

THE RIGHT OF COUNTERINTERVENTION

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INTRODUCTION

Even in an earlier era when a principle of nonintervention reflected considerations of ethics or policy but not of law, counterintervention as a redress to another nation's intervention stood on its own grounds. Since nonintervention has come to be recognized as a rule of law, a right of counterintervention must be recognized on some terms to permit nations to deal legitimately and effectively with a violation of the rule of nonintervention. I believe that in regard to these principles something approaching a consensus exists among scholars, and certainly all governments recognize a right of counterintervention in some terms.

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The central rationale underlying the right of counterintervention is both simple and irrefutable. The concept was stated by John Stuart Mill in 1859 as follows:

The doctrine of non-intervention to be a legitimate principle of morality, must be accepted by all governments. The despots must consent to be bound by it as well as free States. Unless they do, the profession of it by free countries comes but to this miserable issue, that the wrong side may help the wrong, but the right may not help the right. Intervention to enforce non-intervention is always rightful, always moral, if not always prudent.¹

Another well-known scholar recognized the principle in these terms:

It is incontestable that a grave infraction is committed when the independence of a state is improperly interfered with; and it is consequently evident that another state is at liberty to intervene in order to undo the effects of illegal intervention, and to restore the state subjected to it to freedom of action.²

Similarly Professor Louis B. Sohn put the concept succinctly when he stated:

If a state does not comply with its obligations under international law and intervenes illegally in an internal conflict in another state, other states are entitled to remedy this situation by counterintervention. A state violating international law cannot claim that other states, acting collectively to support the victim of intervention, are also violating the basic rule.³

¹ Mill, *A Few Words on Non-Intervention*, FRASER'S MAGAZINE (Dec. 1859), reprinted in, 3 MILL, DISSERTATIONS AND DISCUSSION: POLITICAL, PHILOSOPHICAL AND HISTORICAL 176 (1875).

² W. HALL, A TREATISE ON INTERNATIONAL LAW 342 (A.P. Higgins 8th ed. 1924).

³ Sohn, *Gradations of Intervention in Internal Conflicts*, 13 GA. J. INT'L & COMP. L. 225, 229-30 (Supp. 1983). I believe Professor Sohn states what is now the consensus view. A right of counterintervention is supported in several sources. See M. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 244-45 (5th ed. 1984); I. BROWNIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 327 (1963); R. HIGGINS, *Internal War and International Law*, in 3 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 118 (C. Black & R. Falk ed. 1971); J.N. MOORE, *Toward an Applied Theory for the Regulation of Intervention*, in LAW AND CIVIL WAR IN THE MODERN WORLD 26-27 (1974); Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1642 (1984); R. VINCENT, NONINTERVENTION AND INTERNATIONAL ORDER 291-92 (1974). See also Wright, *United States Intervention in Lebanon*, 53 AM. J. INT'L L. 112, 123 (1959). Resolution of L'Institut de Droit International, *The Principle of Non-Intervention in Civil Wars*, art. 5, 56 ANN. INST. DR. INT. 545, 549 (1975). Report of the Committee on Use of Force in Relations Among States, PROCEEDINGS AND COMMITTEE REPORTS OF THE AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION 188, 212, 213-14 (1985-86) [hereinafter Report].

Despite the emerging consensus that a right of counterintervention exists on some terms, significant differences or uncertainties persist as to the circumstances in which a right of counterintervention arises, the kinds of actions which it permits, and the parties against whom it is permitted. The attempt in this Article is to formulate the right of counterintervention, within established law, and to identify the principles which define and delimit the actions to which states may resort under this right.

Although this involves areas of some controversy, the subject deserves attention of the highest priority, for the risks of a failure to translate the rationale into recognized grounds and limits for effective action seem plain. Without an effective lawful response to illegal intervention, such interventions will surely escalate. Furthermore, responses to intervention that are not measured by the limits of a counterintervention remedy authorized by law may contribute to the escalation. In such actions and responses the stakes are high, for interventions often involve the global or regional balance of power; indeed, interventionary actions are often taken precisely to shift the power balance or secure some balance of power advantage. If not checked within the law, it is not realistic to think that the limitations on the use of force in article 2, paragraph 4 of the Charter of the United Nations⁴ can be maintained.

Although it is not within the scope of this Article to discuss in detail the principle of nonintervention, some observations concerning it are relevant here. In a sense the principle of nonintervention defines the right of counterintervention. If international law did not prohibit coercive interference in the affairs of another state, there would be no occasion to consider the legal justification of a counter-coercive response, which also would *a fortiori* be legal. Moreover, it follows that the kinds of coercive conduct which the principle of nonintervention prohibits are the kinds of conduct which, when performed in response to intervention, need to be justified as legitimate counterintervention to be legal. Yet the principles are not parallel. Counterintervention involves an additional normative focus, for the unique problem in defining the limits of counterintervention is that under its rationale, otherwise illegal actions can be justified by the need to counter the illegal intervention.

⁴ U.N. CHARTER art. 2, para. 4 provides, "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

The fact that there are different kinds of prohibited intervention, which in turn present different legal issues in the analysis of the legitimacy of a counterintervention response, complicates the formulation of grounds and limits of the right of counterintervention. Intervention may involve a use of force amounting to an "armed attack" under article 51 of the Charter of the United Nations.⁵ Similarly, intervention may involve a use of force constituting a violation of article 2, paragraph 4, of the Charter but not constituting an armed attack. Finally, it may involve no violation of article 2, paragraph 4, but may constitute coercive interference of another character.

The United Nations General Assembly's unanimous 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (Resolution 2625)⁶ identified separately (1) the principle limiting the "threat or use of force" and (2) the principle concerning the duty not to "intervene" in matters within the domestic jurisdiction of a State. The two principles are actually interrelated. Under the resolution the latter principle includes "armed intervention" and other activities which the former principle would certainly cover.⁷ Nevertheless, the principle of nonintervention is broader. Thus, under the Resolution the prohibition on intervention also includes "the use of economic, political or any other type of measures to *coerce* another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind."⁸

In its June 1986 Judgment on the Merits in Military and Paramilitary Activities in and Against Nicaragua, the International Court

⁵ U.N. CHARTER art. 51 provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

⁶ G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970), *reprinted in*, 65 AM. J. INT'L L. 243 (1971) [hereinafter Resolution 2625].

⁷ *Id.*

⁸ *Id.* (emphasis added).

of Justice expressly declared the "principle of non-intervention" to be a part of customary international law,⁹ and while undertaking to define only those aspects of the principle relevant to the case before it, stated the rule in terms closely parallel to the terms of Resolution 2625:

[I]n view of the generally accepted formulations, the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. 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* in 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.¹⁰

The court also made clear that while prohibited intervention may involve coercive conduct of any kind, different kinds of prohibited intervention can have different legal consequences.¹¹ Thus, the court held that intervention may constitute a threat or use of force in violation of article 2, paragraph 4, which does not necessarily amount to an "armed attack" triggering a right of "collective self-defense" under article 51 of the United Nations Charter.¹²

An analysis of the right of counterintervention must consider these differences. Interventions involving force present special issues under rules of international law relating specifically to the threat or use of force. Likewise, in the context of counterintervention, it must be

⁹ Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, Judgment, 1986 I.C.J. 14, 25 INT'L LEGAL MAT. 1023, at para. 202 (1986) [hereinafter *Nicaragua v. United States*].

