

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

Problèmes actuels du recours à la force en droit international

Sous-groupe : Intervention sur invitation

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

*Sub-group : Intervention by Invitation*

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## I. Preliminary Report

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

### A. Introduction

“Intervention by invitation” in the broadest sense has frequently been conducted from ancient up to recent times<sup>2</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>3</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>4</sup>. Such activities are, however, subject to certain legal constraints resulting either from international<sup>5</sup> as well as national law<sup>6</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.

#### 1. *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

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<sup>2</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>3</sup> Doswald-Beck, *op. cit.*, 189; Nolte, *op. cit.*, 65.

<sup>4</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>5</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>6</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.

military confrontation within a State<sup>7</sup>. On the basis of a report by M. Schindler, it adopted a resolution on “The Principle of Non-Intervention in Civil Wars” at the session of Wiesbaden in 1975<sup>8</sup>. This resolution<sup>9</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>10</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>11</sup> so that there was no certainty on whether the resolution reflected *lex lata* or proposed articles *de lege ferenda*.<sup>12</sup>

The discussions revealed a certain tendency to an almost complete ban of such military intervention although several members of the commission

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<sup>7</sup> See in particular the reports of the Rome Session 1973 (IDI Annuaire 1973, 416) and the Wiesbaden Session (IDI Annuaire 1975, 119)

<sup>8</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>9</sup> IDI Annuaire 1973, 474

<sup>10</sup> Ibidem.

<sup>11</sup> The divergence of views was reflected in particular in the voting results : 16 members voted in favour, 6 against and 16 members abstained; 1975 Report, 474. See also Nolte, *op.cit.*, 117; Hanspeter Neuhold, *Internationale Konflikte* (1977), 101.

<sup>12</sup> Nolte, 117; according to Schindler the resolution could only be seen as *de lege ferenda*, IDI 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.

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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>13</sup>

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>14</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.

## **2. *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>15</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>16</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>17</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>18</sup>, or rather the government, requesting such an intervention as well as the relation to the object and purpose pursued by the relevant activity.

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<sup>13</sup> IDI Annuaire 1975, 126.

<sup>14</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-iil.org/idiE/resolutionsE/1999\\_ber\\_03\\_en.PDF](http://www.idi-iil.org/idiE/resolutionsE/1999_ber_03_en.PDF).

<sup>15</sup> Nolte, *op. cit.*, 29.

<sup>16</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>17</sup> Nolte, *op. cit.*, 125.

<sup>18</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.



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>19</sup>, that a right to render such assistance would be open to misuse or that the role of the United Nations could be impaired<sup>20</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>21</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>22</sup>. In this respect one has to note a shift in the position of the United Nations from a reluctance to admit the

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<sup>19</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: Lori Fisler Damrosch, David J. Scheffer (ed.s), *Law and Force in the New International Order* (1991), 135.

<sup>20</sup> The discussions in the IDI in 1973 and 1975 were substantially influenced by the Vietnam War, Nolte, *op. cit.*, 116.

<sup>21</sup> These limits will be discussed *infra*.

<sup>22</sup> Le Mon who 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.

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legality of such activities as it still transpires in Resolution 2625 (XXV) to the recognition of the legality in the later resolutions<sup>23</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 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>24</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>25</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>26</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>27</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>28</sup>

Again, this phrase which speaks of intervention on request does not provide any limit to such activities. In particular, such activities if

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<sup>23</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.

<sup>24</sup> A/RES/36/103

<sup>25</sup> A/RES/2625/XXV

<sup>26</sup> Nolte, *op. cit.*, 180

<sup>27</sup> Le Mon, *Unilateral Intervention by Invitation in Civil War*, 35 *International Law and Politics* (2003), 749; Nolte, 211

<sup>28</sup> *Case Concerning Military and Paramilitary activities in and against Nicaragua* (Nicaragua v United States of America), ICJ Reports 1986, para. 246.

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 and becomes perfectly lawful if it occurred at the request or with the agreement of the State.<sup>29</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>30</sup>

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<sup>29</sup> <http://www.lcil.cam.ac.uk/Media/ILCSR/rft/Sr29.rtf>

<sup>30</sup> *Ibidem*; 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); *ibidem*, 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.

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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>31</sup>

Notwithstanding the reference to this principle, the existing analysis and reviews of the practice, undertaken by Doswald-Beck<sup>32</sup>, Le Mon<sup>33</sup> and Nolte<sup>34</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 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>35</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>36</sup>

#### ***B. 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>37</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>38</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

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<sup>31</sup> See *infra*

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

<sup>33</sup> Op. cit.,

<sup>34</sup> Op. cit; this work undoubtedly constitutes the broadest analysis of the practice in this field.

<sup>35</sup> Christopher J. Le Mon, *Unilateral Intervention*, op. cit., 743.

<sup>36</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>37</sup> See e.g. Schindler, *IDI 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, para. 246.

<sup>38</sup> See *infra*

issue was addressed by the 1975 Resolution of the IDI.<sup>39</sup> In order not to undermine the 1975 Resolution it is proposed not to deal with this issue here.

### ***1. 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.

#### *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>40</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>41</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>42</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”

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<sup>39</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.”

<sup>40</sup> Wehser, *Die Intervention nach gegenwärtigem Völkerrecht*, in: Simma, Blenk-Knocke (ed.s), *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>41</sup> <http://www.iciss.ca/report2-en.asp>.

<sup>42</sup> *Ibidem*, point 1.37.

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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>43</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 condition of things<sup>44</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>45</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>46</sup>. Seen in this perspective, one cannot but come to the conclusion that “intervention by invitation” is a *contradiction*

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<sup>43</sup> Resolution A/RES/2131(XX) and A/RES/2625(XXV).

<sup>44</sup> Robert Jennings, Arthur Watts, *Oppenheim’s International Law* (1992), 430.

<sup>45</sup> Oran R. Young, *Systemic Bases of Intervention*, in: J.N. Moore (ed.), *Law and Civil War in the Modern World* (1974), 111.

<sup>46</sup> See *supra*.

*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.

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>47</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>48</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>49</sup>. Since an explicit exclusion would otherwise not be needed, it must be concluded that this

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<sup>47</sup> See, for instance, the report of 1973.

<sup>48</sup> The qualifier „purely“ is added in Article 4

<sup>49</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.”

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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 personnel 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 personnel 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

- I. that is attributable to the foreign State and
- II. 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>50</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>51</sup> according to which the receiving State has to assume responsibility for them, notwithstanding the fact that the

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<sup>50</sup> Resolution A/RES/56/83

<sup>51</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.”



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>52</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>53</sup>, Stanleyville 1964<sup>54</sup>, Gabun 1964<sup>55</sup>, Dominican Republic 1965<sup>56</sup>, CSSR 1968<sup>57</sup>, Afghanistan 1979<sup>58</sup>, Grenada 1983<sup>59</sup>, Panama 1989<sup>60</sup> to Central African Republic 1996<sup>61</sup> and Iraq 2004<sup>62</sup>. In all these cases troops

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<sup>52</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>53</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.

<sup>54</sup> Nolte, *op. cit.*, 261; Doswald-Beck, *op. cit.*, 217.

<sup>55</sup> Nolte, *op. cit.*, 305.

<sup>56</sup> Nolte, *op. cit.*, 268; Doswald-Beck, *op. cit.*, 227.

<sup>57</sup> Nolte, *op. cit.*, 271; Hacker, *op. cit.*, 775.

<sup>58</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>59</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>60</sup> Nolte, *op. cit.*, 289; Abraham Sofaer, *The Legality of United States Action in Panama*, 29 *Columb. J. Trans. L.* (1991), 281; Louis Henkin, *The Invasion of Panama Under International Law: A Gross Violation*, 29 *Columb. J. Trans. L.* (1991), 294.

<sup>61</sup> Nolte, *op. cit.*, 342

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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 act on their behalf<sup>63</sup> or they can authorize the deployment of such forces<sup>64</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>65</sup>.

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<sup>62</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/insight135.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).

<sup>63</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>64</sup> The United Nations has started to follow this practice in particular since the Resolution S/RES/678 (1990).

<sup>65</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

*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>66</sup> or Additional Protocol II of 1977<sup>67</sup> since they could also 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>68</sup>.

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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; Wippman, David Wippman, Pro-democratic intervention by invitation, in: Gregory H. Fox, Brad R. Roth (ed.s), *Democratic Governance and International Law* (2000), 302.

<sup>66</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>67</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 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>68</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.

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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>69</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>70</sup>.

The exclusion of the situation of civil war situations requires first a definition of that notion<sup>71</sup>. In its definition of civil war, the 1975 IDI

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<sup>69</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. Gandhi, 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>70</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.

<sup>71</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.

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>72</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
- (iii) the ability to implement the Protocol.”<sup>73</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

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(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>72</sup> <http://209.85.135.104/search?q=cache:EwBYEFYurbwJ:www.icrc.org/ihl.nsf/COM/475-750999%3FOpenDocument+%22Insurgents+fighting+against+the+established+order+would+normally+seek+to+overthrow%22&hl=de&ct=clnk&cd=2&gl=at>

<sup>73</sup> ICRC Commentary; <http://www.icrc.org/ihl.nsf/COM/475-760004?OpenDocument>, No. 4451

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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>74</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>75</sup>

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

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<sup>74</sup> ICRC Commentary; <http://www.icrc.org/ihl.nsf/COM/475-760004?OpenDocument>; No. 4474

<sup>75</sup> Ibidem, No. 4476; footnotes omitted.

disturbances, when force is used as a preventive measure to maintain respect for law and order”<sup>76</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>77</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>78</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.

## **2. 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>79</sup>. The 1975 IDI

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<sup>76</sup> Ibidem, No. 4477.

<sup>77</sup> Ghandi, op. cit, Reisman, Silk, op. cit., 481.

<sup>78</sup> Reisman, Silk, op. cit., 464.

<sup>79</sup> So, for instance, in Afghanistan 1979, see Reisman, Silk, 485, according to whom the invitation was self-issued.

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Resolution did not deal with this issue as it declared such activities in civil war situations as 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>80</sup>. Frequently, there were doubts regarding the author of the invitation on which objections to the validity of the consent were based<sup>81</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>82</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>83</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.

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<sup>80</sup> Wippman, *Change and Continuity*, op. cit., 440; Le Mon, *Unilateral Intervention*, op. cit., 759.

<sup>81</sup> So, for instance, concerning the case of Czechoslovakia in 1968, Nolte, 272.

<sup>82</sup> Ian Brownlie, *International Law and the Use of Force by States* (1963), 317.

<sup>83</sup> See in particular Daniel Thürer, *Der Wegfall effektiver Staatsgewalt: der 'Failed State'*, 34 *Berichte der Deutschen Gesellschaft für Völkerrecht* (1995), 9.



*(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>84</sup> An affirmative answer relied on effectiveness of the government as the criterion of validity of consent<sup>85</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>86</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>87</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

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<sup>84</sup> See for instance Doswald-Beck, *op. cit.*, 195.

<sup>85</sup> See Le Mon, *Unilateral Intervention*, *op. cit.*, 745.

<sup>86</sup> David Wippman, *Pro-democratic intervention by invitation*, in: Gregory H. Fox, Brad R. Roth (ed.s), *Democratic Governance and International Law* (2000), 298.

<sup>87</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, 523

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government entitled to issue a request for assistance to regain the control over the State, as occurred in the case of Haiti<sup>88</sup>. According to Nolte comparable situations existed in Sierra Leone 1995<sup>89</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>90</sup>. Nowrot and Schabacker recognize in the case of Haiti and its President, Aristide, "a turning point in the determination of the legitimate government of a state under international law"<sup>91</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>92</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>93</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>94</sup>, recognition can be derived from the establishment and maintenance of normal contacts with a government<sup>95</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

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<sup>88</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, 146.

<sup>89</sup> Nowrot, Schabacker, *op. cit.*, 339.

<sup>90</sup> Nolte, *op. cit.*, 147.

<sup>91</sup> Nowrot, Schabacker, *op. cit.*, 337.

<sup>92</sup> *Ibidem*, *op. cit.*, 338.

<sup>93</sup> Davis Brown, *The Role of Regional Organizations in Stopping Civil Wars*, 41 *A.F. L. Rev.* (1997,) 270.

<sup>94</sup> Nolte, *op. cit.*, 141.

<sup>95</sup> Robert Jennings, Arthur Watts, *Oppenheim's International Law*, vol. I (1992), 148.

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 that of governments in exile<sup>96</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>97</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>98</sup>. It has been argued that the democratic nature of the government could also form a criterion for the assessment of its legitimacy<sup>99</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

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<sup>96</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>97</sup> Wippman, Pro-democratic intervention, *op. cit.*, 300.

<sup>98</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>99</sup> David Wippman, Pro-democratic intervention by invitation, in: Gregory H. Fox, Brad R. Roth (ed.s), *Democratic Governance and International Law* (2000), 300.

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Haiti and Sierra Leone.<sup>100</sup> Other governments were not recognized although they had gained full control of the territory because of their non-democratic origin or performance.<sup>101</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>102</sup>. Even writers who militate in favour of the democratic legitimacy recognize only a tendency in this direction, but not yet an established norm<sup>103</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>104</sup>. This view results from the reactions following the coups in Sierra Leone, Haiti, Burundi, Niger, Ivory Coast, Guinea Bissau, and Togo.<sup>105</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>106</sup>

However, as will be presented<sup>107</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.

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<sup>100</sup> Ibidem, 301, 303.

<sup>101</sup> One pertinent case was the government of Afghanistan in 1994 whose legitimacy was contested; Nolte, *op. cit.*, 156.

<sup>102</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>103</sup> Nowrot, Schabacker, *op. cit.*, 338.

<sup>104</sup> Jean d'Aspremont, Legitimacy of Governments in the Age of Democracy, 38 N.Y.U. J. Int'l L. & Pol. (2006), 889.

<sup>105</sup> Ibidem.

<sup>106</sup> Ruth Wedgwood, Commentary on Intervention by Invitation, in: Lori Fisler Damrosch, David Scheffer (ed.s), *Law and Force in the New International Order* (1991), 138.

<sup>107</sup> See *infra*.

*(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>108</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>109</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>110</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.

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>111</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>112</sup>) or in the internal law of the

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<sup>108</sup> Commentary on Article 20 of the Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the ILC 2001, 174.

<sup>109</sup> Ibidem.

<sup>110</sup> Ibidem, 175.

<sup>111</sup> Nolte, *op. cit.*, 582.

<sup>112</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.

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requesting State (Cuba<sup>113</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>114</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 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>115</sup>.

Writers are divided as regards the legality of military measures based on such treaties<sup>116</sup>. The best known instance where this right was generally

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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>113</sup> See Konrad Ginther, *Der Satellitenstaat*, 9 *Österr. Zeitschrift für Außenpolitik* (1967), 6.

<sup>114</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>115</sup> David Wippman, *Treaty-Based Intervention: Who Can Say No?* 62 *U.Chi.L.Rev.* (1995), 607.

<sup>116</sup> Doswald-Beck, *op. cit.*, 244.

discussed is the Treaty of Guarantee<sup>117</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>118</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>119</sup>. Cyprus frequently rejected the construction of 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>120</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

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<sup>117</sup> U.N.T.S. No. 5475

<sup>118</sup> Wippman, *Treaty-Based*, op. cit., 609.

<sup>119</sup> Wippman, *Pro-democratic intervention*, op. cit., 317; Doswald-Beck, op. cit., 247.

<sup>120</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).

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of imperative norms.<sup>121</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>122</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>123</sup>. Practice proves that a general right of military interference has been rejected as a ground for legalising concrete measures<sup>124</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 armed forces “beyond the termination of the agreement”.<sup>125</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.

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<sup>121</sup> Wippman, Treaty-Based, op. cit., 611; see also Doswald-Beck, op. cit., 260.

<sup>122</sup> Doswald-Beck, op. cit., 240; Wippman, Treaty-Based intervention, op. cit., 612.

<sup>123</sup> In this sense also the Report of M. Schindler in 1973, IDI Annuaire 1973, 492.

<sup>124</sup> Nolte, op. cit., 590.

<sup>125</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;”



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>126</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>127</sup>.

*(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.

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<sup>126</sup> In particular, Wippman strongly favours such an approach; Wippman, *Treaty-Based intervention*, op. cit., 621.

<sup>127</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”

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### 3. *The legality of military assistance upon request*

#### a. *The legal basis*

As Wippman states, the theoretical basis for the rule that consent may validate an otherwise wrongful intervention is not entirely clear.<sup>128</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>129</sup>. This construction seems to be apparently reflected in the *obiter dictum* of the ICJ in the *Nicaragua Case*<sup>130</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>131</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:

First, arguments can be derived from the weakness of the definition of intervention<sup>132</sup>, the different objectives of intervention<sup>133</sup> and assistance

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<sup>128</sup> David Wippman, Pro-democratic intervention, op. cit., 295.

<sup>129</sup> Cf Article 20 of the Articles on State Responsibility.

<sup>130</sup> *Supra*.

<sup>131</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>132</sup> *Supra*.

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>134</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>135</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>133</sup> *Supra*.

<sup>134</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>135</sup> IDI Annuaire 1973, 506.

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“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>136</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>137</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>138</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

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<sup>136</sup> IDI Annuaire 1973, 427.

<sup>137</sup> IDI Annuaire 1973, 428.

<sup>138</sup> IDI Annuaire 1973, 451.

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.

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>139</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>140</sup>

Nevertheless, the commentary adds that

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<sup>139</sup> See the practice reproduced by Doswald-Beck, *op. cit.*, *passim*, Nolte, *op. cit.*, *passim* and Le Mon, *op. cit.*, *passim*.

<sup>140</sup> ILC Report 2001, 209.

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“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>141</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 principles of non-interference, non-use of force or the threat of force, and self-determination of peoples”.<sup>142</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>143</sup>, direction and control<sup>144</sup> as well as coercion<sup>145</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>146</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>147</sup>, intervention and assistance of request

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<sup>141</sup> Ibidem.

<sup>142</sup> Rein Mullerson, *Intervention by Invitation*, in: Fisler Damrosch, Scheffer, op. cit., 133.

<sup>143</sup> Article 16.

<sup>144</sup> Article 17.

<sup>145</sup> Article 18.

<sup>146</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, 169..

<sup>147</sup> *Supra*.

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>148</sup> so that the impression exists that the 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-determination<sup>149</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>150</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 at 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

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<sup>148</sup> Oscar Schachter, *International Law: the Right of States to use Armed Forces*, 82 Mich. L. Rev. (1984), 1633.

<sup>149</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>150</sup> "Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations"

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belonging to the imperative norms of international law<sup>151</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.

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>152</sup>. Neither the wording of Article 2 of the UN Covenant on Civil and Political Rights regarding its territorial scope<sup>153</sup> nor the *Bankovic* decision of the European Court of Human Rights<sup>154</sup> where the Court rejected the argument that

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<sup>151</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.* 411, 440 (1989); 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

<sup>152</sup> See John Lawrence Hargrove, *Intervention by Invitation and the Politics of the New World order*, in: Damrosch-Beck, Scheffer, *op. cit.*, 113.

<sup>153</sup> Article 2 (1) reads :



“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>155</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>156</sup>. However, it is also clear that such a State is 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>157</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.

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“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>154</sup> *Bankovic and Others v. Belgium and Others*, no. 52207/99, ECHR 2001-XII, paras. 74 et sequ.

<sup>155</sup> *Ibidem*, para. 75.

<sup>156</sup> See Wippman, *Treaty-Based Intervention*, op. cit., 611.

<sup>157</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.”

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*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>158</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.

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.

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<sup>158</sup> Wippman, Pro-Democratic Intervention, op. cit., 294.

Otherwise the requesting State would have ample opportunity to circumvent its obligations.

**4. 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 principle:

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

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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.

## **II. Comments addressing the preliminary Report**

### ***Comments by Vladimir-Djuro Degan***

[...]

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,<sup>159</sup>[1] 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 Afganistan 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 Afganistan 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.

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 U.S.A. (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.

[...]

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<sup>159</sup>[1] In the French original version it is stated : "...sous la seule réserve du respect dû aux normes impératives du droit international général,..".

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*Comments by Abdulqawi Ahmed 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’etat 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 widespread 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.

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### **Questionnaire (10 june 2009)**

#### *Definitions and scope of the subject*

1. Do you agree that a more appropriate name for our subject would be "Military Assistance on Request"?
2. Should the Resolution of 1975 on the Principle of Non-Intervention in Civil Wars be used as a starting point for our resolution?
3. In particular, is our report to be confined to situations falling outside the definition of international and non-international armed conflicts as set forth in the two Additional Protocols to the Geneva Conventions of 1977? Or should this report also cover situations of military assistance in the case of civil war or non-international armed conflict respectively?
4. Should peace-keeping operations be included in the scope of this report? (I personally don't think so)

#### *Legitimacy of the government/ author of the request*

5. Must the government issuing the invitation or request fulfill certain conditions such as
  - a. Effectiveness
  - b. Recognition
  - c. Democratic legitimacy?
6. Which organs shall be considered competent to issue a request or invitation?
  - a. Any of the organs mentioned in Article 7 of the Vienna Convention on the Law of Treaties
  - b. Only the highest state organs
7. Should a government in exile be considered entitled to issue a request for military assistance?

