10 DOWNING STREET

THE PRIME MINISTER

26 September, 1984

Dear Professor Higgins.

I was sorry to hear that you will not be able to come to the Seminar on 1 October but most grateful for the thought-provoking note that you have sent. I am sure that many of the points you raise will come up in the discussion and it is a shame that you will not be there to help us. Would you agree to my circulating your note to the other participants in the Seminar?

With best wishes.

Yours sincerely

Margaret Thatcher

Professor Rosalyn Higgins.

FILE (CAMAFA)

10 DOWNING STREET

9 October, 1984

From the Private Secretary

The Prime Minister has asked me to thank you for your letter of 8 October. We did in fact take a chance and circulate your paper at the seminar. Thank you for the retrospective authority!

The Prime Minister was very sorry that you missed the discussion which she found stimulating even though - and this will hardly surprise you - no real conclusion was reached.

(C.D. Powell)

Professor Rosalyn Higgins

The London School of Economics and Political Science

(University of London)

LAW DEPARTMENT

Houghton Street,
London WC2A 2AE
Telephone: 01-405 7686
Telegrams: Poleconics, London
Telex: 24655 BLPES G

8th October, 1984.

19 seminar PMS

Rt. Hon. Margaret Thatcher, M.P.,
10 Downing Street,
London, S.W.1.

Dear Prime Minister,

Thank you very much for your letter of 26th September. I am extremely sorry not to have replied sooner, but I have only just returned from an extended period working in France.

I very much hope that my inability to reply to your letter in time did not prevent your circulating my note to the other participants in the seminar, which is of course what I would have wished. If this is not the case, and if you would still think it useful, I would of course be happy for it to be circulated now.

I am so sorry I was not able to be at what I imagine must have been a very interesting discussion.

With best wishes,

Yours sincerely,

Rosalyn Higgins.

Rosalyn Higgins

Foreign Policy: Chequers Seminar 6/84

10 DOWNING STREET

Prime Minister

Is Intervention Ever Justified?

You may like to glance at this contribution from Rosalyn Higgins, who unfortunately can't attend the seminar.

Some fair points, but a very weak piece at the end on the Containment of Communism.

CDP 24/9.

Excellent - I must write and thank her

The London School of Economics and Political Science
(University of London)

Telephone: 01-405 7686
Telegrams: Poleconics, London
Telex: 24655 BLPES G

LAW DEPARTMENT

Houghton Street,
London WC2A 2AE

21st September, 1984.

Mr. Charles Powell,
Private Secretary,
10 Downing St.,
London, S.W.1.

Dear Mr Powell,

Thank you very much for your letter of 5th September and enclosed background paper.

I enjoyed reading the paper and feel that it should stimulate a fruitful discussion. I enclose some comments arising from it. (See folder at back of file)

Yours sincerely,

Rosalyn Higgins

Rosalyn Higgins

PROF. HIGGINS' NOTES

(1) I found the section on international law very helpful. While there are a few specific points that I could make on it I feel that I would prefer to step back from the technicalities and make some comments on the policy issues that run through all the legal arguments.

(2) Much of the discussion is focused upon whether present international law does or does not "forbid" (or conversely "permit") intervention as defined in the paper. I feel that the statement at II.1.: "All contemporary international lawyers agree that intervention is, as a general rule, forbidden by international law" greatly over-simplifies the problem. The heart of the argument is about what is "the rule" and what are "the exceptions". And may it be the case that "the exceptions" are actually so numerous and significant as to require us to look again at what constitutes "the rule"? This observation necessarily leads us into questions of legal theory. I would for present purposes only say that there are those who will go on asserting that a rule exists even though it is honoured in the breach; while other international lawyers (including myself) would regard that state of affairs as evidence of emergent new rules.

(3) In answering the question of whether present international law "forbids" intervention, there are a variety of sources to be looked at, including writers, who are of course cited in the paper. Most important of these sources is (a) State practice, and (b) Judicial decisions.

(a) As to State Practice, there seems to me to be overwhelming evidence that East and West alike engage in intervention in one form

or another. (I analysed the factors militating towards this some time ago in a paper that I now attach). At certain levels not involving the overt use of major force, it is also arguable that the Superpowers tolerate - through the doctrine of spheres of interest - each other's intervention. There are certain perceived thresholds above which such intervention is not, however, acceptable.

The invocation of international law in support of such commonly practised and, to some extent, mutually tolerated intervention, is often Article 51 of the Charter. But the fact that Article 51 is invoked, often in manifestly inappropriate circumstances, should not blind us to the fact that it is a quite different type of intervention that states are engaging in. It is partly for this reason that the expression "intervention in self-defence" seems to me inappropriate. While self-defence may indeed entail military action, such military action would then definitionally not be intervention.

(b) Judicial decision. What the tribunals say stands in substantial contrast with what is actually going on all around us. The recent decisions of tribunals in this area accords very much more than does state practice with traditional international law. The unlawfulness of intervention is still heavily emphasised. This comes through in the Corfu Channel Case and more recently in the Nicaragua/U.S. case. Naturally what a court will have to say will depend upon the available facts of the case. For example, the International Court's discomfort with the United States rescue attempt in Iran is probably to be read as embarrassment about the timing of that action, given that the issue was before the Court. And courts are undoubtedly likely to deal more sympathetically with, for example, an "in and out" rescue attempt of direly threatened nationals, as in an Entebbe type situation, than with, e.g. mine laying in the port of Nicaragua. The immediacy of the need to

intervene will be critical.

(4) We are in that uncomfortable period of time where judicial pronouncement differs significantly from substantial areas of state practice. The problem is not that one or more renegade nations no longer accept the rules, but rather that the leading powers of East and West have in large part moved away from the rules, even though in their rhetoric they will often endeavour to justify their conduct in terms of the traditional rules. It may therefore be that the law itself is in an evolutionary process of change, but that there is still a great reluctance to look at it in these terms.

(5) The Grenada and Nicaragua cases have obviously greatly exercised international lawyers in the West, because in the former case there has been much satisfaction with the outcome of intervention and in the latter case there is a widespread understanding of the anxiety that the United States feels over the Sandinistas' involvement in the spreading of communism. But at the same time many Western international lawyers have found it very hard to agree with the legal justifications put forward for these actions. In Grenada there was no evidence of substantial danger to U.S. nationals; considerable evidence of pre-preparation by the U.S. authorities; doubts as to whether indeed the Governor-General asked for help at the relevant time and if so what his status was in doing so; anxiety that the issue of whether the revolutionary government was nonetheless "government" has been ignored; and discomfort at the attempt to fit the intervention into the regional treaty framework. The fact that a very desirable outcome is achieved cannot push these anxieties on one side. As for Nicaragua, we have been faced with the discomfort of the United States overtly supporting rebel forces and using the same type of arguments that the Soviet Union uses elsewhere, and which we

normally so readily decry. The real explanation, of course, can only lie in the comments on "Lessons of Cuba" made by President Kennedy and cited at V.14 in the background paper which the Planning Department has provided.

(6) This leads me to say that it is no good telling international lawyers (as I have frequently been told in the last few months) that we should harness our skills to fighting the good fight and achieving desired ends. While we are as keen as anyone to achieve these ends of democracy and liberty, this argument looks like just another variation of ends justifying means. Moreover, it totally emphasises the short-term over the long-term and ignores the long-term importance of maintaining the fabric of agreed norms - which necessarily involves applying those norms in hard cases.

(7) The greatest contemporary damage is in my view done by selective application and invocation of these norms by governments. It can only breed the deepest cynicism when governments insist that moral imperatives make non-intervention inappropriate in Case A, while ignoring the moral imperatives of Cases X, Y and Z. The moral tone underlying the claims made in favour of intervention in Grenada thus stand in marked contrast with the absence of any claims about the need of intervening in the face of atrocities in, e.g., Indonesia. Sometimes of course the problem is simply that the scale of unacceptable events that would make us think about intervention is simply too great. How could we successfully intervene in, e.g. Cambodia or the Soviet Union or South Africa? And sometimes it is simply that we have no national interest in what is going on in some other countries, e.g. Haiti. But one is still left with the question of what is it other than self-interest, together with the fact that the problem is manageable that distinguishes, e.g. Grenada from other

cases where undesirable governments have taken over by force.

(8) It is in my view impossible to articulate an international law rule that permits intervention in the one case but not in the other. That is not to say that international law is simply about the mechanistic application of the rules regardless of context. I do not believe that to be the case at all - but at the same time it does not follow that because one believes in a contextual application of international law that one can simply apply it uncritically in the service of desired ends. In this context I enclose a paper given by Professor Gordon of the United States at the 1984 meeting of the American Society of International Law, against the background of animated discussion on the issues of Grenada and Nicaragua.

(9) The most useful thing perhaps is to identify three main areas where the intellectual problems of intervention are very pressing.

(i) Humanitarian intervention (and here I make no special distinction between the rescue of nationals and non-nationals because I personally do not believe the arguments that Article 51 covers the position of nationals are very convincing). I am among those who believe that it can sometimes be lawful for such interventions to take place, but that they would have to fulfil the test in Article 2, paragraph 4 that they be not against the territorial integrity of a state, nor undermine its political independence; and it would also have to be shown that no other reasonable alternative was available. However, I share the view that the general presumption should be as to the unlawfulness of intervention under this head, leaving the onus on an intervening state to defend its case in the above terms. I am of course very aware that in any decentralised system it is all too easy for states to abuse this, and that is why the presumption should always be against intervention.

(ii) The "Small States Problem". Here I refer to the Grenada-type problem - namely the ease with much small states can be subverted and freedom lost for their peoples. If the subversion is external, it ought to be possible to provide some protection against that by defence treaties. Such treaties would in my view have to be regional and local, because all the evidence shows that external guarantees by larger powers are probably not worth the paper they are written on. The tripartite guarantee in the Middle East and the Cyprus treaties of guarantee are among the many examples one could cite.

If the subversion is internal, then we have to ask ourselves whether there are special problems in this case that make the normal rules of non-intervention inapplicable, i.e. is there something so very special about the dilemma small states face that should legitimise friendly intervention? For reasons I have indicated above, I feel the answer has to be in the negative. Assistance against internal subversion is surely best done not through bending international law (under the rhetoric of harnessing it to the cause of freedom) but through providing the political infra-structure to resist subversion. I doubt whether this simply means the provision of military support, but aid and political cooperation.

(iii) The Containment of Communism. Here we face the question of intervention in response to prior intervention directed at the revolutionary exportation of communism. Once again the precipitating factors and the subjectivities involved make it highly undesirable (along with other reasons I have already referred to) that intervention should be "exceptionally" permitted here. The problem cannot be resolved, or indeed even contained at the international legal level, but must surely lie in the long-term in making communism unattractive to the indigenous population. While this is beyond my

own field, it would seem that much lies to be done in terms of assisting in achieving the economic aspirations of the very poor, and in curbing the excesses of undemocratic governments which so often allow communism to take root. Aid which is not harnessed to these ends, and in which military assistance is predominant, seems to me doomed to failure - a failure in which the manipulation of rules of international law cannot and should not assist.

Rosalyn Higgins.

21 Sept. 84.

Pl. put with seminar papers.
DR.

INTERNAL WAR AND INTERNATIONAL LAW

in The Future of the International Legal Order, ed. Falk and Black (1971)

Rosalyn Higgins

INTRODUCTION

This paper seeks to examine the role of international law in internal wars and to make suggestions as to the future of the international legal order in this regard. The theme is one which, until fairly recently, was regarded as of limited interest to the international lawyer. International law is largely concerned with international transactions and, to a lesser degree, with the promotion within nations of international standards on certain questions. Events occurring within a state have been regarded as prima facie a matter solely for the country concerned; but it has long been recognized that the dimensions and duration of a civil conflict may affect the position of outside parties.* To the extent that this is so, traditional international law has purported to provide certain rules of conduct to be observed by the community of nations in respect of a civil war. And since 1949 international law has also sought to promote a certain minimum standard of conduct by the parties to the hostilities.

---

* Lauterpacht, Recognition in International Law, Pt. 3; Berlia, 'La guerre civil et la responsabilité internationale de l'Etat "Revue general de Droit International (1937) 51; Fenwick, "Can civil wars be brought under the control of international law?" 32 AJIL (1938) 538; Garner, "Recognition of belligerency" 32 AJIL (1933) 106; Green, "Le statut des forces rebelles en droit international" Revue General de droit international (1962) 5; Kotzsch, The Concept of War in Contemporary History and International Law (1937) 121; Silvanie, Responsibility of States for Acts of Unsuccessful Insurgent Governments; Siotis, Le Droit de la Guerre et les conflits annés d'un caractère non international; Walker, "Recognition of belligerency and grant ofmbelligerent rights" 23 T.G.S. (1937) 177; Weber, Problèmes de droit international public posés par les guerres civiles; Wehberg, "La guerre civile et le droit international "Hague Recevil 1 (1938); Wilson, "Insurgency and International Maritime Law" 1 AJIL (1907)46; Castrén, Civil War; Pinto, "Les Regles de Droit International concernant la Guerre Civile" 114 Hague Recevil (1965) 451.

Only comparatively recently, however, has there been much critical analysis of the degree to which the stated 'rules' in fact conform to experience.* Those who believe that law must accurately reflect community expectations, rather than consist of a mere statement often unheeded 'rules'** have contended that the traditional rules no longer represent an accurate statement of the law.*** Further, there has been recently some work of considerable importance on the causes and international implications of civil strife,**** which has caused the contention to be made that the traditional rules are inimical to the policy interests of the world community.*****

Major research in this field is now under way,****** commanding infinitely greater resources than the present writer has at her disposal. The target of this paper is therefore modest: it seeks to look at current practice to analyse contentions made by the foremost scholars in the field, and to examine alternative proposals for the future. This is done in tentative form pending discussion, suggestion and criticism by conference members.

I have sought to handle the multitude of relevant factors and variables by presenting groupings of claims made by the protagonists. This method has the advantage of highlighting the real issues at stake, and enables one to relate the traditional law to the assertions of legality actually made by

---

* See, for example, the comments of Siotis on the practical irrelevance of the notion of recognition of belligerency by the legal government itself: Siotis, op.cit., 223; Cf. Castrén, op.cit., 138.

** The present writer would number herself among them. See McDougal "Some basic theoretical concepts about international law: a policy-oriented framework of enquiry" IV Journal of Conflict Resolution (1960) 337.

*** Falk,"Janus tormented: The International Law of Internal War" in International Aspects of Civil Strife (ed. Rosenau) 185-92.

**** See the admirable volume International Aspects of Civil Strife (ed. Rosenau) which provides an interdisciplinary analysis of the problems involved.

***** Falk, op.cit. supra, 210-48.

****** By the American Soc. of Int. Law, under the direction of Prof. Falk.

the actors.* In essence, the claims which are made concern three international aspects of civil strife: the existence of a civil war, as opposed to international conflict or mere domestic revolt; claims concerning the right of third parties to participate in the outcome of the war; claims concerning the conduct of the war; and claims concerning relations between the contending factions and third parties.

No policy recommendations can be made without distinguishing between various types of civil conflict. To do otherwise would be to paint with too broad a brush, for the interests of the international community are by no means identical in each case. Before proceeding to an analysis of the claims made, therefore, we will briefly refer to the varying motives and situations which lead to internal war:

SITUATIONS

Internal wars may be of a variety of types, occurring for a variety of different reasons. They may be civil conflict simpliciter, in which two parties are contending for the status of government of all the territory: this was the case in the Spanish civil war. The incumbent government may be democratically elected, and the insurgents communists, military junta, fascists or other non-democrats. Alternatively, the incumbent government may be unrepresentative, and the insurgents may be seeking to introduce democracy. Or neither party may command popular or democratic support. The motives of such insurgents vary. They may be seeking to establish certain minimum human rights; they may be acting from ideological motives; they may be seeking to secure a government more acceptable to the majority of the people; or to the neighbours of the territory concerned; or they may be engaged in a simple power struggle.

---

* This is a technique which the present writer has found helpful in other comparatively uncharted areas of international law: see Higgins, The Development of International Law through the Political Organs of the United Nations.

The civil conflict may also occur not as a dispute over central power, but because one party wishes to secede from the political unit as it is established. The Nigerian civil war is clearly a dispute over secession rather than an attempt by Biafra to seize power in Lagos. The civil war in the Congo was in part - though not solely - caused by the attempted secession of Katanga. The reasons for attempts at secession also vary. Secession may be attempted by a wealthy part of a larger federal unit which does not wish to share its resources with, or pay tax on them to, the central government. It may be encouraged in this attitude by foreign economic interests. Both of these factors are relevant to the Katanga and Biafra secessions. The secession may be felt necessary because tribal groups residing in one area believe that they are not treated as equals and fear for their security: this is clearly the prime motive of Colonel Ojukwu's attempt to establish a separate state of Biafra. And the secession may represent the attempt of a locally charismatic leader to secure a greater measure of power than he has been able to achieve in the federal structure. One can also imagine attempts at secession in order to join with ethnically similar neighbours: although the fighting between Kenya Somalis and the Kenya government has never reached the status of civil war, one may note that the rebel's objective has been to unify with the neighbouring state of Somalia.