¹⁰ *Id.* at para. 205 (emphasis added).

¹¹ See generally *id.*

¹² *Id.* at paras. 195, 230, 247. For other discussion of the right to take countermeasures against illegal intervention, see *id.* 201, 210-11, 247-49, 252, 257-69. See also *id.* at para. 292(3). Compare the dissenting opinion of Judge Schwebel, *Nicaragua v. United States*, 1986 I.C.J. 259, 25 INT'L LEGAL MAT. 1146, paras. 174-77, 241-42, 249-50, 268-72 (1986). Compare further the dissenting opinion of Judge Jennings, *Nicaragua v. United States*, 1986 I.C.J. 528, 544-46, 25 INT'L LEGAL MAT. 1280, 1288-89 (1986).

recognized that specific use of force rules may apply. The context is, however, different, as noted above. The counterintervention context adds an additional element; the law needs to be concerned not only with giving effect to the limitations imposed by law on resort to force, but also with providing the remedies to make that law work.

I. COUNTERINTERVENTION AS REMEDY

The central rationale underlying a right of counterintervention is the need to provide a remedy for another nation's breach of international law. As such, it is occasioned by a violation of law and is in turn governed by law. Moreover, the right of counterintervention is part of a larger body of law governing unilateral remedies for violation of international law.

As early as the 1600's, Hugo Grotius provided a perspective for the problem of remedies in international law which remains valid today:

It is surely beyond doubt that the licence which was prevalent before the establishment of courts has been greatly restricted. Nevertheless there are circumstances under which such licence even now holds good, that is, undoubtedly, where judicial procedure ceases to be available. For the law which forbids a man to seek to recover his own otherwise than through judicial process is ordinarily understood as applicable only where judicial process has been possible.

Now judicial procedure ceases to be available either temporarily or continuously. It ceases to be available temporarily when one cannot wait to refer a matter to a judge without certain danger or loss. It ceases to be available continuously either in law or in fact: in law, if one finds himself in places without inhabitants, as on the sea, in a wilderness, or on vacant islands, or in any other places where there is no state; in fact, if those who are subject to jurisdiction do not heed the judge, or if the judge has openly refused to take cognizance.¹³

The law governing the right of nations to use force has evolved in ways not foreseen by Grotius, but it continues to be true that the justification for self-help lies in the inability to assure an effective remedy through legal process.

¹³ GROTIUS, *De Jure Belli ac Pacis Libri Tres (On the Law of War Peace, Three Books)*, Edition of 1646, in 3 CLASSICS OF INTERNATIONAL LAW 92 (F. Kelsey trans. 1925).

The law of remedies in international law is in a formative stage. The attempt to draft articles determining the legal consequences which an internationally wrongful act of a state may have under international law is the subject of Part Two of the proposed Articles on State Responsibility currently under study by the International Law Commission.¹⁴

Part One of the Commission's draft already includes an article entitled Countermeasures in respect of an internationally wrongful act.¹⁵ The article provides, "[T]he wrongfulness of an act of a State not in conformity with an obligation of that State towards another State is precluded if the act constitutes a measure legitimate under international law against that other State, in consequence of an internationally wrongful act of that other State."¹⁶ What countermeasures are "legitimate under international law" is logically a subject to be treated in Part Two of the draft.

The articles included in Part One of the International Law Commission's draft also anticipate Part Two in another respect. They reflect a difference in the legal consequences of acts recognized as international crimes from those which are merely international delicts. Article 19, paragraph 3(b) specifically takes the position that "a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples" may be recognized as an international crime by the international community as a whole.¹⁷

The Commission's 1983 report,¹⁸ approaching the issues of Part Two, notes the Special Rapporteur's enumeration of four elements of legal consequences which are common to international crimes, excluding the crime of aggression. The elements include:

- (1) the *erga omnes* character of the wrongfulness of the act; (2) the jurisdiction of the United Nations over the situation; (3) the

¹⁴ 1983 Report of the International Law Commission, 38 U.N. GAOR Supp. (No. 10) at 83-93, U.N. Doc. A/38/10 (1983), *reprinted in*, [1983] 2(2) Y.B. INT'L L. COMM'N 39-43.

¹⁵ 1979 Report of the International Law Commission, 34 U.N. GAOR Supp. (No. 10) at 311-28, U.N. Doc. A/34/10 (1979), *reprinted in*, [1979] 2(2) Y.B. INT'L L. COMM'N 93, 115-22 (Article 30).

¹⁶ *Id.*

¹⁷ 1976 Report of the International Law Commission, 31 U.N. GAOR Supp. (No. 10) at 175, 226, 287-91, U.N. Doc. A/31/10 (1976), *reprinted in*, [1976] 2(2) Y.B. INT'L L. COMM'N 75, 95, 119-21.

¹⁸ 1983 Report of the International Law Commission, *supra* note 14.

non-applicability of the duty of each State not to intervene in matters within the domestic jurisdiction of another State; and (4) the duty of solidarity between all States other than the author State.¹⁹

In his 1984 report to the Commission, the Special Rapporteur has attempted to implement these concepts in certain draft articles for Part Two. These articles include the following: article 5 (definition of "injured state"); article 8 (suspension of reciprocal obligations); article 9 (suspension of other obligations; requirement of proportionality); article 10 (exhaustion of international procedures for peaceful settlement); article 12 (diplomatic immunities; peremptory norms); article 14 (consequences in case of an international crime); article 15 (consequences for an act of aggression); and article 16 (exclusion of certain questions).²⁰ The extent to which the development of the law of remedies is still in a formative stage may be reflected in these draft articles. Thus, draft article 14, paragraph 1 appears to avoid crucial issues in providing broadly: "An international crime entails all the legal consequences of an internationally wrongful act and, in addition, such rights and obligations as are determined by the applicable rules accepted by the international community as a whole."²¹ Draft article 16(c) in turn qualifies the provisions of the articles in that they "shall not prejudice any question that may arise in regard to . . . belligerent reprisals."²² These cautious obscurities, no doubt, reflect in part the Special Rapporteur's view that the International Law Commission could not be expected to take a definite stand on certain measures involving a use of armed force.²³

The work of the Commission thus far, while recognizing generally the role of appropriate countermeasures, has not provided significant guidance on specific limitations applicable to counterintervention as a remedy. However, certain limitations are inherent in its character

¹⁹ *Id.* at 86; [1983] 2(2) Y.B. INT'L L. COMM'N at 40 (emphasis added). As to the *erga omnes* character of certain violations of international law, see generally Part VII of the text. As to the non-applicability of the duty not to intervene, see generally the excerpt from the Special Rapporteur's Report, *infra* note 30.

