

# Proposal & Mandate

## Use of force: Military Assistance on Request

### 1. Introduction

The present document sets out a proposal for a new ILA Committee on the Use of Force focusing on ‘military assistance on request’, a topic which is of great contemporary importance in light of recent State practice, and which is in dire need of normative clarification.

The envisaged Committee would succeed the current ILA Committee on the Use of Force, which concluded its mandate and presented its final report to the biennial ILA conference in Sydney in August 2018. The new Committee will focus on a somewhat neglected, but no less problematic and important, component of the law on the use of force, *viz.* ‘military assistance on request’ – also known as ‘intervention by invitation’.

This proposal is submitted by Professor Claus Krefß (Universität zu Köln, German Branch) and Professor Vera Rusinova (Higher School of Economics, Russian Branch) (as proposed co-chairs), as well as by Professor James A. Green (University of Reading, British Branch) and Professor Tom Ruys (Ghent University, Belgian Branch) (as proposed co-rapporteurs).

### 2. Topic and Background

Amidst the intense and fierce debates over topics such as the legality of humanitarian intervention or self-defence against non-State armed groups, it is easy to overlook the fact that numerous State military interventions in other States are justified, not based on self-defence, authorization of the UN Security Council, or humanitarian intervention, but rather by reference to the existence of an ‘invitation’ or ‘request’ for assistance from the State in which force then is used. The legality of ‘military assistance upon request’ (often referred to as ‘intervention by invitation’, albeit that the scope of the two notions does not overlap completely) is firmly established. The premise is that military intervention at the request of a third State does not, as a general rule, breach the prohibition on the use of force enshrined in Article 2(4) UN Charter and customary international law, and it finds support in the case-law of the International Court of Justice, in the practice of the UN Security Council, in the UNGA Definition of Aggression, as well as, for instance, in the Constitutive Act of the African Union. This position also is broadly accepted as a legal starting point in doctrine.

Contemporary practice is rife with examples where States have agreed to setting up military bases abroad, where they have engaged in joint military exercises, or have concluded so-called ‘hot pursuit’ agreements, permitting military or police personnel to pursue suspected rebels, ‘terrorists’ or criminals across a shared border. At the same time, throughout the Charter era, there have been numerous controversial applications of the doctrine of ‘military assistance on request’, which have flirted with, or clearly transgressed, the boundaries of the legally permissible.

### 3. Mandate

Against this background, it is submitted that recent practice calls for a thorough re-examination of a classical topic of international law, which has previously been addressed (in part) by the *Institut de droit international* in 1975, but never by the International Law Association itself. In particular, the aim of the envisaged Committee is to examine recent practice with a view to bringing normative clarity to an area that is in urgent need thereof. On the basis of existing primary and secondary sources (including relevant case-law, resolutions of the UNSC and UNGA, etc.) as well as relevant State practice and *opinio juris*, the Committee seeks to draw up a set of conclusions, to be accompanied with commentaries, with the aim of providing guidance for future State action and facilitating the identification of unlawful behaviour.

At the outset, the Committee intends to focus on two related key questions:

- (a) *What requirements must be fulfilled for the conclusion to be reached that valid consent has been given by the territorial State, thus allowing for an action that otherwise be a breach of the prohibition of the use of force?*

In the interests of completeness, the Committee will consider parameters concerning the requirements for the provision of military assistance by request that appear to be relatively straightforward, including, for instance, the requirement that an invitation to intervene must in principle precede the actual intervention and cannot be *ex post facto*; that it can be conditional, and; that it must be freely given and not coerced. However, the main focus will be on the difficulties that can, and do, arise in situations where it is difficult to identify which person or body is entitled to speak on behalf of the State. The Committee will seek to identify the relevant parameters that determine *who* is competent to request outside military assistance, and whether elements such as ‘democratic legitimacy’, or the position of the UNGA and the UNSC, have any bearing in this respect. In so doing, the Committee will also build on the prior work of the ILA Committee on Recognition/Non-Recognition in International Law.

Other notable issues for analysis by the Committee in this context include: (1) the extent to which States can give ‘advance consent’ to third-State military intervention on their soil, specifically by means of a bi- or multilateral treaty: does such a treaty preclude the need for ad hoc consent at the moment of the actual intervention?, and; if so, can advance consent be withdrawn at a later stage (and how)?, and; (2) the extent to which consent must be open/publicly communicated.