#### *Form of the Request*

8. Shall treaties be viewed as anticipating a request for military assistance or consent thereto?
9. Is a specific request necessary in cases where a treaty containing a general clause regarding military intervention has been concluded?
10. Do treaties of guarantee require a special request?



11. What are the circumstances under which consent may be deemed revocable?

*Legal basis*

12. What is, in your view, the legal basis for military assistance on request?

13. Is a request for military assistance capable of overriding a peremptory norm prohibiting the use of force?

14. Does the legality of military assistance upon request constitute a primary norm of international law?

*Limits to military assistance upon request*

15. Is compliance with a request for military assistance limited by

- a. the principle of non-intervention
- b. the principle of self-determination
- c. human rights
- d. obligations incumbent upon the requesting state
- e. obligations incumbent upon the requested state?

**Responses to the Questionnaire**

***Comments by Mahnoush Arsanjani and Michael Reisman (25.06.2009)***

[...]

This response to your questionnaire of June 2009 is submitted jointly by Mahnoush Arsanjani and Michael Reisman.

1. Neither of the titles seems entirely satisfactory. Intervention by invitation covers the so-called intervention treaties and could serve as a useful focus for your inquiry. But “military assistance on request” implies the absence of the treaty and a request without a prior conventional basis. Moreover it raises the question of what constitutes “military assistance.” In the 1975 Schindler Report, assistance was conceived very broadly in Article 2. So the question of title ultimately turns on the scope you intend for your report ; that is an issue which should be decided, initially, by you and then discussed by the sub-group.

2. The factual and legal situation since 1975 has changed dramatically and while reference might be made to the 1975 resolution, it should not, in our view, be the starting point for your inquiry.

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3. We are not certain as to why you raise this question and how you would approach the matter under one or the other of the options. Subject to discussion, our preference would be for the most comprehensive inquiry, although specific findings of law or policy recommendations might vary insofar as they might take account of the nature of the conflict concerned.

4. we agree with your preference.

5. This question presumes that, first, intervention is lawful in international law and, second, that the government which makes the request must meet certain tests. If you take this issue up in your report, it would appear that you must first establish as a matter of policy that intervention by invitation is sometimes possible. We would note in this regard that that such a presumption is rejected in the 1975 Resolution. We would also note that a critical question which is not reflected in your questionnaire is whether the "purpose" of an intervention can affect its lawfulness and could, in some circumstances, neutralize the three criteria that you set out in question 5. This issue is raised indirectly and partially in question 15, but we believe it needs to be addressed more directly and early on in the report.

6. Assuming that intervention by invitation is to be deemed lawful, such invitations should be issued only by the highest state organs in circumstances in which there is an effective government in operation. In circumstances in which there is no such government, intervention by invitation would appear to require a contextual examination.

7. No.

8. Assuming that such treaties can be lawful and would not be viewed *per se* as inconsistent with *jus cogens*, whether a particular treaty anticipating a request for military assistance or consent thereto would depend upon the interpretation of that treaty.

9. We think it would be a useful presumption to require a request in circumstances in which the apparent invitation is expressed in general terms.

10. See our answer to question 9.

11. In the absence of specific terms in a treaty, consent may be withdrawn at any time as long as the sovereignty of the state having consented is not extinguished.

12. This is a complicated question. If the request is for self-defense, its legal basis is Article 51 of the Charter. Beyond that case, your question requires a determination of the lawful limits (if any) of intervention by invitation.

13. No.

14. We do not understand the purport of this question.

15. We address your questions seriatim :

a. No.

b. Yes.

c. Yes ; in our view, in contemporary international law, human rights are always a factor to be considered in making determinations of lawfulness.

d. Yes.

e. Yes.

[...]

***Comments by Mohamed Bennouna***

[...]

Vous trouverez ci-après la réponse au questionnaire que vous m'avez adressé le 12 juin concernant les travaux de l'IDI relatifs à « l'intervention sur invitation » :

1. En droit international l'intervention sur invitation ou sollicitée (« intervention by invitation ») a une longue histoire dont vous ne pouvez pas faire l'économie en lui substituant simplement un nouvel intitulé. Il s'agit d'une action armée d'un Etat au sein d'un autre Etat aux prises avec un conflit interne. L'action du premier Etat peut recouvrir plusieurs formes, elle peut être directe ou indirecte, autrement dit, consister en un convoi de troupes de combat ou en une assistance militaire en armes et en logistique. D'autre part, cette action peut prendre place là où ne se déroule qu'un conflit limité à l'Etat demandeur et à des forces en son sein, ou bien dans une situation où existent d'autres intervenants.

C'est cette complexité qui fait l'intérêt de ce sujet. On ne peut dès lors en changer l'intitulé en le réduisant à l'un de ses aspects, soit l'assistance militaire. Cela reviendrait à changer de sujet, décision qui relève des instances appropriées de l'Institut.

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2. La résolution de 1975 sur le principe de non intervention dans les guerres civiles ne peut servir de point de départ à la résolution que nous préparons, pour la simple raison qu'elle ne traite pas de la question du consentement à l'intervention, soit notre sujet. Elle est donc de peu de secours pour poser la problématique de ce sujet, même si elle pourra servir lors des discussions sur le principe de non intervention.

3. Ainsi que je l'ai rappelé en réponse à la première question, ce qui est en cause est l'intervention sollicitée qui doit être traitée de façon exhaustive de manière à bien cerner la portée du consentement sur le principe de non intervention et en conséquence sur celui du non recours à la force et de l'autodétermination.

4. Bien qu'il existe des relations entre notre sujet et les opérations de maintien de la paix, je crois également préférable de ne pas traiter directement de celles-ci, même si nous serons amenés à les évoquer au cours de nos discussions.

5. La question de la légalité du gouvernement demandeur ne se pose pas dans l'abstrait, elle dépend des conditions dans lesquelles sa demande a été faite. Elle est donc en relation avec la réponse qui sera apportée à la légalité de l'intervention elle-même. C'est en fonction donc des conditions dans lesquelles la demande est faite et dans lesquelles se réalise l'intervention, qu'il faudra s'enquérir de la compétence du gouvernement en place pour solliciter celle-ci.

6. Comme je l'ai mentionné dans ma réponse à la question précédente, il est difficile de répondre de même à cette question dans l'abstrait. Il faudra tenir compte de la situation en cause et du détenteur réel du pouvoir. Ceci étant, je pencherai *in abstracto* et pour ce genre de décision pour les plus hauts autorités de l'Etat.

7. La réponse est négative.

8. La réponse dépend de l'interprétation du traité en question et de l'appréciation de sa validité, notamment par rapport aux normes du *jus cogens*.

9. L'analyse de la pratique internationale montre que ce type de traité ne donne pas carte blanche à la puissance intervenante mais ouvre la possibilité d'une intervention à la demande du gouvernement en place. Autrement il s'agirait d'un traité instaurant un véritable protectorat d'un Etat sur l'autre.

10. Même réponse que précédemment.
11. Si l'Etat est libre de donner son consentement, il peut aussi le retirer à tout moment.
12. Le sujet concerne l'intervention sollicitée qui présente différents aspects ; la base juridique sera fonction de chacun d'entre eux analysé séparément.
13. La réponse ne peut être que négative.
14. Si on oppose norme primaire à norme secondaire, dans le sens du droit de la responsabilité internationale, il ne peut s'agir que d'une norme primaire.
15. Je réponds successivement aux différents points :
  - a) Tout dépend du contexte
  - b) oui
  - c) oui
  - d) oui
  - e) oui

***Comments by Vladimir-Djuro Degan (8.07.2009)***

[...]

Here are my short answers to your questionnaire.

Ad 1. I agree with you that the most appropriate and the most precise title of our future resolution would be "Military Assistance on Request". However, we should not forget the fact that such "assistance" has consisted in most practical cases in armed interventions on "invitation" which in some cases was dubious. Therefore I see the main objective of our resolution to provide legal restrictions *de lege lata*, as well as *de lege ferenda*, which should prevent flagrant abuses of military assistance or its false qualifications.

Another aspect of this problem should not be neglected. The ICJ in its famous dictum in the 1949 Judgment in *The Corfu Channel Case* refuted arguments by the U.K. on collecting evidences by a mine sweeping operation in the Albanian territorial waters as legitimate measures of a self-protection or self-help :

"The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise

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to most serious abuses... Intervention is perhaps still less admissible in the particular form it would take here ; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself".<sup>160</sup>

The same is with the relationship between a State giving military assistance and that enjoying it. It cannot be expected that the U.S. Government ask military assistance from Panama or the Dominican Republic in case of its internal disturbances.

For this reason it seems appropriate to include among the principles, which you call primary norms, also the principle of sovereign equality of States as formulated in the GA resolution 2625 (XXV) of 1970. That should be a counter-point to this reality.

Ad 2. The Resolution of our Institute of 1975 should not be disavowed by our new resolution. It still provides a set of important legal restraints in case that a civil war as representing a threat to (international) peace is not the subject matter of an action by the UN Security Council under Chapter VII of its Charter.

Ad 3. You had a wish to confine the scope of our resolution only to situations of internal disturbances and tensions in order not to collide these situations with internal armed conflicts. However, all international instruments that you quote assert that such situations are not armed conflicts. Hence, if a government asks a foreign military assistance because it is obviously unable to redress such a situation by its own police and its regular armed forces, it proves the lack of effectiveness and by that its legitimacy to ask it from abroad.

In addition, you cited in good faith at p.244 of your Report situations of "internal tensions" according to the conclusions of the Conference of Government experts of 1970. Such situations, if occur, not only disable an "established government" to ask foreign military assistance, but its exercising in support of that government could result in violations of human rights of local population.

Unless the matter is not of a permanent member State of the Security Council, or of another State that enjoys unconditional support by one of

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<sup>160</sup> *I.C.J. Reports 1949*, p.35.

them, these situations of internal tensions call for actions under Chapter VII of the Charter as representing a threat to peace.

I still believe that a resolution on this subject matter should be useful if it clearly formulates the legal restrictions of foreign military assistance by invitation. There are some fluid situations in progress between such tensions and genuine internal armed conflicts, as was proved in the protracted process of disintegration of the SFRY since 1991.

Ad 4. Peace-keeping operations should be excluded from our purview but keeping in mind that many problems in respect of them are not resolved. If for instance the Security Council fails in ensuring its primary responsibility for the maintenance of international peace and security and does not act in order to prevent a serious threat to a large-scale crime of genocide, as it happened in April 1994 in Rwanda, the problem is of international responsibility not only of the United Nations Organization, but also of the States represented in the Security Council.

The same occurred in July 1995 when an air strike could thwart the commission of genocide in Srebrenica in Bosnia-Herzegovina.

Ad 5, a and b. Both criteria are of essential importance. They should be combined in a formulation of "effective government which enjoys large international recognition", or "effective and generally recognized government", or so.

Ad 5, c. The requirement of "democratic legitimacy" is in international affairs gravely abused. It is claimed only in respect of governments that oppose the policy of a State. Friendly States are labeled as "moderate", what is probably an *ersatz* for their democratic legitimacy. Such double criteria do not promote the Western style democracy in the world. Therefore, it is the best to avoid this requirement, that what you also suggested.

Ad 6. In order to avoid possible abuses, it seems the best that the only highest state organs are considered to be competent to issue a request or invitation for military assistance, provided that they enjoy effectiveness and international recognition.

Ad 7. A government in exile lacks its effectiveness and it could not request a foreign military assistance.

Ad 8 to 11. I generally agree with the joint observations done by Mme Mahnouch Arsanjani and Mr. Michael Reisman. It could be suggested,

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but perhaps not in form of a legal precondition, that in case of application of a treaty on military assistance a special request should be welcome.

All these treaties on military assistance belong to the category of *traites-contrats* according to the classical doctrine of our discipline. In the former jurisprudence they were sometimes interpreted *contra proferentem*. Hence, according to the 1925 Advisory Opinion of the PCIJ on the *Frontier between Turkey and Iraq* :

"if the wording of a treaty provision is not clear, in choosing several admissible interpretations, the one which involves the minimum of obligations for the Parties should be adopted. This principle may be admitted to be sound."<sup>161</sup>

Ad 12. Its legal basis probably lays in the right of all sovereign States to self-limitation, subject however to stringent conditions preventing its abuses which should be provided in our resolution.

Ad 13. Obviously not.

Ad 14. That problem should be avoided.

Ad 15. It is very important clearly to formulate the limits of the compliance with a request for military assistance. As suggested above, the principle of sovereign equality of States should also be provided for.

Instead of mentioning of "the principle of non-intervention", it should be quoted : "the principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the United Nations" (Article 2, paragraph 4 of the UN Charter and the Declaration on Principles in the GA resolution 2625 (XXV)). That formulation encompasses also acts of aggression.

I am unable to suggest a succinct formula of the principle of self-determination.

In respect of "human rights" it should be added : "especially those whose large-scale and systematic infringements constitute generally recognized crimes under international law". In my personal view they are genocide, crimes against humanity, war crimes, aggression, international terrorism

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<sup>161</sup> P.C.I.J., *Series B. -- No.12*, p.25. I exposed in my book on : *L'interprétation des accords en droit international*, La Haye 1963, pp.114-116, some other but not very numerous cases on interpretation *contra proferentem*.



(in spite of the lack of its generally adopted definition), slavery and slave trade, and piracy on the high seas.

Finally, the problem of obligations incumbent upon the requesting and the requested State for military assistance should be avoided altogether. Article 16 of the Rules on State Responsibility offers in this respect reasonable criteria that the ICJ will the most probably apply as alleged customary rules of international law.

[...]

***Comments by Jeannette Irigoien-Barrenne***

[...]

*Definitions and scope of the subject*

1. Do you agree that a more appropriate name for our subject would be “Military Assistance on Request”?

- I prefer “Military Assistance on Request” .

2. Should the Resolution of 1975 on the Principle of Non-Intervention in Civil Wars be used as a starting point for our resolution?

- No

3. In particular, is our report to be confined to situations falling outside the definition of international and non-international armed conflicts as set forth in the two Additional Protocols to the Geneva Conventions of 1977? Or should this report also cover situations of military assistance in the case of civil war or non-international armed conflict respectively?

- It is important to consider structuring the report according to the types of conflicts.

4. Should peace-keeping operations be included in the scope of this report? (I personally don't think so)

- I send you a report about Peace-keeping operations, prepared with R. Benavente.

*Legitimacy of the government/ author of the request*

5. Must the government issuing the invitation or request fulfill certain conditions such as

a. Effectiveness ?

b. Recognition

- Yes

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c. Democratic legitimacy?

- Yes

6. Which organs shall be considered competent to issue a request or invitation?

a. Any of the organs mentioned in Article 7 of the Vienna Convention on the Law of Treaties

b. Only the highest state organs

- Yes

7. Should a government in exile be considered entitled to issue a request for military assistance?

- Only if it is recognized for a majority of democratic states

*Form of the Request*

8. Shall treaties be viewed as anticipating a request for military assistance or consent thereto?

- May be in some cases

9. Is a specific request necessary in cases where a treaty containing a general clause regarding military intervention has been concluded?

- We must analyse the text of the treaty.

10. Do treaties of guarantee require a special request?

- Again, we must consider the text of the treaty

11. What are the circumstances under which consent may be deemed revocable?

- My consideration is : always

*Legal basis*

12. What is, in your view, the legal basis for military assistance on request?

- Humanitarian compassion motivates all the interventions of peace, even if these are unexpected and disturbing. In some cases, seeing what the Americans call mission creep, ie a loss (absence) of driving the strategy. Examples of Somalia, Bosnia and Rwanda revealed severe obstacles and constraints faced by certain missions. Among the most significant articles and least used of the Charter of the United Nations are those relating to the use of armed force. Article 39 allows the Council of Defence to identify and declare the existence of a threat to international peace and

security ; Article 41 gives the possibility to decide non-military sanctions on the attacking State (suspension of diplomatic relations, imposing an economic embargo and retaliation) ; Articles 42-47 provide for the use of military means under the UN to hold, reject or defeat this aggressor. In its entire history, the Security Council invoked Article 7 only once (against North Korea in 1950) to authorize military intervention by United States. In 1990-1991 endorsed and legitimized the U.S. military action against Iraq, a case in which the UN has no influence on decisions taken by the coalition of countries led by the diplomacy of Washington. In 2003, it underestimates the mechanisms of the UN, not to submit to the legitimacy of the Security Council authorization of the use of force against Iraq. In contrast, nothing is in the Chapter VII to deal with intrastate conflict, a subject on which there is a legal vacuum.

13. Is a request for military assistance capable of overriding a peremptory norm prohibiting the use of force?

- It seems that the UN have lost its monopoly on the peacekeepers, which currently are deployed in a number almost as important in the heart of a defence alliance like NATO

14. Does the legality of military assistance upon request constitute a primary norm of international law?

- I think we have to discuss more about it, I don't have a previous answer for that.

*Limits to military assistance upon request*

15. Is compliance with a request for military assistance limited by

a. the principle of non-intervention

- no

b. the principle of self-determination

- yes

c. human rights

- yes

d. obligations incumbent upon the requesting state

- yes

e. obligations incumbent upon the requested state?

- yes

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[...]

**Comments by Edward McWhinney**

[...]

1. It should be recalled that the 10th Commission was created at our Berlin, 1999 reunion as a single, unified Commission mandated to come back with a final Report within two years under a fast-track process that would eliminate the Institut's classical three-step methodology involving completion of Preliminary Report, and Provisional Report and Questionnaire, before the ultimate stage of the Final Report in plenary session. In the case of the 10th Commission as created in 1999, the absence of the first two steps and in particular of a classical-style Questionnaire resulted [in policy terms at least] in a somewhat open-ended and inconclusive Report with only a handful of written responses by Commission members. The Bureau's decision in 2001 to reconstitute the 10th Commission under a new, somewhat blander general title, but with a key, internal structural change of splitting the Commission up into four separate and essentially autonomous sub-commissions, each with its own distinct mandate as to subject matter, was no doubt necessary, but it has presented problems of coordination between the four sub-groups and also considerable logistical demands as to scheduling and timing of meetings of the full membership of each sub-group at the regular biennial sessions of the Institut. This explains the fact that it was only possible to schedule the first full meeting of our particular sub-group on the penultimate day of the Santiago, 2007, reunion ; and that the sub-group's report will now be tabled at the 2009, Naples session, ten years after the establishment of the 10th Commission itself.

2. For this reason as well as the intrinsic excellence of the Institut's Wiesbaden, 1975 Resolution and accompanying Report on Non-Intervention in Civil Wars, our sub-group is clearly right in taking that earlier Resolution as authoritative legal starting-point for its own work. There is no reason to doubt the 1975 Resolution's character as expression of the *lex lata* of the period, strongly influenced as that was by the doctrines and jurisprudence from the Spanish Civil War [1936-1939] era and the Resolutions of the Council of the League of Nations adopted in December, 1936, and May, 1937. The right of a *de jure* government of a state to invite outside assistance in response to rebellion or internal insurrection emerged as clear ; just as, correlatively, did a legal No-Right

[ in Hohfeld's term ] of opposition forces within that state to invoke or to receive a similar aid from outside states. Nothing in subsequent state practice or in authoritative doctrines or in jurisprudence—see especially, here, the ruling of the International Court of Justice in *Nicaragua v. U.S.*—gainsays or departs from this.

3. The UN General Assembly's celebrated Resolution 2625 [XX] of October, 1970, on Friendly Relations and Cooperation among States in accordance with the United Nations Charter, and the emergence of new, peremptory norms as to Genocide, large-scale crimes against humanity, and large-scale war crimes, may presage possible exceptions to the prohibition under Chapter VII of the UN Charter on the recourse to armed force and on Intervention in the absence of any clear and unequivocal, prior legally enabling Resolution voted by the UN Security Council or by the UN General Assembly [the latter on the basis of the 1950 Uniting-for-Peace Resolution precedent] The Institut's 2007, Santiago Resolution on Humanitarian Action, with its annexed Presidential Declaration, makes it clear, however, that there is no legal authority today for Unilateral interventions outside the United Nations or the UN Charter itself.

4. On reading the written responses by several of our confreres to your Report of July 25, 2007, I am able fully to endorse the qualifications offered by Professor Degan as to the doctrine of Recognition today : it is only a *de jure* legal entity [and not a "puppet government" or a "client state"] that is entitled legally to request outside intervention, and any invitation to intervene must be a *bona fide* one [ not coerced, directly or indirectly]. The role of independent, objective Fact-finding as a condition precedent to valid legal claims and legal action has been amply reaffirmed in the context of the distinct and separate Afghanistan and Iraq operations of recent times.