Government persecution, or claimed persecution of minorities, and resistance by those minorities, could lead to civil war. Were the Kurds and the Nagas militarily better organized the internal hostilities could acquire the status of internal warfare. Equally, disputes between ethnic or religious groups as to the constitutional disposition of power between them can cause domestic strife on a major scale, as the tragedy of the Cyprus experience shows.

A further group of internal wars arise from the process of decolonization. The peoples of colonial territory may take up arms because they have no prospect of obtaining independence from the metropolitan power - such is the case in Angola and Mozambique. In yet other territories, even if independence is promised, the local leaders may insist that the timetable is too slow, or that the people to whom power is to be handed are not representative. These factors were of great significance in the fighting in Aden between British forces and the nationalist groups. Insofar as the administering authority declares that the territory in question is an integral part of the metropolitan territory - as was the claim in respect of Algeria - then, at least from the point of view of the metropolitan power, any conflict is an internal rather than international war. The international community has regarded such claims with some scepticism, and from the point of view of, for example, the United Nations, such a war is not necessarily internal.* The evidence points to this imbalance of legal perspective, though certain authors prefer to rest on the formalistic argument that such wars cannot be international "since such areas do not have the status of a subject of international law".** A similar problem arises in the case of anti-colonial wars in those dependent territories which have a special legal status, such as protectorates or trusteeship areas. In both cases there is some controversy as to the division of sovereignty between the dependent and governing authorities. Some authors view colonial wars in protectorates as internal,*** and those in trust territories as international.**** In any event, the

---

* For a full discussion of the United Nations perspective, see below p.

** Castrén, op.cit., p.37. Cf. Siotis, op.cit., p. 47.

*** Castrén, p. 37. Cf. Castberg, op.cit., p.86.

**** Castberg, p. 86; Castrén p.38.

international community is taking an increased interest in their outcome, and whatever their precise status, they cause important international repercussions.

Rebellions in colonial territories are usually between the colonial authority and those representing the majority of the indigenous population. It can occur, however, that the rebellion against the administering authority is by a minority element in the territory, seeking to secure power against the indigenous majority. This has been the case in the seizure of power by Ian Smith's government in Rhodesia.

In all of these cases the policy considerations, from the point of view of the world community, are different. For the moment we merely note the different and the differing motives for which they are fought. In our concluding section on recommendations for the Future International Legal Order, we shall seek to relate these variables to certain proposals.

CLAIMS CONCERNING THE EXISTENCE OF A CIVIL WAR

1. Claim that the war is internal rather than international

The identification of a major conflict as either civil or international war is essential to the correct application of the relevant legal norms. Two main factors operate to make difficult the appraisal of a conflict as simply 'internal'. In the first place, the international community (and the parties themselves) may be divided as to whether the territory concerned is one political unit or state, or two. In the second place, it may be claimed that what appears ostensibly as a civil war is in fact violence fomented from outside. Should this be so, different considerations of both law and policy will ensue.

The appraisal of a conflict as internal war, rather than international conflict, entails legal consequences so far as the status of the warring parties is concerned; so far as the rights of third parties to participate or remain neutral is concerned; and so far as the modalities of the conflict is concerned. All of these aspects are discussed below. For the moment we may note that the war in Vietnam provides a clear example of this problem. Certain observers have regarded Vietnam as legally one state*; entailing the consequence that the fighting was initially a civil war, which gave no entitlement to the United States to intervene on one side.** Others have

---

* It is argued that the Geneva Accords of 1954 established the unity of Vietnam. See, eg. Lawyers Committee on American Policy toward Vietnam, American Policy vis à vis Vietnam, Memorandum of Law, in 112 Cong. Rec. 2552; Senator Morse, 112 Cong.Rec. 1975; Commanger "Our Vietnamese Commitment" Diplomat (June 1961) in 112 Cong. Rec. 11174; Standard, "United States Intervention in Vietnam is not legal" 52 A.B.A.J. 627(1966); Partan, "Legal Aspects of the Vietnam Conflict", in The Vietnam War and International Law, ed. Falk, pp. 216-7; Wright, "Legal Aspects of the Vietnam Situation", ibid., p.285. Falk, "International Law and the United States Role in the Vietnam War", ibid. pp.363-69.

** The scope of the right to intervene in a civil war is discussed below, pp. 19-44.

contended that, the intentions of the Geneva Accords notwithstanding, North and South Vietnam are now effectively two de facto states; and that, if aggression by one can be shown, there is a right by the other to invite the assistance of another nation in collective self defence.*

Similar arguments, though in more muted terms, were heard in respect of the Korean war. In this case South Korea had been recognized in a resolution of the United Nations General Assembly,** and thus the majority of the international community were on record as acknowledging the de facto statehood of the South. The crossing of the parallel by North Korean troops was thus readily deemed an international breach of peace,*** and not a mere civil conflict.

The sequence of events, as well as the status of the territorial units involved, is also relevant to the determination of a conflict as internal or international. Thus in the case of Vietnam it is argued by some that the conflict was originally between the Diem Government and the NLF, but that it was internationalized by the United States intervention, leading in turn to a response by regular troops of Hanoi.**** Others read the evidence differently, asserting that the United States responded only after intervention by the North.*****

---

* Eg. Hawkins, "Issues rais d by the U.S. actions in Vietnam" in The Vietnam War and International War, op.cit. supra.

** GA Resolution 195 (III)

*** SC Resolution S/1501

**** Falk, "International Law and the U.S. role in Vietnam" in Legal Order in a Violent World at pp. 376-7, 398.

***** Eg. Memorandum of the LegalAdviser, Dept. of State "The Legality of U.S. Participation in Defense of Vietnam", reprinted in Legal Order in a Violent World, pp. 594-5.

2. Claim that international law is relevant to the situation

Clearly, international law is not directly relevant to all domestic conflicts. Traditionally, major domestic violence has been classified as falling within one of three categories: rebellion, insurgency or belligerency. Rebellion is understood to entail sporadic violence which is capable of containment by the national police or militia. By definition, a government has no need to call for outside help in controlling the situation.* International law gives no protection to the rebels, and is relevant only insofar as it entitles the government to promulgate measures which may incidentally inconvenience other nations, and makes help to the rebels an offence.

By contrast, certain traditional norms of international law are - or are said to be - relevant to internal hostilities which are deemed either insurgency or belligerency. Some guidance is given by the records of the Geneva Diplomatic Conference of 1949** which lists "convenient criteria" *** which are useful for "distinguishing a genuine [internal] armed conflict from a mere act of banditry or an unorganized and shortlived insurrection". These criteria are as follows:

> "(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 national territory.

---

* Though cf. Falk, Legal Order in a Violent World, who states that foreign states are however free to help the government against the rebels, p.118.

** The Conference at which the texts of the 1949 Geneva Conventions were adopted.

*** Cited in Whiteman, Digest of International Law, vol.10, p. 41.

(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 the 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 persons within a determinate territory;

(c) that the armed forces act under the direction of the organized civil authority and are prepared to observe the ordinary laws of war;

(d) that the insurgent civil authority agrees to be bound by the terms of the Convention". *

All violent acts against the Government, whether rebellion, insurgency, or belligerency, are likely to be punishable under domestic law.** However, neither treaty nor customary international law condemns civil war;*** indeed, many have explicitly asserted that the law of nations permits civil war.**** There is also a considerable sympathy for the notion that civil war may be the only way by which the peoples of a country can express their will in an authoritarian environment, and that it should thus not be condemned by international law.

---

* Final Record of the Diplomatic Conference of Geneva, 1949, vol.II-B p.121. We shall return below, pp.12-19 to the application of the Geneva Conventions in civil war.

** See Geamanu, La Résistance à l'oppression et le Droit à l'insurrection (Paris 1933).

*** Nothing in the United Nations Charter forbids civil war; nor does the Inter-America Habana Convention of 1928.

**** See Wehberg, Guerre Civil, pp. 9 and 40; Scelle, Revue General (1938) 266; Lauterpacht, Recognition in International Law, p.175; Castrén, Civil War p.19.

While international law neither prohibits nor condemns civil war, it has a relevant role to play in where the domestic violence is more than mere rioting or rebellion. This is even though, as we shall see below, it has become in recent years virtually unheard of to grant a formal status of either insurgency or belligerency. Though the traditional distinctions - and the methods for enacting them - have become largely irrelevant, it remains correct to observe that minor domestic violence entails few international - and thus international legal - repercussions.

3. Claim that the status of the protagonists renders a conflict a civil war.

Traditional international law recognizes two categories of domestic violence which establish a civil war; and different legal consequences flow from each of these categories.

The lesser, and less well defined status, is that of insurgency. It is, as Professor Falk has correctly commented, an international acknowledgment of the existence of an internal war, which leaves each state substantially free to control the consequences of this acknowledgment.* De Visscher has described the recognition of insurgency as "more elusive in its criteria than recognition of belligerency,** while Lauterpacht has observed that

> "any attempt to lay down the conditions of recognition of insurgency lends itself to misunderstanding. Recognition of insurgency creates a factual relation in the meaning that legal rights and duties as between insurgents and outside states exist only insofar as they are expressly conceded and agreed upon for reasons of convenience, of humanity, or of economic interest". ***

---

* Falk, Legal Order in a Violent World, p. 119-22.

** De Visscher, Theory and Reality in Public International Law (1957),238.

*** Recognition in International Law, pp.276-7.

The recognition of insurgency - whether implied or express, is an indication that the recognizing state regards the insurgents as legal contestants, and not as mere lawbreakers.* Such an acknowledgment does not entail the legal burdens of a neutral - the recognizing state is possibly still free to assist the legal government**, and would be illegally intervening if it materially assisted the insurgents.***

The recognition of belligerency, on the other hand, involves more than the mere acknowledgment of the fact that hostilities are being conducted. Traditionally, four criteria are cited: first, there must exist within the State an armed conflict of a general character; second, the insurgents must occupy and administer a substantial portion of national territory; third, they must conduct the hostilities in accordance with the rules of war and through organized armed forces responsible to an identifiable authority; and fourth, there must exist circumstances which make it necessary for third parties to define their attitude by recognition of belligerency.****

CLAIMS CONCERNING THE CONDUCT OF INTERNAL WAR

1. Claim that international law regulating the methods of warfare is applicable in internal war.

Any examination of the purpose of the laws of war - the minimizing of suffering and destruction - reveals that they must in principle be regarded as relevant to internal war. The fact that one party is not, in traditional terminology, a full subject of international law, is not relevant to this

---

* Memorandum of Legal Adviser Yingling, cited in 2. Whiteman, Digest 487.

** though see the discussion on self determination below, p. 34-5.

*** Hyde, International Law Chiefly as Interpreted and Applied by the United States, Vol. 1, 2nd ed., p.204.

**** Lauterpacht, op.cit., p. 176.

proposition. Nor is the characterization of the rebels as criminals under the constitutional law of the country concerned. Lauterpacht's views in 1946 remain appropriate:

> " A clearly ascertained state of hostilities on a sufficiently large scale, willed as war at least by one of the parties, creates suo vigore a condition in which the rules of warfare become operative...Once a situation has been created which, but for the constitutional law of the state concerned, is indistinguishable from war, practice suggest that international law ought to step in in order to fulfill the same function which it performs in wars between sovereign states, namely, to humanize and regularize the conduct of hostilities as between the parties." *

To the traditionalist, recognition of belligerency was required before the rights and duties of the laws of war and neutrality were conferred upon the recognized party. Broadly speaking - and certainly in respect of belligerent rights as against neutrals - this proposition remains true. However, attempts have been made to make operative certain minimum humanitarian standards. These attempts are found in Article 3 of all four** Geneva Conventions of 1949, which provide:

---

* Recognition in International Law, p. 246. This is one reason why Lauterpacht contends that the government is under a duty to recognize the insurgents as belligerents. See also McDougal and Feliciano: " The physical characteristics of exercises of violence and their effects upon people and resources are of course the same, assuming violence of comparable proportions in an internal as in an international conflict. It would thus seem fairly obvious that what has been generalized above as a fundamental policy of minimum unecessary destruction is equally vital and applicable in one as in the other type of conflict". Law and Minimum World Public Order, p. 535.

** On the Wounded and Sick in the Field, On the Wounded, Sick and Shipwrecked at Sea, On prisoners of War, and on Civilians during War.

" In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict."*

What this provision does is to call for certain humanitarian rules to be applied irrespective of whether the insurgents have been recognized, by the

---

* This Article was a compromise, the Conference being unable to decide whether the Conventions should be automatically applicable to civil wars; or whether they should not; or whether they should be applicable only in certain major types of civil war. See Castrén, op.cit., p.85. Siotis, op. cit., pp. 185-206; McDougal and Feliciano, op.cit., pp.536-7; and Yingling and Ginnane, "The Geneva Conventions of 1949", 46 AJIL (1952), p .395-6.

legitimate government or by third parties. It also makes clear that interventions by the Red Cross are not to be regarded as unfriendly acts. The provisions of Article 3 have not, unfortunately, been regarded as an integral whole. There have been cases where Red Cross intervention has occurred, but none of the other paragraphs of Article 3 have been employed - and still less have the parties made special agreements to bring the rest of the Convention into effect. Nonetheless, this basis for Red Cross action has still proved useful. The Red Cross has been able to act in Guatemala in 1954, and in Costa Rica in 1955, though there was no recognition of belligerency.* It remains true, however, that the attitude of the constitutional government may still remain hostile to the Red Cross, even while allowing it certain limited rights of action, as has been the case in Nigeria.

The Article is binding on both parties, and is not subject to reciprocity. It does not itself define an "armed conflict not of an international character", but - given its humanitarian purposes - it would seem to be applicable to major insurgency and probably also rebellion as well as to civil war.**

While this provision in the Geneva Convention has performed the valuable function of making clear that humanitarian behaviour depends neither on recognition, nor on the formal status of the parties, actual practice*** all too often falls lamentably below the standards required by the Geneva Convention of 1949. This is so whether or not the constitutional government is a party to the Conventions, and whether or not the parties have agreed to heed the humanitarian requirements of the laws of war.

---

* See Castrén, op.cit., p.78; Siotis, op.cit., p. 209ff.

** To this effect, Siotis, p. 209, Castrén, p.87.

*** And note also that Portugal has a reservation in respect of Article 3 to the effect that she reserves the right not to apply the Article if it is considered contradictory to her domestic legislation. Such a reservation would seem to be quite incompatible with the overall intentions of the Convention.

The war in Vietnam has been marked by indiscriminate murder, torture, the use of weapons of doubtful legality, and lack of discrimination between civil and military targets. While, so far as one knows, the Nigerian civil war has not occasioned terrorism and torture on any scale, the deliberate bombing of civilian centres has been all too evident.*

Behaviour is frequently anomalous, and occasionally the humanitarian provisions of Article 3 of the Geneva Conventions are applied in spite of the refusal of the constitutional government to recognize the insurgents as belligerents. France refused to recognize the Algerians as belligerents, but did permit relief activity of the Red Cross. The French government acknowledged that the conflict was not a purely criminal matter but was an armed conflict of the type mentioned in Article 3 of the Geneva Conventions. Nonetheless, she denied the international character of the conflict.** Neither side fully adhered to the legal standards of Article 3. Not infrequently, a gover ment permits activity by the Red Cross asserting that it does so as an act of sovereignty, and not because Article 3 is applicable. The United Kingdom never admitted that Article 3 applied in respect of the conflicts in Kenya and Cyprus, though it did allow the Red Cross to visit detainees in Cyprus in 1955 and in Kenya in 1957.***

---

* See, for example, the eyewitness accounts of Mr. Winston S.Churchill in The Times (London) during March 1969.

** Castrén, p.74. See also Siotis, p.211. Bedjaoui, Law and the Algerian Revolution, p.159 observes that France engaged in actions that were tantamount to a recognition of belligerency - such as stopping, searching and re-routing foreign ships sending supplies to the Algerian rebels.

*** Col. Draper observed in 1958 "...several thousand troops were employed to quell the Mau Mau in Kenya, the terrorists in Malaya, EOKA in Cyprus, and no less than 400,000 are employed in Algeria where the rebels are still active. The refusal of France and the United Kingdom to recognize that these conflicts fall within Article 3 has, it is thought, been determined by political consideration and not by any objective assessment of the facts". The Red Cross Conventions, p. 15, n.47.

In Nigeria the situation seems confused. The Federal authorities agreed to enter into arrangements with the International Red Cross concerning proposals for airlifting supplies to airports under federal control but rejected an appeal (on 23 May 1968) for extensive lifting of the blockade on Biafra, the sparing of civilians from bombing attacks, and the exchange of some prisoners of war. The Federal Government stated that the I.C.R.C. was "allowing itself, perhaps unwittingly through political naivety, to be used as a tool of rebel propaganda."* The Biafrans agreed to cooperate with the Red Cross, but clearly wanted an airlift operation rather than a land corridor, for political rather than humanitarian reasons. Although the Federal authorities have not formally deemed Article 3 of the Geneva Conventions to be applicable, they have invited in international observers to inspect Federal military operations in the field. By and large, their reports have been favourable. The Federal Government has stated that it will, voluntarily, apply the standards of the Geneva Conventions. At the same time, there have been widespread reports about indiscriminate bombing and the holding up of relief supplies.

In Vietnam the United States, viewing the situation as an international rather than a civil war, deems the entirety of the Geneva Conventions applicable, rather than only Article 3. All parties to the conflict - North Vietnam**, South Vietnam and the USA - are bound by the four Geneva Conventions.

