

## **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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## 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>.

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<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.

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

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

<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.

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

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

condition of things”<sup>43</sup>. The element “dictatorial” in this definition seems to exclude from the term “intervention” activities of a foreign State based on an invitation by the State addressed by this activity. Other definitions which do not emphasise the “dictatorial” element by defining intervention as “organized or systematic activities directed across recognized boundaries and aimed at affecting the political authority structures of the target”<sup>44</sup> likewise seem to exclude “intervention by invitation” since these “interventions” or rather acts of assistance do not purport to affect detrimentally the political structures of the inviting State. Such activities pursue different objectives so that they must be distinguished, on the one side, as assistance on request and as intervention, on the other. It can easily be stated that the objective of intervention is diametrically opposed to that of this type of assistance : If the intervention is carried out against the will of the government of the State where the intervention occurs, the assistance receives its legality from the support of the government concerned expressed by the latter’s assent. The definition of intervention in the General Assembly resolutions 2625 (XXV) and 2131 (XX) clearly express this opposition when they speak of the coercion of another State and of the subordination of the exercise of sovereign rights<sup>45</sup>. Seen in this perspective, one cannot but come to the conclusion that “intervention by invitation” is a *contradiction in se*. It is interesting to note that resolution A/RES/36/103 “Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States” only asserts the “duty of a State to refrain from any economic, political or military activity in the territory of another State without its consent” without stating that consent would amount to a justification of otherwise illegal intervention.

In its 1975 Resolution, the IDI quite correctly abstained from elaborating a definition and replaced this term by “assistance”. For this reason it is suggested to use this term in the present Report as well instead of intervention and to qualify it by the epitheton “military” so that the present topic should be referred to as “military assistance on request”. In any case, the use of “assistance” instead of “intervention” avoids the problem created by the necessity to qualify “intervention” as lawful although it must be kept in mind that such activities performed without the consent of the target State amount to violations of territorial sovereignty and, eventually, to a breach of the fundamental rule of the prohibition of use of force.

<sup>43</sup> ROBERT JENNINGS, ARTHUR WATTS, OPPENHEIM’S INTERNATIONAL LAW (1992), 430.

<sup>44</sup> Oran R. Young, *Systemic Bases of Intervention*, in (J.N. Moore ed.), LAW AND CIVIL WAR IN THE MODERN WORLD (1974), 111.

<sup>45</sup> See *supra*.

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

*ii) Different types of assistance*

This “military assistance” can take the most different forms : It can reach from the supply of war material to the sending of military advisers and trainers, of other personnel and of military troops. Neither the 1975 Resolution of the IDI nor the reports preceding it<sup>46</sup> defined the scope of assistance to be covered. Only Article 3 of the 1975 resolution offers a certain indication of which kinds of activities should also be addressed as it excludes from the prohibited assistance beside purely<sup>47</sup> “humanitarian aid” also “technical and economic aid which is not likely to have any substantial impact on the outcome of the civil war”<sup>48</sup>. Since an explicit exclusion would otherwise not be needed, it must be concluded that this kind of activities should also be covered by the assistance targeted by this resolution.

As to the present Report, assistance to be addressed by it is understood as being rendered for military purposes so that the term “military assistance” can be seen as adequate in order to characterize the assistance.

Nevertheless, a further limitation is needed since the term “military assistance” is still not clear enough ; if even reduced to the sending of military personal this form of assistance can be subject to two different legal regimes :

1. Individual military persons can be placed under the command and control of the receiving State so that the acts of these persons would become attributable to the latter.
2. In contrast, troops can also be sent to give military assistance, but act under the command and control of the sending State so that their acts remain attributable to the sending State. This situation does not include the sending of officers, military experts, instructors and similar personal who act under supervision and control of the receiving State.

The original title of the topic under consideration seems to exclude the latter type of cases since if taken in its original meaning “intervention” (military assistance) is considered as an act

– that is attributable to the foreign State and

<sup>46</sup> See, for instance, the report of 1973.

<sup>47</sup> The qualifier „purely“ is added in Article 4

<sup>48</sup> Article 3 reads as follows: “Exceptions

Notwithstanding the provisions of Article 2, third States may : a) grant humanitarian aid in accordance with Article 4 ; b) continue to give any technical or economic aid which is not likely to have any substantial impact on the outcome of the civil war ; c) give any assistance prescribed, authorized or recommended by the United Nations in accordance with its Charter and other rules of international law.”

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

- requires certain activities attributable to that State in the territory of the requesting State.

Although State responsibility is not the matter discussed to be in this Report, the Articles on the Responsibility of States for internationally wrongful acts elaborated by the ILC and taken note of by the General Assembly<sup>49</sup> are very helpful to clarify certain issues, in particular concerning the attributability of acts to a State. The activities that should be excluded from the present report correspond to those covered by Article 6 of these Articles<sup>50</sup> according to which the receiving State has to assume responsibility for them, notwithstanding the fact that the requested States remain responsible for the sending of the personnel (but not for the acts performed by them).

This approach excludes not only the mere delivery of arms and other war material but also the sending of individual military personnel. It includes only the sending of troops remaining under the control of the sending State in the performance of assistance given the requesting State. To concentrate on those acts is justified by the fact that in the case of a secondment of individuals to a foreign State to perform acts attributable to the latter, the sending State can no longer be held responsible for their activities as foreseen under Article 6 of the Articles on State Responsibility<sup>51</sup>. In the situation under discussion it has to be assumed that the troops sent to the assistance remain organs of the sending State which has to answer for their acts.

For these reasons, it is proposed that the present Report only addresses situations of international concern as reflected in international discussions. This approach addresses most cases where the legality of foreign assistance was discussed, “interventions”, *inter alia*, in Hungary 1956<sup>52</sup>, Stanleyville 1964<sup>53</sup>,

<sup>49</sup> Resolution A/RES/56/83

<sup>50</sup> Article 6 of these articles reads: “**Conduct of organs placed at the disposal of a State by another State.** The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed”.

<sup>51</sup> Although in his report, the Special Rapporteur excluded “experts from another State or an international organization advising a Government, or individual officials seconded to another State” from the scope of this article, it has nevertheless to be recognized that these persons perform activities that are attributed to the receiving State. The commentary upon the respective draft article of the first reading text clearly indicates that such persons do not fall under this provision only for the reason that they are no longer organs of the sending State ; they are, however, able to trigger the responsibility of the receiving State.

<sup>52</sup> The most extensive presentation and discussion of the different cases is offered by Nolte ; Nolte, *op. cit.*, 79 ; Doswald-Beck, *op. cit.*, 223 ; JENS HACKER, DER OSTBLOCK (1983), 557.

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

Gabun 1964<sup>54</sup>, Dominican Republic 1965<sup>55</sup>, CSSR 1968<sup>56</sup>, Afghanistan 1979<sup>57</sup>, Grenada 1983<sup>58</sup>, Panama 1989<sup>59</sup> to Central African Republic 1996<sup>60</sup> and Iraq 2004<sup>61</sup>. In all these cases troops were sent to a foreign State on an alleged or factual request of the latter as separate bodies over which the sending State retained command and control.

*iii) Should peace-keeping operations be included ?*

The question has been raised whether this Report should cover activities that could be qualified as “peace-keeping operations” or “peace-enforcing operations” (depending also on the definition of these kinds of activities). Since in the overwhelming number of cases they are subject to the consent of the target State, practice seems to favour their inclusion if they are not authorized by the United Nations.

However, most such cases are based on relevant resolutions of international organizations, which can be of two different kinds : They can establish peace-keeping forces that become subsidiary organs of the relevant organization and

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<sup>53</sup> Nolte, *op. cit.*, 261 ; Doswald-Beck, *op. cit.*, 217.

<sup>54</sup> Nolte, *op. cit.*, 305.

<sup>55</sup> Nolte, *op. cit.*, 268 ; Doswald-Beck, *op. cit.*, 227.

<sup>56</sup> Nolte, *op. cit.*, 271 ; Hacker, *op. cit.*, 775.

<sup>57</sup> Nolte, *op. cit.*, 273, Doswald-Beck, *op. cit.*, 230 ; W.Michael Reisman, James Silk, “Which Law Applies to the Afghan Conflict?” 82 AJIL (1988), 459.