²⁰ 1984 Report of the International Law Commission, 39 U.N. GAOR Supp. (No. 10) at 236, U.N. Doc. A/39/10 (1984). The draft articles are reproduced in the Commission's 1984 Report. *Id.* at 236, n.299. As to article 5, see further in Part VII of text.

²¹ 1984 Report of the International Law Commission, 39 U.N. GAOR Supp. (No. 10) at 239-40, U.N. Doc. A/39/10 (1984).

²² *Id.* at 240.

²³ *Id.* at 242.

as a remedy, and these limitations would be generally acknowledged. They include the following:

(1) The triggering event (assuming the counterintervention involves measures which would otherwise violate international law) has to be an act in violation of international law by some offending state. This is the premise of draft Article 30 of Part One of the International Law Commission draft articles on State responsibility.²⁴

(2) Resort to counterintervention must meet the test of necessity.²⁵ Specifically, an adequate remedy must not in fact be available through such means as negotiation, adjudication under applicable provisions, or the exercise of binding Security Council jurisdiction under Chapter VII of the United Nations Charter.²⁶ The test of necessity may be met as to interim measures despite the availability or prospect of future redress by other measures.²⁷

(3) The counterintervention measures must meet the test of proportionality.²⁸ The concept is not simply one of precluding an excessive response, or even confining the response to the character of the offense (e.g., economic response to economic offense). If counterintervention is not to be merely a pretext for adding one violation of the rule of nonintervention to another, the response also must be proportional to the requirements of the case. Being justified as remedial action, it must, so far as is practicable, take the form of corrective action necessary to contain, oppose, resist, interdict, offset, neutralize, reverse or otherwise redress the specific offending foreign intervention.²⁹

²⁴ *Supra* note 15.

²⁵ RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 905 comment c, Reporter's Note 3 (Tent. Draft No. 6, 1985) [hereinafter RESTATEMENT]. See M. MCDUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION 217-18, 241-44 (1961). See also the International Law Commission's commentary on its draft art. 30 of Part One, *supra* note 15, at 115-22, and draft art. 10 of Part Two, *supra* note 20.

²⁶ The United Nations Charter, in art. 2, para. 3, imposes an obligation to settle international disputes "by peaceful means in such a manner that international peace and security, and justice are not endangered."

²⁷ See 1984 Report of the International Law Commission, *supra* note 20, at 238 (draft art. 10, para. 2).

²⁸ See *id.*, draft art. 9, para. 2, at 238. See also RESTATEMENT, *supra* note 25, § 905 comment d, Reporter's Note 5. See generally M. MCDUGAL & F. FELICIANO, *supra* note 25.

²⁹ See in Part V of text as to reprisals. A recent study concluded:

It is not enough to ascertain that countermeasures have to be consistent with proportionality. The most important step is to clarify the elements between which this proportionality should take place. Should proportionality be construed as a relation between this effect and the purpose of the

(4) The recognition of counterintervention as remedy does not suspend the operation of principles of international law generally, nor the United Nations Charter, nor regional treaties, nor other treaties which may be applicable.³⁰ The question involves application of the binding principles to the circumstances of each case, considering the specific remedial measure to be taken against the specific violation of international law involved.

(5) Remedial action taken by any state or states is subject to the jurisdiction of the Security Council to take binding action under Chapter VII of the United Nations Charter where that jurisdiction is applicable. As in the case of collective self-defense under Article 51, the right to act is the inherent right of a state and continues "until the Security Council has taken measures necessary to maintain international peace and security."³¹

II. COUNTERINTERVENTION AND THE BALANCE OF POWER

In addressing the issues involved in recognizing and defining a right of counterintervention as a remedy under law, it is necessary

countermeasure there would be grounds to consider proportionality as the genuine legal criterion of countermeasures because proportionality in that case is ultimately the only way to tailor the countermeasure to each breach of an international obligation and consequently to each lawbreaker. As a result, should these prerequisites be respected, proportionality is certainly a very useful safeguard and a strong guarantee of the legitimacy of countermeasures.

E. ZOLLER, PEACETIME UNILATERAL REMEDIES: AN ANALYSIS OF COUNTERMEASURES 136 (1984).

³⁰ The Special Rapporteur to the International Law Commission on State Responsibility has commented:

A third common element would be that the principle of international law "concerning the duty not to intervene in matters within the domestic jurisdiction of any State," as formulated in the Declaration of Principles of International Law, does *not* apply in a case in which an international *crime* has been committed (footnote omitted).

This would mean that every State or group of States, other than the author State, has the *right* to take countermeasures against the author State which would otherwise be prohibited by the *aforementioned principle*. It does *not* mean, however, that every other State or group of States would have the right to take measures which are specifically prohibited by *other* rules of international law, either general rules of customary law, or treaties governing the relationship between the author State and the other State or group of States.

Fourth Report on the Content, Forms and Degrees of State Responsibility, 37 U.N. GAOR CN.4, U.N. Doc. A/CN.4/366/Add.1 (1983), *reprinted in*, [1983] 2(1) Y.B. INT'L L. COMM'N 3, 12 para. 61.

³¹ U.N. CHARTER art. 51.

to consider those concerns which undoubtedly exist. Some would prefer to think of considerations of the balance of power as providing the justifications, free of the inhibitions of any framework of remedies under law. Others, however, harbor different concerns that the mere recognition of remedies under law might unleash uncontrollable rationales of realpolitik under the color of law and in the end destroy the attempt to subject the use of force to the limitations of law. Both concerns are legitimate to the extent that the right of counter-intervention must be responsive to the realities of the balance of power *and* must support and reinforce the design to subject the role of force to the rule of law.

That these objectives are not in opposition but rather work in concert with one another is reflected in the articulation of the premises of foreign policy since World War II. There are few now who would assert that nations can afford to disregard considerations of the balance of power. But the balance of power has come to be seen not as an alternative to law, but as the indispensable underpinning for law. In the words of Professor Eugene V. Rostow:

If one's goal is not simply the absence of war but a condition of peace compatible with the independence of nations, then the course of prudence is that power be organized so that no state likely to succumb to hegemonial ambition be in a position to achieve hegemonial power.

Achieving and preserving a balance of power is the indispensable first step.³²

The post-War principle of the balance of power has been shaped by respect for the independence of states and the principle of self-determination. Indeed, the balance of power is sustained by safeguarding that independence and self-determination. The balance of power principle has evolved, not surprisingly, as one of preserving the balance of power against external attempts to alter it unilaterally by an illegitimate use or threat of force or coercion direct or indirect.³³ The United States, when pressed to articulate its position, has rec-

³² E. ROSTOW, *PEACE IN THE BALANCE: THE FUTURE OF AMERICAN FOREIGN POLICY* 317 (1972).