5. I fully agree with our confrere, Dr. Yusuf, on the legal primacy or priority that is to be accorded to UN Regional organisations, strictly defined in terms of Chapter VIII of the UN Charter, as to international decision-making on invitations to intervene : the UN Security Council and General Assembly should, in the first instance, sensibly defer to the advice or decisions of *bona fide*, duly constituted UN Regional organisations before themselves acting. I also endorse Dr. Yusuf's strictures as to "failed states" : it is not a legal category in itself and it

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appears too often to be politically invoked in aid of colourable or illegal armed interventions.

I am responding hereunder, seriatim, to the 15 matters raised in your Questionnaire of June 12,2009.

Question 1. No. The original wording, "Invitation", has a sufficiently precise connotation for International Law purposes : the suggested change would, in my view, tend to encourage the sort of verbal equivocation or evasion identified by our confrere Professor Degan in his Comments on the Report of July 25, 2007. [See my prefatory remarks, supra].

Q.2. Yes.

Q.3. I recommend the narrower definition for the general reasons I have outlined, supra, for Question 1.

Q.4. No.

Q.5. A. Effectiveness is a principal criterion in the application of Classical International Law principles of Recognition and should be retained.

Q.5 B. Yes.

Q.5.C. No.

Q.6. A. No.

Q.6.B. Yes.

Q.7. Only so long as the government-in-exile remains recognised de jure by the government to which it addresses its request.

Q.8. No.

Q.9. Yes.

Q.10. Yes.

Q.11. At any time for a Recognising state.

Q.12. The only legal base is a request by a de jure government still in effective control of its territory ; or a decision by vote of the UN Security Council or by the UN General Assembly [the latter on the 1950 Uniting-for-Peace Resolution precedent].

Q.13. No.

Q.14. No. [Is the question perhaps intended to address "peremptory" rather than "primary" norms?].

Q. 15. A, Yes.

Q.15 B, No.

Q.15.C, No.

Q. 15, D and E, No, unless these “obligations” have already been determined and adopted by Resolution of the UN Security Council or the UN General Assembly [on the Uniting-for-Peace Resolution precedent] ; or by a bona fide Regional organisation under Chapter VIII of the UN Charter operating within its own constitutional jurisdiction and processes as outlined by Dr. Yusuf in regard to the Organisation of African Unity in his Comments for your Report of July 25, 2007 [see my prefatory remarks, supra].

In conclusion I wish to place on record my appreciation of the work of our rapporteur, Professor Hafner, for his painstaking and comprehensive research under the difficult conditions, which have not been of his creation, of the timing and scheduling of our group’s work. I look forward to the adoption of our Sub-Group’s Report at the forthcoming Naples reunion and to the final completion of the mandate of the 10th Commission established in Berlin a decade ago.

[...]

***Comments by Emmanuel Roucouas (15.07.2009)***

[...]

1. The expression “military assistance on request” is wider than that of “intervention by invitation”. It might include a variety of operations by authorization, such as the operations Silver Wake and Libelle in Albania in 1997. Its adoption would also lead to a re-examination of the meaning of both notions of “military” and “assistance”. It is thus preferable to maintain the original title of the item as “intervention by invitation”.

2. Reference to the Resolution of 1975 on the Principles of Non-Intervention in Civil Wars is an illustration of the continuous interest of the Institute on the issues involved. “Intervention by invitation” should be understood as a clarification and actualization of the rules of international law regarding third-part involvement in “armed conflict not of an international character”. Otherwise the exercise would seem inconsistent with some parts of the 1975 Resolution.

3. Developments in both practice and law since the adoption of the 1977 Additional Protocols to the Geneva Conventions make it useful to extend

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the enquiry to situations of “armed conflicts not of an international character”. The term includes civil wars. However, divergence on the definition of these “armed conflicts” not only between the 1975 Resolution and the subsequent 1977 Additional Protocol II, but also between the latter and the general formulation in Article 3 common to the 1949 Geneva Conventions merits to be addressed.

4. No. Even operations undertaken upon authorization by the Security Council have a different legal basis.

5. Effectiveness and/ or recognition of the government issuing the invitation is required ; the need for both or either qualities depends on circumstances. Also, democratic legitimacy as a further component of a lawful request, although debatable, can be addressed. In any case the legitimacy of the government is at the core of the invitation. I think the following sentence from the 1986 decision of the International Court of Justice in the *Nicaragua Case* (paragraph 246) is helpful : “...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 the state, were also to be allowed at the request of the opposition”.

6. Only the highest state organs shall be entitled to issue the invitation. Otherwise, the risk of abuse could not be excluded.

7. A legitimate government in exile could not be prevented from entering into alliances with foreign states. But puppet governments are not entitled to invite for intervention.

8. No general answer can be given to this question, which is a matter of treaty interpretation.

9. In reference or without reference to the above, a specific request by the legitimate government is always necessary.

10. Yes, otherwise the action will be null and void, and violate peremptory norms (*jus cogens*) and Article 103 of the United Nations Charter.

11. Consent is always revocable. State sovereignty yields in situations of extreme necessity and the invitation cannot be conceived as a *carte blanche* to foreign states.



12. The legal basis of intervention is to be found in the invitation itself, i.e. in the consent of the authority issuing the invitation. In this case consent is a circumstance precluding wrongfulness.

13. Following the above, the invitation does not override a peremptory norm prohibiting the use of force, as only the nucleus of the non-use of force constitutes a peremptory norm of *jus cogens*.

14. No, as the legal basis for the action is consent.

15. The compliance with a request for military assistance is indeed limited by the principle of self-determination, human rights, obligations incumbent upon the requesting state or upon the requested state.

[...]

**Comments by Budislav Vukas (15.07.2009)**

[...]

*Definitions and scope of the subject*

Ad 1. I agree with the Rapporteur that “a more appropriate name for our subject would be ‘Military Assistance on Request’ “ if he is sure that our Sub-Group will deal only with “military assistance”, and not with other possible ways/means of assistance. Anyhow, it is true that the title of the Tenth Commission mentions only “Use of **Armed Force**”.

Ad 2. International relations have not significantly changed since the adoption by the Institute of the Resolution “The Principle of Non-Intervention in Civil Wars” in 1975. Therefore, it remains a rather restricted field for the elaboration of innovative ideas by our Sub-Group.

Ad 3. In my view, our report should cover all the situations of military assistance in the cases of invitation by the local government/authorities in the case of massive violations of fundamental human rights (e.g. Afghanistan).

Ad 4. I agree with the Rapporteur that peace-keeping operations should not generally be included in the scope of our report. However, in some situations they may be invited for the same lawful, humanitarian reasons/purposes as armed forces of individual States.

*Legitimacy of the government/author of the request*

Ad 5. It is not necessary that the government/authority issuing the invitation or request fulfils any formal conditions. It is only important that it does not request intervention against its own enemy or for any

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other political reason. The only important condition is the probability that the intervention could stop the violation of fundamental human rights without causing more sufferings to the population of the State/territory where it takes place.

Ad 6. For many reasons it would be useful that the request or invitation be issued by one of the organs mentioned in Article 7, paragraph 2(a) of the Vienna Convention on the Law of the Treaties. However, for the reasons mentioned under no. 5 above, other active organs should also be entitled to ask intervention in order to save their population.

Ad 7. Yes, if it satisfies the conditions mentioned under 5 *supra*.

*Form of the request*

Ad 8. Universal, regional or bilateral treaties anticipating requests and setting rules for military assistance in humanitarian situations would be useful, although not indispensable for later specific requests. However, the treaty should contain a procedure permitting the decision on the military intervention in the situations when the competent authorities are not in a position to issue a specific request. Such are, for example, these days (mid July 2009) in Somalia and Iraq.

Ad 9. Such a specific request would be useful as it would clarify the reasons for requesting the military intervention as well as the compatibility of that request with the rules of the treaty containing general clauses regarding military intervention.

Ad 10. I am not quite sure what the Rapporteur considers as “treaties of guarantee”.

Ad 11. Various changes of the circumstances which were the reason for inviting a foreign State (or States, or organizations), to intervene, may be a valid reason for revoking the consent. The main reason would be a new situation making possible that the intervention itself endangers basic human rights. Such a situation would be the loss of influence by the authority having invited the intervention. The new dominant authority in a State could be against the intervention, and in such a case the intervention automatically ceases to be “by invitation” and becomes mostly dangerous for the population.

*Legal basis*

Ad 12. The legal basis for military assistance is the right and duty under international law of the competent organs of every State to protect the fundamental human rights of their population.

Ad 13. The use of force is already in the Charter of the United Nations permitted in self-defense if an armed attack occurs against a State (Article 51). Therefore, the request for military assistance in order to save the population can be considered as only partially extending the provisions of the UN Charter.

Ad 14. The resolution adopted by the Institute will contribute to the recognition of the legality of military assistance upon request to be considered a primary norm of international law.

*Limits to military assistance upon request*

Ad 15. As the only reason for “intervention by invitation” should be the protection of the population from the violation of fundamental human rights, the compliance with a request for military assistance should be limited by the evaluation that the intervention could cause more sufferings than the existing situation in a State/territory.

## Final Report

### A. Introduction

1. "Intervention by invitation" in the broadest sense has frequently been conducted from ancient up to recent times<sup>162</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>163</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>164</sup>. Such activities are, however, subject to certain legal constraints resulting from international<sup>165</sup> as well as national law<sup>166</sup>. The problem under discussion in this report is to discuss the extent to which States are entitled under international law to seek military assistance from foreign States for this purpose and to which foreign States may render such assistance.

#### 1. *The work of the IDI*

2. The IDI has 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>167</sup>. On the basis of a

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<sup>162</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>163</sup> Doswald-Beck, *op. cit.*, 189 ; Nolte, *op. cit.*, 65.

<sup>164</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>165</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>166</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>167</sup> See in particular the reports of the Rome Session 1973 (*IDI Annuaire* 1973, 416) and the Wiesbaden Session (*IDI Annuaire* 1975, 119). 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

report by M. Schindler, it adopted a resolution on “The Principle of Non-Intervention in Civil Wars” at the session of Wiesbaden in 1975<sup>168</sup>. This resolution did not rule out altogether any such intervention : it did so only insofar as third States were called upon to “refrain from giving assistance to parties to a civil war which is being fought in the territory of another State”<sup>169</sup>. 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>170</sup>

3. This resolution permits an interpretation according to which military intervention by invitation is not outlawed in situations short of a civil war in the sense of Article 1 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>171</sup> so that there was no certainty on whether the resolution reflected *lex lata* or proposed articles de *lege ferenda*.<sup>172</sup> According to Rapporteur Schindler the resolution could only be viewed as *de lege ferenda*.<sup>173</sup>

4. 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 intervention or

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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>168</sup> IDI Annuaire 1973, 474 (hereinafter : “1975 Resolution”).

<sup>169</sup> Article 2.

<sup>170</sup> Ibidem.

<sup>171</sup> The divergence of views was reflected in particular in the voting results : 16 members voted in favour, 6 against and 16 members abstained ; 1975 Report, 474. See also Nolte, *op.cit.*, 117 ; Hanspeter Neuhold, *Internationale Konflikte* (1977), 101.

<sup>172</sup> Nolte, 117 ; 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 non-intervention and should influence state practice”, Oscar Schachter, *International Law : The Right of States to Use Armed Forces*, 82 *Michigan Law Review* (1984), 1620.

<sup>173</sup> IDI Annuaire 1973, 413.

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military assistance to a foreign government “à la demande expresse” of the latter was undisputed.<sup>174</sup>

5. 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>175</sup>

6. In view of the fact that this resolution was adopted thirty years ago, before the end of the cold war, one has to acknowledge that since then the political background has changed in a measure that warrants a substantially different solution. The decision of the majority of the IDI in favour of a complete ban of intervention in a civil war was undoubtedly a reaction to the political situation at that time, in particular to the political environment regarding this issue, which was characterized by the Vietnam War, the East-West conflict as well as the establishment of neo-colonial structures<sup>176</sup>. The East-West conflict involved the political acceptance of separate zones of political and military influence of the two State systems as it was appraised in particular by the system of socialist States and its doctrine. However, in particular western doctrine fervently criticised this approach. So, e.g. the invasion of the CSSR in August 1968 by the troops of the socialist States, which the Soviet Union justified by an invitation from CSSR authorities, encountered broad refusal in doctrine. It was therefore not surprising that in the aftermath of these events the majority of the IDI voted in favour of a total ban of intervention in situations short of international armed conflicts. This ban was seen as a legal tool to reduce the hegemony of the major powers as intervention by invitation was regarded as an instrument for major powers to influence smaller States and was likely to be misused very easily. The divided world in the General Assembly provided ample materials of condemnation of such forms of intervention that were allegedly justified by reference to invitations.<sup>177</sup>

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<sup>174</sup> IDI Annuaire 1975, 126.

<sup>175</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>176</sup> See Doswald-Beck *op.cit.*, 252.

<sup>177</sup> Doswald-Beck, *op.cit.*, 209, 252.

7. Although the Resolution of 1999 reiterated the gist of the 1975 Resolution, it is nevertheless justified to acknowledge that at present a different political situation serves as basis for the decision on the lawfulness of such conduct. It must also be recognized that the prohibition of intervention by invitation as envisaged by the 1975 Resolution did not reflect the practice and thus amounted to a rule *de lege ferenda* that corresponded neither to practice at the time nor to subsequent practice. The 1975 Resolution therefore does not exclude a rule that deviates from the one included in this resolution..

## 2. *Writers and practice*

8. The question whether or not States may seek military 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>178</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>179</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>180</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>181</sup>, or rather the government, requesting such an intervention as well as the relation to the object and purpose pursued by the relevant activity.

9. The view supporting the prohibition of such military 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>182</sup>, that a right to render such military

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<sup>178</sup> Nolte, *op. cit.*, 29.

<sup>179</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>180</sup> Nolte, *op. cit.*, 125.

<sup>181</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>182</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*,

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assistance would be open to misuse or that the role of the United Nations could be impaired<sup>183</sup>.

10. 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 ;

11. This phrase obviously attests to 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. In the course of its elaboration, Argentina and Jamaica clearly stated that intervention by invitation did not violate international law.<sup>184</sup> 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>185</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>186</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

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

<sup>183</sup> The discussions in the IDI in 1973 and 1975 were substantially influenced by the Vietnam War, Nolte, *op. cit.*, 116.

<sup>184</sup> Peter E. Harrell, *Modern-Day “Guarantee Clauses” And the Legal Authority of Multinational organizations To Authorize the Use of Military Force*, 33 *Yale J.Int.L.* 417, at 428.

<sup>185</sup> These limits will be discussed *infra*.

<sup>186</sup> Le Mon who 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.



such activities as it still transpires in Resolution 2625 (XXV) to the recognition of the legality in the later resolutions<sup>187</sup>.

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

13. This position was endorsed by the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States<sup>188</sup>, which abstained from quoting the duty of non-intervention in internal armed conflicts, which was still contained in the Declaration on the Principles on the Friendly Relations of States<sup>189</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>190</sup>.

14. 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>191</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>192</sup>

Again, this phrase, which speaks of intervention with prior consent, 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

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<sup>187</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.

<sup>188</sup> A/RES/36/103.

<sup>189</sup> A/RES/2625/XXV.

<sup>190</sup> Nolte, op. cit., 180.

<sup>191</sup> Le Mon, *Unilateral Intervention by Invitation in Civil War*, 35 *International Law and Politics* (2003), 749 ; Nolte, 211.

<sup>192</sup> *Case Concerning Military and Paramilitary activities in and against Nicaragua* (Nicaragua v United States of America), ICJ Reports 1986, para. 246.

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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.

15. 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 and becomes perfectly lawful if it occurred at the request or with the agreement of the State.<sup>193</sup>

16. 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>194</sup>

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<sup>193</sup> <http://www.icil.cam.ac.uk/Media/ILCSR/rft/Sr29.rtf>.

<sup>194</sup> Ibidem ; 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) ; ibidem, 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.

17. 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>195</sup>

18. Notwithstanding the reference to this principle, the existing analysis and reviews of practice, undertaken by Le Mon<sup>196</sup> and Nolte<sup>197</sup>, do not deny the admissibility of such activities despite different views expressed in the General Assembly or the Security Council. Doswald-Beck's analysis also confirms this result, irrespective of her conclusion that such activities should be prohibited ; but this latter conclusion only constitutes a rule de *lege ferenda* and is not in conformity with existing practice<sup>198</sup>. Accordingly, the starting point of 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>199</sup>. What remains disputed and intensively discussed is the question of the type and author of the invitation (request or prior consent) and the limits of such activities under international law.<sup>200</sup>

#### **B. The parameters of the subject under discussion**

19. The authors who deal with "intervention by invitation" sometimes also address the issue of intervention by invitation from the side of the party opposing the government in an internal armed conflict<sup>201</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>202</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.

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<sup>195</sup> See *infra*.

<sup>196</sup> Op. cit.

<sup>197</sup> Op. cit ; this work undoubtedly constitutes the broadest analysis of the practice in this field.

<sup>198</sup> Doswald-Beck, op. cit., 242.

<sup>199</sup> Christopher J. Le Mon, Unilateral Intervention, op. cit., 743.

<sup>200</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>201</sup> See e.g. Schindler, IDI 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, para. 246.

<sup>202</sup> See *infra*.

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20. A second issue frequently dealt with in conjunction with the present subject is that of military assistance if the opposite side received substantial support and assistance from a third State. This issue was addressed by the 1975 Resolution.<sup>203</sup> It is proposed not to deal with this question here since the focus of this Report should be on the involvement of third States on the side of the government.

**1. Definitions and scope of activities**

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

*a. Character of Activities*

i) From “intervention” to “military assistance”

22. 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>204</sup>. There exist a wide variety of definitions or attempts at a definition. A broad potential scope 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>205</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>206</sup>. Some, however, would confine its use to military force.

23. General Assembly Resolutions 2625 (XXV) and 2131(XX) include in this term :

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<sup>203</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.”

<sup>204</sup> Wehser, *Die Intervention nach gegenwärtigem Völkerrecht*, in : Simma, Blenk-Knocke (eds.), *Zwischen Intervention und Zusammenarbeit* (1979), 24 ; see also the ICISS 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>205</sup> <http://www.iciss.ca/report2-en.asp>.

<sup>206</sup> *Ibidem*, point 1.37.

“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>207</sup>.

24. The classical definition mostly referred to is that given by Oppenheim : “intervention consists of any dictatorial interference by a State into the affairs of another State for the purpose of maintaining or altering the actual condition of things”<sup>208</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>209</sup> likewise seem to exclude “intervention by invitation” since these “interventions” or, rather, acts of military 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 as military assistance on request or with prior consent on the one side, 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

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<sup>207</sup> Resolution A/RES/2131(XX) and A/RES/2625(XXV).

<sup>208</sup> Robert Jennings, Arthur Watts, *Oppenheim’s International Law* (1992), 430.

<sup>209</sup> Oran R. Young, *Systemic Bases of Intervention*, in : J.N. Moore (ed.), *Law and Civil War in the Modern World* (1974), 111.

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in the General Assembly resolutions 2625 (XXV) and 2131 (XX) clearly expresses this opposition when the coercion of another State and the subordination of the exercise of sovereign rights are addressed.<sup>210</sup> Whereas rules on non-intervention address activities by foreign States, which are undertaken for the purpose of undermining the existing government, the activities addressed in this Report intend to support the government. 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.

25. In its 1975 Resolution, the IDI quite correctly abstained from elaborating a definition and replaced the term “intervention” by “assistance”. For this reason it is suggested to use the term “assistance” instead of “intervention” in the present Report as well and to qualify it by the epithet “military”. 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. For this reason, it was proposed in the preliminary Report to replace the term “intervention by invitation” by “military assistance on request” indicating that the issue under discussion only

- (i) relates to military assistance
- (ii) and requires a request.

26. However ; different members of this committee raised various concerns regarding this formulation : One concern was that the term “intervention by invitation” has already found wide recognition in theory and practice<sup>211</sup> as is confirmed by the Nicaragua judgment of the ICJ<sup>212</sup>,

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<sup>210</sup> See *supra*.

<sup>211</sup> See Responses to Questionnaire by M. Bennouna.

<sup>212</sup> *Case Concerning Military and Paramilitary activities in and against Nicaragua* (Nicaragua v United States of America), ICJ Reports 1986.

another member questioned the expression “military assistance” as it was seen to be too broad so as to include operations Silver Wake and Libelle (“Dragonfly”) in Albania<sup>213</sup>. One view was that “request” should be avoided since the term “invitation” already possesses a firm and concrete meaning in international law<sup>214</sup> whereas others support the change of the designation of this topic<sup>215</sup>.

