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EUROPEAN UNIVERSITY INSTITUTE

Department of Law

**THIRD STATE
ARMED INTERVENTION IN INTERNAL CONFLICT**

Antonio TANCA

Thesis submitted for assessment with a view to obtaining the
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THIRD STATE
ARMED INTERVENTION IN INTERNAL CONFLICT

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THIRD STATE ARMED INTERVENTION IN INTERNAL CONFLICT

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INTRODUCTION

1.

A product of the Second World War, the United Nations Charter set up a system for the control of armed coercion which was mainly aimed at preventing the reoccurrence of events like the two world conflicts. Even as it came into force, however, it became clear that the political premises underlying it - which were also the factual bases for its effective operation - were undergoing a deep and perhaps irremediable transformation. This was a consequence of post-war events such as the proliferation of means of mass destruction, the end of colonialism with the consequent marginalization of the European States in the world scene, and the partition of the world into blocks.

While the main goal of the Charter remained intact: preserving future generations from the scourge of war, the legislative instruments arranged to implement it revealed themselves to be increasingly inadequate. The clear-cut cases to which the Charter system was meant to respond were becoming comparatively rare, while new tensions concentrated in some of its "grey areas", left there presumably because of the States' unwillingness to tackle problems whose solution had not appeared

necessary at the time, and because of a strong confidence in the Security Council, which later turned out to be ill-placed.

2.

One of these grey areas can be found in the ambiguous relationship between the pursuance of the "general interest" embodied in the organization and the preservation of the sovereignty of individual States. The negative consequences of this ambiguity have become very clear with the emergence at international level of other entities existing alongside States, which can play a not negligible role in the outbreak or resolution of armed conflicts. The shifting of the locus of many conflicts from the purely international level (across international borders) to an international/internal level (between the government and other factions within a State, with the direct involvement of third States in favour of any of the belligerents), is a typical and rather common example.

Legally speaking the internationalization of internal conflicts does not represent a serious problem. A relevant part of the literature deems an exclusively internal conflict to be outside the scope of the system of control of international coercion, and an armed intervention of a third State into the conflict lawful, if the "legitimate" government requests it.

It can be very difficult, in practice, to identify the legitimate government, particularly in situations of anarchy, where none of the factions can claim such status, or when such government no longer wields effective power. Of course this is a crucial problem if one wants to determine who, in a certain situation, has the right to ask for external help or whether a foreign intervention which has already taken place is lawful.

3.

Furthermore, by virtue of the principle of self-determination of peoples, international law recognizes that entities such as peoples or National Liberation Movements have a special status, and under certain conditions it denies to governments the right to request a foreign intervention even when they could objectively be defined as "lawful". Again, even though there is agreement about the conditions under which a people or a government are subject to the special norms mentioned above, it is always difficult in practice to single out a people or a government to which these rules might apply.

In practical terms this means that precisely where a violation of the law is most likely, the key to the assessment of the situation is embodied in rather vaguely drafted rules. It follows that some States may feel they can intervene legitimately

on the basis of their assessment of facts, while others may judge this intervention to be illegal. Since an illegal intervention would be tantamount to an act of aggression against the target State, it is easy to see how futile the system set up by the United Nations Charter might appear in this particular field. In fact, the system does not provide satisfactory solutions to these problems. Indeed, it does not afford any generally accepted criteria for identifying, in case of internal conflict, who is entitled to speak on behalf of the State and may therefore ask for external help. The crucial question here obviously centres on the behaviour of third States: on whether, in other terms, they are allowed to do anything in such cases and, if so, subject to what conditions.

4.

This is the starting point of the present research. My intention is to examine the behaviour of individual States in all cases of foreign intervention in internal conflict in the period after the Second World War. This survey of State practice, together with an analysis of the applicable legal rules, should lead to the verification of one of the following three hypotheses:

- the ban on the use of force set forth by the United Nations Charter is practically rendered ineffective by the emergence of internationalized internal conflicts, because they create a "no man's land" where States recover the freedom of action they had surrendered in subscribing to the general ban;
- the internationalization of internal conflicts introduces other exceptions to the ban, alongside self-defence, which are accepted and applied by States: so modified the system maintains its validity;
- the prohibition of the use of force maintains its validity substantially unimpaired even in the cases just mentioned, both because States (and the other relevant entities) tend to behave by and large in accordance with it, and because the registered violations are not so numerous and of such a magnitude as to represent sufficient evidence of a change in the law.

5.

The method I intend to adopt in this research is that of analyzing all cases of foreign armed intervention in internal conflicts according to the justifications given by the

intervening State and the subsequent reaction of the international community. I shall also include those cases where the existence of an internal conflict an/or an external threat to the target State was put forward but never adequately proved. This might show, on the part of the intervening power, the existence of opinio juris concerning the validity of the rule analyzed.

In its recent judgement on the Nicaragua case, the international Court of Justice made a very important statement concerning the evaluation of State practice. It said:

It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention into each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems sufficient that the conduct of States should, in general, be consistent with such rules, and instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to

exceptions or justifications contained within the rule itself, then ~~whether~~ or not the State's conduct is in fact justifiable on ~~that~~ basis, the significance of that attitude is to confirm rather than to weaken the rule.

I fully subscribe to this statement, and I shall adopt the general criteria it sets forth, in the evaluation of State practice in the present work.

I shall therefore examine first the two most common justifications which are found in State practice: the consent of the target State and self-defence. I shall then consider three minor justifications such as self-determination of peoples, protections of nationals abroad and humanitarian intervention. Finally, I shall deal with the concept of counterintervention, to assess its foundation in law and its role in the present system of control of armed coercion in international relations.

CONSENT OF THE VICTIM STATE

1. Introduction.

States often justify their armed intervention in other States by the consent of the State where the intervention takes place. Such consent is usually expressed by an "ad hoc" invitation to the foreign State, or is contained in a previous agreement between the two States¹. Both in recent and less recent practice States have often resorted to this justification, but they usually prefer to justify their actions on more than one legal grounds, all of which are to be analyzed separately.

1. On the existence, in certain cases of a "right" of intervention, see the distinction drawn by Oppenheim. L. Oppenheim, International Law - A Treatise, (1st edn., London 1905; Vol. I, 8th edn. (ed. Lauterpacht), 1955) p. On the question of consent arising from a treaty, see the remarks made in para.9, page 64. That paragraph also points at instances when a treaty was invoked.

The aim of the present chapter is to analyze the validity of consent in itself as a legal justification for foreign armed intervention. After a general introduction on consent as a circumstance precluding the international wrongfulness of unlawful acts committed by States, the applicability of this circumstance to the concept of armed intervention will be assessed as a matter of theory. Consideration of the practice of States in this matter, with reference to internal conflict, will follow.

2. Consent as a circumstance precluding wrongfulness.

The best legal approach to the concept of consent in international law is found in the law of international responsibility of States, where it is included among the general circumstances precluding the wrongfulness of otherwise unlawful

acts committed by States². This general approach can easily be transferred to the more specific problems of armed intervention.

It has never been seriously questioned that general international law recognizes the existence of certain circumstances, under which an act which would normally be wrongful - namely an act imputable to a State, representing a violation of an international obligation of that State - loses its unlawful character. This is so because, as a result of these circumstances, the unlawful act loses its objective element, namely the breach of an international obligation³. The

2. These circumstances have been defined by Anzilotti as follows: "E' generalmente ammesso che vi sono dei casi in cui un atto, di per se' illecito, o non produce le conseguenze proprie dei fatti illeciti, o perde addirittura il carattere di illecito, od anche rappresenta l'esercizio di un diritto che prevale su quello che l'atto stesso viola o disconosce" - D. Anzilotti, Corso di Diritto Internazionale, (Vol.I, IV Ed., Rist. Anastatica, Padova, 1964) p.413.

3. E.g. D. Anzilotti, Teoria generale della responsabilità dello Stato nel diritto internazionale, (1st edn. Firenze 1902 (reprinted by S.I.O.I., vol.II, 1, Padova, Cedam, 1956); R. Ago, "Le délit international", HR 1939-II, p.533; I. Brownlie, System of the Law of Nations, State Responsibility. I. Oxford, 1983; Jagota, "State Responsibility - Circumstances precluding Wrongfulness", NYIL, 1985, p.249ff. and, in general, Eighth ILC Report on State Responsibility "The Internationally wrongful Act of the State, Source of International responsibility by Mr. Ago, Special Rapporteur, Doc. A/CN.4/318 and Add.1-4, p.27 and ff.

The report mentions a doctrinal dispute on whether it would not be more correct to speak about 'circumstances precluding responsibility' rather than 'wrongfulness'. The special rapporteur Ago disagrees with this thesis.

admissibility and the conditions for the application of some of these circumstances have been subject to change in recent years, especially as a result of the coming into force of the Charter of the United Nations⁴.

The International Law Commission has recently systematized the whole subject in its reports aimed at the drafting of an

4. The circumstances precluding wrongfulness recognized in the ILC report are the following: Consent, Countermeasures in respect of an internationally wrongful act, Force Majeure, Distress, State of Necessity and Self-Defence. In customary law armed reprisals were also included among these circumstances. This is no longer so, as a result of the coming into force of the United Nations Charter and the ban on the use of force which has made armed reprisals illegal. See e.g. M. Giuliano, Diritto Internazionale, Milano, Giuffrè, 1974, p.599.

This is the opinion expressed by the majority of the authors. Bowett, however, wonders whether, despite the formal illegality under the Charter, reprisals are not de facto tolerated, given the present state of the centralized system for the control of coercion. D. Bowett, "Reprisals Involving Recourse to Armed Force", 66 AJIL (1972), p. 4ff.

The position of Barsotti is very interesting. Even though admitting the theoretical need for additional exceptions to self-defence, this author rules out reprisals because they do not comply with the general standards set by the Charter insofar as they purport the use of armed force (which is to be avoided to the greatest possible extent) for the enforcement of less important rights (right to compensation or reparation), which could be obtained through acts of lesser gravity (peaceful reprisals etc.). R. Barsotti, "Armed Reprisals", in A. Cassese (ed.) The Current Legal Regulation of the Use of Force, Dordrecht, Nijhoff, 1986 p. 79 at 98.

On the problem of the alleged admissibility of counter-measures involving the use of armed force, see infra, chapter on self-defence, p.79

international convention on State responsibility⁵. Part of the report of the "rapporteur special" Roberto Ago, is expressly devoted to the circumstances precluding wrongfulness⁶. A specific article is devoted to the consent of the injured State. The reason for the insertion of consent among these circumstances is to be found in its capacity to bring about an international agreement between the two subjects concerned, the object of which would be the cessation of the validity of the international obligation between them, or its suspension in the particular case involved. The report, in other words, recognizes the existence, in international law, of the principle volenti non fit injuria according to which the illegitimacy of the conduct of a certain State for lack of conformity with an international obligation "is precluded (with respect to that State) if such conduct is consented to by the State that would have the right to demand

5. After the approval (first reading) of the First Part of the Draft Articles on State Responsibility (hereinafter cited as ILC Articles), dealing with the elements of the international wrongful act, the International Law Commission (ILC) is now examining the Second Part of the Draft, concerning the consequences of the wrongful act (ILC Ybk., 1985, II, 1, p.3) and the Third Part, on the settlement of disputes on responsibility (ILC 7th Report on Content, Form and degrees of State Responsibility, 38th Session 1986, Doc. A/CN.4/397).

6. The circumstances precluding wrongfulness are contained in Chapter V of the Draft Articles (artt.29-34), ILC Articles, p.33

compliance with the obligation in question"⁷. It is also observed that there is substantial consensus both in the literature and the practice of States in this sense, with two general - perhaps implied in the concept itself - qualifications, namely that consent must be expressed by an international legal subject, and that it must be expressed with reference to a rule which admits derogation⁸.

Substantial agreement both in the literature and in the practice of States on the general conditions for the application of the principle itself is also reported. The first of these conditions is that the consent must be validly expressed, in the sense that it must be clearly established (explicitly or implicitly, expressly or tacitly, it does not matter); it cannot

7. Ibid. 30.

8. Ibid. 31. Some doubts have however been formulated as to whether the consent given by a State to the violation of an obligation towards it by another State constitutes in fact an agreement between the two States. Conforti has observed that, were it so, there would be no need to include it as a specific circumstance precluding wrongfulness because the presence of a subsequent agreement between the two States concerned would already be in itself sufficient to abrogate the previous obligation. He asserts: "Se così fosse, ci sarebbe da chiedersi che senso abbia parlare di cause di esclusione dell'illiceità, visto che l'efficacia sospensiva del consenso ed i suoi limiti in rapporto allo jus cogens sarebbero già perfettamente ricavabili dai principi che disciplinano l'accordo ed i suoi rapporti con le altre fonti di diritto internazionale". B. Conforti, Diritto Internazionale, Napoli, Edit. Scientifica, 1987, p. 341.

be presumed⁹. The second condition is that the consent expressed ~~must~~ be internationally attributable to a State. This means that it must be issued by a person or entity whose will is internationally regarded as the will of that State and that that entity must be competent to manifest the will in the particular case involved¹⁰. The three other conditions are that the consent should not be vitiated by defects (like any other manifestation of the will of a State), that it should be expressed at the time of or prior to the conduct in question¹¹, and that it must not constitute a wrongful act vis-à-vis third States.

Two exceptions to the principle are also listed, as mentioned above. They concern the existence of more than one injured subject (in which case, obviously, the consent of one of them cannot preclude the wrongfulness of the same conduct vis-à-

9. ILC Articles, p. 35 and n. 137.

10. Ibid. p. 36 and especially n. 161. See also infra, p. 274, where this very question is discussed in greater detail.

11. The effect of an expression of consent subsequent to the wrongful act would not, in the opinion of the ILC, preclude its wrongfulness, but only constitute a waiver on the part of the injured State and of its rights arising out of the wrongful act (including a claim to reparation).
Ibid. p. 37 and n. 168.

vis the others)¹², and the existence of a peremptory norm of international law, which precludes derogation by agreement¹³.

12. See e.g. the view taken by the Soviet member in A/CN.4/318 and Add.1 -3; 1538th Meet., 24.5.79. This hypothesis would cover, besides the case of an obligation arising from a multilateral treaty, also the so-called obligations erga omnes which may exist vis-à-vis the entire international community and which only partially coincide with peremptory norms of international law: while all peremptory norms purport erga omnes obligations, not all erga omnes obligations are peremptory. The existence of this kind of obligations was clearly pointed out by the International Court of Justice in the Barcelona Traction, Light and Power Co. case:

"...In particular an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes". ICJ Rep., 1970, p. 3, para.33.

The issue of the obligations erga omnes with reference to the prohibition of the use of force, of special interest in the present context, will be dealt with in greater detail infra, p.22:23.

13. The definition of a peremptory norm of International Law (or norm of jus cogens) is given in the article devoted to consent in the following terms:"...a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general International Law having the same character". See article 29.2 of the Draft Articles.

Conforti seems skeptical about the practical workability of this norm. If, he asserts, the only State which can claim the illegality of the consent given because it is in contrast with a peremptory norm is the consenting State (which is presumably the victim of the act) then it is extremely unlikely that it will do it; if, on the other hand, each State is entitled to claim it, then the consent would be invalid anyway, since it only precludes the wrongfulness vis-à-vis the consenting State and not every one else. Conforti, p. 342.

3. Consent with respect to armed intervention.

After this brief introduction, I shall focus on armed intervention and its status in international law, in order to point out the principles it might violate and to ascertain to what extent, if at all, consent can cancel this violation. In the concept of armed intervention it is possible to distinguish two separate elements: the intervention itself (as the act of intervening), and the use of armed force (which refers to the way the intervention is carried out). These elements are the object of two different rules in international law¹⁴.

The concept of intervention has been defined in general terms as a "dictatorial interference by a State in the affairs of another State for the purpose of maintaining or altering the

14. The need to ascertain, in every case of armed intervention, the violation of each norm individually considered, was recently confirmed by the International Court of Justice in the 27th June 1986 Judgment on the Nicaragua case, at para. 184 and passim.

actual condition of things"¹⁵. It is, in general, prohibited by international law, with a limited number of exceptions where it is possible to speak of a "right" of intervention¹⁶. The main elements of the concept, upon which the prohibition turns (as a matter of general rule), are interference (in the recognized internal jurisdiction of a State) and coercion (whatever form it

15. This is the definition given by Oppenheim, p.304. See also Brierly, The Law of Nations (an Introduction to the International Law of Peace, 6th edn. (ed. by Sir H.Waldock), Oxford, At the Clarendon Press, 1963, and M. Bennouna, Le consentement à l'ingérence militaire dans les conflits internes, Paris, Dichon et Durand, 1974, p.11.

This definition is criticized by J.N. Moore, "Foreign Intervention in Internal Conflicts, in Moore (ed.) Law and the Indochina War, Princeton, Princeton University Press, 1972, p.127. He asserts: "Such definitions are by themselves so devoid of content that any real meaning they convey is little more than pseudo-knowledge comparable to saying that sleeping pills put one to sleep because they contain a dormative agent".

It is doubtful, anyway, that at this level of abstraction it is possible to provide a more precise definition or a definition capable of enabling us, with a sufficient degree of certainty, to appraise in every concrete situation, whether it is intervention or not. Rather, the purpose of such a definition is that of providing a framework of common features capable of including all the possible situations susceptible to classification as "intervention".

16. Oppenheim draws a distinction between "intervention by right" in all cases where the sphere of sovereignty of a State is limited in a certain field, so that the State in question has a legal duty to submit to the interference, and "intervention in default of a right" where there is no such limitation or legal duty, but the intervention cannot be considered illegal. Oppenheim, p. 306.

may take)¹⁷.

Generally speaking, the use of armed force falls within the prohibition set forth by article 2.4 of the Charter of the United Nations, a principle which must now be considered - and there is general agreement on this - a customary rule of international law¹⁸. Article 2.4 forbids the use of force - certainly of armed

17. Here, too, the definition proposed is meant to be as generic as possible. The disagreement about the precise scope and content of the concept of intervention is pointed out by Ronzitti: "Above all, (it is) the meaning of the word 'intervention', which is well known to be the source of misunderstanding. In State practice it is used with a number of meanings covering a large variety of actions ranging from the use of armed force to mere representations carried out by one State to another. Doctrine also uses the term 'intervention' in a large number of meanings and misunderstandings remain in spite of the attempts made the content of the Non-Intervention principle in res. 2131 (XX), 2625 (XXV) and 36/103 of the United Nations General Assembly". N. Ronzitti, Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity, Deventer, Kluwer, 1985, pp. XVII-XVIII. On various definitions of intervention, see also Bennouna, p.11; J. Charpentier, "Les effets du consentement sur l'intervention, Mélanges Sefériades, vol.II, Athens, 1961, p.489; Thomas & Thomas, Non intervention - The Law and its Import in the Americas, Dallas, South. Meth. Univ. Press, 1956, pp.91ff.

18. This has recently been confirmed by the International Court of Justice in the Nicaragua case at paras. 188-192. See moreover UN Res 2625 (XXV) (Declaration on Friendly Relations), GAOR 25th Sess., Supp.28 (A/8028); and G.A. Res. 42/22 of November 18, 1987 containing the "Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations", Part I, n.1.

force¹⁹ - when exercised "against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations". The prohibition is subject to certain qualifications and exceptions.

As armed intervention is the object of two different rules, the same action may be subject to different evaluations according to the rule one refers to²⁰. Since the legal consequences of these evaluations might be different, the effects of consent on each of the rules must be examined separately.

The principle that a State can give its consent to the intervention of another State in its own internal affairs does

19. The question of whether article 2.4 also covers other kinds of coercion has been repeatedly raised. Most authors, however, take the view that its scope is limited to armed force. This was confirmed in the debate leading to the adoption of G.A. res. 2625 (XXV) (hereinafter Declaration on Friendly Relations). See A. Tanca, "The prohibition of the Use of Force in the U.N. Declaration on Friendly Relations of 1970" in Cassese (ed.) Current Legal Regulation, p. 397 at 400.

20. The ICJ: "A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion with regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of prohibited intervention, is particularly obvious in the case of an intervention which uses force either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State". Nicaragua case, para.205.

not seem to be seriously questioned by anyone both in the literature and in practice²¹. In fact, this view can hardly be questioned from a logical point of view: for, if a State agrees with another State about an intervention of the latter in its own internal affairs, the effect of the consent is that of eliminating - on that occasion or in general, it depends on the form of the consent given - the wrongfulness of the act concerned, which stems from the coercion of the latter State's will²². For this reason, in referring to the two fundamental elements of intervention mentioned above, some authors even argue that it is incorrect to speak of intervention, when consent is given. The consent of the "target" State would, in the opinion of these authors, eliminate one of the basic elements of the concept, that of coercion. The result would be a "denaturation" of the concept of intervention in that case: there would not simply be a lawful intervention, but no intervention at all, since the conduct adopted would lack one of the essential

21. Ibid. para 246.

22. ILC Report, pp. 31-32; I. Brownlie, International Law and the Use of Force by States, Oxford, At the Clarendon Press, 1964, pp. 317ff.; Oppenheim, p.306; Thomas & Thomas, p.91.

requirements for it to be classified as such²³.

With reference to the ban on the use of armed force, there seems to be a rather broad consensus to the effect that, as a matter of principle, the consent of the "target" State precludes the application of the prohibition. An armed intervention that in normal conditions would constitute an act of aggression, "ceases to be so characterized and becomes entirely lawful if it occurred at the request or with the agreement of the State"²⁴. Ample evidence is given in support of this view. Indeed, it seems the only possible one, if the prohibition is conceived as having the sole purpose of protecting individual States from the armed coercion that might be exercised by other States against them. If the purpose just mentioned is the only interest protected by law, then the principle of non-use of armed force comes out as a logical corollary to it, just as the duty of non-intervention is a logical corollary to the duty of respect for sovereignty.

One may question, however, whether that is really the only purpose of the prohibition of the use of force. The view could be taken that the prohibition serves the general purpose of

23. ILC report, p.35; Thomas & Thomas, p.91; Charpentier, (with certain qualifications), pp. 492ff.

24. E. Lauterpacht, "Intervention by Invitation", 7 ICLQ, 1958, p.103; Brownlie, p.317; ILC Report, p.31.

preserving world peace, by banning the use of force from international relations²⁵. As a consequence, since every State has a legal interest in world peace, which might be endangered by the use of armed force - even if consented to by the target State - the duty not to resort to armed force would exist vis-à-vis the entire international community, and not only vis-à-vis the individual State concerned. If, as some authors do, one deems the ban on the use of force to be an obligation erga omnes²⁶, the consent of the target State could not preclude the wrongfulness of the armed intervention vis-à-vis all other States of the international community since according to article 29.1 of the

25. Some elements in the UN Charter, such as its Preamble, the general power of the Organization "to take effective collective measures for the prevention and removal of threats to the peace", the power of any member State to bring a dispute or a situation likely to endanger the maintenance of international peace and security to the attention of the Security Council (articles 34-35), or the exclusion of the domestic jurisdiction exception for matters relating to the Chapter VII of the Charter, could possibly be regarded as elements in support of this view.

26. Most authors deem the ban on the use of force to be a peremptory norm of international law which has, among its characteristics, that of establishing an obligation vis-à-vis the entire international community. See, e.g. Ronzitti, p.72 ff.; N. Ronzitti, "Use of Force, Jus Cogens and State Consent" in Cassese (ed.) Current Legal Regulation, p. 147 at 150; Y. Dinstein, War, Aggression and Self-defence, Cambridge, Grotius, 1988 (debate, p. 99 and especially p. 101); and a rather perplexed G. Gaja, "Jus cogens beyond the Vienna Convention", HR, 1981 III, p. 287ff.. The ICJ, in Nicaragua, has also acknowledged that the peremptory character of the ban on the use of force is now recognized by several States (para. 190).

Draft Articles consent can preclude wrongfulness only in the relationship between the "acting" State and the "consenting" State. The consent of that State, therefore, would no longer be sufficient to make the action lawful: the consent of the rest of the world community (possibly in the form of an authorization by the competent UN organ) would also be necessary²⁷. But one may wonder whether the object of the erga omnes rule is the use of force tout court, or the use of force against another State. The consequences of each are very different. In the first case everything is centred on the use of force, independent of its purpose. The crossing of a State's border by the armed forces of another State would be sufficient to breach the obligation towards the other members of the international community. The consent or invitation of the target State would certainly be capable of precluding the wrongfulness of the conduct of the "attacking" State but only in their bilateral relations; that conduct would remain wrongful vis-à-vis all the other members of the international community, for which the consent given by the target State is irrelevant. In the second case another element, besides the crossing of borders, would be necessary: the coercion

27. This view is taken by Charpentier, pp.497-8, and is mentioned in the Report of the ILC on the work of its 31st session, Doc.A/34/10,p.114 and n.579.

of the target State, the clash between the aggressive intentions of the attacker, and the "resistance" of the target State. When both elements are present, there is a use of force against that State. The same rule is also violated vis-à-vis the rest of the international community, whose members, if the violation amounts to an armed attack, may intervene against the aggressor. To do this, however, they need the request of the target State²⁸.

The two hypotheses just mentioned bring about different consequences, when one focuses on the effects of consent on them. In the first case consent would not be able to preclude the wrongfulness of the use of force vis-à-vis the international community. In the second, the absence of coercion of the will of the target State giving its consent would shift the allegedly unlawful conduct (the use of force) outside the scope of the

28. Accordingly, the ICJ in Nicaragua asserted (para. 195): " It is also clear that it is the State which must form and declare the view that it has been so attacked. There is no rule, in customary international law, permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation. Where collective self-defence is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of an armed attack".

The problem of collective self-defence and the conditions for its exercise will be considered in greater detail in the next chapter. What is important for the present purposes is that the Court considers an essential element of the violation of the rule, the belief of its alleged victim that it has indeed been violated.

provision which makes it unlawful. Hence, that use of force would not be against the target State and would not fall within the prohibition erga omnes mentioned before. No interest or right of third States would then be violated²⁹. The well-foundedness of this last interpretation will be verified through an examination of State practice.

4. Preliminary remarks on the practice of States.

29. With reference to the use of force to protect nationals abroad, Ronzitti asserts that the jus cogens prohibition and the customary ban on the use of force are not identical in scope, the latter being much wider. He also deems the exact evaluation of the scope of the jus cogens prohibition to be a moot point, even though he seems to include acts of aggression in it, to the exclusion of lesser forms of use of force. See, Ronzitti, Use of Force, p. 147 and, Ronzitti, p. 75 and passim.

In so doing, however, the problem remains open: is an armed operation, which in abstracto would be considered an act of aggression but which is carried out with the consent of the target State, still aggression? But, on the other hand, has a State which consents to such operations within its own territory, given this consent really freely? It seems clear that the problem should rather be focused on the validity of the consent given. See, infra, p.274.

Having identified the principle in theory, together with its exceptions and the conditions for its application, and assessed its relevance to the concept of armed intervention, the central question becomes one of its practical application by States. A brief look at the cases in which this principle has been invoked (whether correctly or not will be discussed later) immediately shows that in practice it is not so clear cut as it may appear in theory. As will be seen later in greater detail, a common feature of the practice of States in the field is the constant rejection by large sections of the international community of justifications for armed intervention based on the consent of the target State, not as a matter of principle but as a matter of fact: while not denying the existence and the validity in international law of the principle in question, it has very often been denied by third States that in the individual cases the conditions for its validity were met³⁰.

A reason for this is presumably to be found in one of the conditions set forth in the ILC report, namely whether the

30. See, infra, p.324. The problem has also been well pointed out by N. Ronzitti, Rescuing nationals Abroad through Military Coercion and Intervention on Grounds of Humanity, Dordrecht, Nijhoff, 1985, p.84. More in general, on the question of the factual denial of justifications put forward by States see Schachter, "Self-defence and the Rule of Law", 2 AJIL, 1989, p. 259.

consent is ever "internationally attributable" to the State expressing it. In other words, the central question becomes whether the government or the authority which expresses the consent of a State to foreign armed intervention is, at that moment, legally entitled to do so³¹. In fact, in most cases governments tend to ask for external help when faced with serious internal problems undermining their authority. One might argue that a government in this situation is no longer fully "effective" and, since effectiveness is the factual basis upon which a government may lawfully exercise its sovereign rights - among which the right to ask for foreign aid -, that government is not legally empowered to request foreign intervention³².

31. With reference to the British dispatch of troops to Muscat and Oman (1957) and Jordan (1958) (see appendix, n. 2 and 3) the International Law Commission recalled that ... "During the relevant debates in the Security Council and the general Assembly no state contested the validity of the actual principle that, as a general rule, the consent given by the territorial state precluded the wrongfulness of sending foreign troops into its territory. The points on which there were differences of opinion were, rather, whether or not there had been consent by the State, whether or not that consent had been validly expressed, and whether or not the rights of other states had been infringed". ILC Report 1979, p.110, para.6.

32. See e.g. Fitzmaurice, RC 1957 (II), p.178; Lauterpacht, p.103; Q. Wright, "US Intervention in Lebanon", 53 AJIL, 1958, p.112; R.J. Dupuy, "Agression indirecte et intervention sollicitée dans l'affaire libanaise", AFDI, 1959, p.431; Thomas &

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States seem to recognize on the one hand that every State has the right to ask for foreign help even when this involves the use of armed force, and, on the other hand, that there is a duty of non-intervention in the internal affairs of other States in case of internal unrest³³. The first rule presupposes the existence of an effective government issuing the invitation. The second rule implies that, in case of civil strife, third States ought not to attempt to influence its outcome. But what happens when one of the parties to the internal conflict - notably the incumbent government - requests an intervention? What is not clear is how these two principles inter-relate: the stage at which the first principle is no longer applicable and the second must be applied or, in other words, in what circumstances the consent of the incumbent government may no longer be lawfully

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Thomas, p.216-221; L. Doswald Beck, Military Intervention by Invitation of the Government, BYIL, 1985, p. 189. Moreover, with a partly different position, see J.H. Leurdijk, Civil War and Intervention in International Law, NILR, 1977 p.143. See also, contra, Brownlie, p.327.

33. See, e.g., Res.2131(XX)(A/6220), "Declaration on Inadmissibility of Intervention in Domestic Affairs of States and Protection of their Independence and Sovereignty", para.2; and Res.2625 (XXV), "The Principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter".

invoked as the only legal ground for foreign armed intervention. A widely recognized principle of international law is the principle of "internal" self-determination, according to which every people is entitled to choose its own form of government without any interference from outside. A foreign armed intervention in favour of a government which does not enjoy the support of its people, aimed at keeping it in power against their will, would be a violation of the principle just mentioned³⁴.

The most important cases of armed intervention in which an "invitation" (either ad hoc or pursuant to a treaty) was given as a justification in the period after 1945 and before 1970 were carried out by the USSR in Hungary (1956) and Czechoslovakia

34. Oppenheim, p.306; Bennouna, p.54. A definition of "internal" self-determination is given by A. Cassese in Cot Pellet (eds.), *Commentaire à la Charte de l'ONU*, p. See infra p.194
In the G.A. Resolution 2625 (XXV) this principle is embodied part (c) devoted to non-intervention and reads as follows:

"Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State".

It is also reformulated in terms of right of peoples in part (e) devoted to self-determination":

"By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the U.N., all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development and every State has the duty to respect this right in accordance with the provisions of the Charter".

The problem is examined in greater detail in the section of this work devoted to armed intervention with a view to promoting self-determination, infra, p.172

(1968), by the United Kingdom in Oman (1957) and Jordan (1958), by France in Gabon (1964) and in Chad (1968), and by the United States in the Lebanon (1958), in Congo (1964) and in the Dominican Republic (1965). In the period after 1970 they were carried out by Cuba in Angola (1976), by Morocco in Zaire with French support (1977), by France and Belgium in Zaire (1978), by France alone in Chad (1978 and 1983), by Libya in Chad (1980), by the Soviet Union in Afghanistan (1979) and by the United States in Grenada (1983)³⁵. Obviously, the circumstances in which the interventions took place vary greatly from case to case. The range of situations goes from almost total internal peace (and possibly external threat) to total internal disorder. What all these cases have in common is that the existence of an "invitation" was alleged. The problem to be discussed, with a view to identifying a general tendency, focuses precisely on that: the legal value of the invitation in every single case, in the light of the different circumstances.

Moreover, in most cases the invitation was not the only legal ground upon which the intervention was justified. Very often justifications like collective self-defence, protection of

35. See appendix, cases n. 1, 10, 2, 3, 7, 11, 4, 8, 9 and, after 1970, n. 15, 16, 17, 18, 25, 21, 22, 24.

nationals or regional action were also given³⁶. This renders more difficult the interpretation of the behaviour of States. The distinction between all these concepts, although very clear-cut in theory, is somewhat blurred in practice, for States tend to allege as many legal grounds as they can to justify their actions. Furthermore, in some of these cases the consent of the "target" State was given in accordance to a treaty in force between it and the intervening State (and sometimes third States as well), while in the remaining cases there was no such kind of prior engagement between the States concerned³⁷.

5. Cases of armed intervention upon demand of the "incumbent" government.

36. This was true in all the cases mentioned but Muscat and Oman, Jordan, Gabon, Chad (1968) and Afghanistan. In three of the ^{youar cas} however, an external threat was also alleged, even though not very well specified. See, infra, p.35ff.

37. See, appendix;

There seems to be substantial agreement among States on the existence of a right of States to invite foreign troops into their territory. Statements to this effect have been made by many States of all geopolitical areas, in almost all the cases examined³⁸. The problem, once again, is the actual application of the principle in practice, since in most cases it was denied that

38. See, e.g. statement of the British Government in the Oman case, quoted by E. Lauterpacht, "Cont. Pract. of the UK", 7 ICLQ, 1958, p.101; see also with respect to the American intervention in Lebanon, statements in the General Assembly by Australia, Greece, Ethiopia, Ghana: GAOR, 3d Emerg. Spec. Sess. Meet. 734-735. With reference to the U.S./Belgian intervention in the Congo, see SCOR, 19th year, meet. 1170-1189, statements by Nigeria, Ivory Coast, Central African Rep. and Ghana. See also, with reference to the Soviet invasion of Czechoslovakia, SCOR, 23d year, meet. 1441-1445, statements by USSR, Poland, Bulgaria and Hungary; and, with reference to the South African intervention in Angola, SCOR, 31st year, meet. 1900-1906, statement by Pakistan; with reference to the French intervention in Zaire, see statement by Tanzania, RGDIP 1979, p.202. Finally, with reference to the French intervention in Chad, see statements by the UK and Guyana, UN Monthly Chronicle, May-June 1983 and for the Soviet intervention in Afghanistan, GAOR, 6th Emerg. Spec. Sess.. Meet. 1-7, statements by Madagascar, Mozambique and India. Intervention in Grenada, SC debates, UN monthly Chronicle, Dec. 1983, statement by France.

This principle was openly questioned by the Kenyan member during the debate in the ILC on the article on consent. Anyway, this member's proposal to drop consent from the list of the circumstances precluding wrongfulness was rejected. See ILC rep. Debate A/CN.4/SER.A (1538th Meet.).

a certain government was entitled to represent the State³⁹. Nevertheless, very occasionally, when the foreign intervention did not have the purpose of meddling in an internal conflict or helping one faction against another, the territorial State's consent to the operation was seen by everybody as the element which made the whole operation lawful⁴⁰.

States thus deem the principle valid, but pay much attention to the conditions in which the right in question is

39. See, e.g., declaration made by the USSR in the Lebanese case, GAOR, 3d Emerg. Spec. Sess., Meets. 734-5 ; statements by Algeria, Burundi and Congo (Brazzaville), in the Stanleyville case, SCOR, 19th year, meets. 1170-1189; Yugoslavia and Czechoslovakia in the Soviet intervention in Czechoslovakia, SCOR, 23d year, meets. 1141-1145; statements by Tanzania in the Shaba case; statement by Japan in the Afghanistan case, cit., and by France in the Grenada case.

40. This was the case, for instance, in the hostages rescue operation carried out by West German troops in Mogadishu in 1977. Apart from the problem of the legality of armed intervention to protect nationals abroad, in the case in question there is no doubt that the legitimizing effect was provided by the consent given by the Somali authorities. The authority of the Somali government was not being threatened in that moment. The need for a foreign intervention lay simply in the lack of technical means to carry out the operation, without jeopardizing the lives of the highest possible number of hostages; see F. Pocar, "Soltanto il consenso della Somalia ha permesso l'operazione militare", Corriere della Sera, ...Ottobre 1977; Ronzitti, pp.79-80 and 86.

The Mogadishu 'raid' took place in October 1977 (Keesing's 28914 A). The consent of the territorial government was also claimed by Egypt as a justification for its failed hostages rescue attempt, carried out at Larnaca airport, Cyprus, on Feb.19, 1978 (see Keesing's 29303A).

exercised, namely the legal capacity of the entity which expresses its consent to do so.

The next problem is to find out the limits that States put on this "capacity". The object of the analysis in the next few pages will be the identification of common patterns of behaviour which may shed light on the following problem: until what stage, in a given situation, do intervening States deem it legal to intervene exclusively on the basis of the consent (however expressed) of the government of the "target" State? In other terms, under what conditions can consent alone provide a valid legal basis for foreign armed intervention? To give an answer to this question, the justifications given by the intervening States, and the reactions of third States will be taken into account⁴¹.

In some of the cases examined, namely Oman, Jordan, Gabon and Chad (1968)⁴², the external armed intervention (performed either by sending troops from outside or by utilizing troops already stationed in the country concerned by virtue of an agreement) had the main and avowed purpose of "restoring order"

41. The justifications advanced by the authorities requesting the intervention are obviously less relevant in this context for it is the very status of these authorities which is often questionable.

42. See appendix, cases n. 2, 3, 7 and 11.

in the country of the intervention. Particularly in the first two cases, some kind of foreign involvement in the domestic troubles was also alleged (in the Jordanian case the action was also justified as an act of collective self-defence)⁴³, while in the two cases of French intervention, France claimed it was acting under the provisions of a treaty⁴⁴. In the case of Oman, Britain asserted the right of a ruler to seek and receive support and the right for any country to send it upon request⁴⁵. France, on the other hand, stressed that it was acting under the terms of a treaty of mutual defence and co-operation⁴⁶. The two intervening countries mostly justified their interventions on the formal "legitimacy" of the ruler and his capacity to give consent (whether or not pursuant to a treaty) to an armed intervention in purely internal affairs. Anyway, although proved virtually

43. See "British Practice in International Law", 7 ICLQ, 1958, p.99, and 8 ICLQ, 1959, p.151 with comments by E.Lauterpacht. With reference to Jordan, see also GAOR, 3d Emerg. Spec. Sess., cit.

44. See AFDI 1964, p.928-29, and Keesing's 20024A (Gabon) and RGDIP 1969 p.169 and ibid., 1970, p.199.

45. See Lauterpacht. He asserts that the British statement was not meant to have general character.

46. The treaties concerned were signed on July 12th, 1960. See Degenhardt (ed.) Treaties and Alliances of the World, 3d ed., Longman 1981.

inexistent in practice, the presence of an external threat was alleged in two of the cases⁴⁷. Also, it must be taken into account that the countries concerned still maintained a "special" relationship with the intervening States, which had been administering them only a few years earlier. This is obviously not enough to assert that the latter States had a right to intervene; but it is certainly true that they kept a closer eye on them in order to ensure that these new countries, in their first years of independence, did not take a path too far from the one originally planned⁴⁸. Finally, the legality of these operations was questioned both in the intervening countries themselves and abroad⁴⁹.

47. I am referring to Oman and Jordan. In the first case, the insurgents were using weapons of foreign - and unknown - origins. In the case of Jordan the foreign threat was represented by the revolution which had taken place in nearby Iraq, which was said to have been fomented by Syria. Infiltration from this country into Jordan were also reported. See appendix, case n.3.

48. In fact, former "administering powers" were exercising special protection to give the newly born institution time to consolidate and in so doing avoid their possible collapse not as a result of a genuine change of will, but of the action of external forces taking advantage of their intrinsic weakness.

49. See, e.g., the Soviet reaction in 8, ICLQ, 1959, p.154, or the reactions in the French Parliament, as quoted by RGDIP, 1970, p.199. The British operation in Oman was openly condemned by Iraq

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Also in all subsequent cases, the existence of an explicit invitation expressed by some authority within the target State was claimed as a justification. This justification, though, was coupled with other justifications of a different legal nature such as collective self-defence, or protection of nationals (and sometimes more than one at the same time)⁵⁰. Among these cases, two main categories must be distinguished: the first includes all cases of intervention in situations of rather clear internal unrest, with well-distinguished factions. The consent, in these situations, was given by an entity representing one of the factions. The second category also includes cases of intervention in situations of internal unrest; in these cases, though, the body requesting the intervention did not directly represent any

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and by the USSR. Iraq maintained that, being a war between two independent States, the United Kingdom could only intervene in collective self-defence or within the framework of a U.N. sanction, but this was not the case.

The reactions to the British operation in Jordan were somewhat commingled with those to the U.S. intervention in Lebanon which took place at the same time.

The reactions in the French Parliament mainly concerned the power of the French government to undertake this kind of operation under the terms of the existing agreement. They did not focus on the legality of intervention by invitation as such. See, appendix, cases n. 2, 3 and 5.

50. See appendix, section 3 of each case.

of the factions (in some cases it was not even possible to speak of clearly formed factions) and did not enjoy a position of effective power either. The reason for the distinction is that in the latter category the purpose of the intervention was "to restore order" rather than to take sides in the fighting⁵¹. Four cases, it will be seen, do not fit into this classification. They will be considered separately because they present special problems.

6. Cases of intervention in favour of one of the parties in an internal conflict.

51. The distinction reflects three very common situations: the case of an established government (for historical reasons, for succession rights etc) with a certain degree of effectiveness and one or more adversary factions fighting against; the case of anarchy with clearly formed factions, with none of them in a position to claim any "legitimacy" and, finally, the case of anarchy with or without clearly formed factions, with the presence of a body, deprived of any effectiveness, out with "formal" authority.

The first category includes the American intervention in the Lebanon (1958), the "Stanleyville operation" performed by Belgian paratroopers (with US support: in the Congo in 1964, the Cuban intervention in Angola in 1976, the French and Libyan interventions in Chad and the Soviet intervention in Afghanistan in 1979.