---

* Keesings Contemporary Archives, 24 August 1968, 22877.

** The International Committee of the Red Cross classifies the situation as armed conflict between two or more of the Contracting Parties. It also has stated - and has not been contradicted by any of the parties - "The National Liberation Front too is bound by the undertakings signed by Vietnam". See letter from Jacques Freymond to Dean Rusk, 11 June 1965, reproduced in International Legal Materials, Nov. 1965, p.1171. But cf. contrary reports, eg. N.Y. Herald Tribune, 7 May 1966 which stated that the I.C.R.C. had been informed that the Viet Cong were 'freedom fighters', not subject to the responsibility of Hanoi. They were entitled, it was argued, to regard themselves as not bound by the Geneva Conventions.

In reply to a letter from the I.C.R.C., the United States indicated its intention to abide by the provisions of the Geneva Conventions, adding the caveat, that given the reliance by the North on disguise and illegal methods of warfare, it is

> "difficult to develop programs and procedures to resolve fully all the problems arising in the application of the provisions of the Conventions. Continued refinement of these programs and procedures in the light of experience will thus undoubtedly be necessary". *

The Republic of Vietnam reported that the Geneva Conventions were being applied in respect of Viet Cong prisoners. Visits by the I.C.R.C. would be permitted. The Democratic Republic of Vietnam replied that the aerial attacks on the North by the United States, indiscriminate bombing, and the use of napalm, were all in breach of the Geneva Agreements of 1949. Consequently, it regarded captured air pilots as "criminals" and liable for judgment under North Vietnamese law.*** North Vietnam's reply made no mention of the applicability of the Conventions to the situation.**** * North Vietnam has not allowed inspection of camps by the I.C.R.C., nor has it given lists of prisoners. Certain attempts have been made by third parties - such as the UAR - to act as protecting power for U.S. forces held by Communist forces, but these have been unsuccessful. On occasion, captured military personnel have been paraded in a manner contrary to the Conventions.

---

* International Legal Materials, November 1965, p. 1173.

** Ibid., p. 1174.

*** At the time of capture of the pilots it was threatened that they would be brought to trial as 'war criminals'. In fact this has not occurred.

**** Reprinted in International Legal Materials, Jan. 1966, p. 124.

Undoubtedly, there have also been breaches of the Conventions in the South, though there is evidence that the United States has sought to control these.* Given the difficulty of making the Viet Cong fall within the definition of Prisoners of War in Article 4 of the Convention, it could have been argued that they were unprotected by this Convention; yet, because the war was international, the minimum humanitarian provisions of Article 3 did not apply either. Fortunately, this narrow argument has not been advanced, and P.O.W. status has been granted to North Vietnam regulars and to Viet Cong alike. The United States has no doubt been mindful of its own traditions, public opinions, and the hope that it would be able to call for reciprocity.

CLAIMS CONCERNING PARTICIPATION IN INTERNAL WARS

1. Claims in favour of outside participation

A. Claim by the constitutional government

(i) that it is entitled to ask for help

Traditional international law is fairly clear in indicating that, in relations with third states, a lawful government is in a privileged position compared with the insurgents,** at least until there has been recognition of belligerency. What is less clear - and it has become still more doubtful in recent years - is the legal authority of the government to ask for military assistance during civil hostilities, in the sense of either arms or active participation. While the majority of writers support aid in general terms for the government, they are divided where aid in arms or

---

* Thus in July 1966 the United States decided not to hand over all prisoners directly to the South Vietnamese Army, but to keep them in U.S. hands until transferred to P.O.W. camps. Under Article 12 of the Convention of Prisoners of War, a capturing power is required to turn prisoners over to another country to guarantee their well-being.

** This aspect is dealt with below, under Claims concerning relations with third parties.

forces is concerned. Those supporting* the right of the government to call for assistance point to the fact that it is still the recognized government, and that the insurgents have no status under international law. Others suggest that once a government requests foreign military aid it no longer, by definition, represents all the state.** What is clear beyond doubt is that governments faced with rebellion do frequently ask for assistance, and other governments see fit to grant it. Given the increasing infrequency of recognition of belligerent status - a legal concept fast becoming irrelevant in the context of internal wars - governments feel more and more free to answer a plea for help from another government, irrespective of whether the rebels are mounting an organized opposition, and have control of a substantial portion of the territory.

Calls for assistance in the form of troops usually occur when the government classifies the war as international rather than internal. In Vietnam, the South Vietnamese emphasize that the fight is against North Vietnamese regulars, and that even the Vietcong are assisted by and directed from Hanoi. Sometimes there is comparatively little evidence that the conflict is anything but internal; thus Chamoun's Government in the Lebanon sought aid from the U.S.A. in 1958, claiming that the domestic rebellion was being fomented by the U,A.R. A UN observer group found no proof of this.***

---

* Among those supporting the legality of military aid, see Castberg, Borgekrig, p. 104; Brownlie, International Law and the Use of Force by States. pp. 325-7; Castrén, pp. 110-11.

** See Raestad, Ned. Tid. Int. Ret. 1938, p.5.

*** For an overall survey of the UN role in civil wars, see below, pp.37-43.

It is comparatively rare for a government faced by a rebellion to call for assistance by foreign troops. East African governments asked with great reluctance for British help in 1964 in putting down mutinies; but this damaged their prestige in the region and would be unlikely to be repeated. Clearly, most governments that have recently secured their independence from their colonial masters are unwilling to invite them to assist in terminating civil conflict. However, requests are made - and met - for arms supplies to the government.*

In short, there is a clear community expectation that a government may seek arms supplies from abroad when a civil conflict occurs, and is not prevented from doing so even if the rebels have acquired a position which, under traditional international law, would have been granted the status of belligerency. Most governments are reluctant to ask for foreign help when the conflict is purely civil, but they and the world community believe that they have the right to do so when the civil war is fomented or supported from outside.

(ii) that it is entitled to belligerent rights

Although the formal recognition of belligerency is becoming increasingly rare, we may note that under traditional international law the constitutional government is not entitled to claim belligerent rights unless the insurgents have been recognized as belligerent. As we shall observe below, this nominal restriction has little practical effect on the course of the war.

---

* For a discussion of the right of outside parties to provide arms, see below, p. 26-30.

B. Claims by insurgents

(i) that they are entitled to belligerent status

This claim may be advanced by the insurgents in respect of the constitutional government. There has been academic debate as to whether such recognition is constitutive* - bringing into existence certain rights and duties - or whether it is declamatory.** Suffice it to say that, since the Spanish war, belligerent recognition of the insurgents by government and by third parties has lost all practical significance,*** though it can be argued that tacit recognition of this status*** still brings certain legal consequences into effect. Whereas it is arguable that, as a matter of policy, insurgents should be entitled to recognition by the government, there is less case for making such a suggestion in respect of third parties because the recognition of belligerency cannot be gratuitous, but depends upon the necessity of the relations between the insurgents and the third party concerned.*****

There are arguments for and against the proposition that states are obliged to recognize the belligerent status of insurgents when the appropriate conditions exist. An obligation to recognize belligerency entails subsequent neutrality by the recognizing party (which it may or may not deem to its

---

* Castrén, op.cit. -.138; Castberg, p. 109.

** Lauterpacht, p.253, who notes that recognition acknowledges that the civil war has fulfilled certain pre-requisites for recognition and that the recognition is mandatory. It is recognition of belligerency which brings the laws of war into operation - though Article 3 of the Geneva Conventions applies irrespective of recognition by either the government or third parties.

*** Thus Siotis, op.cit., p.223.

**** Castrén, pp. 136, 147.

***** On which question, see below, p. 45-48.

advantage, depending on the circumstances) and its non-participation in the internal conflict.* On the other hand, recognition entails highly significant consequences for the recognizing state, and it will be reluctant to acknowledge that insurgents, lacking formal status under traditional international law, can oblige it to embark upon these. We shall suggest later** that this is an area in which community procedures could be profitably employed.

(ii) that they are entitled to recognition as either the government of all the territory or of a seceded portion of the territory

So far as traditional international law is concerned, insurgents may on occasion pursue the claim that they are entitled not merely to recognition as belligerents, but to recognition as a de facto government. Sometimes an insurgent government may be recognized as the de facto government in the area which it controls (though some have said that this is merely tantamount to a recognition of belligerency***). However, insurgents may also be recognized as the general de facto government. Recognition must traditionally be based on factual prerequisites, although the granting of it is discretionary. When the goal of civil war is separation of a portion of the territory, and if the insurgents have already succeeded in establishing their rule, and have been recognized by many states, it is arguable that the internal war has now become an international one.****

---

* This reason - the tendency to limit the scope of civil wars - is emphasized by Lauterpacht when he urges the legal obligation to recognize belligerency. Recognition in International Law, p. 229ff.

** p.49.

*** Spiropoulos, Die de facto Regierung im Völkerrecht, p. 57.

**** A point made by Fiore, Il Diritto internazionale codificato, p. 556.

All this being said, one may note that practice has varied considerably. In the Spanish civil war, Germany and Italy early recognized Franco as the only lawful government in Spain. Academic arguments as to the propriety of this notwithstanding*, these countries opened diplomatic relations and provided Franco with arms and troops. De jure recognition was also accorded by Portugal, Albania, El Salvador, Guatemala and Nicaragua. Yet other states granted de facto recognition.** The Soviet Union and Mexico, on the contrary, recognized the National Government as the only lawful government, and Franco as a mere insurgent.

In other cases recognition has taken place in circumstances which the majority of nations regard as premature, because the outcome was uncertain: the recognition by certain nations of the Algerian government was a case in point. Here the traditional criteria were fulfilled and the controversy was about timing. In some recent cases, however, it has become clear that some governments assert a right to recognize even when the traditional criteria are manifestly not fulfilled. The eloquent statement by President Nyerere of Tanzania on his decision to recognize Biafra reveals a preoccupation with questions of morality, and a total ignoring of the customary legal factors.

C. Claims by outside states

1. Claims in favour of supporting the Government

(i) that armed assistance, mere rebellion or insurgency is taking place. It used to be generally accepted that a state may aid a government threatened with riots and insurgency, until such time as it has recognized - whether by

---

* The German and Italian action is widely regarded as premature and illegal: Castrén, p.58, Castberg, NTIR (1937), p.164.

** Britain sought a middle path by recognizing, in due course, Franco as the local de facto government.

implication or expressly - the belligerent status of the insurgents This statement of the traditional rule is now to be qualified by concern for the principle of self determination: to what extent is such help an intervention preventing the self determination of the population of the territory concerned, notwithstanding the limited status of the rebels? This aspect is discussed below.*

Intervention by invitation is a doctrine to be regarded with suspicion so long as there are no centralized procedures for establishing the support commanded by the rebels, and so long as the openings for abuse are so many.** One point was well put as early as 1924:

> "[if intervention is] directed against rebels, the fact that it has been necessary to call in foreign help is enough to show that the issue of the conflict would without it be uncertain, and consequently that there is a doubt as to which side would ultimately establish itself as the legal representative of the state. If again, intervention is based upon an opinion as to the merits of the question at issue, the intervening state takes upon itself to pass judgment on a matter which, having nothing to do with the relations of states, must be regarded as being for legal purposes beyond the range of its vision". ***

A more detailed discussion of the policy considerations at stake in this question will follow in the final section of this paper. For the moment, we may note that the traditionalist view - allowing a right of intervention where there has been no recognition of belligerency - is losing favour.****

---

* p. 34-5.

** On this point generally, see Higgins, The Development of International Law through the Political Organs of the UN, pp. 210-13.

*** Hall, A Treatise on International Law, p. 347 (8th ed.)

**** See eg. Wright, 53 AJIL (1959) p.121-2.

(ii) that arms may be sold to the lawful government if the belligerency of the rebels has not been recognized.

We have already observed that, given the general desire for international stability, the lawful government starts with a built-in advantage against the rebels. The duty of non-intervention requires states not to furnish arms, munitions, military goods or financial aid to the rebels, and not to allow their territory to be used as a base for rebel activities against the lawful government.* However, it appears in these circumstances to be lawful to continue to provide arms to the lawful government. The U.S. Department of State, in justifying its decision in respect of the 1930 resolution in Brazil to prohibit all arms to that country save to the Government, explained:

> "Until belligerency is recognized, and the duty of neutrality arises, all the humane predispositions towards stability of government, the preservations of international amity, and the protection of established intercourse between nations are in favour of the Existing Government". **

Such a view does not appear to be inconsistent with the view that there is a legal right of revolution, and certainly it is consistent with state practice.

(iii) that arms may be sold to the recognized government, irrespective of the status of the rebels.

Given the contemporary infrequency of formal recognition of belligerency, it has become more and more possible for states to deal with the lawful government as if the rebels had not the status of belligerents, even though

---

* Relations between third states and the parties to an internal war are dealt with more fully below, pp. 45-7.

** Dept. of State, Latin American Series No.4., 1931. Cited in Lauterpacht, p.231.

the facts clearly indicate otherwise. In other words, the legal relevance of the particular rights and duties flowing from the existence of a major civil war is denied. A clear example of this tendency is available in the handling of the British Government of the Nigeria-Biafra war. The British Government appear to acknowledge - indeed, it would seem impossible on the facts to do otherwise, - that a civil war exists in Nigeria. At the same time, the government regards itself as free to provide the Federal Government with arms, merely on the legal ground that it is the recognized Government. Speaking in the House of Commons, the Secretary of State for Commonwealth Affairs commented:

> "Neutrality was not a possible option for Her Majesty's Government at that time. We might have been able to declare ourselves neutral if one independent country was fighting another, but this was not a possible attitude when a Commonwealth country, with which we had long and close ties, was faced with an internal revolt. What would other Commonwealth countries have thought?" *

Lest it be thought that the Commonwealth Secretary was implying that this was a mere rebellion, it may be noted that he had earlier classified the situation as "a civil war".** The entire speech largely ignores the legal issues, and in so far as they are touched on at all, it is in confusion. Nor was the Secretary of State endeavouring to draw a distinction so far as aid to the government is concerned, between civil war and secession. The Deputy Leader of the Opposition had supported the supply of arms, but added:

---

* Hansard, 27 August 1968, col. 1146.

** Ibid., col. 1443.

> "However, the position could change of the struggle took on the character of a genuine civil war...Despite the recognition of Biafra by a number of other territories on the African continent, is it not still a fact that this is a matter of secession rather than a civil war?" *

The suggestion, apparently, was twofold: first, secession was something different from civil war; and that in the case of the former - but not the latter - arms supplies could continue. But the Secretary of State did not wish to grasp at even this legal straw, for he replied (no doubt correctly) **:

> "I do not follow the distinction that the right hon. gentleman was seeking to make between the issue of secession and the fact of a civil war. I would describe this as a civil war over the issue of secession". ***

The historical antecedents of this claim to aid the recognized government, irrespective of the circumstances, lie in the Spanish civil war. Quincy Wright has pointed out that if an outside state could respond to help from the de jure government, then where different states recognize different factions, there is a prescription for the internationalizing of a local dispute. He goes even further, denying the right to help the recognized government even where the insurgents have not attained the status of belligerency. He contends that what is relevant is not recognition of belligerency, but the uncertainty of the outcome.****

---

* Ibid., col. 1437.

** We approve the definition by McDougal of a civil war " A genuinely internal conflict within a nation state in which a counter-elite group seeks forcibly to organize a new political unit separate from the old body politic, or to capture effective control of existing governmental structures". McDougal and Feliciano, Law and Minimum World Public Order, p. 535.

*** Hansard, cols. 1443-1444.

**** Wright, "United States Intervention in the Lebanon", 53 AJIL(1959) 121-2.

(iv) that they are under a treaty obligation to sell arms to the lawful government.

Nations which have treaty arrangements for the supply of arms to a particular government are placed in an embarrassing position - and especially if they are the traditional supplier of arms - if a civil war breaks out in the territory. Here the term 'non-intervention' is something of a misnomer because the foreign state is already involved; and if it ceases to supply the lawful government, that may be regarded, effectively, as assistance for the rebels. There is considerable evidence that the export of arms de novo during a civil war is impermissible. By a Joint Resolution of Congress of 8 January 1937 the United States prohibited the export of arms and munitions to Spain. Again, during the American Civil War a British proclamation of 4 December 1861 prohibited the export of arms and military stores. The claim of a government engaged in civil war to be able to buy arms in countries to which it has had access hitherto would not seem to be upheld by either principle or practice. But the position where there is a treaty covering the matter is very much more complicated. Policy considerations would seem to indicate the paramountcy of the desirability of non-intervention in a civil war, even over and above treaty commitments. Lauterpacht devised a method of squaring this particular circle by suggesting that

> "even the provisions of the treaty may have to be read subject to the implied condition of its fulfilment not involving the danger of international complications following upon interference, implied in a unilateral grant of advantages, in a civil war of considerable dimensions..." *

---

* Recognition in International Law, pp. 232-3.

Clausula rebus sic stantibus might be thought relevant here. But the essential difficulty - that in the case of a long standing arms supplier, the cessation of supplies is effectively intervention on the side of the rebels - remains. Closely related is the argument that the withdrawal of arms by a traditional supplier, far from limiting an internal war, in fact lengthens it because the rebals are also securing arms. This argument has also been advanced in the Nigerian war - Britain has claimed that, from a humanitarian point of view, it is better that a war which will inevitably be won by theFederals in the long term should be won by them sooner rather than later.