27. In any case, the expression “intervention by invitation” can hardly be seen as reflecting the conduct of States envisaged by this Report as it is not an intervention in the usual sense of international law so that the expression “intervention” has to be avoided. It is certainly hard to reconcile all the views expressed regarding a different designation. However, the extent of the term “intervention by invitation” is not very clear.<sup>216</sup> It is justified to understand the meaning of this term as “military assistance” as this is also corroborated by doctrine : Nolte, for instance, also avoids the expression “intervention”.<sup>217</sup> The common denominator seems to be to maintain the expression “military assistance”<sup>218</sup> and to combine it with the requirement of prior consent so that the issue could be called “military assistance with prior consent”. The epithet “prior” is necessary to exclude the possibility of consent *ex post*, which cannot legitimise any military activities undertaken without consent<sup>219</sup>. One could also derive from the term “assistance” that it already implies prior consent to have been given since otherwise such activities would not constitute assistance. However, in order to avoid misunderstandings the qualifier of prior consent is useful.

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<sup>213</sup> See Responses to Questionnaire by E. Roucouas. These were military operations by the US and Germany, respectively, to rescue their own nationals from Tirana, Albania in March 1997.

<sup>214</sup> See Responses to Questionnaire by E. McWhinney.

<sup>215</sup> See Responses by B. Vukas, J. Irigoien, V. D. Degan.

<sup>216</sup> See Responses by M. Bennouna and also by E. Roucouas. In favour of a change in title are B. Vukas, J. Irigoien and V. D. Degan.

<sup>217</sup> The German term « Eingreifen » is not identical to the terms « Einmischung » or « Intervention ».

<sup>218</sup> As to the explanation see *infra*.

<sup>219</sup> See for instance the Article on consent of the Articles on State Responsibility where it is clearly stated that consent must be prior in order to serve as a circumstance excluding wrongfulness. The commentary on this provision offers as example the referendum held in Austria in April 1938 after the Anschluss on 13 March 1938. The Nuremberg judgment qualified this referendum as invalid.

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ii) Objectives of the assistance

28. The term “assistance” already implies that acts of military assistance are aimed at supporting the government so that rights “to intervene” for other purposes are excluded. As expressed in the Declaration on Principles of International Law, Friendly Relations and Co-operation among States, “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, are in violation of international law.”<sup>220</sup> In this regard, it also states that, “Every State has the inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.”<sup>221</sup> These statements express a basic principle, which also applies to military assistance with prior consent. Such assistance may be directed only at supporting the government in the interest of the consenting State. It may not go beyond assistance to the government or be directed against the territorial integrity or political independence of the consenting State<sup>222</sup> so that such or similar activities are also excluded from the scope of this Report.

29. In support of the above, Nolte argues that assistance for limited purposes has generally been accepted by the international community, whereas the attempt at overthrowing the State system by foreign troops, even with the consent or at the request of the government, must be seen as violating the principle of non-intervention.<sup>223</sup>

iii) Different types of assistance

30. 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 nor the reports preceding it<sup>224</sup> defined the scope of assistance to be covered. Article 2 provides a non-exhaustive listing of activities considered to be assistance in the sense of the 1975 Resolution :

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<sup>220</sup> Resolution 2625 (XXV), 24.10.1970.

<sup>221</sup> Ibidem.

<sup>222</sup> See, e.g. US Instrument of Ratification with Amendments, Conditions and Reservations to the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal which expressly provides that “action by the US taken in accordance with the Panama Canal Treaty shall never be directed against the territorial integrity or political independence of Panama”, (June 15, 1978), 17 ILM 827 (1978).

<sup>223</sup> Nolte, *op.cit.*, 562 et seq.

<sup>224</sup> See, for instance, the report of 1973.



- “ a) sending armed forces or military volunteers, instructors or technicians to any party to a civil war, or allowing them to be sent or to set out ;
- b) drawing up or training regular or irregular forces with a view to supporting any party to a civil war, or allowing them to be drawn up or trained ;
- c) supplying weapons or other war material to any party to a civil war, or allowing them to be supplied ;
- d) giving any party to a civil war any financial or economic aid likely to influence the outcome of that war, without prejudice to the exception provided for in Article 3 (b) ;
- e) making their territories available to any party to a civil war, or allowing them to be used by any such party, as bases of operations or of supplies, as places of refuge, for the passage of regular or irregular forces, or for the transit of war material. The last mentioned prohibition includes transmitting military information to any of the parties ;
- f) prematurely recognizing a provisional government which has no effective control over a substantial area of the territory of the State in question.”

31. Article 3 of the 1975 Resolution offers a further indication of which kinds of activities should also be addressed as it excludes from the prohibited assistance besides purely<sup>225</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>226</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 military assistance targeted by this resolution.

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<sup>225</sup> The qualifier “purely” is added in Article 4.

<sup>226</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.”

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32. However, this kind of definition in the 1975 Resolution permits the conclusion that it first of all had military assistance in mind, i. e. the sending of military forces. As far as the other forms are concerned, such as supplying weapons or other war material, financial or economic aid, making territory available to a foreign government or premature recognition, they are not included in the usual understanding of “intervention” in the sense addressed here and fall within the purview of a different legal regime. Therefore, as to the present Report, assistance is understood as being rendered for military purposes so that the term “military assistance” is adequate in order to characterize the assistance.

33. Nevertheless, a further limitation is needed since the term “military assistance” may still be subject to two different legal regimes :

3. 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.

4. 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 first type of cases since if taken in its original meaning “intervention” (military assistance) is considered as an act

1. that is attributable to the foreign State and

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

34. Although State responsibility is not the matter to be discussed 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>227</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

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<sup>227</sup> Resolution A/RES/56/83

Article 6 of these Articles<sup>228</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).

35. This approach excludes not only the delivery of arms and other war material but also the sending of individual military personnel. Nevertheless, it must be discussed whether the act of sending military personnel itself, even if this personnel is supposed to act under the direction of the requesting State, should fall within the purview of this Report. Such an act of sending could give rise to the responsibility of the sending State according to Article 16 of the Articles on State Responsibility<sup>229</sup> insofar as it intends to facilitate the commission of an internationally wrongful act by the assisted State. According to the commentary on this article, three conditions have to be met to create responsibility :

“First, the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful ; secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so ; and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting State itself.”

36. The sending of military trainers and similar personnel into the service of the requesting State could also be seen as assistance in the sense of this article and of this Report. Nevertheless, one could argue that the original term “intervention by invitation” does not cover the mere act of sending personnel and was also not addressed by the 1975 Resolution.

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<sup>228</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>229</sup> Article 16 reads as follows : *Aid or assistance in the commission of an internationally wrongful act*

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if :

(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.

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However, replacing the term intervention by assistance broadens the scope of activities addressed by this Report. Such a broadening should be avoided since it would require a reassessment of the whole issue. For this reason, it is proposed to explicitly redress the term of “assistance” so as to exclude the mere act of sending personnel to be placed under the control and direction of the requesting State.

37. Accordingly, this Report includes only 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>230</sup>, Stanleyville 1964<sup>231</sup>, Gabun 1964<sup>232</sup>, Dominican Republic 1965<sup>233</sup>, CSSR 1968<sup>234</sup>, Afghanistan 1979<sup>235</sup>, Grenada 1983<sup>236</sup>, Panama 1989<sup>237</sup> to Central African Republic 1996<sup>238</sup> and Iraq 2004<sup>239</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.

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<sup>230</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.

<sup>231</sup> Nolte, *op. cit.*, 261 ; Doswald-Beck, *op. cit.*, 217.

<sup>232</sup> Nolte, *op. cit.*, 305.

<sup>233</sup> Nolte, *op. cit.*, 268 ; Doswald-Beck, *op. cit.*, 227.

<sup>234</sup> Nolte, *op. cit.*, 271 ; Hacker, *op. cit.*, 775.

<sup>235</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>236</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>237</sup> Nolte, *op. cit.*, 289, Abraham Sofaer, *The Legality of United States Action in Panama*, 29 *Columb. J. Trans. L.* (1991), 281 ; Louis Henkin, *The Invasion of Panama Under International Law : A Gross Violation*, 29 *Columb. J. Trans. L.* (1991), 294.

<sup>238</sup> Nolte, *op. cit.*, 342.

<sup>239</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 prone 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 10 *ARIEL* (2005), 147.

iv) No obligation to render military assistance

38. States are not obliged to comply with a request for military assistance by another State unless they are bound by a treaty provision to render such assistance.<sup>240</sup>

v) Should peace-keeping operations be included ?

39. 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).<sup>241</sup> 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.

40. 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 act on their behalf<sup>242</sup> or they can authorize the deployment of such forces<sup>243</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>244</sup>.

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<sup>240</sup> On the issue of consent or request by treaty, see *infra*.

<sup>241</sup> The general view among the members of the Committee is that peacekeeping operations should not be addressed here.

<sup>242</sup> This is the traditional practice of the peacekeeping operations of the United Nations, where the peacekeeping troops constitute subsidiary organs and the official acts are attributable to the United Nations.

<sup>243</sup> The United Nations has started to follow this practice in particular since the Resolution S/RES/678 (1990).

<sup>244</sup> The authorizing resolution would not be needed and would be redundant if the activities in question would constitute military assistance with prior consent. 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 ; Wippman, David Wippman, Pro-democratic intervention by invitation, in : Gregory H. Fox, Brad R. Roth (eds.), Democratic Governance and International Law (2000), 302.

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*b. Scope of application* *ratione temporis*

41. This topic relates to forcible activities that are performed within the territory of another State with the prior consent of the territorial State. They can take place in the course of non-international armed conflict, civil strife, or any other kind of disturbances in the territory of the requesting State where no third State is involved. A new dimension has been added to the purview of this topic by the increase of terrorism and the subsequent “war on terror” which has served as justification for intervention. This new tendency has also materialized in Article 222, the “Solidarity clause” of the Treaty on the Functioning of the European Union in the version of the Lisbon Treaty, which provides for a reaction – in addition to situations of natural or man-made disasters - in cases of a terrorist threat or terrorist attack in the territory of the Member States.<sup>245</sup>

42. The character of armed activities during which military assistance with prior consent may occur allows for the delimitation of this topic *ratione temporis* insofar as activities of the requested State before or after the advent of certain armed activities do not fall within the ambit of the present topic.

43. The 1975 IDI Resolution only referred to civil war by defining it as :

“any armed conflict, not of an international character, which breaks out in the territory of a State and in which there is opposition between :

- a) the 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, or
- b) two or more groups which in the absence of any established government contend with one another for the control of the State.

2. Within the meaning of this Resolution, the term "civil war" shall not cover :

- 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 ;

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<sup>245</sup> See *infra*. European Council statement on combating terrorism (2/22) Bulletin EU 3-2004 I.29. (25 and 26 March 2004) ; European Council Declaration on solidarity against terrorism (1/1) Bulletin EU 3-2004 I.50. (25 and 26 March 2004).

c) conflicts arising from decolonization.”

44. In view of the 1975 Resolution that declared as illegal any military assistance if performed at the time of civil war as defined in its Article 2, it was proposed in the preliminary Report to restrict the notion of military assistance to activities carried out in situations reaching from internal disturbances up to non-international armed conflicts, notwithstanding the possible illegality of such acts. It was further suggested in the preliminary Report that military assistance with prior consent should not extend to situations qualified as “civil war” or “armed conflict” either in the sense of common Article 3<sup>246</sup> or of Additional Protocol II.

45. However, the majority of the Committee members<sup>247</sup> were in favour of a comprehensive solution that would encompass all situations short of an international armed conflict.<sup>248</sup> On the basis of the different objectives of intervention on the one side and of assistance on the other, it is possible to deal with military assistance during non-international armed conflicts as well, notwithstanding the 1975 Resolution which does not permit such a distinction since it speaks generally of assistance that is prohibited during situations of civil war.<sup>249</sup>

46. In this regard it is important to recall that the 1975 IDI Resolution was adopted before the elaboration of the two Additional Protocols to the Geneva Conventions in 1977. Therefore it seems justified to proceed with the use of terms from the Additional Protocols so that this Report would address all situations of armed activities, including armed conflicts,

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<sup>246</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>247</sup> See comments by M. Bennouna, E. Roucouas, B. Vukas, M. Arsanjani and M. Reisman.

<sup>248</sup> The broad view was expressed by members of the Committee that this Report should address all situations short of an international armed conflict with the exception of V.D. Degan.

<sup>249</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.”

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outside of armed conflicts of an international character as defined by these Protocols.<sup>250</sup>

47. The cases falling within the purview of a comprehensive analysis include situations of non-international armed conflicts as well as situations below the threshold of common Article 3 of the Geneva Conventions<sup>251</sup> or Additional Protocol II of 1977<sup>252</sup> like situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature. These situations are not defined as armed conflicts and are excluded *ratione materiae* from Additional Protocol II of 1977<sup>253</sup>.

48. It is obvious that situations in which such military assistance is rendered are not included in the notion 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. Military assistance in such a situation would amount to the exercise of collective self-defence, a matter that does not fall under this topic. Although situations in which collective self-defence is exercised through the involvement of a foreign State by military assistance in accordance with Article 51 UN Charter may be conceivable, these situations fall outside our scope : this justification for military activities on the territory

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<sup>250</sup> Some of the members of the Committee such as E. McWhinney, E. Roucouas, B. Vukas and V.D. Degan favoured the 1975 Resolution as a starting point, whereas M. Reisman and M. Arsanjani support the view that the situation has changed significantly. M. Bennouna and J. Irigoien are also of the opinion that the 1975 Resolution should not be used as a starting point for this Report.

<sup>251</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>252</sup> This Protocol 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 No. 17513.

<sup>253</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.



of another State presupposes an armed attack in the sense of an international armed conflict.<sup>254</sup>

49. However, fighting against persons, bands etc. infiltrating the territory of the requesting State from outside does not give rise to the international character of the conflict unless another State gets involved in the conflict against the government.

50. The distinction which remains to be made concerns that of the involvement of a foreign State or international organization in armed activities taking place against the targeted State. It is therefore useful to assess the lawfulness of military assistance with prior consent in all situations short of international armed conflict as defined in the Geneva Conventions and Additional Protocol I relating to the Protection of Victims of International Armed Conflicts. Concerning its scope of application Protocol I first resorts to Article 2 common to all Geneva Conventions defines the notion of inter-state armed conflict and declares the Conventions applicable

1. in cases of declared war or
2. any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

51. The Commentary explains that this definition comprises situations of open hostilities irrespective of a formal declaration of war.<sup>255</sup> It goes on, “any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. An international armed conflict therefore exists where two States confront each other with military force.

52. Protocol I supplements the definition of international armed conflicts from common Article 2 to include “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.”<sup>256</sup>

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<sup>254</sup> For further details on the threshold of an armed attack and the notion of the use of force see the Report by E. Roucouas, 10th Commission of the IDI, Sub-group on Self-defence, (Santiago, 2007) paras 26 et seq.

<sup>255</sup> J. S. Pictet (ed.), Commentary on the Geneva Conventions of 12 August 1949, 32, [www.icrc.org/ihl](http://www.icrc.org/ihl).

<sup>256</sup> Article 1(4) Additional Protocol I.

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Nowadays, however the significance of wars of national liberation and decolonization is greatly diminished.<sup>257</sup>

53. In this regard the question arises whether and from which level onwards the involvement of a foreign State or foreign nationals may render international an internal conflict.<sup>258</sup> Certain doctrine distinguishes between international armed conflicts on the one hand and internationalized non-international armed conflicts on the other. "An internationalized non-international armed conflict is a civil war characterized by the intervention of the armed forces of a foreign power."<sup>259</sup> It is to be discussed whether internationalized non-international armed conflicts fall within the scope of this Report.

54. The ICTY Appeals Chamber in the Tadic case is often cited as an authoritative definition of internationalized armed conflicts: "It is indisputable that an armed conflict is international if it takes place between two or more States. In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State."<sup>260</sup> This statement (in particular the term "alongside") shows that the ICTY also distinguishes between two situations: international armed conflicts - rendered international through the participation of a foreign States - on the one side and internationalized internal armed conflicts where some participants were acting under the control of the sending State.

55. An armed conflict will generally become international when direct military support from a foreign State is given to armed groups in the

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<sup>257</sup> H. Quane, e.g. delimits the period of decolonization from 1945-1997, *The United Nations and the Evolving Right to Self-Determination*, 47 ICLQ, 573 (1998) 551.

<sup>258</sup> A. Paulus, M. Vashakmadze, *Assymetrial War and the Notion of Armed Conflict – An Attempt at a Conceptualization*, 9 *International Review of the Red Cross* (2009).

<sup>259</sup> H.-P. Gasser, *Internationalized non-international armed conflicts: Case studies of Afghanistan, Kampuchea, and Lebanon*, 33 *American University Law Review*, 157 (1983).

<sup>260</sup> ICTY, *Prosecutor v. Tadic*, Case No. IT-94-1 (Appeals Chamber), July 15, 1999, para. 84, see also ICTY, *Kordic and Cerkez*, (Trial Chamber), February 26, 2001, para. 66. An application of this principle was also found in ICTY, *Blaskic*, (Trial Chamber), March 3, 2000, para 83-123.

context of their struggle against an effective government.<sup>261</sup> Taking into account the inter-state component in the definition of international armed conflicts in common Article 2, conflicts between States and non-State groups become internationalized only when the military action of such groups is clearly attributable to the respective State.<sup>262</sup> The level of support rendered by a foreign State to armed non-state groups in order for the actions of the armed groups to be attributable to the foreign State was determined by the ICJ in the Nicaragua Case which applied the test of “effective control”.<sup>263</sup> In reviewing jurisprudence of the ICTY, Zimmermann questions whether the Nicaragua test, which was developed by the ICJ for purposes of State responsibility, may validly be applied in order to determine whether a given armed conflict is international or internal.<sup>264</sup> The Appeals Chamber in the Tadic case finally determined that the Nicaragua test is not persuasive.<sup>265</sup> However, in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, the ICJ held, in contrast to the ICTY Appeals chamber in the Tadic case, that the “overall control test” developed in the jurisprudence of the ICTY was not appropriate concerning the determination of State responsibility.<sup>266</sup> But the ICJ observed that “logic does not require the same test to be adopted in resolving two issues, which are very different in nature”<sup>267</sup> and went on to state that the overall control test may still be applicable and suitable when deciding whether an armed conflict is international or non-international in nature.<sup>268</sup> Therefore, when the involvement of a foreign State remains below the threshold of “overall control” the conflict does not become an international armed conflict for the purposes of this Report.

56. Although writers are quite unanimous in their wish to abandon the distinction between international and non-international armed conflict,

<sup>261</sup> International Institute of Humanitarian Law, *The Manual on the Law of Non-International Armed Conflict - with Commentary*, 2 (2006).

<sup>262</sup> Paulus, Vashakmadze, *op. cit.*

<sup>263</sup> *Case Concerning Military and Paramilitary activities in and against Nicaragua* (Nicaragua v United States of America), ICJ Reports 1986, para. 109.

<sup>264</sup> A. Zimmermann, Article 8 in : O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, 481 (2008).

<sup>265</sup> *Prosecutor v. Tadic*, paras. 116 et seq.

<sup>266</sup> *Bosnia and Herzegovina v. Serbia and Montenegro* (2001) para. 402 et seq.

<sup>267</sup> *Ibid.*, para. 405.

<sup>268</sup> *Ibid.*, para 404., see Zimmermann, *op.cit.*, 482.

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this distinction has to be maintained.<sup>269</sup> However, this relates only to the law applicable to the conduct of the hostilities, a matter which is not the concern of the present topic.

57. The question remains whether internal conflicts may become international armed conflicts through the involvement of a foreign State on behalf of the government, which has consented to military assistance. Gasser in particular refers to Afghanistan and other cases as falling under the category of internationalized armed conflicts.<sup>270</sup> Since these cases are also cited as cases of Intervention by Invitation or, now, military assistance with prior consent, they remain non-international armed conflicts.

58. However, according to Fleck “the non-international or international character of an armed conflict depends on the question whether or not a responsible territorial government has given its consent to military operations performed by the intervening State.”<sup>271</sup> Consent, therefore, excludes the internationalized character of such a conflict so that the cases cited by Gasser could be regarded as internationalized only under the condition that the consent given in such cases was not valid as it was, for instance, issued by a government installed by the assisting State.<sup>272</sup> Whether these cases are addressed by the permission of military assistance with prior consent depends on the validity of the consent.<sup>273</sup>

59. An international armed conflict takes place as soon as there is any use of armed force by one State against another. Accordingly, when it comes to international armed conflicts, the criterion of protracted intensity and organization of armed groups required for non-international armed conflicts<sup>274</sup> does not apply to the definition of an international armed conflict. The ICTY, for instance, confirms that an international armed conflict exists “whenever there is a resort to armed force between

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<sup>269</sup> See, e.g. J. G. Stewart, Towards a single definition of armed conflict in international humanitarian law : A critique of internationalized armed conflict, 85 *International Review of the Red Cross*, 313, 344 (2003).

