Is an Intervention at the Request of a Government Always Allowed? From a "Purpose-Based Approach" to the Respect of Self-Determination

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In the *Military and Paramilitary Activities* Case, the International Court of Justice (ICJ) observed that

> "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".[1]

This famous *dictum* leaves one question open: if an intervention at the request of a government is "allowable", what does it mean in practice?

Following the works of some famous authors,[2] *Karine Bannelier* and *Théodore Christakis* have answered the question by using a "purpose-based approach", defined in the following terms:

> "The criterion of the *purpose* of the foreign military operations is thus decisive and external intervention by invitation should be deemed in principle unlawful when the objective of this intervention is to settle an exclusively internal political strife in favour of the established government which launched the invitation."[3]

This approach has been strongly criticised by several participants to the Max Planck Trialogues workshop that took place in November 2018. Four main objections have been expressed during the debates.

- First, it would be difficult, if not impossible, to identify precisely what the "legitimate objectives" justifying an intervention in an internal conflict could be. To protect its nationals, to riposte to an outside interference or to fight

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1 Italics added; ICJ, *Military and Paramilitary Activities*, Rep. 1986, 126, para. 246.

2 See particularly *M. Bennouna*, Le consentement à l'ingérence dans les conflits internes, 1974; *L. Doswald-Beck*, The Legal Validity of Military Intervention by Invitation of the Government, BYIL 56 (1985); see also Institut de droit international, The Principle of Non-Intervention in Civil Wars, Wiesbaden Session, 1975.

3 *K. Bannelier/T. Christakis*, Under the UN Security Watchful Eyes: Military Invitation by Invitation in the Malian Conclict, LJIL 26 (2013), 860; *T. Christakis/K. Bannelier*, Volenti non fit injuria? Les effets du consentement à l'intervention militaire, A.F.D.I. 50 (2004). See also *O. Corten*, The Law against War, 2010, 288 et seq.

terrorism, can undoubtedly be characterised as legitimate. But what about, for example, the fight against an internal secession?

- Second, to prove the genuine purpose of an intervention appears extremely difficult, not to say illusory. Governments often label all rebels or opponents as "terrorists", but it seems excessive to make an outside intervention to crush them on the sole basis of this qualification legal.
- Third, the "purpose-based approach" gives the biased impression that it would be for the State that intervenes on the basis of an invitation validly given by an established government to prove that it pursues a legitimate objective. Yet, and this can be clearly deduced from the ICJ's dictum mentioned above, this kind of intervention is presumed to be legal.
- Fourth, practice would not confirm this "purpose-based approach". If some "purposes" are occasionally advanced by the intervening States, their discourses would not reveal any legal conviction. They, in fact, rather seem to be the reflection of mere political considerations.

Those critics highlight the difficulties surrounding the determination of the legality of an intervention by invitation. At the same time, however, they seem to forget about the right of peoples to self-determination, which has been recognised as fundamental principle of international law. In this respect, certain basic elements must be kept in mind when appraising the critics evoked above.

- First, according to Article 2.4 of the United Nations (UN) Charter, "All Members shall refrain […] from the threat or use of force […] in any […] manner inconsistent with the Purposes of the United Nations.[4] Yet, one of the purposes of the United Nations is to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples […]"[5] It is, therefore, inconceivable to ignore the principle of self-determination when assessing the legality of a use of force.
- Second, beyond the right for colonial peoples (or peoples submitted to a foreign occupation or to a racist regime) to create a new State, self-determination guarantees the right to the population of existing States to "freely […] determine, *without external interference*, their political status […]."[6] Resolution 2625 (XXV) moreover specifies that: "no State shall […] *interfere in civil strife in another State*."[7] These texts, together with several human rights treaties,[8] clearly show that a State cannot be reduced to the will or the "consent" of its government.

4 Italics added.
5 Art. 1.2 of the UN Charter.
6 Italics added; GA Res 2615 (XXV), 24.10.1970.
7 Italics added; GA Res 2615 (XXV), 24.10.1970.
8 See e.g. Common Art. 1 to the 1966 UN Covenants.

- Third, considering that all States have recognised self-determination as an *erga omnes* principle (if not a peremptory rule of international law),[9] the role of practice must be correctly understood. It is for those who consider that self-determination does *not* limit the possibility to intervene in an internal conflict (a limit that can be deduced from the texts just cited) to show that a customary norm has emerged in support of their thesis. And this task will be difficult to accomplish, as States systematically deny interfering in an internal conflict when they are invited by a government of another State.

It remains that the notion of "purpose" is probably not the best suited to express the current state of international law. According to Article 3.1 of the Rhodes resolution adopted by the Institut de droit international in 2011,

> "Military assistance is prohibited when it is exercised in violation of the Charter of the United Nations, of the principles of non-intervention, of equal rights and self-determination of peoples […] in particular when its *object* is to support an established government against its own population."[10]

The notion of "object" appears more appropriate, as it suggest that, whatever the intention or objectives, the intervention (envisaged by reference to its concrete effects) must remain within the limits of the principle of self-determination. That would not be the case if, in fact (and the facts have to be established objectively, on the basis of the factual elements on the ground), the intervening State has given militarily support to a government against its own population. To examine the "object" and to assess the "effects" of the intervention would be more appropriate than to speculate about its purpose and, consequently, about the (subjective) intention(s) of the intervening State.

Of course, this change of terminology does not elude all the difficulties, notably with respect to proof. But, at least, it seems to reflect both the presumption of legality stated by the *dictum* of the ICJ quoted in the introduction (a presumption that reflects the existing practice), and the necessity to maintain some limits to intervention by invitation as deduced from basic principles of international law, especially the principle of self-determination of peoples.

[9] See e.g. ICJ, Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, A.O. of 25.2.2019, para. 180.

[10] Italics added; Military Assistance on Request, 2011.