The American intervention in the Lebanon in 1958 was carried out at the request of President Chamoun. Prior to the intervention, President Chamoun had addressed a complaint to the Security Council alleging "illegal infiltrations" from the neighbouring U.A.R.. The Security Council had decided to send UN observers to the border between the two countries with a view to verifying the facts alleged in the Lebanese complaint. After little more than a month President Chamoun requested the United States to intervene. In so doing, the Americans gave a threefold justification based on collective self-defence against an indirect aggression, consent of the legitimate government and protection of American citizens abroad. In accordance with article 51 of the Charter, the action was immediately reported to the Security Council, which met but failed to take any position

because of the Soviet veto⁵².

Although criticized in the literature, the American intervention received the support of a large part of the world community. In harshly condemning it, the USSR stressed the inexistence of an external threat and the inadmissibility of an intervention with the sole purpose of supporting the Chamoun government. The countries supporting the action acknowledged the existence of an external threat⁵³.

In the Congo, the armed intervention had the limited purpose of rescuing the European citizens resident in Stanleyville. The operation, carried out by Belgian troops with American support, had been authorized by the central government of Léopoldville led by Moïse Tshombe. This government had no effective control over the area of the operations, which was held

52. On the Lebanese case see, appendix, case n. 4 and, in general: statement of Pres. Eisenhower, DSB, Aug. 4, 1958, p. 181; Statement of the British Foreign Secretary, 8, ICLQ, 1959, p. 148; message of compliments to the American Govt. from Turkey, Iran and Pakistan, 39 DSB, p. 183;

See also Wright; Dupuy, Agression indirecte; M. Kerr, "The Lebanese Civil War", in Luard (ed.), International Regulations of Civil Wars, London, Thames and Hudson, 1972; P.B. Potter, "Legal Aspects of the Beirut Landing", 52, AJIL, 1958, p. 727.

53. See statements by the USSR and Sweden, and statements by France, United Kingdom and China, SCOR, 13th year 831st meet.

by rebels, who had their capital in Stanleyville⁵⁴. The operation was limited to the humanitarian purpose it had been conceived for and did not have any serious influence on the positions of the two parties. Despite this, it was condemned by most African countries which also questioned the authority of the Tshombe government to authorize operations of this kind in areas not under its control. The countries which approved the operation stressed its humanitarian character (which was emphasized by the intervening States themselves). A resolution requesting States to abstain from intervention in the Congo was approved at the UN⁵⁵. In sum, the States which approved of the intervention put the stress on the justification based on the protection of nationals,

54. On the Stanleyville operation, see E. Luard, "The Civil War in the Congo", in Luard (ed.); D.W. McNemar, "The Post-Independence War in Congo, in Falk (ed.), The International Law of Civil War, Baltimore, J.Hopkins, 1971, p.245; R. Falk, Legal Order in a Violent World, pp.324-35; C. Hoskyns, OAU and the Congo Crisis, Dar Es Salaam. See, moreover, appendix, case n.8.

55. See statements in the SC by USSR, Algeria, Burundi, Congo (B.), Ghana, Guinea, Kenya, UAR, Tanzania, and those by France, Brazil, China, Bolivia and Norway. Nigeria, Ivory Coast and the Central African Rep. stressed the legitimacy of the Léopoldville Government; SCOR, 19th year, meet.1170-1189. Resol.(SC) approved on 30.12.64 with 10 to 0 + 1 abst.(France), (S/6129).

On the debate at the United Nations, see K.J. Twitchett, "The racial issue at the United Nations: A Study of the African States' Reaction to the American-Belgian Congo Rescue Operation of November 1964", Int.Rel., 1965, p.830. See, moreover, A. Gérard, "L'opération Stanleyville-Paulis devant le parlement Belge et les Nations Unies", RBDI, 3 (1967), p.242.

the States which criticized or condemned it questioned the validity of an invitation issued in these conditions.

Much more complex is the case of Angola. The consent to the Cuban intervention was given by one of the three National Liberation Movements (MPLA), which only controlled 20% of the territory, before Angola had even attained independence⁵⁶. The justification given, apart from the "consent of the Angolan government" (whatever was meant by this expression) were that the operation constituted a reaction against a previous South African intervention, and a general "revolutionary solidarity"⁵⁷.

At the moment of independence, the MPLA government (which was still in control of only a limited part of the Angolan territory), had obtained the recognition of part of the international community, while the opposing movements (which had constituted another government) had not then been recognized by any State. Nevertheless, it is also clear that the Cuban troops

56. In the period immediately before independence the official government was still the Portuguese administration. In the last months, though, they had lost all effective control of the country. For a detailed account of this period, see C. Legum, "Foreign Intervention in Angola", Afrique Contemporaine, 1975-6, pp.A3-A38; Bennouna, p.339-40; P. Jimenez, "La intervencion extranjera en el conflicto angolés y la adecuacion a las normas de derecho internacional, Rev. Jur. Univ. Puerto Rico 45, 1976 3/4; p.329. See also RGDIP, 1976, p.1098 and 1977, p.554.

57. See statements by Pres. Castro, RGDIP 1977, and Jimenez, p.345.

played a major role in the subsequent conquest of the rest of the territory by MPLA. Although the international reactions mostly focused on the previous South African intervention (which was generally condemned), many countries condemned the Cuban involvement as well⁵⁸. The States which supported it (among which were obviously all the countries that had recognized from the very beginning MPLA as the lawful government of Angola) stressed its defensive character.

It is very difficult to draw conclusions of any kind from the Angolan situation: if the Cuban intervention was not (or not only) an act of collective self-defence against the South African aggression (even admitting that MPLA was entitled to ask for it), but had the main purpose of helping MPLA to gain control of the whole country, the international community was so deeply divided in its reactions that it is not possible to glean from the incident any objective criteria to identify the faction legally entitled to ask for foreign intervention. It is however true that those countries recognizing MPLA as the legitimate government of Angola, did not assert that it had the right to ask for a foreign

58. These countries were China, South Africa, Italy (on behalf of EEC countries), UK, France, Japan and the US; see SCOR, 31st year, meet.1900-1906. Res. 387 (1976) adopted by 9 to 0 with 5 abst. and China not participating to the vote. The resolution only condemned the South African intervention.

intervention to crush the other factions, but only that of seeking help to face the South African attack⁵⁹.

Even more complex is the situation of Chad. Taking only the main events into account, in the period between 1978 and 1983 the internal conflict in the country had practically been continuous. In the same period Chad had witnessed three different foreign interventions - two carried out by France, and one by Libya -, and each of them at the request of the "legitimate" government, i.e. the government which in that moment controlled the capital N'djamena (located in the South). The French intervention in 1978 had been justified by the need for protection of French nationals and as a reaction against an alleged Libyan involvement. In 1983 it had been again justified as a reaction against a previous

59. See, e.g. the representative of Kenya, speaking on behalf of the African group of States at the UN who asked the Security Council "to condemn the racist régime of South Africa for using Namibia for aggressive purposes against the People's Republic of Angola; or the Chinese representative, speaking about an armed aggression against Angola by South Africa. The USSR representative stated that in the face of south African troops (helped by mercenaries) advancing towards Luanda, "like all socialist countries the USSR could not remain indifferent to the fate of the Angolan people and had decided to help them", U.N. Ybk., 1976, pp.173-5.

Libyan attack⁶⁰. The Libyan intervention in 1980, which had also taken place upon request of the government (at that moment led by the former chief of the rebels) while the civil war was still going on, was justified as technical and humanitarian aid and by the "fusion of the Chadian and Libyan peoples"⁶¹. In that kind of situation, it seems clear that nobody had ever been fully in control of the country. Consequently, the intervening powers were conferring legitimacy on the party that had invited them. World reactions (in 1983) were rather uncertain: a few countries backed Libya, stressing that Libyan troops were in Chad at the request of the legitimate government which had been illegally ousted. States which supported France clearly did so by upholding the plea of collective self-defence. A third group of States,

60. On the succession of events, see appendix cases n. 18, 21 and 25; RGDIP 1979, p.1047; 1980, p.908; 1984, p.288. On the French justification, see AFDI 1978, p.1090; 1979, p.907; 1980, p.875; 1982, p.1075; 1983, p.914. See also Keesing's: 29125 A; 30067; 30693; 32591 A and C. Legum, "Foreign Intervention in Africa", YBWA 1980-81; Guilhaudis, "Remarques à propos des récents conflits territoriaux entre Etats africains: Bande d'Aouzou, Ogaden, Saillant de Kyaka", 1979, AFDI, p.223; Treaty of Mutual Defence between Chad and France, cit.; J.P. Cot, "The role of the Inter-African Peace-Keeping force in Chad (1981-82)", in Cassese (ed.), Current Legal Regulation p.167.

61. See AFDI 1978 and 1983 and RGDIP, 1984, supra, n.60.

finally, condemned all foreign intervention in Chad⁶².

In the case of Afghanistan, the situation is also confused, since the exact circumstances in which the Afghan government consented to the intervention have never been completely clarified⁶³. The declaration that the Soviet Union had met an Afghan request for help was made on December 28th 1979. It followed an announcement made on the previous day concerning the overthrow of President Amin's régime by Babrak Karmal (who had arrived meanwhile from Czechoslovakia). Soviet troops had already been in Kabul since December 25th, while five other divisions had been massed at the border in preparation for the invasion.

There are no doubts that there had been a situation of internal unrest in the country during the few weeks previously, with entire areas in rebellion or threatening to rebel against the central government. Still, the question of who had actually

62. See, for the first group, statements by Dem. Yemen, Iran, Nicaragua, Syria; for the second, see stat. by France, Guyana, US and Zaire; for the third, see stat. by China, the Netherlands, USSR: see SC meetings 3, 11, 12, 16 and 31 August, UN Monthly Chronicle, Oct. 1983, p.11.

63. For an account of events, see appendix, case n.22, RGDIP 1980, p.826, and Keesing's 30229 A; see also Alajmo, p.287; F. Cetinic, "Sovjetska Intervencija u Afghanistanu" (Summ. in French), Jugosl. Rev. za Medunar. Pravo 1981, p.153; "Legal responses to the Iranian-Afghan Crises", 74 PAS 1980, p. 248ff.; J. Hacker, "Voelkerrechtliche Aspekte neuerer Interventionsfaelle", 31-2 Recht Ost West, 1987, p.65ff.

issued the invitation, and when, is somewhat unclear. The remarkable number of Soviet troops in Kabul before the overthrowing of President Amin, indicates that they were there with his consent, but it seems now unquestioned that his overthrow was organized (or at least covered) by the Soviets themselves, who started their military operations in full scale only after Karmal had assumed power. As neither of the two leaders could realistically be regarded as on the side of the rebels, the overthrow of Amin probably served to enable the Soviets to move more freely, rather than to impose a politically different leadership⁶⁴. This fact is particularly important. Both the USSR and the new Afghan government stressed that the intervention was based on self-defence against an external threat, according to the 1978 Treaty of Friendship between the two countries⁶⁵.

64. See, in this sense, J. Collins, "L'armée soviétique en Afghanistan", in Brigot A., Roy O. (eds.) La guerre de l'Afghanistan: Intervention soviétique et résistance. Paris, La Documentation Française, 1985, p. 55 at 55-6.

65. For a text of this treaty see RGDIP, 1980, p.965.

N.B.: article 4 only provides for reciprocal help in case of external threat and only in a very vague form ("se consulteront réciproquement e prendront les mesures appropriées").

See, moreover, statements of the Soviet and Afghan representatives at the General Assembly: GAOR, 6th Emergency Special Sess., meets. 1-7, p.5 and p.20.

The international reactions to the invasion were overwhelmingly negative. Only a few of the statements made by third States focused on the question of the legality of intervention by consent in that situation (and only to doubt that consent had been given at all)⁶⁶. All statements focused on the plea of self-defence and denied the existence of an external threat, thereby questioning the right of the USSR to intervene simply to crush an internal rebellion. Given the vehemence of the almost universal condemnation and subsequent reactions, and the rejection of the justification based on self-defence, it seems doubtful that third States would have accepted the intervention if the invitation had been issued by Amin instead of Karmal, or if the brisk and somewhat suspect change of leadership had not taken place⁶⁷. What seems relevant in this case, is that in Afghanistan the situation of internal unrest, although very serious, had not (yet?) then reached the stage of a full-scale

66. See appendix, case n.22. See, moreover the survey of the relevant reactions of all groups of states in Brigot-Roy, annexe, p.139ff.

67. E.g. Alajmo, p.287. The author examines in depth the problem of the consent given by the Afghan government. She rules out the possibility that Karmal could ever have given a valid consent, but leaves open the question of whether, had the consent been given by Amin instead - and had Amin not been killed - ,the operation could have been held lawful.

internal conflict⁶⁸. The right of the central government (whether it was Amin or Karmal is not important, since both were on the pro-Soviet side), to ask for external help in the absence of an external threat was almost universally denied. By the same token, many stressed the principles of non-intervention and self-determination⁶⁹.

A common feature of the cases just examined is that, in relation to situations of rather clear-cut internal unrest, States seem reluctant to justify their intervention solely on the

68. Collins describes the situation as follows: " En décembre 1979 la vision soviétique de la situation est la suivante: selon les déclarations du général Pavlovski, commandant en chef des forces terrestres, le régime d'Amin était en train de s'effondrer et l'armée afghane, qui n'avait aucune base politique, ne pouvait plus se battre contre la rébellion, l'économie s'écroulait et le gouvernement ne contrôlait plus que dix-huit des vingt six provinces de l'Afghanistan"

It is clear that there was no real external threat and that the rebellion was purely internal. It is however important that the Soviets asserted its existence, because it conforms that even the Soviets did not believe that the consent of the ruler would have been sufficient to authorize a foreign intervention against the will of the local population. Claiming that the rebellion was fomented by foreign imperialists would have made the matter look much different.

69. See statements in the Sec. Council 35th year, meet. 2185-2190 made by the UK, China, France, Japan, Liberia, the Netherlands, West Germany. See also in the General Ass., GAOR, 6th Emerg. Spec. Sess., Meet. 1-7, statements issued by Senegal, Pakistan, Kenya, Nigeria, Kuwait. Almost all these countries stressed the principle of self-determination of the Afghan people. In its official reaction, the US stated that the Afghano-Soviet Treaty of Friendship was in violation of the article 103 of the Charter and of Jus Cogens; see, in this sense, AJIL, 1980, p.418.

basis of the consent given by one of the parties even in cases where the party asking for intervention is regarded as the lawful government for one reason or another. Conversely, there is a growing tendency for third States to support these actions only when they are prima facie defensive against an external threat.

Two general observations can therefore be made:

a) apart from the requirement of effectiveness, a generally accepted criterion for considering a government the "legitimate" authority in these situations, hence entitled to ask for foreign intervention, cannot be deduced from these cases⁷⁰. In my opinion, such a criterion is nowhere to be found in the international community nowadays, for lack of agreement, among the relevant groups, on the intrinsic characters a government

70. In fact in the Lebanon the constitutional government had asked for it, but this criterion is not applicable to Angola, where the "formally lawful" government was still Portugal at the time when the intervention started. In Chad the "lawful" government had asked for the Libyan intervention but then it had been "illegally" ousted by another government which had thereby become the "lawful" one (although never controlling the totality of the country) and had asked for the French intervention. Yet, international reactions did not follow the criterion of the "legally established" government, because they were certainly more negative at the time of the Libyan intervention than, later, when France did the same, despite the uncontroversial fact that the former had been requested by the "lawful" government. In Afghanistan, finally, the request for help of the government "in charge" had been virtually unanimously condemned but, once again, if the intervention had been requested by the head of state in charge, President Amin, reactions would not have been very different.

should fulfil to be considered "legitimate". As a consequence, a common policy aimed at granting "recognition" to some governments while denying it to others does not exist⁷¹;

b) intervening States seem to be more and more aware of this and tend to avoid the problem by always invoking other legal grounds for their actions.

There is therefore a practical erosion of the sovereign right of a government to ask for help, even when it is faced with only limited internal unrest. The application of the correlative right of "internal" self-determination, which prevents foreign States from keeping a certain government in power against the will of its people, seems to be enlarging. One could attempt to

71. Doswald Beck, instead, asserts that "the personality of the State, having as its components territory and people, could thus be represented by a body other than the regime in power, if that body is perceived as more truly representing the State, as in the case now with Kampuchea. Such a body would be in a position to complain of the breach of the duty of non-intervention against the State". Doswald-Beck, p.243.

It is difficult to share this view, because it would make the legal personality of a State dependent on the recognition policy of the international community. It can certainly be asserted that that a government propped up and kept in power by a foreign State should be denied recognition (as in the case of Kampuchea or Northern Cyprus), but the reason for this is once again the lack of effectiveness, for that government would not be able to keep itself in power thereby lacking one of the fundamental requirements an international legal subject should fulfil. If, conversely, a government is propped up by an illegal foreign intervention, but then manages to stay in power and be fully effective, it is difficult to see how it could be denied a full international legal personality (see, e.g. Bangla Desh).

explain the ratio of what just said. Besides the increasing importance of peoples and of their rights as distinct from those of States, another reason certainly lies in the disproportion between the powers conferred upon an authority of possibly doubtful standing and their immediate effects on world peace. The purpose of the international regulation of the use of force is to avoid conflict to the greatest possible extent by making the relevant rules as clear and stringent as possible. It would run against this very purpose to enable an authority within a State to transform an armed conflict into an international one, without general agreement about both the requirements this authority should fulfil to exercise this power, and the standing and the rights of other entities within the same State.

7. Cases of intervention to "restore the order" in absence of an established authority.

The cases of the second category differ mainly in two respects: first, the entity asking for intervention is not directly connected with any of the fighting factions but is, so

to speak, super partes; second, one of the purposes of the intervention, at least officially, is to "bring peace" (or to keep it) without taking sides in the fighting. The question therefore is to what extent such an entity or body can be deemed to be legally entitled to issue an invitation, if no one else can speak on behalf of the State.

The two relevant cases in this category are the American-Caribbean intervention in Grenada in 1983, and - less important from this point of view - the American intervention in the Dominican Republic in 1965⁷². In the latter case, the justification based on consent played a minor role as compared to the two main justifications, namely the protection of nationals (as an initial justification for the American intervention)⁷³ and regional peace-keeping action (to justify their staying on there, together with an inter-American force). Apart from these considerations, an invitation had in fact been issued, according

72. On the American intervention in the Dominican Republic see, appendix, case n. 9 and, in general, Bell, The Dominican Republic, Boutler, Colo., Westview, 1981; Bohan, "The Dominican Case: Unilateral Intervention", 60 AJIL, 1966, p.809; C.G. Fenwick, "The Dominican Republic: Intervention or Collective Self-Defence", 60 AJIL, 1966, p.64; CAREY (ed.), The Dominican Republic Crisis 1965, New York, Oceana, 1967. On the American justifications, see L.C. Meeker, "The Dominican Situation in Perspective of International Law", 1965, DSB, pp.60-65.

73. For a discussion on the legal admissibility of this justification, see, infra, p.202 ff.

to the statements of the American authorities (particularly of President Johnson), by "Dominican law enforcement officials" or "anti-rebel military and police authorities"⁷⁴. It is by no means clear exactly what status these authorities had (although it is very likely that they were somehow connected to the loyalist, right wing faction) and whether or not they had the authority to issue such an invitation. The invitation, however, issued by a Colonel Benoit, expressly referred to the American nationals in danger. The subsequent operations were justified in a different way⁷⁵.

The United States paid much attention to showing that they were not taking sides in the internal struggle which was going on, and stressed the humanitarian and peace-keeping aim of the entire operation. Both in the statements of the U.S. and in the reactions of third States the question of consent was not given much consideration. The reactions in the Security Council, however, were not unanimous. States condemning the action

74. The first expression was used by President Johnson, see 52, DSB, p.738; the second one was employed by Meeker, cit, p.60.

75. See appendix, case n.9. There was however a vote within OAS which authorised a peace-keeping force to be dispatched there. Indeed, the OAS peace-keeping force was composed of soldiers of different nationalities, even though the bulk of it was obviously constituted by Americans. The question of the compatibility of this OAS decision with the obligations under the UN Charter, will be discussed later.

stressed that the principle of non-intervention should have been applied on this occasion. Those approving of it underlined the emergency character of the situation, and recognized the power of the US to undertake such an action within the OAS framework⁷⁶. Moreover, the Security Council did not condemn the American action limiting itself to the approval of cease-fire resolutions⁷⁷.

However difficult it may be to draw conclusions from these data as far as consent is concerned, one cannot help but notice that part of the international community (and not only western powers) still supported the right of an outside power (although subsequently backed by a regional organization) to intervene in other States for purposes such as "keeping the peace" or maintaining order⁷⁸.

76. See statements in the Security Council, 20th year, Meets. 1208-1217, made by the USSR, Cuba, Uruguay, Jordan and of Bolivia, France, the Netherlands and Ivory Coast.

77. Res. 203 (1965)(S/6355), and Res. 205 (1965)(S/6376).

78. See in this sense all cases examined in the first group, supra, p.32. It is interesting to notice that the concept of intervention "to restore order" was more common in the fifties and sixties than later. Even though the relationship between the United States and the Dominican Republic is not comparable with that between Britain and France and their former colonies or protectorates, this kind of operation seemed to be more acceptable at that time than later.

The justification based on consent played a much more relevant role in the recent intervention carried out by joint American-East Caribbean forces in the island of Grenada in 1983. This intervention followed a situation of internal unrest caused by the overthrow by military radicals of the left-wing government led by Maurice Bishop, and the subsequent establishment of a revolutionary council⁷⁹. The alleged legal grounds for the intervention were somewhat similar to those given in the case previously examined: consent of the lawful authority, protection of nationals and regional peace-keeping action. A differentiating point was that while in the Dominican republic a full scale internal conflict was taking place, here there was only a situation of general turmoil, since the authority of the new council was not fully established yet, and the unrest itself was

79. On the Grenada action see, in general, appendix, case n. 24, and RGDIP 1984, p.484, J.N. Moore, Law and the Grenada Mission, Charlottesville, 1984; W.C. Gilmore, The Grenada Intervention - Analysis and Documentation, London, Mansell Publishing, 1984. The amount of literature on this case is massive. I shall cite only some of them: J.H.H. Weiler, "Armed Intervention in a Dichotomized World: the Case of Grenada", in Cassese (ed.) Current Legal Regulation, p.241; L. Doswald-Beck, "The Legality of the U.S. Intervention in Grenada", 31-3, NILR, 1984, p.355; M.J. Levitin, "The Law of Force and the Force of Law: Grenada, the Falklands and Humanitarian Intervention", 27-2, Harv. Int'l Law Journ., 1986, p. 621ff.

at a much earlier stage⁸⁰. Consequently, the American residents on the island did not seem, at least at that stage, threatened. For these reasons, the justification based on the invitation by the Governor General Sir Paul Scoon has greater relevance.

Sir Paul Scoon was the Governor General of the island. Since Grenada is a member of the British Commonwealth, under the 1974 constitution he was the local representative of the Head of State. After the left-wing coup in 1979, the constitution had been suspended but he had kept his position, although his functions were mainly formal and he wielded no real power. After the military takeover the situation was still too fluid to say what his position was. However, he had not been formally dismissed from his office (not at that stage, at least) and, although he had no real power, nobody else seemed to be fully in control of the situation. He seemed to be, therefore, prima facie the highest - and still unchallenged - authority of the State. Moreover, according to the results of an opinion poll held on the island after the operation, the population was overwhelmingly in favour of the intervention. This argument, although of dubious

80. For the official statement of the American Government see AJIL, 1984, p.200. As well as in the Dominican Case, a communist threat was also mentioned as a cause for intervention, but it was not included among the official justifications. For a description of the situation after the military coup, see Moore, Law and Grenada, p.5 and ff.

legal value, provides some evidence in favour of the "moral power" of the Governor General to issue an invitation⁸¹.

The reactions of the world community were almost unanimously negative (although the resolution approved by the General Assembly did not openly condemn the intervention)⁸². In particular, some countries like France explicitly denied that the principle allowing intervention by invitation was applicable in this case⁸³.

81. Some doubts have in fact been cast about the time at which consent was given and about whether it had really been given spontaneously. See, in this sense, Gilmore, p.54.

As will be discussed later in an appropriate chapter, the U.S. intervention was also condemned because the life of U.S. nationals was not really in danger and the US troops did not depart as soon as the alleged danger was over.

82. See statements made in the Security Council by Cuba, Colombia, Mexico, Venezuela, France, Jordan, the Netherlands, Pakistan, Poland, USSR, Guyana, Malta and (somewhat more mildly) the UK, UN Monthly Chronicle, Dec. 1983, p.15.

Resolution asking for the withdrawal of foreign troops and for free elections approved by the General Assembly by 108 votes to 9 (Antigua and Barbuda, Dominica, Barbados, El Salvador, Israel, Jamaica, Saint Lucia, Saint Vincent, USA) and 27 abstentions (Belgium, Belize, Canada, Central African republic, Chad, Equatorial Guinea, Fiji, Gambia, Germany (F.R.), Guatemala, Haiti, Honduras, Ivory Coast, J, Luxemburg, Malawi, New Zealand, Paraguay, the Philippines, Samoa, Salomon Islands, Sudan, Togo, Turkey, Cameroon, Zaire) 2.11.1983.

83. See statement by France, UN Monthly Chronicle, cit., p.21. "France had been troubled by the tragic death of former Prime Minister Bishop of Grenada. Its concern had increased at news of

(Footnote continues on next page)

Also with regard to this second category, one can discern a certain tendency of the international community to apply the principle which is the subject of this chapter within increasingly restrictive limits. What is particularly interesting in these two last cases is that, although the interventions had somewhat "objective" and "impartial" purposes, or were aimed at enforcing universal values like peace, order or human rights⁸⁴, there is increasing awareness, even within the community of Western States, of the relative character of these concepts in the world community taken as a whole, and of the fact that they cannot override the right of every people freely to choose their own form of government without outside interference. Consequently, the legal capacity of entities such as "law

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the foreign armed intervention in the island. France deeply deplored the intervention. The justifications for it, relating to the internal situation of Grenada, were not admissible. International law and the U.N. Charter authorized intervention only in response to the legitimate authority of a country or upon decision of the Security Council".

84. In this sense the statement by the US delegate Kirkpatrick: "...That perspective treated the prohibition in the Charter against the Use of force as absolute. But that prohibition was contextual, not absolute. It provided justification for the use of force in pursuit of other values also inscribed in the Charter, such as freedom, democracy and peace." UN Monthly Chronicle, cit., p.17.

enforcement officials" or "formal constitutional authorities" to invite foreign troops in, even for the enforcement of the aforementioned values, is increasingly questioned. This remark provides another element to be taken into account when trying to answer the question put at the beginning of this chapter⁸⁵.

8. Other cases of armed intervention by invitation.

There are two more cases in which the consent of the "target" State was claimed as one of the justifications for intervention: the two Soviet interventions in Hungary (1956) and

85. The first element, see supra, p.374, is that in the situation examined before, where there is an incumbent government and an insurgent party, both the intervening State and the requesting government have stressed the existence of an external threat. International approval has been greater, the more realistic has this external threat appeared. There was practically no international approval, when there was no such threat, to show that a government whose effectiveness is seriously challenged from inside has no right to ask for help. The second element is that, in situations of anarchy or general turmoil, with nobody claiming to be "incumbent", nobody should have the right to ask for external help.

Czechoslovakia (1968). The general background and the succession of events of these two cases are well known⁸⁶. These cases fall out of the classification made before. In the first (Hungary), there had been indeed a situation of unrest, because in large demonstrations people had shown dissatisfaction with the policies carried out by the leadership. The situation was however almost solved because the new leadership had decided to embark on new policies, more in line with the people's will. The Soviet intervention was carried out precisely because of this change of policy. The Soviets intervened, propped up a government which stated it had invited them in, and toppled the previous one. In Czechoslovakia the situation was not very dissimilar. There, however, there had not even been internal unrest like in Hungary. The new leadership of the Communist Party, led by Alexander Dubcek, had been carrying out for a few months a reform programme. The Soviets (and other Warsaw Pact countries) intervened to block it alleging the existence of a conflict between the forces against Socialism and those in favour of it, who had invited them for this very reason (and who were installed in power as a result of the intervention).

86. See, however, in general, appendix, cases n.1 (Hungary) and n.10 (Czechoslovakia).

It is therefore unquestionable that at the time of the intervention the authority of the government was not challenged by anyone within the country concerned. Furthermore, the entity asking for intervention was not the established government: the established government unequivocally stated it had never issued any kind of invitation to the Soviets (or other Warsaw Pact troops)⁸⁷. Finally, an ex post consent had been given by the authority which had seized power as a result of the intervention. Here, therefore, the question is certainly not that of assessing the power of the authority issuing the invitation to do so, for both cases fail even prima facie to comply with the basic requirements for a legally valid expression of consent. As in the case of Afghanistan, anyway, one may doubt that the strong wave

87. See statement by Imre Nagy, Hungarian Prime Minister before the invasion, as quoted by F.Fejto (histoire des democraties populaires, p.123):

"La lutte qui s'engage est la lutte du peuple hongrois pour la liberté, contre l'intervention russe. Je ne pourrai peut-être plus rester à mon poste qu'une heure ou deux. Le monde entier verra comment les forces armées écrasent la résistance du peuple hongrois au mépris de tous les traités et de toutes les conventions..".

See also the protest declaration addressed by the Czechoslovak government to the other socialist countries:

" Le gouvernement de la Tchécoslovaquie déclare que ni le gouvernement ni aucun autre organisme constitutionnel du pays n'a jamais donné son accord à l'invasion et à l'occupation de la Tchécoslovaquie. L'occupation de la Tchécoslovaquie par la force est contraire à la Charte de l'ONU, au Traité de Varsovie et aux principes fondamentaux du droit international".

RGDIP, 1969, p.254-5.

of condemnation from the international community could have been avoided, for example, if the authority issuing the invitation had been the "incumbent" leader wanting to preserve the status quo and scared by the pressure towards reform from below, rather than a puppet government propped up by the intervenors. Condemnation stemmed from the awareness that the people wanted a change of policy, had obtained it from the territorial government, but that a foreign power was employing armed coercion to impose the unwanted policies against people's will. In substance, the foreign interventions amounted to a violation of the right to self-determination of the Czech and the Hungarian peoples⁸⁸.

9. Consent pursuant to a treaty.

88. Other justifications were however put forward to give a legal basis to the foreign intervention in these two cases. See infra, p.1244. For a general discussion on the facts and legal implications of these two cases, see D. Manai, Discours juridique soviétique et interventions en Hongrie et Tchécoslovaquie, Droz, Geneve, 1980.

In some of the cases so far examined one of the justifications for armed intervention was the existence of a contractual engagement between the two States, and the fact that the action had been undertaken pursuant to that engagement. The question is, therefore, whether the existence of a treaty between the States concerned entails special legal consequences as compared with an armed intervention carried out on the basis of an "ad hoc" invitation⁸⁹. It is indeed worth discussing this issue: since in most cases it is questioned whether a certain government did actually express its consent to foreign intervention, and whether this government enjoyed enough effectiveness to be legally entitled to do so, it could be asserted that the existence of a previously given consent could solve all these problems and render the legal grounds for intervention unchallengeable.

A first remark to be made is that most of the treaties invoked provided for reciprocal assistance only in case of external threat⁹⁰. Hence, as far as these treaties are concerned,

89. The existence of a treaty as a basis for the armed intervention was claimed in the following cases: Hungary, Gabon, Dominican Republic, Chad (1968), Czechoslovakia, Chad (French Interv.), Afghanistan, Grenada. They are all mutual defence agreements, on a bilateral or regional multilateral basis.

90. E.g. Brownlie, p. 195 n.32.

the question is outside the scope of the present chapter and will be examined with reference to the concept of self-defence.

The treaties relevant in this context are those which give a right to each party (and even to only one of them), to intervene in each other's internal affairs, and to restore law and order upon request of the government⁹¹. Yet, the essential question does not appear to be substantially different from that discussed so far. For, if the problem is the effectiveness of the "inviting authority" (which is the one that is to be helped to restore the order), the fact of having previously concluded a treaty with a foreign State does not make that authority more "effective" than it would have been without having done so. Nor could the foreign power claim to be applying the treaty "bona fide" if it intervened to keep in power or to restore an authority which had just been overthrown by its own people or was on the verge of being overthrown. It is certainly true that there have been a couple of cases in which the legality of such intervention was practically unquestioned, but in the same period other cases of intervention "to restore order" on the basis of ad hoc consent were also unquestioned, while later the existence of a treaty did not seem to make much difference. It should also be

91. In the Chad and Gabon cases, the inexistence of an external threat did not prevent the treaty from being applied.

observed that contractual engagements of this kind are rather typical of the immediate post-colonial era, when the old colonial powers maintained special rights in order to help the new States in the first stages of independence.

On the whole it does not seem that the existence of these treaties modifies in any considerable way the remarks made so far. For, if the principle of "internal" self-determination is gaining more and more importance, it cannot be overridden by a contractual engagement any more than by an ad hoc expression of will⁹². Moreover, if one regards, as some do, self-determination of peoples as a peremptory norm, any agreement in this sense would be invalid anyway⁹³.

92. It is true that on several occasions the problem of the existence of a treaty was raised in internal debates in the country resorting to intervention (see, e.g., France when intervening in Chad or in Gabon). There are however two aspects of the question which ought not to be confused: the first is the importance, at the international level, of a treaty providing for mutual assistance. Intervening States tend to claim they acted under the terms of a treaty because this might, in their opinion, legitimize to a greater extent the whole operation, especially if they can show that the circumstances giving rise to the intervention had been foreseen in advance and that the target State was aware from the beginning of the possible consequences. The existence of a previously concluded agreement may however also be extremely important from a purely internal viewpoint, to justify, for instance, the undertaking by the government of armed operations without previous consultation of Parliament or of other State organs.

93. See, e.g. the US position with regard to the USSR-Afghanistan mutual assistance treaty, supra, n....

A special case is the Treaty of Guarantee of Cyprus which, at article IV, enables Cyprus' guaranteeing powers to take the necessary measures to ensure the observance of the treaty⁹⁴. Some interpret this provision in such a way as to allow - under certain conditions - unilateral use of armed force by any of the guaranteeing powers⁹⁵. Assuming that this is the case, under the terms of the treaty the "ad hoc" consent of the Cypriot government would not be necessary for the armed intervention to be legal.

I shall leave aside the problem of the legality of the Turkish armed intervention of 1974 which, according to most authors and States was in breach of the treaty anyway, both for procedural and substantive reasons, and focus only on the terms

94. Article IV of the Treaty of Guarantee reads as follows: "In the event of a breach of the provisions of the present treaty, Greece, Turkey and the United Kingdom undertake to consult together with respect to the representations or measures necessary to ensure observance of those provisions.

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

382 UNTS, p.3, n.5475 (Treaty of Guarantee, Signed at Nicosia on 16 August 1960).

95. E.g. Ronzitti, p. 126ff., who also disposes of the objection that such treaties would contravene article 103 of the Charter. See, contra, Doswald Beck, p. 250.

of the treaty⁹⁶. Under its terms an external intervention is in fact allowed - once certain procedural conditions are fulfilled - for the purpose of countering any threat to the status quo (which includes a certain balance between the Greek- and the Turkish-Cypriot communities). This is, in other terms, a kind of "external guarantee" of the self-determination of the two peoples against possible abuses from each of them (and possibly from the government which is in power at that moment)⁹⁷.

The problem is that if one holds that the consent of the government of Cyprus is a necessary pre-condition for any external armed intervention, this is incompatible with the terms of the treaty and might also go against its purpose, which was to safeguard the community in a weaker position, which might prove necessary even against the government itself. If, conversely, one holds that each guaranteeing power has the right to intervene

96. See appendix, case n. 13.

Even admitting that Turkey had the right to use armed force under the terms of the treaty, before doing so it should have first of all attempted to reach a common solution, together with the other parties. Turkey only accepted to do so after it had already landed on the island. Moreover the Turkish intervention led to the de facto partition of the island, rather than to the restoration of the status quo. See, e.g. E. Sciso, "L'intervento turco a Cipro: aspetti giuridici", RDI, 1977, p. 75. See, in favour of the legality of the intervention, Y. Altug, "The Cyprus Question", 21 GYIL 1978, p.311ff.

97. E.g. Ronzitti, p. 133-134.

upon its own judgment concerning the internal situation of Cyprus, and against the will of its government, it is legitimate to have doubts about the real independence of the Cypriot State⁹⁸. It is not surprising, therefore, that the Cypriot government always rejected the latter construction and went as far as claiming the invalidity of the treaty on the grounds that it had been concluded under duress⁹⁹.

10. Conclusions.

It is now possible to attempt some conclusions and try to answer some of the questions put before.

The first problem was theoretical: whether the consent given by a State can ever preclude the wrongfulness of the use of

98. This is the view taken by D.G. Lavroff, "Le statut de Chypre", RGDIP, 1961, p. 527 at 530, and by Altug, p. 320.

99. SCOR, 1098th meet., 27 February 1964; SCOR, 1235th meet., 5 August 1965; GAOR, 1st Comm., 1407th meet., para.5.

force by another State in its territory. It focused on the interpretation of the prohibition of use of force, which is deemed by many to be laid down in a peremptory norm of international law. Since all peremptory norms of international law also lay down erga omnes obligations, the consent of the target State could be deemed invalid for two reasons: first because consent cannot preclude wrongfulness stemming from a breach of a jus cogens obligation, and second because if the obligation not to use armed force is erga omnes, the consent of the target State would not preclude the wrongfulness of the same act vis-à-vis the rest of the international community¹⁰⁰.

If however the actual object of the peremptory norm is not the use of armed force tout court, but the use of armed force against another State, the theoretical problem can be solved. The consent of the target State would ipso facto bring the action outside the scope of the norm ratione materiae. The armed intervention, if consented to by the target State, would not be against it; the peremptory norm would be inapplicable and no rights or interests of any third State would be infringed¹⁰¹.

100. See, supra, p. 15

101. See, supra, p. 234-

In my opinion, the survey of the relevant State practice definitely supports this interpretation. In all cases examined the right of States to consent to the use of foreign armed force within their territory was never questioned, even by those States opposing the intervention on that occasion. What was often questioned was the power of a certain government to issue the invitation. If States had intended to rule out consent from the valid justifications for the use of force, they would have said so clearly. On the contrary, very often many stressed the existence of this right in abstracto.

Structural weakness is only one of the reasons why a government faced by internal difficulties may consent to a foreign intervention. A State might require another State to intervene forcibly not to be helped to stay in power, but, for example, for lack of the technical skills needed to face a certain situation. A good example is the rescue carried out by the Federal Republic of Germany of hostages on board of a hijacked plane at Mogadishu. In that case, the German intervention, with the consent of the Somali government, was not prompted by any lack of power of this government, but by the need for corps trained in that kind of action which Somalia could not supply. Yet armed force was employed, and it was employed on the territory of another State. No one protested or even hinted that the consent of the Somali government was not sufficient to render

the operation lawful, or that some other authority's consent ought to have been asked¹⁰².

Once ascertained that the use of force tout court on the territory of another State is not sufficient to violate the norm, but that some "awareness of having been attacked" on the part of the target State is also necessary, what becomes central is the evaluation of the manifestation of will of that State. The attention shifts, in other terms, to the problem of whether the organ or the authority expressing the will of the State is legally entitled to do so, and under what conditions and subject to what limits. An attempt to tackle this issue was made through an examination of the State practice. Among the relevant cases a first distinction was made between a group of older ones, where the invitation of the government of the target State was practically the only justification invoked by both the inviting State and the intervening State, and a group of more recent ones, where consent was invoked alongside other grounds such as self-defence or protection of nationals. Furthermore, within this latter group, a distinction was made between those situations where there was an internal conflict with rather clear-cut factions and those where there was anarchy.

102. See, infra, chapter on protection of nationals abroad. For a very good narration of the events see Ronzitti, p.79.

In all cases of the first group (pre-1970), the plea based on consent was met with relative acquiescence. The armed interventions were however carried out by the former colonial or "protecting" power. Also, at that stage, the number of countries which could express disapproval was much smaller than what it would become later.

In all subsequent cases, for the "part" of the operation which could only be justified by the consent of the target State, no other generally accepted criteria (apart from effectiveness) emerged, and this was the very reason why many interventions were harshly criticized by a relevant part of the international community. In other words, the effectiveness of the inviting authority was the only criterion accepted by everybody as a matter of principle. This very effectiveness was deemed in most cases to be lacking or insufficient. Consequently both "inviting" authorities and intervening States attempted to allege the existence of an external threat or infiltration. I also stressed that the more documented and realistic the allegation made, the greater the international approval.

It is possible to conclude that the consent of the target State certainly exists as a legal justification for armed intervention but, depending on the expression of will of that State, it brings about serious problems when it is invoked in the context of internal conflicts, where it is the very power to express the State's will which is put into question. It is true

however that in the first ten or twenty years after World War II there was a larger consensus among the (then) members of the international community about an unqualified right of the "incumbent" government to demand external aid in case of rebellion. Since the mode of acquisition of power by the incumbent government bore no relevance for international law, the mere fact that that government was in power (even though threatened from inside) and could express the State's will was considered more important than the potentially opposing will of a segment of the population wanting to overthrow it. The practical effect of this prevalence was not only a prohibition on third States to help rebels but also the right of third States to help incumbent governments at their request. In other words the interest of the people in overthrowing an unwanted government was not considered relevant enough to impose a general ban on foreign intervention in the country concerned.

This proposition has been increasingly questioned in subsequent years, partly as a consequence of the increased number of members of the international community (some of which openly question the validity of some international legal rules). The unqualified right of the "incumbent" government has therefore been eroded by the increasing relevance of the principle of "internal" self-determination. By virtue of this principle, which will be examined in greater detail in one of the subsequent chapters, the people of a State have the right to choose the

government they wish by the means they wish. A government may not be forcibly imposed from outside without violating this principle, and the same can be said for a government which is losing power and, unable to maintain it with its own forces, asks for assistance abroad.

No other accepted criterion has emerged, capable of conferring on the incumbent government (or some faction) the right to ask for foreign intervention. "Historic" rights are not universally accepted, if that government does not exercise effective power, nor are accepted constitutional rights (the fact of having been freely elected or having attained power by lawful means under the municipal law of that State) for the same reason stated above. Finally, recognition by third States cannot be accepted either, since each State grants it according to its own criteria, which are essentially political. In other words, it is not possible to make rights or duties derive from a political decision which could be taken in total disregard of legal considerations.