<sup>58</sup> NOLTE, *op. cit.*, 282, DOSWALD-BECK, *op. cit.*, 236, Christopher C. Joyner, *The United States Action in Grenada: Reflections on the Lawfulness of Invasion*, 78 AJIL (1984), 138.

<sup>59</sup> Nolte, *op. cit.*, 289, Abraham Sofaer, *The Legality of United States Action in Panama*, 29 Colum. J. Trans. L. (1991), 281 ; Louis Henkin, *The Invasion of Panama Under International Law: A Gross Violation*, 29 Colum. J. Trans. L. (1991), 294.

<sup>60</sup> Nolte, *op. cit.*, 342

<sup>61</sup> See Christopher Le Mon, *Legality of a Request by the Interim Iraqi Government for the Continued Presence of United States Military Forces*, <http://www.asil.org/insights/insigh135.htm> ; see also the “report on the Chatham House discussion of 28 February 2007: The Principle of Non-Intervention in Contemporary International Law: Non-Interference in A State’s Internal Affairs Used to be a Rule of International Law: Is It Still ?” In this discussion, it was clearly stated that “(i)t should be noted at the outset that intervention (even military intervention) with the consent, duly given, of the Government of a State is not precluded“, but that this rule is notoriously to abuse. <http://www.chathamhouse.org.uk/pdf/research/il/IL280207.pdf>. ; Andrea Carcano, *End of the Occupation in 2004? The Status of the Multinational Force in Iraq After the Transfer of Sovereignty to the Interim Iraqi Government*, 11(1) Journal of Conflict and Security Law (2006), 60 ; Catherine Quidenus, *The Continued Presence of the Multinational Force on Iraqi Request*, in ARIEL (in print).

act on their behalf<sup>62</sup> or they can authorize the deployment of such forces<sup>63</sup>. In the latter case, the forces do not become subsidiary organs of the authorizing organization which does not have to answer for the acts performed by these forces. These forces remain forces of the sending State. However, the title of the present topic suggests to exclude even those activities from this Report since the legal instrument by which they become lawful will then be the authorizing resolution and not the request of the State<sup>64</sup>.

#### **b. Scope of application *ratione temporis***

This topic relates to forcible activities as are performed within the territory of another State upon a request by the latter. They can be performed in the course of civil strife, civil war or any other kind of disturbances in the territory of the requesting State where no third State is involved.

This condition allows for the delimitation of this topic *ratione temporis* insofar as activities of the requested State before or after the advent of such situations do not fall within the ambit of the present topic.

The cases falling within the purview of the situation addressed within this topic could go beyond the situations addressed by common Article 3 of the Geneva Conventions<sup>65</sup> or Additional Protocol II of 1977<sup>66</sup> since they could also

<sup>62</sup> This is the traditional practice of the peace keeping operations of the United Nations, where the peace keeping troops constitute subsidiary organs and the official acts are attributable to the United Nations.

<sup>63</sup> The United Nations has started to follow this practice in particular since the Resolution S/RES/678 (1990).

<sup>64</sup> The authorizing resolution would not be needed and would be redundant if the activities in question would constitute military assistance on request. In contrast, the resolution would generate a legal effect, only if these activities were not military assistance of such nature. The best example of this kind is the case of Haiti, where the Security Council did not consider Aristide's consent as sufficient to permit military action ; David Wippman, *Pro-democratic intervention by invitation*, in (Gregory H. Fox, Brad R. Roth eds), *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* (2000), 302.

<sup>65</sup> This article relates to the "case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties", *UNTS* No. 970 – 973.

<sup>66</sup> This Convention applies "to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol" ; it does not apply to "to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts." *UNTS*

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

encompass situations that are below the threshold of those covered by the said Articles, like situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts and excluded *ratione materiae* from Additional Protocol II of 1977<sup>67</sup>.

In view of the IDI Resolution of 1975 that declared as illegal any such assistance if performed at the time of civil war as defined in its Article 2, it is here proposed to restrict the notion of military assistance to activities carried out in situations reaching from internal disturbances up to non-international conflicts, notwithstanding the possible illegality of such acts. However, they do not extend to situations qualified as “civil war” or “armed conflict” either in the sense of common Article 3<sup>68</sup> or of Additional Protocol II.

It could be argued that on the basis of the different objectives of intervention on the one side and assistance of the other it would be possible to deal also with assistance during civil war without becoming incompatible with the resolution. However, the text of the resolution does not permit such a distinction since it speaks generally of assistance that is prohibited during situations of civil war<sup>69</sup>.

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No. 17513. Protocol I applies to the situations referred to in common article 2 of the Geneva Conventions, including armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination” (Article 1 (3))

<sup>67</sup> Article 1 (2) reads: “This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts”. Similarly, Article 8 (2) (d) excludes “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature” from the application *ratione materiae* of the Rome Statute of the International Criminal Court ; *U.N.T.S.* No. 38544.

<sup>68</sup> According to Gandhi, commenting on this article, “in the absence of the definition of armed conflict, it is left to the state to determine whether an armed conflict exists or not. In practice, low intensity conflicts are not considered as armed conflict”. M. Ghandi, Common Article 3 of Geneva Conventions, 1949 in the Era of International Criminal Tribunals, 11 *ISILYBIHRL* 2001, <http://www.worldlii.org/int/journals/ISILYBIHRL/2001/11.html>.

<sup>69</sup> However, it must also be borne in mind that the Chatham House discussion on intervention concluded that “It is sometimes suggested that intervention in a civil war on the side of the Government and at its request is unlawful, but there is little support for this in practice.” Nevertheless, for the reasons of not undermining the 1975 resolution of the IDI situations of civil war are not addressed.

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

The exclusion of the situation of civil war situations requires first a definition of that notion<sup>70</sup>. In its definition of civil war, the 1975 IDI Resolution referred to the criteria of the intention of the insurgent movements since it defined civil war as a situation where there is

“opposition between established government and one or more insurgent movements whose aim is to overthrow the government or the political, economic or social order of the State, or to achieve secession or self-government for any part of that State”

In contrast, the definition of armed conflict in Additional Protocol II was more restrictive as it was deemed to introduce “a material criterion: the existence of open hostilities between armed forces which are organized to a greater or lesser degree. Internal disturbances, characterized by isolated or sporadic acts of violence, therefore do not constitute armed conflict in a legal sense, even if the government is forced to resort to police forces or even to armed units for the purpose of restoring law and order. Within these limits, non-international armed conflict seems to be a situation in which hostilities break out between armed forces or organized armed groups within the territory of a single State. Insurgents fighting against the established order would normally seek to overthrow the government in power or alternatively to bring about a secession so as to set up a new State”<sup>71</sup>.

Finally, Additional Protocol II singles out three distinctive criteria :

- “ (i) a responsible command ;  
 (ii) such control over part of the territory as to enable them to carry out sustained and concerted military operations ; and

<sup>70</sup> It might be useful to quote the following definition of civil war : “(1) That the Party in revolt against the de jure Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention. (2) That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory. (3) (a) That the de jure Government has recognized the insurgents as belligerents ; or (b) That it has claimed for itself the rights of a belligerent ; or (c) That it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention ; or (d) That the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression. (4) (a) that the insurgents have an organization purporting to have the characteristics of a State. (b) That the insurgent civil authority exercises de facto authority over the population within a determinate portion of the national territory.(c) That the armed forces act under the direction of an organized authority and are prepared to observe the ordinary laws of war. (d) That the insurgent civil authority agrees to be bound by the provisions of the Convention”.

<sup>71</sup> <http://209.85.135.104/search?q=cache:EwBYEFYurbwJ:www.icrc.org/ihl.nsf/COM/475>

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

(iii) the ability to implement the Protocol”<sup>72</sup>.

According to the commentary, this Protocol does not apply to internal disturbances and tensions although it is difficult to define these situations :

“The concept of internal disturbances and tensions may be illustrated by giving a list of examples of such situations without any attempt to be exhaustive : riots, such as demonstrations without a concerted plan from the outset ; isolated and sporadic acts of violence, as opposed to military operations carried out by armed forces or armed groups ; other acts of a similar nature, including, in particular, large scale arrests of people for their activities or opinions”<sup>73</sup>.