³³ For more extended discussion see J. PERKINS, *THE PRUDENT PEACE: LAW AS FOREIGN POLICY* 7-32 (1981). For a discussion of the earlier history of the relationship of the concept of the balance of power and international law, see Vagts & Vagts, *The Balance of Power in International Law: A History of an Idea*, 73 *AM. J. INT'L L.* 555 (1979).

ognized this relationship. Thus, President Truman in his 1947 message on Greece and Turkey stated:

"The world is not static, and the *status quo* is not sacred. But we cannot allow changes in the *status quo* in violation of the Charter of the United Nations by such methods as coercion, or by such subterfuges as political infiltration."³⁴ Professor Rostow defined the modern balance of power policy represented in the Truman Doctrine in these terms:

I should put it this way: equilibrium, and therefore the possibility of detente, requires mutual understanding that neither side should attempt to change the frontiers of the systems by force or by the threat of force. For such attempts, unlike certain other forms of change, threaten the general world equilibrium, and therefore risk a confrontation between great powers, and world war.³⁵

In the war in Vietnam, President Johnson identified as one of the United States basic objectives "a concrete demonstration that aggression across international frontiers or demarcation lines is no longer an acceptable means of political change."³⁶ Fighting under the banner of upholding the right of self-determination, the United States made clear it would abide by the choice of the people of South Vietnam, even if that choice was for a Communist government. President Johnson commented:

We do not seek to impose our political beliefs upon South Vietnam. Our Republic rests upon a brisk commerce in ideas. We will be happy to see free competition in the intellectual marketplace whenever North Vietnam is willing to shift the conflict from the battlefield to the ballot box.³⁷

Similarly President Nixon stated in his third annual foreign policy report to Congress:

The only serious barrier to a settlement which remains is the enemy's insistence that we cooperate with him to force on our ally at the negotiating table a solution which the enemy cannot force upon him in the field, and is unwilling to entrust to a political process. That we are not willing to do. We are ready to reach an

³⁴ *Recommendations on Greece and Turkey*, 16 DEP'T ST. BULL. 534, 536 (1947).

³⁵ E. ROSTOW, *LAW, POWER, AND THE PURSUIT OF PEACE* 43 (1968).

³⁶ *The Defense of Viet-Nam: Key to the Future of Free Asia*, 56 DEP'T ST. BULL. 534, 535 (1967).

³⁷ *Id.* at 535.

agreement which allows the South Vietnamese to determine their own future without outside interference.³⁸

Even in the current tangled affairs of Central America, the focus of security concern on change through external force or interference continues. President Reagan's Commission on Central America, the Kissinger Commission, in its 1984 report to the President, identified the foreign policy imperative as the need to check "externally supported" insurgencies.³⁹ The Commission firmly declared as one of its central points: "indigenous reform, even indigenous revolution, is not a security threat to the United States. But the intrusion of aggressive outside powers exploiting local grievances to expand their own political influence and military control is a serious threat to the United States, and to the entire hemisphere."⁴⁰

The right of counterintervention, triggered as it is by the illegal intervention of another nation, functions within the post-World War II principle of the balance of power. Counterintervention helps preserve the present balance against change by foreign coercion or by any illegal interference with the right of self-determination. By recognizing counterintervention as a remedy under law for an international law violation of another nation, and by subjecting it as a remedy to the limitations of law, the legal regime governing the use of force and other foreign coercion is reinforced. The threat to the legal regime for the control of force would lie only in leaving nations free to act outside the law to protect the balance of power.

III. INTERVENTION BY INVITATION

Some actions in the past have been taken under the asserted claim that "the lawful governmental authorities of a State may invite the assistance in its territory of military forces of other states or collective organizations in dealing with internal disorder as well as external threats."⁴¹ Where such an invitation is issued in response to the

³⁸ Nixon, *1971-The Watershed Year-An Overview*, 66 DEP'T ST. BULL. 314, 319 (1972).

³⁹ N.Y. Times, Jan. 12, 1984, at A14, col. 1.

⁴⁰ *Id.* at A14, col. 2.

⁴¹ This statement was made by the Legal Adviser to the United States Department of State in reference to the United States action in Grenada. Robinson, *Letter from the Legal Adviser, United States Department of State*, 18 INT'L LAW. 381, 382 (1984). See *International Law and the United States Action in Grenada: A Report*, 18 INT'L LAW. 331 (1984) (for the special report submitted to the Council of the

unlawful intervention by another state, it indeed may be a request for action appropriate in the exercise of a right of counterintervention. Where the request is dictated, however, not by a breach of international law, but for the purpose of supporting the government in a local contest for authority, assistance provided upon the request may take on a different character. Such assistance often is intended to influence the outcome of an internal struggle for power.

In spite of the position formally asserted by the United States Government, it is inconsistent with now-accepted legal doctrine for the invitation of the recognized government to legitimate action *which would otherwise be an illegal intervention* in an indigenous contest confined to local actors. Legal developments have overtaken the traditional doctrine which permitted aid to a recognized government, at least until a condition of belligerency was reached, and prohibited aid to insurgents.⁴²

The doctrine of intervention by invitation was criticized long before the adoption of the United Nations Charter. As early as the 1920's, commentators argued cogently against a right to intervene upon invitation:

As interventions, in so far as they purport to be made in compliance with an invitation, are independent of the reasons or pretexts which have already been discussed against illegal acts etc., it must be assumed that they are based either on simple friendship or upon a sentiment of justice. If intervention on the ground of mere friendship were allowed, it would be idle to speak seriously of the rights of independence. Supposing the intervention to be directed against the existing government, independence is violated by an attempt to prevent the regular organ of the state from managing the state affairs in its own way. Supposing it on the other hand to be directed against rebels, the fact that it has been necessary to call in foreign help is enough to show that the issue of the conflict would without

ABA Section of International Law and Practice by the Section's Committee on Grenada on Feb. 10, 1984) [hereinafter *Special Report*]. See also Leich, *Contemporary Practice of the United States Relating to International Law*, 78 AM. J. INT'L L. 655, 661-66 (1984) (containing major portions of the letter from Davis R. Robinson, Legal Adviser to the Department of State); 78 AM J. INT'L L. 200, 200-04 (containing major portions of the statement by Kenneth W. Dam, Deputy Secretary of State, to the House Committee on Foreign Affairs on Nov. 2, 1983).