(v) that the insurgents are being assisted by one or more other states

State practice reveals that, even if a civil war is manifestly in progress, governments feel free - regardless of the 'rule' of non-intervention - to intervene on the side of the government if the rebels are receiving external assistance. This argument is used with particular vigour where it is believed that the rebellion is not essentially indigenous, but is fomented from outside. Thus the United States in 1958 went to the assistance of President Chamoun of the Lebanon, supporting his assertion that rebellion in the Lebanon was being fomented by the United Arab Republic.* But even where the war is intially a bona fide civil war, the claim of counter-intervention is now frequently heard. The UAR asserted that it was supporting the Yemen republicans because Saudi Arabia was interfering in the civil war by supporting the Royalists. The mirror claim was made by Saudi Arabia. The

---

* But see UNOGIL's reports denying major intervention by the UAR: S/4040 3 July 1958, S/4043 8 July 1958. For a detailed analysis of the UN role in the Lebanon civil strife, see Higgins, United Peacekeeping 1946-67, Documents and Commentary, Vol.I pp. 535-603.

United States regards itself as authorized to intervene in the war between the Viet Cong and South Vietnam, because North Vietnam has been aiding the Viet Cong. The list could be greatly enlarged. Professor Falk has brilliantly analyzed why this claim is more commonly heard than the traditional emphasis on non-intervention.* He notes that in a decentralized system, it is hard to establish authoritatively the sequence of events, and each side is able to claim initial intervention by the other. After describing other reasons for the breakdown of the concept of non-intervention in civil wars, Professor Falk goes on to suggest that "offsetting participation by nations in internal wars may often be more compatible with the notions of non-intervention than is an asymmetrical refusal to participate".** These are points of policy to which we shall return below.***

(vi) that another state is assisting the lawful government

This claim is not normally dealt with in the growing literature on internal war, but is very much a reality. If there is a civil war in State A, State B may be inclined to support the government if it sees that State C, its enemy, is supporting the insurgents. However, if it desires the outcome of the civil war to be victory for the government of State A, State B may be disconcerted to see its rival State C helping the lawful government; and may itself intervene on the side of the lawful government in order to effect the influence of State C in State A. Obviously different policy considerations

---

* "Janus Tormented: The International Law of Internal War" in International Aspects of Civil Strife, ed. Rosenau, p. 206ff, 222-27.

** Ibid., at p.207. This view is elaborated by Manfred Halpern, "The Morality and Politics of Intervention", Ibid. 249-88.

*** pp. 50-55.

obtain here. What is disconerting is the built-in predisposition, in a divided world, to intervention. There is a case for intervention if one's rival enters the field on one's chosen side, or against it. This claim has been very much at the forefront of the British Case for continuing to supply arms to the Nigerian Federal Government:

> "The Russians have already secured a political foothold in Nigeria by supplying military aircraft and bombs, which we refused to supply. If we cut off our arms supplies, Russia would be only too willing to fill the gap and gain the influence which we would lose. Is it seriously argued that this is the best way to help a new Commonwealth to stand up to the pressures of Soviet imperialism?" *

The depressing logic of this position is that, in an area of any major importance to them, if one super-power intervenes a competing superpower will also intervene, either on the same side or on the opposing one, according to its preferred outcome to the internal war.

(vii) that the internal war is occurring within a super-powers' sphere of interest

No state, of course, baldly asserts that it is intervening because it has a vital interest in the outcome of an internal conflict within its sphere of influence. Events, however, indicate that this is a common course of practice, and one which given the nuclear confrontation, is increasingly tolerated as between the superpowers. The Monroe Doctrine formalizes the interest of the United States in the prevention of successful communist governments in the Americas. The Bay of Pigs was clearly in breach of traditional norms of non-intervention (though this, of course, occurred some considerable time after the conclusion of the internal hostilities in Cuba). And the United States intervention in the Dominican Republic in 1965 was based on a concern felt by that country that certain persons coming to power

---

* Hansard, 27 August 1968, col. 1448.

were known communists. The charges, in fact, proved lamentably untenable: but the point at issue was that the United States believed it to be a sufficient legal basis for intervention. In Guatemala, in 1954, the United States again intervened for identical reasons in an internal dispute. In eastern Europe the grip of the Soviet Union has been sufficiently strong to prevent situations developing into civil war. But in a situation that comes very close to it - Hungary in 1956 - the Soviet Union showed that it too had a major interest in the outcome of internal conflicts in the communist world. And it was prepared (and Czechoslovakia confirms that it is still prepared) to use the most repressive and harsh methods. Though the nations concerned may complain (though they usually do only in muted terms - the Guatemala Case of 1954 being an exception) the interventions by one super power in its own sphere of influence are in fact tolerated by the other super powers.

(viii) that humanitarian reasons dictate the necessity of intervention

Intervention for humanitarian reasons more usually arises in the context of the treatment of minorities. Occasionally, however, this particular problem of intervention occurs in the context of a civil war. The doctrine is obviously open to abuse, and this writer has suggested elsewhere that it is not to be regarded as compatible with contemporary international law.* In 1964 the British, American and Belgian governments, in cooperation with the government of the Congo, intervened in the rebel-held areas of Stanleyville to rescue certain missionaries whose safety was at risk. The operation was a strictly limited one avoiding participation in the outcome of the internal

---

* Higgins, The Development of International Law through the Political Organs of the United Nations, p. 220.

strife. The Department of State emphasized that it was acting with the authorization of the Congo Government and "in exercize of our clear responsibility to protect U.S. citizens under the circumstances existing in the Stanleyville area".* The State Department communiqué also pointed to the fact that the treatment of the civilian prisoners by the rebels fell lamentably short of the Geneva Conventions. The task force was speedily withdrawn. However, complaints were made both at the United Nations and at the Organization of African Unity, and it is clear that, if even the particular intervention on a specific occasion is reasonable and limited, the international community is reluctant to approve such interventions.

2. Claims in favour of assisting the insurgents

(i) that a state is at war with the government which is engaged in civil war

In these circumstances an outside state will feel legally free to help the insurgents rather than to remain neutral.

(ii) that support must be given to the right of self-determination

The extent to which the self-determination of peoples has become an accepted right under international law is perhaps debatable.** This writer has suggested that the right is now established in principle, even if its contents are still somewhat imprecise.*** The term is now spoken of as a legal right by virtually all the nations of the world, and no state has publicly denied its validity. Outside states are under a duty not to hinder

---

* Dept. of State statement, Nov. 24, 1964, Cited in 5 Whiteman's Digest, p. 476.

** See the debates on this point in the Pleadings of the South West Africa Cases, 1966.

*** Higgins, The Development of International Law, etc. pp. 90-106. See also Fawcett, "Human Rights and Domestic Jurisdiction" in Luard, Protection of Human Rights, Cf. earlier views by L.C. Green, ILA Report 1956, pp.56-7; Potter, 52 AJIL (1958) 727-8. For another, dissenting opinion, see Linda Miller, World Order and Local Disorder, pp. 53-4.

the expression of self-determination in a nation torn by civil strife. The promotion of the right of self-determination is counterbalanced by considerations of stability. Thus until the rebels have established themselves with a status tantamount to that traditionally regarded as meriting a recognition of belligerency, normal relations may continue with the recognized government. However, third states should not, once a civil war occurs, engage in activities preventing the self determination of peoples. Normally speaking, this is an authorization for non-participation.. However, where the government is repressive and undemocratic, and where the rebels represent the forces of self-determination, outside countries may seek to support them. It is doubtful, however, whether the right to self-determination can entail more than neutral posture on the part of a third state.

Where the civil war takes the form of secession, the question arises whether self-determination of the region is a determining factor. Those recognizing Biafra (such as Tanzania and Zambia) and those assisting her with arms (such as France) has emphasized the right of self-determination of the Biafran peoples. The United Kingdom, on the other hand, has spoken darkly of the undesirability of balkanisation on the African continent, as it clearly thinks of self-determination as a concept operating within larger units.

(iii) that the insurgents are waging a war of liberation

The traditional doctrine of non-interference has little appeal either for the revolutionary Marxist, or for the newer nations who see no pacific method for altering the status quo in certain areas. The Communist nations have made it clear, both in word and practice, that they regard themselves as free to assist in what they term wars of liberation. To a considerable extent, these are wars in which the indigenous population is fighting against

the colonial authority- although the claim could also apply to a revolutionary group engaged in seizing power from a conservative. non-representative government. The justification is advanced that the principle of non-intervention in civil wars can not be relied on by 'reactionary' regimes, and that the principle of self-determination is paramount. Accordingly

> "It was essential that the principle of non-intervention should be applied in international law in such a way ...[as not to weaken] ...the provisions of international law designed to help those countries still under colonial rule".*

Again, the Soviet Union has made it clear that if African nationalists found themselves in a position to wage a war of liberation against the white minority governments of Southern Africa, assistance would be forthcoming.

The newer nations find themselves in a similar position, thoughvtheir motives are not ideological. Given the everyday assistance afforded to the white minority governments of Southern Africa, and given the United Nations apparent inability to bring about peaceful change in the areas concerned, they believe that they are under no moral obligation to abstain from any civil conflict that may occur. The departure from the traditional rules of law is in the broad area of intervention: members of the OAU are overtly committed to providing military assistance for guerrillas operating in Portuguese, Rhodesian and South African territory. In Rhodesia and South Africa there is no internal war; in Mozambique there is. Non-intervention is regarded as an irrelevant norm in respect of both of these situations. In recent United Nations resolutions there has been a tendency to introduce clauses which whittle away the traditional rule of non-intervention, and instead reflect practice so far as liberation movements

---

* Czechoslovakian delegate, GAOR 18th sess. 6th Committee, 802nd mtg.

are concerned. Thus, in the latest resolution on Rhodesia, the resolution calls upon UN members to give moral and material assistance to those in Rhodesia opposing the Smith régime.*

(iv) that the insurgents are to be supported for humanitarian or ethnic reasons.

If the internal conflict is due to ethnic or religious controversy, it may be that third states having ties with the rebels will feel constrained to intervene on their behalf. Turkey has on several occasions threatened to intervene in Cyprus on the side of the Turkish Cypriots, who have been - until the UN Force established itself** - engaged in major hostilities with the Greek Cypriot authorities.

(v) that major interests of state require the support of the rebels

While this claim is not overtly advanced, it is clearly of relevance so far as policy is concerned. There is ample evidence that the Belgian government, heavily committed to the Union Minière, in fact tacitly supported the attempts at secession by Katanga.***

3. Claims in favour of participation by international organizations

(i) The United Nations

Article 2(7) of the United Nations Charter provides that

> "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state... but this principle shall not prejudice the application of enforcement measures under Chapter VII".

---

* Security Council resolution S/253, 29 May 1968.

** See Stengaga , The UN Force in Cyprus;
and Higgins: "The UN Force in Cyprus: Basic Facts", World Today, August 1964.

*** Catherine Hoskyns, The Congo since Independence.

At the same time, Article 1 of the Charter stipulates that the purposes of the United Nations include the maintenance of international peace and security, and the development of friendly relations based on self- determination of peoples.

To relate these broad propositions to the problem of internal war, we may note that the United Nations has been faced with three main categories of civil war: colonial wars, a major breakdown in internal law and order, and internal conflicts allegedly fomented from outside.*

There has been widespread discussion elsewhere as to the meaning of 'intervention' by the United Nations.** In the context of internal wars caused by colonial conflicts, the United Nations has shown itself willing to intervene in the sense of passing resolutions to bring pressure to bear on the colonial authority. Far from remaining 'neutral' in such conflicts, the United Nations has indicated that its sympathies lie with the indigenous population; and, in the case of the war in Angola and Mozambique, the Security Council has even called for an arms embargo against Portugal.*** The clearly emerging tendency in UN practice points to the acceptance of community pressures against the government when its 'internal' conflict occurs in an overseas territory seeking independence. Even Portugal's NATO allies have indicated - by their abstention in the voting - that they don't regard the matter as an essentially internal one, falling within the scope of Article 2(7). In this category of cases the UN has also been willing to suggest quite specific measures: thus in Angola it has called for an

---

* These three classifications are used by Linda Miller in her interesting study World Order and Local Disorder.

** Higgins, The Development of International Law, etc. pp. 64-130; Rajan, The United Nations and Domestic Jurisdiction, 2nd ed.

*** S/5380 31 July 1963.

amnesty,-* and in the Indonesia-Dutch dispute, ultimately alienated by the second Dutch 'police-action', the Security Council spelled out a detailed programme for a political settlement. African members of the United Nations have overtly supported the Angolan and Mozambique rebel groups (indeed, some have recognized them de jure); and the United Nations itself has shown no inclination to condemn such practice as contrary to the international law requirements of non participation in a civil war. The United Nations has legitimized its intervention in colonial civil wars by reference to human rights and self determination.**

Rhodesia has presented a particularly complex problem in this category. It is not internal war in the full sense, due to the British decision not to use arms; yet it is undoubtedly a rebellion against the lawful government, in which all the normal pressures ancillary to the use of force are being used. In this case a British internally self governing*** territory unilaterally declared its independence under a minority government headed by Mr. Ian Smith. The issues were extraordinarily complex. If international law recognizes the right to revolution, does it recognize a right to revolution by an élite representing minority interests? The international community is being asked, through the United Nations, not to stay impartial in a conflict

---

* S/5480, 11 December 1963.

** In the context of the Portuguese territories, as Linda Miller correctly points out, there was disagreement on the meaning of the term 'self determination', because Portugal promised new laws designed to ensure local participation in administrative and political life, whereas the Angolans wanted to be free to opt out of Portuguese control altogether, p.59.

*** Although the General Assembly insisted that Rhodesia was non -self governing within the meaning of Article 73. See Higgins, "The Rhodesian rebellion: Britain at the United Nations", Round Table, March 1966.

between a metropolitan and dependent territory, but on this occasion to help the metropolitan power in suppressing the rebellion. The grounds are similar to those in the case of Angola - discrimination on grounds of colour, amounting to a denial of human rights, and the right of all the Rhodesian peoples to self-determination. Throughout, the United Kingdom, recognizing that the question is one of international concern, has used the UN to assist it in its attempt to end a rebellion. The United Nations has been offended not so much by UDI as by a long standing denial of human rights in Rhodesia, and its objectives are not so much the ending of UDI as the achieving of majority rule in that country. In other words, whereas Britain might be satisfied with a return to the situation of 1963, the United Nations would not.* The United Nations has in this case considerably gone beyond the traditional norms concerning civil conflict. Not only has the UK case been formally supported by the international community, but the United Nations Security Council has formally prohibited states from trading with Southern Rhodesia - not only in war materials, but in all commodities which could assist the survival of Rhodesia as an independent state. Intervention on the side of the lawful government has been for the purpose of sanctioning the rebels. It is because nations are in any event under a general international law obligation not to support the rebels that the Security Council has legally been able to address its remarks to non-members such as West Germany, as well as to UN members. The United Nations has also required governments to act more strictly than usual in controlling the activities of individuals in non-military aid and trade.

---

* See Higgins, "International Law, Rhodesia and the United Nations", World Today, March 1967. See also McDougal and Riesman, "Rhodesia and the UN: the lawfulness of international concern", 62 AJIL (1968) 1-19.

The Security Council found itself in a predicament in that minority rule and racial discrimination - the questions with which the UN has been really concerned - are not themselves grounds for recommendations under Chapter VII. Accordingly, it was necessary to ; this desire to act on the existence of "a threat to international peace"* - a course of action strongly resisted by the United Kingdom in the early stages, when it feared escalation to Article 42, but agreed to later when it became prepared to use the veto, if necessary, to avoid international military sanctions. The Security Council has thus established the principle that an internal rebellion, in which racial questions play a strong part, may be a threat to international peace, warranting community sanctions, if neighbouring states feel compelled to support the majority peoples of the territory. The situation is anomalous enough for the precedents - including authorization to Britain to blockade the port of a third power** assisting the rebels - to be far from clear. Nonetheless, the UN role in respect of Rhodesia does mark a move away from traditional rules of law.

The second major category of internal conflicts which the UN has faced are those entailing a breakdown of law and order, which in turn entails international repercussions. The UN has shown a preparedness to intervene physically - when invited - in this type of case. In the Congo the United Nations was asked to help at the stage of a mutiny by the Force Publique

---

* For a full discussion, see Higgins, "International Law, Rhodesia and the UN", World Today, March 1967, pp.100-03.

** The authorization to the Royal Navy to stop the Joanna V and any other ships from discharging oil for Rhodesia at Beira, Mozambique. For a full discussion, see Higgins, World Today, March 1967, pp. 95-7.

but before major civil war had developed. Indeed, at this juncture the situation was fairly readily recognizable as a threat to peace, and rather less as a potential civil war, although separatist tendencies had long been evident. After the mutiny of the Force Publique against its Belgian officers, Belgian paratroops re-entered the Congo, purportedly to protect the life oftheir nationals. The situation rapidly degenerated. On 11 July Tshombe announced the secession of Katanga. Having received a cable from Lumumba and Kasavuba,* Secretary-General Hammarskjöld used his powers under Article 99 of the Charter to convene a meeting of the Security Council. Hammarskjöld stated that the breakdown in law and order had posed a threat to peace and security. The ensuing resolutions of the Security Council spelled out the UN task as securing the withdrawal of Belgian troops, restoring law and order, and ensuring respect for the territorial integrity and political independence of the Congo. As time went by, and various interests began to assert themselves, the UN became more and more involved with ending the Katangese secession until, after Hammarskjöld's death, the ONUC was authorized to "use force if necessary in ending the civil war". The UN had thus become involved on the side of the central government in ending a secession: though this strictly relied on the fact that foreign elements - Belgian mercenaries - were instigating the secession.