During the first session of the Conference of the Government experts in 1970, internal disturbances were defined as follows :

“This involves situations in which there is no non-international armed conflict as such, but there exists a confrontation within the country, which is characterized by a certain seriousness or duration and which involves acts of violence. These latter can assume various forms, all the way from the spontaneous generation of acts of revolt to the struggle between more or less organized groups and the authorities in power. In these situations, which do not necessarily degenerate into open struggle, the authorities in power call upon extensive police forces, or even armed forces, to restore internal order. The high number of victims has made necessary the application of a minimum of humanitarian rules.”

Situations of “internal tensions” were deemed to :

“include in particular situations of serious tension (political, religious, racial, social, economic, etc.), but also the sequels of armed conflict or of internal disturbances. Such situations have one or more of the following characteristics, if not all at the same time :

- large scale arrests ;
- a large number of "political" prisoners ;
- the probable existence of ill-treatment or inhumane conditions of detention ;
- the suspension of fundamental judicial guarantees, either as part of the promulgation of a state of emergency or simply as a matter of fact ;
- allegations of disappearances”<sup>74</sup>.

<sup>72</sup> ICRC Commentary ; <http://www.icrc.org/ihl.nsf/COM/475-760004?OpenDocument>, No. 4451

<sup>73</sup> ICRC Commentary ; <http://www.icrc.org/ihl.nsf/COM/475-760004?OpenDocument>, No. 4474

<sup>74</sup> *Ibid.*, No. 4476 ; footnotes omitted.

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

Finally, the ICRC commentary concludes that “there are internal disturbances, without being an armed conflict, when the State uses armed force to maintain order; there are internal tensions, without being internal disturbances, when force is used as a preventive measure to maintain respect for law and order”<sup>75</sup>. Of course, it cannot be excluded that the conclusion by Ghandi that “certain non-international conflicts may be more violent, extensive and consumptive of life and value than international one”<sup>76</sup> also applies to the relation between internal disturbances and tensions on the one side and non-international armed conflicts on the other.

Pursuant to these various explanations and due to the introduction of the objective criterion, the definition of non-international armed conflict as used in Additional Protocol II is narrower and does not cover all cases addressed by common Article 3<sup>77</sup> or the definition in the 1975 IDI Resolution. Since, however, this definition of Additional Protocol II has already found wide acceptance in practice, it now seems appropriate to apply it also in the present Report so that the latter addresses those situations where acts of force are committed, but the conditions spelled out in the Additional Protocol II are not yet met. To add the subjective element referred to in the 1975 IDI Resolution would certainly create difficulties in the production of evidence.

It is obvious that this meaning of military assistance does not extend to situations of international armed conflict as defined in Protocol Additional I since the term “intervention” indicates an exclusion of “international” conflicts where other States are involved. Assistance in such a situation would amount to the exercise of collective self-defence, a matter that does not fall under this topic. However, fighting against persons, bands etc infiltrating the territory of the requesting State from outside do not give rise to the international character of the conflict unless another State gets involved in the conflict against the government.

#### ***Request (invitation/consent)***

Many discussions have already taken place concerning the issue of the invitation which is seen as one of the decisive elements in this respect. In several cases assisting States justified their assistance by an invitation but were met with disbelief on the part of other States<sup>78</sup>. The 1975 IDI Resolution did not deal with this issue as it declared such activities in civil war situations as

<sup>75</sup> *Ibid.*, No. 4477.

<sup>76</sup> Ghandi, *op. cit.*, Reisman, Silk, *op. cit.*, 481.

<sup>77</sup> Reisman, Silk, *op. cit.*, 464.

<sup>78</sup> So, for instance, in Afghanistan 1979; see Reisman, Silk, *op. cit.*, 485, according to whom the invitation was self-issued.

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

unlawful irrespective of whether or not they had been carried out upon invitation.

Contrary to this Resolution, the present Report has to deal with situations where assistance is lawful because of the consent of the target State so that a particular need arises to examine the validity of such consent expressed by an invitation or request. The discussion of the request has to deal with the author of the request, with its the form and with the content of the request.

#### a. Author

The topic of this Report relates to requests issued only by the legal government of one State to that of another State. Doctrine is quite clear when asserting that it is within the sovereign prerogative of a State and its government to give such consent in the form of a request<sup>79</sup>. Frequently, there were doubts regarding the author of the invitation on which objections to the validity of the consent were based<sup>80</sup>. According to Brownlie, “the difficulty arises when the legal status of the government which is alleged to have given consent is a matter of doubt”<sup>81</sup>. However, doctrine and practice use different criteria to define the legality of the author of such requests, such as effectiveness or democratic principles.

By contrast, the request by a group fighting against a government cannot be regarded as one issued by a legal government, even if the group has already gained power and control over a certain portion of the State’s territory so that such a request falls outside the scope of this Report. It remains to discuss whether, in the case of a State that had lost its authority (“failed State”<sup>82</sup>) or of the absence of a “generally recognized” government, a military assistance on request could be considered at all as lawful and, if so, whose request could be regarded as justifying military assistance.

#### i) Effectiveness

The question has been raised whether, in the presence of armed opposition to a government, the authorities giving consent could still be considered as able or sufficiently effective to represent the will of the State.<sup>83</sup> An affirmative answer relied on effectiveness of the government as the criterion of validity of

<sup>79</sup> Wippman, *Change and Continuity*, *op. cit.*, 440 ; Le Mon, *Unilateral Intervention*, *op. cit.*, 759.

<sup>80</sup> So, for instance, concerning the case of Czechoslovakia in 1968, Nolte, *op. cit.*, 272.

<sup>81</sup> IAN BROWNLIE, *International Law and the Use of Force by States* (1963), 317.

<sup>82</sup> See in particular Daniel Thürer, *Der Wegfall effektiver Staatsgewalt: der 'Failed State'*, 34 *Berichte der Deutschen Gesellschaft für Völkerrecht* (1995), 9.

<sup>83</sup> See for instance Doswald-Beck, *op. cit.*, 195.

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

consent<sup>84</sup>. From this perspective, the authority which has come to power after a brutal overthrow of the former government and which exercises full control over the country would have to be regarded as the legitimate government of the State, entitled to give consent that may be regarded as valid under international law.

Undoubtedly, effectiveness remains a fundamental criterion for judging the legality of a certain government representing the State, but cannot be the only one. A criterion based solely on the effectiveness of a government opens the way for the argument that a government is no longer legal if it encounters major resistance in the country. The criterion of effectiveness comes under attack from two sides : on the one hand, it is argued that the existence of an opposition within the State would signify a lack of effectiveness so that a State or rather a government suffering armed opposition could no longer issue a valid request for assistance. It is even stated that in such a situation “the presumption that the government represents the State may become untenable”<sup>85</sup>. On the other hand, practice proves that authorities that came to power by a violent overthrow of the government were frequently not recognized by other States as legitimized to represent the State. So, for instance, the case of Kampuchea proves that effectiveness does not suffice to induce recognition as legal government. States did not consider any request stemming from such authorities as authorizing lawful military assistance<sup>86</sup>. Exercising control only for a short period of time is not deemed sufficient to establish effectiveness ; a certain period is needed during which the effective control must be exercised. Thus, when the heads of a government were ousted and forced by rebels to leave the seat of the government, the former government continued to be considered the legal government entitled to issue a request for assistance to regain the control over the State, as occurred in the case of Haiti<sup>87</sup>. According to Nolte comparable situations existed in Sierra Leone 1995<sup>88</sup>, Angola 1993, Georgia 1993, Liberia 1990, Mozambique 1992, Sudan 1995, Tajikistan 1994 and Zaire 1997 where the government either no longer exercised any control over the State’s territory or controlled on small parts of it<sup>89</sup>. Nowrot and Schabacker recognize in the case of Haiti and its President, Aristide, “a turning point in the determination of

<sup>84</sup> See Le Mon, *Unilateral Intervention*, *op. cit.*, 745.

<sup>85</sup> David Wippman, *Pro-democratic intervention by invitation*, in (Gregory H. Fox, Brad R. Roth eds, *Democratic Governance and International Law*, 2000), 298.

<sup>86</sup> Eventually, in the case of Kampuchea other States did not refer to the invitation which had been issued by the people of Kampuchea, Nolte, *op. cit.*, 523

<sup>87</sup> Karsten Nowrot , Emily W. Schabacker, *The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone*, 14 *Am. U. Int'l L. Rev.* (1998), 338 ; Nolte, *op. cit.*, 146.

<sup>88</sup> Nowrot, Shabacker, *op. cit.*, 339.