States are well aware of all this and, on more recent occasions, have always alleged the existence of some kind of external threat or infiltration (though not always resorting to the concept of self-defence). If the problem is to demonstrate that the government asking for help is effective enough to be entitled to do so, it can sometimes be shown that the internal rebellion is mainly encouraged, directed and financed from abroad

(which is to say that the rebellion would not take place, or would not reach that scale without that essential contribution). In such cases effectiveness should no longer be questioned because it would be unimpaired without the previous external infiltration.

My tentative conclusion (which I will try to demonstrate fully in the next chapters of this work) is that in internal conflict no authority may consent to an external armed intervention unless it is fully effective. The authority's effectiveness is presumed, if it is questioned by a rebellion mainly directed and fomented from outside. In such case that authority would have the right to invite the troops of a foreign power in.

There are a few qualifications to add. The first is that the legal basis for intervention would not be (or not necessarily) collective self-defence, but the simple consent of the target State. Also, the inviting government must be in a position to demonstrate that its effectiveness is in question mainly as a consequence of the foreign activity. This means that it must have had full control of the situation before the foreign activity began. Finally, if the internal situation is such that no authority is in this position, no one has the right to invite anyone, and third States should strictly abide by the duty of non-intervention.

Because of the requirement of an external threat or involvement, this principle will partly overlap with that of collective self-defence. The distinctions which need to be made between the two will be dealt with in the next chapter.

SELF-DEFENCE

1. Introduction

The present chapter focuses on the principle of self-defence, the most important legal ground upon which foreign armed intervention in internal conflicts is justified. The great relevance of the principle in this context can be explained as follows.

Self-defence, as embodied in article 51 of the Charter of the United Nations, represents the main exception to the general prohibition of the use of force in international relations contained in article 2.4 of the Charter¹⁰³. There is general agreement, both in literature and in practice, on the admissibility of the use of armed force in self-defence (even though the scope of the principle and the conditions for its application are rather

103. The Charter contains however other exceptions, whose relevance is very limited in practice. See, infra, p.850.111

controversial)¹⁰⁴ and this principle has been claimed as a

104. That even States themselves are unable to agree on a formulation of the principle of self-defence more explicit than article 51 is confirmed by the drafting of the Principle (a) on the non use of force in the Declaration on Friendly Relations (Res.2625-XXV), and by the rather vague mention of it in the 1974 Definition of Aggression (Res. 3314).

The relevant part in the Declaration on Friendly relations reads as follows (principle (a), last paragraph):
"Nothing in the foregoing chapters shall be construed as enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful".

The drafting of such a provision in the Declaration on Friendly relations was the result of the lack of agreement about the lawful uses of armed force. Examples of the various proposals:

- Joint proposal by Algeria, Burma, Cameroon, Ghana, India, Kenya, Madagascar, Nigeria, U.A.R., Yugoslavia (22.3.1966 A/AC.125/L.21, article 6:" The prohibition of the use of force shall not affect either the use of force pursuant to a decision by a competent organ of the U.N. made in conformity with the Charter, or the right of States to take, in case of armed attack, measures of collective self-defence in accordance with article 51 of the Charter, or the right of peoples to self-defence against colonial domination".

- Joint proposal by Australia, Canada, United Kingdom and U.S.A. (23.3.66 A/AC.125/L.22), article 3: "Nothing in the foregoing paragraphs is intended to affect the provisions of the Charter concerning the lawful use of force, when undertaken by or under the authority of a competent U.N. organ or by a regional agency acting in accordance with the Charter, or in exercise of the inherent right of individual or collective self-defence".
There were two more proposals, one by Chile (23.2.66, L.23), limiting self-defence only to the case of armed attack, but allowing "reasonable measures" against threats not constituting armed attacks, with the obligation to report to the Security Council, one by Italy and the Netherlands (L.24) drafted in the way which prevailed in the end.

The idea of drafting an exhaustive list of specific exceptions failed to prevail because of the disagreement.

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justification in nearly all cases of armed intervention over the last thirty years¹⁰⁵.

The application of the principle of self-defence must be examined with reference to internal armed conflict. As is well known, the general prohibition of the use of force contained in

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On this principle, in the declaration on Friendly Relations, see G. Arangio Ruiz, The Normative Role of the General Assembly of the U.N. and the Declaration of Principles of Friendly Relations, Leiden, Sijthoff, 1972, p. 524; B. Graf zu Dohna, Die Grundprinzipien des Voelkerrechts ueber die Freundschaftlichen Beziehungen und die Zusammenarbeit zwischen den Staaten, Berlin, Duncker & Humblot, 1973, p. 18. Also, on the definition of Aggression, "The Definition of Aggression", 16 Harv. IL Journ, 1975, p. 589 ff.

Finally, the General Assembly Resolution 42/22 "Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations" states in Part I, para.13:

"States have the inherent right of individual and collective self-defence if an armed attack occurs, as set forth in the Charter", and, in n.2(a):

"Declares that nothing in the present Declaration shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful".

105. Of all cases studied in the present research the "defensive" character of the intervention was not claimed in the following: Hungary (1956); Congo (1960); Cuba (1961), Congo (1964), Gabon (1964), Chad (1968) and Cyprus (1974). It was claimed as a minor justification in Bangla Desh (1971), Timor (1975) and Cambodia (1979). See appendix, n.3 of each case.

article 2.4 only refers to "international relations"¹⁰⁶. The prohibition and its corresponding exception of self-defence only become relevant with respect to internal armed conflicts when they acquire an international dimension¹⁰⁷. This happens:

- when a government, in fighting an internal rebellion, crosses the borders of a neighbouring State;
- when a third State intervenes on the side of one of the fighting factions;
- when these combine.

106. The interpretation of this part of the provision has never really been questioned. Bowett asserts: "...prima facie the prohibition does not extend to force used within the State's own metropolitan areas, in its colonies and protectorates. This qualification harmonises with the general limitation on the scope of the authority of the organization contained in article 2.7, which preserves to the members matters "essentially within the domestic jurisdiction". D.W. Bowett, Self-Defence in International Law, Manchester, Manchester Univ. Press, 1958 p.149. For the same view see: P.L. Lamberti Zanardi, La legittima difesa nel diritto internazionale, Milano, Giuffr , 1972 p. 146 ff.; Sir H. Waldock, "The Regulation of the use of Force by Individual States in International Law", III HR, 1953, pp.455ff. at 492; H. Wehberg, "L'interdiction du recours   la force. Le principe et les probl mes qui se posent", I HR 1951, p.3 at 73.

107. This assertion is without prejudice to the more complex question of whether the prohibition applies to relations between States and NLMs. On this specific question, with reference to article 2.4 see Lamberti Zanardi, p. 148, and Virally (in Cot-Pellet commentaire), p.121.

The question of the use of force for self-determination is the object of a specific section of this work; see, infra, p.172

This chapter will focus on the second and the third situations which cover most cases of "internationalization" of an internal conflict, and are also the most common ways to pursue "disguised" international conflicts.

There is no question that the concept of self-defence maintains its crucial importance even in the context of these "disguised" international conflicts¹⁰⁸. However, it is particularly in these situations, that the exact content of the concept, its scope, and the problems relating to its application are very unclear. Moreover, a literal and contextual analysis of article 51, even taking into account all the interpretations provided by the literature, is not sufficient to clarify the problems. After an overview of the debate on the controversial aspects of the principle of self-defence, this chapter will be devoted to examining the relevant cases, with a view to discerning some kind of trend towards a coherent application of the principle of self-defence to internal armed conflict by

6. See supra, chapter on consent.

What is in fact central, in all cases of internal conflict and armed intervention is the preoccupation of all States to claim the existence of an external threat as one of the causes justifying the external intervention. In so doing the armed action always appears as a reaction against another unlawful activity.

individual States¹⁰⁹.

2. The applicable concept of self-defence

The concept of self-defence, whose origins are extremely old, can be found in every legal system. In very broad terms it can be defined as a residual form of direct self-help permitted to the private individual whenever a timely intervention by the centralized authority is impossible¹¹⁰.

109. My intention is obviously not that of drawing conclusions about the principle of self-defence, valid only with reference to internal conflict. It is however true, as will be seen later, that the most relevant areas of dispute about the interpretation of the principle concern matters arising especially during "internationalized" civil wars (e.g. the problem of indirect aggression, or the concept of proportionality). See, infra, p.102 and ff.

110. For a very clear analysis of the concept of self-defence in municipal law and the differences with the corresponding concept in international law, see E. Giraud, "La théorie de la légitime défense", III, HR, 1934, 634, particularly at 707-720, Obviously

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In contemporary international law the concept enjoys primary importance, and is embodied in the United Nations Charter. According to article 51 of the Charter, self-defence constitutes the main exception to the general prohibition of the use of force and according to most authorities, practically the only circumstance in which individual States can resort to armed force without a previous authorization of the centralized authority¹¹¹. However, there is little doubt that the concept already existed in customary international law, well before the coming into force

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the concept of self-defence referred to by the author is a relatively new one in positive international law, which arises after the creation of the League of Nations and the conclusion of the Pact of Paris (1928). The scope of the right of self-defence in modern legal systems is considerably narrower than in older ones, due to an increased degree of centralization of the exercise of coercion in organized societies. This applies to a certain extent to the international legal system as well after the coming into force of the United Nations Charter. For a detailed analysis of the evolution of the concept up to the recent times, see Lamberti Zanardi. This author takes the view that an autonomous concept of self-defence existed in International law before the creation of the League. See, also, infra, n. 4412.

111. According to the prevailing view, all other hypotheses of use of coercion in international relations must be directly undertaken or previously authorized by the Security Council. The only exceptions to this principle, besides article 51, are constituted by actions against ex-enemy States, provided for in articles 53.1, 106 and 107 of the Charter.

of the Charter. There seems to be no doubt about its existence in the period immediately before World War I, when the first limitations on the freedom of States to go to war were introduced, though some authors cast doubts on its existence as an autonomous concept in the customary law prior to that period¹¹².

In the United Nations system, it is possible to speak of a proper right of self-defence, which is to say more like the corresponding concept in municipal law. In such a system, at least in theory, the use of coercion is completely centralized, and every use of force must necessarily fall into one of these three categories: unlawful use of force, centralized sanction, individual or collective self-defence.

Article 51 is the channel through which every use of coercion by individual States must pass, to be accepted as legal by the international community. This is due to its crucial importance as the main exception to article 2.4, to the failure to set up the

112. For a survey of the doctrinal tendencies which absorbed the concept of self-defence in the broader one of self-help see Lamberti-Zanardi, p. 9 and ff.; on the autonomy of the concept of self-defence as essentially preventive and non-retributive in character see BOWETT, *Self-defence*, p. 13. According to Lamberti Zanardi, however, at least before the beginning of this century, self-defence had a different function insofar as it constituted a hypothesis of use of force short of war (not amounting to a condition for the coming into force of the laws of war) rather than an exception to a general ban on the use of force. In other words, with the coming into force of the first limitations to the resort to war, self-defence acquired a much more relevant role.

centralized enforcement machinery devised in Chapter VII of the Charter, and to the extremely frequent failure of the Security Council to reach a decision. It is not surprising, therefore, that its interpretation is extremely controversial both in literature and in practice.

First of all the interpretative problems focus on the definition of the scope of the alleged customary right of self-defence - which, in the wording of article 51, is defined as "inherent" - and on its relationship with article 51 itself. In other words, there is no agreement on whether article 51 only has the function of referring to that right, leaving it to be defined by custom and unimpaired by the Charter, or whether it limits it in any way. This question is strictly connected with the interpretation of article 2.4 as inclusive or not of the use of force in self-defence in its scope¹¹³. There is a whole range of opinions between the most and the least restrictive interpretations of the

113. The essential question is whether article 2.4 constitutes an absolute prohibition, and, in this context, what the function is of the qualifications "against the territorial integrity etc." included in it. Particularly, whether the use of force in self-defence is a priori excluded from the scope of article 2.4 only by virtue of article 51. On this particular dispute, see Ago's report on State Responsibility, 1980, p. 63 and ff.. In Ago's view, the customary right of self-defence as it was in 1945 and article 51 are totally identical in scope; *ibidem*, p. 67.

role of self-defence in the system of the United Nations. According to the latter, the "right"¹¹⁴ of self-defence can be exercised whenever a right which a State deems fundamental for its security is unlawfully threatened by another State and an immediate forcible response is the only option available¹¹⁵. According to the former view, the scope of the right of self-defence is limited by the wording of article 51. The customary right is therefore restricted and may be exercised only in case of "armed attack". According to this view, moreover, no form of

114. Bowett, Self-defence p.8-9 defines self-defence as "in itself a "privilege" or "liberty" which justifies conduct otherwise illegal which is necessary for the protection of certain rights stricto sensu" and refers to other authors as for the conceptual distinction between "privilege" or "liberty" and "right". According to the ILC report, on the other hand, both self-defence and state of necessity are expressions that connote situations or de facto conditions, not a subjective right (p.53). In the present work, the term "right" will be used, with reference to self-defence, for reasons of convenience, without prejudice of the real nature of the concept.

115. The most important authors sharing this view (albeit with partially different positions) are M. Mc Dougal, F. Feliciano, Law and Minimum World Public Order: The Legal Regulation of International Coercion, New Haven , Yale University Press, 1961, p. 232; Bowett, Self-defence, p. 187 ff.; J. Stone, Legal Controls of International Conflicts, 1954, p. 243 ff.; Waldock, p. 495 ff..

anticipatory self-defence is allowed¹¹⁶.

Further problems are created by the concept of "collective" self-defence, also embodied in article 51. The conditions under which a third State is allowed to intervene in favour of a State which has been attacked and is defending itself are the subject of controversy. There are four possibilities: the first is that any third state which feels threatened may intervene against the aggressor, once it is ascertained that an armed attack has occurred somewhere, independent of the victim's request; the second is that this intervention must be subject to the consent of the State under attack; the third is that there must also be a previously concluded treaty of alliance between the two States; the fourth is that no State may intervene, even upon request, unless

116. See, e.g., B. Roeling, "On the Prohibition of the Use of Force", in Legal Change - Essays in Honor of Julius Stone, Sidney 1983, p. 276; J. Delivanis, La légitime défense en droit international public moderne, Paris, LGDJ, 1971, p. 49 ff.; Lamberti Zanardi, p. 204 ff.; Brownlie, Use of Force, p. 272 ff.; Wehberg, p. 81 ff..

As already remarked, this interpretation allows no form of anticipatory self-defence. It seems however an excessively restrictive interpretation of article 51 to exclude even a first strike against an imminent and documented large scale attack against the State. Such an action seems in fact compatible with the wording of article 51 "if an armed attack occurs". See in this sense Bowett, Self-defence, p. and Waldock, p. This is also confirmed by the wording of the Definition of Aggression under which a first strike constitutes only prima facie evidence of aggression (see Res. 3314 (XXIX), supra, p.90.).

there is a direct threat to itself as well¹¹⁷.

Apart from these controversial points which are, after all, confined to the position and the operation of the concept of self-defence in the system of the Charter, everyone seems to agree on the fundamental requirements a forcible action must fulfil to be characterized as defensive. These are the requirement of necessity, which implies that a self-defensive action can only be allowed in response to an immediate danger jeopardizing the very existence of a State - which must be serious, immediate, and incapable of being countered by other means¹¹⁸- and the requirement of imputability, which implies that the imminent danger must be the result of the wrongful conduct of another State¹¹⁹. Finally, there is a third requirement, which refers to

117. On the legal grounds of each of these view, see, infra, p.147 ff.

118. See Ago's report, p.53. This is, in this author's view, the common element between self-defence and state of necessity. See, moreover, the Nicaragua case, para. 122, where the Court holds that the United States did not fulfil the requirement of necessity, because the alleged threat could be countered by other means.

119. This particular element is seen by most authors as the distinctive one between self-defence and state of necessity. See e.g. Bowett, Self-defence, p. 56 ff.; G. Arangio Ruiz, "Difesa

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the self-defensive action itself, rather than to the circumstances which may have provoked it: that of proportionality. This requirement, it seems, must be referred to the "result to be achieved by the defensive action, and not (to) the forms, substance and strength of the action itself"¹²⁰. In other words, in order to fulfil the requirement of proportionality, the defensive action should not exceed an intensity and magnitude sufficient to

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Legittima (Diritto Internazionale)", in Novissimo Digesto Italiano Vol. VI, Turin, p. 632.

On this matter, the ILC report reads as follows: "However, as we have stressed, the State vis-à-vis which another State adopts a form of conduct inconsistent with an international obligation without having any excuse rather than "necessity" is a State which has committed no international wrong against the State taking the action. It was in no way responsible, by any of its own actions, for the danger threatening another state (para. 88, p. 53)" and, in the corresponding footnote:

" The test for deciding that a case comes within the scope of "state of necessity" and not within the scope of "self-defence" is that the cause of the serious and imminent danger must not be an event attributable to the State and constituting a non-performance by that State of an international obligation it owes to the State which reacts out of necessity"(n. 210).

See, on the other hand, the view taken by Dinstein, according to whom, whether an armed attack originates from a State or is it attributable to a State, the victim State has always the right to react in Self-defence. Dinstein, p. 200 passim.

120. ILC Report, p. 69 (para. 121) (1980).

avert the danger. It can go well beyond the limits of the unlawful action which provoked it, as long as it is necessary to repel it¹²¹.

It is now possible to turn to the analysis of the cases of external involvement in internal conflict in which self-defence has been claimed as a justification. The two main interpretative problems concerning self-defence, namely what kind of action can give rise to a self-defensive reaction, and under which conditions are third States entitled to intervene in collective self-defence are in fact crucial to the issue of third State intervention in internal conflict.

In the evaluation of the types of conduct giving rise to the "right" of self-defence two different approaches can be adopted. The conduct in question can be characterized in descriptive terms (armed attack, blockade, "indirect" aggression and so on, possibly elaborating an exhaustive list), or in "teleological" terms (the effects/aims of the unlawful conduct, such as a serious

121. See ILC Report, p. 69 on the specific requirement of proportionality and the right way to interpret it. See, moreover, on the basic requirements of a self-defensive action Brownlie, Use of Force, p.261; Mc Dougal-Feliciano, p. 217, 229 and 241; Waldock, p.463.

Another requirement listed by the ILC is that of immediacy. It is admitted however that if "...the attack in question consisted of a number of successive acts, the requirement of the immediacy of the self-defensive action would have to be looked at in the light of those acts as a whole"(p.70).

threat to the very existence of a State or to its fundamental rights)¹²². The latter approach has the advantage of being more elastic, and therefore closer to reality, for it regards as central the ratio for the existence of a principle such as self-defence: the ultimate protection of a State. Yet, it may prove difficult to apply in practice, since it does not set criteria of immediate and objective evidence to judge individual cases. The other approach, while providing clear-cut categories by which every action can be classified in a sufficiently objective way, might prove unrealistic insofar as it confines the admissibility of self-defence only to the cases falling into those categories, precluding it in other cases in which the existence of a State may be as seriously threatened. Obviously, the use of a more vague definition is of greater utility when there is a centralized body entitled to decide on the application of the definition to individual cases. In the practical absence of such a body the drive is towards a degree of "objective" evidence as large as possible. The risk of having the reality slip through the rules is even in those cases far from averted.

122. This was one of the crucial controversial points when trying to draft a definition of aggression. The solution found was an illustrative list of instances of aggression, which does not exclude that other cases might also, in certain circumstances, be defined as such. See e.g. Bröms, p. 320 ff..

These two approaches, however, have a considerable degree of empirical coincidence, in the sense that the categories employed in the first usually represent the most common means to endanger or threaten the existence or the fundamental rights of a State. Yet, this might not be true in every case, particularly so when internal conflicts and covert forms of intervention and subversion are involved.

In the subsequent sections both approaches will be referred to, in an attempt to reconcile them on an empirical basis. The categories employed to classify the various cases will be used in a descriptive, rather than prescriptive way. This will by no means exclude a resort to more elastic criteria such as consideration of the purpose of the unlawful conduct giving rise to the self-defensive reaction, or consideration of the individual cases mainly in the light of the criteria of necessity and proportionality.

3. Conduct justifying a self-defensive reaction

In this section I shall examine all recent cases of foreign armed intervention in internal conflict, where a previous or imminent external involvement has been claimed as a justification by the government of the target State or by the intervening State itself.

Looking at the intensity and magnitude of the alleged illegal conduct, a scale emerges ranging from a full-scale overt armed intervention in favour of one of the factions in an internal conflict, to potential threat of interference by an outside power, likely to cause or worsen a situation of civil strife. The cases in the first categories have per se a sufficient degree of homogeneity to satisfy both the "descriptive" and "teleological" approaches and allow quite definite conclusions, valid for the whole category, to be drawn. The latter categories comprise such a variety of situations with insufficient common characteristics that general conclusions valid for each category as a whole cannot be drawn. In these cases, therefore, resort to more flexible criteria of evaluation, and a much higher degree of uncertainty, will be inevitable. Five categories are sufficient to cover all the available cases:

- foreign direct armed intervention in the State to be assisted in collective self-defence;
- intervention by irregular forces in the State to be assisted in collective self-defence;

- subversion through external infiltration and fomenting of civil strife in the State to be assisted in collective self-defence;
- alleged external threat to the security of the State to be assisted in collective self-defence;
- alleged threat to the security of the State intervening in individual self-defence.

3.1 Foreign direct armed intervention in the State to be assisted in collective self-defence.

This first category includes all cases where, in an internal conflict, the government claims a right of self-defence against the direct intervention of a third State in favour of insurgents¹²³. Generally speaking such an intervention is illegal

123. All statements made in the course of the present section are based on the assumption that there is in every case an incumbent government which is internationally legally entitled to claim its

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because it amounts to a violation of both the prohibition of the use of force contained in the Charter, and of the prohibition of intervention in internal conflict. Also, since it constitutes a fully-fledged armed attack against the territory of the State in question, it undoubtedly gives rise, according to article 51 of the Charter, to that State's right of self-defence¹²⁴. These situations, however, are not very common in practice. Since 1956 only two cases could fall neatly into this category: the Cuban intervention in Angola in 1976 and the French intervention in Chad in 1983. In both cases two previous armed interventions had taken place (by South Africa in the first case, by Libya in the

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right of self-defence. The problems posed by those situations in which none of the struggling factions is legally entitled to claim such a right, the requirements that a government should fulfil to be allowed to do so, and the cases in which a certain government, even if "properly established", is not allowed to use force in self-defence against rebels will be the object of the next section of this chapter. See, infra, p.402 ff.

124. See article 2.4 of the Charter; G.A. Res. 380 (V) "Peace through deeds" of 17.11.1950; G.A. Res.2131 (XX) "Declaration on Inadmissibility of Intervention in Domestic Affairs of States and Protection of their Independence and Sovereignty" of 21.12.1965; Principles (a) and (c) of G.A. Res. 2625 (XXV) of 24.10.1970; Declaration on the "Enhancement of the Effectiveness...", Part I, n.13: "States have the inherent right of individual or collective self-defence if an armed attack occurs, as set forth in the Charter".

second), and the subsequent "counter-interventions" were justified as acts of collective self-defence¹²⁵.

The main events in Angola (1975-76) are well known, although the exact chronology is quite difficult to establish since both interventions, at least at the beginning, took place covertly¹²⁶. Cuba, and the MPLA administration, claimed that the Cuban intervention had started on November 5th, as a response to a previous South African intervention. South Africa admitted it had acted before, and tried to justify its intervention by the need to protect its nationals and a request from the Portuguese administration (still in charge at that time) which, however, denied ever having made this request¹²⁷. The problem with this case is that the two foreign interventions took place before the proclamation of the independence of Angola. In that situation,

125. See Appendix, n.15 (Angola) and n.18 (Chad).

126. See Appendix n.15, para.2: contrasting claims between Cuba and South Africa about which country acted first.

127. In a letter dated March 23d addressed to the UN Secretary General, the representative of Portugal stated that the assertion made by South Africa in a previous letter dated 21st March that the Portuguese government had asked South Africa to remain in the Calueque area and to continue to assume responsibility for the safety of work in progress at the dam was completely without foundation. Portugal had given no advance authorization to South Africa to undertake such action and had not failed to protest, once it became aware of it. See J.N. Ybk., 1976, p.172.

therefore, MPLA (which was only one of the three National Liberation Movements fighting for the independence of Angola against the Portuguese colonial administration), was not legally entitled to represent Angola and had no right to ask for the help of any third State, even in self-defence¹²⁸. The overwhelming majority of the world community condemned the South African intervention. On the other hand, the condemnation by many western States of the Cuban involvement was more attributable to the aforementioned circumstances (which had enabled MPLA to gain control of the whole of the country, using Cuban support against the rival NLMs), than to any willingness to reject the

128. At that stage, one may wonder who, apart from Portugal, would have been entitled to request foreign help in collective self-defence to face the South African attack. Probably no-one. The status of MPLA as National Liberation Movement is probably misleading in this case for, if the Cuban intervention is judged unlawful, this is because MPLA had no status to request it and not because it is not lawful for the government in charge, to request foreign help in case of foreign direct armed attack. If it is deemed lawful, it is because MPLA was considered to be the only true representative of the Angolan people and this gave it, in the opinion of some States, the right to require foreign help on behalf of the whole Angolan people, as if it were the only effective authority. By no means this was to be interpreted as a precedent conferring a NLM an unqualified right of collective self-defence to achieve self-determination. Indeed, even the States supporting the Cuban intervention, stressed that it was necessary to counter the South African attack, and not to beat the other two Liberation Movements. On this specific problem. see infra, p.104, and Appendix, case n. 15, para.4.

admissibility of self-defence against a foreign armed intervention¹²⁹ .

As regards the French intervention in Chad, the great majority of the international community supported the right of the central government in N'djamena to defend itself and ask for external help against the Libyan aggression. Here also, though, some doubts were expressed about the "legitimacy" of the central government vis-à-vis the "rebels" (whose chief G.Oueddei had requested the Libyan intervention when he was president, and had then been violently ousted from power). Some States expressed the view that a strict application of the non-intervention rule was necessary in that case. However, no State condemned the French intervention as such (which would definitely not have taken place

129. See S.C. Res. 387 (XXXI) condemning South Africa approved on 30th May 1976 (S/12030) by 9 votes to 0 and 5 abst. (United Kingdom, Japan, France, Italy, United States). But see also, expressing disapproval for all interventions in Angola, the speeches made by the representatives of China, France, Italy (on behalf of the EEC), United States (Meets. 1900-1906), SCOR, 31st year. It is interesting to note, however, that of all the countries which mentioned the Cuban intervention and supported it (namely USSR, Pakistan, Guinea Bissau, Mali, Congo, Libya), none explicitly mentioned self-defence, although all linked it with the previous South African intervention.

in the absence of the previous Libyan involvement)¹³⁰.

This category only includes instances of direct "armed attack" aimed at supporting rebels. It does not appear, from the cases just examined, that the generally accepted right of self-defence belonging to the incumbent government, is in any way limited by the existence of a situation of internal unrest, nor that the same right is subject to different conditions in this event¹³¹. It is thus possible to assert that an external armed

130. The internal situation of Chad is extremely complicated, due to the continual rebellion in the North, and to the Lagos agreement of 21.8.1979 by which a provisional government of national unity was formed, under the presidency of G. Oueddei (the chief of the northern rebels), with H. Habre (the future president) as minister of Defence. After the break-up of this government, the capital was controlled by Oueddei first (and he was even received in Paris) and by Habre later. At the time of the Libyan invasion (June 1983), the Habre government had been recognized by the OAU in a meeting which opened in Addis Abeba on 9.6.1983. So, although most of the international community had constantly recognised as legitimate the government in control of the capital N'djamena, full control of the whole country by one government had practically never existed. For a brief account of events in Chad see Appendix, cases n. 11, 18, 21 and 25. See also RGDIP, 1984, p.288. In the Security Council, however, the right of self-defence claimed by the Habre government was recognized by the representatives of France (for obvious reasons), Guyana, the Netherlands, the United States) see UN Chr. October 1983, p.11 ff.

131. It should also be noticed that in the case just examined the countries condemning the French involvement as a response to the previous Libyan intervention were the same (USSR, Libya, Syria) as had claimed the right of Angola to do so in the same conditions. It does not seem, therefore, that the declarations of

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intervention in favour of the rebels gives the government a right of individual or collective self-defence, whether or not the authority and "effectiveness" of that government are in any way weakened because of the existence of those rebels¹³².

3.2 Intervention by irregular forces in the State to be assisted in collective self-defence

This category differs from the previous one in two respects. First, although both include cases of actual invasion performed by "organized" troops, in this second category the troops do not

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these countries represent a serious challenge to the view just set out because they obviously reflect a different opinion on the status of the internal body requesting help, rather than about the principles applicable. For the cases where the government which requests the foreign intervention is a colonial government, see infra, chapter on self-determination, p.1754-

132. See, supra, chapter on consent, conclusions.

have an official character (they are irregulars, guerrillas, volunteers or mercenaries) and no foreign State directly admits any responsibility for the operations. Second, the aim of these formations is to take advantage of a situation of real or potential disorder in the target State.

There is little doubt in the literature about the illegality of these actions in International Law. Since they involve the use of force, they fall under the ban of article 2.4¹³³. Moreover, even when States from whose territories these attacks originate are not directly responsible, the simple fact of giving them a sanctuary, or tolerating their operations on their territory, constitutes an international delict as well, and is tantamount to

133. All these activities are usually defined with the expression "indirect aggression", although this term is viewed by some authors as covering also forms of interference not involving the use of armed force, such as economic aggression. For this reason, to avoid confusion, this term will not be used in the course of this work. Instead, specific denomination for the kind of activities referred to every time will be used. On the illegality in international law of forms of subversion ranging from financial support for the organization of civil strife abroad (or infiltration into foreign governmental apparatus for the same purpose) to the actual encouraging of volunteers to engage in civil strife in another State, see P.L. Lamberti Zanardi, "Indirect Military Aggression", in Cassese (ed.) Current Legal Regulation, p. 111-120; J. Stone, "Hopes and Loopholes in the 1974 Definition of Aggression", 71, AJIL, (1977), p.224; Thomas, Thomas, The Concept of Aggression in International Law, Dallas, Southern Methodist University Press, 1972, p.65 and ff.; Brownlie, Use of Force p.370; Mc Dougal-Feliciano, p.192; Bowett, Self-defence, p.49.

a violation of article 2.4. This is confirmed by several UN resolutions such as the 1970 Declaration on Friendly Relations (which lists these acts among the prohibited forms of use of force), and the 1974 Definition of Aggression¹³⁴.

On the other hand, there is disagreement among scholars as to whether this type of conduct can confer a right of self-defence on the target State. Even though everybody seems to agree that self-defence can, in certain cases, be allowed against these actions, there exist differences of opinion on the extent to which this is true. The views range from those who insist on a very strict parallelism (in terms of magnitude and effects) between these actions and "direct" aggressions, for self-defence to be allowed against the former (and this view is echoed in the Definition of Aggression)¹³⁵, to those who admit self-defence

134. See, e.g., Res. 2625 (XXV), cit. Paras. 8 and 9 of the principle (a) on the Non Use of Force and Res. 3314 (XXIX), para. 3(g) (concept of substantial involvement); Res. on the "enhancement of the effectiveness", Part I, n.6.

135. See, e.g., B. Roeling, "Die Definition der Aggression", in Recht in Dienst des Friedens - Festschrift fuer Eberhard Menzel, Berlin, Duncker & Humblot, 1975, p. 391; Lamberti-Zanardi (who also draws a distinction between "aggression" for the purposes of art.39, that indicates the cases in which the Security Council may intervene, and "armed attack" within the meaning of art.51, as the condition for the exercise of the right of self-defence), Legittima difesa, p.248 ff.; Brownlie, Use of Force p.372.

against acts of much lesser gravity and magnitude¹³⁶ .

This section is only concerned with the gravest of these forms of action, where the external invasion by irregular troops is on a considerable scale and represents a serious danger, and when there is the substantial involvement of a foreign power (even if this power disclaims responsibility). On the admissibility of a self-defensive reaction against the actions just mentioned everybody seems to agree¹³⁷.

136. Those who take this "broader" view are generally concerned with the effects of the subversive activities, rather than with attaching legal consequences to a classification only based on the description of those activities taken in abstracto. See e.g. Thomas and Thomas, Concept of Aggression, p. 68 and passim; Mc Dougal- Feliciano, p.192 (esp. n.164); Bowett, Self-defence, p. 260-261. See also Q. Wright, "The United States Intervention in Lebanon", 53 AJIL, (1958), p. 123, although this author draws a distinction between "indirect aggression" and "subversive intervention", with only the former giving rise to the right of individual and collective self-defence, and with the latter justifying the victim State to seek aid abroad, provided the foreign counter-intervention does not cross the borders of the victim State.

137. This is also confirmed by the view taken by the I.C.J. in the Nicaragua case, where it asserted:

"There appears to be now general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular it may be considered to be agreed that an armed attack must be understood as including not merely an action by regular armed forces across an international border, but also 'the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to' (inter

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It appears from the State practice that these cases are relatively rare in comparison to more hidden forms of subversion; on the whole, however, what has just been said seems to be confirmed. The aggressive character (and illegality) of sending irregular troops was underlined in the attempted invasion of Cuba by Cuban refugees trained in the United States, which took place at the Bay of Pigs in 1961¹³⁸. Interestingly, the United States, although acknowledging their open hostility to the Cuban regime, disclaimed responsibility for the operation. Despite this, however, in an exchange of letters between President Kennedy and Chairman Khrushchev, the Soviet Union asserted its right to give the Cuban government and people "all necessary assistance in

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alia) an actual armed attack conducted by regular forces 'or its substantial involvement therein'. This description, contained in art.3 para.(g) of the Definition of Aggression annexed to the General Assembly resolution 3314 (XXIX) may be taken to reflect customary international law".

ICJ Reports, 1986, at 93, para.195.

138. For an account of the main events of this case, see Appendix, case n. 6.

beating back the armed attack on Cuba"¹³⁹. Other relevant cases in this category are the American intervention in Vietnam (starting from 1964), the Moroccan intervention (with French logistical support) in the Shaba region of Zaire in 1977, and the Franco-Belgian intervention in the same region the following year.

The question of Vietnam is extremely difficult to approach, and is so complex that no assertion referring to it can be totally unquestionable. The main difficulty lies in the necessity for any legal analysis to be based on non-controversial facts, around whose interpretation, in the case of Vietnam, the main disagreement can be found¹⁴⁰. An excellent attempt to clarify the issue are Henkin's three different "schemes of interpretation" of the conflict. It is possible to see the conflict as purely

139. See Keesing's p.18151 ff. It also includes excerpts from the exchange of letters between Kennedy and Khrushchev. See also R. Falk, "United States Intervention in Cuba at the Bay of Pigs in International Law", in Falk (ed.) Legal Order in a Violent World, p. 184. The attempted invasion was debated in the Third Committee of the G.A. on the 17th and 18th of April 1961. A rather vaguely termed resolution was adopted (calling on UN members to take appropriate action to remove existing tensions) with the contrary vote of the East Bloc Countries.

140. For a concise but complete history of the main events taking place in Indochina since World War II, see P. Calcocoressi, World Politics since 1945, London, Longman, 1977 (1st ed. 1968), p. 279-292. See, moreover, for more details, S. Karnow, History of the Vietnam War..., 1987.

internal within the State of Vietnam considered as a whole (with the United States intervening on the side of the anti-communist faction); as a purely international one between the two States of North and South Vietnam (with the United States intervening in collective self-defence on the South Vietnamese side against the North Vietnamese aggression); or, finally, as an internal conflict within the State of South Vietnam (with North Vietnam intervening on the side of the rebels, and the United States counter-intervening in favour of the "incumbent" government)¹⁴¹. Obviously, any judgment of the legality of the American intervention varies according to the scheme chosen and it is therefore impossible to take the reaction of third States as unequivocal evidence in support or rejection of the American plea

141. L. Henkin, How Nations Behave, New York 1979, Chapter 16, p.306-307. The Vietnam conflict has been the object of a great number of publications. Those listed hereafter are only given as examples and do not represent a balanced sample of what has been written by authors of various tendencies on the subject:

R. Falk (ed.), The Vietnam War and International Law; J.N. Moore (ed.), Law and the Indochina War, Princeton, Princeton Univ. Press, 1972; P.E. Corbett, "The Vietnam Struggle and International Law", in R. Falk (ed.), The International Law of Civil War, J. Hopkins Univ. Press, Baltimore, 1971, p. 348.

On the official position of the government of the United States on the conflict, see the State Dept. Memorandum by L.C. Meeker, "The Legality of the United States Participation in the Defense of Vietnam", DSB, 28.3.1966. See also, the comment to the memorandum by R. Falk in 75 Yale Law Journ., 1966, pp.1122; 1134-38; 1141-42, and the materials on the Vietnam conflict collected in Henkin, Pugh, Schachter, Smit (ed.) International Law, St.Paul. Minn., West, 1980, p. 948 ff.

of collective self-defence against the indirect aggression carried out by North Vietnam against the South using the Vietcong. All the more so if one considers the escalation of the American involvement and the fact that, at a certain stage, the area of hostilities was extended to the North Vietnamese territory, to Laos and to Cambodia. It could probably be asserted that the international disapproval of the American involvement became general only when it attained very large proportions, and that it was confined to that particular aspect of the conflict, rather than to the legitimacy of the American position as such. Indeed, if one excludes the interpretation of the conflict as a purely internal one within Vietnam considered as a whole, since the two States had been a reality since the mid-fifties, there is no doubt about the American right to intervene on behalf of the government of South Vietnam in the other two schemes of interpretation. In the first it would be a plain example of a State intervening in collective self-defence against an aggressor (North Vietnam), while in the second it would be an example of a State intervening on behalf of the incumbent government against foreign backed rebels (Vietcong). This is not questioned. What is more controversial (and was in fact more criticized) was the bombing of North Vietnam and, even more, the incursions into Laos and Cambodia, because this could be held as incompatible with the requirement of proportionality. On the legitimacy of the American

intervention and operations within the territory of South Vietnam I do not think one can hold doubts.

More definite conclusions can be drawn from the two other cases mentioned above, namely the Moroccan and Franco-Belgian interventions in the region of Shaba, in 1977 and 1978 respectively. In both cases irregular troops, mostly former Katangese soldiers, crossed the Zairean border from Angola, and took control of some of the most important centres of the region of Shaba (former Katanga). In 1978, the invasion was also accompanied by killings, and harassment of the European population resident in Kolwezi (a mining centre of the area)¹⁴². In both cases the (Moroccan and Franco-Belgian) troops intervened at the request of the Zairean government. The direct European involvement in 1978 was also due to the considerable number of Western nationals in danger. With a few exceptions, the Moroccan operation was generally approved. Although allegations of direct Soviet and Cuban involvement were never confirmed, the view that

142. For a full account of the events of the first invasion in 1977, see Appendix, case n. 16, and also Keesing's 1977, p. 28397; RGDIP, 1977, p. 1203-1207. See, for the positions of the French and Belgian governments, AFDI, 1977, p. 1013 and RBDI. 1978-79, p. 202-208. For the positions of various governments, see RBDI. 1980. p. 625 and ff.; DSB, 1978 (Aug.) p. 12; 72 AJIL (1978), p. 917. See, moreover, the comments on both invasions by C. Legum, "Foreign Intervention in Africa", YBWA, 1980, p. 76-94 and 1981, p. 23-37, and A. Manin, "L'intervention Française au Shaba", AFDI, 1978, p. 159 ff..

the invasion was a purely internal affair (since the invaders were former Katangese or members of the local Lunda tribe) was rejected by most. Instead, the operation was classified as foreign aggression which entitled the Zairean government to seek assistance abroad ¹⁴³.

The same can be said about the second operation carried out directly by French and Belgian paratroopers in 1978¹⁴⁴. Negative comments on this operation were made by the same countries which had expressed disapproval of the Moroccan operation the previous year, and great emphasis was placed on protection of nationals as the main justification for the direct action of France and Belgium. France also stressed that the function of its troops was to restore security in the area¹⁴⁵. For this reason some French

143. See, e.g. statements made by Pres. Carter (USA), Dep. Premier Li Hsien-nien (China), Morocco, African countries reunited at the Franco-African Conference on April 20-21 1977. Egypt, Sudan and Uganda; see also negative comments expressed by the Soviet Union, Angola, Algeria and Nigeria; Keesing's 1977, p.28399-28400.

144. For the facts, see Appendix, case n. 17.

145. See the negative reactions of the same countries as before plus Tanzania, whose President Nyerere stated: "We do not deny the principle that any African State has the right to ask for assistance, either military or economic from the country of its choice [but] we must reject the principle that external powers

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contingents remained in the area after the Europeans had been evacuated, until they were substituted by an Inter-African peace-keeping force, stationed there to prevent the rebels from using the territory of neighbouring countries (namely Zambia and Angola) as a base or for transit to launch attacks against the Zairean territory ¹⁴⁶.

In conclusion, although the cases just mentioned support the view that the use of force in self-defence can be allowed against armed operations carried out by irregulars, it must be admitted that clear-cut cases such as the two just mentioned are comparatively rare. In fact, foreign involvement in internal conflict tends to take much less detectable forms. This also

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have the right to maintain in power African governments which are universally recognized to be corrupt or incompetent or a bunch of murderers when their people try to make a change" Keesing's, 1978, p.29128-30. The negative comments were mostly connected to the involvement of European Powers in African affairs more than anything else.

For the French and Belgian Justifications, see AFDI and RBDI cited supra in note 40.

146. The indirect responsibility of countries like Angola in the invasion was admitted by Angola itself. See statements made on June 10th by Pres. Neto of Angola (Keesing's 1978, p.28892) and report about assurances given by Angola to Germany that Pres. Neto had ordered the FNLC (Front National de Liberation du Congo) to pull back from the border area with Zaire (ibidem, p.29127).

provides an excuse for a government facing threats of an exclusively internal nature to claim the existence of foreign subversion as a justification for asking for foreign aid, as we shall see in the next section.

3.3.a Subversion through external infiltration and fomenting of civil strife in the State to be assisted in collective self-defence.

The cases included in these two categories (examined jointly in the present section) constitute most of those in which self-defence or a response to external illegal conduct was claimed as a justification. Besides this feature, however, the actions which had allegedly provoked self-defensive reactions have little in common. Ordering them according to the usual criteria of intensity and magnitude, it appears that they range roughly from instances of actual infiltration of foreign agitators into the target State's territory, to cases in which a vague, scarcely

identified and documented threat against the State's security was claimed¹⁴⁷.

