opinions on this issue, reaching from the admissibility of such intervention, to their admissibility only under certain narrowly described circumstances and to the total exclusion<sup>16</sup>. This vagueness is understandable because of the political sensitivity of this issue ; the views expressed by different States in various international bodies such as the General Assembly depend on the political relations between the intervening State and the State<sup>17</sup>, or rather the government, requesting such an intervention as well as the relation to the object and purpose pursued by the relevant activity.

The view supporting the prohibition of such assistance results from the fear either that the involvement of a State in the political quarrels within another State could eventually generate a genuine international armed conflict<sup>18</sup>, that a

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<sup>13</sup> The first Preambular Paragraph reads : “Recalling its Resolutions “Droits et devoirs des Puissances étrangères, au cas de mouvement insurrectionnel, envers les gouvernements établis et reconnus qui sont aux prises avec l’insurrection” (Neuchâtel Session, 1900), “The Principle of Non-Intervention in Civil Wars” (Wiesbaden Session, 1975) and “The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States” (Santiago de Compostela Session, 1989)”, [http://www.idi-iiil.org/idiE/resolutionsE/1999\\_ber\\_03\\_en.PDF](http://www.idi-iiil.org/idiE/resolutionsE/1999_ber_03_en.PDF).

<sup>14</sup> Nolte, *op. cit.*, 29.

<sup>15</sup> See the criticism by Nolte of the views expressed by Doswald-Beck and Tanca, both supporting the prohibition of such military assistance, NOLTE, *op. cit.*, 119

<sup>16</sup> Nolte, *op. cit.*, 125.

<sup>17</sup> This power oriented relation inspired Doswald Beck to rule out such military activities, Doswald Beck, *op. cit.*, 226. Nolte criticizes also the paucity of the cases examined by Doswald Beck and Tanca, Nolte, *op. cit.*, 120.

<sup>18</sup> In this sense in the discussions in the IDI, according to Nolte, de la Pradelle, Virally and de Visscher, Nolte, 114 ; see also Ruth Wedgwood, *Commentary on Intervention*, in

10<sup>th</sup> commission : Present Problems of the Use of Force in International Law D. Sub-group on Intervention by Invitation  
10<sup>ème</sup> commission : Problèmes actuels du recours à la force en droit international D. Sous-groupe sur l’intervention sur invitation

right to render such assistance would be open to misuse or that the role of the United Nations could be impaired<sup>19</sup>.

However, there exists some authoritative evidence in favour of the admissibility of such intervention : In particular, two elements of evidence are usually quoted : Article 3 (e ) of Resolution A/RES/3314 (XXIX) including the definition of aggression :

“(t)he use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement ;

This phrase obviously attest the legality of the use of armed forces of a State within the territory of a foreign State provided that this use is in conformity with the latter’s consent. The term “use” related to “armed forces” points towards military activities and not only passive presence in the foreign State. It may be queried to which extent this use remains lawful, in particular whether it is limited by other norms embodied in the Charter or resulting from general international law, such as the right to self-determination or the rule of non-intervention<sup>20</sup>. Irrespective of the scope and effect of these limits, it cannot be denied that this wording of resolution 3314 points to the legality of the military activities of troops of foreign States with the consent of the State on whose territory these activities take place<sup>21</sup>. In this respect one has to note a shift in the position of the United Nations from a reluctance to admit the legality of such activities as it still transpires in Resolution 2625 (XXV) to the recognition of the legality in the later resolutions<sup>22</sup>.

Even prior to this resolution, the Security Council had confirmed the legality of such activities ; its Resolution S/RES/387 (1976) condemning South Africa’s aggression against the People’s Republic of Angola had underscored in its preambular paragraph “the inherent and lawful right of

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(Lori Fisler Damrosch, David J. Scheffer, eds), *Law and Force in the New International Order* (1991), 135.

<sup>19</sup> The discussions in the IDI in 1973 and 1975 were substantially influenced by the Vietnam War, Nolte, *op. cit.*, 116.

<sup>20</sup> These limits will be discussed *infra*.

<sup>21</sup> Le Mon argues that such “a right remains of continued utility in an international system that lacks effective multilateral security guarantees”, Christopher J. Le Mon, *Unilateral Intervention by Invitation in Civil Wars: The Effective Control Tested*, 35 N.Y.U. J. Int Law and Pol., (2003), 792 ; Nolte, 180.

<sup>22</sup> The reason could be seen in the change of the general political situation after the end of the Vietnam War, Nolte, *op. cit.*, 183, Doswald Beck, *op. cit.*, 212.

10<sup>th</sup> commission : **Present Problems of the Use of Force in International Law** D. Sub-group on Intervention by Invitation  
 10<sup>ème</sup> commission : **Problèmes actuels du recours à la force en droit international** D. Sous-groupe sur l'intervention sur invitation

every State, in the exercise of its sovereignty, to request assistance from any other State or group of States”.