<sup>89</sup> Nolte, *op. cit.*, 147.

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

the legitimate government of a state under international law”<sup>90</sup> towards a rejection of the "effective control" doctrine which, during the Cold War, was based on the fact of the absence of commonly accepted understanding of democracy<sup>91</sup>.

## ii) Recognition

Some authors argue that “the incumbent government must have the recognition of the international community. Under the traditional approach of governmental recognition, the government must be in *de facto* control of the territory and the means of administration, have the acquiescence of the population, and indicate its willingness to comply with the state's international obligations”<sup>92</sup>.

Generally, recognition of governments is induced only in the cases of a new government coming into power after a coup d'état, a revolution or any other break of continuity. Although in the overwhelming majority even of such cases, States do not explicitly recognize foreign governments<sup>93</sup>, recognition can be derived from the establishment and maintenance of normal contacts with a government<sup>94</sup>. In order not to recognize a government of a foreign State, a State must clearly express its wish not to recognize. But, one can easily deduce a certain general recognition of the government of a foreign State from the fact that the majority of States, in particular those which have the closest relations with the government in question and the major powers, did not express any explicit objection to the recognition of a government. A further decisive element is certainly the attitude of regional or universal international organizations towards this government, in particular the United Nations, and relevant regional organizations.

The element of duration corresponds to a general recognition by the plurality of States inasmuch as recognition can be induced from the conduct of normal State-to-State contacts with the government during a certain time. The effect of recognition continues even if the government authorities were forced to leave their posts for a short time : there has always been a presumption in favour of the existing and generally recognized legal government even if it encounters armed resistance in the country, its situation being comparable to

<sup>90</sup> Nowrot, Shabacker, *op. cit.*, 337.

<sup>91</sup> *Ibidem*, *op. cit.*, 338.

<sup>92</sup> Davis Brown, *The Role of Regional Organizations in Stopping Civil Wars*, 41 A.F. L. Rev. (1997,) 270.

<sup>93</sup> Nolte, *op. cit.*, 141.

<sup>94</sup> ROBERT JENNINGS, ARTHUR WATTS, *OPPENHEIM'S INTERNATIONAL LAW*, vol. I (1992), 148.

that of governments in exile<sup>95</sup>. It must, however, also be admitted that, according to other authors, present international law does not provide a clear answer to the question whether a *de jure* government overthrown in breach of the constitution may authorize external military measures to re-establish its authority. Nevertheless, it was also recognized that presently most States seemed to ignore a brief discontinuity in the *de jure* government's effective control of the State's territory as long as the military measures were swift and small in scale<sup>96</sup>.

### iii) Democratic legitimacy

The theory of effective control as the basis for recognition has become subject to challenges referring to democratic elements. "Academics have suggested that internal democratic legitimacy does play a role in the legal question of external legitimacy"<sup>97</sup>. It has been argued that the democratic nature of the government could also form a criterion for the assessment of its legitimacy<sup>98</sup>. Assistance on request would only be legitimate if its purpose was to restore or protect democratic legitimacy of the requesting government. The examples quoted in support of this view are the cases of Haiti and Sierra Leone<sup>99</sup>. Other governments were not recognized although they had gained full control of the territory because of their non-democratic origin or performance<sup>100</sup>.

However, even authorities which acceded to power in a non-democratic way and were subsequently not confirmed by general elections, and still did not meet with objections concerning the exercise of the functions of government, were seen as entitled to issue a request for military assistance<sup>101</sup>. Even writers who militate in favour of the democratic legitimacy recognize only a tendency

<sup>95</sup> Jennings, Watt, *op. cit.*, 148 ; Stefan Talmon, *Who is a Legitimate Government in Exile? Towards Normative Criteria for Governmental Legitimacy in International Law*, in (Guy S. Goodwin & Stefan Talmon eds.), *THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE* (1999, 523. Wippman, *Pro-democratic intervention, op. cit.*, 299.

<sup>96</sup> Wippman, *Pro-democratic intervention, op., cit.*, 300.

<sup>97</sup> Le Mon, *Unilateral Intervention, op. cit.*, 744 ; Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 Am. J. Int'l L (1992), 46.

<sup>98</sup> David Wippman, *Pro-democratic intervention by invitation*, in (Gregory H. Fox, Brad R. Roth eds), *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* (2000), 300.

<sup>99</sup> *Ibid.*, 301, 303.

<sup>100</sup> One pertinent case was the government of Afghanistan in 1994 whose legitimacy was contested ; Nolte, *op. cit.*, 156.

<sup>101</sup> Nolte, *op. cit.*, 240, 601. He quotes the cases of Chad, Djibouti, Rwanda and Gabon, where military assistance was given governments which had not been elected democratically.

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

in this direction, but not yet an established norm<sup>102</sup>. Writers confirm the view that recognition is decisive for assessing whether an authority calling itself government is entitled to issue a request legitimising military assistance. The only exception that could be made in support of the democratic element is that “the legitimacy of a democratically elected government generally offsets its lack of effectiveness”<sup>103</sup>. This view results from the reactions following the coups in Sierra Leone, Haiti, Burundi, Niger, Ivory Coast, Guinea Bissau, and Togo<sup>104</sup>. As Ruth Wedgwood calls it: “A democratic power asked to intervene is obliged to assay the character of the regime making the request”<sup>105</sup>.

However, as will be presented<sup>106</sup>, a result comparable to that generated by this legal limitation will be achieved – if the democratic legitimacy is derived from the principle of self-determination or from a legal obligation to abide by democratic governance in *statu nascendi* – by the limits imposed by international law on military assistance.

iv) Organs competent to issue a request

A further aspect to take into account is the identification of the State organ entitled to issue a valid request for assistance.

As to the validity of consent, the Articles on State Responsibility offer no further characterization of valid consent as this was considered a topic outside State responsibility<sup>107</sup>. Nevertheless, it was emphasised that “validity” had different implications: on the one hand with regard to the competent author of such consent, on the other with regard to cases “in which consent may not be validly given at all”<sup>108</sup>. As to the first aspect, the commentary on Article 20 states that different organs may be competent, depending on the issue in question<sup>109</sup>. Applicable rules of international law, such as Article 7 of the Vienna Convention of 1969 on Treaties, and of national law, mostly constitutional law, provide guidance in this respect.

<sup>102</sup> Nowrot, Schabacker, *op. cit.*, 338.

<sup>103</sup> Jean d'Aspremont, *Legitimacy of Governments in the Age of Democracy*, 38 N.Y.U. J. Int'l L. & Pol. (2006), 889.

<sup>104</sup> *Ibidem*.

<sup>105</sup> Ruth Wedgwood, *Commentary on Intervention by Invitation*, in (Lori Fisler Damrosch, David Scheffer eds), *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* (1991), 138.

<sup>106</sup> See *infra*.

<sup>107</sup> “Commentary on Article 20 of the Articles on the Responsibility of States for Internationally Wrongful Acts”, Report of the ILC 2001, 174.

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*, 175.

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

Nolte derives from practice that only requests issued by the highest State organs should be considered valid or, more generally, expressions of consent to foreign military assistance<sup>110</sup>. Although these conclusions sound plausible, they cannot apply, e.g., in cases where the head of State was arrested by the rebels and prevented from performing its constitutional functions. In such a situation, another State organ of comparable rank can replace the head of State as long as it acts within its constitutional powers. In any case, it must be clear that the request expressed in such way constitutes an act expressing the will of the State.

### **b. The form of the request**

#### **i) General**

The request can be issued in different forms : either a priori through a treaty (Panama-Canal Treaty Regime<sup>111</sup>) or in the internal law of the requesting State (Cuba<sup>112</sup>), or *ad hoc* or even subsequently, *ex post*. As to the *ex post* request, however, a comparison with the Articles on State responsibility seems to exclude its legitimising effect since factors resulting from the fact of the *ex-post* issuance could vitiate the validity of the consent<sup>113</sup>.

The form of the request is without importance ; the only condition that has to be met is that the request must be explicit and leaves no doubt that the State

<sup>110</sup> Nolte, *op. cit.*, 582.

<sup>111</sup> Article IV of the Panama Canal Treaty provided:

“Protection and Defense

1. The United States of America and the Republic of Panama commit themselves to protect and defend the Panama Canal. Each Party shall act, in accordance with its constitutional processes, to meet the danger resulting from an armed attack or other actions which threaten the security of the Panama Canal or of ships transiting it.