<sup>270</sup> Gasser, *op. cit.*

<sup>271</sup> D. Fleck (ed.), *The Handbook of International Humanitarian Law*, 608 (2008).

<sup>272</sup> E.g. Soviet intervention in Afghanistan, see Gasser, *op.cit.*

<sup>273</sup> See *infra*.

<sup>274</sup> D. Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, 163 *RCADI* (1979-II), 147. See also ICTY, *The Prosecutor v. Fatmir Limaj*, Judgment, IT-03-66-T, 30 November 2005, paras. 94-134.

States”.<sup>275</sup> D. Schindler, discussing the existence of armed conflict within the meaning of Article 2 common to the Geneva Conventions explains, “any kind of use of arms between two States brings the Conventions into effect.”<sup>276</sup> Moreover, the commentary of the Geneva Conventions confirms that, “any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts or how much slaughter takes place.”<sup>277</sup>

## **2. Consent (invitation/request)**

60. Many discussions have already taken place concerning the issue of the invitation or other forms of consent, 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>278</sup>. The 1975 IDI Resolution did not deal with this issue as it declared such activities in civil war situations as unlawful irrespective of whether or not they had been carried out upon invitation.

61. Contrary to this Resolution, the present Report has to deal with situations where military 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 consent has to deal with the form of the request, with its author and with the content of the request.

### *a. The form of consent*

#### **i) General**

62. The request, invitation or consent can be issued in different forms : either a priori through a treaty (Lebanon<sup>279</sup>) or in the internal law of the

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<sup>275</sup> ICTY, *The Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para. 70.

<sup>276</sup> D. Schindler, *The different types*, op. cit., 131.

<sup>277</sup> J. S. Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, 32, [www.icrc.org/ihl](http://www.icrc.org/ihl).

<sup>278</sup> So, for instance, in Afghanistan 1979, see Reisman, *Silk*, 485, according to whom the invitation was self-issued.

<sup>279</sup> Taef Accords 25 October 1998 Article D, “Considering that the objective of the State of Lebanon is to spread its authority over all the Lebanese territories through its own forces, represented primarily by the internal security forces, and in view of the fraternal relations binding Syria to Lebanon, the Syrian forces shall thankfully assist the forces

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requesting State (Cuba<sup>280</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>281</sup>.

63. The form of the prior consent 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 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

64. 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<sup>282</sup>, 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>283</sup>.

65. Writers are divided as regards the legality of military measures based on such treaties<sup>284</sup>. The best-known instance where this right was

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of the legitimate Lebanese government to spread the authority of the State of Lebanon within a set period of no more than 2 years“, Documents d’actualité internationale (1990), 53-56. See Nolte, p. 510.

<sup>280</sup> See Konrad Ginther, *Der Satellitenstaat*, 9 Österr. Zeitschrift für Außenpolitik (1967), 6.

<sup>281</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>282</sup> As to Guarantee and Guarantee Treaties under international law see Georg Ress, *Guarantee, and Guarantee Treaties*, R. Bernhardt (/ed.), *Encyclopedia of Public International Law*, Instalment 7 (1984) 109 and 117. According to this author genuine guarantee treaties have become rare (idem. 120).

<sup>283</sup> David Wipman. *Treaty-Based Intervention : Who Can Say No?* 62 U.Chi.L.Rev. (1995), 607.

<sup>284</sup> Doswald-Beck, *op. cit.*, 244.

generally discussed is the Treaty of Guarantee<sup>285</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.”

66. 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>286</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>287</sup>. Cyprus frequently rejected the construction of 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>288</sup>.

67. 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

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<sup>285</sup> U.N.T.S. No. 5475.

<sup>286</sup> Wippman, *Treaty-Based*, op. cit., 609.

<sup>287</sup> Wippman, *Pro-democratic intervention*, op. cit., 317 ; Doswald-Beck, op. cit., 247.

<sup>288</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).

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effect of imperative norms.<sup>289</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>290</sup>. Although Harrell comes to the conclusion that such guarantee clauses are consistent with international law and that “a prior treaty agreement can trump the present wishes of the State government”<sup>291</sup>, he nevertheless admits that their effect is limited by imperative norms<sup>292</sup>. His conclusions are also limited insofar as he examines in particular the right of regional international organizations such as ECOWAS or the African Union to intervene in the territory of a State<sup>293</sup>, but not that of individual States. This limitation in his view already provides a check against possible abuses.<sup>294</sup>

68. 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>295</sup>. According to Ress, the guarantee must cover only a precise right and a well-defined legal situation, which means that the subject-matter of a guarantee has to be unambiguously determined.<sup>296</sup> Practice proves that a general right of military interference has been rejected as a ground for legalising concrete measures<sup>297</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*

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<sup>289</sup> Wippman, Treaty-Based, op. cit., 611 ; see also Doswald-Beck, op. cit., 260.

<sup>290</sup> Doswald-Beck, op. cit., 240 ; Wippman, Treaty-Based intervention, op. cit., 612 ; Ress, op. cit., 113.

<sup>291</sup> Harrell, op. cit., 429.

<sup>292</sup> Ibidem, 431.

<sup>293</sup> Ibidem, 438.

<sup>294</sup> Ibidem, 431.

<sup>295</sup> In this sense also the Report of M. Schindler in 1973, IDI Annuaire 1973, 492.

<sup>296</sup> Ress, op. cit., 111.

<sup>297</sup> Nolte, op. cit., 590.



*hoc* consent for a given case which determines the terms and conditions of such measures.<sup>298</sup>

69. An example of a treaty stipulation conferring a right of intervention under limited circumstances is contained in the 1977 treaties granting Panama control over the Panama Canal. The United States is expressly granted a perpetual right to use military force to against danger resulting from an armed attack or other actions which threaten the security of the Panama Canal or of ships transiting it<sup>299</sup>. However, the US Instrument of Ratification with Amendments, Conditions and Reservations to the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal expressly provides that “action by the US taken in accordance with the Panama Canal Treaty shall never be directed against the territorial integrity or political independence of Panama<sup>300</sup>”. The United States declared that the treaty system “shall not have as its purpose or be interpreted as a right of intervention in the internal affairs of the Republic of Panama or interference with its political independence or sovereign integrity<sup>301</sup>”. The United States is thus entitled to use military force on Panamanian territory, but only for the purpose of complying with her obligations arising out of the Treaty whose purpose is to assure that the Panama Canal shall remain neutral, secure and open to peaceful transit by the vessels of all nations.<sup>302</sup> Therefore, it can easily be argued that US military activity under the Panama Canal Treaty system would not require a specific additional ad hoc request for assistance,

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<sup>298</sup> Views of the members of the Committee expressed a preference for such an additional request. The same views apply to treaties of guarantee.

<sup>299</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>300</sup> June 15, 1978, 17 ILM 827 (1978).

<sup>301</sup> Ibid.

<sup>302</sup> Article II, Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, September 7, 1977, 16 ILM 1021 (1977).

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particularly since the objective would not be to assist the State or government of Panama directly. When there is no threat to the neutrality of the Canal or the free transit of vessels in the Canal the US cannot legally claim to intervene in Panama on grounds that it was maintaining the integrity of the Treaty.<sup>303</sup> Since the purpose of this form of intervention does not fall within the objectives of military assistance,<sup>304</sup> the right conferred by the Panama Canal Regime does not fall within the scope of this Report.

70. A good example of the need of additional consent is given by Article 222 TFEU of the Lisbon treaty : It is called “solidarity clause” which suggests that this clause already furnishes the necessary legal basis for intervention in situations addressed by this provision. However, in contrast to the provision on collective self-defense in Article 41 (7) of the TEU of the Lisbon Treaty<sup>305</sup>, it explicitly requires the additional consent of the target State :

“Should a Member State be the object of a terrorist attack or the victim of a natural or man-made disaster, the other Member States shall assist it at the request of its political authorities. To that end, the Member States shall coordinate between themselves in the Council.”<sup>306</sup>

This assistance is not limited to non-military activities, since it provides the involvement of the “structures developed in the context of the common security and defence policy”.<sup>307</sup>

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<sup>303</sup> Max Hilaire, *International Law and the United States Military Intervention in the Western Hemisphere* (1997), 118.

<sup>304</sup> See above.

<sup>305</sup> This provision reads as follows :

“If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States.

Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation.” Official Journal C 115 of 9 May 2008, 1 seq.

<sup>306</sup> Article 222 (2) of the TFEU in the version of the Lisbon Treaty ; *ibidem*.

<sup>307</sup> Article 222 (3) of the TFEU in the version of the Lisbon Treaty ; *ibidem*.

iii) Content of consent

71. The content of the request is subject to the legal conditions imposed on the consenting party and on the requested party. As the Commentary to Article 20, Articles on State Responsibility states : “Sometimes the validity of consent has been questioned because the consent was expressed in violation of relevant provisions of the State’s internal law.”<sup>308</sup> This statement enables the conclusion that consent may only be given in accordance with the obligations incumbent on the consenting State.

iv) Revocability of consent

72. The legality of a military assistance of this type comes under stress if the consent is revoked. It must be asked whether such prior consent or request, once made, could be revoked without the consent of the requested State at any moment, and whether consent expressed in advance in a treaty could also be revoked under similar circumstances.<sup>309</sup>

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 armed forces “beyond the termination of the agreement”.<sup>310</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.

73. 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 this right since 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 its consent to foreign interference<sup>311</sup>. Even if the

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<sup>308</sup> Commentary on Article 20 of the Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the ILC 2001, 73.

<sup>309</sup> The view expressed by the members of the Committee was in favour of a withdrawal of consent at any time although Vukas referred to the emergence of a new situation which would make withdrawal possible. Reisman and Arsanjani made this revocability dependent on specific terms in a treaty.

<sup>310</sup> Article 3 lit e reads : “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>311</sup> In particular, Wippman strongly favours such an approach ; Wippman, Treaty-Based intervention, *op. cit.*, 621 and Wippman, Pro-democratic intervention by invitation, *op. cit.*, 315.

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treaty is sufficiently specific to make an *ad hoc* consent unnecessary the target State is still entitled to revoke its consent.

74. Even if such a right is disputed, the target State is in any case said to be entitled 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, may not encompass measures in breach of imperative norms<sup>312</sup>.

*b. Author*

75. 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>313</sup>. Frequently, there were doubts regarding the author of the invitation on which objections to the validity of the consent were based<sup>314</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>315</sup>. However, doctrine and practice use different criteria to define the legality of the author of such requests, such as effectiveness or democratic principles.

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<sup>312</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"

<sup>313</sup> Wippman, *Change and Continuity*, op. cit., 440 ; Le Mon, *Unilateral Intervention*, op. cit., 759.

<sup>314</sup> So, for instance, concerning the case of Czechoslovakia in 1968, Nolte, 272.

<sup>315</sup> Ian Brownlie, *International Law and the Use of Force by States* (1963), 317.

76. 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 be discussed whether, in the case of a State that has lost its authority ("failed State"<sup>316</sup>) or in the absence of a "generally recognized" government, military assistance with prior consent could be considered at all as lawful and, if so, whose request could be regarded as justifying military assistance.

i) Effectiveness<sup>317</sup>

77. 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>318</sup> An affirmative answer relied on effectiveness of the government as the criterion of validity of consent<sup>319</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.

78. 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 military assistance. It is even stated that in such a situation "the presumption that the government represents the State may become untenable".<sup>320</sup> On the

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<sup>316</sup> See in particular Daniel Thürer, *Der Wegfall effektiver Staatsgewalt : der 'Failed State'*", 34 *Berichte der Deutschen Gesellschaft für Völkerrecht* (1995), 9.

<sup>317</sup> This criterion was generally recognized as a necessary condition for valid consent by the members of the Committee.

<sup>318</sup> See for instance Doswald-Beck, *op. cit.*, 195.

<sup>319</sup> See Le Mon, *Unilateral Intervention*, *op. cit.*, 745.

<sup>320</sup> David Wippman, *Pro-democratic intervention by invitation*, in : Gregory H. Fox, Brad R. Roth (eds), *Democratic Governance and International Law* (2000), 298.

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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>321</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>322</sup>. According to Nolte comparable situations existed in Sierra Leone 1995<sup>323</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>324</sup>. Nowrot and Schabacker recognize in the case of Haiti and its President, Aristide, "a turning point in the determination of the legitimate government of a state under international law"<sup>325</sup> towards a rejection of the "effective control" doctrine which, during the Cold War, was based on the absence of a commonly accepted understanding of democracy.<sup>326</sup>

## ii) Recognition

79. The subject at hand pertains not to recognition of States but to recognition of governments. This issue, however, encounters the problem that most States do not explicitly recognize governments.<sup>327</sup> Some authors argue that "the incumbent government must have the recognition of the international community. Under the traditional approach of governmental

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<sup>321</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, 523

<sup>322</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, 146.

<sup>323</sup> Nowrot, Schabacker, *op. cit.*, 339.

<sup>324</sup> Nolte, *op. cit.*, 147.

<sup>325</sup> Nowrot, Schabacker, *op. cit.*, 337.

<sup>326</sup> *Ibidem*, *op. cit.*, 338.

<sup>327</sup> Stefan Talmon, *Recognition of governments in international law with particular reference to governments in exile* (1998), 3.

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>328</sup>.

80. 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>329</sup>, recognition can be derived from the establishment and maintenance of normal contacts with a government<sup>330</sup>. In order not to accord recognition to 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.

81. 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 that of governments in exile<sup>331</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

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<sup>328</sup> Davis Brown, *The Role of Regional Organizations in Stopping Civil Wars*, 41 A. F. L. Rev. (1997,) 270.

<sup>329</sup> Nolte, *op. cit.*, 141.

<sup>330</sup> Robert Jennings, Arthur Watts, *Oppenheim's International Law*, vol. I (1992), 148 ; Talmon, *op. cit.*, 23.

<sup>331</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.

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may authorize external military measures to re-establish its authority.<sup>332</sup> 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>333</sup>.

iii) Democratic legitimacy

82. 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>334</sup> It has been argued that the democratic nature of the government could also form a criterion for the assessment of its legitimacy<sup>335</sup>. Military assistance with prior consent 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>336</sup> Other governments were not recognized although they had gained full control of the territory because of their non-democratic origin or performance.<sup>337</sup>

83. However, even authorities that 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>338</sup>. Even writers who militate in favour of the democratic legitimacy recognize only a tendency in this direction, but not yet an

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<sup>332</sup> Three members of the Committee give a clear negative reply to the question whether a government in exile should be considered entitled to issue a request for military assistance (Bennouna, Reisman, Arsanjani), whereas for McWhinney recognition is the decisive criterion and Rouconas excludes puppet governments. Vukas requires for the government in exile the satisfaction of all the criteria that apply also to other governments.

<sup>333</sup> Wippman, Pro-democratic intervention, op. cit., 300.

<sup>334</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>335</sup> David Wippman, Pro-democratic intervention by invitation, in: Gregory H. Fox, Brad R. Roth (eds.), Democratic Governance and International Law (2000), 300.

<sup>336</sup> Ibidem, 301, 303.

<sup>337</sup> One pertinent case was the government of Afghanistan in 1994 whose legitimacy was contested; Nolte, op. cit., 156.

<sup>338</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. As to the Responses to the Rapporteur's Questionnaire, in particular McWhinney, like Degan, is against the need to refer to democratic legitimacy as a criterion, whereas Irigoien is of the view that this criterion is also needed.



established norm<sup>339</sup>. Moreover, requiring democratic legitimacy of the requesting government may lead to double standards and abuse of this criterion. 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>340</sup>. This view results from the reactions following the coups in Sierra Leone, Haiti, Burundi, Niger, Ivory Coast, Guinea Bissau, and Togo.<sup>341</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>342</sup>

84. However, as will be presented<sup>343</sup>, a result comparable to that intended 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 consent

85. A further aspect to take into account is the identification of the State organ entitled to issue valid prior consent to assistance.

86. 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>344</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>345</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>346</sup>. Applicable rules of

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<sup>339</sup> Nowrot, Schabacker, op. cit., 338.

<sup>340</sup> Jean d'Aspremont, Legitimacy of Governments in the Age of Democracy, 38 N.Y.U. J. Int'l L. & Pol. (2006), 889.

<sup>341</sup> Ibidem.

<sup>342</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>343</sup> See *infra*.

<sup>344</sup> Commentary on Article 20 of the Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the ILC 2001, 73.

<sup>345</sup> Ibidem.

<sup>346</sup> Ibidem, 175.

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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. This corresponds also to the view of the majority of the members of this Committee.<sup>347</sup>

87. 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>348</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. An analogous application of Article 9 on State Responsibility, regulating conduct attributable to the State in the absence or default of the official authorities,<sup>349</sup> even allows persons lacking any actual governmental authority to act on behalf of the State in special circumstances.<sup>350</sup> In any case, it must be clear that the request expressed in such way constitutes an act expressing the will of the State.

v) Validity of consent

88. As to the second aspect concerning validly given consent the commentary on Article 20 on State Responsibility, states that “certain modalities need to be observed for consent to be considered valid. Consent must be freely given and clearly established. It must be actually expressed by the State rather than merely presumed on the basis that the State would have consented if it had been asked. Consent may be vitiated by error, fraud, corruption or coercion. In this respect, the principles concerning the validity of consent to treaties provide relevant

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<sup>347</sup>Whereas M. Bennouna considers that this question cannot be answered in an abstract manner and B. Vukas refers to Article 7 (2)(a) of the Vienna Convention on the Law of Treaties, the other members support the view that only the highest state organs should be entitled to issue consent.

<sup>348</sup>Nolte, *op. cit.*, 582.

<sup>349</sup>Article 9 of the Articles on State Responsibility provides :  
Conduct carried out in the absence or default of the official authorities

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

<sup>350</sup>Commentary on Article 9, of the Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the ILC 2001,109.

guidance.”<sup>351</sup> These criteria also apply to the consent necessary for the lawfulness of military assistance.

### **3. *The legality of military assistance with prior consent***

#### *a. The legal basis*

89. As Wippman states, the “theoretical basis for the rule that consent may validate an otherwise wrongful intervention is not entirely clear.”<sup>352</sup> It must be borne in mind that the legality of such military assistance with prior consent could be based on at least three legal constructions :<sup>353</sup>

##### i) Consent as a circumstance precluding wrongfulness

90. 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>354</sup>. This construction seems to be apparently reflected in the *obiter dictum* of the ICJ in the *Nicaragua Case*<sup>355</sup>. However, this construction suffers, *inter alia*, from the fact that the military assistance 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>356</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 “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.”

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<sup>351</sup> Commentary on Article 20 of the Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the ILC 2001, 74.

<sup>352</sup> David Wippman, Pro-democratic intervention, *op. cit.*, 295.

<sup>353</sup> McWhinney and Roucouas found the legal basis in the invitation itself, whereas Vukas and Irigoien referred in particular to humanitarian reasons.

<sup>354</sup> Cf Article 20 of the Articles on State Responsibility.

<sup>355</sup> *Supra*.

<sup>356</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.

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91. 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 :

92. First, arguments can be derived from the weakness of the definition of intervention<sup>357</sup>, the different objectives of intervention<sup>358</sup> compared to military assistance with prior consent 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.

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

ii) The legality stems from a primary norm

94. 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>359</sup> since such a norm could avoid the problems arising from the application of a circumstance precluding wrongfulness.

95. 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>360</sup>. In 1975, the IDI changed its approach : The 1975 Resolution proceeded from a general prohibition of assistance during internal armed conflicts and stipulated certain exceptions to it.

96. It must be asked whether, within the purview of the subject discussed here, this approach can be maintained. The present subject differs from

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<sup>357</sup> *Supra.*

<sup>358</sup> *Supra.*

<sup>359</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>360</sup> IDI Annuaire 1973, 506.

the matter discussed in the 1975 Resolution since it is not confined to situations of “civil war” in the sense of that Resolution. Particularly in situations below the threshold of non-international armed conflict, it is doubtful whether the approach followed by the IDI in 1975 is appropriate. Practice proves conclusively that in such situations assistance by consent has not met with major objections, provided that the consent or request was issued by the legitimate government and the assistance did not transgress a certain limited level. The Rome Report, on one hand, states that :

“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>361</sup>.

97. 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 or non-international armed conflict. There is only one remark made which hints at the lawfulness of military 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>362</sup>

98. 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>363</sup>

99. This limitation coincides with that found in A/RES/3314 (XXIX). But it seems that, according to practice, military assistance with prior consent 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

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<sup>361</sup> IDI Annuaire 1973, 427.

<sup>362</sup> IDI Annuaire 1973, 428.