⁴² As to the traditional doctrine, see R. HIGGINS, *supra* note 3, at 81, 93-94. Professor Higgins noted: "What is less clear—and it has become still more doubtful in recent years—is the legal authority of the government to ask for military assistance during civil hostilities—either of arms or active participation." *Id.* at 94.

it be uncertain, and consequently that there is a doubt as to which side would ultimately establish itself as the legal representative of the state. If, again, intervention is based upon an opinion as to the merits of the question at issue, the intervening state takes upon itself to pass judgment in a matter which, having nothing to do with the relations of states, must be regarded as being for legal purposes beyond the range of its vision.⁴³

Ultimately, the adoption of the United Nations Charter and the legal development of its principles replaced the older doctrine permitting intervention by invitation. A new rule is emerging from these legal developments. Professor John Norton Moore stated the rule as follows: "The principle rule is that intervention in internal conflict on behalf of any faction is illegal. This rule is supported by the Charter's principle of self-determination. In genuine civil conflicts the factions are free to try to resolve the issue of self-determination among themselves."⁴⁴ Addressing the same issue, Professor Oscar Schachter wrote:

No state today would deny the basic principle that the people of a nation have the right, under international law, to decide for themselves what kind of government they want, and that this includes the right to revolt and to carry on armed conflict between competing groups. For a foreign state to support, with 'force,' one side or the other in an internal conflict, is to deprive the people in some

⁴³ W. HALL, *supra* note 2, at 346-47. Later criticisms of the traditional doctrine appear in the following sources: M. AKEHURST, *supra* note 3, at 242-45; I. BROWNLIE, *supra* note 3, at 321-27; R. FALK, *Janus Tormented: The International Law of Internal War*, in INTERNATIONAL ASPECTS OF CIVIL STRIFE 206-09, 222-27 (1964); R. FALK, INTRODUCTION, THE INTERNATIONAL LAW OF CIVIL WAR 11-16 (1971); Farer, *Intervention in Civil War: A Modest Proposal*, 67 COLUM. L. REV. 266 (1966); Farer, *Harnessing Rogue Elephants: A Short Discourse in Civil Strife*, 82 HARV. L. REV. 511 (1969); Friedmann, *Intervention, Civil War and the Role of International Law*, PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 67, 73-74 (1965); R. HIGGINS, *supra* note 3, at 97, 115-21; J.N. MOORE, LAW AND THE INDO-CHINA WAR 275-82 (1972); J.N. MOORE, *supra* note 3, at 26, 30-31; Schwenninger, *The 1980s: New Doctrines of Intervention or New Norms of Nonintervention?*, 33 RUTGERS L. REV. 423, 428 (1980-81); A.P. THOMAS & A.J. THOMAS, NON-INTERVENTION: THE LAW AND ITS IMPORT IN THE AMERICAS 93-94, 215-16 (1956); Wright, *United States Intervention in Lebanon*, 53 AM. J. INT'L L. 112, 121-22 (1959). See also J. PERKINS, *supra* note 33, at 88-98.

⁴⁴ Moore, *Legal Standards for Intervention in Internal Conflicts*, 13 GA. J. INT'L & COMP. L. 191, 196 (Supp. 1983). The statement of Professor Moore is slightly qualified in *Panel One: General Discussion*, 13 GA. J. INT'L & COMP. L. 231 (Supp. 1983).

measure of their right to decide the issue by themselves.⁴⁵

In its 1984 Report, the American Bar Association's Committee on Grenada stated simply: "In terms of the purposes and principles of the United Nations Charter and the Rio Treaty, it is difficult to square the commitment to sovereignty, political independence and self-determination with allowing foreign forces to decide which of rival factions will prevail in an internal struggle for power."⁴⁶

Fundamental to the move away from the traditional rule is the nature of the concept of self-determination itself. In article 1, paragraph 2,⁴⁷ and article 55,⁴⁸ the Charter calls for respect for the principle of the "self-determination of peoples," not the self-determination of governments. In the long effort which culminated in the 1970 consensus adoption of General Assembly Resolution 2625,⁴⁹ some states had taken the position that only states, not peoples, could have rights or be the beneficiaries of rights under international law.⁵⁰ The final 1970 Declaration recognized that the "principle" of self-determination of peoples gives rise to a "right" of self-determination, which every state has "a duty" to respect.⁵¹ The Declaration provided that "[b]y virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples

⁴⁵ Schachter, *supra* note 3, at 1641.

⁴⁶ *Special Report*, *supra* note 41, at 370-71.

⁴⁷ U.N. CHARTER art. 1, para. 2, provides, "[t]he Purposes of the United Nations are: . . . To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace"

⁴⁸ U.N. CHARTER art. 55 provides:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

⁴⁹ Resolution 2625, *supra* note 6.

⁵⁰ Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey*, 65 AM. J. INT'L L. 713, 730 (1971).

⁵¹ Resolution 2625, *supra* note 6, at 123-24 (the principle of equal rights and self-determination of peoples).

have the right freely to determine, *without external interference*, their political status and to pursue their economic, social and cultural development”⁵²

Robert Rosenstock, then Adviser to Legal Affairs in the United States Mission to the United Nations, characterized the development in these terms:

As can be seen from the initial paragraph of the formulation on this principle, the Committee recognized that peoples have the right of self-determination, that it is a universal right of all peoples, and that every state has the duty to respect this right. This represents a significant step in the progressive development of international law when compared with the position taken in 1964. Many states had never before accepted self-determination as a right.⁵³

After great controversy over the principle of nonintervention, the Committee finally achieved a consensus on a statement of the principle of nonintervention. The statement closely paralleled the relevant provisions in the Charter of the Organization of American States,⁵⁴ and largely followed the earlier General Assembly Resolution 2131 adopted in 1965.⁵⁵ The rule of nonintervention was declared on terms which preclude intervention on behalf of a recognized government as well as on behalf of insurgents. The Declaration provides: “No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.”⁵⁶ As noted earlier, this general rule was explicitly accepted as a part of customary international law by the International Court of Justice in its 1986 judgment in *Nicaragua v. United States*.⁵⁷

Resolution 2625 further provides that “armed intervention and all other forms of interference or attempted threats against the personality of the State *or against its political, economic and cultural elements* are in violation of international law” and “no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed

⁵² *Id.* at 123 (emphasis added).

⁵³ Rosenstock, *supra* note 50, at 731.

⁵⁴ See ORGANIZATION OF AMERICAN STATES CHARTER arts. 15, 16 (now arts. 18, 19). See also Rosenstock, *supra* note 50, at 729.

⁵⁵ See G.A. Res. 2131, 20 U.N. GAOR Supp. (No. 14) at 11, U.N. Doc. A/6014 (1965). See also Rosenstock, *supra* note 50, at 726-29.

⁵⁶ Resolution 2625, *supra* note 6, at 123 (the principle concerning the duty not to intervene in matters within the domestic jurisdiction of any state, in accordance with the Charter).

⁵⁷ See *supra* notes 9-12 and accompanying text.

activities directed towards the violent overthrow of the regime of another State, or *interference in civil strife in another State.*"⁵⁸

The significance of the 1970 Declaration cannot be dismissed on the ground that the General Assembly has no authority to legislate in such matters. As Rosenstock commented:

The difficulties were all the greater as the Committee agreed to work in general on the basis of unanimity. It was thus necessary to find language which went beyond a mere restatement of the wording of the Charter and yet would be acceptable not only to the United States and the Soviet Union but also to the other states of Europe, Latin America, Africa, and Asia as well. The generality of the language used in the Declaration does not deprive this instrument of its significance as the most important single statement representing what the Members of the United Nations agree to be the law of the Charter on these seven principles.⁵⁹

The special standing attached to the Declaration is reflected in section 3, providing that the principles of the Charter embodied in the Declaration, "constitute basic principles of international law,"⁶⁰ and in its adoption as the title of the resolution, *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations.*⁶¹ The standing of the 1970 Declaration is derived not only from its unanimous adoption, but also from the fact that the law it declares does not purport to be new law, but the law of the Charter itself, which is already binding by its own force.