2. For the duration of this Treaty, the United States of America shall have primary responsibility to protect and defend the Canal. The rights of the United States of America to station, train, and move military forces within the Republic of Panama are described in the Agreement in Implementation of this Article, signed this date. The use of areas and installations and the legal status of the armed forces of the United States of America in the Republic of Panama shall be governed by the aforesaid Agreement.” *U.N.T.S.* No. 21086, and the Agreement in Implementation of Article IV of the Panama Canal treaty of 7 September 1977, *U.N.T.S.* No. 21088.

<sup>112</sup> See Konrad Ginther, *Der Satellitenstaat*, 9 *Österr. Zeitschrift für Außenpolitik* (1967), 6.

<sup>113</sup> “ILC Report 2001”, 174. where reference is made to the referendum held in Austria in April 1938 concerning the “Anschluss”; the Nürnberg Tribunal denied that Austrian consent had been given by means of this referendum ; otherwise it would have been coerced and could not have been used to excuse the annexation. See International Military Tribunal for the Trial of German Major War Criminals, judgment of 1 October 1946, reprinted in 41 *A.J.I.L.* (1947), 192.

<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

consents to such military assistance. This particular requirement results from the fact that military activities are of particularly intrusive nature so that the will of the target State must be clearly established and leaves no doubts about its intention.

## ii) Treaties

A particular problem arises if a general anticipatory consent is given through the conclusion of a treaty. Examples of such agreements are e.g. treaties of guarantee, which provide a right of the State parties to militarily “intervene” in the case of internal disturbances. Such situation occurred in Bosnia-Herzegovina, Comoros, Tajikistan, Djibouti, Togo, Laos, Sri Lanka, Mozambique, Afghanistan, Liberia, Sierra Leone, the Chad, Gabon and Sikkim<sup>114</sup>.

Writers are divided as regards the legality of military measures based on such treaties<sup>115</sup>. The best known instance where this right was generally discussed is the Treaty of Guarantee<sup>116</sup> regarding Cyprus. Article IV reads as follows :

“In the event of a breach of the provisions of the present Treaty, Greece, Turkey and the United Kingdom undertake to consult together with respect to the representations or measures necessary to ensure observance of those provisions.

In so far as common or concerted action may not prove possible, each of the three guaranteeing Powers reserves the right to take action with the sole aim of re-establishing the state of affairs created by the present Treaty.”

Various views have been expressed in support of divergent views : It cannot be the place here to report all the views expressed. On the one hand, the freedom to contract and to obligate oneself was invoked in support of the legality of such measures ; on the other, arguments were put forward against this view on the basis of Article 103 of the Charter and the imperative nature of certain principles such as self-determination or non-intervention<sup>117</sup>. In the case of Cyprus, the discussions in the Security Council and the General Assembly after the events of 1974 called activities justified by reference to this treaty as breaching the principles of non-intervention, of the prohibition of the use of force and self-determination<sup>118</sup>. Cyprus frequently rejected the construction of

<sup>114</sup> David Wippman. *Treaty-Based Intervention: Who Can Say No ?* 62 U.Chi.L.Rev. (1995), 607.

<sup>115</sup> Doswald-Beck, *op. cit.*, 244.

<sup>116</sup> U.N.T.S. No. 5475

<sup>117</sup> Wippman, *Treaty-Based, op. cit.*, 609.

<sup>118</sup> Wippman, *Pro-democratic intervention, op. cit.*, 317 ; Doswald-Beck, *op. cit.*, 247.

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

Article III of the Treaty of Guarantee as a ground for legitimising those activities and was supported in that by Security Council Resolution S/RES/367 (1975) and General Assembly Resolution 3212 (XXIX), in paragraph 2 of which the Assembly urged the speedy withdrawal of all foreign armed forces and foreign military presence and personnel from the Republic of Cyprus, and the cessation of all foreign interference in the affairs of Cyprus<sup>119</sup>.

Writers as well as practice warrant the conclusion that treaty stipulations providing a right or even a duty of military interference are void inasmuch as they are contrary to imperative norms due to the legal effect of imperative norms<sup>120</sup>. It may suffice to assert here that, irrespective of whether the above principles are of an imperative nature, it is undisputed that such clauses are illicit in the sense of Article 103 of the Charter, i.e. up to the extent to which they condone activities in clear violation of Article 2 (4) of the Charter<sup>121</sup>.

However, although not all military activities within the purview of this Report are covered by Article 2 (4), they fall under the principle of non-intervention if carried out without the consent or constitute a violation of the territorial sovereignty of the target State, a core element of the identity of a State. For this reason, such military activity can be legalised by a treaty provision only if the treaty clearly specifies the conditions and character of such measures according to the actual circumstances calling for interference<sup>122</sup>. Practice proves that a general right of military interference has been rejected as a ground for legalising concrete measures<sup>123</sup> unless they have been confirmed by the *ad hoc* consent of the target State. Such a general right of military interference requires an *ad hoc* consent for a given case which determines the terms and conditions of such measures.

### iii) Revocability of consent

The legality of a military assistance of this type comes under stress if the consent is revoked. It must be asked whether such a request, once made, could be revoked without the consent of the requested State at any moment, and whether a request expressed in advance in a treaty could also be revoked under similar circumstances. Various arguments could be advanced : In particular, the right to revoke could be traced back to General Assembly Resolution A/RES/3414 (XXIX) which explicitly declares unlawful the presence of foreign

<sup>119</sup> A collection of relevant resolutions of the United Nations is contained in “Republic of Cyprus, Resolutions adopted by the United Nations on the Cyprus Problem” 1964 – 1999 (1999).

<sup>120</sup> Wippman, *Treaty-Based, op. cit.*, 611 ; see also Doswald-Beck, *op. cit.*, 260.

<sup>121</sup> Doswald-Beck, *op. cit.*, 240 ; Wippman, *Treaty-Based intervention, op. cit.*, 612.

<sup>122</sup> In this sense also the Report of M. Schindler in 1973, *Annuaire* 1973, 492.

<sup>123</sup> Nolte, *op. cit.*, 590.

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

armed forces “beyond the termination of the agreement”<sup>124</sup>. If this text is inspired by the right of a unilateral termination of a treaty, the same must hold true for unilaterally given consent.

In this respect, a treaty stipulation anticipating such a request raises the issue whether, irrespective of such a stipulation, a State is entitled to refuse or revoke the consent. Practice and doctrine seem to accept such a right since such an intervention would amount to such an interference with the territorial sovereignty of States, a core element of the identity of a State, that the State must be entitled to revoke the consent to foreign interference<sup>125</sup>. Even if the treaty is sufficiently specific to make an ad hoc consent unnecessary the target State is still entitled to revoke the consent.

Even if such a right is disputed, the target State is said to be entitled in any case to object to such interference irrespective of treaty provisions. This view can be justified by the fact that, given the objection of the target State to military measures conducted by the other State party to a treaty providing such a right, these measures of the other State party would constitute an act of force against another State, irrespective of whether or not the target State is legally entitled to object. Although the objection could constitute a breach of a treaty obligation that, eventually, could give rise to countermeasures; these countermeasures, however, do not encompass measures in breach of imperative norms<sup>126</sup>.

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<sup>124</sup> Article 3 lit e reads : (e) The 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 ;”

<sup>125</sup> In particular, Wippman strongly favours such an approach (Wippman, Treaty-Based intervention, *op. cit.*, 621).

<sup>126</sup> See Article 50 of the Articles on State Responsibility : “Obligations not affected by countermeasures

1. Countermeasures shall not affect:

- (a) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations ;
- (b) Obligations for the protection of fundamental human rights ;
- (c) Obligations of a humanitarian character prohibiting reprisals ;
- (d) Other obligations under peremptory norms of general international law.

2. A State taking countermeasures is not relieved from fulfilling its obligations:

- (a) Under any dispute settlement procedure applicable between it and the responsible State ;
- (b) To respect the inviolability of diplomatic or consular agents, premises, archives and documents”

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

## iv) Content of the request,

The content of the request is subject to the legal conditions imposed on the requesting party and on the requested party.

***The legality of military assistance upon request***

***a. The legal basis***

As Wippman states, “the theoretical basis fore the rule that consent may validate an otherwise wrongful intervention is not entirely clear”<sup>127</sup>.