As in the cases included in the categories mentioned before, the illegality of these types of conduct in international law, especially when they involve the use of force and/or avowedly challenge the State's security, is unquestioned¹⁴⁸, while a great variety of positions exists on the possible ways to detect violations and, above all, on the admissibility of the individual use of force in self-defence against them¹⁴⁹. These actions raise many problems, of two different orders. First of all, they are hard to detect, especially when an internal conflict is in progress and what must be established is the amount of foreign aid received by a certain faction, as well as its relative weight vis-à-vis the "genuinely internal" element. Moreover, the foreign States involved, or those States whose involvement is alleged,

147. The practical problems caused by the circumstance that, although the effects of these forms of subversion can be clear, there is always a chronic lack of evidence of how foreign subversion produces those effects, which puts these activities beyond any possibility of objective detection, are well pointed out by Thomas, Thomas, Concept of Aggression, p.68 and passim, and Brownlie, Use of Force p.369.

148. See, e.g., the ICJ in Nicaragua, para.195.

149. See, supra, notes 32 to 34,

tend to disclaim responsibility¹⁵⁰. The direct consequence is that, on the one hand, States wishing to threaten or overthrow foreign governments through subversion have an easy way to do so by causing, or taking advantage of, situations of internal unrest abroad, by means which are difficult to detect¹⁵¹. On the other hand, governments facing serious internal challenges are provided with a very good excuse (the foreign threat or the foreign involvement which can never be adequately proved) to ask for the intervention of a foreign State - an intervention which is actually designed to keep them artificially in power. The same is true for potentially intervening powers, wishing to maintain in

150. The only possible exception to this statement is represented by the overt assistance given to people struggling for self-determination. See, infra, p. 45 ff.

151. Judge Schwebel in his dissenting opinion in Nicaragua (the law, paras. 154ff.) points out this problem, and asserts the existence of a right of the victim State and of those helping it, to resort to "covert" forms of subversion in self-defence.

The problem is undoubtedly real and serious but one can doubt that the solution proposed by Judge Schwebel would really be the desirable one. It has indeed been criticized by Falk:

"...Somehow, Judge Schwebel appears to accept covert operations as a legitimate use of force in international affairs if characterized as "defensive" by the user ... The imperial perspective seems prominent here. We are hardly prepared to endorse a conception of legitimate covert operations that validates State-sponsored terrorism characterized by its user as "defensive", but this is precisely what is implied". R. Falk, "The World Court's Achievement", 81 AJIL 1987, p.106 at 111.

And indeed, if these operations are legitimate, why should they be covert?

power a certain foreign government in their own sphere of influence: they can simply claim that "foreign agitators" are responsible for the internal uprising that threatens their "puppet" government, and thus have a comfortable excuse to intervene in "collective self-defence"¹⁵².

Furthermore, from a legal viewpoint, there is no doubt that these activities do not, prima facie, constitute an "armed attack" within the meaning of article 51 of the Charter. Also, due to the usually rather gradual, vague and undetectable character of these activities, they do not always represent a danger complying with the requirement set by the Caroline case to be "instant, overwhelming, leaving no choice of means and moment for deliberation" to justify the exercise of the right of self-

152. This was very effectively pointed out by R.J. Dupuy when commenting on the U.S. intervention in Lebanon in 1958:

"Le gouvernement menacé a un double intérêt à dénoncer le caractère extérieur du mouvement dirigé contre lui. D'une part, prétendant toujours à la fidélité de son peuple 'dominé' selon la formule habituelle 'par une poignée d'agitateurs à la solde de l'étranger', il compte aussi ménager l'avenir. ... D'autre part - et c'est le deuxième intérêt du gouvernement à invoquer l'agression - tant que la lutte se poursuit, il peut se fonder sur le caractère international qu'il attribue au conflit pour adresser un appel à l'aide de ses amis". R.J. Dupuy, "Agression indirecte et intervention sollicitée dans l'affaire libanaise", AFDI, 1959, p.431 at 457.

defence in customary law¹⁵³. In Nicaragua, the Court also denied that operations short of the sending of armed bands by a State (of considerable entity and not just mere frontier incidents) can be defined "armed attacks": "...the Court does not believe that the concept of 'armed attack' includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal affairs of other States"¹⁵⁴.

The Court therefore rigidly sticks to the concept of "armed attack" and is prepared to admit other instances of reactions in self-defence only as a response to situations which are in abstracto equivalent to an armed attack, even when other subversive activities, short of armed attack, strongly undermine the target State's security. It further states: "...the Court is unable to consider that, in customary international law, the provision of arms to the opposition in another State constitutes

153. See events of the "Caroline" case in Moore, Digest of International Law, vol.2, pp.409-414, and Sir R. Jennings, "The Caroline and McLeod cases", 23, AJIL, 1938, p.92. But see Ago's remarks about the requirement of immediacy, reported supra, note 19.

154. Nicaragua case, para. 195.

an armed attack on that State. Even at a time when the arms flow was at its peak, and again assuming the participation of the Nicaraguan government, that would not constitute an armed attack"¹⁵⁵.

Yet, it is impossible to deny that, in certain cases, this type of foreign involvement in internal conflict, can not only reach considerable levels, but represent a serious threat to the stability and security of the target State especially if this State is relatively small, weak or internally divided. In these cases, that State might find itself in an objective situation of danger, which, while not showing the characteristics of immediacy or evidence required for the right of self-defence, demands an immediate positive action which by itself it is unable to take¹⁵⁶. Quid juris in these cases, particularly in the face of a paralyzed Security Council? It seems apparent that no satisfactory solution can be given to this problem by way of

155. Ibidem, para. 230.

156. It is also possible to envisage cases where the internal balance within a State is on the verge of collapse, so that even a relatively small involvement from outside can bring about disastrous consequences for the stability and political independence of the target State.

The rather arbitrary character of the line drawn between actions amounting to armed attacks and uses of force of lesser gravity was repeatedly stressed by Judges Schwebel and Jennings in their dissenting opinions in the Nicaragua case. paras 172-3 (Schwebel), and pp. 532 ff. (Jennings).

establishing, in abstracto, whether certain forms of subversion, not amounting to an "armed attack", can or cannot allow a response in self-defence. A survey of individual cases is necessary.

The relevant cases can be approximately divided into two groups. The first includes all instances in which some form of infiltration into the target State was sufficiently proved. In the cases of the second group the allegation was made of an indefinite threat to the security of the State, but this external threat was not well characterized nor was it ever proved. Obviously, the border between these two groups is extremely vague and is based on facts which can be very controversial; yet the distinction may prove useful for the sake of exposition.

The first group includes the following cases: the British intervention in Muscat and Oman in 1957, the American intervention in the Lebanon in 1958, the second French intervention in Chad in 1978 and the American "covert" intervention in Central America, which began in 1981. Most of these cases have already been examined in the previous chapter from the point of view of the consent given by the central government; the main facts are therefore already

known¹⁵⁷.

Self-defence was explicitly claimed as a justification for the two US interventions in the Lebanon and Central America, while in the other two cases the existence of foreign involvement was alleged, with no mention of self-defence as such¹⁵⁸.

In the Lebanon the infiltrations were coming from the neighbouring UAR (Syria) and had the purpose of fomenting civil war in the country and undermining the authority of President Chamoun, while in Muscat they had the purpose of substantially helping the rebels who wanted to overthrow the ruling Sultan. In Chad the Libyans were aiding the northern rebels against the French-backed central government, while in Central America the US

157. See, Appendix, case n. 26. For more details about the Nicaragua case see Keesing's 1983, p.32302; RGDIP, 1984, p. 657; UN Monthly Chronicle, May 1983, p.8; July 1983, p.34; November 1983, p.31. See, furthermore, the State Dept. Statement called "US withdrawal from the proceedings initiated by Nicaragua in the International Court of Justice", published in the New York Times, 19.1.1985; Judgement of the Court on admissibility (Nov.26th 1984): 1984 ICJ Rep., 392; Judgement on the merits, 1986, ICJ Rep. 14.

After the decision on the merits an impressive amount of literature has been produced on this subject. An interesting collection of comments on the various aspects of the decision can be found on AJIL, 81, 1987.

158. See Appendix, cases n. 2, 4, 18 and 26. See also, supra, p.32³⁹. With the exception of Lebanon where, after the complaint made by Pres. Chamoun to the SC, observers were sent to verify the well-founded of the Lebanese allegations, in the other two cases the entity of these foreign infiltrations was never verified.

action in favour of the "contras" fighting against the Sandinista government in Nicaragua, was claimed to be a response in collective self-defence to the support given by the Sandinistas to the rebels in neighbouring El Salvador¹⁵⁹.

With the exception of Central America, world reactions to the other three cases were either rather favourable or indifferent. Some observations could usefully be made: the first is that in all cases, for different reasons (mostly the size and the situation of the target country vis-à-vis the intervening power), the likelihood of a foreign involvement seriously influencing the outcome of hostilities was very high. The Central American case presents some differences from the other three cases insofar as the US "covert" intervention, although allegedly directed against El Salvador rebels helped by Nicaragua, was not mainly directed, as one would expect, against these rebels. Instead, it was directly aimed at the Nicaraguan territory. The most plausible aim was the elimination of the problem at its root, by way of the removal of the Sandinista government. Obviously this renders a judgement of the legality of the situation even more problematic. Even admitting the legality of a reaction in collective self-defence by the United States, additional problems of

159. See, supra, note 53.

proportionality between the reaction adopted and the actions carried out by Nicaragua would arise¹⁶⁰.

Had the United States limited their action to the Salvadorean territory, with a view to blocking the alleged Nicaraguan infiltration, the evaluation of their conduct would probably have been different. Without trying to draw conclusions from events which are purely hypothetical, it is a fact that the harsher criticism of the American activities was due to their way of dealing with the problem, which was somewhat oblique. There were strong suspicions that the main purpose of the American operation was not, as had been claimed, to help the government of El Salvador deal with the internal rebellion.

With regard to the other cases, those actions were substantially accepted. The first two are however rather "old": the above considerations about the subsequent evolution of the practice and the changes in the international community are also

160. In Nicaragua the Court in fact stated:

"Since the Court has found that the condition sine qua non required for the exercise of the right of collective self-defence by the U.S. is not fulfilled in this case, the appraisal of the United States activities in relation to the criteria of necessity and proportionality takes on a different significance. As a result of this conclusion of the Court, even if the U.S. activities in question had been carried on in strict compliance with the canons of necessity and proportionality, they would not thereby become lawful. If however they were not, this may constitute an additional ground of wrongfulness."

Nicaragua case, para. 237.

valid here¹⁶¹. Previous foreign infiltration was in any event the circumstance rendering those interventions lawful. Whether it is so by virtue of the principle of self-defence it is open to question. Actions in collective self-defence are subject to the requirement of proportionality which is rather elastic. In principle they may involve the territory of the alleged aggressor. This happened in the Central American case with the intervention of the United States against Nicaragua, with negative reactions. Furthermore, the alleged infiltrations could hardly be equated with armed attacks, no matter how wide the interpretation of this notion may be.

If, conversely, the view is taken that it was the consent of the target State which made the interventions lawful, this would justify them only to the extent they were confined to that State's territory. Indeed, this is what happened in the first three cases examined.

It is unquestioned, in my opinion, that a State subject to an external threat consisting of foreign subversion or infiltration is entitled to request foreign help. In the previous chapter I reached the conclusion that the power of the "incumbent" government to request an intervention in these cases is prima

161. See, supra, chapter on consent, p.32 ff.

facie presumed. Undoubtedly these operations are defensive in character: yet the difficulties of inscribing them within the framework of self-defence lie in the rather "slippery" character of the unlawful activities provoking them, which hardly fits with the rigid concept of "armed attack", and in the risk of a "legalized" extension of the conflict to other States, particularly the alleged aggressor: something which would be a matter of course in any self-defensive reaction.

I shall leave this question open for now. I will attempt to answer it at the end of this work, on the basis of other considerations.

3.3.b Alleged external threat to the security of the State to be assisted in collective self-defence.

In the instances of the second group, self-defence was claimed as a justification for intervention against a not always identified and, above all, not proved external threat. Moreover, in most cases it was not advanced as the main ground but in addition to other legal grounds. These cases are the Soviet

interventions in Hungary (1956), Czechoslovakia (1968) and Afghanistan (1979-80); the British intervention in Jordan in 1958 and (as a very secondary justification) the US interventions in the Dominican Republic (1965) and Grenada (1983)¹⁶².

As was said before, and clearly appears from a closer examination of the facts, in none of these cases was any substantial evidence provided to support the allegations of a foreign threat. In every case the countries regarded as responsible were those which could have a political interest in subverting the status quo in the target States; however, their involvement was never admitted, nor proved. Nor was it specified how the foreign countries allegedly involved were actually planning to carry out their subversive plans. With the possible exception of the British intervention in Jordan (whose scale cannot absolutely be compared to that of the other cases, and whose peculiarities have already been pointed out in the previous chapter) the reactions of the international community to the

162. For a full account of the events which took place in Afghanistan, Jordan, the Dominican Republic and Grenada, and of the Soviet intervention in Hungary and Czechoslovakia see Appendix, cases n. 1, 3, 9, 22 and 24. For a very detailed account and a comment on the legal justifications in the last two cases, see D. Manai, Discours juridique soviétique et interventions en Hongrie et Tchécoslovaquie, Genève, Droz, 1980.

other interventions were almost always ¹⁶³ overwhelmingly negative. If one considers the rather suspect circumstances in which in every case the government of the target State had issued its request to the intervening power, this is hardly surprising.

To sum up, no conclusive assessment of the legality of the use of force in self-defence against the actions in question can be achieved, if it is only based on the character of the actions themselves. It is interesting to notice, nevertheless, that in the cases where evidence was provided to support the claim of a foreign involvement, the reactions of the international community were not as negative as they were when self-defence was claimed against an alleged threat not substantiated by compelling evidence. It should also be noticed that, apart from a few exceptions (interventions such as the one in Jordan which did not raise significant negative reactions) the alleged threat or infiltration was in most cases either totally negligible if compared to the genuinely internal turmoil which had prompted the foreign intervention or not serious enough to be reasonably

163. The only exception to what has just been said is the intervention in the Dominican Republic, where only a few States condemned the US action. It should be recalled however, that the justification based on self-defence was a secondary one, for the US claimed to have intervened to rescue their citizens from a very dangerous situation and, later, justified their presence by a mandate given by the OAS.

expected to threaten the target State's security or strongly influence its internal situation.

An explanation could be found when analyzing the abovementioned cases on the strength of the criteria of necessity and of the effects of the illegal conduct (rather than its character). Of all the cases examined, only in the Lebanon, Muscat and Chad did the external involvement, though not amounting to a full scale aggression through regular or irregular troops, really constitute a serious danger for the target State, and the danger was such as to require an immediate reaction (which probably neither government was able to undertake without foreign help).

If a conclusion can be drawn at all from the observations just made, it is that States do seem to admit foreign intervention as a response to forms of involvement not amounting to an "armed attack" or aggression within the limits set forth by the 1974 definition. The alleged threat or involvement must really be likely to endanger the target State's security (an effect that the "internal" rebels would not alone be able to achieve), and the danger must be of such gravity as not to be averted by any other means short of an immediate forcible reaction.

I recalled before that the International Court of Justice clearly ruled out, in the Nicaragua case, that forms of infiltration or subversion of limited character (such as supply

of weapons etc.) can ever be equated with an armed attack¹⁶⁴. The stress, as one can see, is mainly on the typology of the activity (it must be an armed attack or it must be equated with an armed attack) even though the effects of it are also mentioned. In other words, according to the Court, for it to be classified as an armed attack, an "irregular" action must reach such a scale and effect, to be classified as an armed attack were it carried out by regular forces¹⁶⁵. Other kinds of actions, which might amount to a violation of article 2.4 but falling below the threshold of an armed attack do not give rise to the right of self-defence but only (possibly) to countermeasures (whether or not involving the use of force is not completely clear). These

164. Nicaragua case, para.195.

165. Farer has tried to clarify this point:

" On the one hand the Court concludes that there are circumstances where aid to rebels can be deemed an "armed attack" with all the attendant legal consequences. On the other, it categorically rejects the claim that a State crosses the armed attack threshold merely by arming the rebels. Nor does it appear that arms plus advice and sanctuary for rebel leaders suffice to transform illegal intervention into an armed attack. What will suffice, if I understand the Court correctly, is a level of collaboration exemplified by the Bay of Pigs, that is where the rebels are organized, trained, armed and then launched by their patron in an assault of such dimension that, if it were carried out by troops of a foreign State there would unquestionably be an armed attack. Presumably (although the Court did not have to address this case), the dimension can be measured over time; in other words, multiple infiltration by small units can equal a single mass border crossing".

T. Farer, "Drawing the Right Line", 81 AJIL, 1987, p.112, at 113.

countermeasures, however, may only be adopted by the victim State and not by any third State. This latest statement is rather perplexing, especially if one believes that these countermeasures may encompass the use of force. This question however cannot be dealt with in depth here¹⁶⁶.

In any event, the Court seems to advocate a rigid distinction between armed attack and what falls short of it, even though this rigidity could be a little loosened up in interpretation by giving weight to the word effect. If the effect of an action is to be relevant it might well happen that the same action, against two different States and in different conditions might pass or fall short of the threshold. Should the relationship between scale and effects of the two actions be evaluated in abstracto or with reference to the possible target? It seems that the Court's test is the best to decide prima facie whether an armed attack has taken place (and therefore whether self-defence has been lawfully invoked) but that derogations from the test should be possible in special situations.

It seems to me that if a foreign intervention is allowed under any conditions upon request (whether by virtue of a valid

166. See criticism by J.L.Hargrove, "The Nicaragua Judgment and the Future of the Law of Force and Self-defence", 81 AJIL, 1987, p. 135 ff. at 141-2, and by J.A. Frowein, "Collective Enforcement of International Obligations, ZAÖRV, 1987, p. 67 at 71.

consent or by virtue of self-defence), the classification of the previous foreign involvement as armed attack, becomes relevant only to judge the legality of armed operations undertaken by the intervening State against the alleged aggressor¹⁶⁷.

3.4 Alleged external threat to the security of the State intervening in individual self-defence

It seems appropriate now to mention two more cases of foreign intervention in situations of internal unrest, in which self-defence was put forward as a justification: the Indian intervention in East Pakistan (which subsequently became Bangla Desh) in 1971, and the more recent "Peace for Galilee" operation, carried out by Israel in the Lebanon in 1982. These two cases are examined in a separate section because, though prima facie similar to all the others (in both cases there was a situation of

167. See, infra, section on proportionality, p.15^a ¶.

internal unrest in the target State, and the intervening powers claimed self-defence as justification), they are substantially different in some basic respects. A common feature of all the cases examined before is that the foreign intervention always took place on the side of one of the factions (usually the established government), and was justified as collective self-defence. In these two cases, instead, the intervening powers claimed to be acting in individual self-defence against a threat originating in the target State, owing to the situation of internal disorder.

The events of the Bangla Desh conflict are well known¹⁶⁸. The justification given by India for its intervention was twofold. One was the assistance to the people of Bangla Desh in their struggle for self-determination, the other was self-defence of India against the Pakistani attack (although that could not justify operations of such a large scale in East Pakistan), and

168. For a detailed account of the events of the Indo-Pakistani war and the independence of Bangla-Desh, see Appendix, case n. 12; RGDIP 1972, p. 538-564; Keessing's p.24989; 25053; 25069 and 25429. See, also, V.S. Mani, "The 1971 War in the Indian Subcontinent and International Law", 12 Indian JIL, 1972, p.83.

The independentist group Mukhti Bahini had proclaimed the independence of Bangladesh since April 10, 1971 as a result of the repressive policies of the Pakistani government. For the text of the declaration see Indian JIL, 1971, p. 54. For the statement of recognition of Bangla Desh by the Prime Minister of India (6 December 1971) ibidem, p.685.

defence against the threat to the economy and security of India represented by the massive inflow of refugees (caused by the repressive policies adopted by the Pakistani government in East Pakistan)¹⁶⁹.

Leaving aside the question whether self-determination can ever justify armed intervention, which will be dealt with later, the main problem raised by this case is the admissibility of an armed reaction in self-defence against an inflow of refugees. It is important to remember, however, that the inflow was not in itself aimed at the disruption of the territorial integrity or political independence of India and, albeit a direct consequence of the Pakistani policies, could not be said to have been caused by a Pakistani intention to harm India¹⁷⁰.

169. See statements by the Permanent Representative of India at the UN General Assembly on 7.12.1971 (GAOR, 26th Sess, A/PV.2003; and by the Indian Foreign Minister at the Security Council on 12.12.1971 (UN Doc.S/PV.1611).

170. Let us assume that the Pakistani policies in the Eastern part of the country were unlawful. We would have an unlawful activity carried out by a State (even though within its own boundaries) which causes damage to another State. This circumstance would certainly entitle India to the right to a reparation on the part of Pakistan, but would not give India the right to react in self-defence, since that activity, taken in itself, is not an armed attack. In any case, the inflow of refugees, even though a heavy burden for the Indian economy, is not such as to constitute an immediate and overwhelming danger.

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The Israeli action, too, was justified with individual self-defence against the incessant attacks of Palestinians from Southern Lebanon, whose general disorder allowed them. Here the Palestinian attacks constituted a threat to the security of Israel and its citizens, but the Israeli intervention was directed against Lebanon, which did not have a direct responsibility for the attacks and was unable to stop them¹⁷¹. Here too, therefore, the element of direct imputability is

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Self-defence would not be applicable, therefore, even in its more "traditional" sense. The same considerations are valid a fortiori when assuming that the Pakistani activities in East Pakistan were not in themselves internationally wrongful. The justification based on individual self-defence does not seem founded in law.

171. The basic facts are narrated in the Appendix, case n. 23. For further details on the operation, see Keesing's 1983, p. 31914; RGDIP. 1983, p.428-437.

The action was repeatedly justified by Israel as self-defensive (See Israeli statement in the Security Council on June 6th, UN Chr., Sept. 1982, p. 15 and letter to the SC by the Permanent Representative of Israel on June 8th). In the first occasion it stated it had to take action because the Council would never act to curb aggression against the country and that Israel had no quarrel with Lebanon but with those who have subjugated it.

lacking¹⁷².

International reactions were rather mixed in the case of Bangla Desh (even though every State later accepted the "fait accompli" of the secession of Bangla Desh), while they were overwhelmingly negative to the "Peace for Galilee" operation¹⁷³.

172. Here the question of self-determination is involved but in the opposite sense as before. Israel was not intervening to give assistance to a people (i.e. the Palestinian people), fighting for self-determination, but against them. This question complicates the matter. If one accepts that the PLO are entitled to the right of self-determination, this right applies to the Arab territories occupied by Israel (West bank and the Gaza strip). According to various G.A. resolutions, Israel should not be allowed to use force to deprive the Palestinians of their right. Does this prohibition only apply to the occupied territories (and conversely, is the right of PLO to use force limited to those territories)? Or is the PLO entitled to use force in whatever part of the Israeli territory in order to free the occupied territories?

173. See, with reference to the Bangla Desh case, statements in favour of the Indian intervention by Argentina, USSR, Turkey (A/PV.2002) and by Syria (S/PV.1613); or, against, US State Department Decl. (reported by Keesing's, cit.) which accused India of "major responsibility". The initial US negative reactions were subsequently muted after congressional criticism. See, moreover, declaration of China in the Sec. Counc.(S/PV.1608). It is also to be noticed that the resolution adopted by both the General Assembly (Res.2793(XXVI) of 7.12.1971) and the Security Council (Res.307 (1971) 21.12.1971) failed to condemn the Indian intervention.

On the other hand, with reference to the Israeli invasion of Lebanon, see the overwhelmingly negative reaction (with the exception of the US which conditioned the withdrawal of Israel to the cessation of PLO attacks) and by the international community and the two draft resolutions calling for an unconditional and

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A general question raised by the cases just mentioned can be as follows: can events harmful to a certain country, which originate in a neighbouring State due to a situation of internal unrest, but without the specific and avowed intention of the latter State to harm the former, give this State the right to intervene in self-defence? It is submitted that an armed reaction as those described above could be justified more easily as a state of necessity than as self-defence¹⁷⁴. In the ILC Report on

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immediate withdrawal of the Israeli forces (6 and 26 June 1982) vetoed by the United States. The plea of self-defence was openly rejected by several delegations (see UN Chr., Sept. 1982) in the General Assembly, which adopted on June 26 by 127 votes to 2 a resolution calling on Israel to withdraw all its military forces from the Lebanon.

On August 19th, at the conclusion of a four day emergency special session on the Palestinian question, the General Assembly adopted by 120 votes to two (Israel and the US) with 20 abstentions (mainly Western European countries) a resolution condemning Israel for ignoring previous UN calls for a withdrawal from Lebanon and urging the Sec. Council to take "practical" measures to compel Israel to comply. The same resolutions called for the "free exercise in Palestine of the inalienable rights of the Palestinian people to self-determination without external interference and to national independence".

174. For an extremely useful introduction to the state of necessity see Ago's Report, 1980, p.14.

The problem is the following: the concept of "necessity" is distinct from that of self-defence in that it does not presuppose

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State responsibility the state of necessity has been included among the circumstances precluding the wrongfulness of an

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a wrongful act on the part of the other State, and the act is not necessarily directed against the person who created the danger (M. Sørensen, "Principes de Droit International Public", HR 1960 III, p.219-220).

This could apply to both situations. Of course one could argue that the Lebanese conduct in sheltering the Palestinians was not wrongful, or that the quasi-genocidal policies carried out by Pakistan, even though wrongful in themselves, did not represent such an overwhelming danger for India, to justify its armed intervention. If we assume that the basic conditions to justify an armed intervention were present, it must be borne in mind that the circumstance of "necessity" cannot preclude the wrongfulness of an act of aggression. Therefore, was the Israeli use of force a strictly limited one, purely confined to the purpose of averting the danger, or did it (in terms of magnitude and intensity) constitute an act of aggression? And, with reference to the case of Bangladesh, could it be said that the Indian conduct was only limited to the removal of the cause at the origins of the inflow of refugees? These problems will be examined in greater detail in the chapters devoted to self-determination and humanitarian intervention.

On the relationship between state of necessity and use of armed force see C. Gutierrez Espada, El estado de necesidad y el uso de la fuerza en Derecho Internacional: reflexiones sobre la interpretación y consecuencias que pueden derivarse, en tal materia, de la aceptación por la CDI del estado de necesidad, Madrid, Edit. Tecnos, 1987, and J.J. Salmon, "Faut-il codifier l'Etat de nécessité en Droit International?" in Etudes de Droit International en l'honneur du juge Manfred Lachs, The Hague, Nijhoff, 1984, p. 235 ff.. See also the view taken by P.L. Lamberti-Zanardi, "Necessità (diritto internazionale)" EdD, Vol. XXVII, p.898 where he asserts the non-existence in the law post World-War two, of a distinct concept of necessity as a circumstance precluding wrongfulness.

otherwise wrongful act committed by a State. According to the report, what differentiates the state of necessity from other circumstances such as consent or self-defence is that "the preclusion of the wrongfulness of an act of a State not in conformity with an international obligation to another State is totally independent from the conduct adopted by the latter. In determining whether the wrongfulness is precluded by a state of necessity, there is no need to ascertain whether the State in question had consented to or previously committed an internationally wrongful act, or engaged in aggression"¹⁷⁵. In other words the "imputability" of a wrongful act to the State victim of the armed reaction would not be necessary.

The applicability of the state of necessity to the prohibition of the use of force seems however very limited. The International Law Commission, even though clearly denying its applicability as a justification for those uses of force amounting to aggression¹⁷⁶, leaves it open as to whether it can justify limited forcible violations of States' territorial

175. ILC Report, 1980, p.34, para.2.

176. Ibidem, para.22.

sovereignty falling below that threshold¹⁷⁷. Even in the latter hypothesis, however, such use would be submitted to very strict conditions. The first is that there should not be an excessive disproportion between the interest that the State invoking a state of necessity wants to preserve, and the right of the victim State infringed by the wrongful action. Moreover, a state of necessity cannot justify the violation of a peremptory norm of international law, or the provisions of a treaty which expressly precludes its application. Finally, it cannot be invoked if the State which invokes the circumstance has itself contributed to its creation¹⁷⁸.

To sum up, and assuming as a "working hypothesis" that a state of necessity could be invoked to justify lesser forms of use of force falling short of aggression, such use of force could be possible:

- if the interest at stake in the intervening State is really vital;
- if the target State is unable or unwilling to act but not directly responsible;

177. *Ibidem*, p.25. See, moreover, Appendix, case n.5 (Belgian intervention in the Congo, 1960).

178. ILC Articles, article 33 (State of Necessity), para.2 (letters a,b, and c).

- if the forcible action has a very limited character, it is directly aimed at its target and stops as soon as the aim is achieved.

We can assume that the first two requirements were fulfilled in our two cases, because the security of the Galilean northern villages and the economic well-being of the Indian regions "flooded" by refugees were indeed vital interests, and because Pakistan and Lebanon were not directly responsible for what was happening. However, there are no doubts that the consequences of the Israeli and Indian attacks were disproportionate to the aims allegedly pursued. Both goals could reasonably be achieved without bringing about the secession of Bangla Desh or the military occupation of half of Lebanon including Beirut.

Thus if it can be easily accepted that a situation of turmoil within a State's territory may cause damage to the territory of another State, it seems unwarranted to invoke a state of necessity for anything more than limited actions aimed at preventing the impending damage or at putting a stop to it. Any action going beyond that, as in our two cases, would represent an abuse of the right. The state of necessity would provide a comfortable excuse for interfering into another country's

internal affairs, profiting from a situation of anarchy¹⁷⁹.

Since a state of necessity cannot provide a valid justification for either of the two interventions, the sharp contrast between the international reactions elicited by them remains to be explained. International reactions to these two interventions, it is suggested, must be explained by the role played by the principle of self-determination. In the first case, indeed, the foreign (Indian) intervention had the purpose of ensuring that the people of Bangla Desh achieved self-determination (to which, according to the generally accepted definition, it was entitled); in the second case the Israeli action resulted in the crushing of the struggle of the

179. The dangers stemming from the evaluation of the relative weight of the contrasting interests of the acting State and the victim State have been effectively pointed out by de Visscher as quoted by Salmon:

"... Il n'est pas vrai que pour réaliser ses fins propres, pour assurer la conservation ou la sauvegarde de ses intérêts vitaux ou essentiels, un Etat puisse méconnaître les droits d'autres Etats. La conservation de l'Etat n'est pas un intérêt juridiquement protégé, elle n'est un droit que tant que ses exigences ne se heurtent pas aux droits d'autres Etats. Ce droit n'est donc nullement un droit absolu; c'est un droit essentiellement relatif, en ce sens qu'il a sa limite nécessaire dans les droits d'autres Etats. La prétention d'un Etat d'élever ses intérêts propres au dessus des droits d'autres Etats crée un conflit juridiquement insoluble. Elle est en opposition directe avec le principe fondamental de l'égalité des Etats souverains; dans la pratique elle se heurte nécessairement au refus des autres Etats de s'incliner devant ses exigences". Salmon, Etat de nécessité, p. 239.

Palestinian people, forcibly denying their right of self-determination to which, in the view of most countries, they are entitled. What I have just suggested aims only at providing a prima facie explanation of the international reactions. The problems raised by the practical application of the aforementioned principle, and by its relationship with the prohibition of the use of armed force, will be examined in detail in the next chapter.

4. The authority entitled to claim self-defence

We must now consider the problem of who, in a situation of internal unrest, is entitled to invoke the right of self-defence. This question has already been dealt with in the previous chapter from a different angle, namely whether there is a general right for a government to give its consent to external armed intervention, when faced by an internal rebellion. It may be recalled that, with reference to internal unrest, the power of a government facing a serious internal rebellion to ask for external help was questioned, because that government would not be sufficiently effective (effectiveness constitutes the factual basis on which the right to ask for external help rests)¹⁸⁰.

If the right of a government to ask for external help is curtailed or limited (for reasons of effectiveness) when the rebellion is purely internal, that right should remain unaffected if the authority of the government is not threatened from inside but from outside. Obviously, this right could properly arise only

180. See, supra, Chapter on consent, p.174.

when certain conditions are fulfilled. The foreign involvement must be substantial (so that the authority of the government in question can really be said to be threatened from outside, rather than inside), and the armed option must be the only available¹⁸¹. If there is a presumption in favour of the established government in case of external involvement in a rebellion, this presupposes that that government must have (or have had before the external threat materialized) substantial control of the territory, and its authority must be (or have been) unquestioned; if it is no longer in this position, this must mainly be a consequence of the foreign-backed rebellion (and not of any other autonomous cause)¹⁸².

What has just been suggested is substantially confirmed by State practice. In fact, in all cases where self-defence was successfully invoked (Muscat, Lebanon, Chad, Shaba - both cases -), the government asking for external intervention was in this

181. See, in this sense, D. Schindler, "Le principe de non-intervention dans les guerres civiles", 1973, Annuaire, p.457; Brownlie, Use of Force p.325; E. Lauterpacht, Intervention by Invitation p.106.

182. See, supra, chapter on consent, conclusions, p.70.

position¹⁸³.

Mention should be made of those situations where, because of special circumstances, none of the fighting factions can possibly be said to represent (or to have represented) the "established government". This usually happens in those cases where, after the extinction of the former authority, no new group is strong enough to take over and establish itself over the whole of the country. Among the cases examined before we can cite the situations of Angola and Vietnam (if one upholds the first of Henkin's schemes)¹⁸⁴. In theory, as none of the factions can realistically assert to have been deprived of its complete authority by an external intervention, no one can claim any right of self-defence, and third countries should strictly abide by the rule of non-intervention. In practice, each of the factions usually claims to represent the legitimate authority, and this claim is supported by the segment of the international community which wants that particular faction to prevail. As a result, there are

183. See, supra, p. . The only case in which the government did not have complete authority is Chad. It should be stressed, however, that the principle of the unity of Chad was internationally recognized, and that the government in N'djamena also enjoyed general recognition. Also, the foreign aid was not asked for if not subsequently to the claims of Libyan involvement.

184. See Appendix case n.15 and, for Vietnam, supra, note.141.

external involvements (at different levels) in favour of both sides. However, these situations are rather limited in number and historically connected to the end of the colonial period. As a whole, they do not represent a precedent coherent enough to challenge the view set forth above.

The problems arising from these situations may be of different order: it is possible that, in a situation of anarchy, a foreign power intervenes directly either in favour of one faction, or for autonomous reasons, taking advantage of the situation. The problem is then whether any of the other factions is entitled, by virtue of this previous intervention, to request a counter-intervention, and whether a third country is entitled to intervene to redress the previous "illegal" foreign intervention. This problem will be dealt with in the final chapter¹⁸⁵.

The inter-relation between the rule just mentioned (presumption in favour of the incumbent government) and the principle of self-determination in its "external" version also deserves a few remarks. As will be discussed fully later, the view is generally accepted that peoples struggling for self-determination have the right to seek and receive help to pursue

185. See, infra, p.223 H.

their aims¹⁸⁶, although it is controversial whether this help can take the form of armed intervention. Hence, a government facing the rebellion of a people struggling for self-determination is precluded from using armed force against them. It should also tolerate rebels receiving some external help, even though the exact degree is by no means clear. If one takes the most accepted view, according to which this help may not amount to a direct armed intervention, it can be asserted that only in the latter case would the territorial government be entitled to seek help in self-defence¹⁸⁷.

Obviously, this only represents a general statement of the principle and how it constitutes an exception to the general practice/rule. The problems relating to its application, i.e. the criteria to identify a people in this position, and the kind of help they are entitled to receive (whether armed force is included or not), will be discussed later on.

186. See Res.1514 (XV) of 14.12.1960 "Declaration on the granting of independence to Colonial Countries and Peoples (par.4); Res. 2131 (XX), cit., par.3; Res. 2625 (XXV), cit., principle (e); Res. 3314 (XXIX), art.7.

187. See, infra, chapter on self-determination, p.172 ff.

5. Collective self-defence

The next step in the analysis of the role of self-defence as a justification for armed intervention is the definition of the concept of collective self-defence. The importance of the problem lies in the circumstance that it is this very concept which can justify external armed intervention in internal conflict. An internal conflict can be lawfully "internationalized" because third States can intervene in it, resorting to collective self-defence as a justification¹⁸⁸.

Since this concept has found explicit mention for the first time in the Charter of the United Nations, its exact definition can only be based on the interpretation of article 51. Various

188. Although the term "collective self-defence" was not always employed, the "internationalization" of an internal conflict, by means of intervention of a third State which claimed to help the victim State to face an external aggression is precisely what happened in all the cases examined, with the exception of Bangla Desh and the Israeli invasion of Lebanon.

interpretations have been propounded in legal literature¹⁸⁹. A main interpretative problem lies in the expression "collective self-defence" itself, in the English text. Literally interpreted, self-defence means defence of one's self, in other words that there is only a right to use force for individual defence, and not for someone else's. Accordingly, the attribute "collective" before it can only refer to the concerted exercise of the right of individual self-defence by States which are individually threatened and are undertaking their own defence¹⁹⁰. One might

189. The lawfulness of the conduct which amounted to coming to the assistance of another State that had suffered an armed attack was, in Ago's view, admitted general international law, as was the lawfulness of the conduct of the attacked State in defending itself by the use of force against an armed attack, as an exception to the general prohibition of the use of armed force, when general international law recognized that prohibition. Ago's report, 1980, p.68.

190. This is the view taken by Bowett, Self-defence, p.215 ff. and by Arangio-Ruiz, Difesa Legittima, p.634 ff.. The aforementioned contradiction in the english text was also pointed out by H. Kelsen, "Collective Security and Collective Self-Defence under the Charter of the United Nations", 1948, AJIL, p.792. Nevertheless he did not draw the same conclusions as Bowett or Arangio Ruiz.

It must be said, however, that if one stays with Bowett's conception of self-defence, which may be exercised whenever certain fundamental rights are threatened, leaving the use of force as the only option available, it is quite likely that in the case of aggression against one State, other States' fundamental rights might be threatened giving them the right to react. Obviously, if one takes this broader view of the

(Footnote continues on next page)

however wonder why the attribute "collective" was introduced at all, for, if the States exercising the right of collective self-defence are all equally threatened, the concerted exercise of the right would be a matter of fact; it would need to be expressly mentioned only if this concerted exercise were prohibited by some other provision in the Charter. According to this view, therefore, the function of the attribute "collective" is precisely that of rendering lawful the use of force by a third State, not itself threatened, in aid of a State which is exercising its individual right of self-defence¹⁹¹. The views taken by most authors have been sketched at the beginning of this chapter. Among them, the view taken by Dinstein is particularly interesting. According to him the request by the victim State is not necessary for the intervention of a third State in collective self-defence against the aggressor. This view is based on the

(Footnote continued from previous page)

circumstances giving rise to the right of self-defence, to allow a third State which is not in itself threatened to intervene in collective self-defence, would amount to an excessive broadening of the range of cases where individual use of force is lawful.

191. This seems to be the view of the majority of the authors. See, e.g. Lamberti Zanardi, Legittima Difesa, p.276; Delivannis, p.152; Brownlie, Use of Force, p.329 ff.; Mc Dougal- Feliciano, p.248 ff..

assumption that article 2.4 lays down a duty erga omnes not to use force, binding upon all nations. An armed attack would therefore infringe a legal interest of every member of the international community. Any of these States, particularly if it feels directly or indirectly threatened, would be entitled to exercise its right of collective self-defence against the attacker, and make it stop, whether or not the victim of the attack requests it¹⁹².

The view advocated by Dinstein is, in my opinion, correct even though the consequences this author draws cannot be fully shared. What is in fact the legal basis of the right of collective self-defence? Is it a right third States may exercise because of the mere fact that an armed attack has occurred somewhere, or must there be the infringement of a legal interest of the intervening State as well? If there is an infringement, how serious should it be? Must it amount to a threat as serious as that facing the victim State, or can it be lesser?

A "strict parallelism" between the threat facing the victim State and that which should entitle the possible intervener to use force in collective self-defence should be ruled out right away. If admitted, collective self-defence would be deprived of

192. Dinstein, p. 230-33; p. 247 ff. and especially p.250.

any useful function. A strong State would take the utmost care to limit its aggression to a weaker State, feeling sure that no other State would be entitled to come to the victim's rescue.

Yet, it is difficult to accept that a system which was drafted in such a way as to limit individual use of armed force to the greatest extent possible, and where so much attention is devoted to the identification of the practical boundaries of the admissible exceptions, can at the same time allow that the use of coercion suddenly becomes possible for any State merely on the basis of a request, without at least the infringement of a legal interest of that State.

Anyway, if the prohibition of force is conceived as a rule erga omnes, it is apparent that any violation taking place against a member of the international community would infringe a legal interest of all other members. Every State would ipso facto be affected and sometimes even threatened by the violation of peace. This is certainly a valid legal basis for an intervention in collective self-defence by any third State.

The basic conditions for its valid exercise must still be a previous attack against a member of the international community and its request for help. This latter element is necessary if the rule erga omnes is to be deemed violated. The request of the victim State constitutes evidence that the intervention has occurred against its will; it is a substantive condition to

establish the violation of the norm erga omnes ¹⁹³, thereby giving third States the right to react in collective self-defence. This request may obviously also be made in advance in the form of a treaty establishing that if certain events occur, signatory States have the right to intervene in collective self-defence.

The view cannot be accepted, therefore, that any third State would be entitled to use force against the presumed aggressor even in absence of a specific request or a treaty. In the absence of a superior authority establishing in every case whether an aggression has occurred, the subject best placed to judge this is the victim State. If that State fails to do so for any reason, it is to be presumed that the element of coercion against it is absent and thus the norm erga omnes is not violated. Hence, no right of collective self-defence arises. It would certainly run against the general interest in world peace to give any third State the right to judge the facts autonomously and freely wage war against the alleged wrongdoer.

A survey of the cases in which collective self-defence has been claimed supports this view. Only in a few of the cases examined earlier was the existence of a concrete threat against

193. See, supra, chapter on consent, p.17 ff. and 704.

the intervening power claimed as a justification: in all cases but one, the justification based on self-defence was universally rejected for other reasons¹⁹⁴. With regard to those cases there is real doubt as to whether, if taken alone, the kind of threat against the intervening power would have been serious enough to confer upon it a right of individual self-defence. The existence of a request by the victim State was however always stressed by the intervening power.