- (b) *Is it lawful to intervene in situations of a crisis amounting to the level of non-international armed conflict or even civil war?*

The second main question for the Committee is whether, having regard to the non-intervention principle and the right of self-determination, military assistance on request is permitted in situations of civil war. The fundamental debate pertaining to the permissibility of intervention by invitation in civil wars raises a number of subsidiary questions. First, when does a ‘civil war’ exist? A second, and closely related, question is what restrictions could possibly apply to military assistance on request beyond the civil war context, e.g., when States are confronting ‘mere’ riots or local disturbances of low intensity. Last but not least, is the question of what, if any, limitations apply (stemming from the non-intervention principle and the right of self-determination) to the provision of, for instance, weapons and so-called ‘non-lethal support’ to governments fighting non-State armed groups.

It is worth noting that the conclusions and commentaries in the proposed Committee’s final report may include both *lex lata* and *lex ferenda* – however, the Committee’s officers would seek to ensure that where *lex ferenda* was included this was made explicit.

## **5. Proposed Time Schedule/Work Plan**

### Year One (2018-2019)

- Late 2018/early 2019: preparatory work following approval of the Committee by the Executive Council; constitution of membership through the usual approach (i.e., initially via nominations by branches and then, if appropriate, chairs’ appointments).
- March 2019: first meeting of the Committee, Cologne.
  - o General discussion of the mandate and work required to complete it; Committee members asked to prepare background reports/notes on specific sub-questions.
- December 2019: second meeting of the Committee, Ghent.
  - o Discussion of submitted reports by Committee members, development of planned structure for and contents of interim report (e.g., initial draft of conclusions and commentaries, or interim report as more of an overview).

### Year Two (2020)

- January-March 2020: drafting of interim report by officers, based on submitted background work and discussions.

- March 2020: circulation of first draft of the interim report to members.
- March-June 2020: redraft of interim report by officers based on members' input.
- June 2020: submission of interim report to ILA HQ ahead of the ILA Biennial conference.
- August 2020: third meeting of the Committee; open session, ILA Biennial conference.
  - o Discussion of interim report; planning for work to be conducted in year three/four (further background work requested of members as required).
- August 2020 onwards: first drafting of final report (i.e., conclusions and commentaries) by officers begins.

#### Year Three (2021)

- February 2021: first draft of final report circulated to members for consideration at the fourth meeting of the Committee.
- April 2021: fourth meeting of the Committee, Moscow.
  - o Discussion of the first draft of the final report; changes/additions considered; plan for further work, as required.
- April-October 2021: second draft of final report prepared by officers, taking into account input from members.
- October 2021: second draft of final report circulated to members for consideration at the fifth meeting of the Committee.
- December 2021: fifth meeting of the Committee, Reading.
- Discussion of second draft of final report; consideration of any final (notable) changes.

#### Year Four (2022)

- January-March 2022: drafting of third (and last) version of the final report (i.e., conclusions and commentaries) by officers.
- March 2022: third (and last) draft of final report circulated to members for consideration at the fourth meeting of the Committee.
- May 2022: any required final changes to final draft of the report based on members' input incorporated by officers.
- June 2022: submission of final report to ILA HQ ahead of the ILA Biennial conference.
- August 2022: presentation of final report (i.e., conclusions and commentaries) and adopting resolution; final open session, ILA biennial conference.
  - o NB: the option to extend the Committee's mandate to August 2024 at this time if required is noted, although the proposed officers currently envisage completing the Committee's work within the original 4-year timeframe.

## **6. Proposed Officers**

### Professor Claus Kreß (co-chair, German Branch)

Claus Kreß (Dr. jur. Cologne; LL.M. Cantab.) is Professor for Criminal Law and Public International Law. He holds the Chair for German and International Criminal Law and he is Director of the Institute of International Peace and Security Law at the University of Cologne. Since 1998 he has been a member of Germany's delegations in the negotiations regarding the International Criminal Court. Claus serves on the editorial board of several law journals, including the *Journal of International Criminal Justice* and the *Journal of the Use of Force* and *International Law*. He was a Visitor at the Lauterpacht Centre for International Law (2010), at Columbia Law School (2015/2016) and at Melbourne Law School (2017). He currently holds a Fernand Braudel Senior Fellowship at the European University Institute in Florence. He is a Life Member of Clare Hall College at the University of Cambridge, a Member of the Academy of Sciences and Arts of Northrhine-Westfalia, and the recipient of the 2014 M.C. Bassiouni Justice Award. He was awarded Honorary Doctorates from the Universities of Huánuco and Tbilisi. His more than 150 publications covering the international law on the use of force, the law of armed conflicts and international criminal law. Some of his more important works on the international law on the use of force are *Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen in Fällen staatlicher Verwicklung in Gewaltakte Privater* (Duncker & Humblot, 1995); *The Prohibition of the Use of Force and the Right to Self-Defence in Cases of State Involvement in Acts of Force by Private Persons* (English summary); 'Major Post-Westphalian Shifts and Some Important Neo-Westphalian Hesitations in the State Practice on the International Law on the Use of Force' (2014) 1 *Journal on the Use of Force and International Law* 11-54; and 'The International Court of Justice and the 'Principle of Non-Use of

Force', in M. Weller (ed.), *The Oxford Handbook of the Use of Force and International Law* (Oxford University Press, 2015), 561-604.