A force with a not dissimilar mandate** (though of a very different composition) was established to help restore law and order in Cyprus after civil war between the two communities. Again, international factors were

---

* For full background, see Legum, Congo Disaster; Catherine Hoskyns, The Congo since Independence; Merriam, Congo: Background of Conflict; Van Langenhove, The Congo and Problems of Decolonization; Linda Miller, World Order and Local Disorder; and Burns and Heathcote, Peacekeeping by UN Forces; Lefevre, Crisis in the Congo: A United Nations Force in Action.

** See Miller, pp.116-48; Stengaga, op.cit.

involved - the ethnic ties of Greece and Turkey with the two communities, and the treaty rights of those two countries and Britain. Again, the consent of the host government was required.

In the third main category of civil wars - internal wars allegedly fomented from without - the United Nations seems to have evolved a particular technique. This is the technique of observation/fact finding. In the cases of Greece (1947), the Lebanon* (1958) and the Yemen,* the claim was made that the civil war was ext nally organized. In each of these cases UN observers, with powers limited to observing and reporting facts, went to investigate the charges. A variety of circumstances made it impossible for UNYOM to function efficiently, and it was withdrawn from the Yemen. But the experience of UNSCOB and UNOGIL was altogether more favourable. In this area the United Nations has seen fit to participate when invited, but the principle of consent has remained pivotal.**

It seems to be the case, therefore, as a rough rule of thumb, that the UN is an active participant in several types of civil war. So far as colonial wars are concerned, the UN will pass resolutions and engage in certain preserves, but will not itself intervene physically. So far as wars inv olving the need to restore law and order is concerned, the UN has been willing to participate with para-military forces, nominally on the basis of neutrality, although inevitably with advantage to the incumbent government. And in the third case of 'proxy wars' the UN has found it helpful to offer its services in the field of observation and fact finding.

---

* For a detailed study of these, see Higgins, United Nations Peace-keeping: Documents and Commentary, Vol.I- The Middle East.

** Though one may note that in the case of the Yemen, the consent of the UAR and Saudi Arabia was regarded as more important than that of the Yemen.

(ii) Regional Organizations

Regional organizations are usually predicated on a certain degree of political homogenity, though the degree required will vary from organization to organization. They have a natural interest in the control of civil wars in their region. The OAU has tried to end the Nigerian war, though its members have been divided on the side they support; the OAS played an active role in finding a way out of the impasse caused by the Dominican Republic strife of 1964. But there are certain disadvantages in their intervention, and these are mentioned below:*

---

* pp. 53-4.

CLAIMS CONCERNING RELATIONS WITH THIRD STATES

Insofar as recognition still remains a relevant factor, the following points may be made: outside states may not lawfully grant recognition to insurgents unless the traditional criteria are present. Recognition so granted is premature, and a hostile act against the constitutional government. However, it is far less certain that there is a duty to recognize if the conditions are fulfilled* - or at least, it is not a verifable duty, because it is for each state to ascertain whether the criteria for recognition are fulfilled. There are nonetheless strong reasons of policy which support the thesis that there is a duty to recognize,** and to this we will return below.*** If the lawful government itself recognizes the belligerency of the rebels, then third states are bound to grant the insurgents belligerent recognition.**** But recognition by certain third states places the lawful government under no obligation to accord recognition also.

A government faced with a rebellion can shut off its own ports to all foreign shipping,***** and outside states must accept this. Some have contended that the government may not blockade the insurgents'-held ports unless belligerency is recognized;****** while others have said that a

---

* Though such claims have been made. See, for example, the U.S. claim against Denmark in respect of the failure of the latter to recognize the U.S. as a belligerent in the War of Independence: Moore, vol. 1, Sec.60.

** See especially Lauterpacht, pp. 228-30.

*** P. 49.

**** For early U.S. and British practice on this point, see Lauterpacht, pp. 188-90.

***** and can probably also lay mines within its own territorial waters- though not in the high seas - provided that clear warning is given. Wehberg, p.51.

****** eg. Castrén, p. 102.

blockade of the insurgents' ports is permissable so long as no rights on the high seas are infringed.* But a blockade, to be legal, must be effective, and this usually involves patrolling on the high seas. Yet others have asserted that, so long as sovereignty over the territory remains with the government, it may at any time blockade insurgent-held ports; and that full effectiveness - a requirement of interstate warfare- is not even essential. A government engaged in civil war would probably be entitled to take action against a foreign merchant vessel seeking to break its blockade on an insurgent port.**

The lawful government may also, in time of civil war, adopt such internal measures as may be necessary, even if they affect aliens. These measures may include limitation on freedom of movement, and the requisitioning of property. At the same time, the laful government is under a duty to protect aliens from dangers arising out of the civil war. But in the absence of fault for negligence there is no liability for injuries to aliens due to civil war, whether caused by the government side or insurgents.***

Although an outside state may (subject to a UN prohibition, as in the case of Rhodesia) continue normal intercourse with the rebels, it may not engage in any assistance which supports the war effort. The sending of war materials, troops and financial support is traditionally regarded as prohibited - though claims of counter-intervention provide a means for states to ignore this injunction. The action of France and Portugal in

---

* McNair, "The Law Relating to the Civil War in Spain" (1937) L.Q.R., p.483.

** This situation has some similarities to the question of the Rhodesian rebellion and the Joanna V. The case is discussed above, p.41.

*** Borchard, Diplomatic Protection of Citizens Abroad, p. 229; Lauterpacht, p. 248-9; The Home Missionary Case, Annual Digest, 1921-2, Case no. 117.

aiding Biafra is more easily affirmed as 'lawful' by the fact of British and Russian aid to Lagos.

Outside parties - either governments, or private companies, may be placed in an embarrassing position if the rebels demand from them actions which seem prima facie to involve active support of the rebellion. This is a predicament which has faced British oil companies in Biafra. The Biafrans decreed that they would deprive the Federal Government of all customs revenue and export duties collected at Port Harcourt, as well as of the erstwhile federal revenue of companies taxes and oil rents and revenues. Shell-BP has a £200 million stake in Nigeria, mainly in the East. It normally pays rental and royalties to the Federal Government every six months. Suggestions of placing the money into a suspended acting for the duration of hostilities was unacceptable to the Federal Government and to Biafra. Biafra then suggested a compromise whereby 57.5% of the royalties and rents would be paid to the authorities in Enugu. The position was inevitably difficult for the oil companies, and particularly so when the British government was actively pro-Federal. Shell-BP, after prolonged discussions, decided to offer an initial payment of royalties to Biafra. The Federal Government now announced a blockade of Port Harcourt, and a prohibition on oil exports. The Federal Government indicated that if royalty payments were not made, the oil concessions would be lost; and when Shell hesitated to make further payments, their installations were taken over by Biafran forces and personnel imprisoned. Since that time no further payments have apparently been made to the Biafran authorities.

RECOMMENDATIONS FOR THE FUTURE INTERNATIONAL LEGAL ORDER

To draw firm conclusions in such an unsatisfactorily charted area of international law is a difficult task. I have sought to show that, in a variety of 'civil war' situations, international law purports to provide guidance on the identification of a conflict as an internal one; on the methods used to wage internal wars; on the intervention by other states and bodies; and on the relations between the protagonists and third parties.

It is clear beyond doubt that international law operates inadequately in at least the first three of these roles.

So far as the identification of a situation as a civil war is concerned, the horizontal authority whereby it is for each state to appraise the facts leads inevitably to the pursuit of different practices consequential upon such appraisals. The legal debate on Vietnam has to a large extent been a'dialogue de sourds', because certain lawyers have seen the situation as essentially a domestic revolt, in which the United States has intervened; while others, with the same information at their disposal, and from within the same cultural background, believe the war to be a truly international one in which the United Nations is entitled to intervene. The divergence of appraisal is undoubtedly bona fide*, and inevitably in a

---

* Though this writer has been disturbed by the way in which protagonists on each side seem to have overstated their case: one would have wished to see-and would have felt more intellectual confidence in- a debate in which some contended that the U.S. had indeed behaved badly in supporting Diem and refusing elections, had indeed increased the stakes in the war, had indeed been somewhat indiscriminate in their bombing targets, had indeed used some illegal weapons, but were nonetheless entitled to assist the South Vietnamese; while others contended that the Viet Cong had conducted warfare in a terroristic manner; had at an early stage received support from the North; were seeking to impose their views by force; but were nonetheless entitled to oppose the United States intervention. These two positions seem to this writer far closer to reality than the more extreme cases, unremitting in support for every action of the favoured side, that have been advanced. The highly informative and interesting volume, International Law and the Vietnam War (ASIL, Ed. Falk) reveals this deep cleavage, with little give and take on the middle ground.

decentralized system. There would therefore seem to be a case for suggesting that efforts be directed towards the process of appraising the domestic or international causes of the conflict. The United Nations has shown a certain ability to fulfil this role successfully, and in a variety of ways. In Laos 1959, a special Representative of the Secretary-General was used, and in the Lebanon in 1958 an Observer Group fulfilled this function. Undoubtedly, in the case of the latter, the clear assertion by UNOGIL of the domestic quality of the fighting made the tenability of the American argument in favour of the intervention very difficult, and contributed to containment and a speedy solution. National decision makers should thus support - and informed groups should press for support - of a UN fact finding role in civil wars on a regular basis. Where approximate, regional organizations should also be encouraged to assert this competence though it is preferable for this task to be carried out by the United Nations, because bodies like the OAS and the OAU obviously have a strong predisposition in favour of the established government. Community procedures for recognition of status could also usefully be employed. The experience of Korea, and the satisfactory way in which the UN has handled recognition problems concerning Iraq, the Yemen and the Congo, indicates that it could play a helpful role in providing normative judgments on the status of the parties to a civil war. This is so notwithstanding the UN recognition and China question, which, while unhappy, is an isolated example.

On the question of conduct, it must be conceded that the provisions of the Geneva Conventions are at once too weak and too open to ambiguity. In some cases prisoners are given the status of prisoners of war, in others they are not, in some cases basic humanitarian standards are applied, in others they are not. Clearly, a new international convention to deal specifically with standards of conduct in civil war would be desirable. At the same time, it is clear that there is no practical hope of getting

consensus at an international conference on even these topics, let alone such thorny questions as the status to be accorded to guerrillas, who do not wear uniforms or insignia or bear arms openly, and yet represent a major element in the realities of civil war. There is an encouraging trend for the International Red Cross or other international observers to be invited in to witness the fighting, and the international community has a considerable stake in promoting the idea thst to refuse international scrutiny is prima facie evidence of guilt. The Red Cross has visited South Vietnam camps, and UN observers (who have reported in very favourable terms) have attended Nigerian prisoner camps. When the states supporting a party in a civil war have public information media, there is a considerable , and desirable, pressure on them to use their influence to achieve desirable behaviour by their 'clients'. Thus the United States has undoubtedly improved the treatment of Viet Cong by South Vietnamese (though undoubtedly much is left to be desired) while Britain has perhaps made the Nigerian bombing of civilian centres in Biafra less than it might otherwise have been. A norm whereby the selling of arms to parties to a civil war would be strictly related to their obeying international norms of conduct, would obviously be highly desirable; but very unlikely of achievement.

The aspect of civil war which has perhaps attracted most recent attention* has been that of intervention, or participation by outside parties. Professor Falk, in a pioneering essay,** has analyzed the shortcomings of traditional international law in this regard. This writer agrees with each and every one of them. Professor Falk notes that the tendency to

---

* See Falk, op.cit., "Janus Tormented, etc"; Friedmann and Farer, "Intervention in Civil Wars: A modest proposal", 67 Columbia Law Review (1967) 266.

** "Janus Tormented, etc" in International Aspects of Civil Strife.

avoid an express bestowal of status on the parties to a civil war makes it hard to establish the precise nature of claims by third states. Further, the decentralized and increasingly arbitrary assertion of claims make it impossible to standardize what is permitted and what is forbidden. He also correctly observes that the traditional rule of non-interference is incompatible with the revolutionary ideology of communist nations and the anti-colonial commitments of the Afro Asians. With the major powers - and particularly the nuclear powers - wishing to avoid direct confrontation at all costs, ideological wars are being increasingly fought in the guise of civil wars. And this high degree of substantial participation by outside groups makes inadequate the traditional 'recognition criteria' of effective government, a willingness to be bound by the laws of war, and the impingement upon the maritime and other interests of third powers. As Falk puts it

> "The facts of external participation are more important than the extent or character of insurgent aspirations as the basis for invoking transformation rules designed to swing from domestic jurisdiction to international concern".

Moreover, the whole problems of civil war has changed, because they are tending to become increasingly prolonged in duration with the result that neutrality becomes increasingly difficult.

There are, of course. innumerable competing claims being made - claims employing the normative rhetoric that refers to self defence, domestic jurisdiction, non-intervention, the maintenance of international peace. This is to be expected - law is essentially a vast web of alternative claims, between which the relevant decision-maker has to choose at any given moment of time.* Quincy Wright has suggested that, given that revolution is not

---

* This theme is elaborated by McDougal, "The Ethics of Applying Systems of Authority: The Balanced Opposites of a Legal System" in Lasswell & Cleveland, The Ethic of Power.

prohibited, no state should be allowed to intervene to stop it; though the United Nations could act if the civil war was threatening international peace.* Falk goes further, and boldly asserts:

> "It should be stressed, perhaps, that there is a need to promote certain social changes by organizing and encouraging external participation in anti-governmental insurgencies, but that this participation must itself be legitimized by a centralized process of decision and implementation". **

While this writer finds Professor Falk's analysis perceptive and persuasive, she is not convinced as to the practicability of his suggestions. He proposes that a prima facie presumption of legitimate status might be given to the incumbent government; but that it would be overcome if the incumbent regime is based on colonial subordination or racial superiority; and that the regime would be classified as such by the United Nations. But this proposition avoids the realities:

First, so far as the Security Council is concerned, governments will only be condemned insofar as no physical intervention is anticipated, and no close parallel is seen to a situation in which one of the veto powers finds itself. Professor Falk's recommendation would, to be sure, avoid the formalistic pretence that sanctions are being mounted against Ian Smith because his regime is a threat to international peace. But this case is a truly unique one. Whereas Britain and America will vote for arms embargoes against South Africa, they would not vote for a resolution classifying it as an 'illegitimate' regime if they thought that the consequence was to be international participation on the side of freedom fighters in that unhappy land. (Nor, one imagines, would the United

---

* Wright, "Subversive Intervention" 54 AJIL(1960) 529.

** Op. cit., p. 235.

Kingdom have allowed Ian Smith's government so to be designated, if this was the anticipated outcome). In short, resolutions are passed not simply for what is in them, but for what consequences it is thought they will entail.

So far as the General Assembly is concerned, the same point holds good to a lesser degree. Western and Scandinavian nations would be less prone to add their voice to those condemning particular governments. Further, it is very doubtful if the numerical majority at any particular time is an adequate register of normative legitimacy. Deplorable though recalcitrant colonialism and racial supremacy may be, why should these entail a classification of "illegitimacy", whereas other forms of supression do not? Are rebels against Duvalier's regime in Haiti really to receive less support from the international community than guerrillas in Rhodesia? Is western colonialism really more repressive than communist colonialism? The answer should be in the negative; yet, if the 'illegitimating' process is left to the Assembly, one knows that it would be otherwise.

If, then, one rejects Falk's attempt to provide centralized procedures on the problem of intervention, where is one left? This writer would reject the notion of regional hegemony. International law should not be moulded so that the United States is entitled to dictate the political system of the Dominican Republic; or the Arabs that of Israel; or the Russians that of Czechoslovakia. The importance of self determination here seems to outweigh in importance the desire for peace at any price. We have already suggested that there is effectively a norm which permits intervention by the super powers in their sphere of influence: but it permits it only in the sense that physical opposition is not usually countenanced. Opposition at every other level - diplomatic and economic - should be encouraged. And the reciprocal norm should not be extended beyond Big Power relations to areas where smaller

powers are in dispute. The risk is here more worth running.*

Falk would seem to be correct in suggesting that if centralized procedures break down (or if, as here contended, they are inappropriate), the practice of counter-intervention must now be publicly acknowledged as an operational norm.

Professor Farer has suggested that the time is ripe for defining a norm prohibiting overt assistance by armed personnel in a civil war.** Certain all the recent practice indicates that states have paid, in either political or military terms, very heavily for direct participation; and that their decisions to send forces would not be lightly repeated. One thinks of the American experience in Vietnam, the British in East Africa, and the Egyptians in the Yemen. And direct involvement rarely occurs among non-revolutionary nations unless a foreign element is perceived participating on the other side. Thus there has been no question of Britain participating on the side of Lagos, even though its political preference has been clearly stated.