Although some commentators have argued to the contrary,⁶² the effect of the 1970 Declaration in terms quoted above was to reject the older rule allowing intervention in support of a recognized government, in favor of a new rule prohibiting intervention in support of either side in a local contest. This same position was taken in 1975 by the Institut de Droit International, which adopted a resolution on the Principle of Non-Intervention in Civil Wars, declaring that "[t]hird States shall refrain from giving assistance to parties to a civil war which is being fought in the territory of another State."⁶³

⁵⁸ Resolution 2625, *supra* note 6, at 123 (emphasis added).

⁵⁹ Rosenstock, *supra* note 50, at 713-14.

⁶⁰ Resolution 2625, *supra* note 6, at 124.

⁶¹ *Id.* at 121.

⁶² Rostow, REMARKS, PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 263, 268 (1973).

⁶³ 56 ANN. INST. DR. INT. 544, 547 (1975).

For purposes of the resolution, "civil war" was defined to include armed conflict between "the established government and one or more insurgent movements whose aim is to overthrow the government or the political, economic or social order of the State, or to achieve secession or self-government for any part of that State." The definition excluded "local disorders or riots" and "conflicts arising from decolonization."⁶⁴

What then is the reach of these developments? There is a need for elucidation, because part of the resistance of some to these conclusions may arise from misunderstanding. The rule against intervention in support of a recognized government, even at the invitation of that government, is not a rule against all aid to the government in all circumstances. Rather, it is a rule against aid which infringes on the people's right of self-determination and the political independence of the state. The point to be made is that the invitation of the recognized government does not make legal what is otherwise an illegal intervention. The circumstances in which aid to the government will be prohibited are defined by the principle of nonintervention itself. Aid that involves a "use of force" will be prohibited under article 2, paragraph 4 if it imposes a restriction on the "political independence" of the state.

It follows that aid to the government is permitted in contexts where self-determination and political independence issues are not involved. The Institut de Droit International's resolution of 1975, in excluding "local disorders or riots" from its definition of "civil war," implicitly recognized this limitation. In a similar manner, Professor Schachter has drawn a distinction between a case where outside military assistance invited by the government "is used to impose restrictions on the 'political independence' of the country, as for example, by limiting the choice of the population in regard to the composition of the government or the policies it should follow," and a case where foreign force is invited by the government "to help put down an attempted coup or to assist in restoring law and order."⁶⁵ Professor Moore, in stating the nonintervention rule in terms of "genuine civil conflicts,"⁶⁶ seems to reflect the same kind of distinction. The Report of the Committee on Use of Force in Relations Among States of the American Branch of the International Law Association, submitted in May

⁶⁴ *Id.* at 545, 547.

⁶⁵ Schachter, *supra* note 3, at 1645.

⁶⁶ *See supra* note 44 and accompanying text.

1986, states: "Furthermore, outside military force is not necessarily precluded in all civil conflict situations and, in those which present only law and order implications, is clearly not prohibited by international law. The test is one of its substantive effect on the political independence of the state."⁶⁷ Under the rule of nonintervention, assistance to the government which does not involve any foreign intrusion in indigenous choice will be allowed.

Aid to the government in enforcement of law and order is not, however, an overriding exception to the rule of nonintervention. Even in cases of civil conflict arising out of genuine political issues, governments resort to law and order remedies. In such cases assistance to the government from third states may involve material foreign intrusion in indigenous choice, and when that is the effect, such assistance must indeed be barred under the principle of the rule of nonintervention. In theory at least, a pure law and order context may arguably exist where the government has been elected by the clear choice of the people in a genuinely free election open to all contestants under a generally accepted constitutional process. In that context, aid to the government is in support of the people's right of self-determination and not in infringement of such a right. This is not the kind of case in which issues of intervention and counterintervention are likely to arise, but even here the dilemma of Hall's analysis quoted above is relevant.⁶⁸ Either external aid is not necessary, or, if it is, the conclusion as to the government's support by the population must be in doubt. If the recognized government may need external support to survive against purely indigenous opposition, that should be reason enough to insist that a heavy burden properly rest on any foreign government to demonstrate that its aid has not infringed on the right of the people to determine their own government.⁶⁹

Issues of intervention and counterintervention are more likely to arise in states where the legitimacy of the government is widely challenged from within the state. It is to such cases that the rule of nonintervention is directly addressed. In such cases the rationale of a law and order limitation has no application. To permit a third state to intervene in support of the government on the basis of the third state's contentions as to the legitimacy of the government and the illegality of the opposition would destroy the rule. In a divided

⁶⁷ *Report, supra* note 3, at 210.

⁶⁸ See HALL, *supra* note 43 and accompanying text.

⁶⁹ *Report, supra* note 3, at 215.

world it is also a prescription for a power struggle between opposing third states, each acting under its own self-justifying rationale for unilateral action. Even plausible cases would run the risk of simply providing the entry for expansion into increasing infringement on the people's right of self-determination.⁷⁰ In the case of an authoritarian government or in a state where the political process is marked by coups or other violence, the burden under a law and order limitation could rarely if ever be sustained.

The traditional doctrine of intervention by invitation has been overtaken by more than its conflict with the principles given force in the United Nations Charter. Other problems with the traditional doctrine also have played a role. To allow an invitation by the recognized government to legitimate interference by a foreign state in an internal contest was to permit and even encourage the kind of manipulation that made a mockery of international law. The doctrine permitted aid to a government that seized power but not to the ousted government that sought to regain power. It encouraged major powers to establish and maintain puppet regimes to provide legal standing for armed action against insurgents whose international alignment or political orientation was viewed as unfavorable. Its effect was to reward successful misconduct.

This was the kind of ritualistic approach to law which many years ago caused George F. Kennan to argue against approaching foreign policy issues in legal terms. Kennan attacked law for ignoring "the set of techniques by which states can be converted into puppets with no formal violation of, or challenge to, the outward attributes of their sovereignty and their independence."⁷¹

⁷⁰ Professor Schachter notes:

An initial intervention of a limited character may evolve into a more protracted use of foreign forces to repress internal democracy and political expression. There is good reason therefore to place a heavy burden on any foreign government which intervenes with armed force even at the invitation of the constitutional authority to demonstrate convincingly that its use of force has not infringed the right of the people to determine their political system and the composition of their government. It cannot be assumed that governments will, as a rule, invite foreign interventions that leave the people entirely free to make their own political determinations, though on occasion this may be the case.

Schachter, *supra* note 3, at 1645.

⁷¹ G. KENNAN, *AMERICAN DIPLOMACY 1900-1950* 98 (1951). Professor W. Michael Reisman makes essentially the same point in his Editorial Comment, *Coercion and Self Determination: Construing Charter Article 2(4)*, 78 *AM. J. INT'L L.* 642, 644-45 (1984).