The existence of a treaty was very often put forward as a

194. The cases when a threat against the intervening power was claimed as well were the following: the American intervention in Vietnam (a general threat to the American security and a specific attack to US forces after the Tonkin resolution), and Central American (see State Dept. Doc. quoted above where it says "exercise of the inherent right of collective self-defense enshrined in the UN Charter and the Rio Treaty ... in defense of the vital national security interests of the United States and in support of the peace and security of the hemisphere"); it was moreover claimed by the Soviet Union in invading Afghanistan (see USSR statement in the Security Council where it warned that "it would not allow Afghanistan to be turned into a beachhead for the preparation of imperialist aggression against it"). A direct threat against the intervening power also existed in those cases, like the interventions in Shaba, Dominican Republic and Grenada, if one considers the use of force for the protection of nationals abroad as an exercise of the right of self-defence. This specific question will, however, be discussed in a following chapter.

In the first three cases, however, it is very doubtful that the threat which was claimed could legally justify a reaction in individual self-defence by the intervening power, for failure to meet the requirements of necessity and proportionality.

justification for intervention¹⁹⁵. Since World War II, in fact, a considerable number of bilateral and multilateral agreements have been concluded providing for common defence in case of attack against one of the parties¹⁹⁶. No doubt States attach great importance to the existence of a previous engagement between the two powers concerned; they consider that circumstance as a sufficient legal basis for the use of force in collective self-defence. It might therefore seem surprising that in almost all the cases examined (with the possible exception of the French operations in Chad), the treaties invoked did not seem to cover

195. It was specifically claimed (without prejudice of the question of whether the treaty invoked could actually justify the action undertaken) in Hungary, Czechoslovakia, Chad, Vietnam, Afghanistan, Grenada (as far as the OECS countries were concerned) and Central America.

196. It is also true that some of the treaties expressly state that an attack against one of the contracting parties shall be considered an attack against all. This formulation would in fact formally render a third state intervention compatible even with the narrowest interpretation of collective self-defence. For, by virtue of the provision of the treaty, all members would ipso facto be directly threatened and therefore entitled to react.

See, e.g., OAS Charter (1947), article 3(f), 21 UNTS 77, and NATO Treaty (1949), article 5, 34 UNTS 243.

the kind of operation undertaken¹⁹⁷. If one also considers that (again, with the exception of Chad and, possibly, Vietnam), the interventions in question were virtually universally condemned as illegal, the zeal of the States involved in alleging the existence of a treaty could be better explained as an attempt to justify actions which could not be justified otherwise. It cannot provide convincing evidence of a general belief that no intervention in collective self-defence may be allowed in the absence of a previously binding treaty. As it was remarked, a previously concluded treaty may certainly validly substitute an "ad hoc" request. Yet it is difficult to see, as some authors do, why the existence of a treaty should be a condition precedent to the right of States to seek help in collective self-defence by a

197. In Hungary and Czechoslovakia the treaty invoked was the Warsaw pact (1948, UNTS, p.24) which provides for mutual defence in case of external armed attack (article 4) but in both cases the existence of an armed attack from abroad was never proved; in Afghanistan it was a cooperation treaty (see RGDIP, 1980, p.965) which, again, provided for consultation in case of external threat (but, again, the problem was precisely the existence of the external threat; moreover the treaty only talks about appropriate measures); as far as the cases of the Grenada and Central America cases are concerned the treaties invoked are regional treaties under which, in the absence of an external threat, forcible measures can only be adopted with the previous authorization of the Security Council (article 53). For the Vietnam case, finally, the treaty invoked was the SEATO, but South Vietnam was not party to it (but there was a provision concerning the guarantee of its territory).

simple request¹⁹⁸. An "ad hoc" expression of will is certainly as valid as one already crystallized in a treaty.

In the remaining cases in which collective self-defence was claimed (including those where this was done without general opposition), the existence of a treaty was not even mentioned, and the absence of such a treaty did not seem to constitute an obstacle to the widespread approval received by the operations. Also, when the legality of a certain action was questioned, it was always for reasons other than the absence of a treaty or a common threat.

Finally, in the practice examined, the request of the victim State in whatever form was always put forward as a justification (even when the organ issuing it was not competent or when the request was clearly invalid). This consideration is in sharp contrast with the broadest conception of self-defence mentioned above, advocated by Dinstein. In no case, in fact, have intervening States ever claimed their right to counter an

198. An additional consideration may be made. The ratio of the right of collective self-defence is certainly that of putting all States (which are certainly not on the same footing in practice) on the same footing in the interim as to the possibility of defending themselves against an aggression. Obviously, the existence of a previously concluded treaty is in the interest of any State, which can in this way count on automatic help in case of aggression, but it is difficult to see how could it constitute a limit to the State's right to seek help.

aggression against another State, without the latter State's request. On the contrary, as in some of the cases examined, they always try to claim the existence of a request, even when the authority issuing it is not legally entitled to do it. That view, therefore, even though theoretically interesting, turns out to be contrary to State practice.

It thus seems possible to conclude that from an examination of State practice one cannot discern a tendency in favour of attaching to intervention in collective self-defence conditions other than the request or consent of the State victim of the attack.

This view was also implicitly upheld by the International Court of Justice in the Nicaragua v. U.S. case:

"At all events, the Court finds that in customary international law, whether of a general kind or that particular to the inter-American legal system, there is no rule permitting the exercise of collective self-defence in the absence of a request by the State which regards itself as the victim of an armed attack. The Court concludes that the requirements of a request by the State which is the victim of the alleged attack is additional to the

requirement that such a State should have declared itself to have been attacked"¹⁹⁹.

It is apparent that if the Court had meant to introduce (or to declare the existence of) requirements additional to the simple request of the attacked State (and the declaration by the latter of having been attacked) it would have listed them alongside those mentioned. It is also apparent that the request (and above all the declaration of having been attacked) are conditions necessary for the intervention of a third State in collective self-defence²⁰⁰.

It should also be borne in mind that the concept of collective self-defence as interpreted by the Court plays a crucial role if the ban on the use of force is to be deemed valid without penalizing weaker States. The present system is characterized on the one hand by a ban on the use of force and on

199. Nicaragua case, para. 199.

200. Instead, the Court only stated: "The exercise of collective self-defence presupposes that an armed attack has occurred; and it is evident that it is the victim State, being the most directly aware of that fact, which is likely to draw general attention to its plight. It is also evident that if the victim state wishes another State to come to its help in the exercise of the right of collective self-defence, it will normally make an express request to that effect".
Ibidem, para. 232.

the other by the absence of a guarantee that the centralized machinery will intervene to redress possible violations. If admitting only an individual reaction would be unfair when the the victim State is much weaker than the aggressor, allowing a collective reaction only after a previously concluded treaty would unnecessarily limit States' freedom, because it would compel States to enter the sphere of influence of a great power so as not to find themselves disadvantaged in the event of an aggression.

The possibility of participating in defence agreements is no doubt in the interest of most States, which would thereby feel secure in case of attack. However, it is difficult to see why making this participation compulsory would better serve the interest of world peace.

6. Limits of the self-defensive action

The requirements that a self-defensive action must fulfil have already been mentioned: necessity, imputability to another State, and proportionality²⁰¹.

The problems related to the requirement of necessity, which essentially refer to the circumstances which may provoke the self-defensive reaction, have been considered in a previous section²⁰². On the second requirement (proportionality), there is substantial agreement in literature, both on its existence as one of the basic conditions for the admissibility of a plea of self-defence, and on the way it is to be interpreted. According to Ago's Report on International Responsibility, which on this point restates the view generally adopted in the literature, the concept of proportionality should not be related to the initial wrongful conduct and the opposing conduct. The action needed to repulse the danger may well assume a dimension disproportionate to the threat or attack suffered. What matters is the result to be achieved by the defensive action and not the forms, substance

201. See, supra, p. ; ILC Report, paras. 9 and 22.; Nicaragua case, para. 194 (the Court only mentions necessity and proportionality).

202. See, supra, section 3 of the present chapter.

and strength of the action itself²⁰³.

As regards internal conflict, this is corroborated by the cases examined: in all cases where self-defence was correctly invoked as a justification for the action taken (i.e. the external intervention), the action in question was usually of limited duration and foreign troops were promptly withdrawn as soon as the danger was averted. This was the case in Muscat, Lebanon, in both interventions in the Shaba region and in Chad²⁰⁴.

In all other cases of intervention, whose legitimacy (at least as far as it was based on a plea of self-defence) was already extremely dubious, this did not happen, and most often the foreign intervention continued after the alleged threat had

203. Ago's Report, 1980 p.69. See, moreover, Lamberti Zanardi, La legittima difesa, p.127. Brownlie, Use of force, p.261; Mc Dougal-Feliciano, p.241; Bowett, Self-defence, p.53-4; Waldock, p.464.

204. See, supra, p. With reference to the last French intervention in Chad (1983), it must be pointed out that an agreement for the simultaneous withdrawal of forces was reached by France and Libya. Only the former power, however, observed it.

receded, or failed to materialize²⁰⁵.

With special reference to internal conflict, another problem connected with the general question of the limits to the self-defensive action deserves attention.

Unlike purely international conflicts, which usually take place across State to State boundaries, and tend to involve, in different measure, the territory of both the States concerned, the area of hostilities in internal conflicts tends to be limited to the territory of the target State even when foreign States are involved²⁰⁶. In the conflicts in question, the foreign involvement most likely to bring about the self-defensive reaction (and the intervention of a third State in collective self-defence), is not an open and direct armed attack launched from another State. More often it occurs by means of irregular bands or other forms of subversion, which, even when a foreign

205. In Afghanistan, for example, the foreign attack never materialized, but Soviet troops remained in the country for more than eight years subsequently; in Angola the Cuban troops remained even when it was clear that the South Africans had withdrawn; in Uganda the occupation of the country went well beyond the reconquest of the Kagera salient, previously occupied by the Amin troops; in Lebanon, finally, the Israeli troops occupied half of the country (much more than the area necessary to ensure the security of the Galilean villages).

206. This is in fact what happened in all cases examined but Vietnam and Central America.

state is substantially involved, cannot be directly attributed to that State.

As the behaviour of States is coherent in this sense, one might wonder, in these internal conflicts with an international dimension, whether the area of operations (and the limits of the foreign intervention in collective self-defence) should not (by virtue of a prescriptive rule) be confined to the territory of the State concerned. Various arguments could be put forward to support this view.

The first, which stems from some of the considerations made above, is to be found in the uncertain scope of the notion of "armed attack"²⁰⁷. Even though the International Court of Justice has drawn a line between activities by irregular forces amounting to an armed attack and those falling short of it, and put the alleged Nicaraguan activities in El Salvador in this second category, the distinction remains far from clear. It is however generally accepted that, in case of external infiltration threatening the stability and the power of a government, this government is entitled to consent to a foreign armed intervention in its territory with a view to putting an end to the infiltration. In this case attention is not focused on the

207. See, supra chapter on consent, p. 704 and first section on self-defence, p. 84ff.

magnitude of the foreign activity in itself, but on the degree of foreign involvement in the internal rebellion (a much more elastic concept). The government has the right to request a foreign intervention anyway but, if it seeks to justify it with collective self-defence, it must be able to show that the foreign infiltration amounts to an armed attack.

The fundamental difference between the two hypotheses is to be found in the magnitude of the requested intervention. If it is justified with collective self-defence this intervention may involve, besides the territory of the target State, that of the State held responsible of the aggression or infiltration. If it is only the victim State's consent which allows it, it may not be extended beyond its borders, because its consent cannot allow more.

It would thus be advisable (and this, as will be seen, seems the view shared by most States) considering the rather uncertain (and fundamentally arbitrary) character of any line drawn between what constitutes armed attack and what does not, to limit the area of hostilities to the target State's territory. By contrast, the territory of the alleged infiltrator could become involved only when a direct attack occurs from it.

A second consideration is that such a limit, if established, would better satisfy the general interest of world peace, which is not served by a territorial escalation of the conflict. This view is also taken by various authors, even though not

specifically in connection with the concept of self-defence, but with foreign intervention in civil war in general²⁰⁸.

In all the cases examined (with the exception of the American intervention in Vietnam and the covert operations in Central America)²⁰⁹, the area of hostilities was always confined to the territory of the target State, thereby keeping the conflict "internal" at least from the point of view of geography if not of participation.

Even in Vietnam, a conflict which the United States deemed to be international in substance (between North and South Vietnam), the U.S. government was extremely reluctant to extend hostilities to North Vietnam and, when it eventually did so, it felt the need to justify its decision with an alleged direct attack against U.S. forces outside the territory of South Vietnam

208. See, in this sense, O. Schachter, "The Right of States to Use Armed Force", 82, Mich. Law Rev., 1984, p.1643 (with reference to counter-intervention); Schindler, p. 458; Falk, Legal Order p.244 ff.; Brownlie, Use of Force, p.373; Wright, p. 123.

209. With reference to the US operations in Central America, Schachter asserts: "This territorial limitation on counter-intervention has been observed in nearly all recent civil wars. However it apparently has been abandoned by the United States insofar as its "counterintervention" on the side of the El Salvador regime has extended to support of anti-Sandinista forces fighting in Nicaraguan soil". Schachter, Right of States, p.1643.

(the so-called Tonkin resolution)²¹⁰. In any case, there was no widespread international approval of these operations, while the international disapprobation of the American involvement in Indochina grew considerably when other countries like Laos and Cambodia became involved. Finally, the International Court of Justice failed to uphold the American position on the operations carried out against Nicaragua, and stated:

"Whether or not the assistance to the contras might meet the criterion of proportionality, the Court cannot regard the U.S. activities summarized in paras. 80, 81 and 86, i.e. those relating to the mining of the Nicaraguan ports and the attacks on ports, oil installations etc., as satisfying that criterion. Whatever uncertainty may exist as to the exact scale of the aid received by the Salvadorian armed opposition from Nicaragua, it is clear that these later U.S. activities in question could not have been proportionate to that aid. Finally, on this point, the Court must also observe that the reaction of the U.S. in the context of what it regarded as self-defence was continued long after the

210. In fact, some even go as far as saying that the alleged North Vietnamese attack against US warships in the Tonkin gulf never actually occurred. See International Herald Tribune, May 8th, 1985, p. 8.

period in which any presumed armed attack by Nicaragua could reasonably be contemplated"²¹¹.

7. Conclusions

Without affecting the way the principle of self-defence is applied to purely international conflicts, the aforementioned cases show a tendency towards admitting the right of governments to use force and ask for external help whenever they are faced with internal unrest for which a foreign power is mainly responsible, and which cannot be dealt with by means other than an immediate forcible response. The legality of the target State's forcible reaction seems to depend, in the last instance, more on an evaluation of the effects of the foreign involvement (in which the situation of the target State is also taken into account), than on its characteristics considered in abstracto.

211. Nicaragua case, para. 237.

Once these requirements are fulfilled, there are no limitations on the right of foreign powers to provide it upon request. Finally, in the cases examined, States tend to confine the area of hostilities to the target State.

In the cases examined in this chapter self-defence has not been openly invoked every time, even though foreign interventions have always been justified on the basis of a prior foreign involvement. If one also takes into account the limitation of the area of hostilities to the latter State's territory, one might ask whether the principle in question constitutes something distinct from self-defence and peculiar to internal conflict . This is, for instance, the view of such authors as Quincy Wright (who distinguishes between indirect aggression and subversive intervention, differentiating the admissible forcible reaction), or Richard Falk, who prefers to use the terms "intervention" and "counter-intervention", limiting the area of hostilities to the target State)²¹².

In fact, the question whether, in case of prior foreign involvement, foreign intervention in another State must be justified by consent, rather than self-defence, is largely theoretical, as long as the conditions which regulate

212. See, in this sense, Q. Wright, "Subversive Intervention", 54, AJIL, 1959, p.529.

intervention are the same. Self-defence has the advantage of submitting every use of force in international relations (whether originating in an internal conflict or not) to the same requirements: the existence of a foreign unlawful conduct, and the criteria of necessity and proportionality. The same conditions must be met even when one considers a foreign intervention on the basis of the consent of the target State's government as legal.

What appears decisive to me is the necessity of confining the hostilities to the target State, thus avoiding a dangerous escalation and a true internationalization of the conflict. Only for this reason does it seem advisable to place a narrow interpretation on the notion of "armed attack" (this is indeed the view taken by the International Court of Justice) and justify foreign intervention as a response to an illegal infiltration only on the basis of consent.

All these considerations, in conclusion, render the attribution of a foreign intervention to one or the other rubric rather irrelevant in practice if the following conditions are fulfilled:

- a previous foreign illegal involvement in the target State;
- the valid request of the "lawful" government;
- the limitation of the hostilities to the target State's territory.

MINOR JUSTIFICATIONS FOR FOREIGN ARMED INTERVENTION

Besides the very common - and more accepted - pleas of consent of the target State and self-defence, other justifications have often been put forward by States with reference to internal conflict. Less common than the previously mentioned ones, they are conceptually linked to the substantive causes of these conflicts, or to the consequences they have on individuals.

Internal conflicts may begin because a certain group, feeling oppressed and discriminated against, wants to break away from the ruling group and achieve autonomy or independence; or because the population wants to get rid of a government deemed tyrannical or inefficient. These are only illustrations. But in these or similar cases the problem could be raised as to what the attitude of third States ought to be, in light of the impotence of the centralized organs, particularly when the enforcement of the rights sought by these groups or populations is also embodied in the Charter or is part of customary law.

When these conflicts break out, the position of individuals is put in jeopardy. The position of third States whose

individuals are resident in the conflict areas also needs clarification.

Minor justifications such as promotion of self-determination, "humanitarian intervention" or protection of citizens abroad were thus put forward by States in many of the cases examined. Their admissibility and scope is the subject of the present chapter.

ARMED INTERVENTION TO PROMOTE SELF-DETERMINATION

1. Introduction

The principle of self-determination of peoples plays a very important role in the legal regulation of armed intervention. The emergence or, better, the increased relevance of new entities such as peoples in the international scenario is one of the reasons for the partial disruption of the traditional system of rules governing external intervention in internal conflict, and thus for the evolution and greater uncertainty of the law nowadays²¹³.

In internal conflict, the principle can be relevant in different ways: conceptually, when it is invoked with a view to

213. How great this uncertainty can be, especially as far as the application of these rules to the actual facts is concerned is well pointed out by Franck. He criticizes the lack of "coherence" of this principle throughout its evolution. T. Franck, "Legitimacy in International Law," *AJIL* 1988, p 705 especially at 713 ff.

justifying an activity otherwise illegal, namely aid provided by foreign powers to peoples entitled to self-determination²¹⁴; it is also relevant when judging the legality of the imposition by a foreign power of a government which does not enjoy the support of the population of its country. These two aspects stem from the two facets of the principle of self-determination: "external" and "internal"²¹⁵.

There has been a long debate in the international community over the effects of the principle upon the generally accepted

214. In the Resolution 1514 (XV) of 14 Dec. 1960 (Declaration on the Granting of Independence to Colonial Peoples), the general Assembly, by proclaiming the necessity for peoples subject to colonial domination to acquire independence, sets forth a derogation to the customary duty of States not to help internal insurrection movements. See, in this sense, A. Cassese, "Commentaire à l'article 1.2 de la Charte des Nations Unies", In J.P.Cot, A. Pellet, La Charte des Nations Unies, Paris, Economica, 1985, p.39-55 at 47.

215. A definition of both external and internal self-determination is given by Cassese:
"External" self-determination refers to the ability of a people or a minority to choose freely in the field of international relations, opting for independence or union with other States. "Internal" self-determination usually means that a people in a sovereign State can elect and keep of its choice and that an ethnic, racial, religious or other minority within a sovereign State has the right not to be oppressed by the central government".
A. Cassese, "Political Self-Determination: Old Concepts and New Developments"; in A. Cassese (ed.) UN Law - Fundamental Rights, Alphen aan den Rijn, 1979, p.137.

norms concerning the use of force²¹⁶. The debate has focused on the kind of aid which foreign powers may provide to a people struggling for self-determination. In a few cases, in fact, the principle was invoked as a justification (even though put forward somewhat tentatively) for armed intervention abroad²¹⁷. The principle of self-determination has however made its appearance in the State practice even in its second dimension, which is probably more interesting in the context of this work.

216. One of the main points of discussion (and disagreement) when attempting to codify both the ban on the use of force and the principle of self-determination in the Declaration on Friendly Relations, was that of whether those peoples entitled to self-determination had a right of "self-defence" against colonial domination. In the view of Western countries the problem of self-determination, insofar as it concerned the relationship between a State and a people, and not between two subjects of international law was outside the scope of the ban, which only concerned international relations. The position of non-aligned countries, on the other hand, aimed both at the recognition of the international character of national liberation struggles and, in this context (since article 2.4 would thus be applicable to them) to the recognition to these movements of a right of self-defence (See e.g. the speeches of the Algerian or the Yugoslavian delegates in G.A.O.R. A/AC 125/SR 23 and SR 65).

The result was that, in the Declaration, there is no mention of self-defence as such, but the "international" character of the struggle (para. 6 principle (e) and the right of the people concerned to receive external help (para. 5) were recognized. How far this help could go has ever since been a matter for debate and is the object of the present chapter.

217. See, infra, p.189 ff.

2. "External" self-determination

In recent years (especially during the decolonization process) the principle of self-determination has been the subject of a great number of works, and a considerable number of documents of international organizations²¹⁸. Despite this

218. - The most important UN documents on the principle of self-determination of peoples (besides art.1.2 and art. 55 of the Charter) are the following: Res.1514(XV) (Declaration on the granting of independence to the colonial countries); Res.1564(XVI); UN Covenants on Human Rights (art.1 of both); Res.2625 (XXV)(Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States); Res.2787(XXVI); Res.3103 (XXVIII); Res. 42/22 (November 18th 1987) on the "Enhancement of the Effectiveness", Preamble (paras. 16 and 19); Part I, para.5.

See, moreover: A. Cassese, "Le Droit International et la question de l'assistance aux mouvements de liberation nationale", RBDI, 1986, p.307 ff.; A. Cassese in Cot-Pellet, p.39; A. Cassese, Political Self-determination, p.137 ff.; N. Ronzitti, "Wars of National Liberation: A legal definition", Italian YIL, 1975, p.192-205; Sinha, "Is Self-Determination passé ?", Col.JTL, 12, 1973, p.260; G. Arangio-Ruiz, The Normative Role, p. 419 ff.; V.P. Nanda, "Self-Determination in International Law", 66 AJIL, 1972, pp. 321-336; R. Emerson, "Self-Determination", 65 AJIL 1971.

With a rather skeptical attitude towards the legal value of the concept, see M. Pomerance, Self-determination in Law and Practice. The New Doctrine in the UN, The Hague, Nijhoff, 1982. With a very critical attitude towards the application of the principle to Africa, and its relationship with the principle of

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impressive amount of literature it still retains a somewhat peculiar status, owing to a series of problems connected to its definition and application to practice, whose solution is prevented by the present structure of the international legal system. Before moving to the application of the principle to the subject of this work, it is therefore useful to recall the elements of this principle for which there is an agreed definition, and point at the problems which still remain unsolved.

A convincing overview of the various aspects of the principle of self-determination as it stems from the text of various documents and practice is provided by Cassese.

Peoples subject to colonial, racist or alien domination are entitled to the right. They may also go so far as to use armed force to implement it, while third States have a duty to help

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uti possidetis, see B. Neuberger, National Self-determination in Post-colonial Africa, Boulder (Colo.), Lynne Renner Publ., 1986. A very interesting collection of essays on the subject is: Le droit des peuples à disposer d'eux mêmes; Mélanges offertes à Charles Chaumont, Paris, 1984.

See moreover the study prepared by A. Cristescu: "The right of self-determination - Historical and current developments on the basis of UN Instruments, 1981 E/CN/Sub. 2/404 Rev.1.

them²¹⁹. In the International Covenant on Civil and Political Rights (article 1), the exercise of the right of self-determination is also considered a pre-condition for the effective enjoyment of human rights and fundamental freedoms²²⁰.

In the Declaration on Friendly Relations the principle has been codified. The content of the right, those who may claim it, the duties of States with reference to it, the different ways by which it can be implemented and the lawful means which may be employed to attain it are set forth there²²¹. A general limit is also contained in the last two paragraphs of the principle with a view to avoid disrupting the territorial integrity of existing States²²². Nonetheless, the interpretation and application of the

219. Cassese in Cot-Pellet, p.47

220. For the text and a comment on this provision, see A. Cassese, "The Self-determination of Peoples", in L. Henkin (ed.), The International Bill of Rights, New York, Col.Univ. Press, 1981, p. 92 ff.

221. See, infra, note.223

222. These paragraphs read as follows:

"Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus

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principle still gives rise to serious problems.

The first problem relates to its nature. Its definition as a right would obviously presuppose the existence of a subject of international law which can exercise it. It is problematic to identify this subject in a "people" because a people is an entity of a somewhat vague character²²³. Moreover, were such an entity

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possessed of a government representing the whole people belonging to the territory without distinction as to race creed or colour.

Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country".

223. The problems one faces when trying to define clearly the notion of "people" are clearly sketched by N'Kolombua:

"Il faut se rémemorer les propositions essentielles de définition de la notion de peuple. Deux solutions s'offrent à cette question: l'une objective, l'autre idéaliste subjective. Chacune ou la combinaison des deux engendre une définition qui prétend préciser la notion de peuple. Selon la première solution, la notion de peuple est définie eu égard aux critères préétablis a priori, objectifs, notamment le territoire, la race, la langue, la religion, la culture. D'après ces critères la notion de peuple reste vague, incertaine et ne couvre pas assez tous les cas où se pose le problème de la définition de la notion de peuple. Quant à la seconde solution, elle met l'accent sur le vouloir vivre collectif pour définir le concept de peuple. Si la première solution a tous les inconvénients des définitions analytiques, énumératives, la seconde est basée sur une conception synthétique de la notion de peuple à l'inconvénient de refléter l'idéologie de l'auteur de la définition. Il en résulte qu'il y a autant de

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easily identifiable, there would still be the difficulty of conferring on it a full international legal personality. This is only an aspect of the more general problem of the international legal subjectivity of entities other than States and international organizations ²²⁴. Nor could the problem be solved by conferring legal personality on the National Liberation Movement, representing the people entitled to the right. In fact, even though there have been many examples of NLMs carrying out "generally recognized" legitimate struggles against their colonial, alien or racist opponents, the formation of movements which define themselves "National Liberation" does not automatically guarantee that they represent anyone, or that the people they claim to represent are in fact entitled to self-determination.

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définitions du concept de peuple que les auteurs des définitions."

A. N'Kolombua, "L'ambivalence des relations entre le droit des peuples à disposer d'eux mêmes et l'intégrité territoriale en droit international contemporain", in Mélanges Chaumont, p.433, at 461.

224. - For a survey of the various positions on this question see J.A. Barberis, "Nouvelles questions concernant la personnalité juridique internationale", HR, 1983 (I), p.145.

The non-recognition by the competent international organization of a National Liberation Movement does not mean, conversely, that the corresponding people are not entitled to self-determination²²⁵. As a matter of fact it seems that this recognition is granted according to political criteria²²⁶, tending to recognize the right of self-determination only to peoples oppressed by former colonial powers or "western" powers in general²²⁷.

A viable approach is that adopted in several international legal documents. In these documents, although self-determination

225. Cassese in Cot-Pellet, p.52.

226. E.g. H.A. Wilson, International Law and the Use of Force by National Liberation Movements, Oxford, Ox. Univ. Press, 1988, p. 138 ff.

227. The many ambiguities stemming from the application of the principle of self-determination to Africa are well pointed out and discussed in great detail by Neuberger:

"African leaders and governments who demanded international intervention and supported the use of force in order to liberate colonies or fight the white minority régimes in the name of the right of national self-determination, barricaded themselves against similar interventions by sanctifying the principles of non interference and territorial integrity. Support for the national self-determination of Angola's and South Africa's African majority was legitimate, but the same did not apply to the Ogadenees, Ibos, Eritreans and Burundi's Hutus."

Neuberger, p.116. The attempts to limit the application of the principle of self-determination only to colonial situations is criticized by Bowett. D.W. Bowett, "Self-determination and Political Rights in the Deveicping Countries", Proc. ASIL, 1966, p. 129 ff.

is defined as a right belonging to every people, the exercise of the right is formulated in terms of the duty of every State to ensure it²²⁸. In practice this means that if a people embarks on a lawful struggle for self-determination, the State concerned is not entitled to put any obstacle in their way. Its freedom to crush an internal rebellion is therefore limited by virtue of the principle of self-determination, provided that the 'rebels' are legally entitled to claim the right in question²²⁹.

There is general agreement (also confirmed by the text of many resolutions of the General Assembly and by article 1.4 of the 1st Geneva Protocol of 1977) that the principle of self-determination applies to the peoples subject to colonial, racist

228. - See e.g. Res.1514(XV) para.4 and 5; Covenant on Civil and Political Rights articles 1.2 and 1.3; Res. 2625(XXV), principle (e).

See also Arangio Ruiz, Normative Role, p.571: "...The international right corresponding to any legal obligation with regard to self-determination would presumably develop - short of a fundamental change of the system - as a right of other States vis-à-vis the duty bound one".

229. Cassese in Cot-Pellet, p. 47; Res. 2625 (XXV), principles (a) and (e).

and alien domination²³⁰. Since decolonization, however, a negligible number of peoples are still subject to colonial domination. The attribute "racist" domination was meant to cover essentially the situations of Southern Rhodesia as well as Namibia and South Africa, which will, it is to be hoped, be solved in due course. The attribute "alien", on the other hand, which was meant to cover the struggle of the PLO against Israel

230. The text of article 1.4 of the first Geneva Protocol of 1977 reads as follows: "The situations referred to in the preceding paragraphs include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of international law concerning friendly relations."

See, moreover, Resolutions 2588 B (XXIV) of 15.12.69; 2649 (XXV) of 30.11.70; 2787 (XXVI) of 6.12.71; 2955 (XXVII) of 12.12.72; 3070 (XXVIII) of 30.11.73; 3246 (XXIX) of 29.11.74; 3382 (XXX) of 10.11.75 on "The Importance of the Universal Realization of the Right of Peoples to Self-determination and of the Speedy Granting of Independence to the Colonial Countries and Peoples for the Effective Guarantee and Observance of Human Rights".

See, finally, the declaration on the "Enhancing of the Effectiveness", 10th and 19th preambular paragraphs; n.1, Part I, para. 5 and n. 3. This last provision reads as follows:

"Declares that nothing in the present Declaration could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among states in accordance with the Charter of the United Nations, particularly (und. mine) peoples under colonial and racist régimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration".

(not a colonial, nor a racist power)²³¹ considerably widens the scope of the definition. So, although the majority of States - and especially the newly independent States - construe it in such a way as to preserve the territorial integrity of existing States, it could, if literally interpreted, apply to many situations. In fact, if the principle is meant to have general validity, it must apply not only to past and present situations, but also to those as might arise in the future. It is by no means sure that, considering the way it is drafted, in those cases the members of the international community will find substantial agreement about its application. This problem, therefore, although solved in theory, is presumably yet to be solved in practice²³².

231. See Cassese, in Cot-Pellet, p. 46.

232. The problems relating to the practical applicability of the categories just mentioned are well pointed out by the West German delegate at the Humanitarian Law Conference (1977), quoted by Pomerance, p.54:

"...The terms "colonial domination", "alien occupation", "racist régimes" are not objective criteria but lend themselves to arbitrary subjective and politically motivated interpretation and application. Moreover they have been chosen rather with a view to short term political problems and objectives, and thus do not fit well into a legal instrument intended to be of long term value..."

Humanitarian Law official Records, vol.6, page 61 .

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Another problem is the actual content of the principle. According to the Declaration on Friendly Relations, "By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provision of the Charter". It is also stated that the right may be implemented by reaching independence or by merging into the territory of another State²³³.

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The strain between a literal application of the principle of self-determination for the peoples subject to alien domination, and other principles of regional validity such as the intangibility of African borders is clearly studied - with a very coherent if somewhat radical approach - by N'Kolombua. Cassese (in Cot-Pellet p.49) also points out the unsatisfactory application and at some patent injustices stemming from the attribution of the right of self-determination to those peoples subject to alien domination.

233. The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination of that people.

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A final problem concerns the means to implement the right of self-determination when it is forcibly denied. If, as is clearly stated in the documents mentioned before, the principle of self-determination is formulated in terms of the duty of every State vis-à-vis the people and the international community, what can third States do when this duty is not fulfilled by the State concerned? An answer to this question can be given by studying the relationship between self-determination and the use of armed force. The main issue is whether, and under what conditions, the principle of self-determination can justify a foreign direct armed intervention. It is clear that, if a general right to use force to help peoples to achieve self-determination were to be asserted in the absence of a stringent and practically viable definition of the peoples entitled to such a right, this would radically undermine the present system for the control of coercion. The great majority of scholars do not harbour

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Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their action against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and receive support in accordance with the purposes and principles of the Charter

Res. 2625 (XXV), GAOR, 25th Sess. Supp.28 (A/8028).

substantial doubts about the kind of aid peoples may receive when struggling for self-determination. The typical case, as applied to internal conflict, is that of a conflict breaking out between two groups: one is the "incumbent" government, and the other are insurgents, representing an ethnic entity different from the ruling one, homogeneous in itself, which is denied any form of expression under that government²³⁴. The application of the principle of self-determination would render lawful the aid given to these rebels. This assistance, however, cannot go as far as providing direct military help. On the other hand, by virtue of the same principle, the government would be committing an act in violation of international law if it crushed the rebellion by armed force²³⁵.

234. I am not concerned here with finding a solution on the question of identifying the peoples entitled to self-determination, or with striking a balance between self-determination of peoples and territorial integrity of States. For a thorough and deep discussion on the matter see N'Kolombua, Mojekwu, Arangio-Ruiz, Pomerance, Guarino, Cassese, Wilson.

235. See in this sense Cassese in RBDI, p. 307 ff.; P. Rubino, "Colonialism and the Use of Force by States", in Cassese (ed.), Current Legal Regulation, p. 133 at 134. N. Ronzitti, "Resort to Force in Wars of National Liberation", in Cassese (ed.) Current Problems of International Law, Milano, Giuffr , 1975, p. 319 at 352; Arangio Ruiz, Normative Role, p.569; Bowett, Self-determination, p. 132-3.

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There have been attempts to justify the direct armed assistance to peoples struggling for self-determination by recognizing their right of self-defence against the aggression represented by colonialism²³⁶. According to this thesis, the peoples concerned would be given a full legal status in international law: their struggle would no longer be considered a purely internal matter; they would at the same time be recognized a "jus ad bellum", which would obviously include the possibility of asking for external help in collective self-defence. This view, however, advocated by a large part of the non-aligned countries would have brought about enormous theoretical and practical problems had it been accepted. For this reason,

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For a more ambiguous position on the problem, see O. Sukovic, "Principle of Equal Rights and Self-Determination of Peoples" in M. Sahovic (ed.), Principles of International Law concerning Friendly Relations and Co-operation among States, Beograd, 1972.

See, moreover, contra, N'Kolombua, p.460. After an examination of the State practice he concludes:

"Une intervention armée directe en faveur d'un peuple revendiquant son droit à disposer de lui mêmes, si elle est conforme au principe de l'égalité des droits des peuples et à leur droit à disposer d'eux mêmes est comparable à une personne en danger".

236. See, e.g. the Indian annexation of the Portuguese enclave of Goa in 1961. For an evaluation of that case and subsequent relevant practice, with a view to verifying the existence of such a rule, See Rubino, p.134 ff.

together with the staunch opposition of western countries, it failed to prevail²³⁷. The principle of self-determination, as embodied in the most relevant international instruments, does not contain any reference to a right to ask for direct external aid belonging to the peoples struggling for self-determination. Such right, therefore, does not seem to be recognized by international law.

This is substantially confirmed by the practice. It is impossible not to notice that the process of decolonization has taken place almost entirely peacefully, while in the cases where an armed conflict has taken place between people and administering power, assistance to the people has hardly ever taken the form of direct armed intervention²³⁸. However, two cases which have taken place in recent years are worth close

237. - See, e.g., statements made by the delegates of Algeria, Ghana and Yugoslavia within the Special Committee on Friendly Relations (A/AC125/SR23; 64 and 65). There were two different versions of this view: one according to which peoples had a right of self-defence against the permanent aggression represented by the colonial domination; another according to which this right would arise only in the event of repressive measures adopted by the "oppressing" power.

No reference to a right of self-defence so conceived was however included in the final text of the Declaration.

238. For a brief and concise survey of recent decolonization conflicts see Kende, "Twenty-five years of Local Wars, 8, Journal of Peace Research, 1971, p.5 and, same author, "Wars of Ten Years (1965-1976)", 15, Journal of Peace Research, 1978, p. 227.

examination. The cases in question are the Indian intervention in East Pakistan in 1971 and the Indonesian intervention in East Timor in 1975²³⁹. In both cases the principle of self-determination played a significant role²⁴⁰.

The facts of the Bangla Desh intervention have been recounted above²⁴¹. It is useful to recall that the aim of the Indian intervention, besides reacting against the previous Pakistani attack (even though the exact circumstances of this attack are not quite clear) and solving the problem created by the inflow of refugees, was avowedly that of helping the Bengali people to attain independence. Even though the international community later accepted the "fait accompli" of the creation of the independent State of Bangla Desh, such a procedure was never

239. - For the facts of the Bangla Desh war, see Appendix, case n.12, and Keesing's 24989 A; 25053 A; 25069 A; 25429 A. See moreover: V.S. Mani, "The 1971 War on the Indian Subcontinent and International Law", 12 Indian JIL, 1972, p.83; V.P. Nanda, "Self-Determination outside the Colonial Context: the Birth of Bangladesh in Retrospect", Houston JIL, 2 1979, pp.71 ff.

Main facts of the East-Timor invasion: Appendix, case n. 14 and Keesing's 27533 A; 27906 A. See, also, J.F. Guilhaudis, "La question de Timor", AFDI, 1977, pp.307 ff.; P.D. Elliott, "The East-Timor Dispute", ICLQ 1978, pp.238 ff.

240. - See statement of the Minister of Foreign Affairs of India in the Security Council on 12.12.1971 (1971, IndianJIL, p.699), and also statement of the representative of Indonesia in the General Assembly on 2.12.1975 (1975 UN Ybk., p.859).

241. - See, however, Appendix, case n. 12.

recognized as legal by the United Nations and was openly condemned by a part of the international community²⁴².

In East Timor, after the "de facto" withdrawal of the Portuguese army, an armed conflict started between two main factions (composed of several political parties). Both of them wanted to sever the ties between East Timor and Portugal before the date set up by Portugal²⁴³. One of them, FRETILIN, was in favour of the independence of the ex-colony tout-court, while the other advocated its integration with Indonesia. The Indonesian intervention²⁴⁴ was justified by the need to re-establish order so that the people could peacefully exercise their right to self-determination. In practice this meant strong support for the pro-Indonesian faction and direct struggle against FRETILIN, which at the time controlled most of the territory. The pro-Indonesian faction had meanwhile formed a temporary government which was in

242. - The thesis according to which it is possible to intervene directly to promote self-determination was openly condemned in this case by the representatives of the United States, China, Somalia, Tunisia, and Saudi Arabia in the Security Council and the General Assembly. See, Appendix, case n. 12.

243. Both groups, in fact, unilaterally declared the independence of the former colony at a day's distance from one another. See, in this sense, Appendix, case n. 14.

244. Indonesia claimed that it had been carried out by "volunteers".

due course to declare the merger with Indonesia. In other words, the Indonesian official position was that its intervention had not only re-established order but that, once that had been achieved, the people of East Timor had freely chosen to merge with Indonesia. The truth was that without the Indonesian intervention FRETILIN would probably have prevailed and the merger with Indonesia would never have been chosen. And indeed, the reaction of the international community was one of overt condemnation²⁴⁵.

Only in the Bangla Desh case, the group on whose behalf the armed intervention was made met the legal conditions which could in principle justify foreign assistance in its struggle²⁴⁶. In the second case, in fact, (Timor), there was no conflict between the people of the territory and the former administering power: instead, the conflict was among different local factions, trying to gain control over the whole country after the withdrawal of

245. - See, e.g. G.A. Res.384 and S.C. Res. of 22.4.1976 requesting Indonesia to withdraw from East Timor and respect the right of its people to self-determination.

246. The partition of British India gave birth to an Indian State and a Pakistani State. The latter was divided in two parts. The only thing these two sections had in common was the Moslem religion, but a strong Hindu minority continued to live in the East. For a description of the political and economic situation of East and West Pakistan before the independence of Bangla Desh see M.K. Nawaz, "Bangla Desh and International Law", 11 Indian JIL, 1971, p. 251 ff.

the Portuguese colonial administration. The foreign intervention therefore had the purpose of imposing one of them without letting the people choose freely.

These two cases confirm the view taken by the overwhelming part of the literature, and which is based on the most relevant international instruments on the subject, according to which the right of self-determination cannot by itself justify a foreign direct armed intervention, even on behalf of a group which is entitled to it as was the case in Bangla Desh. It should also be added that, with the era of decolonization coming to an end, the traditional advocates of giving the widest possible scope to this principle, namely most non-aligned countries, are becoming much more lukewarm on the matter and tend to limit its applicability only to specific situations such as South Africa²⁴⁷.

It is very interesting to observe the reactions of most non aligned countries to the Falklands conflict between Argentina and

247. See, e.g. the gradual shifting of the various G.A. resolutions on the matter (supra, p.824), towards an increasingly limited scope of the principle.

See also the recent resolution on the "Enhancing of the Effectiveness", n.3, where it states that the right to seek and receive support from abroad to achieve self-determination belongs particularly to peoples subject to colonial, racist or alien domination.

the United Kingdom (1982)²⁴⁸. In that case a western power, the United Kingdom, was advocating the principle of self-determination, while Argentina stressed its historical rights over the territory as a successor of the Spanish Empire, which had been forcibly deprived of it. Most non-aligned countries supported the position of the Argentine government, notwithstanding the fact that it had employed armed force to achieve its ends, and despite its contrast with the principle of self-determination²⁴⁹.