One can urge other points as relevant to decision-making. Does the traditional concept of collective defence apply in its full vigour where

---

* Cf. Falk's curious statement - as one who is in principle prepared to have the UN physically intervene in specified circumstances- that regional homogeneity "is unfortunate in many respects to compel dissenting national communities to conform to regional political preferences, but it may be indispensible for the maintenance of minimum comditions of international stability". "The Legitimacy of Legislative Intervention by the United Nations", in Essays in Intervention, p.55. Is the concern of the international community with apartheid in South Africa really based on preference of other states on the continent? Or is not the inherent lack of human dignity the real point on which apartheid is to be judged?

** In his interesting article " Intervention in Civil Wars: a modest proposal" 67 Columbia Law Review (1967) 261.

the war is primarily internal, and where the domestic government is manifestly undemocratic, corrupt and authoritarian? This has, until comparatively recently, been a major query- though an inadequately debated one - on Vietnam. If the war is a colonial one, and a definite date for independence has been given (as was the case in Aden) should violence to achieve earlier independence be condoned? And by what right does a European power pronounce that Balkanisation would be disastrous for another country and that (as in the case of Biafra) this disaster of secession should be prevented by force of arms? And if a civil war is for the control of power throughout the country, does not the international community have a greater stake (though still a limited one) in the outcome than if the war is one of secession?

What I have urged here is not that centralized procedures are wholly irrelevant, but that they should be focussed on the question of fact finding and determining the status of the war, rather than on the question of intervention. If the status of the war were internationally determined, this would inevitably have consequences for the participation of other states. And this may be thought a more useful and realistic way of approaching the problem. Meanwhile, centralized pressures for social change, short of direct intervention, should certainly continue. For ultimately the internal war problem will only be resolved by removing both the causes for rebellion.*

---

* Rosenau has helfully pointed out that the civil wars have a twofold characteristic: they are convention-breaking and authority-oriented. Journal of International Affairs (Summer 1968) 167-70; for other useful contributions to the military, political and psychological factors operating in the civil war problem, see the essays in the same journal, particularly those by Oran Young, Adan Yarmilinsky, and Andrew Scott.

Article 2(4) and Permissive Pragmatism

Remarks of Professor Edward Gordon before the
American Society of International Law,
Washington, D.C., April 12, 1984

It is unfortunate that in her remarks earlier today Ambassador Kirkpatrick chose to invoke the names of two former presidents of this Society, Myres S. McDougal and the late Harold D. Lasswell, and to emphasize their influence upon her own thinking and the foreign policy of the present Administration. It surprises me to hear that either McDougal and Lasswell or the approach to legal jurisprudence associated with them has been particularly influential in the formulation of the Administration's foreign policy. That policy, I am afraid, will have to be judged on its own merit -- or lack of it. Borrowing the prestige of McDougal and Lasswell would be unnecessary if the policy had merit -- and will not help appreciably since it has none.

But the substance of her remarks does serve the useful purpose of reminding us why the study of international law is so important. We should recall, in this respect, T. D. Woolsey's advice, contained in his treatise on international law, published in 1874:

> Every educated person ought to become acquainted with international law because he is a responsible member of the body politic and . . . because the executive if not controlled will be tempted to assume the province of international law for us.[1]

Somehow we have allowed the Executive to assume the province of international law for us. In my comments today, I would like to address a few aspects of this phenomenon.

I think it appropriate to begin with an observation made recently by Professor Georg Schwarzenberger in an essay which, coincidentally, appears in a book that deals with the teaching of international law.[2] Dr. Schwarzenberger refers to what he sees as a destructive trend among western international lawyers, a trend he characterizes as permissive pragmatism. He does not single out American lawyers and legal scholars. But his point seems particularly well directed at what is sometimes said to be the Achilles heel of American legal realism, especially as manifest in the international law field in the jurisprudential approach favored by McDougal and Lasswell and those of us who have been influenced by their scholarship: namely, its unusually severe susceptibility to manipulation in the cause of whatever outcome one wishes to justify. What is lawful seems to be a function of the result one favors, rather than being a matter of compatibility with prevailing rules of law. The emphasis is upon primary values, at some cost, arguably too high a cost, to the stability and compelling authority of those mediating rules that most people have in mind when they speak of "the law." In effect, the complaint is that this kind of realism merges advocacy with objective analysis, with the latter usually falling victim to the influence of the former.

I have spent too many years denying this charge to yield completely to it just yet. I continue to think that, as is generally true of the legal realism from whose roots it springs, McDougal and Lasswell's jurisprudence simply forces us to be aware of both the potency of hidden assumptions and the consequences of applying rules of law in disregard of the social outcomes to which their application may lead. But in light of the tendency among some of its adherents to apply their jurisprudential approach to international law in a way that seems invariably to justify

even the most militantly aggressive instances of American foreign policy, it becomes increasingly difficult to deny the charge that it really is too easily manipulable, too permissive, too suitable to the ends of zealots, and too likely to operate to the long-term detriment of the rule of law in international relations.

I do not suggest, of course, that the phenomenon Dr. Schwarzenberger describes is attributable solely or mostly to one school of jurisprudence. Permissive pragmatism aptly characterizes a good deal of the discussion of the legal aspects of foreign relations among those of us in this country whom Oscar Schachter has dubbed the "invisible college" of international lawyers and legal scholars. Indeed, one reason the Administration's misguided attitudes about international relations have been able to sustain the illusion of legitimacy among some opinion leaders in the United States is that we who bear a special responsibility for appraising the compatibility of international conduct with rules of international law have thus far failed to subject the Administration's conduct of foreign relations to sufficiently rigorous scrutiny.

Let me offer a case in point. A few months ago, the blue ribbon panel appointed by the President to help articulate and forge a national policy towards Central America produced their long awaited report -- the so-called Kissinger Commission Report or, more formally, the Report of the National Commission on Central America. It is a substantial document, running over a hundred and thirty pages of lean prose, with an annex of over eight hundred pages. It bears the imprimatur of a panel of experts whose ranks include, among others, a former associate justice of the Supreme Court. According to The New York Times, its two principal draftsmen were, respectively, the President of the prestigious Council on Foreign

Relations, who happens to be a graduate of The Fletcher School of Law and Diplomacy, and a former president of this Society, who is a graduate of Yale Law School. Their professional credentials and those of the members of the Commission cannot seriously be challenged, nor can it be said that the Commission lacked counsel on relevant norms of international law or United States treaty commitments. Whatever the report says, or does not say, about this law and these commitments represents deliberate choice, not ignorance or inadvertence.

There is therefore reason to be alarmed that the report utters scarcely a word about existing legal rules and treaty commitments bearing upon the use or threat of force as an aspect of our relations with the countries of Central America. No mention is made of the UN Charter, Article 2(4), Article 2(3), Article 33 or any other provision. Or of Articles 18, 20 or 21 of the OAS Charter, either. And the only references to the Rio Treaty take the form of laments that it has failed to stop the spread of communism in Latin America.

Where the report refers to treaties at all it is chiefly to say that any future agreement concerning Central America should be verifiable, should avoid any loophole that would permit the Soviet Union and Cuba to argue that whatever is not specifically prohibited is allowed, should not be ambiguous, and so on. But nothing is said that would identify as already binding on the U.S. existing treaties and non-treaty norms governing the conduct of foreign relations. Even the Constitution itself does not appear in the report to be of relevance. Nor do treaties to which the U.S. is a party, even though these too constitute the law of the land that the President and his subordinates are sworn to uphold.

You and I know that Article 2(4), for example, renders the use or threat of the use of force in international relations unlawful, other than in exceptional circumstances. But the Kissinger Commission was and its members apparently still are prepared to give the impression that inter-American relations can be carried out in something of a legal vacuum, that because our motives are just and the desired outcome desirable, any existing legal constraints are of no moment.

Why has this aspect of the report elicited so little criticism so far? One reason may be that the attitude towards law that it reflects corresponds to the impression left by a series of Supreme Court decisions, beginning with Curtiss-Wright[3] and extended by Baker v. Carr,[4] Goldwater v. Carter[5] and most recently Dames & Moore v. Regan:[6] that is, that in its foreign relations the Executive Branch operates above or at least beyond the constraints of law.

The circumstances and laws at issue in these cases have varied, and the precise holdings in them can be distinguished from one another to some extent. Moreover, strictly speaking, the Court has never said that law is irrelevant to the conduct of foreign relations. But the cumulative effect of these decisions and the opinions in which they are explained has been to leave the impression that, so far as the judiciary is concerned, the applicability of legal rules and treaty commitments to the conduct of foreign relations is something for the Executive Branch to determine for itself. The implicit message has not been lost on the members of the Executive Branch, on the Kissinger Commission or on opinion leaders in this country.

In the 1960s and 1970s, when the general outline of these decisions was coming into focus, government lawyers were saying in private as they were in pleadings that their effect was not to write international law

out of the conduct of foreign relations, but merely to leave with the Executive Branch the prerogative of deciding free from independent judicial review whether and when legal norms and treaty commitments apply to its conduct of foreign relations. They were not then persuaded that the history of law in society compels the conclusion that self-constraint is not an adequate substitute for third-party review, especially when self-constraint is subject to unusual political stresses and perceived exigencies. The frequency and importance of apparently exigent circumstances tend to be enhanced by the prospect that their sufficiency will never be amenable to independent appraisal. Some of the government lawyers who lauded the Supreme Court's decisions in the past now decry the Administration's apparent indifference to law as an element in the making and execution of foreign policy. But it is appropriate now to remind them that this attitude of indifference did not come about overnight.

Each of the leading cases in which the Supreme Court found the conduct of foreign policy to lie beyond judicial scrutiny seems to have been motivated to some extent by a feeling among the justices that what they were deciding was pragmatic, if not strictly correct. As it turns out, in this respect their contribution to the rule of law in this country is neither pragmatic nor correct, as the Kissinger Commission's attitude of indifference to international law so well demonstrates.

My concern, though, is more with our own contribution to the emergence of this attitude. We represent virtually the only continuing, informed constituency international law has in this country. Others are influenced by international law, or at least by concern that this nation and its officials conduct foreign relations with the same due regard for law as applies domestically.

And of course a fair number of political leaders and writers of opinion pieces for the editorial pages of our newspapers find it at least convenient from time to time to lace their views with allusions to international law. But it is to you and me that the integrity of the regime of international law matters most -- professionally, intellectually and, if we are honest with ourselves, even emotionally, since more than any other group in this country we have tied our sense of personal and professional identity to the idea of a world legal order and its influence.

Therefore, we are the ones at whom the charge of excessively permissive pragmatism is most pointedly and accurately levelled. What it implies, if it is correct -- and I think it is -- is that we have not kept the faith. Which brings me -- at long last? -- to Article 2(4) of the UN Charter. Simply put, even though Article 2(4) is ambiguous in important respects, even though it has been violated with disconcerting frequency and impunity, even though events subsequent to its adoption have shown it to be less than perfectly suited to contemporary affairs, nevertheless it contains a solid, inalienable core of objective meaning independent of the judgment of national government officials and eminently worth protecting and preserving. If, therefore, we are true to our commitment to the principled conduct of foreign relations, then we should be among the forefront of those who champion the cause of Article 2(4), rather than dwelling upon its plasticity and the apparent overreach of its idealism.

Moreover, we ought best to know and to remind others of the historical context in which Article 2(4) came to be adopted and of its interrelationship to other legal norms and treaty commitments. Earlier today, we heard several necessarily abbreviated renditions of this historical background. Reference was made, as it should be, to the Covenant of the League of

Nations and to the Kellogg-Briand Pact. Undoubtedly, Article 2(4) owes some of its spirit to the principle of the "hue and cry" first articulated in Articles 10 and 11 of the Covenant. But Article 2(4) also owes some of its inspiration to the parallel development, in our hemisphere, of the principle of nonintervention as a basic organizing concept of hemispheric solidarity. Especially in light of current concern with events in Central America, that principle and its importance in twentieth century hemispheric relations cannot be emphasized too often or too much. In my judgment, its omission from Ambassador Kirkpatrick's remarks earlier today is glaring and inexcusable.

The circumstances that preceded adoption of the principle are worth noting here. The tendency of U.S. foreign policy early in this century to resolve all issues involving Latin America through force or the threat of the imposition of force is well known. Not so well remembered, perhaps, is that virtually every time the United States sent military forces into the Caribbean or Latin America, American international lawyers were quick to deny that it infringed on the sovereignty or political independence of the Latin states whose territory we were invading. Our military force, it seemed, was always employed in furtherance of principles of international law.

In 1898 John Bassett Moore said of the U.S. invasion of Cuba that it "was analogous to what in private law is called the abatement of a nuisance."[7]

In 1913, even while U.S. troops occupied Haiti and Santo Domingo, Charles Evans Hughes assured a meeting of the American Bar Association that the application of the Monroe Doctrine did not threaten the sovereignty or political independence of any country in South America. Our invasions

in the Caribbean, he said, were humanitarian and had been carried out in the interest of the protection of human rights.[8]

These instances are merely illustrative. Additional time would permit me to offer many more examples, even if I were to limit myself to the pages of the American Journal of International law. For whatever reasons, our professional history is replete with enthusiastic endorsement of the compatibility of our hemispheric aggressiveness with prevailing norms of international law, and with explanations of the practicality of policies whose lawfulness cannot otherwise be defended.[9]

We should learn. Our forebears' rationalization of the use of force by the United States against the smaller republics of this hemisphere became so humiliating to Latin Americans that the delegitimation of force in the Americas became a major objective of Latin American diplomacy.[10] In 1927 the Inter-American Commission of Jurists recommended the adoption of a principle of noninterference that was simple, direct and uncompromising: "No nation," it said, "has a right to interfere in the internal or foreign affairs of an American Republic against the will of the Republic."

Initially, the United States opposed adoption of the principle. Then, following Franklin D. Roosevelt's election to the presidency, the United States accepted the Commission's proposal, tentatively at first (in 1933 at the Conference of American States in Montevideo), but by 1936 completely, without reservation (at the Inter-American Conference for the Maintenance of Peace, at Buenos Aires). At Buenos Aires the American states declared as "inadmissible the intervention of any one of them, directly or indirectly, and for whatever reason, in the internal or external affairs of any of the Parties" to the declaration. Towards the

end of World War II, this principle was reiterated in the so-called Act of Chapultepec, adopted by the Inter-American Conference on Problems of War and Peace.

Thus, by the time Article 2(4) of the UN Charter came to be drafted and adopted at the San Francisco conference, the unilateral resort to armed force in foreign relations had already been deprived of legitimacy in this hemisphere, through the untiring efforts of Latin American diplomats and their insistence that hemispheric relations be based upon this bed-rock principle. Following the adoption of the Charter, the principle was embodied in the OAS Charter and the Rio Treaty, the two major instruments defining the legal regime governing international relations in the Americas. This history, it should be remembered, is not some footnote in the archives of international law. The adoption of the principle of nonintervention, its acceptance by the United States and its emergence as a preeminent element in the law governing hemispheric relations for half a century represent one of the finest achievements of Latin American diplomacy.

Surely, then, its omission from Ambassador Kirkpatrick's remarks earlier today and, I regret to add, from the heart of the Kissinger Commission's report should not go unchallenged. At best, it represents indifference; at worst, outright contempt. The effect in either case is to pretend that, like Article 2(4) of the Charter, inter-American treaty commitments are minor impediments to any inclination to interpose American military force to bring about a change of policy or governments in the Americas.

I have so little time remaining that I can only allude briefly to what was to have been the subject of the concluding portion of my remarks; that is, the techniques (other than blatant omission) international lawyers have used to justify otherwise intolerable violations of Article 2(4). I will try to be brief, mentioning only one or two and leaving to another occasion a fuller development of this topic.

One technique is to assume that the constraints of Article 2(4) have simply lapsed. In effect, that is what Ambassador Kirkpatrick was telling us today. That if not the entire UN Charter, then at least Article 2(4) is no longer legally binding. Of course, this audience should not accept any such contention. It is not justified by the terms of the Vienna Convention on Treaties. Under the Convention, the grounds she mentioned or left implicit -- e.g., obsolescence, fundamental change of circumstances, and so on -- may justify abandoning a treaty or provisions of it under certain circumstances. But they do not justify simply ignoring the treaty or the provisions so long as they remain in force. Other than in exceptional circumstances a state cannot violate a treaty commitment with impunity merely by saying that the commitment has simply lapsed, at least without having previously indicated its intention to renounce the treaty or to treat its provisions as having lapsed. Remember that in the International Law Commission's discussion of proposed provisions of the Convention dealing with termination, withdrawal from and the lapsing of treaty commitments the Rapporteur, Professor Waldock, pointed out that if one were to allow mere violations of a treaty to constitute grounds for treating its legal constraints as having lapsed, the effect in the case of human rights treaties would be to deprive the victims of human rights violations of the legal protection provided by treaties on the basis of those very violations![11]

A second technique one sees being used is that of saying that Article 2(4) is simply one provision among many in the Charter and that in appraising the lawfulness of a state's resort to force it is necessary to refer to the purposes for which the force is employed. When Ambassador Kirkpatrick spoke to the UN Security Council last October in a vain attempt to persuade the other members of the Council that the use of force in Grenada was legally justified, she said:

> The prohibitions against the use of force in the United Nations Charter are contextual, not absolute. They provide ample justification for the use of force in pursuit of the other values also inscribed in the Charter -- freedom, democracy, peace. . . . [12]

Thus explained, Article 2(4) is reduced to an incidental means to the attainment of a primary goal, rather than -- as its negotiating history would suggest -- an objective rule of treaty law and, by now, general international law.