It must be borne in mind that the legality of such assistance could be based on at least three legal constructions :

a. It could be explained by resorting to a secondary norm, by arguing that the prohibition of intervention or use of force is the primary norm, but that the wrongfulness of its breach in a given case is removed by the consent acting as a circumstance precluding wrongfulness<sup>128</sup>. This construction seems to be apparently reflected in the *obiter dictum* of the ICJ in the *Nicaragua Case*<sup>129</sup>. However, this construction suffers, *inter alia*, from the fact that the military assistance constituting the use of force without consent could amount to a use of force in the sense of Article 2 (4) of the UN Charter and to the breach of a peremptory norm prohibiting resort to the use of force<sup>130</sup>. Neither is a circumstance precluding wrongfulness able to override such a norm and to remove the wrongfulness nor could the request be considered as a “valid” consent. A similar argumentation is that any such request is illegal by virtue of Article 103 Charter since that article gives priority to Article 2 (4) of the Charter, overriding any consent amounting to an agreement in the sense of that Article. General Assembly Resolution A/RES/42/22 explicitly states:

“No consideration of whatever nature may be invoked to warrant resorting to the threat or use of force in violation of the Charter”.

However, the construction, based on the rules of non-intervention and non-use of force which only become lawful because of the consent is unconvincing for two additional reasons, apart from the reference to imperative norms and Article 103 of the Charter of the United Nations :

<sup>127</sup> David Wippman, *Pro-democratic intervention, op. cit.*, 295.

<sup>128</sup> Cf article 20 of the Articles on State Responsibility.

<sup>129</sup> *Supra*.

<sup>130</sup> Article 26 of the Articles on State Responsibility : “Compliance with peremptory norms Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law”.

<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

First, arguments can be derived from the weakness of the definition of intervention<sup>131</sup>, the different objectives of intervention<sup>132</sup> and assistance and the scope of the rule of non-intervention. The term “prohibited intervention” is admittedly very vague ; the relevant texts condemning intervention, such as various resolutions of the General Assembly, are unable to clarify the meaning of such intervention, so that they are a fragile basis of such a norm. From this perspective, the consent cannot work as ground of justification because of the absence of clear identification of the norm the breach of which should be justified.

Second, it is doubtful whether such military assistance amounts to the use of force in the sense of Article 2 (4) what gives leeway to the argument that even a treaty providing a duty of military assistance would not suffer from an inconsistency with the Charter.

b. These reasons militate in favour of the explanation that the legality of “intervention upon request” is to be sought in the field of primary norms<sup>133</sup> since such a norm could avoid the problems arising from the application of a circumstance precluding wrongfulness.

The IDI draft resolution of 1973 resorted to this construction insofar as it assumed legality of such assistance and defined only the cases where it was prohibited<sup>134</sup>. In 1975, the IDI changed its approach : The 1975 Resolution proceeded from a general prohibition of assistance during civil war and stipulated certain exceptions to it.

It must be asked whether, within the purview of the subject discussed here, this approach can be maintained. The present subject differs from the matter discussed in the 1975 Resolution since it is not confined to situations of civil war in the sense of that Resolution. In situations below the threshold of civil war, it is doubtful whether the approach followed by the IDI in 1975 is appropriate. Practice proves conclusively that in such situations assistance has not met with major objections, provided that the request was issued by the legitimate government and the assistance did not transgress a certain limited level. The Rome Report, on the one hand, states that

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<sup>131</sup> *Supra*.

<sup>132</sup> *Supra*.

<sup>133</sup> It has to be kept in mind that the Articles on State Responsibility are deemed to include only secondary norms ; in the words of the ILC, these articles deal with “the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom.”, “ILC Report” 2001, 59.

<sup>134</sup> *Annuaire* 1973, 506.

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

“il est incontesté qu’en cas d’absence de troubles à l’intérieur d’un Etat toute aide accordée au gouvernement de cet Etat est licite”<sup>135</sup>.

On the other hand, however, the Resolution only deals with situations of civil war and does not address the situation in between one without any troubles and one of civil war. There is only one remark made which hints at the lawfulness of assistance in such situations:

“La doctrine paraît être unanime à considérer cette aide comme licite tant qu’il n’y a pas de mouvement organisé d’une certaine importance ayant pour but de renverser le gouvernement établi ou d’ériger un nouvel Etat sur une partie du territoire national »<sup>136</sup>.

And, later on, the Report sees a limiting criterion only in the fact that the assistance has accomplished its task, since otherwise there would be unlawful intervention :

“Si un Etat apporte de l’aide à un gouvernement étranger pour le rétablissement de l’ordre, il doit – cela va sans dire – retirer ses forces lorsque le but est atteint. Il n’a en aucun cas le droit de poursuivre ses propres intentions politiques à l’intérieur de l’autre Etat. S’il le faisait, cela aboutirait à une ingérence illicite dans les affaires intérieures de cet Etat »<sup>137</sup>.

This limitation coincides with that found in A/RES/3314 (XXIX). But it seems that, according to practice, military assistance in such a situation is subject to more limiting criteria. From the 1975 Resolution one can infer two limits as a threshold up to which military assistance would be considered permissible : the high level of the military activities within the State and the intention of the opposition to overthrow the government. According to this Resolution, this conclusion relies on the argument *a contrario* : once this threshold has been reached, the general prohibition applies.

But contrary to the 1975 Resolution and below the threshold of civil war, it is necessary to assume that military assistance is permitted unless it is prohibited. The question remains as to whether it is necessary to formulate a primary norm permitting military assistance upon request. This norm would remove any problems concerning the definition of the norm breached by such measures if committed without the consent as well as the invocation of consent as precluding wrongfulness. The other approach would be to assume that a State is free to act unless it is prohibited by a norm of international law. Whatever the answer to this question is, it is necessary to confine the scope of this report only to situations not covered by the 1975 Resolution.

<sup>135</sup> Annuaire 1973, 427.

<sup>136</sup> Annuaire 1973, 428.

<sup>137</sup> Annuaire 1973, 451.

Notwithstanding a positive norm permitting assistance, it must also be clearly stated that measures carried out pursuant to this norm still remain subject to further legal impediments.

**b. *The limits to assistance under international law***

Contrary to the Rome Report of the IDI, that saw no necessity to identify limits to military assistance in situations short of civil war, practice and writers also mention limiting criteria irrespective of the existence of a civil war and consider military assistance in such situations as lawful unless it encounters normative limits. Although the central pillars of these limitations are the principles of non-intervention and self-determination, as documented by the international reaction to measures of assistance<sup>138</sup>, the existence of other normative limits such as human rights are not excluded.

Formulated in more general terms, 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. In particular, the request cannot override the obligations owed to other subjects of international law. No need would arise to define the legal limitations resulting from *ius cogens*, as they are already covered by the necessity of valid consent. According to the commentary on Article 26 of the Articles on State Responsibility,

“One State cannot dispense another from the obligation to comply with a peremptory norm, e.g., in relation to genocide or torture, whether by treaty or otherwise”<sup>139</sup>.

Nevertheless, the commentary adds that

“in applying some peremptory norms the consent of a particular State may be relevant. For example, a State may validly consent to a foreign military presence on its territory for a lawful purpose”<sup>140</sup>.

For these reasons, it is useful to refer explicitly to these legal impediments in order to remove any doubts as to the legal limitations to assistance. According to Mullerson, international law “does not prohibit assistance even by means of the dispatch of armed forces to the legitimate government upon its request in cases of internal disorder within a State, the rendering government bears a heavy burden of proof that such an intervention does not contradict the

<sup>138</sup> See the practice reproduced by Doswald-Beck, *op. cit.*, *passim*, Nolte, *op. cit.*, *passim* and Le Mon, *op. cit.*, *passim*.

<sup>139</sup> “ILC Report” 2001, 209.

<sup>140</sup> *Ibid.*

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

principles of non-interference, non-use of force or the threat of force, and self-determination of peoples”<sup>141</sup>.