248. The Falklands conflict is not one of the cases studied in the present research, insofar as it was a "classical" international conflict fought between two sovereign States with regular armies and conventional means. Several legal principles were invoked to justify the claim over the disputed islands of each of the two parties. Self-determination was one of them.

For more references about the dispute concerning the sovereignty over the islands - and the history of the respective claims - but not about the conflict, see V. Ferrer Vieyra, "Las Islas Malvinas y el Derecho Internacional". See, moreover, about the conflict itself, P. Rubino, in Cassese (ed.) Current Legal Regulation, p. ; S. Rubin, "The Falklands, International Law and the OAS", 76 AJIL, 1982, p. 594; R.J. Dupuy, "L'impossible aggression: les Malouines entre ONU et OEA", AFDI, 1982, p.337.

249. On this very question see the illuminating article by Dupuy, L'impossible aggression p.337; and Cassese, in Cot-Pellet, p.51.

3. "Internal" self-determination.

The lack or relative scarcity of clear-cut situations to which the principle is applicable do not mean that it has lost its relevance in the international community. Its emergence has not only accompanied decolonization but also marked the end of an era characterized by the exclusive authority of the territorial government over the events taking place in a certain State. A direct consequence is that the right of a government, which does not enjoy the support of its own people, to ask for direct armed assistance abroad to preserve its power is increasingly questioned²⁵⁰.

In this context it is worth recalling the international reactions to the Soviet invasion of Afghanistan. Many States, on that occasion, when condemning the Soviet invasion, did so because the right to self-determination of the Afghan people had

250. See, supra, chapter on consent, *conclusions*, p. 70

been violated²⁵¹. A situation of civil unrest was developing, with rebel groups threatening the authority and stability of the pro-Soviet government in power which therefore welcomed the Soviet troops when they crossed the border to help crush the rebellion. In fact, it is important to recall that the elimination of President Amin and his substitution with Babrak Karmal was not, in itself, the circumstance vitiating the consent given by the Afghan government. It was only one detail of an operation which would have been held unlawful anyway²⁵².

It seems therefore beyond doubt that the principle of self-determination of peoples, in its "internal" version, continues to play a very important role in international relations. It represents a limit to the power of any government to ask for external intervention to crush an internal rebellion²⁵³. If that government is not effective, so that it needs a foreign

251. See Appendix, case n. 22, and especially the statements at the General Assembly by the representatives of China, Senegal, Kenya, Romania. G.A.O.R., 6th Emergency Special Session, meets. 1-7.

The same is true with respect to the Soviet invasion of Czechoslovakia. See Appendix, case n. 10. See also Ph. Bergmann, Self-determination. The Case of Czechoslovakia 1968-69, Lugano, Grassi, 1972.

252. See, supra, chapter on consent, p.48

253. E.g. Bowett, Self-determination, p. 132-3; Brownlie, Use of Force, p. 327.

intervention to maintain its control on society, then the right of "internal" self-determination of the population of that State should prevail over the freedom of the government to "invite" foreign troops in.

4. The doctrine of "Humanitarian Intervention"

If the role of the principle of self-determination as a "limit" to foreign armed intervention upon request is unquestioned, it is not possible to go so far as to state that it confers the right of armed intervention to topple a government which does not enjoy the support of its population and commits gross violations of human rights. This doctrine of "humanitarian intervention", however, has made itself felt in at least two cases: the Vietnamese overthrow of the Pol Pot régime in Kampuchea in 1978, and the Tanzanian overthrow of the government

of Idi Amin Dada in Uganda in 1979²⁵⁴.

Both governments had an appalling record of compliance with the basic standards of human rights. Of course, it is doubtful that the protection of human rights was the only motivation leading the aforementioned countries to intervene. Still, the most important result was the removal of the incumbent governments, and the change was in both cases welcomed by the local population. Vietnam, however, maintained an army of occupation in Kampuchea which is only now withdrawing²⁵⁵. This is one of the reasons why the UN openly condemned the intervention in spite of the fact that it was putting an end to a genocidal policy²⁵⁶. The Tanzanian intervention was criticized by a few countries as a matter of principle, even though everybody welcomed the installation of a new government, which was quickly recognized by the great majority of the international community²⁵⁷.

254. See, Appendix, cases n. 19 and 20.

255. At the moment talks are in progress, with a view to obtaining the Vietnamese withdrawal and U.N. supervised elections in the entire Kampuchean territory.

256. See P. Isoart, "La situation au Kampuchea", 87, RGDIP, p.61

257. See Appendix, case n. 20 and Ronzitti, Rescuing Nationals, p.105.

From these two cases, which can be taken as examples of "humanitarian intervention" insofar as they concern two governments whose atrocities had induced horror in the international community as a whole, it is not possible to assert a right of intervention into foreign countries to topple "unpleasant" or even "criminal" governments²⁵⁸. The general condemnation of the Vietnamese intervention, and the somewhat brisk and embarrassed way in which most countries welcomed the change of régime in Uganda cannot certainly be taken as evidence for the existence of such a right. And the reasons appear obvious if one only thinks of the absence of any agreed standard or international control over the "acceptability" of a given government.

This was clearly pointed out by the representative of Nigeria at the Assembly of the Heads of State and Government of the OAU, which took place in Monrovia (Liberia) shortly after the Tanzanian intervention. He said that a distinction had to be made

258. See e.g., in favour of the legitimacy of humanitarian intervention, R.B. Lillich, "Humanitarian Intervention: a Reply to Ian Brownlie and a Plea for Constructive Alternatives", in J.N. Moore (ed.), Law and Civil War in the Modern World, Baltimore, J.Hopkins Univ. Press, 1974, p.238. See, contra, I. Brownlie, "Humanitarian Intervention", in Moore (ed.), Law and Civil War, p. 217 ff.

between the overthrow of a tyrant from within a country and an attack from outside²⁵⁹.

Absence of generally agreed standards about the status of a government requesting a foreign intervention to crush an internal rebellion often renders the legality of such intervention rather doubtful. The existence of a right of intervention "for humanitarian purposes" can be denied for the same reason. It seems, in other words, that any rule purporting a derogation from the absolute ban on the use of force must be based upon reasonably clear and accepted criteria for its operation. It does not seem to be so as far as the implementation of self-determination or of other basic human rights is concerned²⁶⁰.

259. "We saw our duty as being to condemn, to warn and to bring together whatever pressure we could to bear on the constituted government of Uganda to curb its excesses and return to the path of morality and decency. We never saw it as our duty., and we did not see it as the duty of another country, to forcibly effect a change in the government of another country on the grounds that we do not agree with the ideology, style and morality of that government and under any smoke screen" (quoted by Ronzitti, Rescuing Nationals, p.106.

260. Ronzitti, Rescuing Nationals, p.110.

5. Concluding remarks

The evaluation of relevant cases concerning the inter-relation between the ban on the use of force and the principle of self-determination was aimed at verifying the existence of additional instances of lawful use of armed force, justified by self-determination or implementation of basic human rights. If established, this would have implied the right of any State to intervene directly in a foreign country to promote the self-determination of a people subject to colonial, racist or alien domination. It would also have included a right of "humanitarian" intervention against governments committing gross violations of fundamental rights.

Even though the relevant instruments are sometimes ambiguous as to the admissibility of the use of force for these purposes, its compatibility with the ban on force could have been demonstrated by a "substantive" and coherent practice in that sense. The cases examined certainly do not fulfil these requirements, and the controversial character of a few of them is more to be interpreted as a violation of the rule, tolerated for exceptional reasons, than as evidence of the formation of a new rule. All the more so in light of the considerable practical problems that such an additional exception would, if

demonstrated, bring about. It can comfortably be asserted that, in the present state of the law, such a rule does not exist.

Conversely, the principle of self-determination plays a fundamental role as a limit to the other admitted exceptions to the ban on force. In its external version it limits the right of a government to crush the legitimate struggle of a people entitled to self-determination within its territory. This obviously prevents this government from asking for external assistance abroad to this end even when the people are being helped from abroad (though not directly). In its external version it limits the right of a government to request foreign help against a genuinely internal rebellion, when it is not able to control the situation with its own means.

ARMED INTERVENTION FOR THE PROTECTION OF NATIONALS ABROAD.

1. Introduction.

The question of the legality of intervention for the protection of nationals abroad is a much debated and controversial topic in international law. The purpose of this chapter is not to assess its admissibility or otherwise in general/absolute terms. Distinguished scholars have done so already, and no significant contribution could be made to the existing doctrinal dispute. The main positions in this dispute will nonetheless be sketched in the coming pages²⁶¹.

261. Among the most important authors who have dealt with the question see: D.W. Bowett, "The Use of Force for the Protection of Nationals Abroad", in Cassese (ed.), Current Legal Regulation, p.39 ff.; M. Akehurst, "The Use of Force to protect Nationals Abroad", 5 Int. Rel., 1977, p. 5 ff.; Lamberti Zanardi, Legittima Difesa p.72; Brownlie, Use of Force, p.289-296; D.W. Bowett, "The Use of Force in the Protection of Nationals", Grotius ST 1957,

(Footnote continues on next page)

In many of the cases observed in the previous chapters, the need for protection of their own citizens was advanced as a justification by intervening States. This may seem obvious: in situations where there is a breakdown of law and order, and where the authority which should maintain them is seriously challenged, it is likely that the safety of the population is put in jeopardy. The need for forcible protection of nationals may also arise in cases where there is a government fully in charge and effective²⁶².

I shall only deal with the cases of internal conflict, with a view to seeing - whatever the doctrinal dispute on the matter - whether the same rule applies to these cases, what are the special problems raised by this kind of conflict, and whether the

(Footnote continued from previous page)

1962, p. 111 ff.; Bowett, Self-defence, p.87-99; Waldock, p.499-503.

For a recent and complete survey of the literature and practice on this subject, see Ronzitti, Rescuing Nationals.

262. In recent times there have been several well-known cases in which the main justification for the performance of forcible operation was the protection of nationals abroad. In these cases, however, the alleged situation of danger had not been provoked by a breakdown in law and order but by other sets of causes. I refer particularly to Mayaguez (1975), Entebbe (1976), Mogadishu (1977), Larnaca (1978), Teheran (1980); Bangkok (1981) and, possibly, Malta (1985).

possible solution might be different. More specifically, I shall endeavour to see whether, according to the State practice in the period observed, the right of protection of nationals may justify a foreign intervention, and, if so, subject to what conditions and limitations.

2. The General Rule on Protection of Nationals Abroad.

The use of coercion for the protection of nationals is one of the means by which States exercise their general right to protect citizens (and their property) abroad²⁶³. From a different angle, it constitutes a means of redress against the violation by a State of its international obligation to ensure a minimum

263. - For a discussion about whether and to what extent the right to protect nationals abroad should also include the right to use force to protect their property see Bowett, *Grotius Society*, p.111.

standard treatment to foreigners resident on its territory²⁶⁴.

In the last century and at the beginning of the present, the use of coercion was only one of the options available for the redress of international wrongs; not being prohibited by international law it was very often resorted to by the most powerful States. Protection of nationals had only the function of indicating the infringement of a right (which was the legal basis of the forcible reaction), rather than providing a special legal justification for the use of armed force which was allowed anyway. This situation changed with the coming into force of the Charter of the United Nations. Since the Charter does not contain any express reference to the protection of nationals as a derogation from the ban on the use of force, the problem was whether the use of coercion for this purpose was still allowed in the system of the Charter and, if so, by virtue of which provision and subject to which limits and conditions for application. It goes without saying that the problem of the conditions and limits of this legal concept becomes of much greater relevance in a system where the very circumstance of nationals being in danger must allow in exceptional cases a use of coercion otherwise prohibited.

264. - See e.g. Ronzitti, Rescuing Nationals, p. XIV; Oppenheim, p.221 ff..

The positions in literature vary with the different interpretations of the prohibition of force contained in article 2.4 of the Charter and of the exception contained in article 51 given by the various authors. The most restrictive view is taken by those who maintain that the right to use force for the protection of nationals is not guaranteed by the Charter without the previous authorization of the Security Council. This is so because article 51 limits the right of self-defence to the case of armed attack against the aggrieved State, (to which, they say, a situation of danger for citizens abroad can hardly be compared)²⁶⁵. On the other side there are those who maintain that the right to protect citizens abroad constitutes one of the fundamental rights of a State²⁶⁶, and that its violation can give rise to this State's right of self-defence. There are also jurists who prefer to base the legality of the use of force for protection of nationals on the non-absolute character of the prohibition of the use of force. According to the latter view, the use of coercion in this particular circumstance is not covered by article 2.4 because, having only limited purpose and

265. - This is the view, already exposed in the previous chapter on self-defence, taken by Brownlie, Lamberti Zanardi and other authors; see, supra, p.88-89

266. - See, e.g. Bowett, in Cassese (ed.) p.39 ff.

effects, it would not violate the territorial integrity or the political independence of the target State, nor would it be incompatible with the purposes and principles of the United Nations, insofar as it would be undertaken for humanitarian purposes²⁶⁷.

It is apparent that the real object of the dispute is the interpretation of article 51 (limitation of the right of self-defence to armed attack or not) and of article 2.4 (qualified or absolute ban). This question has already been considered in the previous chapter²⁶⁸.

It is not necessary for me to take an autonomous position on the general question. It is uncontroversial that there were many cases in recent and less recent times, where States resorted to force for this purpose even outside the context of an internal conflict²⁶⁹. Intervening powers often maintained that the reasons behind these operations were impending necessity, the impotence or the refusal of the territorial State to solve the situation

267. - This is the view taken by J. Stone, Of Law and Nations. Between Power Politics and Human Hopes, Buffalo-New York, 1974, pp.1-38. See also the position of Akehurst, Use of Force, p.3, who seems to admit it within very restrictive limits.

268. - See, supra, chapter on self-defence, p.84ff.

269. See, supra, note 50.

and the paralysis of the Security Council (or the lack of sufficient time to wait for its deliberations). They also stressed their limited aim (rescuing people and nothing else).

At one time a monopoly of "western" powers, these operations have recently been carried out by other countries such as Egypt and Indonesia. They have almost always provoked negative reactions and criticism from at least a few members of the international community²⁷⁰. Yet, these reactions do not seem to have modified the conviction of States resorting to it to be acting within their right, particularly when the conditions set forth above were met and all other peaceful ways to solve the problem had been unsuccessful. Now that even other "less suspect" countries behave in the same way, it could tentatively be asserted that, with the technical capabilities, every country would resort to it if the situation required. The fact that not

270. With the exception of the Mogadishu and the Bangkok operations, which were authorized by the territorial governments and which, accordingly did not provoke any negative reactions, international reactions to the other operations ranged from almost unanimous condemnation from the Socialist countries and the great majority of non aligned countries to the substantial approval (with some exceptions as far as the Mayaguez case is concerned) from the Western countries. A few European countries (see e.g. Sweden in the Entebbe case) expressed satisfaction for the outcome of some individual operations, but stressed that similar actions should not be allowed in international law.

every country has the technical means does not seem a good reason to deny this right to everybody else.

The main obstacle is in most cases the territorial government, which might take a different view as to the gravity of the situation and the consequent impending necessity to use force. In most cases, however, the danger and necessity are objectively evident (i.e. when hostage-taking or killing is involved), while the inability or refusal to act by the territorial State may be as evident. The violation, albeit temporary, of State's sovereignty is certainly an uncontrovertible fact. It is interesting to notice, as will be seen later in-greater detail, that States using force to rescue nationals have never sought to justify their actions otherwise (thereby implying that they believed were acting within their right). Also, countries condemning these interventions always preferred to deny the existence of a situation of danger, rather than openly assert that the right to use force in those circumstances did not exist under any conditions. I shall therefore assume, as a "working hypothesis", that within the strict conditions set forth above, and considering the limited character of the violation of sovereignty and its lack of long term effects on the situation of the territorial State, the State whose nationals are in danger should be allowed to act according to its own evaluation of facts, which should prevail over that of the territorial State. I shall try to demonstrate this

proposition in the coming pages at least as far as internal conflict is concerned.

3. Protection of Nationals in Internal Conflict

When a group of foreign nationals is in an objective situation of danger because of the outbreak of internal conflict, that situation makes it often impossible to ascribe a direct responsibility to any international legal subject. Either the entity formally in control is not in a position to ensure the safety of foreigners, or there is no such kind of authority at all.

The cases most relevant for our purposes, namely those where protection of nationals was invoked in order to justify a foreign intervention in an internal conflict, are rather numerous: they have also been examined in the previous chapters from other points of view. They are the American intervention in the Lebanon in 1958, the two Belgian interventions in the Congo in 1960 and 1964 (the so called Stanleyville operation), the American intervention in the Dominican Republic in 1965, the French

intervention in Chad in 1978, the French-Belgian joint intervention in the region of Shaba in 1978 and, finally, the American intervention in Grenada in 1983²⁷¹.

Even though the main events of each of these interventions are known already, it is useful to recall some common circumstances which are relevant for our purposes.

In all these cases but one (Congo 1960), the plea of protection of nationals was not given alone²⁷². It was usually coupled with the consent of the authority (I shall leave aside here the problem of the real existence, the status and the effectiveness of such authority, already examined in the first chapter on consent), with self-defence, with a more general justification such as "restoration of order" or with more than

271. - For the basic facts of the cases mentioned see, Appendix, cases n. 4, 5, 8, 9, 17, 18, 24 and, supra, chapters on consent and self-defence. For the main events and international reactions to the Belgian intervention in Congo in 1960, see, moreover, Keesing's and UN SCOR, 15th year, 879th meet. (July, 21 1960), p.28; UN Doc.S/4382, July 13, p.11-12.

See also E. Luard, "The Civil War in the Congo" in E. Luard (ed.), The International Regulation of Civil Wars London, Thames & Hudson, 1972; D.W. McNemar, "The Post-independence War in Congo", in Falk (ed.), The International Law of Civil War, Baltimore, J. Hopkins Univ. Press, 1971.

272. Even in the Congo, in fact, the Belgian government spoke of the "necessity" to protect its nationals.

one of those combined. Moreover, in virtually every case²⁷³, the people in danger were resident in the country concerned (the target State). They were there, in other words, by their own free-will and did not have any special link with their country of origin apart from being its citizens. To put it differently, there was no special duty of protection on the part of the territorial State vis-à-vis these people, arising from their position, except the customary rules on treatment of foreigners.

As was pointed out in the previous chapters, in some of the countries concerned there was an internal conflict with different factions struggling for power; in others the situation was rather one of anarchy, where either the official authority was not in effective control of the situation, or there was no such an authority at all²⁷⁴. What is relevant here, however, is that in all cases examined the intervening power claimed that no internationally responsible local authority was in a position to do anything about the people in danger, either because they were

273. - In Chad French troops and French technicians were in the country at the request of the government of Chad.

274. - The situation in Lebanon (potentially, at least), the Congo (1960), the Dominican Republic and Grenada could be classified in the second category. All remaining cases should rather be put in the first.

outside the area controlled by the authority, or because there was total anarchy. What must be noticed, however, because of the special importance it bears for this research, is that in most of these cases the forcible operation carried out by the intervening power was not limited to rescuing people. Rather, it went far beyond this task, aiming at influencing the outcome of the internal struggle in the target State²⁷⁵. In these cases, therefore, the plea of protection of nationals - brought forward at the initial act of intervening - was later coupled with other legal grounds, such as self-defence, or restoration of order upon consent of the "local authority". These additional grounds were meant to justify the prolongation of the forcible operations and, above all, of the presence of the intervening power²⁷⁶. This makes it quite plain that even in the opinion of the intervening States, the limits of the forcible actions which can be justified

275. This was the case in the Lebanon, where the intervention had the purpose of protecting the government of President Chamoun against subversion; in Stanleyville, where the external intervention was a substantial contribution to the defeat of the rebellion; in the Dominican Republic, where it clearly supported the "loyalist" faction; in the Chad, where the intervening troops were employed against the northern rebels; in Shaba (both cases) where troops helped the Zairean forces defeating the "irregulars" and, finally, in Grenada, where the American troops ousted the Cubans and allowed the restoration of the pre-Bishop government.

276. This was in fact the case in the Lebanon, Congo (1960), the Dominican Republic, Chad, Shaba and Grenada.

with the need to protect one's nationals from an imminent danger are quite clear and accepted. The operation may not be prolonged beyond the strict purpose of rescuing people. Any operation going beyond these limits must be based upon other legal grounds²⁷⁷.

This distinction proves very useful when attempting to assess the legality of the same operations on the basis of the reactions of the international community. In the cases which raised many negative reactions most of these were more concerned with the subsequent operations of the intervening power under the initial justification of protection of nationals, than with the legality of the intervention to protect nationals itself. Furthermore, in their negative statements, States questioned the applicability of the use of force for protection of nationals as a matter of fact rather than principle. What was usually questioned was:

- a) that there really was a situation of danger for the citizens concerned;
- b) that an external intervention was necessary because there was

277. Which does not mean, of course, that they were correctly invoked, in the cases when it occurred.

really no authority in control²⁷⁸.

4. Concluding remarks

The definition and the limits of the intervention for protection of nationals described in the literature are substantially confirmed by the behaviour and the declarations of individual States in the cases discussed above. In all cases the operations carried out were limited in character (and they were justified differently when they went beyond these limits); they

278. - The fact of there being a real situation of danger for the citizens in question was denied by some in several cases. It was denied by those States which did not recognize the legality of the operation. None of them (with the exception of Zimbabwe with reference to the American intervention in Grenada), expressly stated that it is illegal to intervene even when there is an objective situation of danger and no authority is in charge. The problem, however, was debated with reference to the following cases: Lebanon (1958), Congo (1960 and 1964) and Grenada (1983). No significant statement, referring to the legality of the use of coercion to protect nationals abroad was made in relation to the interventions in Chad and in the Shaba (1978).

were occasioned by situations of emergency and were strictly limited to their original purpose.

What is still open to question is whether, within the limits and under the conditions now mentioned, they are substantially accepted as legal. From the declarations and reactions of the various governments it appears that virtually none of them is in principle against an external action for purely humanitarian purposes when the situation in a certain country is out of control and there is no authority in charge. Obviously, if such a situation arose, appropriate action could in theory be undertaken or authorized by the centralized organ. A decision in this sense by the Security Council, however, is in reality far from automatic: the ascertainment itself of a situation of emergency, coupled with the evaluation of the necessity of immediate action can be a matter for dispute; furthermore there is no guarantee that a positive decision would be taken exclusively following a factual ascertainment of an emergency. In other words, the paralysis of the Security Council does not necessarily mean that the situation is not of such gravity as to require immediate action. For this reason, although an authorization by the Security Council should be sought in every case, it seems rather problematic to state that if the Security Council is paralyzed

individual States (and particularly the State directly concerned) are barred from doing anything²⁷⁹.

On the other hand it seems difficult to classify all forcible measures adopted by an individual State to rescue its nationals in danger within the framework of self-defence, at least if one holds to the definition of self-defence recalled in the previous chapter. It has been shown that the constitutive elements which can justify an action in self-defence are imputability, necessity, and strict proportionality. Furthermore, the first two elements must be referred to the aggrieved State or to its essential elements. When danger does not arise out of internal conflict, the element of imputability is present. In the cases mentioned at the beginning²⁸⁰ the government of the target State was directly or indirectly responsible for the situation of

279. It is however necessary - and it is worth repeating it here, even though it might seem obvious - that beside the humanitarian grounds there must be a direct link between the intervening power and the nationality of the people to be rescued.

It goes without saying that if there is a group of people of different nationalities, the power that rescues its own citizens is entitled to rescue the others as well. Yet, the main link must exist. In other words, a situation of extreme danger for the life of a group of people in their own country, can by no means justify a forcible action of the kind discussed so far.

280. See, supra, note 50.

danger, or had the power to avert it²⁸¹. As for the cases of internal conflict, it is impossible to ascribe the situation of danger to any internationally responsible entity. In other words, even though one can admit that the situation of danger for foreign citizens amounts to a violation of a right of the State to which they belong, the perpetrator of the violation in question cannot be deemed to be an international legal subject. So, it seems problematic to classify the above mentioned action within the framework of self-defence, because the concept itself would become too broad²⁸².

At least in theory, the problem of the lack of an internationally responsible authority against whose acts a reaction in self-defence could be envisaged, could be solved by resorting to the concept of state of necessity. In the chapter on self-defence a reference to it was made, in an attempt to find a legal justification to forcible reactions against acts which - though endangering the security of a State - were not ascribable

281. When it lacked the technical capability to conduct the operations successfully it consented to a foreign intervention as in the cases of Mogadishu and Bangkok.

282. See, contra, Bowett in Cassese (ed.) Current Legal Regulations p. 39, and in all his other works on the subject. This author includes the right to protect nationals abroad among the fundamental rights a State is entitled to protect by resorting to the use of force in self-defence, which existed in customary law and have been left unimpaired by the Charter.

to any international legal subject²⁸³. The absence of the element of imputability also characterizes the group of cases just mentioned. Doubts can still be cast, however, about the applicability of this concept to the situation concerned. According to article 33 of the ILC Report, the situation of danger must concern an essential interest of the State. Something, in other words, putting at stake the very existence of the State. In practice, it is difficult to ascertain under what circumstances - if at all - the suppression of a group of persons may endanger the very existence of a State. But perhaps it is even improper to inquire further in this direction. If the concrete reason for seeking a derogation from the generally accepted rule is that of rescuing human life, the value of one life is in itself sufficient to make the operation worthwhile in principle. The threshold beyond which the operation becomes legal cannot be based on the "counting of heads" so that if the endangered lives are in sufficient number, the operation to save them is legal, otherwise it is illegal. The solution must simply be sought elsewhere.

A state of necessity was only once openly invoked by an

283. See ILC report, article 33 (State of Necessity), p.14 ff.

intervening State in the cases examined²⁸⁴. This shows that, even though convinced of acting within their right, States did not necessarily believe that it was because an essential interest of theirs was at stake. It is certainly unacceptable to assert that if a State is allowed to intervene to save the life of a hundred of its citizens it may not do so when there is only one. Yet, admitting that a situation of danger for one individual citizen resident in another country puts an essential interest of the national State in jeopardy would probably broaden too much the category of essential interests whose infringement could allow the aggrieved State to use armed force. This could provide a comfortable excuse to use armed force for less lofty purposes.

A more acceptable solution to this problem is that proposed by Ronzitti. It postulates the existence of a customary rule allowing a derogation from the general ban on the use of force, for the limited purpose of rescuing nationals. This resort to coercion should be allowed subject to very narrow conditions, namely the existence of an objective situation of danger for the citizens concerned, the previous failure (or non-practicability) of any other means to solve the problem peacefully and, last but not least, the paralysis of the centralized competent organs.

284. See the Belgian intervention in the Congo (1960); Appendix, case n.5, section n. 3.

Moreover, the entire operation should be subject to strict proportionality between the aims sought and the possible costs of the operation (especially in terms of human lives), and be limited to the actual purpose of rescuing nationals²⁸⁵.

Several considerations suggest this solution. The first is State practice itself. In almost all the cases examined third States' reactions were directed at denying the existence of a situation of imminent danger, or the unavailability of alternative peaceful means, rather than at asserting in unequivocal terms that operations aimed at rescuing the lives of innocent civilians are illegal under any circumstances. With the resort to this plea by countries such as Egypt, one can also be led to believe that the original "colonialistic" flavour of these forms of intervention - aimed at preserving western interests abroad in spite of the possible cost in terms of local human lives - is starting to fade away. The increase in international terrorism, which is no longer striking exclusively "western" targets, also contributes to providing a wider consensus on the legality of such actions.

Legally speaking, this solution avoids the dangers coming from broadening too much the concept of self-defence. It also

285. See Ronzitti, Rescuing Nationals, p. 68 ff.

avoids the risks of unduly limiting the cases of admissible intervention, as would happen when trying to inscribe the subject of this chapter within the generally accepted notion of self-defence. In so doing questions such as the importance in abstracto of the group to be rescued - for the purpose of ascertaining the presence of the requirement of necessity -, or its status - in order to assess the degree of responsibility of the territorial State - would become irrelevant. This does not rule out, of course, that in certain instances, particularly where the direct responsibility of the territorial State is apparent, the forcible action undertaken could be inscribed within the framework of self-defence.

It goes without saying that in the context of this research this justification, albeit allowed, only plays a very limited role, because of its in-built limitation. It is true that it can justify the act of intervening: a derogation from the ban on armed force and a forcible violation of another State's sovereignty. Yet, taken by itself, it cannot justify any change in the status quo or provide any external capable of modifying the possible outcome of an internal conflict.

THE ALLEGED RIGHT OF COUNTER-INTERVENTION

1. Introduction

All the various legal grounds provided by individual States to justify their armed interventions abroad have now been examined. What emerges from the practice of States in this field is that the two main derogations to the prohibition of the use of force, namely the consent of the target State and self-defence, still represent the only generally accepted justifications for armed intervention²⁸⁶. The application of these justifications to internal conflicts however is not always possible and in more than one of the cases examined the factual conditions needed were absent. In those cases, they were used as figleaves to conceal

286. I am not including the protection of nationals abroad, because of its limited importance, and limited weight on the outcome of an internal conflict, when it is carried out lawfully. See, supra, p.215-4.

substantially illegal actions²⁸⁷.

In the chapter devoted to consent, the absence of any agreed criterion - apart from the rather elastic one of effectiveness - for assessing in abstracto the "legitimacy" of a government, and consequently its right to ask for foreign help, was pointed out²⁸⁸. Since, as is generally recognized, effectiveness (or legitimacy) is required for a legally valid expression of consent by the government in question, the fact that in most of the cases examined (and, by definition, in most internal conflicts) this

287. - See, e.g. at least the following cases: Hungary (1956), Bay of Pigs (1961), Czechoslovakia(1968), Bangla Desh (1971), Cyprus(1974), Timor(1975), Angola(1976), Kampuchea (1979), Uganda (1978-9), Afghanistan(1980), Israel-Lebanon(1982), Grenada(1983); Nicaragua (1981-87). Appendix, cases n. 1, 6, 10, 12, 13, 14, 15, 19, 20, 22, 23, 24, 26.

The judgment on the illegality of the intervention stems from both the legal considerations about the justifications put forward and the reaction of third States (usually overwhelmingly negative in the cases considered). In three of these cases (Bangla Desh, Angola and Uganda) international reactions were milder and there was later a substantial acceptance of the "fait accompli". In the cases of Bangla Desh and Uganda, however, an illegal means (the direct armed intervention) was employed to achieve what was seen by most a desirable end (the independence of Bangla Desh and the overthrow of president Amin). In Angola, on the other hand, the victory achieved by MPLA with Cuban help did not represent the end of the internal conflict, and indirect foreign aid was provided to the guerrillas (UNITA), who are still fighting against the central government. On a possible agreement aimed at the withdrawal of the Cuban in exchange for the cessation of the South African help to UNITA, see RGDIP, 1989, p. 421.

288. See, supra, p. ~~20~~ff.

very effectiveness is questioned, whereas the need to respect internal self-determination is stressed, often renders the practical use of this justification problematic²⁸⁹. Precisely for this reason, the justification given in many of the cases examined, based upon the consent of authorities whose effectiveness was inexistent or very doubtful, has been frequently rejected as illegal²⁹⁰.

Intervening powers, aware of this, have almost always sought to couple this justification with the alleged presence of an external threat to the target State. I have tried to distinguish the criteria (those logical and those resulting from the practice) to ascertain what kind of threat can lawfully give rise to a self-defensive reaction on the part of the target State and justify its request for external help²⁹¹. As a result of the application of these criteria, in some of the cases examined the external intervention has been judged legal (taking into account the reactions of the international community and the United Nations) or illegal.

289. Quote the dilemma by Hall in Perkins article.

290. - See, e.g. Hungary, Czechoslovakia, Timor, Angola, Kampuchea, Afghanistan and Grenada.

291. See, supra, chapter on self-defence, p.113~~4~~ and passim

It has also been shown that the other justifications examined were incapable of justifying either a long term intervention²⁹², or any kind of foreign intervention altogether²⁹³.

2. The factual bases of a hypothetical right of counter-intervention

In recent years, there have thus been a not negligible number of forcible interventions in internal conflicts in violation of article 2.4 of the Charter, which were not justified under any of the generally accepted exceptions; nor did they represent valid precedents for the creation of additional exceptions. Even in the face of the inadequate reaction of the

292. See, supra, chapter on protection of nationals, conclusions, p. 245

293. - See, supra, p.200 section on self-determination and "humanitarian intervention".

international community and its competent organs, these acts were acts of aggression.

Normally, in "classical" State to State conflicts, an unlawful use of force by a member of the international community against another elicits two possible responses: a) an immediate reaction by the competent centralized authority (directly or by any other body upon previous authorization), or, b) a unilateral (or multilateral) reaction by the target State in the exercise of its right of individual or collective self-defence if it amounts to an armed attack²⁹⁴. Neither response proves very useful when the conflict in question is an "internationalized" internal conflict of the kind examined so far.

Historically, the United Nations has almost never acted forcibly (or in any other effective way) to curb, prevent or punish an illegal intervention. Even when the wrongdoer was not a superpower, and the illegality of the conduct in question had repeatedly been declared by the competent organs, no effective

294. If it falls short of an armed attack, proportionate countermeasures may be adopted by the victim State (see Nicaragua case, para. 249). It is not clear whether such countermeasures may or may not encompass the use of armed force. In the Court's view, however, they may only be adopted by the victim State itself, and not by any third State.

measure was ever taken²⁹⁵. One of the reasons for the inaction of the United Nations is easily found in the ideological background of the most recent internal conflicts, directly connected to the division of the world into blocks. The seizure of power by any of the conflicting factions in a given State was likely to be detrimental to the interests of one of the superpowers in the area insofar as it involved the choice of a certain economic model or a certain foreign policy. Any "globally sponsored" settlement, which must often favour one of the factions, was obviously likely to be blocked by the superpower protecting (directly or indirectly) the other one. This remark is not intended to point to a technical incapacity of the world organization, but to the fact that, at least in the more recent period, the international situation has not allowed "globally sponsored" settlements in areas where inter-block conflict is taking place. So long as this situation continues, the power of the central organization to maintain world order is de facto non-existent. As a matter of fact, it could even be asserted that the United Nations Charter was very realistically drafted insofar as it recognized the plain truth that no real settlement of world tensions could be achieved against the will of any of the

295. - See e.g. the cases of Hungary, Czechoslovakia, East-Timor, Kampuchea, Afghanistan and Grenada.

superpowers. The legal devices to paralyze the organization in absence of such an agreement were therefore built into the Charter. It is also true, however, that the ban on the use of force is drafted in unconditional terms, which means that States have accepted refraining from using force unconditionally, and so independent of the existence of an agreement among the permanent members.

It is then probably incorrect to speak about the centralized machinery as one of the fundamental pillars of the system for the enforcement of the ban on force, because that machinery cannot but have a merely vicarious function, insofar as it depends on the political will of a few States. As a consequence the mechanism to enforce the ban must be sought in the ban itself and its system of exceptions²⁹⁶.

The exception of self-defence, which has become the cornerstone of the entire system of regulation of the use of armed force, can hardly ever apply to the situations in question. The application of this principle presupposes a State attacking

296. With the recent change in political relations between the two superpowers, the importance of the Security Council may be enhanced, as an effective machinery to solve world tensions. See, in this sense, Sir C. Tickell, "The Role of the Security Council in World Affairs, 18, Ga. Journ. Int'l Comp. Law, 1988, p. 307 ff., and moreover, T.M. Franck, "Soviet Initiatives: US Responses - New Opportunities for Reviving the UN System", 83 AJIL, 1989, p. 531 ff.

another and the government of the attacked State undertaking the defence of the State and possibly seeking external help²⁹⁷. In the cases examined these two factual conditions are lacking. The illegal intervention often takes place by toppling, by apparently "internal means", the government which would otherwise have asked for help and substituting it with a puppet government. It can also take place, in situations of complete anarchy, by the forcible establishment of a "friendly" government representing the interests of the intervening power rather than those of the local community²⁹⁸. The cases examined, in other words, are characterized by the absence of a central legal authority (internationally responsible or accountable) which can claim its right of self-defence. This remedy remains therefore inapplicable in most cases.

3. Legal bases of counter-intervention

297. See, supra, p. 94 ff.

298. - An example of the first type is represented by the intervention in Hungary or Czechoslovakia; an example of the second type is provided by the interventions in Angola or in Grenada.

The purpose of this chapter should now be clearer: to find out what are (if any) the remedies afforded to individual States when a foreign intervention cannot be justified on any of the legal grounds examined before, and is therefore illegal. Another problem, strictly connected to the first, is the identification of the legal basis, under customary law and the Charter, of this remedy.

Even *prima facie* it is difficult to envisage any effective, generally recognized remedy; on the other hand, the admission that there is none, could be taken as an implicit admission that the way has been found in the contemporary world to get around the present system of control of international coercion, provided one is a superpower or is protected by a superpower.

Given the conditions set beforehand, an individual right of counter-intervention should theoretically arise out of two basic conditions: a) an unlawful intervention by a given State in an internal conflict; b) the paralysis of the centralized authority or its failure to adopt any effective measure (a condition the fulfilment of which can be practically always be taken for granted). Such a right, if admitted, would not be subject to the same conditions as self-defence. In particular, for the counter-intervening State there would not be the requirement of being directly the object of an armed aggression or being requested by the State victim of an armed aggression.

Various authors assert the existence in international law of an individual right of counter-intervention, once an internal conflict has already been internationalized²⁹⁹. It should be specified, however, that for some of these authors the legal rules applying to internal conflicts (and to possible foreign interventions in them) are different from those applying to purely international conflicts. Yet, it is difficult to accept this differentiation for anything more than purely descriptive purposes. In fact, in the present system, where the use of force in international relations is prohibited, with the only explicit exception of self-defence, it is difficult to see how a State, barred from using coercion except in self-defence or upon request of another State, can intervene on its own initiative in a conflict which, in itself, does not amount to an aggression on its territory. In other words, nowhere in the Charter can be found, together with the allowed exceptions to article 2.4, an

299. See e.g. R. Pinto, "Les règles du droit international concernant la guerre civile", HR 1965, pp.482 ff.; R. Falk, "International Law and the United States Role in Vietnam", in Falk (ed.) The Vietnam War and International Law, Vol.I, Princeton, 1968, p.485; R. Falk, "The International Law of Internal Wars: Problems and prospects", in Falk (ed.), Legal Order in a Violent World, Princeton, 1968, p.122. Among those admitting a right of counter-intervention as a response to a prior illegal intervention, see Schachter, Right of States p.1642.

additional exception allowing third States to intervene forcibly in an internal conflict already started³⁰⁰.

Obviously, when there is a prior illegal intervention against the incumbent government (by fomenting a rebellion or by providing substantial help to rebels), a third State counter-intervention in favour of the government may in some cases be justified by collective self-defence in case of armed attack or simply by the latter's request, (and these hypotheses have already been discussed in the previous chapters)³⁰¹. More problematic is the opposite case, when the prior illegal intervention takes place in favour of the authority formally in charge which, for some of the reasons discussed above, might not be entitled to request it. It is believed that the principle of self-determination cannot go as far as to justify a direct foreign intervention in favour of groups struggling against non-representative governments (even when such a government receives direct foreign aid)³⁰². This is the heart of the matter, as sketched before. We admitted that a State may be in such conditions that no internal authority is considered legally

300. See infra, note.303

301. - See, supra, p.96 ff ; 102 ff; 113 ff. ; 124 ff.

302. - See, supra, chapter on self-determination, p. 200 ff.

entitled to request a foreign intervention: can any third State "counter-intervene" in those cases if the Security Council fails to act?

As self-defence cannot justify these forms of counter-intervention for lack of an authority legally entitled to issue a request, they could only find a legal basis in an additional exception to article 2.4. The recognition of such an additional exception would create many theoretical problems, which would mostly revolve around the holder of such a right. Would any State be entitled to counter-intervene just because somewhere an illegal intervention has taken place? Or should there be at least a legal interest of the potential intervener in the target State? This last hypothesis would be tantamount to a broadening of the range of hypotheses by which a State can resort to force, which does not seem justified under the terms of the Charter. Even prima facie it appears that asserting the existence of such a right would bring about the de facto stultification of the entire system of control of international coercion³⁰³.

303. Perkins asserts that an additional exception is not needed, for such counterintervention (in response to a previous illegal intervention) would not in itself be directed against the territorial integrity or the political independence of the victim State, nor be incompatible with the purposes of the United

(Footnote continues on next page)

4. Assessment of State practice

The above proposition seems substantially confirmed by the practice. Of all the cases of armed intervention examined, ten or eleven have been carried out illegally. In fact, none of the justifications given was adequate to provide a valid legal basis for the action performed (and this was borne out by the statements of the U.N. organs and the overwhelming majority of the members of the international community). The cases in question are the Soviet intervention in Hungary in 1956, the disguised American intervention at the Bay of Pigs in 1961, the Soviet intervention in Czechoslovakia in 1968, the Turkish

(Footnote continued from previous page)

Nations. See J.A. Perkins, "The Right of Counter-Intervention", 17 Ga. Journ. Int'l Comp. Law, 1986, p. 171 at 204 ff.

This might be true in theory. The fact however that a third State, not directly involved in the internal dispute, may independently decide that an illegal intervention has taken place and counterintervene accordingly would render the practical effect of the ban set forth in article 2.4 extremely dubious. This author admits however (p. 203) that the counterintervention may not take place without the consent of the recognized government. If this is the case, it is suggested, there is no need to assert the existence of an implied exception to article 2.4 under the heading of counter-intervention. Such act would be rendered lawful by the consent of the target State.

intervention in Cyprus in 1974, the Indonesian annexation of East Timor in 1975, the Cuban intervention in Angola in 1976, the Vietnamese intervention in Kampuchea in 1979, the Soviet intervention in Afghanistan in 1979-80, and the American interventions in Grenada in 1983 and Nicaragua in the early eighties. From the very beginning it is possible to take out of this list the episode of the Bay of Pigs, for its limited importance, and the fact that the attempted invasion was blocked by the Cubans themselves without any further international involvement. Of the remaining cases, with the exception of the Turkish intervention in Cyprus (which raises special problems) and the American intervention in Central America, all others took place upon invitation by some internal authority. In the same cases, however, the effectiveness of such authority, or its very power to issue invitations was denied or questioned very seriously. In the other two cases (Cyprus and Central America) the justification given was not deemed sufficient. In almost all cases clear and repeated condemnations were issued by the United Nations³⁰⁴, but in none of them did the condemnation deter the wrongdoer from continuing the violation of the law. This fact did not push the Organization to proceed further, by recommending to a State or a group of States the use of coercion to vindicate the

304. - See, appendix, nos. 1, 6, 10, 13, 14, 15, 19, 22, 24, 26.

wrongful act. Even in the face of the paralysis of the United Nations, in none of the above mentioned cases did any third State assert a right of counter-intervention or threaten to intervene directly. A possible exception is the Vietnam war. However, the theoretical dispute on the very nature of the Vietnamese conflict renders this case useless as a precedent.