The history of the travesties of law in those cases where the invitation of the recognized government was used as a legal justification provided other reasons for burying any rule founded on intervention by invitation. Professor Sohn, recalling the German occupation of Austria in 1938 and of Czechoslovakia in 1939, the Soviet Union's occupation of Finland in 1939, of Hungary in 1956, of Czechoslovakia in 1968, and of Afghanistan in 1979, and the involvement of the United States in Santo Domingo in 1965 on the invitation of the chief of police of the city, concluded: "Regardless of the merits of a particular situation, the point is clear, I hope, that an invitation by one of the parties to an internal conflict is not a sufficient justification for any intervention."⁷²

Where genuine civil conflict exists, the pressures of our dangerous world impose a great urgency for acceptance of a rule of nonintervention that prohibits intervention in support of either a recognized government, or a group of insurgents. Only a principle of reciprocal abstention can insure that indigenous civil strife within a state does not erupt into a contest between major powers. If every local contest is to be determined by whichever major power provides the decisive margin of force, every local contest will have the potential for exploding into a dangerous confrontation between the major powers.

These considerations undoubtedly have been relevant to the erosion of the traditional doctrine permitting intervention in support of a government by its invitation. The doctrine has yielded most, however, to the legal developments recognizing that when intervention in support of a government is applied to coerce the outcome in a local contest for power, it impairs the people's right of self-determination. The invitation of the government cannot be permitted to override that right.

Thus, under the principles of nonintervention formulated under the United Nations Charter, the role of an invitation by the recognized government must be reformulated. A government's invitation can provide a valid basis for military or economic assistance where the assistance does not trespass on the people's right of self-determination or the political independence of the state—that is, where the assistance does not involve any prohibited intervention. The invitation also can be the basis for assistance within the limits of legitimate counterintervention where insurgents are receiving assistance from a third state.

⁷² Sohn, *supra* note 3, at 227.

Furthermore, it must still be true that military action upon the territory of the victim state in support of its recognized government is not permissible without the consent of the recognized government of that state. Certainly, military action in support of the government of a state can hardly be taken on the state's territory contrary to the wishes of its government by a state which recognizes that government.⁷³

In light of these considerations, some comment is appropriate as to how the Judgment of the International Court of Justice in the Nicaragua case⁷⁴ may bear on the issue of intervention by invitation. Before pursuing this issue, however, it should be noted that neither Nicaragua's Application nor its submissions put in issue the lawfulness of direct military or economic assistance by the United States to El Salvador.

As previously noted,⁷⁵ the Judgment affirms the principle of non-intervention as a part of customary international law. The Judgment seems to be derived from General Assembly Resolution 2625 as it quotes extensively from the Resolution with apparent approval.⁷⁶ The Judgment refers specifically to Resolution provisions that provide "no State shall . . . interfere in civil strife in another State,"⁷⁷ and that denounce "participating in acts of civil strife . . . in another State."⁷⁸ Furthermore, the Judgment notes that the Resolution sets out principles "which the General Assembly declared to be 'basic principles' of international law."⁷⁹

There are passages in the Judgment which may give some comfort to those who disagree with the foregoing analysis. The language appears in the discussion of other issues. In its 1984 Judgment on Jurisdiction and Admissibility⁸⁰ regarding the contention of the United States that third states, particularly Honduras, were necessary parties,

⁷³ The same respect for the authority of the recognized government over its own territory bears on the manner in which counterintervention in support of insurgents may be conducted to redress a violation of international law by the intervention of another state in support of the government. This point is further discussed in Part X of the text.

⁷⁴ *Nicaragua v. United States*, *supra* note 9.

⁷⁵ *See supra* notes 9-12 and accompanying text.

⁷⁶ *Nicaragua v. United States*, *supra* note 9, paras. 188, 191, 192, 193, 203, 205, 228, 264.

⁷⁷ *Id.* at para. 192.

⁷⁸ *Id.* at para. 228.

⁷⁹ *Id.* at para. 203.

⁸⁰ 1984 I.C.J. 392.

the Court noted Nicaragua's response that it was asserting claims only against the United States. The Court commented: "Nicaragua's Application does not put in issue the right of a third State to receive military or economic assistance from the United States (or from any other source)."⁸¹ The Court referred to this comment in its 1986 Judgment on the Merits in considering whether El Salvador would be "affected by the decision" under the multilateral treaty exclusion of the United States acceptance of the Court's jurisdiction:

In its Judgment of 26 November 1984, the Court recalled that Nicaragua's Application, according to that State, does not cast doubt on El Salvador's right to receive aid, military or otherwise, from the United States (*I.C.J. Reports 1984*, p. 430, para. 86). However, this refers to the direct aid provided to the Government of El Salvador on its territory in order to help it combat the insurrection with which it is faced, not to any indirect aid which might be contributed to this combat by certain United States activities in and against Nicaragua.⁸²

In addressing the different question of whether a request by the *contras* for United States aid in Nicaragua could provide legal justification to the United States, the Court in its Judgment added:

[T]he principle of non-intervention derives from customary international law. It would certainly lose its effectiveness as a principle of law if intervention were to be justified by a mere request for assistance made by an opposition group in another State—supposing such a request to have actually been made by an opposition to the regime in Nicaragua in this instance. Indeed, it is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition. This would permit any State to intervene at any moment in the internal affairs of another State, whether at the request of the government or at the request of its opposition. Such a situation does not in the Court's view correspond to the present state of international law.⁸³

In regard to these brief references to the provision of aid to the government within its territory at its request, it is important to note the context of this case: the United States provided support to El

⁸¹ *Id.* at 430, para. 83.

⁸² *Nicaragua v. United States*, *supra* note 9, para. 51.

⁸³ *Id.* at para. 246.

Salvador against an insurgency supported by Nicaragua, not against an insurgency receiving no external support. The court specifically found that "support for the armed opposition in El Salvador from Nicaraguan territory was a fact up to the early months of 1981."⁸⁴ Judge Schwebel, commenting in his dissenting opinion, makes this context explicit:

In such a case [Nicaraguan support of the armed insurgency against the Government of El Salvador], El Salvador is entitled to seek assistance in collective self-defense. Such assistance may in any event take place on the territory of El Salvador, as by the financing, provisioning and training of its troops by the United States.⁸⁵

The court was not dealing with United States aid to El Salvador as a case of support to a government against a purely indigenous insurgency, and it did not address the issues involved in such a case. One should not read the court's words as sanctioning aid to the government in circumstances where that support would transgress the people's right of self-determination or the political independence of the state.

IV. MILITARY AID WITHOUT INTERVENTION

Here an important distinction must be made. Support to the government of another state in the form of military aid for various purposes is commonplace in international relations and may not involve intervention at all.

The usual and legitimate purposes of providing military aid to a government include the following: (1) to assist the state in maintaining its self-defense; (2) to assist the state in asserting its role in arrangements for collective self-defense; or (3) to assist the state in maintaining a regional or global balance of power. If military aid to the government is provided and used only for these purposes, no question of intervention arises.

This is certainly true of military aid to a widely recognized government facing no substantial threat to its authority. It must also be true of aid to a government which faces problems of civil strife, so long as appropriate measures are taken to assure that the assistance will not be used to support the government in the internal strife in

⁸⁴ *Id.* at para. 152.