Professor Vera Rusinova (co-chair, Russian Branch)

Vera Rusinova is Professor at the Chair for Public and Private International Law at National Research University 'The Higher School of Economics' in Moscow. Until 2012 she headed the Chair for International and European Law at Immanuel Kant Baltic Federal University in Kaliningrad. Vera Rusinova holds a Doctor of legal sciences degree (Diplomatic Academy of the Ministry for Foreign Affairs, Moscow, 2016), Candidate of legal sciences (Institute for State and Law of the Russian Academy of Sciences, Moscow, 2005) and a Master degree (University of Göttingen, 2004). She serves as Editor-in-Chief of the law journal *International Justice (Mezhdunarodnoe pravosudie)*. Vera has in recent years been a fellow at the Berlin Potsdam Research Group 'International Law – Rise or Decline?' (2017), at the Max Planck Institute for International and Foreign Public Law in Heidelberg (2011) and at the Göttingen Institute for International Law (2012). She is the author, co-author and editor of several books and has published more than 60 articles and reviews on general international law, human rights law, International Humanitarian Law, international responsibility, *jus contra bellum* and the application of international law to cyber operations. Her latest book is *Human Rights in Armed Conflicts: Problems of Relationship between Norms of International Humanitarian and Human Rights Law* (in Russian; Moscow, 2017).

Professor James A. Green (co-rapporteur, British Branch)

James A. Green (Ph.D Nottingham; LL.M by thesis Reading; LL.B Reading) is Professor of Public International Law at the University of Reading, UK, where he is chair of the [Global Law at Reading](#) research grouping. He has been a visiting scholar at the University of Oxford (2017-2018) and the University of Michigan (2005). James is a member of the ILA's current Committee on the Use of Force, and sat on the ILA Steering Committee in 2016 at the Johannesburg conference. James is co-editor-in-chief of the [Journal on the Use of Force and International Law \(JUFIL, Routledge\)](#). He is the author of *The Persistent Objector Rule in International Law* (Oxford University Press, 2016), which was the winner of the European Society of International Law Book Prize 2017, and *The International Court of Justice and Self-Defence in International Law* (Hart Publishing, 2009), which was the winner of the Francis Lieber Prize 2010 awarded by the *American Society of International Law*. He has also edited three book collections, and has authored numerous book chapters and articles published in leading journals around the world (predominantly, although far from exclusively, focusing on aspects of the law on the use of force). These include 'Questioning the Peremptory Status of the Prohibition of the Use of Force' (2015) 32 *Michigan Journal of International Law* 215-257; and 'The Article 51 Reporting Requirement for Self-Defense Actions' (2015) 55 *Virginia Journal of International Law* 563-624.

Professor Tom Ruys (co-rapporteur, Belgian Branch)

Tom Ruys is a professor of international law at Ghent University, where he heads the Ghent Rolin-Jaequemyns International Law Institute ([GRILI](#)). Tom studied law and international relations at the Universities of Ghent, Nottingham (LL.M.) and Leuven (M.Sc.). He holds a doctoral degree from the University of Leuven (2009) and is a member of the Brussels bar (Stibbe, off counsel). He was a visiting researcher at Yale Law School (2008) and a visiting fellow at the Lauterpacht Centre, University of Cambridge (2016). Tom is a member of the ILA's Committee on the Use of Force and the ILA Study Group on Sanctions. He is co-editor-in-chief of the [Journal on the Use of Force and International Law \(JUFIL, Routledge\)](#), and coordinates the Journal's periodic digest of State practice. He also serves as general editor of the *Military Law and Law of War Review* and is a member of the editorial board of the *Revue belge de droit international*. He is the author of *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Cambridge University Press, 2010) (awarded the 2011 Francis Lieber Prize) and co-editor (with Olivier Corten) of *The Use of Force in International Law: A Case-Based Approach* (Oxford University Press, 2018). Other publications include, *inter alia*, 'The Meaning of "Force" and the Boundaries of the *Jus ad Bellum*?' (2014) 108 *American Journal of International Law* 159-210 (awarded the 2015 Francis Lieber Prize and the 2015 Francis Déak Prize) and 'Weathering the Storm: Legality and Legal Implications of the Saudi-led Military Intervention in Yemen' (2016) 65 *International and Comparative Law Quarterly* 61-98 (with Luca Ferro).