It is also more appropriate to elaborate on these legal impediments than on the limits to the request as it seems doubtful whether a request per se can be subject to legal constraints, contrary to the activities performed in compliance with the request. It must be borne in mind that, in the chapter on Responsibility of a State in connection with the act of another State, the Articles on State Responsibility address only aid and assistance<sup>142</sup>, direction and control<sup>143</sup> as well as coercion<sup>144</sup>, but not solicitation and incitement. If a State requests assistance in the breach of an international obligation, the request itself could hardly be considered as committing the breach, unless it is accompanied by acts which directly impede the enjoyment of this right.

i) The principle of non-intervention

Although the principle of non-intervention has frequently been invoked, in State-to-State relations, as a legal limitation to measures to which the target State has consented<sup>145</sup>, it would nevertheless be difficult to consider it as such, unless it were characterized as a principle of *ius cogens*. As already stated above<sup>146</sup>, intervention and assistance of request are diametrically opposed concepts so that the one cannot be a legal limitation to the other.

A closer look at the discussions reveals that these objections were particularly motivated by the principle of self-determination.

ii) The principle of self-determination

The question is whether violence in the exercise of the right to self-determination automatically generates a situation of civil war. It has been argued that a situation of civil war presupposes that a group already exercises a certain control over a defined territory and is entitled to exercise self-determination<sup>147</sup> so that the impression exists that the these two situations are identical. I beg to differ : A non-international armed conflict is not necessarily identical with the situation generated by the exercise of the right of self-

<sup>141</sup> Rein Mullerson, *Intervention by Invitation*, in FISLER DAMROSCH, Scheffler, *op. cit.*, 133.

<sup>142</sup> Article 16.

<sup>143</sup> Article 17.

<sup>144</sup> Article 18.

<sup>145</sup> Dosdwald-Beck, *op. cit.*, 208 ; Nolte discusses the relation between the “intervention by invitation” and the principle of non-intervention as well as with the practice relating to this issue, *op. cit.*, 169.

<sup>146</sup> *Supra*.

<sup>147</sup> Oscar Schachter, *International Law: the Right of States to use Armed Forces*, 82 Mich. L. Rev. (1984), 1633.

<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

determination<sup>148</sup> so that, in order to envisage all the possibilities, it could be more appropriate to resort to the principle of self-determination in addition to the situation of civil war as limiting criteria.

It can quite safely be concluded that if a State seeks the military assistance of other States in case of internal violent disturbance, the other State is legally precluded from rendering such assistance if the military measures are intended to combat activities arising from the exercise of the right to self-determination, as confirmed by General Assembly Resolution A/RES/42/22<sup>149</sup>. To perform acts of force aiming at depriving an entity of its right to self-determination would amount to a wrongful act committed by the requesting as well as the requested State.

The substance of the right of self-determination as well as the definition of the groups of people enjoying it raise a number of problems of definition since this term is as least as vague and blurred as the term “intervention”. However, the existence of the principle cannot be denied so that there is no need to embark on – necessarily fruitless – attempts of defining it. On various occasions, this right has been declared as belonging to the imperative norms of international law<sup>150</sup>. But irrespective of whether or not this characterisation can be shared, the right of self-determination undoubtedly constitutes a legal bar to foreign military assistance.

Since the right to self-determination is a right appertaining to the people the State cannot dispose of it by its consent to military assistance.

<sup>148</sup> It could easily be imagined that acts are performed in the exercise of the right of self-determination, which do not yet entail the existence of a situation of a civil war. So, for instance, if sporadic and individual forcible acts are motivated by the right of self-determination, a situation of civil war does not exist.

<sup>149</sup> “Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations”.

<sup>150</sup> This right is even deemed to constitute a norm of jus cogens, see Karen Parker & Lyn Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 *Hastings Int. & Comp. L. Rev.* (1989) 411, 440 ; A. CRITESCU, THE RIGHT TO SELF-DETERMINATION, U.N. Doc. E/CN.4/Sub.2/404/Rev. 1 (1980) ; H. GROS ESPIELL, THE RIGHT TO SELF-DETERMINATION, U.N. Doc. E/CN.4/Sub.2/405/Rev.1, (1980) ; “report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its thirty-first session” (E/CN.4/1296), paras. 163.172 ; the Separate Opinion of John Dugard in *Case concerning armed activities on the territory of the Congo* (new application: 2002) (Democratic Republic of the Congo v. Rwanda) ; <http://www.icj-cij.org/docket/files/126/10449.pdf>. In its *East Timor* Judgment, the ICJ already declared this right as a right *erga omnes*: “The Court indeed made it clear that the right of peoples to self-determination is today a right *erga omnes*”: *East Timor (Portugal v. Australia)*, *Judgment, I.C.J. Reports 1995*, p. 102, para. 29

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

This is not the place to discuss the principle of self-determination *in extenso*. The only thing needed is an indication of the extent to which it serves as a limiting criterion on the rendering of military assistance.

iii) Other legal impediments

However, neither the right to self-determination nor, if accepted, the principle of non-intervention are the only legal limitations to the kind of military assistance discussed here. In order to avoid discussing them, it would seem possible to abstain from discussing the scope and details of these rights and to refer only to the rights under international law enjoyed by the opposing group of people, respectively by the individuals, as well as third States.

aa) *Human Rights*

Any assisting State is bound by human rights with regard to the individuals affected by its measures<sup>151</sup>. Neither the wording of Article 2 of the UN Covenant on Civil and Political Rights regarding its territorial scope<sup>152</sup> nor the *Bankovic* decision of the European Court of Human Rights<sup>153</sup> where the Court rejected the argument that

“anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention”<sup>154</sup>

can serve as pretexts for not observing human rights since the obligation to respect these rights under general international law and not under a specific Convention is owed to any individual. It would run counter to the idea of human rights if a State, when performing acts of force outside its territory at the request of the target State, were not bound to respect human rights resulting from customary international law<sup>155</sup>. However, it is also clear that such a State is

<sup>151</sup> See John Lawrence Hargrove, *Intervention by Invitation and the Politics of the New World order*, in: Damrosch-Beck, Scheffer, *op. cit.*, 113.

<sup>152</sup> Article 2 (1) reads :

“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. As to the problem raised by the term “within its territory and subject to its jurisdiction” see Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary* (2005), 43.

<sup>153</sup> *Bankovic and Others v. Belgium and Others*, no. 5207/99, ECHR 2001-XII, paras. 74 et sequ.

<sup>154</sup> *Ibid.*, para. 75.

<sup>155</sup> See Wippman, *Treaty-Based Intervention*, *op. cit.*, 611.

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

bound only to the extent to which the target state is. So, if the latter invokes a situation of public emergency which threatens the life of the nation as provided in Article 4 of the UN Covenant on Civil and Political Rights<sup>156</sup>, it would be reasonable to apply the same characterisation also to the invited State.

*bb) Terms and conditions of request*

The assistance of a foreign State has to comply with the terms and conditions of the request. Resolution A/RES/3314 is quite clear in this respect by stating that the “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” amounts to an act of aggression.

*cc) Other legal conditions*

In this context, it must be asked to which extent the assisting State is bound by the obligations incumbent upon the requesting State alone or, in other terms, whether these obligations apply also to activities undertaken by the assisting State in the course of the assistance. The doctrine argues that the request has to be construed in conformity with the international obligations imposed upon the requesting State<sup>157</sup>. Theoretically, such an obligation cannot have effect on the assisting State unless the latter has accepted it. Thus, a regional treaty restricting the activities of a State towards its nationals cannot be invoked against a State which is not a Party to it. It is obvious that if a State requests another State to perform acts that the former, but not the latter, is prohibited under international law to perform, the latter would not have to assume responsibility for these acts, while the former has to incur responsibility for them. It is, however, a different matter when the requested State likewise has to assume responsibility for these acts. Article 16 of the Articles on State Responsibility makes the assisting State responsible only if two conditions are fulfilled :

- (a) that State does so with knowledge of the circumstances of the internationally wrongful act ; and
- (b) the act would be internationally wrongful if committed by that State.

<sup>156</sup> Article 4 (1) reads : “In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin”.

<sup>157</sup> Wippman, *Pro-Democratic Intervention*, *op. cit.*, 294.

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

If the assisting State is not subject to the particular obligation, it does not become responsible for breaches of this obligation by the requesting State. The unlawfulness of the act of the requesting State does not “infect” the legal characterisation of the acts of the assisting State unless the latter would breach its own obligations. Accordingly, the obligations incumbent upon the requesting State are not extended to the assisting State. This conclusion can be explained by the fact that the assisting State is hardly aware of all the obligations imposed on the requesting State. An attempt to do so would require that either the assisting State is aware of the obligations of the requesting State or these obligations have a manifest character. Such an extension would certainly be *de lege ferenda* but seems justified by reasons of a necessary political constraint. Otherwise the requesting State would have ample opportunity to circumvent its obligations.