<sup>363</sup> IDI Annuaire 1973, 451.

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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.

100. However, having examined the limits imposed by the 1975 Resolution, we must conclude that our enquiry is a broader one. But, although in including situations of non-international armed conflicts this analysis differs from that of 1975, the approach under this legal construction is dogmatically similar : In the face of a general prohibition of military assistance, such assistance based on the prior consent of the State falls under the *lex specialis* as the legal basis for a permissive rule of international law. As was suggested in the ILC, “primary obligations were often thought of in contexts where the factor of consent entered into the primary obligation” and may be more than the simple expression of an exception.<sup>364</sup>

101. Such a *lex specialis* 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. Irrespective of this approach the question remains as to whether it is necessary at all to formulate a primary norm permitting military assistance with prior consent.

iii) Military assistance with prior consent is permitted unless it is prohibited

102. The third approach would be to assume that a State is free to act unless it is prohibited by a norm of international law. Its legal basis can be derived from the principle of “auto-limitation” which emanates from State sovereignty.<sup>365</sup>

103. Formulating this possible legal construction it is necessary to assume, contrary to the 1975 Resolution, that military assistance is permitted unless it is prohibited. This follows from the fact that international law leaves to States “a wide measure of discretion which is

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<sup>364</sup> Remark by Quentin-Baxter, YBILC 1979 I, 42, 1540 meeting.

<sup>365</sup> Luzius Wildhaber, Sovereignty and International Law, in *The Structure and Process of international law*, Ronald St. J. Macdonald, Douglas M. Johnston (eds.) 425, 442.

only limited in certain cases by prohibitive rules.”<sup>366</sup> Therefore, only an explicit rule of international law could render military assistance by consent internationally wrongful.

104. Whereas the approach under ii) focuses primarily upon the rendering of assistance, the approach under iii) pinpoints the request for assistance so that both approaches have their merits and both approaches can be applied to the issue under discussion. Since this Report covers both acts, the legal basis for such assistance must therefore be formulated in a manner conforming with both approaches. Notwithstanding the lawfulness of such assistance, it must also be clearly stated that measures carried out still remain subject to further legal limitations.

*b. The limitations to military assistance under international law*

105. Contrary to the Rome Report of the IDI, that saw no necessity to identify limits to military assistance in situations short of non-international armed conflicts, practice and writers also mention limiting criteria irrespective of the existence of an internal armed conflict and consider military assistance with prior consent 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>367</sup>, the existence of other normative limits such as human rights are not excluded.

106. Formulated in more general terms, military assistance, even if performed with the valid prior 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,

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<sup>366</sup> *The Case of the SS Lotus*, Judgment of 7 September 1928, PCIJ Series A, No. 10, pp. 18 and 19; see also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 226 at para 21.

<sup>367</sup> See the practice reproduced by Doswald-Beck, *op. cit.*, *passim*, Nolte, *op. cit.*, *passim* and Le Mon, *op. cit.*, *passim*.

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“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>368</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>369</sup>

107. 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 principles of non-interference, non-use of force or the threat of force, and self-determination of peoples”.<sup>370</sup>

108. It is also more appropriate to elaborate on these legal impediments than on the limits to the request or consent 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>371</sup>, direction and control<sup>372</sup> as well as coercion<sup>373</sup>, but not solicitation and incitement. If a State requests or consents to 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 that directly impede the enjoyment of this right.

i) The principle of non-intervention

109. Although the principle of non-intervention has frequently been invoked, in State-to-State relations, as a legal limitation to measures to

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<sup>368</sup> ILC Report 2001, 209.

<sup>369</sup> Ibidem.

<sup>370</sup> Rein Mullerson, Intervention by Invitation, in : Fislser Damrosch, Scheffer, op. cit., 133.

<sup>371</sup> Article 16.

<sup>372</sup> Article 17.

<sup>373</sup> Article 18.



which the target State has consented<sup>374</sup>, it would nevertheless be difficult to consider it as such, unless it were characterized as a principle of *ius cogens*.<sup>375</sup> As already stated above<sup>376</sup>, intervention and military assistance with prior consent are diametrically opposed concepts so that the one cannot be a legal limitation to the other.

110. A closer look at the discussions reveals that these objections were particularly motivated by the principle of self-determination.<sup>377</sup>

ii) The principle of self-determination

111. The question is whether violence in the exercise of the right to self-determination automatically generates a situation of non-international armed conflict. 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>378</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-determination<sup>379</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 non-international armed conflicts as limiting criteria.

112. 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, even with prior consent of the government, 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

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<sup>374</sup> Doswald-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, 169.

<sup>375</sup> Members of the Committee generally expressed the view that this principle poses no limitation to military assistance, except for McWhinney. Degan suggested to mention the principle of the sovereign equality of states.

<sup>376</sup> *Supra*.

<sup>377</sup> Nolte, op.cit., p 172 et seq describing discussions in the framework of the UNGA.

<sup>378</sup> Oscar Schachter, International Law : the Right of States to use Armed Forces, 82 Mich. L. Rev. (1984), 1633.

<sup>379</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.

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A/RES/42/22.<sup>380</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.

113. 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>381</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 with prior consent.<sup>382</sup>

114. 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.

115. 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

116. 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 at issue here. In order to avoid the inquiry, 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

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<sup>380</sup> “Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations”

<sup>381</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.* 411, 440 (1989); 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

<sup>382</sup> All members of the Committee are of this view with the exception of McWhinney.

the opposing group of people, respectively by the individuals, as well as third States.

(a) Human Rights

117. Any assisting State is bound by human rights with regard to the individuals affected by its measures<sup>383</sup>. Neither the wording of Article 2 of the UN Covenant on Civil and Political Rights regarding its territorial scope<sup>384</sup> nor the *Bankovic* decision of the European Court of Human Rights<sup>385</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>386</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>387</sup>. However, it is also clear that such a State is 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>388</sup>, it would be reasonable to apply the same characterisation also to the invited State.

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<sup>383</sup> See John Lawrence Hargrove, *Intervention by Invitation and the Politics of the New World order*, in : Damrosch-Beck, Scheffer, op. cit., 113.

<sup>384</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>385</sup> *Bankovic and Others v. Belgium and Others*, no. 52207/99, ECHR 2001-XII, paras. 74 et sequ.

<sup>386</sup> *Ibidem*, para. 75.

<sup>387</sup> See Wippman, *Treaty-Based Intervention*, op. cit., 611.

<sup>388</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

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118. Moreover, it has frequently been argued that a State is prohibited from assisting another State if the latter is engaged in massive and systematic violations of human rights<sup>389</sup> since this would amount to “aid or assistance in the commission of an internationally wrongful act in the sense of Article 16 State Responsibility.<sup>390</sup> In such a situation the conditions of this article are satisfied since the protection of human rights is an *erga omnes* obligation so that third States are also under an obligation to respect human rights. As both confrères Degan and Vukas remarked, the respect for human rights and the protection of human rights, especially those rights whose large-scale and systematic infringements constitute generally recognized crimes under international law,<sup>391</sup> are a central condition for military assistance with prior consent.<sup>392</sup>

(b) Terms and conditions of consent

119. The military assistance of a foreign State has to comply with the terms and conditions of the consent. 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.

(c) Other legal conditions

120. In this context, it must be asked to which extent the assisting State is bound by the obligations incumbent upon the consenting State alone or, in other terms, whether these obligations apply also to activities undertaken by the assisting State in the course of the military assistance.<sup>393</sup> Doctrine argues that prior consent or a request has to be construed in conformity with the international obligations imposed upon

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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>389</sup> Nolte, *op. cit.*, 579.

<sup>390</sup> Commentary on Article 16, Articles on State Responsibility, ILC Report 2001 ; see further *infra*.

<sup>391</sup> See comments to the preliminary report by V.D. Degan.

<sup>392</sup> The majority of the members of the Committee see human rights as a limitation to military assistance, again with the exception of McWhinney.

<sup>393</sup> Most members of the Committee responded that military assistance is limited both by obligations incumbent upon the requesting state and upon the requesting state. McWhinney is of the opposite view.

the requesting State<sup>394</sup>. Theoretically, such an obligation cannot have an 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.

121. If the assisting State is not subject to the particular obligation, it does not become responsible for breaches of this obligation by the consenting 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 consenting 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 consenting State. An attempt to do so would require that either the assisting State is aware of the obligations of the consenting 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.

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<sup>394</sup> Wippman, Pro-Democratic Intervention, op. cit., 294.

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### C. Draft Resolution

#### Draft Resolution

*The Institute of International Law,*

*Recalling its Resolution “The Principle of Non-Intervention in Civil Wars” (Wiesbaden Session, 1975) ;*

*Noting that with the end of the cold war, the end of colonialism and of the establishment of neo-colonial relations a new political environment has emerged since the adoption of the above mentioned resolution ;*

*Having regard to existing practice of States of seeking military assistance from foreign states ;*

*Noting that it is a prerogative of the sovereignty of each State to seek assistance from other States in situations short of international armed conflicts ;*

*Noting also that armed groups opposed to the government frequently surpass the power of the respective Government so that assistance by other States is needed to end the suffering from such conflicts ;*

*Considering that military assistance by foreign states is subject to legal limitations under international law ;*

*Convinced therefore that it is necessary to specify the duties incumbent upon other States in rendering such assistance ;*

*Recalling the statement of the International Court of Justice that intervention is allowable at the request of the government of a State ;*

*Adopts the following Resolution :*

#### CHAPTER 1

#### GENERAL PROVISIONS

#### *Article 1*

#### **Definitions**

For the purposes of this resolution

- a. “Intervention by Invitation” means “Military assistance with prior consent” ;
- b. “Military assistance” encompasses the sending of armed or police forces or military volunteers, instructors or technicians to the government of the consenting State, provided that these forces remain under the control of the sending State for the period of assistance ;

- c. "Consent" means the free expression of will requesting or accepting military assistance by competent authorities of the consenting State.

*Article 2*

**Scope**

This resolution applies to all situations of armed activities short of an international armed conflict as defined in Article 2 common to all Geneva Conventions of 1949 and Article 1 of Protocol I Additional to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts of 1977. Accordingly, it applies not only to non-international armed conflicts in the sense of Article 1 of Protocol II Additional to the Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts of 1977, but also to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature where the objective is to support the government in its efforts against a non-State actor or individual persons on the territory of its state.

*Article 3*

**Basic principle**

International law does not prohibit any State from rendering military assistance to another State in a situation that does not amount to an international armed conflict, subject, however, to the latter's prior consent and further legal conditions set out below.

CHAPTER II

CONSENT

*Article 4*

**Form of Consent**

Consent can take the form of an ad-hoc request or of a bi- or multilateral treaty.

- a. If consent is given in the form of an international treaty, provisions of the treaty must refer in explicit terms to a concrete situation in which assistance is sought ;
- b. If consent results from an agreement that refers only to general situations of military assistance, additional ad hoc consent is required for the specific case.

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*Article 5*

**Prior Consent**

Consent must be given prior to any act of military assistance.

*Article 6*

**Obligations of the consenting State**

Consent to military assistance must be in conformity with the obligations incumbent upon the consenting state.

*Article 7*

**Validity of Consent**

For consent to be valid it must be freely given and clearly established, it must not have been vitiated by error, fraud, corruption or coercion.

*Article 8*

**Author of Consent**

Consent must be given by an effective and generally recognized government.

- a. Whether a government is effective and generally recognized is to be decided according to the circumstances in each individual case.
- b. The recognition can be explicit or implicit.
- c. A criterion for the general recognition is the recognition by the majority of States, in particular by the States in the vicinity of the consenting State and universal international organizations or international organizations of the relevant region.
- d. A mere brief discontinuity of the effective control of the generally recognized government over its territory does not exclude its effective nature as long its return to power is to be expected in the near future.

*Article 9*

**Competent Organs**

The organs competent to consent to military assistance by another state are the highest State organs or a person acting in such capacity if the highest State organs are unable to fulfill their functions.

*Article 10*

**Withdrawal**

The consenting State is free to withdraw its consent to such assistance at any time, irrespective of the expression of consent through a treaty.



CHAPTER III  
ASSISTANCE

*Article 11*

**No obligation to render assistance**

No State is legally required to comply with a request for assistance unless it is bound by a treaty.

*Article 12*

**Assistance is limited by terms and conditions of consent**

Assistance must be carried out in conformity with the terms and conditions of the consent.

*Article 13*

**Objectives of the assistance**

Military assistance must not be directed against the personality of the consenting state nor against its political, economic, social or cultural system. It must not constitute a measure to coerce another state in order to obtain from it the subordination of the exercise of the latter's sovereign rights.

*Article 14*

**Obligations of the consenting State**

The assisting State is not relieved from its other obligations under international law, in particular those resulting from the principle of self-determination of peoples and human rights.

*Article 15*

**Circumvention of obligations by consenting State**

Military assistance must not be used by the consenting State to circumvent its own international obligations.

*Article 16*

**Duration of Assistance**

Military assistance must not be provided beyond the time for which it has been consented to by the State to which the assistance is provided.

*Article 17*

**Responsibility**

Acts carried out in the course of military assistance remain attributable to the State providing it. This does not relieve the consenting State from its own responsibilities incurred in the course of such assistance.

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## DÉLIBÉRATIONS DE L'INSTITUT

### Septième séance plénière

Mardi 8 septembre 2009 (matin)

La séance est ouverte à 9 h 40 sous la présidence de M. *Roucounas*, premier Vice-président.

M. *Conforti*, en sa qualité de Président de l'Institut, souhaite en premier lieu accueillir les nouveaux Membres qui viennent de rejoindre la Session à la suite de leur récente élection.

The *President* invited the Rapporteur to present the report of the Sub-Group on Intervention by Invitation.

#### Draft Resolution

*The Institute of International Law,*

*Recalling its Resolution The Principle of Non-Intervention in Civil Wars (Wiesbaden Session, 1975) ;*

*Noting that with the end of the cold war, the end of colonialism and of the establishment of neo-colonial relations a new political environment has emerged since the adoption of the above mentioned resolution ;*

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### CONSENT

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effective nature as long its return to power is to be expected in the near future.

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*Article 17*

**Responsibility**

Acts carried out in the course of military assistance remain attributable to the State providing it. This does not relieve the consenting State from its own responsibilities incurred in the course of such assistance.

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**Projet de résolution**

*L'Institut de droit international,*

*Rappelant* sa résolution sur le Principe de non-intervention dans les guerres civiles (Wiesbaden Session, 1975) ;

*Considérant* qu'un nouvel environnement politique est advenu depuis l'adoption de la résolution susmentionnée, à la suite de la fin de la guerre froide, de la fin du colonialisme et de l'établissement de relations néo-coloniales ;

*Tenant compte* de ce que, dans leur pratique, les États ont recours à l'assistance militaire d'États étrangers ;

*Considérant* que le fait de demander une assistance militaire à d'autres États dans des situations ne constituant pas des conflits armés internationaux, est une prérogative souveraine de tout État ;

*Considérant en outre* que l'assistance d'autres États est nécessaire pour mettre fin aux souffrances engendrées par de tels conflits dès lors que la puissance des groupes armés surpasse fréquemment celle du gouvernement auquel ils s'opposent ;

*Considérant* que l'assistance militaire par des États étrangers fait l'objet de restrictions juridiques en droit international ;

*Convaincu* dès lors qu'il est nécessaire de préciser les obligations s'imposant aux États portant/apportant une telle assistance ;

*Rappelant* la jurisprudence de la Cour internationale de justice selon laquelle l'intervention est soumise à la requête des autorités gouvernementales ;

*Adopte* la présente résolution :

CHAPITRE I  
DISPOSITIONS GENERALES

*Article 1*

**Définitions**

Pour les besoins de la présente résolution :

- a. « Intervention sur invitation » signifie « assistance militaire (ayant fait l'objet d'un consentement préalable) préalablement consentie » ;
- b. L'« assistance militaire » inclut l'envoi de forces armées, de forces de police ou de volontaires militaires, d'instructeurs ou de techniciens au gouvernement de l'État consentant pour autant que ces forces demeurent sous le contrôle de l'État d'envoi durant la durée de l'assistance ;
- c. Le « consentement » consiste en la libre expression de volonté par les autorités compétentes de l'État requérant ou acceptant une assistance militaire ;

*Article 2*

**Portée**

La présente résolution s'applique à toute action armée ne constituant pas un conflit armé international tel que défini par l'Article 2 commun aux quatre conventions de Genève de 1949 et par l'Article 1 du Ier Protocole Additionnel aux Conventions de Genève relative à la protection des victimes des conflits armés internationaux de 1977. En conséquence, elle s'applique non seulement aux conflits armés non internationaux au sens de l'Article 1 du deuxième Protocole Additionnel aux Conventions de Genève relatif à la protections des victimes des conflits armés non internationaux de 1977, mais aussi aux situations de troubles et de tensions internes, telles que des émeutes, des actes de violence isolés et sporadiques, de même que d'autres actes de nature similaire, lorsque l'objectif (de l'assistance militaire) est de soutenir le gouvernement confronté sur son territoire à des acteurs non étatiques ou des individus.

*Article 3*

**Principe fondamental**

Le droit international n'interdit pas à un État de porter assistance militaire à d'autres États dans des situations ne constituant pas des conflits armés internationaux, pourvu que le consentement ait été préalablement accordé et que les conditions juridiques précisées ci-après soient respectées.

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CHAPITRE II  
CONSENTEMENT

*Article 4*

**La forme du consentement**

Le consentement peut être exprimé sous la forme d'une invitation *ad hoc* ou d'un traité bilatéral ou multilatéral.

- a) Si le consentement est exprimé sous la forme d'un traité international, la situation concrète dans laquelle l'assistance est demandée doit être expressément prévue par les dispositions du traité ;
- b. Dans le cas d'un traité qui vise l'assistance militaire de manière générale, un consentement distinct est nécessaire.

*Article 5*

**Consentement préalable**

Toute assistance militaire doit faire l'objet d'un consentement préalable.

*Article 6*

**Obligations de l'État consentant**

Le consentement à l'assistance militaire doit être conforme aux obligations de l'État qui en est l'auteur.

*Article 7*

**Validité du consentement**

Le consentement est valide s'il est exprimé librement et de manière non équivoque. Il ne doit pas être vicié par l'erreur, le dol, la corruption ou la contrainte.

*Article 8*

**Auteurs du consentement**

Le consentement doit être exprimé par un gouvernement effectif et largement reconnu.

- a. L'effectivité et la large reconnaissance du gouvernement est une question d'espèce.
- b. La reconnaissance peut être explicite ou implicite.
- c. La large reconnaissance peut dépendre de la reconnaissance par la majorité des États, en particulier par les États géographiquement proches de l'État consentant, et par les organisations internationales à vocation universelle ou régionale.
- d. Si le gouvernement largement reconnu cesse durant une brève période d'exercer un contrôle effectif sur son territoire, il n'est pas



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pour autant privé de son effectivité à condition qu'il recouvre son pouvoir rapidement.

*Article 9*

**Organes compétents**

Les organes compétents pour consentir à l'assistance militaire par un autre État sont les [plus hautes autorités] de l'État ou toute personne agissant en cette qualité dans l'hypothèse où les plus hautes autorités de l'État ne sont pas en mesure de remplir leurs fonctions.

*Article 10*

**Retrait du consentement**

L'État consentant à l'assistance militaire [est libre] de retirer son consentement à tout instant, [quand bien même] celui-ci aurait été exprimé par traité.

CHAPITRE III

Assistance

*Article 11*

**Absence d'obligation de porter assistance**

Sauf obligation conventionnelle, aucun État n'est tenu de fournir l'assistance demandée.

*Article 12*

**Modalités de l'assistance définies par le consentement**

L'assistance doit être mise en œuvre dans le respect des conditions définies par le consentement.

*Article 13*

**Objectif de l'assistance**

L'assistance militaire [ne doit pas être dirigée] contre l'[identité] de l'État consentant, ni contre son système politique, économique, social ou culturel. Elle ne peut constituer une mesure coercitive destinée à s'assurer la [sujétion] de ce dernier.

*Article 14*

**Obligation de l'État consentant**

L'État portant assistance n'est pas délié des autres obligations lui incombant en vertu du droit international, et en particulier celles qui

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découlent du principe d'autodétermination et des droits de la personne humaine.

*Article 15*

**Soustraction de l'État consentant à ses obligations**

L'assistance militaire ne peut être utilisée par l'État consentant pour échapper à ses obligations internationales.

*Article 16*

**Durée de l'assistance**

L'assistance militaire ne peut se prolonger au-delà du terme défini par l'État consentant.

*Article 17*

**Responsabilité**

Les actes accomplis dans le cadre de l'assistance militaire demeurent attribuables à l'État portant assistance. L'État consentant n'est pas pour autant déchargé des responsabilités qui lui incombent pendant la durée de l'assistance.