What is unfortunate is not so much that a United States governmental official should seriously advance this proposition as that we who are committed to the influence of international law should let it go unanswered. Here, too, I think the explanation lies in a kind of permissive pragmatism. But clearly I have now used the time available to me and I must hope that these brief thoughts stimulate you to wonder how pragmatic we have been, and are being, in allowing the Executive to assume the province of international law for us.

Footnotes

1. T.D. Woolsey, Introduction to International Law (1874)(Rothman reprint, 1981, at p. 355).

2. Schwarzenberger, International Law and the Problems of Political World Order: Inter-Disciplinary Working Hypotheses and Perspectives, in INTERNATIONAL LAW: TEACHING AND PRACTICE 62 (B. Cheng, ed., 1982).

3. United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

4. 369 U.S. 186 (1962).

5. 444 U.S. 996 (1979).

6. 453 U.S. 654 (1981).

7. Quoted in Hughes, Observations on the Monroe Doctrine, 17 AJIL 611, 620 (1923).

8. Id. at 615-621.

9. Particularly good illustrations may be found in Brown, International Responsibility in Haiti and Santo Domingo, 16 AJIL 433 (1922), and Moore, Grenada and the International Double Standard, 78 AJIL 145 (1984).

10. See generally Fenwick, The Monroe Doctrine and the Declaration of Lima, 33 AJIL 257 (1939).

11. UN Doc. A/CN.4/SR.832, at para. 23.

12. Reprinted at 83 Dep't St. Bull. 74 (1983).

Intervention is one of the essential and perennial issues in international relations. This book, based on a series of lectures given at Oxford University, provides a re-examination of this issue of coercive interference by outside parties in the internal affairs of foreign states. Such a re-examination is topical because of the progress of Soviet intervention in the Third World; the recovery of belief in military intervention in the USA so soon after a period of deep disillusion about it; the scepticism evident in Western Europe about this belief; the discovery of a new rationale for intervention – or, more strictly, the rediscovery of an old one – in access to resources, especially oil; the connection that is made between intervention and human rights, and the resurgence of an old belief in humanitarian intervention; and the spate of interventionary activity occasioned by movements for national liberation – whether to suppress these movements or to assist them.

The authors of the different papers all speak with authority although none is narrowly academic. This makes the book of value to all students taking courses in international relations, strategic studies, and politics, as well as to the general reader who is interested in these subjects.

Hedley Bull is Montague Burton Professor of International Relations at the University of Oxford, and Fellow of Balliol College Oxford. He is also a member of the Council, Institute for Strategic Studies, London.

ıch, given the nature of most dably artificial or, as in the ıs problems, like population e how the outside world can d condition for having an s a relative ideological dis- rs, and that seems to be very in the world are likely to vention has only too bright a

ΓES

A Theory of International Relations, ı, 1966.

red, Houghton Mifflin, Boston, 1957.

Wars, Basic Books, New York, 1977;

ilosophy and Public Affairs, Spring 1980,

3
Intervention and International law

ROSALYN HIGGINS

To those who are not international lawyers, it may seem very unlikely that international law has any real relevance to the question of intervention.

It is apparent that intervention can mean many different things to many people. It is perhaps less obvious that there are also very many different views about what international law is. If one views international law simply as a static set of rules formulated in a bygone age then it is apparent that it can have nothing to say on the contemporary problem of intervention. But if one perceives it, as I do, as a dynamic process of authoritative decision-making,[1] then it will be seen that it is very relevant to the current attempt to identify and promote acceptable limits to the impinging of one state's activities and interests upon another state's. Rules are really only the accumulated body of past decisions,[2] which, while an essential starting-point, tell us little about variables and still less about changing circumstances. The preferable emphasis is on international law as continuing process, a flow of legal decision-making. It is necessary also to say something about the sources of international law, so that we understand why it is appropriate to draw on particular materials in this context. International lawyers perceive the source of international law, (that is to say where we look for international law), as comprising treaties—multilateral and bilateral, but importantly multilateral treaties; custom, which is the habit evidenced in state practice of doing something through a period of time with the belief that one is obliged to act in that way; and judicial decisions.[3] Each of these is relevant in the context of intervention. It is also arguable that decisions of international organizations are a source of international law whether as state practice or as a special distinct category.[4] But

that is more controversial because quite often these decisions emanate from bodies which do not have the authority to bind their members, and consequently one looks to them not as 'rules' or 'judicial decisions' or even 'quasi-judicial decisions' but rather as part of this flow of state practice which can generate custom. They form an important part in the story we have to tell about international law and intervention.

Is there an acceptable definition of intervention in the context of international law? One perceives very rapidly that not only is it not profitable to seek such a definition, but that really one is dealing with a spectrum. This spectrum ranges from the notion of any interference at all in the state's affairs at the one end; to the concept of military intervention at the other. And if one is choosing to deal with all of these as intervention, that choice is immediately complicated by the fact that not every maximalist intervention is unlawful and not every minimalist intrusion is lawful. One cannot simply indicate a particular point along the spectrum and assert that everything from there onwards is an unlawful intervention and everything prior to that point is a tolerable interference, and one of the things we put up with in an interdependent world. It is not that simple. The purpose of the international law doctrine of intervention is, it seems to me, to provide an acceptable balance between the sovereign equality and independence of states on the one hand and the reality of an interdependent world and the international law commitment to human dignity on the other.

Let us return to this idea of the spectrum, and look first of all at minor non-violent intrusions upon the interest and assertions of sovereignty of the other state. The whole question of intervention of a non-military character is closely tied up with international law notions of jurisdiction. An unacceptable minor, non-military intrusion is a violation of a state's jurisdiction. It is universally accepted that a state has jurisdiction over events and persons within its territory.[5] That is known to international law as the territorial basis of jurisdiction. It is not regarded as an infringement of sovereignty or as an interference in a foreign state's affairs to assert jurisdiction over that foreign state's nationals when they are on one's own territory. Territoriality is not the only

basis of jurisdiction, however. Other alternative bases of jurisdiction do give rise to questions of unacceptable interventions. For example the United States relies much more heavily than we do on the notion of 'impact jurisdiction'. It is prepared to assert jurisdiction over foreign persons outside of its own territory if the acts they are engaged in have an adverse impact within the United States; their extraterritorial antitrust law is a classical example of this.[6] And this is much resented in the United Kingdom and our recent Trading Interests Act[7] —which many lawyers think a singular piece of legislation[8]—is in my view an altogether excessive and inappropriate response to that difference of perception about what is and is not tolerable in this context.

We have spoken of minor intervention really being a problem of jurisdiction. The other side of the coin is that there exist exceptions from territorial jurisdiction which would be regarded as an unwarranted intervention in the public functions of the state—even though normally one can exert jurisdiction over the nationals or events concerning a foreign state within one's own territory. International law requires restraint if that assertion of jurisdiction would intrude upon the public functions of the other state; and it is for that reason that we have the law of diplomatic privileges and immunities[9] and immunity for foreign states in our courts when they are acting *qua* government.[10]

The term 'intervention' only has a meaning measured against the question 'intervention against what?' and the answer has to be 'intervention against a state's domestic jurisdiction'—that is, intrusion upon that which is for a state alone. But what *is* a state's domestic jurisdiction is a relative matter, and changes through time. A celebrated international law case that came up before the Permanent Court of International Justice, the *Tunis–Morocco Nationality Decrees Case*, contained some very interesting statements about the relativity of domestic jurisdiction and international law and the ability of the line dividing the two to shift through time.[11] We see no better example of this than the area of human rights where we feel free to speak about all sorts of events occurring within the territories of other states, to bring pressure, indeed to exercise certain sanctions and coercion, when in bygone

years those would have been regarded as matters essentially for the jurisdiction of the state concerned.

There is a wide range of minor intrusions upon a state's sovereignty carried on through a variety of methods. The diplomatic weapon is obviously extremely important in this context. A state normally has total freedom to establish diplomatic relations with another country or not; but when that weapon is used in a collective form such as the United Nations, one then gets not so much a collective recognition policy but rather a collective non-recognition policy where the diplomatic weapon is used as a form of sanction (a non-military sanction) against a state as a mark of disapproval of its particular policies. The case of Rhodesia was a very clear example,[12] as has been the call of the United Nations for the non-recognition of the South African bantustans of Transkei, Bophuthatswana, and Venda.

Trade presents many problems in the context of minor intervention. Again, one starts from the proposition that any state is free to trade with whomsoever it wants, and indeed free to terminate any trade arrangements that it has; but the reality is that expectations are built up over trade patterns—when trade patterns continue for a period of years expectations about the future are built up, and it is thus an over-simplification to say that one could therefore cut such relationships off at will. This dilemma too is reflected in contemporary events. For example, when the United States introduced its own arms and then subsequently the other forms of export bans to Iran after the taking of the hostages, it is not commonly realized that current contracts were in fact fulfilled. It was only future contracts that were prohibited, but it was regarded—at least on a unilateral basis without a Security Council directive—as inappropriate to terminate existing arrangments even in the extreme circumstances of that time. There has to be a very substantial military background (for example, the Middle East war forming the background to the 1973 Arab oil embargo) before these expected patterns are cut off without any notion of unwarranted intervention. But when one state can legally terminate trade with a prior partner, then definitionally others can join it in doing so. Parallel unilateral action then takes on the appearance of joint action and, again, most countries in responding to the hostages episode in Iran and to the USSR intervention in Afghanistan drew the line after existing contracts had been fulfilled.[13] Trade sanctions, of course, arise as collective diplomatic sanctions in exactly the same way as do the other forms of diplomatic sanctions, such as non-recognition. They are mentioned in Article 41 of the Charter under which trade sanctions are permissible when ordered by the Security Council, when there has been a finding of a threat to the peace, breach of the peace, or act of aggression. The difficulty arises when there has been, for example, a failed resolution at the UN—one that has not been passed because of the veto of a permanent member of the Security Council; and then an attempt to take that same form of sanction that the veto of the resolution would have authorized. The United States, for example, called upon its allies to take with it exactly those measures that were vetoed in the Security Council by the Soviet Union in connection with Iran. And that clearly gives rise to some difficult legal problems.[14] On the one hand there is a resolution that has not gone through; on the other hand there is the proposition that if one country can decide not to trade then several countries can decide jointly not to trade. I think it is right to say there are no clear-cut answers here but rather a delicate balancing act.

Another area of non-military intervention that has become of major importance in the last couple of decades is the question of capital investment and economic influence as an intervention in the internal affairs of a country. This phenomenon, which in a different context is spoken of as neo-colonialism, is closely tied in with contemporary ideas of intervention in the non-military sense. The argument runs that economic influence to that degree can distort the economy; it can lead to the support of one local political party over another; it can have unwarranted influence on the government. This range of problems is not really dealt with by the law of intervention as such at all, but is rather dealt with by a body of law that international law compendiously terms the law of permanent sovereignty over natural resources. That body of law[15] clearly connects the freedom of countries to develop and exploit their own natural resources with the

doctrine of non-intervention on the part of other states. A brief survey of some of the leading contemporary instruments illustrates the way in which that relationship has developed. The useful starting-point is the resolution 1803 (1962) on permanent sovereignty over natural resources, which provided *inter alia* that peoples and nations had the right to permanent sovereignty over their natural wealth and resources, and that this right must be exercised in accordance with the well-being of the state concerned. That was followed within a decade by a further series of resolutions which spoke in terms of the efforts of the developing countries and of the peoples of the territories under colonial and racial domination and foreign occupation in their struggle to regain effective control over their natural resources.[16] And more recently there has been the so-called Charter of Economic Rights and Duties which seeks to lay out in some detail the acceptable balance in this area and the detailed articles of that Charter which is a General Assembly resolution. Article 1 states that every state does indeed have the sovereign inalienable right to choose its economic system 'without outside interference coercion or threat in any form whatsoever';[17] so the interrelationship is clearly there.

A further area of interest is that of intervention and human rights. Human rights have shifted from being a matter traditionally of solely domestic concern into a matter of legitimate international concern. We thus now have a situation where other parties are entitled to raise complaints in all appropriate forums without any charge of intervention being reasonably raised against them. There are of course problems about what human rights are, whether some are more 'basic' than others, whether the list is not ever expanding, and so forth.[18] This is not the subject-matter of this essay. But what we can say in the context of our discussion on intervention is that certainly once a human right appears in treaties it then acquires international status, and it is no intervention in the state's domestic affairs to criticize its performance in relation to that obligation. There are many such instruments today, ranging from the UN Declaration on Human Rights to the UN Covenants, which are binding instruments for the parties to them, to the UN Convention on

the Elimination of All Forms of Racial Discrimination.[19] But the idea that human rights are essentially still a domestic matter seems to die extraordinarily hard, and a surprising number of western politicians seem to share the Soviet view that mere verbal concern is tantamount to intervention. For example, Enoch Powell, writing about Soviet failures to implement the human rights provisions of the Helsinki Final Act said, in an article in *The Times*: 'The whole policy of Helsinki, Belgrade and the rest is a hair-raising absurdity. The relationship of the Russian state to its subjects has remained unchanged ever since the Russian state emerged . . . to try to shame or cajole or negotiate the Russian state into abandoning these convictions is like standing by the Volga inviting it to be so obliging to flow north instead of south.'[20] Now, of course, Mr Powell makes a fair point in inferring that the Soviet Union could not implement human rights and survive in its present form. But at the margin there is always room for improvement, and there are obviously considerable differences between various Communist countries in the implementation of different human rights, as there are in the western democracies. Freedom of movement, for example, is substantially greater even now for the citizens of Hungary than for the citizens of the Soviet Union. Where I think Enoch Powell is simply wrong is in believing that the treatment of its citizens is a matter only for the country concerned. Human rights have long since passed, by all the conventional criteria that I have identified, into that realm which is of legitimate international interest. We now have a variety of international instruments which actually institutionalize the possibility of states intervening in these areas. The Helsinki Final Act itself, while not technically a treaty, provides for review of progress by continual meetings between heads of state. The eastern European countries continue to contend that the aspect which is written into the Final Act itself is an unwarranted intervention in their domestic affairs, notwithstanding that it is something to which they have given their signatures, along with the substantive rights there.[21] And under the European Convention on Human Rights we have most unusally, a system whereby one state can now bring an action relating to a human rights violation in another

state that does not even concern its own national.[22] That is a considerable step forward in the diminution of old ideas about what was and was not unacceptable intervention. The doctrine of sovereignty has here been restricted to accommodate growing notions of human rights.

While examining this end of the spectrum on intervention a brief word is appropriate about non-military intervention and the United Nations itself. The key problem here is that of the celebrated domestic jurisdiction clause in the Charter—Article 2, paragraph 7. Article 2(7) provides that nothing in the Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of a state. It goes on to say that this provision shall not prejudice enforcement measures. Thus once there has been a threat to the peace, breach of the peace, or act of aggression, a finding of that by the Security Council, and a call for enforcement measures, then the state can no longer protect itself by claiming domestic jurisdiction. Intervention by the United Nations at that juncture becomes entirely lawful. But short of that situation, what acts are unlawful intervention? What is the status of general (i.e. not specifically directed) resolutions about affairs that do concern internal matters of states? Are they unlawful interventions? Certainly the practice of the United Nations over the years has indicated that they are not. And indeed, specific resolutions directed at individual states have been widely tolerated as a legitimate method of bringing pressure upon a state and yet not falling foul of the prohibition against intervention in Article 2, paragraph 7. One is led very near to saying that most things short of actual action by the United Nations are in fact now permissible interventions.

I now turn to the other end of the spectrum, the military aspects of intervention. The starting-point for any international lawyer must here of necessity be the two articles of the Charter—Article 2, paragraph 4, and Article 51. Article 2(4) is the basic prohibition against the use of force. That clause provides that all members 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.

That must be read together with the limited permission that the United Nations gives for the use of force by individual states. Article 51, which identifies self-defence, provides that 'nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations'. Then it goes on to provide that the Security Council shall act to take measures to maintain international peace and security. The prohibition against the use of force is balanced by the permission to engage in individual or collective self-defence. But individual and collective self-defence appears to be limited to armed attacks, whereas the prohibition clause is drafted more widely. Article 2(4) prohibits the threat or use of force against the territorial integrity or political independence of a state. The two sides of the coin do not entirely match. There has been a tendency among most international lawyers to interpret the phrase 'if an armed an attack occurs' quite widely, so as to allow a certain measure of self-defence by way of anticipatory self-defence where the need appears to be 'instant and overwhelming and leaving no choice as to alternative means'.[23]

Now in this area of military intervention, as well, there has been a series of UN resolutions, which again are General Assembly resolutions and not technically binding. For example, there has been the Declaration on Friendly Relations between Nations[24]—a Declaration which was the outcome of several years of legal negotiations, and not a hasty political compromise. The Declaration attempts to elaborate the Charter articles on the use of force. It proclaims the principle that the use of force constitutes a violation of international law, and proceeds to the principle concerning the duty not to intervene. No state or group of states has the right to intervene directly or indirectly for any reason whatever, in the internal or external affairs of any other state. Consequently 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. The Declaration proceeds to provide that no state may use or encourage the use of economic, political, or other types of measures to coerce another state, in order to

obtain from it the subordination of the exercise of its sovereign rights. No state shall organize, assist, foment, finance, incite, or tolerate subversive, terrorist, or armed activities directed towards the violent overthrow of the regime of another state. Though this resolution was arrived at after many years of negotiating, there are very few states which take seriously what is in it. Those from one political corner read in an implicit exception as regards finance and support of armed activities directed towards another state, when these armed activities are those of 'national liberation movements' overthrowing colonial or alien government. And certainly many states regard it in practice as entirely acceptable to bring various pressures to bear, to influence the internal or external events of other states. One thus has constantly the problem of identifying the reality, and measuring it against the rhetoric.