## II. Conclusions

Here are the possible issues to be addressed in recommended principles:

### Definitions

#### *Scope :*

These principles do not affect the rules of foreign military assistance in situations of civil war since this matter is addressed by the IDI resolution of 1975. For this reason it is necessary to define the situation that does not amount to civil war. It is suggested to proceed from the situation not amounting to civil war in the sense of Additional Protocol II of 1977, such as internal disturbances, characterized by isolated or sporadic acts of violence.

For the purposes of this report, “military assistance” is meant to relate only to situations where troops were sent to a foreign State on an alleged or factual request of the latter as separate bodies over which the sending State retains command and control so that the acts of these troops remain attributable to the sending State.

#### *Basic principles :*

The term and title of this topic “intervention by invitation” is a misnomer and needs to be changed into “military assistance upon request”. The objective of intervention, namely to take actions against the government of a foreign State, is diametrically opposed to military assistance that aims at supporting the government of a foreign State.

International law does not prohibit any State to render military assistance to another State, subject, however, to the latter’s consent (request) and further legal conditions set out below.

Consent must be valid (in the sense of Article 20 of the Articles on State Responsibility) and issued by the effective and generally recognized government. The criteria of general recognition depend on the individual case ; a certain general recognition of the government of a foreign State can be deduced from the fact that the majority of States, in particular those which have the closest relations with the government in question and the major powers, did not express any explicit objection to the recognition of a government. A further decisive element is certainly the attitude of regional or universal international organizations towards this government, in particular the United Nations, and relevant regional organizations. A brief discontinuity in the de jure government's effective control of the State's territory can be ignored as long as the military measures are swift and small in scale Democratic legitimacy is not yet decisive although a certain tendency in this direction is already recognizable. However, other legal constraints on military assistance can lead to a similar result.

Consent can take different forms ; in particular, it can be given unilaterally or by a treaty.

Consent does not relieve the assisting State from its obligations under international law, except from those owed to the requesting State and incompatible with the consent given.

The intervention must comply with the terms and conditions provided in the request.

Such military assistance is subject to the same legal constraints under international law as are other activities of the requesting State.

In particular, such assistance must not impair rights enjoyed by an entity that has already acquired a legally recognized status under international law, such as the principle of self-determination of people or human rights to the extent that these principles and rights are binding upon the assisting State.

The acts of the assistance are attributable to the requested State in accordance with the rules of international law on state responsibility.

A State may at any time withdraw its request or require the cessation of the intervention, irrespective of any treaty commitments.

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

#### *Comments by Professor Degan*

Dear Confrère,

[...]

In your text you tried to formulate in impersonal language many questions which are subject to political assessments and as such are open to grave abuses. You did your best in order to eliminate these possible abuses by providing exceptions and reservations to your more general conclusions. It remains nevertheless a tremendously difficult task.

I see the problem in “legality” of a government entitled to seek an armed intervention from abroad. I found an interesting observation in the Opinion No.10 by the (Badinter) Arbitration Commission of 4 July 1992, which concerns the recognition of a new State :

“4. As, however, the Arbitration Commission pointed out in Opinion No 1, while recognition is not a prerequisite for the foundation of a state and is purely declaratory in its impact, it is nonetheless a discretionary act that other states may perform when they choose and in a manner of their own choosing, *subject only to compliance with the imperatives of general international law*, (in the French original version it is stated : “... sous la seule réserve du respect dû aux normes imperatives du droit international général, [...]) *and particularly those prohibiting the use of force in dealings with other states or guaranteeing the rights of ethnic, religious or linguistic minorities*”. (italics added).

The question is whether a new State which is engaged in an aggressive war against its neighbors and is committing grave breaches of human and minority rights against its own population, deserves recognition by other States. It seems to me that the same reservation should apply to such a government in respect to its right to demand foreign armed intervention.

Similar to this was the Taliban regime in Afghanistan which was blamed for supporting Al Q'aida. The UN Security Council Resolution 1373 invoked in its preamble the inherent right of individual and collective self-defence of States victims of terrorist attacks. It is a pity that the same resolution did not empower the U.S.A. and the U.K. to intervene in Afghanistan in order to overthrow the Taliban regime. The intervening States did this by invoking their right to self-defence.

But, as we know, after that came the armed intervention against the regime of Saddam Hussein in Iraq in 2003 without the authorization by the Security Council. The intervening States created for themselves the situation in Vietnam prior to 1975. They wage a war which they cannot win.

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

I see the problem not only of the intervention against such regimes, but of their “legitimacy” to claim foreign intervention in their favour as well. If the present government of the USA. (or of Israel) qualifies a regime in a State as “non-democratic”, the foreign intervention can come in their support in the form of terrorist acts. By this a vicious circle is closed.

[...]

Sincerely yours,

***Comments by Dr Yusuf***

I agree that intervention implies “forcible acts” and that therefore one should refer to it as either ‘forcible intervention’ or as ‘armed intervention’. Activities of a pretended or actual peace-keeping nature should also be included in the definition, since it is very difficult or almost impossible to distinguish them from other activities of forcible intervention. I also agree that an international armed conflict should be excluded from this topic.

On the issue of the recognition or legitimacy of the requesting Government, it is my view that the litmus test is the position of the United Nations or of regional organizations such as the African Union ( AU) with respect to such a Government. If such international organizations recognize the government as the legitimate government of the country concerned, then it should be considered as such. In the contemporary world, it is not so much recognition by individual States, but recognition by international organizations of States such as the UN and the AU that matters. The external or international legitimacy or legality of a government is to be assessed against the position taken by the international community (as represented by international organizations) towards such government rather than the position taken by individual States. For example, in the African context, the AU Constitutive Act prohibits the unconstitutional change of governments and therefore governments established as a result of a *coup d’état* are banned by the AU and are not recognized as legitimate governments.

I would advise against the use of the expression ‘failed State’ for it has no meaning in international law. A state can not fail under international law, for its constitutive elements are not limited to the existence of an effective government. Nor does a ‘failed State’ mean the absence of a generally recognized government as stated in the Rapporteur’s outline. Expressions such as ‘government collapse’ or the lack of an ‘effective government’ or a ‘State in suspended animation’ are preferable since their meaning is clear from a legal stand point. The expression ‘failed State’ is more of a journalistic label with no legal significance. It is also occasionally used by political scientists to describe a State with a non-functioning government or in suspended animation as a ‘

failed State'. Legally, however, it could give rise to misunderstanding and confusion.

The Rapporteur's outline does not appear to have given the intervention by invitation of international organizations, particularly that of regional and sub-regional organizations, the importance it deserves. It is my view that this is today the most important type of intervention by invitation. The Constitutive Act of the African Union(AU) provides for such intervention( see Paragraph 4 (j) of the Act). Similarly, the constitutions of various African sub-regional organizations provide for intervention by request of a Member State. Thus, the intervention by Angola, Namibia and Zimbabwe in the Democratic Republic of Congo (RDC) in 1998 was justified as an intervention by invitation addressed to SADC by President Kabila. Likewise, the intervention by Libya and Burkina Faso in the Central African Republic in 2002 was presented as intervention by invitation addressed to CEN-SAD by President Patasse of the CAR. The intervention by Nigeria in Liberia in 2003 was equally undertaken on behalf of ECOWAS at the invitation of the interim Government of Liberia. These examples should be analyzed in the Report as to whether or not they amount to intervention by invitation.

The forcible or armed activities undertaken by an intergovernmental organization following an invitation by a legitimate government need therefore to be comprehensively covered since they are the most wide-spread example of such interventions in the contemporary world.

An intervention by invitation does not, in my view, fall under the scope of Article 2(4) of the UN Charter when carried out by an intergovernmental organization whose members had already subscribed to a treaty authorizing such intervention when requested by one of the States Parties to the treaty, such as the Constitutive Act of the AU.

As regards the responsibility to protect, it is worth noting that in the case of the African union(AU) the right to intervene by the organization in respect of grave circumstances, namely war crimes, genocide and crimes against humanity is clearly distinguished from intervention by invitation which is not subject to the existence of such grave circumstances. A clear distinction therefore needs to be made between the two types of intervention.