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The *Rapporteur* announced that he would present the report in three parts : first, he would refer to the history of the work of the sub-group ; second, he would talk about the approach chosen ; and third, he would like to raise certain points to be discussed, which had been summarised in a paper distributed to the plenary.

Turning first to the history of the work, the *Rapporteur* mentioned that a preliminary report had been discussed in Santiago. After the Santiago Session, questionnaires had been issued to members of the sub-group and a lively discussion about fundamental questions had taken place in the sub-group. Concerning the future, the *Rapporteur* indicated that, after the present discussion, the sub-group could finalize the report and the draft Resolution, which could then be adopted at the next Session of the Institut.

As to the scope of work, the *Rapporteur* referred to the fact that the Institut had already dealt with the issue of « Intervention by invitation » in situations of non-international military confrontation within a State. On the basis of a report by Mr Schindler, it had adopted a Resolution on « The Principle of Non-Intervention in Civil Wars » at its Session of

Wiesbaden in 1975. That had raised the question of whether or not the Resolution could be maintained. In the report for the Santiago Session, the Rapporteur had tried to deal only with issues which had not been covered in the 1975 Resolution. In Santiago, he had felt that he should go beyond these limits and include especially civil wars below the threshold of international armed conflict. The 1975 Resolution had been adopted before the elaboration in 1977 of the two Additional Protocols to the Geneva Conventions. Consequently, it did not use the terminology of the Additional Protocols. The discussion in Santiago had led the Rapporteur to believe that the political environment had changed since 1975, and so different conclusions could possibly be arrived at. The background of the 1975 Resolution was characterised by the Viet Nam War, the establishment of neo-colonial structures and the Cold War. All these circumstances had changed in the meantime. At the Santiago Session, the question of how the sub-group should be designated had been addressed. In the view of the Rapporteur, « Intervention by Invitation » was a *contradictio in se*, an intervention being directed against a government whereas the invitation had been issued by that very government. In the Saturday sitting of the sub-group, consent had been achieved to change the title. The Rapporteur was open to suggestions in that respect. The term « Intervention » could be replaced by « Assistance ». The Rapporteur went on to say that the term « invitation » was not appropriate in itself either. The required consent could be expressed in different forms, invitation being one amongst others.

As regards the types of assistance, the Rapporteur expressed the view that they should be limited to military activity under the responsibility of the assisting State. If measures such as military credits were included, these would be covered by totally different legal regimes. Apart from that, the general title of the Commission referred to use of force, and the scope of work of the sub-group should come under that same subject. With respect to peace-keeping missions, the Rapporteur proposed not to include them. Mostly, peace-keeping missions were based on resolutions adopted by international organisations and were either established as subsidiary organs of the relevant organisations or based on their authorisation of the deployment of forces by States. Accordingly, their legal basis was neither an invitation nor the consent of the requesting State, but the act of an international organisation.

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The Rapporteur then turned to the issue of the scope of application *ratione temporis*. There was a variety of armed activities during which military assistance with prior consent might occur. The forcible activities could take place in the course of non-international armed conflict or any other kind of disturbances in the territory of the requesting State. New tendencies had also materialised in Article 222, the « Solidarity clause» of the Treaty on the Functioning of the European Union (TFEU) in the Lisbon Treaty version. Consequently, many situations had to be covered and certain generalisations were necessary.

Concerning the form of consent, the Rapporteur stressed that no particular form was prescribed. He then referred to treaties of guarantee as one form of particular concern. The issue had been raised in the context of the Cyprus crisis. Article IV of the Treaty of Guarantee between Greece, Turkey and the United Kingdom was regarded to be null and void on different grounds, in particular on the basis that it contradicted peremptory international law. Another treaty relevant in this respect was the Panama Canal Treaty. The 1977 treaties granting Panama control over the Panama Canal expressly gave the United States the perpetual right to use military force. However, the US Instrument of Ratification provided that action by the US taken in accordance with the Panama Canal Treaty should never be directed against the territorial integrity or political independence of Panama. Practice proved that a general right of military interference was rejected as a ground for legalising concrete measures unless they had been confirmed by the *ad hoc* consent for a given case which determined the terms and conditions of such measures. The need for additional consent was corroborated in Article 222 TFEU of the Lisbon Treaty. The so-called solidarity clause explicitly required the additional consent of the target State. In the view of the Rapporteur, the right to revoke consent should be as broad as possible.

Regarding the author of the invitation, the Rapporteur clarified that the invitation had to be issued by the highest authorities and not necessarily by the head of State. The request might be issued by the government of the territorial State only and not by other parties to the conflict. As to the character of government, it was usually stated that it should be « effective ». The meaning of this stipulation, however, was not clear and had to be discussed. In the particular case of governments in exile, the

Rapporteur deemed it to be appropriate and accepted in practice that the government would still be entitled to request assistance if it had left the country recently. Otherwise it should no longer hold a right to receive assistance. According to the Rapporteur, effectiveness was not the only criterion for governments to be entitled to request assistance. The subject at hand also pertained to the recognition of governments, which needed to be distinguished from recognition of States. The issue, however, encountered the problem that most governments did not explicitly recognise foreign governments. Under these circumstances, one could 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 had 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 was certainly the attitude of regional or universal international organisations. The democratic character of the requesting government had been mentioned in doctrine as an additional criterion. Still, there was a certain tendency in the Commission not to regard democratic legitimacy as decisive. As to the validity of consent, the Rapporteur referred to Article 20 of the Articles on State Responsibility.

Turning to the general question of the legality of military assistance with prior consent, the Rapporteur pointed out that, in contrast to the 1975 Resolution of the Institute, he regarded it to be generally lawful but subject to certain conditions. Either consent could be seen as a circumstance precluding wrongfulness, or the legality could be regarded to stem from a primary norm, or military assistance with prior consent could be considered to be permitted unless it was prohibited. The Rapporteur preferred not to classify consent as precluding wrongfulness in the given context. Still, the legality of military assistance was subject to significant limitations in international law, deriving, for example, from the principle of self-determination and from human rights law. In general, it would be difficult to enumerate all such limitations.

Finally, the Rapporteur addressed the points mentioned in the paper circulated to the members, which read as follows :

**Points to be discussed**

1. As to the designation of the subject under discussion : « intervention by invitation » some members of the Commission wished to maintain the

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title whereas were opposed as they considered it to constitute a *contradictio in se*. Others were of the view that the expression « intervention » should not be mentioned at all. The expression « assistance » was seen as too much linked with delivery of war materials. For this reason a preliminary working title was formulated, reading : « Armed actions of a foreign State with prior consent [of the government] ». It is quite clear that the details of this designation (e.g. which government etc) should be left to the resolution.

2. It was agreed in the Commission that the subject should cover all situations below the threshold of an international armed conflict. A possible definition of international armed conflict could be taken from Article 1 of Additional Protocol I of 1977 with exception of the fights in the course of decolonization since these latter situations seem to be no longer relevant.

3. There was major agreement on the point that the IDI Resolution of 1975 could serve as reference material only in a limited way because of the changed political environment.

4. No agreement could be reached as to the approach to be taken concerning the regulation of the envisaged activities. One view was expressed that different situations or categories of situations should be used as a starting point ; the rapporteur preferred a rather more general approach that by others, however, was seen as an invitation to unilateralism and protection of powerful States to the detriment of weak States.

5. There seems to be agreement that the qualification of consent as a circumstance excluding wrongfulness was not applicable in the present context.

6. Major discussion arose as to the government entitled to request such actions. It was argued that this issue has to be considered in a more general framework. It was agreed that regional organizations play a major increasing role concerning the acknowledgement of a general recognition of governments.

7. It was proposed not to include a criterion of democratic legitimacy of the government. Problems were raised as effectiveness of the government and the role of exile governments.

8. The conditions to which such acts are subject must be clearly defined. In this context, emphasis was also put on regional organization as can be derived from recent practice of the African Union.

9. It is proposed that a State should always be entitled to revoke the consent provided a very specific treaty obligation precludes this.

10. Major emphasis was put on the limitations to such actions : Reference was made to the role of the Security Council as an organ excluding lawfulness or declaring certain activities as lawful.

As to the designation of the subject, he felt that the working title « Armed actions of a foreign State with prior consent [of the government] » was very long. The term « intervention » should be deleted. The Rapporteur repeated that he was open to any alternative suggestions. He went on to say that it had been agreed in the Commission that the subject should cover all situations below the threshold of an international armed conflict. A possible definition of international armed conflict could be taken from Article 1 of Additional Protocol I of 1977. There had been major agreement in the sub-group that the 1975 Resolution could serve as reference material only in a limited way because of the changed political environment. By contrast, no agreement could be reached as to the approach to be taken concerning the regulation of the envisaged activities. One view had been expressed that different situations or categories of situations should be used as a starting point. The Rapporteur preferred a rather more general approach. Still, Article 3 of the draft Resolution was seen as an invitation to unilateralism and protection of powerful States to the detriment of weak States, whereas the general idea should be multilateralism. The Rapporteur was under the impression that the classification of consent as a circumstance excluding wrongfulness was not applicable in the context of assistance on request. The conditions to which acts of consent were subject had to be clearly defined. In this context, the Commission put emphasis on the practice of regional organisations, especially that of the African Union. Although some thought that the criterion of democratic legitimacy of the government should be included, the general tendency was to the contrary. The Rapporteur had become aware of additional ideas during the discussion in Naples. Major emphasis had been put on the role of the Security Council as an organ excluding lawfulness or declaring certain activities as lawful. Furthermore, it had been proposed to introduce a limited idea of proportionality in the context of assistance by request. Only acts in a way proportional to the situation should be legal. This limitation was regarded to be an instrument capable of limiting the risk of abuse.

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Finally, the Rapporteur emphasised that he would welcome reactions from the plenary. He hoped to have reported correctly what had been discussed in the sub-group and proposed to give priority to members of the sub-group in the debate.

The *President* thanked the Rapporteur for his excellent introduction to the work of the sub-group. He suggested proceeding as indicated by the Rapporteur and starting with a general discussion before turning to several concrete points.

Mr *Degan* agreed with most of the points raised by the Rapporteur. Still, his approach was a little different especially as far as Articles 13 to 15 of the draft Resolution were concerned. He claimed that only a *doctor juris* from Zagreb University would know what was at stake here. Some more practice had to be taken into account. A reference to the Cuban Missile Crisis of 1962 could not be omitted. Lessons should be learned from precedents in order to assess agreements such as those signed between the United States and Poland, the Czech Republic and Colombia, respectively. The Resolution should stipulate that military assistance was not to be to the detriment of third States. Mr Degan was critical of the criterion of « democratic legitimacy » put forward in point 7 of the points raised by the Rapporteur. He believed that another distinction was warranted, namely between criminal and other governments. Criminal governments were those whose actions against their own populations resulted *inter alia* in massive flows of refugees in third countries. Such governments were certainly not entitled to request military assistance.

Mr *McWhinney* was another member of the Hafner sub-group and he wished to stress that the Commission had been the victim of changing circumstances. It had first been established in 1999 in Berlin following the events in ex-Yugoslavia. The common understanding had been that the Commission had a two-year fast-track mandate to address the novel issues raised by armed actions against ex-Yugoslavia outside the framework of the United Nations Charter. This had proven to be far too optimistic. The Rapporteur had received only two replies from members of the Commission between 1999 and 2001 and he had decided to resign. The Commission had then been split into four sub-groups, one of which was the present Hafner sub-group. The other sub-groups on Articles 2(4) and 2(7) of the United Nations Charter had dominated the time at the Santiago Session, preventing the Hafner sub-group from presenting its



work to the Institut in Chile. This accumulation of difficult circumstances meant that the sub-group whose work was now being presented to the confrères and consœurs had in fact been created ten years earlier. In the meantime, a key intervening event had been the attack on Iraq in 2003, which had completely changed the background against which the sub-group worked.

Mr McWhinney noted that some of the points raised in the report presented by the Rapporteur had gained extra currency since the Iraq war. In particular, the events surrounding the American-led intervention in that country had highlighted the importance of fact-finding. The international controversy regarding the work of confrère Hans Blix had shown that legal principles regarding intervention could not operate in a vacuum. The factual background of an intervention was absolutely essential in assessing its legality. For this reason, Mr McWhinney agreed with the proposal made during a sitting of the sub-group the day before to work on the basis of case studies. He also agreed wholeheartedly with the proposal made during the sub-group's sitting by Mr Yusuf to study the practices of regional organisations. The constitutional instruments of some of those organisations complied with United Nations constitutional law, but many questions remained open. First, should NATO qualify as a regional organisation? Second, was it possible to act outside the framework of the United Nations? If so, who was entitled to request assistance, to provide assistance, and under which rules? Finally, the issue of proportionality was crucial and warranted a detailed examination.

Mr McWhinney had been very much surprised during the previous sitting of the Commission to see that some Members had made reference to legal materials seldom referred in past Sessions of the Institut and, in any event, unknown to him. This reflected the new pluri-culturalism of the Institut which he very much welcomed, but also underlined the need for further discussion of the report. The current report might have been too Euro-centred and Mr Hafner had been well advised not to rush towards a Resolution but rather to wait until he received comments from members of the Commission in 2011.

Mr McWhinney also welcomed the proposal made by certain members of the Commission hailing from the French tradition of international law to insert a chapeau at the beginning of the draft Resolution. The Resolution should include general postulates expressing from the outset its

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innovative nature. He also remarked that in the world of 2009 unilateralism had become *passé*. He was happy to see that States had come back to multilateralism and classic diplomacy. The chapeau of the Resolution should take this into account and stress the importance of multilateralism.

M. *Bennouna* remercie M. McWhinney de lui avoir facilité la tâche en traitant plusieurs des points qu'il souhaitait lui-même aborder. Il regrette que son absence à la Session de Santiago l'ait empêché de participer aux discussions antérieures de cette Commission, et tient à féliciter le Rapporteur pour les efforts qu'il a déployés sur un sujet ancien et difficile, qui lui était de surcroît peu familier. La présentation d'un projet de résolution lui semble toutefois quelque peu précipitée, dans la mesure où la question n'est pas encore mûre.

D'un point de vue méthodologique, M. *Bennouna* insiste pour que l'Institut explore tous les cas de figure possibles et ne se contente pas d'une approche superficielle consistant à ne regarder qu'une certaine doctrine et à ignorer les autres. Il est en cette matière essentiel de conduire des études de cas, ainsi que le soulignait M. McWhinney. C'est un travail auquel M. *Bennouna* s'est livré il y a déjà bien longtemps, et qui révèle que le consentement n'est jamais la seule justification avancée par les États concernés. Il s'agit toujours d'un « consentement, plus quelque chose ». D'autres prétextes sont toujours utilisés, tels que la menace pesant sur des ressortissants étrangers, la situation humanitaire, ou bien encore l'agression « indirecte » par un État étranger soutenant les rebelles.

Ces études de cas montrent également que le consentement n'est jamais cité comme exception à l'interdiction du recours à la force. Or, M. *Bennouna* craint que les travaux du Rapporteur ne conduisent précisément à créer une nouvelle exception à ce principe cardinal de l'ordre international, en érigeant le consentement comme exception à l'article 2(4) de la Charte des Nations Unies. Si c'est bien là l'approche de la Commission, alors M. *Bennouna* s'en retire immédiatement. Une telle perspective n'est ni dans l'intérêt de l'Institut, ni dans celui de la communauté internationale. M. *Bennouna* ne conçoit le travail de la Commission que pour étudier la pratique et en tirer quelques conclusions pour dire, par exemple, que l'assistance logistique peut être admissible dans certains cas, ou à l'inverse que l'intervention d'une armée étrangère

dans un conflit interne ne peut jamais l'être. Ce dernier type de comportement constitue une menace à la sécurité et à la paix internationale, ainsi qu'une certaine forme d'impérialisme dont souffre la communauté internationale depuis la Sainte-Alliance et qui n'a plus sa place dans le monde contemporain. Au final, M. Bennouna attire l'attention de l'Institut sur l'importance de la position adoptée à Bruges, position qu'il ne s'agit en aucun cas d'affaiblir. La Commission doit mener des études de cas et en tirer les conclusions qui s'imposent, mais elle ne doit pas toucher aux principes d'autodétermination des peuples et d'interdiction du recours à la force.

Mr *Wolfrum* thanked his colleagues for their remarks which made his own task easier. He wished to make a series of small points regarding the report submitted by the Rapporteur. First, it was important that the text be filled in at paragraph 38 of the report. Second, he drew the attention of confrères and consœurs to paragraph 70 of the report. The references to the Lisbon Treaty and to the « double consent » principle were indeed most interesting and could possibly provide the sub-group with additional case studies along the lines described by Mr Bennouna. Mr Wolfrum also stressed the importance of the practice of regional organisations. Mr Yusuf had mentioned the African Union. It was important to assess the practices of that and other organisations in detail, so as to identify possible similarities and differences. Mr Wolfrum was of the view that such study was likely to reveal many more differences than similarities.

Mr Wolfrum expressed his appreciation of point 10 of the points raised by the Rapporteur. It was indeed important to focus on the role of the Security Council in that context. He was however quite sceptical of the reference to self-determination at point 7. There was an inherent tension between self-determination and the « criterion of democratic legitimacy » mentioned there. Self-determination was limited where the government had been democratically elected. In other words, he doubted that any group could validly claim to exercise self-determination in such democratic State. Mr Wolfrum also concurred with Mr McWhinney that the principle of proportionality was important in the context of international humanitarian law. He stressed however that proportionality had a very different meaning in the present context. Governments could not legitimately request significant military assistance in response to mere riots on their territory because of a lack of proportionality. The same

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principle of proportionality applied where the assisting State overreacted to a request for assistance. Overall, Mr Wolfrum looked forward to working with the Commission on these very interesting issues and he hoped that the next Session in 2011 would be the right time to present a draft Resolution to the Institut.

Mr *Abi-Saab* congratulated the Rapporteur and the members of the Commission for their very interesting work and put two questions to them. First, he asked for clarification on the purpose of the Resolution, which he regarded to be related to the role of the Institut. He described the alternatives of collecting State practice and of indicating desirable developments in the doctrine of international law. With respect to the second alternative, it was important that the Resolution not be misused in order to justify the use of force. Therefore, the sincerity of the offer to help the requesting State had to be assured, genuine consent required and the circumstances clearly defined in which assistance could legitimately take place. Turning to his second point, the applicable law could be the law of internal or non-international armed conflict or human rights law in the case of armed conflict below the level of common Article 3 of the Geneva Conventions.

*Sir Ian Brownlie* complimented the Rapporteur for the very substantial report and appreciated the work of the Commission. He indicated that his problems with the report overlapped with the points made by Messrs Bennouna and Abi-Saab. First, Sir Ian found it disappointing and a curious inversion of historical perspective to start only in 1975 whereas history went back much further. Even in Europe between the two World Wars, there had been hesitation amongst aggressive States concerning this difficult issue. In his opinion, this sensitivity seemed to have been lost in the report. Second, Sir Ian criticised the lack of determination in the term « assistance ». The word was unhelpful, ambiguous and applied to a very wide range of events which needed to be classified differently in legal and political terms. As to the issue of self-determination, Sir Ian referred to the remark made by Mr Wolfrum. In general, he reproached liberal colleagues for developing new parts for the old industry of intervention.

Mr *Dinstein* stated that, by and large, he shared the Rapporteur's views. Still, he had several comments. First, he thought that the term « intervention » was inappropriate and that it should be replaced either by

« use of force » or by « military action ». Second, he suggested that it should be borne in mind that the issue at hand was not one of *jus in bello* but of *jus ad bellum*, although forcible measures short of war were included. Third, he considered it high time to admit that the 1975 Resolution of the Institut on Non-Intervention in Civil Wars was not or no longer in conformity with existing law. Contemporary customary international law clearly permitted the use of force by one State within the territory of another when this was done with the genuine consent of the central Government of the latter State and by its invitation. He referred to the Judgment of the International Court of Justice in the case of the *Armed Activities on the Territory of the Congo (Congo v. Uganda)* from which it could be inferred that military action on the basis of consent was lawful. Referring to the revocability of consent, Mr Dinstein endorsed the Rapporteur's view. Of course, this was subject to revocability of consent at any time, irrespective of the provisions of any treaty of guarantee. Again, Mr Dinstein cited the Judgment in the *Congo v. Uganda*, which clearly indicated that withdrawal of consent to the presence of foreign military forces in the local territory immediately terminated their right to stay there.

Mr *Dinstein* added that Article 2(4) of the United Nations Charter only applied to international relations between States. It had nothing to do with the use of force against non-State actors. As long as there was no use of force on the inter-State level (due to the consent of the territorial State to the activities of the foreign forces against insurgents), the use of force was not wrongful.