An additional observation on the above-mentioned cases refers to the international reactions to each of them. Every time the illegal intervention was carried out by a great power within its "sphere of influence" (see e.g. Hungary, Czechoslovakia and Grenada), the reactions were only verbal. In some of the other cases (namely Angola, Kampuchea, Afghanistan) there was a stronger reaction from the other States (and particularly from the other superpower). This reaction, however, never went as far as to constitute a direct forcible action. It was usually limited to military and logistical support provided to the "losing" faction³⁰⁵.

305. In the Angolan case, South Africa openly asserted it was counter-intervening against the previous Cuban involvement. South African behaviour was however universally condemned. Even taking into account the particular position of South Africa in the international community at present, it is significant that even those States not approving of the Cuban involvement did not deem the South African counter-intervention to be lawful.

On the whole, therefore, the analysis of the most recent cases does not show a tendency in the behaviour of States towards creating an additional exception to the prohibition of the use of force under the justification of counter-intervention. On the contrary, States tend to keep their forcible actions and the justifications provided for them within the framework of self-defence. Consequently, they do not seem very keen on claiming an individual right to use force outside the hypothesis of a direct involvement in the conflict, or of an explicit request from another State directly involved.

This is confirmed by the majority opinion of the International Court of Justice in the Nicaragua case, if one reads together some of its more relevant statements.

First of all the Court asserted that a request of the victim State is necessary if third States want to exercise their right of collective self-defence³⁰⁶, and that for a direct armed reaction to be adopted, an armed attack must have taken place³⁰⁷. It also said that an intervention by a State in the internal affairs of another State is allowed at the request of the

306. Nicaragua case, para. 199.

307. Ibidem, para. 195.

government of the latter³⁰⁸, and that in case of illegal use of force against a State not amounting to an armed attack, only the latter is entitled to adopt appropriate countermeasures against the culprit³⁰⁹.

Assuming the erga omnes character of the prohibition of the use of force against other States³¹⁰, if an armed attack takes place, a legal interest of third States is prima facie infringed, unless the target State consents to that armed attack. As a matter of fact the prohibition is violated both when the target State admits being the object of an unlawful use of force, and when the internal situation is such that no authority is entitled to express the will of that State internationally (as in some of the cases examined).

The interest violated may allow a direct armed reaction by a third State against the aggressor only in case of an armed attack against the target State and a request from the latter (collective self-defence), subject to the requirement of proportionality. This case must not be confused with that of an

308. Ibidem, para. 246.

309. Ibidem, para. 249. As said above, the question as to whether they may involve the use of force is controversial.

310. The ICJ admitted that the ban on the use of force could be conceived as having peremptory character. Ibidem, para. 190.

infiltration not amounting to an armed attack, where the operations must be confined to the territory of the target State, because the legal basis for the foreign intervention in this case is the consent of the territorial State and not collective self-defence³¹¹. In both cases, anyway, a valid request is necessary.

In the cases being discussed in the present chapter, those interventions which have been deemed unlawful certainly amounted to armed attacks because they involved the direct use of armed force by the intervening State. No-one is however entitled to issue a request. For this reason third states may not intervene directly, either in the target State or against the aggressor, even though a legal interest of theirs has been violated. It is thus apparent that there is a clear distinction between the rights and interests violated on the one hand, and the means of redress available to third States on the other. Those means seem to be somehow limited in "intensity", presumably in the long-term interest of maintenance of peace. This is true even if, in individual instances, peace would be better served by more effective means of counteracting blatant violations.

If one recognized the irrelevance of the condition of the "request of the target State", things would prima facie look much

311. See supra, chapter on consent, p. 70 ff.

easier. This would however open the way to the freedom of any State to intervene directly anywhere, just upon its own evaluation of facts. Analysis of State practice has shown how controversial facts can be and how often divergencies among States have focused on their interpretation. The dangers of escalation stemming from the freedom of States to use force on that basis are thus all too clear. In conclusion, if an illegal intervention takes place somewhere and is of such gravity as to amount to an armed attack, a legal interest of third States is certainly infringed. Yet, in the absence of a valid request (which in cases such as those examined before would be practically impossible to obtain) these States cannot resort to force directly. They may lawfully resort to lesser forms of coercion, with a view to counteracting the effects of the illegal intervention. They may, for instance, provide support to the "losing" faction in various forms, not going as far as a direct armed intervention³¹².

312. This is in fact what some States, like the United States or China have been doing in Afghanistan, Angola or Kampuchea, to support the rebel formations fighting against those governments which had been established by illegal interventions.

CONCLUDING REMARKS

1.

The practical inter-relation of the rules illustrated in the previous chapters is rather complex and contains several obscure areas. This is probably inevitable. States aim at protecting their immediate interests (by exercising the right to invite whoever they wish in case of internal unrest, or the right to defend themselves and seek external help in case of aggression) but they also pursue the more general interest of maintenance of peace. Two potentially contradictory needs must therefore be reconciled: effective maintenance of world peace, necessarily presupposing cases where armed force may be used by individual States, and a limitation of the involvement of these very States, which might, if unchecked, impair world peace.

In case of internal conflict the problem is further complicated because, in the application of the "rules" described above to facts, the distinction between a lawful and an unlawful intervention must be made by resorting to concepts rather controversial in themselves, which may be subject to different interpretations: the effectiveness of a government, and armed attack.

How is it possible to ensure the prevalence of the "common interest" of world peace, in case of controversy over the application of a generally accepted rule? What is needed is a mechanism capable of marking the point at which the individual interest must necessarily give way to the general interest.

In the system of the United Nations such a function is - in theory - entrusted to the Security Council. Yet, the Charter is drafted in such a way that, while the general ban on individual force or the exception of self-defence are unconditional, there is no corresponding unconditional guarantee that the Security Council will take action in cases where world peace or States' security are endangered. From articles 39 and 27 it is plain that while the Security Council has the main power to act in such cases, there is no corresponding duty of its permanent members to authorize such action, since they are empowered to veto it. What are the consequences of a failure of the Security Council to take action? Obviously it cannot mean that a threat to peace or whatever prompted its summoning does not exist. It rather means that whether or not the danger exists nothing must be expected from the Security Council. Quid juris in such cases? Do the ban on force and the corresponding exception maintain the same scope and bind individual States in the same way? There are two possibilities: under the first, when the Security Council fails to act, States may use force even beyond the limits set forth by article 51, individually supplementing its failure. This

possibility, being based on an essentially individual assessment of whether a State's security is actually endangered, entails escalatory risks. The second is that States must strictly comply with the wording of article 51 even in such cases, though this means that certain violations will go unpunished. The risk is obviously that of undermining the credibility of the entire system.

Despite this risk, the second possibility is in my opinion the correct one. Besides the purely literal argument that articles 2.4 and 51 would have been drafted differently if the obligations contained in them were to be considered dependent on the actual effectiveness of the Security Council, it is plain that giving States the freedom individually to assess when their security is endangered and use force accordingly, without some agency to control and supervise the conduct adopted, would in practice impair the very essence of the prohibition.

By taking for granted that the prohibition to use force is customary, and by limiting the exercise of individual or collective self-defence only to cases of armed attack, the International Court of Justice has confirmed the validity of these rules per se, without even hinting that, in their practical application, their scope should vary depending on the action or inaction of the Security Council.

Maintenance of peace is basically to be ensured by these two norms: the ban and the exception to the ban which is meant to

provide a rudimentary system for its enforcement. Hence, the ban on the use of force is fully valid, but the means for its enforcement are in the hands of the States themselves: it is totally decentralized.

2.

The customary (and possibly peremptory) nature of the ban on the use of force is thus beyond discussion, even without a centralized authority enforcing it. If the Security Council cannot play such a rôle, the problem of a criterion to establish when the individual interest must give way to the collective interest remains open.

A decentralized system for the control of coercion contains a serious contradiction. If the object of the ban is the use of armed force, which is considered the gravest form of pressure of a State upon another, a wrongful use of force can in principle only be countered by a heavier reaction of the same kind. In a system lacking an authority automatically intervening to decide who is right and who is wrong, the right to react by force to force (and to be helped upon request) automatically contains serious dangers of escalation: the means introduced to guarantee the system could in fact doom it. Thus the enforcement power

available to individual States must necessarily be weaker and more limited than the range of possible unlawful uses of force.

I shall call this imperative the non-escalation principle. By virtue of this principle, the forcible options available to individual States to react when armed force is wrongfully used must be limited in kind and must necessarily presuppose the infringement of an interest. A legal interest is in fact violated when the State in question is the victim of an armed attack and, given the erga omnes nature of the ban on use of force against other States, when the same happens to any third State, and this State seeks help.

3.

To demonstrate that a "non-escalation" principle is necessary in theory (if we want the ban to make sense in the present system, that principle must exist) and that it can be discerned from the existing rules, does not mean to demonstrate its existence in practice. In fact, the limitations on the individual use of force, insofar as they depend on controversial concepts such as effectiveness or armed attack, might have been totally circumvented in practice, with the effect of persuading individual States to recover their freedom of action, bringing about the de facto neutralization of the system. The present

research has focused precisely on the areas where a "circumvention" of the rules was most likely.

My opinion is that States by and large respect the ban on the use of force. Violations are certainly to be found, particularly when States can take advantage of the "weak spots" mentioned before. Yet, the fact that States claim to have obeyed the rule, even when it is blatantly untrue, may be regarded as a proof of its validity. Also, the fact that there have not been escalations, even in the face of clear violations, as illustrated in the previous chapter on counter-intervention, shows that States do not just pay lip service to the ban, but behave in accordance with the "non-escalation" principle illustrated before. The harsh reactions to interventions justified by "fake" invitations, but the virtually universal opposition to any form of direct counter-intervention are also explained by this principle.

State practice concerning foreign intervention in internal conflict is thus substantially coherent with existing rules. The proliferation - in a certain historical period - of "internationalized" internal conflicts has in no way challenged this system.

States recognize in principle the right of a government to consent to a foreign armed intervention in its own territory. By virtue of the principle of "internal" self-determination, this intervention must not be aimed at imposing a government on a

people not wanting it, if that government is not able to maintain itself in power by its own means. Nonetheless, if that government is fully effective, or its effectiveness is not impaired by internal causes but by a previous foreign involvement, that government may lawfully consent to a foreign intervention to counter it.

This kind of intervention cannot properly be regarded as an exception to the ban on the use of force. Once the problem of the capacity of the territorial government to speak on behalf of the State has been solved, an expressly requested armed intervention cannot be said to be in violation of article 2.4 because it is not directed against the target State. Plainly, in a system lacking an authority automatically establishing whether there has been a violation, the best placed subject to judge it is the target State itself.

If the foreign infiltration into the target State is of such gravity as to amount to a fully-fledged armed attack, the legal basis for the intervention of any third State can also be collective self-defence. Prima facie the difference between the two cases may seem to concern only the label since in practice both interventions are carried out upon request of the target State, in presence of a foreign infiltration. Yet, there are important theoretical and practical differences. The intervention of a third State in collective self-defence is more specifically directed against the attacking State. Hostilities might be

confined to the territory of the victim State, if that proves sufficient to repulse the attack. Still, nothing prevents third States from carrying out operations in the territory of the aggressor, if they comply with the requirements of necessity of proportionality. The simple intervention by invitation, instead, must be confined to the territory of the target State. An armed operation, which would violate article 2.4 if carried out against another State, is legal because the subject which could claim to be its victim has requested it. But obviously its consent is only invalid within its own territory.

The theoretical difference between the two cases should also be clear. An armed attack represents the factual condition for exercising the right of self-defence. It is the event which shows that the ban on force has been violated by one or more States, and that the victim must no longer feel bound by this ban and may use force against the violators and request foreign help. A foreign infiltration, which may prompt a request for external intervention, only provides prima facie evidence that the government asking for help is legally entitled to do so. It is, in other terms, only relevant for assessing the "legitimacy" of the government requesting the intervention, and not the legality of the intervention itself which, in that case, falls outside the scope of article 2.4.

A corollary of all this is that when the internal situation is one of complete anarchy, so that no internal authority is

effective, or can at least claim to have lost power because of foreign involvement, no-one is entitled to issue invitations and no third State is allowed to intervene directly.

The two exceptions to the rules mentioned before do not change the picture significantly. The first - of increasingly limited importance - is provided by the principle of "external" self-determination, according to which a colonial, alien or racist government has no right to consent to foreign intervention, if the previous external involvement (short of an armed attack) takes place in favour of a people legally entitled to that right. The second concerns the forcible protection of nationals abroad, which seems to be allowed with many qualifications and within very strict limits. Their importance is limited insofar as the first cannot justify a direct intervention anyway, whereas the second has an in-built limitation which renders it inadequate to justify a substantive foreign intervention, capable of influencing the outcome of an internal conflict.

Besides the cases listed above, there are no other possibilities of a State individually resorting to armed force in the territory of another State. Thus if an intervention takes place, States which are neither its direct victims, nor are the objects of a legally valid request addressed to them, have no right to use armed force directly, even though they have the

right to counter-intervene with measures short of armed force against the culprit.

Compliance with the "non-escalation" principle explains the fundamentally "self-defensive" character of all cases where armed force may be individually employed. A common feature of all these cases is indeed that armed force may by and large be used only against other - and unlawful - uses of force. The individual use of armed force for the implementation of other values - no matter how lofty or universally shared they may be - is thereby ruled out. This is true even when the use of force represents the only way to implement those values. Direct use of force is practically allowed only to restore the status quo (criteria of necessity and proportionality) and only when the unlawful activity threatening it is sufficiently serious and evident (armed attack). Even the role played by the principle of "internal" self-determination is fundamentally in accordance with it. Indeed, it is not in the interest of world peace that a small group imposes itself on its people, just by resorting to foreign help; third States should indeed be allowed to react, even though their reaction should not encompass the direct use of force, to avoid the remedy being worse than the evil. Of course this does not rule out that a State's survival could in certain instances be endangered by activities other than armed attack; or that the individual use of force could sometimes be desirable to enforce certain values or put a stop to a certain state of affairs. By and large, however,

States have made a clear choice in favour of maintaining few and clear rules (even though imperfect) rather than try and give a legal answer to all possible problems which may arise, because this would necessarily imply a higher degree of discretion which, in absence of a central authority entitled to exercise this discretion erga omnes, would fatally open the way to abuses. The "non-escalation" principle is then a sort of interpretative principle which, in controversial cases, limits individual States' freedom to use force. Accordingly, if a government is illegally ousted from abroad, with means other than an armed attack, or if gross violations of human rights take place in a given State, States' reaction should fall below the threshold of a direct use of force, because this avoids opening the way to possible abuses of the newly formed rule, which no-one would be able to check and stop. In the absence of a centralized authority, rules should not be too elaborate, nor must they leave too much discretion. They must be as simple as possible, even rudimentary. In deciding to ban the use of force States have put peace on a level higher than other values and they behave accordingly, despite short-term injustices.

5. There is a final question to be answered: why is such a system (which does not in itself provide a full deterrent to unlawful use of armed force - given the incomplete character of its enforcement mechanism - but rather represents a legal-conceptual crystallization of a certain situation of balance in the international community) preferable to no system at all? Clearly, if the fundamental to be protected is maintenance of peace, this is better protected with clear and generally agreed rules - even when they are occasionally infringed or circumvented with no effective sanction - than with vague rules or no rules at all, for that would deprive the international community of a safe ground on which a common stand for the effective pursuance of peace can be taken.

So far I have carefully (and I hope successfully) tried to avoid any value-judgment on the desirability or otherwise of the individual use of force per se. I have only tried to establish whether individual States comply with the ban in the particularly sensitive area of internal conflict, and to assess the actual scope of the ban and its exceptions in the light of the purpose it is meant to serve: maintenance of peace. My substantially positive answer to the first question does not obviously mean that this purpose is attained. I have assumed that States have decided to put peace at the top of the values worth preserving, and they have set up a system of rules to achieve this aim. I have privileged a construction of these rules coherent with it

and attempted to demonstrate that States behave by and large in accordance with this construction. Whether world peace can really be achieved by a mere ban on the use of force is obviously a totally different matter. In fact, one can harbour serious doubts as to whether world peace can ever be achieved, if the existing tensions, which usually provoke the outburst of conflicts, are not solved. Of course, if one accepts that conflicts must inevitably take place every now and then, the ban and its rudimentary enforcement system do play the useful function of limiting their consequences and effects, in the interest of general peace.

These days we are increasingly realizing that war as such is losing importance in the scale of the threats to mankind, compared to others such as poverty, environmental damage or terrorism. We are also witnessing a considerable relaxation of the ideological struggle which has characterized the last decades, and the emergence of other sources of instability. There is an increased awareness that direct armed interventions are no longer such effective means to establish hegemony, even when they are not immediately blocked by direct counter-intervention. These events are then becoming comparatively less frequent, while solutions are being found to some of the remaining unsolved conflicts. At the same time the normative picture in this area is gradually consolidating itself. It is not unlikely that as the rules in this field become increasingly clear and generally

accepted - a result of relaxation of the ideological struggle behind - the phenomenon these rules are meant to control and regulate becomes less and less relevant, since real tensions are moving elsewhere.

APPENDIX

Case n.1

U.S.S.R. - HUNGARY (1956)

1. At the beginning of 1956 an increasing dissatisfaction became evident in Hungary. The established leaders of the local communist party, Matyas Rakosi first and Erno Gero later seemed to be unable to cope with it. In October 1956 Imre Nagy, who had been Prime Minister from Stalin's death to July 1955 was reinstated after Erno Gero proved unable to face student demonstrations asking for democratization of the party and withdrawal of Hungary from the Warsaw Pact. These demonstrations provoked a Soviet military intervention on October 23d. The new government of Imre Nagy agreed with the Soviet the immediate withdrawal of their troops, while making it clear that he had never requested the intervention. The first contingents of Soviet troops began to withdraw, though remaining in control of airports. Nagy announced the constitution of a government with non-communist representatives and the end of one-party rule.

2. On November 1st new Soviet troops entered Hungary. Nagy protested and on the same afternoon announced the withdrawal of Hungary from the Warsaw Pact and its neutrality. On the same day the Soviets set up an alternative government led by Janos Kadar. Nagy's minister of defence, who had gone to negotiate with the Soviets the withdrawal of their troops was kidnapped. On November 4th, at 4.00 a.m. Soviet tanks entered Budapest and quickly suppressed the revolution. At 5.00 a radio statement officially announced the formation of Kadar's cabinet. At 6.00 Kadar confirmed requesting the Soviet intervention in order to defeat a counter-revolution.

3. The justification advanced by the Soviets was threefold:
 - Request from the Hungarian Government;
 - Application of the Warsaw Pact and other treaties;
 - Socialist internationalism.

4. The condemnation of the Soviet intervention was general both in the Security Council (where a resolution calling on the USSR to withdraw its forces received only the Soviet contrary vote and the Yugoslav abstention) and in the General Assembly where a long series of resolutions calling on the USSR to withdraw from Hungary and let the people freely choose their government were adopted with large majorities

and only the contrary vote of Socialist states (and a number of abstentions).

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Case n.2

UNITED KINGDOM - SULTANATE OF MUSCAT & OMAN (1957)

1. In July 1957 a rebellion broke out in an internal region of the Sultanate of Muscat & Oman (in the area properly denominated Oman). The rebellion was led by an ex religious leader, the former Imam of Oman, Ghalib bin Ali and was directed against the Sultan of Muscat & Oman (H.H. Said bin Taimur). The local tribes had long since exercised a certain degree of autonomy which had been recognized by the Sultan in 1920 with the Sib agreement¹ by which, however, these tribes had accepted the sovereignty of the Sultan. The agreement was broken by the tribes in 1955 when the Imam tried to establish an independent State. The Sultan sent however forces under his control to the main centres of Oman, meeting no resistance. The Imam was allowed to live in one of the villages. By the 19th of July the insurgents had gained control of the oil-rich Nizwa areas. There were reports that the rebels were using foreign automatic weapons and land mines of unknown origin.

2. On July 16th the Sultan sent a letter to the British Government requesting the "maximum military and air support ... to restore the position and to prevent further loss of ground and loss of confidence". The military operations, carried out by small contingents of British troops with the support of the Royal Air Force, started on July 23d. By August 11-12th the Sultan's authority had been fully restored in the affected areas, the rebel leaders were in flight and a number of small towns and villages, formerly in rebel hands, were reoccupied by the British and Sultanate forces.

3. The British foreign secretary Mr. Selwyn Lloyd, in a statement at the House of Commons on July 22d gave the following justifications to the decision to intervene in the area:
 - the "request of a friendly ruler who has always relied on us to help him resist aggression and subversion"
 - the direct British interests involved and ... the importance of the Persian Gulf.He also added:

1. The interpretation of this agreement was subject to dispute. Whereas the Sultan maintained that the treaty gave him authority over the whole of Muscat & Oman, the Arab league and the ex Imam interpreted the treaty as conferring authority on Oman - i.e. the interior of the country - as distinct from the coastal region of Muscat.

- "the reasons for this action are that the dissidents have clearly received assistance from outside the territories of the Sultan"
- "...we are not doing this under a treaty obligation. We have no treaty obligation to deal with internal affairs in the territory of Muscat. We have certain duties in respect of external affairs, but not in respect of internal affairs."

4. In response to a request from the Arab League the Security Council met on August 20th. An Arab request for the Security Council to put the matter on the agenda was rejected. Four members (Iraq, USSR, Sweden and the Philippines) voted in favour, five against (United Kingdom, France, Australia, Colombia and Cuba) and two abstained (United States and China). Not all the countries voting in favour, however, meant to condemn the British intervention. Of these only two did so openly: USSR and Iraq. The latter country asserted that the British intervention failed to fall into the admitted cases where use of force is permitted.

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2. Chronology of facts: Keesing's 15709A; New York Times, July 21st, p.6; July 22d, p.3; July 23d, p.1; July 25th, p.1; July 30th, p.1; August 11th, p.1; August 16th, p.1
Text of the letter of the Sultan: Contemporary practice of the U.K., 7, ICLQ, 1958, p.100.
3. Statement of the U.K. foreign minister: 7 ICLQ, 1958, p. 100-1; Sec. Ccl Meeting, Statement of the United Kingdom representative, United Nations Yearbook, 1957, p. 57; New York Times, July 23d, p.1
4. Arab countries' request: UN Doc. S/3865 and Add.1; S/3915; UN Yb. 1957, p.57; New York Times August 21st, p.1.

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1. The real background of the dispatch of British troops to Jordan lies in the revolution which had occurred in nearby Iraq between July 14th and 16th 1958. King Faisal and prominent members of the royal family were murdered during the revolution and a republican government was established. The Iraqi royal family, a branch of the Hashemite family, was strictly related to the Jordanian royal family. The two countries had also formed a federation with common organs.

The republican government of Iraq proclaimed a provisional constitution on July 27th, pending the drawing up of a permanent constitution which would be submitted to popular approval in a referendum. On July 14th, in a broadcast from Amman, King Hussein of Jordan denounced the "insurrection" in Iraq, which he described as the work of "hired" elements. In subsequent meetings he assumed the head of the "Arab federation" and replaced its former Iraqi ministers.

2. In a broadcast on July 17th King Hussein announced that he had decided to ask friendly States to send "effective military aid" to Jordan "as a temporary measure to protect our borders from surrounding enemies" (this request had already been made the previous evening to the British and American chargés d'affaires in Amman). In response to the King's appeal, a detachment of 300 British paratroopers landed at Amman in the morning of the 17th. The airlift was completed in the afternoon of July 18th, by which time 2000 men had arrived in Amman from Cyprus.

About 15 persons, allegedly infiltrated from Syria, were arrested on the Jordanian-Syrian border during the last few days of July and held for interrogation. The Jordanian authorities seized a number of rifles, automatic weapons and explosives in the possession of the persons apprehended. A military spokesman in Amman said that the preliminary investigations had disclosed "clear intervention by the authorities of the Syrian army... with the intention of creating disorders in the Hashemite Kingdom of Jordan". The British troops were withdrawn between October 25 and 29th.

3. The justification given by the British government in a statement made at the House of Commons on July 17th was based on the:

- approval (consent) given by King Hussein
- right of collective self-defence under article 51 of the Charter (it was made clear that self-defence was considered legitimate even against an imminent attack).

King Hussein and his Prime Minister stated that Jordan's territorial integrity was threatened by the movements of Syrian forces along the northern border and by infiltration of arms.

4. The reactions of third States concerned by and large the U.S. action in the Lebanon as well, which took place in the same period. The debate in the Security Council (July 15th-22d; August 7th) mainly concerned Lebanon. The USSR, however, denied the existence of an external threat, but also asserted that foreign States had no right to keep in power a government against the will of its own people. Countries supporting the intervention (i.e. Australia, Turkey) admitted that there was a case for self-defence. In the debate at the General Assembly the British action was supported by Turkey, Persia, and Australia. It was openly criticized by the USSR and the UAR. A resolution sponsored by Arab State calling on the UN to take the necessary steps so that foreign forces could be withdrawn from Jordan and the Lebanon was unanimously approved.

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2. New York Times, July 18th, pp. 1 and 2; October 23d, p. 11; Keesing's 16305 A; 16406 A; United Kingdom Contemporary Practice, 8 ICLQ, 1959, p. 151.
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Case n.4

UNITED STATES - LEBANON (1958)

1. In the late spring of 1958 there was a situation of tension among the various communities of the Lebanon. President Camille Chamoun, the constitutional head of State (a member of the Christian-Maronite community) was faced by a growing opposition within the country. His authority was increasingly questioned. On the 6th of June he addressed a complaint to the United Nations Security Council alleging "illegal infiltrations" from the neighbouring UAR. On the 10th of June the Security Council decided to send observers to the border between the two countries with a view to verifying the facts alleged in the Lebanese complaint.

2. On July 14th President Chamoun issued a request to the United States government for help. On the following day (July 15th) a contingent of American marines was dispatched to Lebanon. President Eisenhower issued a statement and a broadcasted message to announce the operation and explain the reasons for it. The action was immediately reported to the Security Council, which met on the same day. President Eisenhower assured that troops would be withdrawn as rapidly as permitted by circumstances.

3. President Eisenhower gave a threefold justification for the American intervention:
 - Invitation by president Chamoun (and of all other members of the Lebanese cabinet);
 - Collective self-defence, to preserve Lebanese sovereignty and integrity. President Eisenhower spoke about a rebellion taking place near the border with Syria, supported by arms, ammunition, money and personnel infiltrated through the border;
 - Protection of the lives of about 2500 American citizens resident in the Lebanon.

4. At the Security Council the U.S. operation met the almost general approval. Two draft resolutions (United States and Japan) failed to be approved because of the Soviet veto. The USSR defined the act an "armed act of aggression against the peoples of the Arab world", because "there was not even a threat of armed attack". The Swedish representative affirmed that the action was not in accordance with article 51. On August 7th the Security Council adopted a resolution calling for a meeting of the general Assembly, which met between the 8th and 21st of August.

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"aggression" (taken by the socialist and some non-aligned countries), in which, however, it was unclear whether the Belgian plea of protection of nationals could in other circumstances be accepted or had to be rejected outright as unable to justify a foreign armed intervention (see, e.g. the position of the Tunisian delegate).

Consequently all agreed that Belgium must withdraw her forces, but while Western powers took the view she should do so only after being sure that the UN troops were able to maintain order, for the Soviet Union and other non aligned countries the withdrawal had to be unconditional. The two resolutions adopted, while urging Belgium to withdraw her troops as speedily as possible, failed to condemn the intervention.

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3. Ibidem
4. Ibidem

1. After a quick and rather unexpected decision, the Belgian colony of Congo became independent on the 30th of June 1960. Lacking the basic "human" infrastructure necessary to administer the country, it maintained a very large number of Belgians in the higher ranks of the administration and the army. A coalition of political parties (some representing the various tribal groups) was to run the newly independent country. Patrice Lumumba of the MNC (Mouvement National Congolais) became Prime Minister and Joseph Kasavubu of Abako became President.
A few days later (5th-6th July) a mutiny broke out in the ranks of the Force Publique (the local army) aimed at replacing the white officers with Africans. Despite attempts by the Prime Minister and the President to restore order, episodes of violence against the Europeans were reported and it seemed that the mutiny was turning into a rebellion (against the Europeans). On July 7th a big flow of Europeans started across the Congo river to Brazzaville, while other Europeans resident in all six provinces of the Congo were fleeing to the neighbouring territories.
2. On July 8th the Belgian government announced it would send reinforcements to the troops already stationed in two military bases in the country. These troops arrived and there were some clashes with the Congolese forces in various areas (including the port of Matadi from where the Europeans were escaping) The military action was subsequently extended to the main towns of the Congo, including the capital Léopoldville. The whole operation was carried out without the consent of the local government which on July 11th appealed to the UN for help. On the same day, M. Tshombe, Prime Minister of Katanga, proclaimed the independence of the province, making it clear that he welcomed Belgian help to restore order. On July 14th the Security Council decided to dispatch troops to the Congo, who began to arrive on the following day numbering over 10 000 by July 28th. Belgian troops were gradually substituted by UN troops, with the exception of Katanga, where the local government refused to allow them in.
3. The armed intervention was justified by Belgium with the "necessity" to protect European lives and ensure the safety of peoples there. This was repeatedly stated as the only purpose of the intervention. Belgium also declared herself ready to withdraw as soon as the UN troops were able to maintain order in a satisfactory way.
4. The reactions of third States, as expressed mainly in the UN Security Council, can be summarized in two main "attitudes": one of "understanding" the Belgian need to protect her citizens (mainly taken by the Western powers), and one of condemnation of the Belgian

Case n.6

UNITED STATES - CUBA (1961)

1. After the revolution led by Fidel Castro, which had ousted from power the former Cuban dictator Fulgencio Batista, the policies adopted by the new government (both economic and foreign policies) proved increasingly incompatible with the interests of American economic groups on the island and United States foreign policy as such. By mid 1960 the socialist character of the Cuban revolution was no longer to be doubted, coupled with the avowed intention of the new government of extending the revolution to other Latin-American countries. In October 1960 the Eisenhower administration declared an embargo on all goods bound to Cuba. On January 3d 1961 diplomatic relations between the two countries were broken. Castro proclaimed Cuba the first socialist republic of America.
2. On April 15th 1961 American planes disguised as Cuban, and piloted by Cuban emigrés tried to destroy the Cuban aviation without great results. Two days later a large group of Cuban emigrés, organized in a Cuban National Revolutionary Council (presided by dr. Cardona) landed at the Bay of Pigs. They were immediately blocked and had also to face the hostility of peasants. The United States refused to intervene directly, even though American planes protected the invaders against Castro aviation. Ships of the American navy rescued some survivors. Most invaders (1241) were captured by the Cubans.
3. The United States denied being directly involved in the attempted invasion. This was confirmed by the President of the Cuban National Revolutionary Council. No open statement was made to deny the employment of American facilities in the operation.
4. In a letter sent to the President of the United States John F. Kennedy, chairman Khrushchev of the USSR declared that his country would give the Cuban government and people "all necessary assistance in beating back the armed attack on Cuba". President Kennedy replied that the United States would honour their obligation under the Inter-American system, in the event of any military intervention from outside. The UN General Assembly (1st Commission) met on 17th and 18th of April. Cuba accused the United States of having organized the invasion but the United states denied any involvement. A resolution failing to condemn the intervention and calling on UN members to take appropriate action to remove existing tensions was adopted with the contrary vote of socialist countries and a few non-aligned countries.

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Case n.7

FRANCE - GABON (1964)

1. During the night of February 17th-18th 1964 a bloodless coup took place in Libreville, capital of Gabon. A "revolutionary committee" compelled President Leon Mba to resign and on the morning of February 18th a provisional government was announced. The coup was carried out by 150 men of the Gabonese army; President Mba was arrested and transferred to an Army camp, while the mutineers seized control of Libreville and nearby military camps without bloodshed.
2. At about 12.00 (noon) of February 18th French troops coming from Brazzaville landed in Libreville. These troops, together with another contingent which arrived from Dakar during the night, joined the French men permanently stationed in Gabon. They moved into the capital on the morning of February 19th; late in the afternoon it was announced that the rebellion was over. Some resistance had been encountered only at the military camp, with a French soldier and about 15 Gabonese reportedly killed. President Mba re-entered the capital on February 20th. On the same date the Vice-President of Gabon, who was absent from the capital at the time of the coup, declared that he had requested the French intervention with a written statement on the afternoon of February 18th.
3. The operation was justified by France with the request issued by the Gabonese government, under article 3 of the defence Agreement concluded between the two countries on 17. August 1960.
4. The operation was supported by some French-speaking countries, notably Madagascar, the Central African Republic, Chad, Niger, Upper Volta and the Ivory Coast. Other countries, however, protested against what they called a French intervention into another country's internal affairs, notably Mali, Algeria and Ghana.

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4. Ibidem.

1. After the departure of the UN forces from Congo in June 1964, and the solution of the problem of the secession of Katanga, the civil war broke out again. The central government, which was first led by Adoula, and then by Tshombe was not able to control the situation except by arms. It recruited Belgian and South African mercenaries to fight against rebels alongside the Armée Nationale Congolaise. The rebels, led by Gbenye, had taken Stanleyville in August and had proclaimed a Popular Revolutionary Government on September 5th. Meanwhile the ANC/mercenary troops were advancing and starting to capture some revolutionary strongholds. On September 26th Gbenye announced that foreigners in Stanleyville would not be permitted to leave the country. ANC/mercenary troops continued to advance towards Stanleyville.

2. On November 17th Belgian paratroopers were flown to Ascension Island. On the 22d they were moved on American aircraft to the Kamina base in the Congo. On the 24th the Belgian/American paradropped on Stanleyville; at the same time two columns of ANC/mercenaries led by Col. Vandewalle entered the city. By the end of November they had gained control of the city. In a letter by Tshombe to the American ambassador the former had authorized the foreign troops to intervene. The United States and Belgium reported the matter to the Security Council which met in December (also upon request of a group of African States) and adopted a resolution drafted in very generic terms.

3. The U.S. Government justified the operation as follows:
 - Authorization of the Government of the Congo
 - Conformity with the U.S. adherence to the Geneva Convention
 - Protection of the U.S. citizens resident in the area (as well as the citizens of at least 18 other countries alongside innocent Congolese.

4. The operation was condemned by most African countries which also questioned the authority of the Tshombe government to authorize operations of this kind in areas which were not under their control. The countries which approved of the operation stressed its humanitarian character (which was emphasized by the intervening States themselves). A resolution requesting States to abstain from intervention in the Congo was adopted at the U.N.

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UNITED STATES - DOMINICAN REPUBLIC (1965)

1. The assassination of Rafael Trujillo in May 1961 marked the end of a 31 year long dictatorship in the Dominican Republic, characterized by tyranny and corruption. The subsequent struggle for succession was fought between reformers and conservatives, the former being led by Juan Bosch, founder of the Dominican revolutionary Party. He won the elections of December 1962 but was ousted by the counter-revolutionaries before the end of 1963. The United States however recognised the new government and continued their aid. In February 1965 two clear factions had formed within the Dominican political establishment: the Constitutionlists (reformers) and the Loyalists (conservatives). On April 10th there was a Constitutionalist coup, led by Col. Caamaño Deno. The constitutionalist wing of the army took control of the capital while the loyalists, led by Brig. Wessin y Wessin and supported by the air-force and the navy took control of the St. Isidro base, outside the capital. Wessin y Wessin informed the U.S. ambassador that the safety of U.S. citizens could not be guaranteed. On April 28th a military junta, led by Col. Benoit was installed at the St. Isidro base, with a view to opposing the constitutionalist faction.

2. On April 28th American marines landed in the Dominican Republic to protect and evacuate foreign nationals and protect the U.S. embassy in Santo Domingo. By April 30th 2500 American citizens and a small number of other foreigners had been evacuated. By May 2d the American force had reached 9500. They established a safety area within Santo Domingo, but also a defensive perimeter around the St. Isidro base, thereby clearly protecting the junta led by Col. Benoit. A provisional cease-fire between the two factions was signed on April 30th. The American forces however continued to arrive even when the safety of foreigners had been ensured. On May 6th the OAS decided to send a peace-keeping force to the Dominican Republic. This force came into formal existence on May 24th with the US troops (who had meanwhile reached 22000) constituting the bulk of it.

3. Justifications for American intervention:
 - Invitation by "Dominican Law-enforcement and government officials"
 - Protection of American lives
 - Self-defence against the Communist threat, and, later:
 - Regional peace-keeping action.

4. In the Security Council, where the debate on the Dominican situation had begun on May 3d, the US action did not meet much condemnation. The reactions however mainly focused on two of the grounds provided by the United States: the protection of nationals and the regional peace-keeping action. Outright condemnations were expressed by

the USSR, Cuba (which also pointed at the denial of self-determination) and, in somewhat less harsh terms, by Uruguay and Jordan. France and the Ivory Coast approved of the operation to the extent it was limited to rescuing citizens, the Netherlands supported the OAS action, while Malaysia took a neutral stand. Other countries such as Bolivia and the United Kingdom supported the operation unconditionally.

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1. In January 1968 a liberalization policy in the Communist Party of Czechoslovakia and in society began, promoted by that party led by Alexander Dubcek. This policy was regarded with increasing hostility by the Soviet Union. On July 12th, routine military manoeuvres within the Warsaw pact which had been held in Czechoslovakia and neighbouring countries officially ended, but many Soviet military formations remained on Czechoslovak territory. At a meeting of the Communist parties of the USSR, East Germany, Poland, Hungary and Bulgaria, held in Warsaw on July 14-15, "deep anxiety" was expressed about developments in Czechoslovakia. Another meeting with representatives of the Czechoslovak communist party took place in Bratislava on August 4th. The Soviet forces withdrew thereafter, but the Soviet press resumed its attacks on the liberalization policy, while troops manoeuvred along the Czech borders.
2. During the night of August 20-21st a big number of Soviet forces, joined by troops of four other Warsaw pact countries (East Germany, Poland, Hungary and Bulgaria) crossed the Czech borders and invaded the country occupying the main cities (Prague, Brno, Bratislava) within a few hours. The strength of the occupation forces was about 300.000, and by the end of the month had reached 600.000, predominantly Soviet. The Czechs offered no resistance to the invaders, who were however treated with scorn and contempt by the population. The leaders of the Czechoslovak Communist party and government were put under arrest but released almost immediately. President Ludvik Svoboda flew to Moscow together with other leading members of the Party. They were kept in Moscow until the 27th where they had talks with the Soviet leaders and other Warsaw Pact delegations. A final communiqué was issued. Soviet tanks pulled out of Prague on September 11-12th.
3. On August 22d, the Tass agency published a statement alleging, among other things, that party and government leaders in Czechoslovakia had asked the Soviet Union and other allied States to render urgent assistance, including assistance with armed forces. It went on saying that "this request was brought about by the threat which has arisen to the socialist system in Czechoslovakia, a threat emanating from the counter-revolutionary forces which have entered into collusion with foreign forces hostile to socialism". It also said that "the further aggravation of the situation in Czechoslovakia affects the vital interests of the Soviet Union and other socialist States and the security interests of the States of the socialist community" and that the action was in accord with the right of individual and collective self-defence envisaged by the treaty of alliance concluded between the socialist countries. Tass also published an "appeal" allegedly issued

by members of the Czechoslovak Communist party, without however specifying their names.

4. The Czechoslovak situation was discussed at the Security Council between August 21 and 24th upon request of six Council members. An eight power resolutions condemning the invasion as a violation of the Charter and requesting the immediate withdrawal of foreign forces from the country received 10 votes in favour, two against and three abstentions but failed to be adopted because of the Soviet veto. The Soviet invasion received widespread condemnation all over the world.

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1. 2. RGDIP, 1969, pp. 253-264; Keesing's, 22885; Ibidem 22967; Ibidem, 23025.
3. 4. RGDIP, 1970, pp. 517-8; Ph. Bergmann, Self-determination: the Case of Czechoslovakia 1968-69, Lugano, Grassi, 1972; M. Bettati, Souveraineté limitée ou internationalisme prolétarien, les liens fondamentaux de la communauté des Etats socialistes, RBDI, 1972, p. 445-481; G. Fischer, Quelques problèmes juridiques découlant de l'affaire tchécoslovaque, AFDI, 1968, p. 15-42.

Case n.11

FRANCE - CHAD (1968)

1. The northern part of Chad, bordering Libya, a region named Tibesti, is inhabited by a population different (in religion and ethnically) from the South, where the capital Fort Lamy (now N'djamena) is situated. This is one of the reasons why, after the independence of Chad, the situation there has never been completely peaceful. In March 1968 a fully fledged rebellion broke out in the area, led by FROLINAT (Front de Libération Nationale), which the central government of President Tombalbaye had difficulties putting down.

2. In a declaration of August 28th the government of Fort Lamy stated that, since all attempts to solve the problem peacefully had failed, they had decided to appeal to French troops to intervene and help them in re-establishing order in the Tibesti. At first the troops employed were those already stationed in Fort Lamy; they were later joined by parachutists and légionnaires sent directly from France. The operation, originally meant to be of short duration, was prolonged until 1972, with other French troops involved in it.

3. The justification given by the French government (mainly to the French Parliament) was based on the request of the Chadian government. This request had been made under the terms of an agreement between France and Chad, signed on July 12th 1960 concerning military assistance. Under article 6 of this treaty "Las forces armées de la République du Tchad peuvent faire appel, pour leur soutien logistique, au concours des forces armées françaises".

REFERENCES & MATERIALS

- 1.2. RGDIP 1969, p. 469; RGDIP 1970, p. 199; Keesing's 23073 A; 23547 A; 24035 A.