This position was endorsed by the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States<sup>23</sup>, which abstained from quoting the duty of non-intervention in civil wars, which was still contained in the Declaration on the Principles on the Friendly Relations of States<sup>24</sup>, and explicitly stated in section II:

“(o) The duty of a State to refrain from any economic, political or military activity in the territory of another State without its consent”.

Accordingly, this resolution again permits the conclusion that consent is to be seen as a justification of military activities in the territory of other States<sup>25</sup>.

A second element of evidence stems from the wording of the ICJ in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua* where the Court stated<sup>26</sup> :

“Indeed, 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”<sup>27</sup>.

Again, this phrase which speaks of intervention on request does not provide any limit to such activities. In particular, such activities if performed upon request do not seem to be limited by the principle of non-intervention. Apparently, this text is inspired by the view that there exist lawful and unlawful interventions, or, in a different perspective, the unlawfulness of intervention is removed by the request notwithstanding the fact that these activities remain an intervention.

This construction seems to prevail still in the commentary on the first reading text on the Responsibility of States for internationally wrongful acts drawn up by the ILC : The commentary on draft article 29 equals the consent with the creation of an agreement:

The entry of foreign troops into the territory of a State, for example, is normally considered a serious violation of State sovereignty and often, indeed, an act of aggression. But it is clear that such action ceases to be so characterized

<sup>23</sup> A/RES/36/103

<sup>24</sup> A/RES/2625/XXV

<sup>25</sup> Nolte, *op. cit.*, 180

<sup>26</sup> Le Mon, *Unilateral Intervention by Invitation in Civil War*, 35 *International Law and Politics* (2003), 749 ; Nolte, *op. cit.*, 211

<sup>27</sup> *Case Concerning Military and Paramilitary activities in and against Nicaragua* (Nicaragua v United States of America), ICJ Reports 1986, p. 126, para. 246.

<sup>10<sup>th</sup></sup> commission : Present Problems of the Use of Force in International Law D. Sub-group on Intervention by Invitation  
<sup>10<sup>ème</sup></sup> commission : Problèmes actuels du recours à la force en droit international D. Sous-groupe sur l'intervention sur invitation

and becomes perfectly lawful if it occurred at the request or with the agreement of the State<sup>28</sup>.

The commentary further refers to the practice :

The consent or the request of the Government of a State whose sovereignty would have been violated in the absence of such consent or request has also been cited as justification for sending troops into the territory of another State in order to help it suppress internal disturbances, a revolt or an insurrection. Such justification has been advanced in many recent cases, including several brought to the attention of the Security Council and the General Assembly of the United Nations<sup>29</sup>.

This evidence confirming the admissibility of such intervention contradicts the principle of non-intervention as embodied in various legal instruments such as GA Resolution A/RES/2131 (XX)<sup>30</sup>.

Notwithstanding the reference to this principle, the existing analysis and reviews of the practice, undertaken by Doswald-Beck<sup>31</sup>, Le Mon<sup>32</sup> and Nolte<sup>33</sup>, do not deny the admissibility of such activities despite different views expressed in the General Assembly or Security Council. Accordingly, the starting point of

<sup>28</sup> <http://www.lcil.cam.ac.uk/Media/ILCSR/rft/Sr29.rtf>

<sup>29</sup> *Ibid.* ; it refers to cases such as that of the dispatch of British troops to Muscat and Oman in 1957 (United Kingdom, Parliamentary Debates (Hansard), House of Commons, Official Report (London, H. M. Stationery Office), 5th series, vol. 574 (29 July 1957), col. 872) and to Jordan in 1958 (*ibid.*, vol. 591 (17 July 1958), cols. 1437-1439 and 1507 ; Official Records of the Security Council, Thirteenth Year, 831st meeting, para. 28) ; by the United States of America in connexion with the dispatch of United States troops to Lebanon in 1958 (*ibid.*, 827th meeting, para. 34 ; Official Records of the General Assembly, Third Emergency Special Session, Plenary Meetings and Annexes, 733rd meeting, para. 7) ; by Belgium in connexion with the dispatch of Belgian troops to the Republic of the Congo in 1960 and in 1964 (Official Records of the Security Council, Fifteenth Year, 873rd meeting, para. 186, and *ibid.*, Nineteenth Year, 1173rd meeting, para. 73) ; by the USSR in connexion with the dispatch of Soviet troops to Hungary in 1956 and to Czechoslovakia in 1968 (*ibid.*, Eleventh Year, 752nd meeting, para. 136, and *ibid.*, Twenty-third Year, Supplement for July, August and September 1968, document S/8759) ; *ibid.*, fn 4. It is interesting to note, that the commentary on the equivalent article in the second reading text (article 20) as it was submitted to the General Assembly abstains from referring to these cases ; JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY* (2002), 163.