One of the most interesting and difficult areas has been the question of humanitarian intervention and international law. Again our starting-point has to be Article 2(4) of the Charter. Is a state entitled to intervene in another state, by the use of force for humanitarian purposes?—for example, rescue its own citizens or indeed, more unusually, to rescue other citizens, or to rescue 'kith and kin' in difficulty? Article 2(4) of the Charter clearly prohibits the use of force against the territorial integrity or political independence of a state, and it also contains the 'catch-all' prohibition 'or in any other manner contrary to the Charter'.

Article 51 only allows the use of force in self-defence. Is rescuing one's nationals abroad really what is meant by self-defence? The case law indicates that to be rather doubtful. The leading cases on this bring me to the view that the only thing one can do is to try and make a contextual case-by-case appraisal of all the circumstances.[25] The so-called intervention at Mogadishu seems not really an intervention at all. The rescuing of the persons on the hijacked aeroplane there, while implemented by external elements, was none the less carried out with the consent and indeed at the request of the host state; we call it 'intervention' at our peril.

The case of the rescue of persons on a hijacked plane in Cyprus is a more difficult case. On the one hand, the Cyprus government certainly was not acting as 'host' to the terrorists

in any sense—and indeed was endeavouring to negotiate for the safe release of the hijacked persons—but on the other hand it had set its face against military action. And when military intervention by the Egyptians occurred, there was in fact a loss of life and a great deal of resentment by Cyprus. The facts make this incident fall in a different category.

The case of Entebbe is on its own facts very much clearer. Here the government was undoubtedly supporting the hijackers, and not engaged in any attempts to secure the release of the hijacked persons. In those circumstances it seems to me there is at least a case to be made that an 'in-and-out action' by a foreign state is lawful, and does not in any real sense infringe the territorial sovereignty or political independence of the state. (I appreciate that any brief intrusion is, at the formal level, really an infringement of the territorial sovereignty.) But the point is that one cannot read legal texts as if they tell one all the answers, regardless of the factual context in which they are to be applied. The text has to be applied contextually in any given circumstances, looking at all the variables. None the less, the Entebbe action by the Israelis was categorized by the Secretary General of the United Nations as 'a flagrant aggression'.[26] I have some difficulty in understanding how he could reach that conclusion so decisively.

Yet another problematic case arose from the holding of the United States hostages in Iran. There the state itself was, as it were, the hijacker, and all alternative means of redress had been tried over a very significant period of time. The United States had been at pains to go to the Security Council, and then the General Assembly, and then the International Court of Justice, and to try economic sanctions, before it was finally moved to attempt military intervention. The great difficulty, even if one is prepared to look at this problem relatively and contextually, is that it is extraordinarily hard to see how it ever could have been successful on an 'in-and-out' basis. It is difficult to see that the hostages, held in the Embassy compound, could have been rescued simply by a lightning swoop that would not have been in any extended sense an intrusion upon the internal affairs of Iran. One imagines that the action would have involved some form of overthrowing or

restricting of the government concerned. And the other great difficulty was that the intervention occurred in fact while the matter was before the International Court of Justice, of which an Advisory Opinion had been requested.[27] One can only surmise that this happened because of military advice as to the most appropriate moment for the intervention, since until then the Americans had been so painstaking about using, very systematically, the non-military route. The International Court of Justice was clearly very disquieted about it. The International Court was not asked about the intervention—it had simply been asked about the lawfulness of the taking of the hostages. But in giving its reply to that legal issue it did take the opportunity to say that it felt it inappropriate to have to be answering that question against that particular military backdrop.[28]

Finally, we come to the question of intervention and civil war. When one is dealing with military intervention in the context of Article 2(4) of the UN Charter, one is really simply dealing with the lawful and unlawful use of force. To call it 'intervention' is simply a value-laden way of saying it is an impermissible use of force. Care should be taken about doing this in any lawyerish context, however. For example, the Declaration on the Definition of Aggression[29] makes it clear that 'aggression' is not 'intervention'. 'Aggression' involves the military use of force and the unlawful military use of force. 'Intervention', as we have seen, is a term used to describe a spectrum of intrusions—some major, some minor, some lawful, some unlawful. One has to guard against using these phrases loosely and in an identical sense. 'Intervention' in the military context has some reality to the international lawyer in the context of humanitarian intervention, and in the further context of participating at some level in civil wars, in internal wars. The traditional classical international law has it that once the insurgent party in a civil war has reached a certain standing, the status which affords it the right to be regarded by the international community as a belligerent (that is to say it has effective control over substantial parts of the territory and an organized fighting unit) requires third parties to be neutral in their relationships with each of the warring factions.[30] The reality is vastly different. Indeed, there is

evidence that the law is perceived differently today. The constitutional government will often itself ask for outside help. It will say that as the constitutional government it is indeed entitled to ask for help. The insurgents will themselves ask for help on the grounds that they are engaged in a battle for self-determination, or to overthrow an undemocratic government or a government that has been engaged in repression of human rights, or they will say they are entitled to recognition as the government perhaps of a ceded part of the territory.[31] Looked at from the perspective of the outside states which have to respond to these requests to intervene, there are many arguments that can reasonably be adduced in favour of supporting the existing government. First of all, they will be able to argue that what is going on in the country concerned is at the moment mere insurgency, mere rebellion; it has not reached that level where neutrality is required. (But conversely, the responding state must bear in mind the growth of the contemporary doctrine of the right of self-determination. If a government is always entitled to ask for the assistance of an outside power it is hard to see the right of self-determination as a reality in the hands of a fighting secessionist or other rebellion movement.) Secondly, it is said that arms may continue to be sold to the lawful government provided that the belligerency has not been recognized. And sometimes it seems to be thought that it is perfectly appropriate for arms to be sold to recognized governments virtually regardless of the status of the rebels. For example, the then Secretary of State for Commonwealth Affairs, speaking in the House of Commons on the Biafra episode, which objectively appeared to fulfil the criteria of a fully fledged civil war, said neutrality was not a possible option for HM Government at that time. Britain might have been able to declare itself neutral if one independent country was fighting another, but this was not a possible attitude when a Commonwealth country with which we had long and close ties was faced with an internal revolt. Such neutrality, he said, would not have been understood or appreciated by other Commonwealth countries.[32] This is strikingly different from the traditional understanding of international lawyers, and one cannot help but notice that really all the arguments

militate towards intervention. One hears that one is under a treaty obligation to sell arms to the lawful government, and that it will be a hostile act to cease supply once war begins—including an internal war. One hears that it is necessary to intervene because in fact the insurgents themselves are being assisted by other states so that some form of balancing act is needed. And indeed, as regards the Nigeria question one heard it argued that it was necessary for us to intervene on behalf of the government because the government itself was being assisted by those we did not regard as our allies. And at the political level it is frequently contended that it is necessary for a superpower to intervene because an internal war is occurring within that power's sphere of interest. The realities all militate in favour of intervention. And the task of the international lawyer over the next few years is surely not to go on repeating the rhetoric of dead events which no longer accord with reality, but to try to assist the political leaders to identify what is the new consensus about acceptable and unacceptable levels of intrusion. We have seen from the things I have said about the non-violent part of the spectrum of intervention that international law *can* accommodate itself to changes here. It should not be impossible for us to be prepared to adapt ourselves to these new tasks. Having said that, there are clearly no easy answers, and indeed in so many of these areas international law cannot itself provide the answers; it can only assist in formulating answers when there is a sufficient political consensus to move towards that. But international law is part of and not extraneous to the current debate on the limits and control of intervention.

NOTES

1 See Higgins, 'Policy Considerations and the International Judicial Process', 17 *International and Comparative Law Quarterly* (1968), 58.

2 See McDougal, 'Law as a Process of Decision: A Policy-Oriented Approach to Legal Study', 1 *Natural Law Forum* (1956), 53; McDougal, Lasswell, and Reisman, 'The World Constitutive Process of Authoritative Decision', 19 *Journal of Legal Education* (1967), 253.

3 Along with general principles of international law and (as a subsidiary source) the writings of leading jurists, see Article 38 of the Statute of the International Court of Justice.

4 See Higgins, *The Development of International Law through the Political Organs of the United Nations*, ch. 1; Castaneda, *Legal Effects of United Nations Resolutions* (1969); Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations* (1960); di Qual, *Les Effets des Résolutions des Nations Unies* (1967).

5 For example, Brownlie, *Principles of Public International Law*, 2nd edn. 290–8; Mann, 111 *Receuil des Cours* (1964), vol. 1, pp. 9–162; Akehurst, 'Jurisdiction in International Law', *British Yearbook of International Law* (1972–3), 145.

6 As exemplified in the Sherman Act of 1890, 15 USC, ss. 1–7 (1976); and the court applications thereof, e.g. *American Banana* v. *United Fruit Co.*, 213 US (1909), 347; *United States* v. *Aluminium Co. of America Case*, 148 F. 2d 416 (2d Cir. 1945); *Timberlane Lumber Co.* v. *Bank of America*, 549 F. 2d 597 (9th Cir. 1976).

7 *Protection of Trading Interests Act*, 1980.

8 See e.g. Tsoris, 'Section 6 of Great Britain's Protection of Trading Interests Act: the Claw and the Lever', 14 *Cornell International Law Journal* (1981), 457; and Huntley, 'The Protection of Trading Interests Act 1980—Some Jurisdictional Aspects of Enforcement of Antitrust Law', 30 *International and Comparative Law Quarterly* (1981), 213.

9 See for example, Vienna Convention on Diplomatic Relations, 500 UNTS 95; Denza, *Diplomatic Law* (1976); and Hardy, *Modern Diplomatic Law* (1978).

10 The common law has recently moved from absolute immunity to qualified immunity, i.e. immunity only in respect of *acta jure imperii*. See Higgins, 'Recent Developments in the Law of Sovereign Immunity in the United Kingdom', 71 *American Journal of International Law* (1977), 423. This immunity is affirmed in the 1978 State Immunity Act.

11 *Tunis–Morocco Nationality Decrees Case*, PCIJ Series B, No. 4.

12 Security Council Resolution 216 (1965), 12 Nov. 1965; Security Council Resolution 277 (1970), 18 Mar. 1970 (Rhodesia); General Assembly Resolution 2775E (XXVI) 29 Nov. 1971; General Assembly Resolution 3411D (XXX) 28 Nov. 1975; General Assembly Resolution 31/6A, 27 Oct. 1976 (Bantustans).

13 See e.g. 5th Report Foreign Affairs Committee, House of Commons, para. 36; Higgins, 'Legal Responses to the Iran Crisis', *Proc. Am. Soc. Int. Law* (1980), 250.

14 Higgins, op. cit., *supra* n. 13 at 251.

15 On which there is now a vast literature. For an introduction, see Schachter, *Sharing the World's Resources*; Brownlie, 'Legal Status of Natural Resources in International Law', *Receuil des Cours* (1978), vol. IV, 249.

16 General Assembly Resolution 1803 (XVII), Dec. 14 1962; General Assembly Resolution 3201 (S-VI), May 1 1974.

17 General Assembly Resolution 3281 (XXIX), Dec. 12 1974. See especially Article 2 thereof for a detailed statement on the treatment of foreign investment.

18 For a thoughtful analysis of some of these questions see Bilder, 'Rethinking International Human Rights: Some Basic Questions', *Human Rights Journal* (1969), 557. See also McDougal, 'Human Rights and World Public Order: Principles of Content and Procedure for Clarifying General Community Policies', 14 *Virginia Journal of International Law* (1974), 387; and Milne, 'The Idea of Human Rights: A Critical Enquiry' in *Human Rights, Problems, Perspectives and Texts*, ed. Dowrick (1979).

19 660 UNTS 195 (Racial Discrimination Convention); UN Doc. A/810 (Universal Declaration); European Treaties Series No. 5 (European Convention on Human Rights); 6 *International Legal Materials* (1967), 360, 368 (Covenants on Human Rights).

20 *The Times*, 24 June 1977.

21 See Henkin, 'Human Rights and Domestic Jurisdiction' in *Human Rights, International Law and the Helsinki Accord*, ed. Buergenthal (1977).

22 Article 24 European Convention on Human Rights provides for interstate complaints.

23 The test enunciated in *The Caroline*, Moore, *Digest*, vii, 919.

24 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, 9 *International Legal Materials* (1970), 1292. See furthur Ronzitti, 'Resort to Force in Wars of National Liberation' in A. Cassesse (ed.), *Current Problems of International Law* (1975).

25 For different views on the problem of humanitarian intervention, see Lillich (ed.), *Humanitarian Intervention and the United Nations*; Brownlie, 'Humanitarian Intervention' in *Law and Civil War in the Modern World* (ed. J. Moore, 1974), p. 217; Frank and Rodley, 'The Law of Humanitarian Intervention by Military Force', 67 *American Journal of International Law*.

26 See, *inter alia*, Paust, 'Entebbe and Self-help', 2 *The Fletcher Forum* (1978), 86; Salter, 'Commando Coup at Entebbe: Humanitarian Intervention or Barbaric Aggression', 11 *Int. Lawyer* (1977), 331.

27 *Case Concerning U.S. Diplomatic and Consular Staff in Tehran (USA v. Iran), ICJ Reports* (1980).

28 Ibid., paras. 93–4.

29 Resolution on the Definition of Aggression, 13 *International Legal Materials* (1974), 710.

30 Lauterpacht, *Recognition in International Law*, and Castren, *Civil War*.

31 Higgins, 'Internal War and International Law' in *The Future of the International Legal Order*, eds. Falk and Black.

32 Hansard, 27 Aug. 1968, cols. 1146, 1443–4.

4
Superpower Intervention

PHILIP WINDSOR

It is fashionable, at present, to suggest that the old Westphalian system of a world of non-interventionist states is on the decline, and that the dangers of growing intervention by different powers in the affairs of other states have been on the increase. The Westphalian system represented some remarkable achievements: the absolute sovereignty of a state rested on a dual basis whereby internal authority was matched by freedom from external interference; and in this way the principle of *cuius regio eius religio*, codified in the Religious Peace of Augsburg, laid the foundation of the modern state system. Today, these achievements are regarded with a degree of nostalgia, and there is a widespread assumption that the current threats to the system represent something new. Yet if one looks at the recent history of the world, it seems that this non-interventionist system of sovereign states, providing states with the domestic freedom to conduct their own affairs as badly as they like, is in many respects rather stronger than it used to be. At the height of the imperial era, or even in the 1920s, states which failed to pay their debts were liable to be bombarded by their creditors. Today a state in default merely asks for a reschedule. Its creditors meet, grant it more money to pay even more interest on further debts, and the nearest anyone comes to interference is that the International Monetary Fund might lay down conditions for a substantial advance. This applies not merely to a case like that of Poland, but also to countries in Latin America, the Middle East, or the developing world. The non-interventionist system is still strong in many respects and its strength has indeed increased. But at the same time a general assumption persists of a world so dominated, indeed permeated, by sheer power that it becomes almost futile to discuss the question of intervention by the superpowers because it is like asking what contribution oxygen makes to our ability to breathe in the atmosphere.

hlè ECL

(ECLACY)

10 DOWNING STREET

From the Private Secretary

5 September 1984

Thank you for your letter of 14 August. The Prime Minister was disappointed to learn that you will be unable to attend the Seminar but of course fully understands the reasons.

I enclose a copy of a background paper which has been prepared for the Seminar and would welcome any comments you have time to make. I shall be grateful if you would treat the paper for your personal information and use only.

Charles Powell

Professor Rosalyn Higgins

The London School of Economics and Political Science
(University of London)
Telephone: 01-405 7686
Telegrams: Poleconics, London
Telex: 24655 BLPES G

Houghton Street,
London WC2A 2AE

Pl. enclose
submit
CDN

14 August 1984

Dear Private Secretary,

I am writing this letter from the United States to confirm my telephone call to David Barclay.

Thank you very much for the invitation to join a group of academic experts to discuss the problems of small States with the Prime Minister.

It is indeed a question in which I am much interested and I would have been delighted to come to

Chequers for such a discussion.

Unfortunately, however, I am leading a London University team on a conference on that date at the University of Aix-en-Provence on the topic of naturalisations and international law. This is a long standing commitment which I cannot change and I must therefore with regret say that I would be unable to be at Chequers on 1 October as I shall be abroad.

If it were nonetheless felt appropriate for me to receive the discussion paper, I would be happy to offer written comments ahead of the meeting if that would be thought useful.

Yours sincerely,

Roslyn Higgins.