3. Text of the treaty: J.O. 30.7.1960. p. 7041.

Case n.12

INDIA - EASTERN PAKISTAN (BANGLA-DESH) (1971)

1. As a result of harsh repressive actions in Eastern Pakistan by West Pakistani troops (who tried to terminate an autonomist movement) a big flow of refugees began to cross the Indo-Pakistani eastern border to find shelter in India. The situation of civil strife had in fact started in March 1971. During the spring and the summer of 1971, two United Nations humanitarian programmes had been established by the Secretary general. Towards the end of the summer, though, the situation had worsened rather than improved. At the beginning of December the General Assembly approved two resolutions inviting the Secretary general to intensify his efforts, also in view of the problems that the inflow of refugees was creating for India. Immediately after the refugees began to flow from Eastern Pakistan into India, border clashes started between the two countries.
2. On December 3d 1971, following a Pakistani attack on airfields in Western India, Indian forces launched an integrated ground, air and naval offensive against Eastern Pakistan. Immediately thereafter, an Eastern Pakistani autonomist party, the Awami League (which had unilaterally proclaimed the independence of Bangla-Desh on April 10th 1971 as a result of the repressive policies of the Pakistani government) formed a Bangla-Desh provisional government which was immediately recognized by India. A few weeks later (December 16th) all Pakistani forces surrendered.
3. India gave the following justifications to its action:
 - Assistance to the people of Bangla-Desh to achieve freedom;
 - Self-defence against:
 - the previous Pakistani attack (on its western border)
 - the threat to the economy and security of India represented by the massive inflow of refugees (caused by the West-Pakistani policies in East Pakistan and amounting to 9.500.000 before the outbreak of hostilities).
 - "Humanitarian" intervention to halt the genocide committed by the West-Pakistani troops against the Bengali people (statement at the G.A.).
 - Invitation of the newly recognized government of "Mukhti Bahini" to come and "restore order" (Statement at the S.C.).
4. In the UN organs only a few countries openly condemned the dismemberment of Pakistan and the birth of Bangla-Desh. Apart from Pakistan itself, these countries were China, the United States, Tunisia and Saudi Arabia. These two countries stated that foreign armed intervention is not an admissible way of achieving self-determination. The United States open condemnation was subsequently muted after

congressional criticism. Other countries (i.e. the USSR, Poland, Ceylon, Syria, Argentina, Turkey) even though did not openly approve of the Indian intervention, admitted that any solution must take into account the will of the Eastern-Pakistani population. This last view was also taken, even though somewhat implicitly, by the United Kingdom and France.

The Security Council failed to take a position. The matter was deferred to the General Assembly which approved a resolution calling on both parties to cease fire and withdraw their troops from both sides of the respective borders. It did not recognise the existence of Bangla Desh. It therefore received the negative vote of socialist countries and India.

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1. RGDIP, 1972, p.538-564; Keesing's 24989 A, 25053 A, 25069 A, 25429 A; Mani , The 1971 War in the Indian Subcontinent and International Law, 12, Indian Journal of International law, 1972, p.83; AFDI, 1972, p.1025.
2. For the integral version of Indian statements and text of the declaration of independence of Bangla Desh, see Indian Journal of International law, 1971, ; Statement on the recognition of Bangla desh by the Indian government (December 6th 1971), Ibidem, p. 685.
3. Statements by the Permanent Representative of India at the United Nations General Assembly (Dec.12th 1971) (GAOR, 26th Sess. A/PV. 2003) and by the Indian foreign minister at the Security Council (Dec. 12th 1971) (UN Doc. S/PV. 1611), also reproduced in Indian Journal, 1971.
4. Statements by Argentina (A/PV 2002, p. 22), USSR, Turkey (Ibidem, p.36-37), and by Syria (S/PV 1613, p. 132); US State dept. declaration, Keesing's 25053; Statement by China, S/PV 1608. Resolutions: G.A. 2793 (XXVI); S.C. 307 (1971)

Further readings:

Nanda ,A Critique of the UN Inaction in the Bangla Desh Crisis, Denver Law Journal, 49, 1972, p. 53; Franck - Rodley, After Bangla Desh: the Law of Humanitarian Intervention by Military Force, AJIL 1973, p. 175; Joyner, The 1971 Indo-Pakistani War in Retrospect. The Interplay of National Interests, Capabilities and International law, 7, Eastern Journal of international Law, 1975, p. 18; Nanda, Self-determination outside the Colonial Context: the Birth of Bangla Desh in Retrospect, 1 Houston Journal of International law, 1979, p. 71.

TURKEY - CYPRUS (1974)

1. In July 1974 rumours about a plot to overthrow President Makarios of Cyprus were becoming more and more "insistent". They proved founded on the 15th, when a Greek Cypriot deputy, Nicos Sampson, staged a coup backed by the national Guard and toppled Makarios who had to flee to England. This event brought about a situation of crisis requiring consultations between the three powers guaranteeing Cyprus' independence: Turkey, Greece and the United Kingdom. The Turkish prime Minister stated that the coup was tantamount to a Greek invasion of Cyprus, for the sympathies of Sampson and his group for the reunification of the island with Greece (enosis) were known. Sampson denied any involvement of Greece in the operation. From the 16th, the Security Council was discussing the matter.

2. On July 20th at dawn a big contingent of Turkish troops landed in force near Kyrenia (northern coast), protected by a strong fleet. At the same time Turkish paratroopers landed in the mountains between Kyrenia and Nicosia. By the time of the UN Security Council cease-fire resolutions, peace-talks began in Geneva between Greece and Turkey. Meanwhile, a definitive cease-fire line was agreed. On August 14th, however, as a consequence of the failure of the Geneva talks, hostilities (which had never completely subsided) broke out again in full and the Turks captured the entire northern third of the island. At that stage Turkey called a cease-fire (August 16th). Greece had meanwhile decided to withdraw its armed forces from NATO.

3. At the UN Security Council the Turkish representative (who was quoting the Turkish prime Minister B. Ecevit) gave the following justifications:
 - Peace operations to end decades of strife in Cyprus;
 - Fulfilment of Turkey's legal responsibility as a co-guarantor of the independence and constitutional order of Cyprus;
 - Reactions against a previous invasion (represented by the allegedly foreign-organised coup).Article IV of the Treaty of Guarantee of Cyprus reads as follows:

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

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

4. After the coup, at the Security Council, most Council members criticized Greece for their involvement in the operation. After the Turkish intervention when talks were still on in Geneva, Turkey was not condemned by any State. On the contrary some countries expressed their understanding while criticizing Greece for having provoked the crisis. After the failure of the talks a few countries (i.e. United Kingdom , France) criticized Turkey for its rigidity in not allowing Greece more time to decide about its proposals. The Turkish intervention as such, at that stage, was not condemned by any State. In one resolution (360-1974) the Security Council "record(ed) its formal disapproval of the unilateral military action undertaken against the Republic of Cyprus". Turkey, however, was not mentioned.

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1. Keesing's 26661 A; UN Yearbook 1974, p. 256
2. Keesing's 26661 A; Sciso, L'intervento turco a Cipro, aspetti giuridici, 1977, RDI, p. 75; Coussirat-Coustère, La crise chypriote de l'été 1974 et les Nations Unies, AFDI 1974.
3. UN Yearbook 1974, p.266; Treaty of Guarantee, Keesing's 16657 A; 38 UNTS, p.3.
4. Ronzitti, Rescuing Nationals abroad, Chapt. 5, p. 115.

INDONESIA - EAST TIMOR (1975)

1. The end of the dictatorship in Portugal awoke in all its colonial territories aspirations to independence. In the colony of East-Timor Portugal intended to grant self-determination by October 1978. In 1975 three independentist movements were present in the territory, UDT and FRETILIN (the first more moderate than the second), favourable to independence, and APODETI, in favour of integration with Indonesia. In August 1975 UDT staged a coup and reclaimed immediate independence. Portugal refused to comply, but this event triggered an internal conflict among the different factions (opposing FRETILIN to the other two movements), in which FRETILIN rapidly took the upper hand and managed to conquer the capital, Dili, at the beginning of September. Indonesia began to show impatience at the new developments, and accused FRETILIN of attacks on Indonesian territory along the border. Both Indonesia and Portugal reaffirmed Portuguese sovereignty over the territory for the time being, but FRETILIN rejected it and on November 28th proclaimed the independence of the territory with the name of "Democratic Republic of East Timor".

2. By the end of October it was clear that Indonesia was engaged in combat against FRETILIN and was training members of the opposing movements. On November 29th these movements openly requested that East Timor become part of Indonesia. On December 7th Indonesian forces invaded East Timor and quickly conquered Dili while FRETILIN troops continued to resist elsewhere in the country. A provisional government was established, while Indonesian troops were still fighting in various areas against FRETILIN troops. By the end of December FRETILIN had been completely defeated. On January 13th 1976 the Indonesian foreign minister stated that the provisional government had requested Indonesia to annex the territory. On June 29th the official announcement of the merger was given. On August 27th East Timor became Indonesia's 27th province.

3. Indonesia justified its behaviour as follows:
 - Reaction against FRETILIN incursions
 - Intervention to restore order and allow the people of East-Timor to achieve self-determination upon their request.Indonesia also added that troops fighting in east-Timor were "volunteers" and that the merger had been freely chosen by the East Timor people after they had attained self-determination.

4. The annexation of East Timor by Indonesia met with virtually universal condemnation. Both the General Assembly and the Security Council approved resolutions calling on Indonesia to withdraw its troops from that territory. They thereby denied that in so doing Indonesia was

aiding East Timor to exercise its right to self-determination. They stressed instead that true self-determination could only be achieved with the withdrawal of Indonesian troops.

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1. RGDIP 1976, p.640; Guilhaudis, La question de Timor, AFDI, 1977, p.307; Keesing's 27533 A
2. RGDIP, cit.; Keesing's 27906 A
3. U.N. Yearbook, 1975, p. 856
4. Res. G.A. 3485 (XXX), 12.12.1975; 31/53, 1.12.76; Res. Sec. Ccl. 389, 22.4.76.

1. On January 15th 1975 the three different movements for the independence of Angola (the MPLA, People's Movement for the Liberation of Angola, led by Agostinho Neto, the FNLA, National Front for the liberation of Angola, led by Holden Roberto, and the UNITA, National Union for the Total Independence of Angola led by Jonas Savimbi) reached an agreement with the Portuguese government concerning the accession of Angola to independence on November 11th 1975. Power was to be transferred to a provisional administration with representatives of the three movements on the 31st of January 1975. Power was in fact transferred, but the provisional government never exercised it effectively because the three factions were struggling militarily throughout the country. Independence was thus proclaimed almost simultaneously by MPLA in Luanda (on November 10th) and jointly by FNLA and UNITA in Huambo (on November 11th). At that time MPLA only controlled 20 % of the Angolan territory.

2. Even though all the independence movements received some kind of indirect aid from abroad, it is not totally clear when a foreign direct involvement did in fact start. There are no doubts that the first contingents of Cuban troops had reached the country sometime before the proclamation of independence. What is not clear is whether the South African troops were there before (October 23d as claimed by the Cuban President Fidel Castro or early August as claimed by the Cuban representative at the United Nations) or arrived only subsequently as a reaction to the Cuban intervention (end of November as claimed by the government of Pretoria). The South African troops numbered about 5000, while the Cubans - according to Pentagon's figures - had reached the number of 11.400 by January 30th 1976.

With the help of the Cuban troops MPLA was able to gain control of the rest of the country in the subsequent months. There were clashes with the South African forces already at the end of November 1975. By the end of february 1976, however, MPLA had virtually conquered the whole country. South African troops withdrew within the Namibian borders on March 27th 1976. At the date of April 15th the Angolan MPLA government had been recognized by 78 countries, including Western European countries.

3. The justification put forward by the Cuban President Castro for their intervention was threefold:

- request from MPLA;
- reaction against a previous South African intervention;
- "revolutionary solidarity"

South Africa justified its involvement as follows:

- right of "hot pursuit" of nationalist elements of Namibia, seeking shelter in the southern region of Angola;

- Need to protect the hydroelectric plant of Ruacana-calueque, and the construction works of a dam, essential to provide water to the Ovambo territory in Namibia (protection of the workers);
- Necessity of ensuring the security of border areas;
- request from the Portuguese authority (circumstance denied by the Portuguese representative at the United Nations).

4. From the speedy recognition of the MPLA government by the overwhelming part of the international community and the debate which subsequently took place at the Security Council (26-31st March 1976) it clearly appears that the attention of the world community was mainly focused on the South African intervention. Western countries (but also Zaire and China) condemned however all forms of foreign intervention in Angola, while most other countries took the view that MPLA was legally entitled to seek foreign help to counterbalance the South African aggression. Obviously the fact that the first Cuban troops had reached the country before the declaration of independence, when MPLA was far from being the official and established government of Angola seemed irrelevant to most. As was the fact that MPLA managed to gain control of the whole country precisely because of the direct Cuban help.

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1. RGDIP 1975, p. 1098-1102; DSB 1975, p.212; DSB 1975, p. 768; Legum, Foreign Intervention in Angola, *Afrique Contemporaine*, 1975-76, p. A3-A38; Bennouna, *Le consentement à l'intervention étrangère...*, p. 339-40; Jiménez, *La intervencion extranjera en el conflicto angolés y la adecuacion a las normas de derecho internacional*, *Rev. Jur. de la Universidad de Puerto Rico*, 45, 1976, 3/4, p.329-353.
2. RGDIP, 1977, p.555; Cervenka-Legum, *Cuba- the Most Important Communist Power in Africa*, *XI Africa Contemporary Records* (1977-78).
3. RGDIP 1977, p. 564 ff.; *United Nations Yearbook* 1976, p. 173-175.
4. *Sec. Council meetings S/PV 1900-1906* (23-31 March 1976); RGDIP 1977, p. 566 ff.; *Sec. Council res. 387* (1976).
See also:
Legum-Hodges - *After Angola: A Study of international Intervention*, 1976 ; RGDIP 1978, p. 240; *ibidem* 1980, p...; *Ibidem* 1984, p. 899.

1. On March 8th 1977, columns of troops, allegedly former Katangese soldiers numbering about 2000 entered the southern region of Shaba (former Katanga) from Angola taking 3 towns of the area. Three days later a "Congolese National Liberation Front (FNLC)" claimed responsibility for the attack in Paris. President Mobutu of Zaire accused Angola, Cuba and the Soviet Union of having organized the attack, but these countries disclaimed responsibility.
The foreign troops continued to advance without encountering any serious resistance, owing to the poor level of training of Zairean troops. On April 2d President Mobutu appealed to the President of OAU in order to receive some help from the organization. On April 8th Morocco confirmed that they had decided to respond to the request.
2. On April 10th the French Government announced that France was providing 11 transport aircraft, to meet a request from Zaire and Morocco, in order to transport 1500 troops and equipment to Zaire. They arrived in Kinshasa on the 10th. By the 16th, however, all French aircraft had flown back to France. The Zairean/Moroccan troops began to retake the rebel-held areas, while refugees were flowing into Zambia and Angola (especially members of the local Lunda tribe, for fear or reprisals on the part of the central government). By the end of April, however, the fighting was reportedly over.
3. The operation was justified by Morocco on the basis of Zaire's request, to help preserve her territorial integrity and national unity and to settle the problem among African nations. France for its part stressed that its contribution had only been logistic, that it had been performed upon request (even though in the absence of any previous agreement concerning defence between France and Zaire or France and Morocco) and finally, that it was clear that the source of the disorder was external.
4. The joint French/Moroccan operation met with the approval of most African countries and China (some of them, in fact, like Sudan or Egypt, had even offered direct help). Nigeria and Algeria expressed criticism, and voiced the fear that the Moroccan intervention was only a Western intervention in disguise. Cuba, Angola and the Soviet Union, which had disclaimed any responsibility from the very beginning, condemned all foreign intervention in Zaire, while strongly underlining that, in their opinion, what had happened in Shaba was a purely internal question of Zaire.

1. Keesing's 28397 A; RGDIP 1977, p. 1203-1207
2. Ibidem; Manin, L'intervention Francaise au Shaba, AFDI, 1978, p.159ff.; Legum, Foreign Intervention in Africa, Yearbook of World Affairs, 1980, p. 76-94; and 1981, pp.23-37; Ogunbadejo, Conflict in Africa, A case-study of the Shaba crisis, 1977, World Affairs, 141, 1979, p. 219-234
3. AFDI, 1977, p. 1013; RBDI 1978-9, p. 652ff.
4. Keesing's, p. 28399-28400; Lake, - Africa in a Global Perspective, DSB 1977, p.844.

1. During the night between 11th and 12th May 1978 a group of 400 rebels of the Lunda tribe, led by ex-Katangese "gendarmes", entered the Zairean territory from Angola and Zambia into the region of Shaba, and took control of the copper-mining centre of Kolwezi, where there was a relatively large community of European residents, numbering about 2000. They harassed the local white population, 200 of whom were killed in the subsequent 10 days. FNLC claimed responsibility for the invasion. AZAP (the Zairean State news agency) accused the Soviet Union, Cuba, Libya and Algeria of being behind the operation. On May 14th the Zairean foreign minister summoned the ambassadors of France, Belgium, the United States and China to ask for help. On May 17th AZAP announced that, following an airborne counteroffensive of the Zairean forces, Kolwezi airport had been retaken. On the same date reports of killings and harassment of whites started to reach Europe.

2. On May 17th President Giscard d'Estaing of France decided to send French Paratroops to Zaire and informed the Belgian Prime Minister of his decision. On May 18th high officers of the Belgian, French and U.S. armed forces met in Stuttgart to co-ordinate operations. French paratroops arrived in Kolwezi in two groups on the 18th and 19th. Belgian troops (1750) (with U.S. logistic support) landed in Kamina (125 miles north of Kolwezi) in the afternoon of the 19th.
By the late morning of May 20th the French had gained full control of Kolwezi, where they found many mutilated corpses of Europeans. Belgian troops, who had meanwhile arrived in Kolwezi began to evacuate Europeans wishing to leave. By May 21st they were all evacuated. The Belgians withdrew on the 22d, leaving 600 men at the Kamina base. French paratroops were progressively withdrawn from the area starting on the 25th and were substituted in Kolwezi by Moroccan troops. An Inter-African force was constituted, which began to reach the area by mid-June.

3. The French government justified the intervention as follows:
 - Request from the legitimate government within their sovereignty and within the boundaries recognised by the international community;
 - Protection of Nationals abroad
 - Participation only in defensive actions with a view to guaranteeing security rather than diminishing it;
 - Fulfilment of a contractual obligation with a friendly country (in fact a treaty in this sense had been negotiated but had not yet been presented to the National Assembly).Belgium:
 - Protection of nationals abroad (the fact that, unlike the French, they had immediately withdrawn having evacuated the Europeans was stressed).

- Consent given by the Zairean central government.

United States:

- They had provided only logistic support upon request of the government of Zaire.

4. International reactions followed the same pattern as the previous year's operation in that area. Strong criticism was expressed by the USSR, for which the plea of protection of nationals was only a figleaf. President Nyerere of Tanzania, even though recognizing the right of each government to ask for military aid abroad, denied that it should be allowed in order to keep in power a corrupt government if the people wanted to make a change. On the 31st OAU Council of Ministers meeting (Khartoum July 7th-15th 1978) Mozambique and Nigeria criticized the operation (Nigeria drew a distinction between the Cuban presence and other Western presences. The Assembly of OAU (18th July onwards) condemned, among other things, the conclusion of military pacts with non-African countries.

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1. Keesing's 29125 A; RGDIP 1979, p.202-208
2. Ibidem; Manin, A. - L'intervention Francaise au Shaba (19 Mai- 14 Juin 1978), AFDI 1978, p. 159-188; Legum, Foreign Intervention in Africa, cit....
3. Keesing's 29125 A; AFDI. 1978, p.1083; RBDI, 1980, p. 630-650; Statement by the American Secretary of state Vance, DSB, August 1980, p. 12; 72, AJIL, 1978, p. 917.
4. Keesing's 29258 A.

1. On April 13th 1975 a coup ousted President Tombalbaye from power. He was substituted by general Malloum. On September 22d the latter requested French troops stationed in Chad to leave the country, and the French complied in the autumn of 1975. The rebellion led by FROLINAT was in the meantime increasing in the northern part of the country. By the beginning of 1978 the rebels controlled the entire region and were dangerously pushing southwards, starting to threaten the capital N'djamena. A cease-fire attempt had been made on March 27th in Benghazi, Libya, but the fighting had not stopped, and the factions had carried on accusing each other of violations.

2. Government forces started a counter-offensive on April 16th, which on April 21st succeeded in halting the advance of the rebels. The counter-offensive already enjoyed French support. On April 26th the French government admitted that French troops had arrived in the area, mainly to protect French citizens. In May fighting started anew, and the French government this time admitted that its troops were in fact taking part in the fighting. In an interview in June, General Malloum asserted that there was evidence of Libyan and Cuban involvement with the rebels. The same accusation he repeated during a OAU meeting on July 20th 1975.

3. 2 justifications:
 - Protection of French citizens.
 - Request of the established government for the purpose of guaranteeing the stability of the region (threatened by "external" infiltration).

1. During the autumn of 1978 there had been continual clashes along the Cambodian-Vietnamese border, and both countries had been accusing the other of incursions into each other's territories. The Vietnamese complaints of Cambodian incursions were particularly frequent, even though, according to western reports, there had been at least a major operation of Vietnamese troops in Cambodian territory at the end of November, which had resulted in a battle near the town of Snoul. The battle had reportedly ended with heavy Cambodian losses. At the beginning of December there was a lull in the fighting, which went on almost until the end of the month.

2. Starting from the end of November Vietnam had begun accusing China of encouraging a war at their borders using the "Cambodian ruling clique". On December 3d it was announced that 200 representatives of the various sections of the Cambodian people had met in a "liberated area of Cambodia" and formed a "Cambodian National United Front for National Salvation" and had elected Heng Samrin as President. The main aim of this front was the overthrowing of the Khmer Rouges régime. On Dec. 9th the news agency of the front (SPK) started to claim uprisings of the local population in several areas.
On December 25th, two Vietnamese divisions, supported by aircraft attacked along highway 19 and penetrated deeply into Cambodian territory. They were joined by about 20.000 United Front troops. Very briskly they occupied about half of the Cambodian territory. Vietnam foreign minister stated that the Cambodian people struggle to overthrow the Pol Pot régime was their internal affair. On January 7th the capital Phnom Penh fell, while the Pol Pot régime remained in control of only two provinces.

3. In his statement at the U.N. Security Council, the Vietnamese representative justified the armed operations carried out by his country as a reaction against an alleged aggression by the Pol Pot régime. The overthrowing of this régime, on the other hand, was the result of an internal uprising led by the National Front and therefore a purely internal affair of Cambodia.

4. The overthrowing of the Pol Pot régime was openly welcomed only by the Soviet Union and its allies, which were also opposed to the Security Council considering the matter. The Soviet representative accused that régime of "genocidal" policies, and of having committed military aggression against Vietnam and Thailand. All other countries (including communist countries not aligned with the USSR and Romania) openly condemned the intervention thereby rejecting the Vietnamese version

according to which it was a purely internal affair. A group of them, among which France, the U.K., the U.S., Norway and Portugal clearly stated that although they objected to the violations of Human Rights by the Pol Pot government, those policies could not justify intervention by another State.

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1. Keesing's, 29613 A; RGDIP 1979, p.757
2. Ibidem; RGDIP 1979, p.1009
3. U.N. Yearbook, 1979, p.271 ff.;
4. Ibidem; AFDI 1979, p.983; 1980, p.888; 1981, p.911; 1983; p.915; Heder, S.P.-The Kampuchean-Vietnamese Conflict; South East Asian Aff., 1979; p.157-186.

TANZANIA - UGANDA (1978-79)

1. In October 1978 there was tension along the Tanzanian-Ugandan border. Both countries often claimed incursions of troops of the other into their territories. On the night between October 31st and November 1st Ugandan troops penetrated into Tanzanian territory, invading the so-called "Kagera salient", an area lying between the Kagera river and the border, which Uganda had often claimed as being part of its territory (and which allegedly also served as a base for Ugandan exiles for incursions into Ugandan territory). On November 2d the Ugandan president Idi Amin Dada announced that that area (about 710 square miles) was now part of the Ugandan territory. The OAU did not condemn the invasion but called on Uganda to withdraw its troops. On November 2d, President Nyerere of Tanzania declared that the invasion of the salient was tantamount to a declaration of war. On November 12th a Tanzanian offensive started and on November 16th Amin declared his intention to withdraw, which he did in the following days. On November 28th Pres. Nyerere denied having any intention of annexing any part of Ugandan territory.

2. On December 18th President Amin accused Tanzanian troops of penetrating Ugandan territory. On January 26th Tanzania admitted having done so after a previous Ugandan attack. By the end of March, however, a substantive number of Tanzanian soldiers, joined by groups of Ugandan exiles (4000 + 1000) carried out a two-pronged attack on the capital and the provincial capital of Masaka. Forces loyal to President Amin (supported by the Libyan air-force) resisted only until April 7th, when the fall of Entebbe airport cut off all foreign support. Kampala fell on April 10th and a new government was formed on the 13th. By the end of May all Ugandan territory was under the control of the new government (which had meanwhile been recognized by most States). Idi Amin Dada fled to Libya.

3. Justifications provided were somewhat confused:
 - Self-defence against the previous Ugandan attack on the Kagera salient.
 - Punishment of President Amin (the OAU having failed to do so).
 - Support to Ugandan exiles (a reference to the mass-violations of Human Rights taking place in Amin's Uganda was made by the new Ugandan delegate at the subsequent OAU meeting)

4. The Tanzanian action was met by (almost) general indifference, since most countries accepted the "fait accompli" of the fall of President Amin and quickly recognized the new government (those countries which had no diplomatic relations rapidly restored them). This is however due more to the appalling reputation of Amin's government

than to approval "in abstracto" of this sort of action. OAU issued no statement on the matter. In an OAU meeting in Monrovia between July 17th and 21st 1979 the Tanzanian intervention was criticized by Sudan and Nigeria as an illegal intervention into another country's internal affairs.

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1. Keesing's, 29669 A; Umzourike, U.D., Tanzanian Intervention in Uganda, 20 Archiv des Voelkerrechts, 1982, p. 301-313; Burrows, N., Tanzania's Intervention in Uganda: Some Legal Aspects, World Today 35, p. 306ff.
2. RGDIP, 1979, p. 1058; Chatterjee, S.K., Some Legal problems of Support Role in International Law: Tanzania and Uganda, 30 ICLQ, 1981, p. 755; Guilhaudis, J.F., Remarques à propos des récents conflits territoriaux entre états africains (Bande d'Aozou, Ogaden, Saillant the Kyaka) AFDI, 1979, p.223ff.; United Nations Yearbook, 1979, p. 262.
3. Keesing's 29669 A
4. Keesing's 29837 A.

1. In August 1979 an agreement was reached in Lagos, Nigeria, among the various struggling factions of Chad with a view to constituting a government of national unity. This agreement ended a year-long internal wa, characterized by endless fighting (mainly between the Moslem north and the Christian/Animist south) and also by two Libyan operations in Chadian territory, aimed at supporting northern groups and later also a secessionist group from the south. Under the new agreement an Inter-African peace-keeping force was due to supervise the cease-fire in the country, while Oueddei and Habré (chiefs of the two opposing northern factions, but both former members of the FROLINAT) became respectively President and Minister of Defence. Rivalry broke out again between the two aforementioned groups, for supremacy in the new government and in March 1980 heavy fighting broke out in N'djamena. It continued throughout 1980 with heavy casualties (5000 - 6000) and extensive damage.
2. After several incursions of Libyan planes in the North of the country against FAN positions (the group led by Habré), on December 6th 2000 Libyan troops, together with forces loyal to President Oueddei launched an offensive against FAN positions in N'djamena. The offensive was resisted for a few days (with a heavy death toll, also among the civilians) but by December 14th-15th the coalition forces took control of the city and Habré fled to Cameroon. On December 16th a cease-fire agreement was signed by both parties.
3. In June 1980 Libya and the transitional government of Chad had signed a treaty of friendship under which both parties undertook to defend each other in case of direct or indirect external aggression. President Kadhafi of Libya always refused to reveal the extent of Libyan involvement. It was however defined as "technical and humanitarian aid" provided in response to a request by the Chad government. On January 6th 1981, following the final victory of Libyan-backed Oueddei forces, the governments of Libya and Chad announced the fusion between the two peoples.
4. The Libyan involvement was harshly criticized by several African countries (during the Lagos conference which ended on December 24th 1980), notably Cameroon, Central African Republic, Guinea, Niger, Senegal, Sudan and Togo. Five of the six other countries participating to the conference (Benin, Congo, Libya, Nigeria and Sierra Leone) proposed a series of amendments with the result that Libya was not mentioned in the final resolution. The fusion between Chad and Libya was

criticized by France in a communiqué issued by the Quay d'Orsay on January 8th 1981.

REFERENCES & MATERIALS

1. Keesing's 30064 A; RGDIP, 1984, p.288
2. Keesing's 30693 A
3. Ibidem; Le Monde, Dec.5th 1980, p.?
4. Keesing's 30693 A; AFDI 1981, p. 901.

1. After the overthrow of the monarchy in 1973 in Afghanistan there was an openly pro-Soviet government. In 1978 a military coup ousted President Daoud from power. The new president, Taraki, embarked on a policy of forced modernization with disastrous results. A situation of internal unrest can be traced back to this date, resulting from the great difficulties of carrying out such policies in a deeply divided and traditional country such as Afghanistan. In September 1979 another coup led by Prime Minister Amin overthrew Taraki. The new government, however, carried on with the same policies. In the period immediately before the end of the year the situation of unrest became generalised, with military uprisings and the provinces rebelling against the central government.
2. On December 25th-26th 1979 Soviet transport aircraft brought into the Afghan capital Kabul an estimated 4000-5000 combat troops and their equipment, while the presence of 5 Soviet army divisions was reported along the Soviet-Afghan border. Two days later a radio report from Kabul announced the deposing of the "tyrannical regime" of President Amin and its substitution with B. Karmal. On the 28th a statement from the Soviet news agency Tass announced the Soviet intervention in Afghanistan, upon request of the Afghan government under the terms of an existing treaty of friendship between the two countries. President Amin was said to have been executed with his family immediately after the coup. Part of the troops amassed along the border entered the country and by mid-January they had gained control of the principal communication routes.
3. The justification provided by the Soviet Union and the government of Afghanistan was based on the right of self-defence against an external threat (even though not well specified), and the request of the government under the terms of the 1978 Friendship treaty.
4. International reactions to the invasion were overwhelmingly negative. Few countries focused on the question of consent to foreign intervention (just to doubt that the consent given was valid). All focused on the plea of self-defence, denying the existence of an external threat. The principles of (internal) self-determination and non-intervention were stressed by many.

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Cetinic - Sovjetska Intervencija u Afganistanu (Summ. in French)
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2. Keesing's 30229 A; Alajmo, Afghanistan e la questione del consenso, RDI, 1981, p. 287; RGDIP, 1980, p. 826
3. See statements by USSR and Afghanistan, 6th Emerg. Spec. Sess., GAOR, meets. 1-7, p. 5 and p. 20; text of the Afghanistan/USSR Friendship treaty; RGDIP 1980, p. 965 (esp. art.4).
4. UN Security Council, 35th year, Meets, 2185-2190 (especially statements by the United Kingdom, China, France, Japan, Liberia, the Netherlands, West Germany). U.N. General Assembly, 6th Emerg. Spec. sess, Meets 1-7, statements by Senegal, Pakistan, Kenya, Nigeria, Kuwait. AJIL 1980, p. 418; AFDI, 1980, p. 870. - Legal Responses to the Iranian-Afghan crises - Proceedings ASIL, 1980, p. 248-274.

1. Starting from 1969 a growing number of Palestinian guerrillas settled in the Lebanon. On November 3d the Lebanese government, under pressure from other Arab States, signed the Cairo agreement, which gave the Palestinians the right to undertake attacks against Israel from Southern Lebanon in co-ordination with the Armée Libanaise and upon consultation with them. After the expulsion of the Palestinian resistance from Jordan and some Israeli retaliatory raids on the Lebanon, the Lebanese government granted the PLO the right to defend Palestinian camps and thus to own heavy weaponry. After the outbreak of the Lebanese civil war in 1975 the PLO began to behave as a State within the State. The first reaction of Israel was the invasion of the southern area of Lebanon for 20 km. The PLO, however, continued its attacks with missiles against the northern villages of Israel.
2. On June 6th 1982 Israeli forces launched a three-pronged attack on Lebanon in an operation which was code-named "Peace for Galilee", by combined armoured, artillery and infantry forces, supported by the air-force and naval units. They encountered fierce resistance from the Palestinian fedayeen and also clashed with Syrian forces. With Israel advancing northwards the Syrian positions in the Bekaa valley were threatened. This provoked a full scale air battle between Israel and Syria, which ended with heavy losses on the Syrian part. By June 10th the Israelis had reached the outskirts of Beirut and by June 14th they had completely surrounded the city, entrapping a large number of PLO guerrilla as well as Syrian soldiers of the Arab Dissuasion Force.
3. Israel defined the operation as self-defensive, against the attacks on its northern villages. It was aimed, the Israeli Prime Minister said, at the establishment of a 40 km safety area starting at the Israeli-Lebanese border.
4. International reactions were overwhelmingly negative. Only the United States accepted to link the Israeli withdrawal from the occupied areas in the Lebanon to the cessation of PLO attacks. The Security Council failed to condemn the action because of the United States veto. The general Assembly adopted with 127 votes to 2 a resolution calling on Israel to withdraw its troops and then (August 19th) a second resolution condemning it for having ignored their previous calls to withdraw (120 to 2 and 20 abst.)

UNITED STATES - GRENADA (1983)

1. A former British colony, the island of Grenada became independent in 1974, as a member of the British Commonwealth of Nations. Five years after independence the power was seized in a coup led by Maurice Bishop. He ordered the dissolution of Parliament and established a revolutionary government aiming for a régime of "people's democracy". The army however pressed for a radicalization of the régime. On October 19th 1983 Bishop was ousted from power and immediately executed together with two of his ministers. A revolutionary council led by General Austin assumed power. In the aftermath of the coup the situation on the island still appeared somewhat confused.

2. In the morning of the 25th. a joint US-Caribbean force (1900 troops from the U.S. and 300 of 6 other States of the Caribbean), protected by a fleet of 11 ships, landed on the island. They started operations aimed at gaining control over the island but met some resistance on the part of Cuban elements (about 700) stationed there with the purpose of building an airport. By October 31st all resistance had ceased, even though some further shipments of troops from the United States had proved necessary (the total number amounted to 7355 by October 31st). The Cubans were sent back to their country at the beginning of November. General Austin was arrested while the former president, Sir Eric Gairy (in power before the Bishop coup) went back to the island in January. American troops left the island mid-December.

3. The justification provided by the United States was as follows:
 - Invitation by the Governor General Sir Paul Scoon (the text of a letter dated October 24th addressed by the latter to the President of Barbados, requesting the intervention of the Organization of the East Caribbean States and the U.S. support was later made public).

 - Regional Peace-keeping action (within the framework of OECS);

 - Protection of American and other nationals on the island.

4. The reactions of the International Community were overwhelmingly negative. At the Security Council, which met immediately after the intervention, a resolution "deeply deploring" the intervention failed to pass, due to the United States veto (which was however the only negative vote, while three States abstained: Togo, United Kingdom and Zaire). At the General Assembly, a resolution "deeply deploring" the events and calling on the immediate withdrawal of foreign troops was adopted with 108 votes against 9 (USA and the East Caribbean States) with 27 abstentions (among which Canada, Japan, and the Federal Republic of Germany). It must be stressed, however, that most of the countries

1. B. Levenfeld, "Israel Counter-Fedayeen Tactics in Lebanon: Self-defence and Reprisal under Modern International Law", 21, Col.Journ. Trans. Law, 1982, pp. 1-48; "Who won Lebanon?", The Economist, May 25, 1985, p. 43.
2. RGDIP, 1983, p. 428; Keesing's 31914; B.A. Feldstein, "The Legality of the Use of Force by Israel in Lebanon - June 1982", 20 Isr. Law Rev., 1985, pp. 265-293.
3. Ibidem; Israeli statement at the Security Council (June 6th) and letter written by Israeli Permanent Representative to the S.C. (June 8th), UN Monthly Chronicle, Sept. 1982, p.15.
4. AFDI 1983, p. 910; UN Chr. 1982.

condemning the intervention did so because they denied the well-foundedness of the pleas invoked, rather than their abstract validity. They were, for instance, denying that American nationals were actually in danger, or that the Governor General was legally entitled to issue an invitation, or that the conditions for a regional peace-keeping action had actually been met.

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2. RGDIP, 1984, p.484; Keesing's 32614 A;
3. AJIL, 1984, p.200; Statement of the US Repres. in the Sec. Ccl., UN Monthly Chronicle, Dec. 1983, p.15
4. Sec. Ccl. debated, UN Monthly Chr., Dec. 1983, p.15; GAOR: A/38/PV 43; Draft res. by Nicaragua and Zimbabwe, A/38/L.8; L. Doswald-Beck, *The Legality of the US Intervention in Grenada*, 31 NILR, 1984, p. 355 ff.; J. Weiler, *Armed Intervention in a Dichotomized World: the Case of Grenada*, in Cassese (ed.), *Current Legal Regulation*, p.241 ff.

1. After the victory of the Libyan/Oueddei forces and the seizure of N'djamena, Libyan troops began to withdraw in November but maintained some strongholds in the North of the country. Civil war broke out again, and Oueddei was again ousted from power by Habré, who re-established a government in N'djamena. Oueddei's forces withdrew in the North. In June 1983 the Habré government was endorsed by OAU (Addis Abeba meeting, June 9th 1983) as the sole representative of Chad.
2. On June 24th rebel forces, backed by Libyan troops, captured the town of Faya-Largeau in the north. Four days later France accused Libya of directly supporting rebel forces and proclaimed its decision to support the government. French material was sent to Chad while 250 Zairean soldiers reached the country backed by Zairean aircraft. On July 11th the government counter-offensive started and by the end of the month Faya-Largeau was recaptured. This provoked strong Libyan air-strikes against Faya-Largeau, which were denounced by the United States and denied by Libya. The United States decided to increase its military aid to Chad. This decision was followed by the French announcement on August 9th that French troops would be sent to Chad. The Zairean contingent was meanwhile increased to 2500. On August 12th the government troops lost Faya Largeau again. The following day the French launched "operation Manta" to establish a steady defence line.
3. The justification put forward by the French government is based on the request of the legitimate government to respond to an external aggression.
4. The reactions of the world community were by and large in favour of Chad's plea of external aggression and the right of self-defence. Libya's position was only upheld by the Soviet Union, while Zimbabwe, China and Togo called for the end of all foreign interference in the country.

REFERENCES & MATERIALS

1. RGDIP, 1984, p.288; Keesing's 32591 A.
2. Ibidem
3. AFDI 1983, p.914

4. UN Monthly Chronicle: May 1983, p.3; June 1983, p.8; October 1983, p.11. See, in favour of Libya, statements by Libya and USSR; in favour of Chad, statements by France, Guyana, the Netherlands, Pakistan, United Kingdom, United States and Zaire.

UNITED STATES - NICARAGUA (1981-1986)

1. After the overthrow of the Somoza dictatorship in Nicaragua the new revolutionary "Sandinista" government had increasingly enhanced its Marxist character and established close relations with Cuba and the Soviet Union. A group of members of the old Somozist National Guard who, after the Sandinista takeover in 1979, had fled across the border with Honduras, had gradually increased their activities against the régime starting from 1981 with the financial and logistical support of the United States. Among the activities of the new Nicaraguan government there was, roughly starting from 1981, a covert aid (the kind and the volume of this aid is not very clear) to rebel formations in the neighbouring state of El Salvador (controlling part of the territory of this republic).

2. The evolution of the internal situation in Nicaragua, together with their international links and their activities in the central American region, were a matter for increasing concern for the United States which, from 1981, started a set of activities aimed at the neutralization of the Nicaraguan influence in the area. These measures consisted in increasing financial and logistical support to the Nicaraguan "contras" established along the borders with Honduras (this included the training of guerrillas within the United States territory), the strenghtening of the American presence in Honduras by means of Marines and construction of new military facilities in that country, increased military aid to the El Salvadorean government, and the adoption of forms of economic pressure against Nicaragua. As a result of the adoption of these measures Nicaragua proposed in October 1983 a project of settlement based on the simultaneous halt of the Sandinista support of the Salvadorean rebels, and the U.S. support of the anti-Sandinista guerrillas. But the State Department refused. After the mining of Nicaraguan ports secretly carried out (with the approval of the White House) by American experts (joined by experts of other nationalities), Nicaragua brought a claim to the Security Council, requesting the immediate stop of the mining. The Security Council failed to adopt a resolution in this sense because of the U.S. veto (April 5th 1984), so Nicaragua filed an application with the International Court of Justice. The Court first ordered, as interim measures, the end of hostile activities in Nicaraguan territorial waters, then it decided it had jurisdiction to hear the case. As a consequence of this decision the United States withdrew from the proceedings.

3. In withdrawing from the proceedings before the International Court of Justice, the U.S. justified its conduct in Nicaragua as an "exercise of the inherent right of individual and collective self-defense enshrined in the UN Charter and the Rio treaty ... in defense of the

vital national security interests of the United States and in support of the peace and security of the hemisphere". They also referred to the declaration made by El Salvador in an attempt to intervene in the proceedings in front of the Court, where it stated "that it was under armed attack by Nicaragua and, in exercise of its inherent right of self-defence, had requested assistance from the United States".

4. The mining activities encountered the disapproval of Western European States and the States of the Contadora group. In the debates at the Security Council Eastern European and most non aligned countries expressed concern about the situation and blamed the United States for it. Western European and most Latin American countries took a milder position, some of them supporting the effort of the Contadora group to bring peace in the region. On June 26th 1986 the International Court of Justice rejected the plea of collective self-defence brought forward by the United States and found it, among other things, in breach of the customary prohibition of intervention in internal affairs of other States and of the ban on the use of force in international relations.

REFERENCES & MATERIALS

1. 2. Keesing's 32302; RGDIP 1984, p. 1984
3. 4. UN M. Chr., May 1983, p.15 ff.; Ibidem, July 1983, p.34 ff.; Ibidem November 1983, pp. 31-2; ICJ Reports, 1986 (decision on the merits). See, moreover, comments by various authors on the decision in 81 AJIL, 1987.