As for recognition of the local Government, Mr Dinstein pointed out that, under existing law, such recognition was declaratory and not constitutive. He did not think, however, that recognition of the local Government was the determinant factor in the given context. In his opinion, the crux of the issue was that of the constitutionality of the Government under the domestic legal system, and he would prefer a reference to constitutionality in the Resolution. He emphasized that the test of constitutionality was not the same as that of the democratic nature of the Government. Democracy was often a political slogan, which had different meanings for different people. By contrast, the criterion of constitutionality was subject to objective legal scrutiny. Again, he did not believe that effectiveness of the Government should be a key consideration, although he would like the

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issue of governments-in-exile to be studied more thoroughly. In his opinion, after a long stretch of time, a government-in-exile was not competent to request assistance from the outside.

Mr Dinstein took the view that the intrinsic value of unilateral action was underrated by previous speakers. A Government in need of military aid from the outside against local insurgents would frequently prefer unilateral help from one specific foreign Government that it felt congenial with, in lieu of assistance on a multilateral basis offered by a host of foreign Governments that it did not fully trust.

As for proportionality, Mr Dinstein did not share the view that proportionality was a general principle of international law or even of international humanitarian law. Proportionality was an important principle, but its applicability was confined to specific contexts. In any case, proportionality was irrelevant in the given context. According to Mr Dinstein, the real question was which law was applicable in the relations between the foreign troops and the local insurgents: the law of international or of non-international armed conflict. The law of belligerent occupation only applied in international armed conflicts. In the recent cases of Iraq and Afghanistan, the law of international armed conflict was actually applied. There was a novel question that had to be answered, namely, whether after a regime change had been brought about by foreign troops, the consent of the new central Government (installed by the foreign troops, but recognized by the international community, including the Security Council) could constitute the necessary foundation for the continued military operations of those very troops in the local territory. In his opinion, this question required some further study.

In conclusion, Mr Dinstein supported the idea of including in the Resolution a reference to the Security Council. In his view, the Security Council acting under Chapter VII of the UN Charter could override any rule of international law, with the theoretical exception of *jus cogens*.

Mr Lee thanked the Rapporteur warmly. He felt that the outcome of the report depended on its basic assumptions. The sub-group had started on the basis of use of force instead of non-use of force and of the idea that, in the case of existing governments needing help, other States should be able to assist. According to the motto of the Institut, *Justitia et pace*, however, every Resolution had to start from this premise and discourage use of force. Mr Lee worried that the present draft Resolution could still

be a licence to use force because the conditions mentioned could be easily met. Consequently, the work should focus more on the conditions and requirements to be fulfilled before consent was given. The approach was not to be too legalistic. Three phases had to be dealt with : first, the requirements to be met before consent was declared ; second, the duties of the acting State after consent had been declared ; and third, after determination of action, consequences like accountability, responsibility and compensation had to be addressed.

Mr *Tyagi* was very grateful for having been granted the privilege of joining the Institut. He briefly commented on the terminology, methodology and substance of the report. As to terminology, he would like to know whether the choice of the term « intervention » had been brought about by consensus or whether it was a choice of the Commission. In his view, an explanation of the methodology adopted in the report was missing. As regards the substance of the report, he felt that the object of the report needed to be clarified and that the Resolution should refer explicitly to the Charter of the United Nations.

M. *Kamto* regrette de ne pas avoir pu prendre part aux travaux de la Commission et souhaite féliciter le Rapporteur pour son excellent rapport. Les difficultés relatives au choix du titre du projet de résolution démontrent amplement le caractère sensible de la question, que l'Institut choisira peut-être finalement d'écarter tant qu'il est vrai que, par certains côtés, elle touche aux aspects les plus vitaux du droit international, et notamment le recours à la force.

M. *Kamto* remarque que l'accent a été mis sur le consentement de l'État requérant l'assistance. Il s'étonne que la question du consentement de l'État sollicité n'ait pas été abordée. Celui-ci est-il contraint de donner suite à une demande d'assistance, ou peut-il exiger que celle-ci soit conforme à certains principes de droit international ? En pratique, la réponse dépendra sans doute de la situation de fait, et il semble impossible d'énoncer une règle générale applicable à tous les cas de figure. De plus, le risque d'une atteinte au principe d'autodétermination des peuples est important, et doit être gardé à l'esprit. Il est donc nécessaire, ainsi que le soulignait M. *Bennouna*, de procéder à des études de cas détaillées afin de couvrir l'ensemble des situations de fait.

M. *Kamto* revient par ailleurs sur l'affaire des *Activités armées sur le territoire du Congo* citée par M. *Dinstein*. Dans cette affaire, l'Ouganda

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évoquait le consentement du Congo comme excuse de sa violation du principe d'interdiction du recours à la force, et non comme fondement de la licéité de son intervention. L'argument lui semble légèrement mais nettement différent de la situation envisagée par le Rapporteur. M. Kamto revient également sur les interventions françaises en Afrique mentionnées par le même M. Dinstein, pour souligner qu'elles étaient fondées sur des accords de défense. Ceux-ci ont été conclus dans les années 1960, puis révisés à plusieurs reprises dans les années 1970 et 1990. Aujourd'hui la doctrine de la France est d'éviter autant que faire se peut l'intervention de troupes françaises, et de préférer celle de forces africaines régionales. Cette nouvelle approche conduit à des solutions pratiques bien différentes selon les cas. La Côte d'Ivoire s'est ainsi vue récemment opposer un refus de la France, alors que celle-ci est intervenue en début de semaine au Gabon. En conclusion, cette diversité de la pratique montre, pour M. Kamto, à la fois l'importance d'études de cas et l'impossibilité de définir une règle uniforme. Il invite l'Institut à éviter d'adopter une résolution bouleversant l'interdiction du recours à la force et propose, pour finir, le titre suivant : « action militaire sollicitée ».

Mr *Meron* warmly congratulated the Rapporteur for the quality of his report and of his oral presentation. His first remark concerned the scope of the draft Resolution. The 1975 Wiesbaden Resolution was restricted to situations of civil war, while the new draft Resolution was much broader in scope. Although the report contained an upper threshold of application, namely the exclusion of international armed conflict, it contained no lower threshold of application. Mr Meron welcomed that approach but believed that it should be clearly reflected in the draft Resolution. It was not clear to him why the draft Resolution should not be applicable to situations where a State requested assistance in connection with a criminal law situation. For instance, should Italy request France to send 2,000 *gendarmes* to fight against the Mafia in Sicily, such request should fall under the draft Resolution. Second, Mr Meron believed that, whatever the scope of the draft Resolution, its application should not depend on the formal characterization of the units sent by the assisting State. It was irrelevant whether such units belonged to the army or to the police. The criterion should be the nature of the functions of such forces rather than their formal affiliation.



M. Ranjeva admet s'être abstenu, pour des raisons évidentes, d'intervenir dans les travaux de cette Commission au cours des précédentes sessions, mais souhaite néanmoins saluer le courage intellectuel et politique du Rapporteur s'agissant d'un sujet proprement « impossible ». Il s'interroge en premier lieu sur la portée du projet de résolution. Il ressort clairement des diverses interventions précédentes que la seule vraie question à laquelle l'Institut doit répondre est la suivante : doit-on accepter la mise en place d'une nouvelle exception à l'interdiction du recours à la force ? M. Ranjeva admet que sa formulation est peut-être brutale mais indique que, pour lui, le consentement ne saurait constituer l'essence du droit (du *jus ad bellum*) mais seulement une circonstance atténuante de nature à excuser l'illicéité de l'intervention. C'est un point sur lequel la Cour internationale de justice s'est toujours montrée ferme, et M. Ranjeva remercie M. Kamto d'avoir rappelé que, dans l'affaire des *Activités armées sur le territoire du Congo*, l'Ouganda n'a jamais invoqué le consentement de celui-ci pour justifier de la licéité de son entreprise, mais bien pour atténuer sa responsabilité.

D'un point de vue méthodologique, M. Ranjeva souligne que le consentement ne saurait être envisagé comme un acte instantané, comme peut l'être par exemple une déclaration de guerre. L'accord de l'État est toujours *ad hoc* ; il résulte à chaque fois d'un processus complexe, et il serait faux de se limiter à une approche purement ponctuelle à cet égard. L'expérience montre que le consentement acquis à la va-vite ou obtenu sous la pression ne produit aucun résultat en termes de maintien de la paix à long terme. Le cas des organisations régionales, et notamment de l'Union africaine, illustre la vacuité, et même le danger, de décisions d'intervention n'ayant pas fait l'objet de réflexions préalables et approfondies. L'Institut doit conserver à l'esprit sa devise, *Justitia et pace*, qui implique courage, humilité et imagination. Le consentement n'est le plus souvent qu'un cache-sexe qu'il convient d'analyser de manière approfondie.

M. Ranjeva souhaite notamment distinguer le consentement *ad hoc* du consentement délivré à titre permanent et préalablement à toute crise. Si la théorie des vices de consentement permet de régler beaucoup des problèmes affectant le premier, une approche concrète, ni formelle ni complaisante, demeure nécessaire. Quant au second, M. Ranjeva considère tout simplement que ce type d'institution n'a pas sa place dans la réflexion

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de l'Institut. Ces consentements permanents et préalables n'offrent aucune garantie de sincérité, de liberté et d'effectivité. Le défaut de sincérité ressort ainsi nettement des accords de défense franco-africains mentionnés par M. Kamto, qui ne furent en réalité que des réponses ponctuelles à des situations géopolitiques particulières. Il en va de même de l'absence de liberté, que M. Ranjeva a pu constater *de visu* lors de sa participation aux négociations des accords franco-malgaches de 1973.

En conclusion, M. Ranjeva souhaite faire deux observations. D'une part la présentation d'un projet de résolution est prématurée. Un travail approfondi d'étude de cas est nécessaire, ainsi que l'a souligné M. McWhinney. L'Institut doit, pour respecter sa devise, retenir une approche holistique qui dépasse le formalisme du rapport actuel. D'autre part, M. Ranjeva propose d'ouvrir le chapitre, plus large, de la restructuration de la paix dans le cadre du droit international après une intervention armée sollicitée.

M. *Torres Bernárdez* félicite le Rapporteur pour un travail particulièrement riche et éclairant. Il lui est difficile de ne pas rappeler la résolution de Wiesbaden de 1975, même si le projet actuel est beaucoup plus large dans la mesure où il couvre toutes les formes de bouleversement de l'ordre public. Il souhaite surtout souligner le renversement d'approche opéré par le Rapporteur. En 1975, le principe général était l'interdiction de l'intervention, avec quelques exceptions ; aujourd'hui, le principe est la licéité de l'intervention, avec quelques limitations. M. *Torres Bernárdez* n'est pas opposé à ce changement de perspective, mais souhaiterait que l'Institut en prenne bien conscience et y réfléchisse plus avant. Il insiste par ailleurs pour que le mécanisme retenu par le projet de résolution soit conforme à l'esprit de la Charte des Nations-Unies. Pour ce faire, une référence dans le préambule à l'article 2(4) ou encore une réserve des pouvoirs du Conseil de sécurité devraient être envisagées.

M. *Torres Bernárdez* approuve le projet quant à la distinction entre assistance militaire et de police. Il insiste toutefois sur la nécessité d'éviter les abus de consentement préalable. Ce type de consentement est déjà limité par le projet de résolution, mais devrait l'être plus encore. M. *Bennouna* avait raison de parler de « consentement, plus quelque chose ». Le seul consentement n'est pas forcément suffisant pour constituer en tout état de cause une justification de l'intervention. Sur la forme, il est

également important que le consentement soit exprimé par écrit, et non par de simples déclarations ou intentions putatives.

Sur la question des organes compétents pour exprimer le consentement, M. Torres Bernárdez souhaite que le projet de résolution renvoie expressément au droit constitutionnel de chaque État. La situation actuelle au Honduras illustre à merveille les situations envisagées par ce projet de résolution, et l'importance de la dimension constitutionnelle. La plupart des États latino-américains continuent à reconnaître la légitimité du président renversé, et aucun accord ne semble à ce jour possible pour sortir de cette situation. Plus loin de nous, le meilleur exemple est celui de la guerre d'Espagne, qui était d'ailleurs dans tous les esprits à Wiesbaden en 1975, et dans laquelle la communauté internationale s'était refusée à intervenir. La diversité de ces situations de fait et les réponses variées apportées par la communauté internationale montrent la difficulté de formuler des règles générales à cet égard.

Enfin, M. Torres Bernárdez souhaite que le projet de résolution mentionne, au titre des limites apportées à l'assistance militaire, les règles du droit international humanitaire. Il s'étonne par ailleurs de la formulation de l'article 13 du projet, qui semble, alors même que le rapport se réclame des principes démocratiques, exclure toute intervention destinée à établir, ou rétablir, la démocratie dans un pays donné. Il termine en félicitant une nouvelle fois le Rapporteur pour le travail effectué ; il l'invite à poursuivre ses efforts en tenant compte des aménagements qu'il a évoqués, et insiste notamment sur l'importance de placer le projet dans la perspective de la Charte des Nations-Unies.

M. *Conforti* félicite M. Hafner pour son excellent rapport. Il propose d'introduire une distinction entre action de forces armées et action de la police. S'il se n'agit que de demander l'aide de la police, aucun problème juridique ne se pose. Il admet qu'il est difficile de trouver la limite entre la situation de police et la force militaire qui dépend des circonstances.

Si besoin est, le *Secrétaire général* rappelle que le rôle de l'Institut est, en ces matières comme ailleurs, de répondre aux questions nouvelles qui sont soulevées dans les relations internationales. Et c'est particulièrement lorsque celles-ci sont difficiles qu'il lui appartient de prendre ses responsabilités. Le contraire ne se comprendrait pas. Nul ne contestera à cet égard l'importance de celles dont est saisi le sous-groupe « intervention sur invitation », quelles que soient les hésitations que peut

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susciter cette appellation. Il est clair qu'en la matière l'Institut ne peut ignorer la pratique. Cela va de soi. Mais de nombreux ouvrages récents, notamment en langue allemande, en ont abondamment rendu compte ces dernières années, comme l'a souligné le rapporteur. Il n'y a dès lors pas à refaire ce qui a été fait ailleurs. Il suffit de prendre dûment en considération ces travaux, pour se prononcer sur les questions de fond qu'ils soulèvent.

A titre personnel, le *Secrétaire général* déclare ne pas pleinement comprendre certaines hésitations concernant le principe d'une « assistance » consentie. La règle de la légitime défense collective la valide explicitement dans les conflits internationaux. On ne voit pas ce qui pourrait justifier qu'elle soit par principe écartée dans les conflits dits internes visés par le projet de résolution ; que l'objectif de cette assistance excède le cas échéant les seuls besoins du maintien de l'ordre – de la « police » – ne change rien à cet égard. Au demeurant, ce n'est pas seulement quelque « bon plaisir » de celui qui demande ou de celui qui accepte une aide qui peut la justifier ; cela peut être aussi la protection qui est due à des populations en grande difficulté. Si le principe paraît à ce titre indiscutable, il reste trois questions auxquelles une réponse doit être adoptée : à quelles conditions une telle « assistance » peut-elle être accordée/sollicitée, ce qui soulève notamment des questions de *compétence* comparables à celles qui sont évoquées à l'article 46 de la convention de Vienne sur le droit des traités ; quelle est la *nature* de l'assistance qui peut être fournie, même s'il va de soi que celle qui n'est pas « armée » ne suscite en principe pas de difficultés ; et enfin quelles sont les *limites* que connaît celle-ci, ce qui met notamment en cause la révocabilité du consentement. A titre personnel, le *Secrétaire général* regretterait que l'Institut s'abstienne de répondre à ces questions au seul motif qu'elles peuvent être « politiquement » délicates.

The *Rapporteur* was very grateful for the ideas raised in the discussion. He declared himself to be prepared for further deliberations. Referring to Mr Degan's contribution, he admitted that it was difficult to elaborate on the various obligations, which he had tried to do in a general way. He signalled future endeavours in this respect. Concerning the Cuban Missile Crisis of 1962, he doubted whether it should be taken into account. As to third States, the *Rapporteur* mentioned the possibility of spelling out the obligations to be respected in their regard.

In reply to Mr McWhinney, the Rapporteur stressed the important role of fact-finding missions in practice but was not sure how to incorporate them in the present project. Regional organisations such as the African Union, by contrast, should be taken into account. As to the Security Council, the Rapporteur said that a procedure comparable to Article 51 of the United Nations Charter could be developed, on the basis of which the Security Council had to be informed.

Turning to Mr Bennouna, to whom he had talked on a bilateral basis before, the Rapporteur expressed his complete agreement. He clarified that it was not intended to restrict prohibition of the use of force. As to the necessity of « double consent », the Rapporteur stated that more research should be done in this respect. With regard to the Security Council and regional organisations, the Rapporteur repeated that they should be taken into account. The criterion of democratic legitimacy, by contrast, should not be included. Concerning the questions raised by Mr Abi-Saab, the Rapporteur underlined that issues *de lege ferenda* were political issues. In that respect, he felt it important to get a sense of the views of the Members. As to the applicable law, the Rapporteur repeated that the Commission should not deal with details of *jus in bello*. The Rapporteur agreed with Sir Ian Brownlie that the term « assistance » was not appropriate, however, the sub-group had tried to define it precisely.

Replying to Mr Dinstein, the Rapporteur mentioned a printing error in Article 14 of the draft Resolution. It should read « Obligations of the assisting State » instead of « Obligations of the consenting State ». He agreed with Mr Dinstein that Article 2(4) of the United Nations Charter was not an issue in the given context. As to the criterion of constitutionality, the Rapporteur expressed his sympathy. He took up the recent case of Honduras as an example of a government in exile. Assistance could be asked if a short time had passed only. He left the question of preference between multilateralism and bilateralism to the plenary of the Institut. Consent had to be revocable at any time even in presence of express treaty provisions to the contrary as a matter of sovereignty. The issue of proportionality had to be discussed in the Commission.

The Rapporteur apologised to Mr Lee for having disappointed him. This, however, might be a problem more of presentation than of content. There was no doubt that the requesting State had to meet conditions also.

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International law was already applicable prior to the declaration of consent. He had increased the requirements to be met for lawful action in order to deter misuse. By contrast, he hesitated to include legal matters relevant after the termination of action, because this would lead to an overloaded text. Addressing Mr Tyagi's contribution, the Rapporteur stressed that the United Nations Charter had not been intentionally omitted. A reference to this framework document should be included. Again, the Rapporteur pointed out that it had not been his intention to create exceptions to the renunciation of force. As to Mr Kamto, the Rapporteur said that he had raised difficult issues, which should be dealt with in the sub-group. He would come back to the question of the title when dealing with Mr Meron's points.

Turning to Mr Ranjeva, the Rapporteur repeated that it had not been his intention to legitimize the use of force. He clarified that consent always had to be declared prior to action, either *ad hoc* or in a treaty. In order to avoid misuse, an additional request was necessary even in cases where a treaty of guarantee provided for a right to take unilateral action.

En réponse aux remarques de M. Torres Bernárdez, le Rapporteur souligne que, dans la pratique, d'autres motifs que le consentement ont toujours été évoqués depuis la seconde guerre mondiale, et notamment dans le contexte de la guerre froide. L'un des derniers exemples est celui de l'intervention soviétique en Tchécoslovaquie en 1968, dont on peut se demander si elle constituait ou non une intervention sur invitation. Quant à la terminologie, le Rapporteur partage les réticences de M. Torres Bernárdez sur l'expression « assistance militaire ». Il se dit heureux d'inclure une référence au droit constitutionnel pour déterminer les organes compétents pour émettre les consentements, mais indique que l'applicabilité du droit international humanitaire dépend de chaque situation. Il a quelque réticence à traiter de la question du droit applicable pendant l'assistance dans le cadre de la résolution. Enfin, il remercie M. Torres Bernárdez d'avoir identifié le problème lié à la formulation actuelle de l'article 13 du projet de résolution et veillera à y remédier dans les prochaines moutures du projet.

Le Rapporteur approuve par ailleurs pleinement la distinction opérée par M. Conforti entre action de police et action militaire. Il appartiendra à cet égard à la Commission de déterminer si cette distinction conduit à différencier les régimes juridiques applicables. Il remercie enfin le

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Secrétaire général pour ses remarques et confirme que celles-ci reflètent bien ce qu'il avait compris de sa mission et de celle de la Commission depuis le début de ses travaux.

Le *Président* remercie le Rapporteur pour les excellentes réponses qu'il a apportées à la plupart des questions soulevées par les Membres présents. Il estime que cet échange de vues permettra à la Commission de poursuivre utilement ses travaux. Dans la mesure où les dix points soumis par le Rapporteur ont été commentés à l'occasion desdites questions, il lui semble possible de mettre fin à la discussion relative aux travaux de cette Commission. Il invite le Rapporteur et la Commission à prendre en compte les commentaires utiles et fort constructifs exprimés en vue des travaux de la prochaine Session.

La séance est levée à 12 h 55.

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