<sup>30</sup> See *infra*

<sup>31</sup> *Op. cit.*,

<sup>32</sup> *Op. cit.*,

<sup>33</sup> *Op. cit.*, this work undoubtedly constitutes the broadest analysis of the practice in this field.

this analysis must be that such activities are lawful as it follows from the sovereignty that entitles a State to request other States for military assistance to quell internal disorders<sup>34</sup>. What remains disputed and intensively discussed is the question of the type and author of the invitation (request) and the limits of such activities under international law<sup>35</sup>.

## Part II. The parameters of the subject under discussion

The authors who deal with the issue of “intervention by invitation” sometimes addresses also the issue of intervention by invitation from the side of the opposing party to a civil war<sup>36</sup>. The Rapporteur’s understanding of the matter under discussion is that it relates only to invitation from the side of the government, notwithstanding the difficulties of defining the latter’s legitimacy<sup>37</sup>. Further, this report does not address the involvement of international organizations in such military assistance since the issue is dealt with in other reports.

A second issue that is frequently dealt with in conjunction with the matter of the present Report is the problem of military assistance if the opposite side received substantial support and assistance from a third State. This issue was addressed by the 1975 Resolution of the IDI<sup>38</sup>. In order not to undermine the 1975 Resolution it is proposed not to deal with this issue here.

### *Definitions and scope of activities*

Already at the outset, it must be noted that the meaning of “intervention by invitation” requires certain clarifications, if not corrections.

<sup>34</sup> Christopher J. Le Mon, *Unilateral Intervention*, *op. cit.*, 743.

<sup>35</sup> It does not fall within the ambit of this report to discuss the legal consequences of such activities such as the applicability of international humanitarian law to such a situation.

<sup>36</sup> See e.g. Schindler, *Annuaire* 1973, 433. It is generally upheld that “rebel forces have never possessed a comparable right to receive external assistance”, David Wippman. *Change and Continuity in Legal Justifications for Military Intervention in Military Conflict*, 27 *Colum.Human Rights L. Rev.* (1996), 440 ; *Case Concerning Military and Paramilitary activities in and against Nicaragua* (Nicaragua v United States of America), ICJ Reports 1986, p. 126, para. 246.

<sup>37</sup> See *infra*

<sup>38</sup> See Article 5: “Whenever it appears that intervention has taken place during a civil war in violation of the preceding provisions, third States may give assistance to the other party only in compliance with the Charter and any other relevant rule of international law, subject to any such measures as are prescribed, authorized or recommended by the United Nations”.

10<sup>th</sup> commission : Present Problems of the Use of Force in International Law D. Sub-group on Intervention by Invitation  
10<sup>ème</sup> commission : Problèmes actuels du recours à la force en droit international D. Sous-groupe sur l'intervention sur invitation

### a. Character of Activities

#### i) From “intervention” to “military assistance”

The title of this Report includes the term “intervention”. But in the given context, this term is a misnomer. Hardly any other expression used in international law is as vague, blurred, controversial and disputed as the term “intervention”<sup>39</sup>. There exist a wide variety of definitions or attempts at a definition. A broad potential width of activities is addressed by this term, including military intervention. According to the Report of the “International Commission on Intervention on the Duty to protect”, any application of pressure to a State is sometimes regarded as intervention, including “conditional support programmes by major international financial institutions whose recipients often feel they have no choice but to accept”<sup>40</sup>. For others, any kind of outright coercive actions would fall under this term – actual or threatened political and economic sanctions, blockades, diplomatic and military threats, and international criminal prosecutions<sup>41</sup>. Some, however, would confine its use to military force.

General Assembly’s Resolutions 2625 (XXV) and 2131(XX) include in this term :

“armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements”

as well as

“the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind”

and, finally, activities consisting in organizing, assisting, fomenting, financing, inciting or tolerating subversive, terrorist or armed activities aiming at the violent overthrow of the regime of another State, or interference in civil strife in another State<sup>42</sup>.

The classical definition mostly referred to is that given by Oppenheim. It states that intervention consists of any dictatorial interference by a State into the affairs of another State for the purpose of maintaining or altering the actual

<sup>39</sup> Wehser, *Die Intervention nach gegenwärtigem Völkerrecht*, in (Simm, Blenk-Knocke eds), *ZWISCHEN INTERVENTION UND ZUSAMMENARBEIT* (1979), 24 ; see also the «ICUSS Report on the Responsibility to protect» ; [http://www.iciss.ca/report2-en.asp#chapter\\_1](http://www.iciss.ca/report2-en.asp#chapter_1).

<sup>40</sup> <http://www.iciss.ca/report2-en.asp>.

<sup>41</sup> *Ibid.*, point 1.37.

<sup>42</sup> Resolution A/RES/2131(XX) and A/RES/2625(XXV).

10<sup>th</sup> commission : Present Problems of the Use of Force in International Law D. Sub-group on Intervention by Invitation  
10<sup>ème</sup> commission : Problèmes actuels du recours à la force en droit international D. Sous-groupe sur l'intervention sur invitation





























