⁸⁵ 1986 I.C.J. 259, 349-50, 25 INT'L LEGAL MAT. 1146, para. 176 (1986) (Schwebel, J., dissenting).

derogation of indigenous choice. A rule which would automatically cut off military assistance in the event of civil strife, or freeze the level of assistance at the pre-insurgency level, could deprive the state of its ability to obtain the means for its own defense. It could nullify the state's capacity to take part in arrangements for collective self-defense. Further, such a rule could impair the maintenance of levels of strength necessary to preserve the balance of power. Finally, a rule prohibiting military aid to governments facing internal conflict would invite outside powers to encourage covertly civil strife in furtherance of their own strategic aims. Creating a condition of civil strife would become a legal block to other powers' military assistance to the government even for usual and legitimate purposes. These are the kinds of games which mock the purposes of international law and can ultimately render it irrelevant and without influence.

One scholar has suggested, "[T]he general consensus is that military assistance should be frozen at levels approximately equal to what they were at the time the conflict broke out. Clearly, simply withdrawing assistance unilaterally at the time a conflict begins may amount to intervention on behalf of the other faction."⁸⁶ The suggestion reflects an appropriate concern that an increase in assistance that merely enables a state to devote a larger part of its own forces to suppressing the insurrection is in reality aid to the government against the insurgents. The occasion for increased military assistance, however, may not be related to the existence or the levels of local strife. The need for the legitimate and Charter-protected purposes indicated above may persist, and in such circumstances the increased aid will not necessarily be sought, given or used in the local contest. It may not enter the scales of force in the local contest.

It should be noted that the alternative to restricting assistance to the pre-insurgency level will not be a withdrawal of all assistance to the government. The purposes of the rule of nonintervention are equally served by imposing on the state which provides the military assistance the burden of insisting on appropriate measures to assure that the aid will not be used to support the government in the internal civil strife. This burden would apply equally to the pre-insurgency assistance and to assistance furnished after the outbreak of civil strife. Only if such arrangements cannot be made should it be necessary under the nonintervention rule to require a termination of assistance.

⁸⁶ Moore, *supra* note 44, at 196. See also J.N. MOORE, LAW AND CIVIL WAR IN THE MODERN WORLD 24 (1974).

These considerations as to what acts constitute illegal intervention in favor of the government also have an important consequence in defining what acts constitute counterintervention in support of insurgents, as discussed in Part X below. As a corollary, the former considerations limit the right of counterintervention in favor of insurgents, for the event which triggers a right of counterintervention is the intervention in violation of international law in favor of the government. If the above analysis is correct, the provision of military aid to a government *per se*, either before or after the outbreak of civil strife, does not give rise to a right of counterintervention. Nor does the fact that arms supplied to the government turn up in use by the government in the internal conflict *per se* give rise to such a right. Rather, the determinative fact is the violation of law by the state providing the assistance. That may be hard to find where assistance is terminated after the internal conflict begins. Moreover, after a known condition of genuine internal conflict exists, the circumstances may impose a heavy burden on the outside state asserting the propriety of continued assistance.

This analysis regarding the provision of military aid to a government faced with civil strife seems appropriate. It protects legitimate military aid and avoids creating an opportunistic right of counterintervention.

V. THE APPLICATION OF ARTICLE 2, PARAGRAPH 4.

Under principles governing remedies, the right of counterintervention does not override other binding principles of international law. The question as to what remedial measures are permitted, as suggested in Part I above, involves the application of these binding principles to the circumstances of each case, considering the specific remedial measure to be taken against the specific international law violation involved. Article 2, paragraph 4 of the United Nations Charter, relating to the threat or use of force, is one of those binding provisions.

Article 2, paragraph 4 prohibits the threat or use of force "against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."⁸⁷ Literally, and with good reason, this provision does not prohibit all uses of force in international relations. Uses of force are outside the prohibition when they are *not* against the territorial in-

⁸⁷ U.N. CHARTER art. 2, para. 4. *See supra* note 4.

tegrity or political independence of a state, and are *not* in any other manner inconsistent with the purposes of the United Nations.

It must follow that not every use of force in international relations is "against the territorial integrity or political independence" of a state under Article 2, paragraph 4. Otherwise, there would be no occasion for the further prohibition against the use of force "in any other manner inconsistent with the Purposes of the United Nations." Nor does the prohibition against the threat or use of force in any manner "inconsistent" with the purposes of the United Nations purport to limit the use of force solely to actions affirmatively authorized in some other provision of the Charter, or to action of the Security Council or the General Assembly acting pursuant to the Charter.

The historical record clearly supports these conclusions. The original Dumbarton Oaks Proposals provided simply that "[a]ll members of the Organization shall refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the Organization."⁸⁸ This language was not thought to impair any right of self-defense. No counterpart of article 51 of the Charter was assumed to be necessary, and none was included. Even at the San Francisco Conference, which did insert in article 51 of the Charter a specific affirmation of a right of individual and collective self-defense,⁸⁹ it was never supposed that article 2, paragraph 4 denied a right of self-defense. Thus, the Report of the Rapporteur of Committee 1 to Commission I at the San Francisco Conference in 1945 states: "The Committee wishes to state, in view of the Norwegian amendment to the same paragraph [article 2, paragraph 4], that the unilateral use of force or similar coercive measures is not authorized or admitted. The use of arms in legitimate self-defense remains admitted and unimpaired."⁹⁰ The addition of article 51 was not oc-

⁸⁸ L. GOODRICH & E. HAMBRO, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 665-66 (3d ed. 1969); 11 DEP'T ST. BULL. 368 (1944).

⁸⁹ U.N. CHARTER art. 51. *See supra* note 5 for the complete text of the article.

⁹⁰ Doc. 944, I/1/34 (1), 6 U.N.C.I.O. Docs. 446, 459 (1945). Earlier the Report of Rapporteur of Subcommittee I/1/A to Committee I/1 had commented:

The Norwegian Government proposed that no force should be used if *not approved* by the Security Council.

The sense of approval was considered ambiguous, because it might mean approval before or after the use of force. It might thus curtail the right of states to use force in legitimate self-defense, while it was clear to the Subcommittee that the right of self-defense against aggression should not be impaired or diminished.

It was furthermore clear that there will be no legitimate wars in any

casioned by a need to create a right of self-defense but rather to affirm the validity of the collective security arrangements then envisioned for the Inter-American system in the Act of Chapultepec and similar regional arrangements.⁹¹

There appears to be broad acceptance of the basic proposition that the plain language of article 2, paragraph 4 is a limited prohibition on the use of force.⁹² This is reflected in the recognition of the legality of certain rescue missions in Tentative Draft No. 6, section 703, comment e, of the American Law Institute's Restatement of Foreign Relations Law of the United States (Revised).⁹³ Reporters' note 8 to

sense.

Doc. 739, I/a/A/19(a), 6 U.N.C.I.O. Docs. 717, 721 (1945). The last sentence is reflected also in the Report of the Rapporteur of Committee 1 to Commission I in the passage quoted in the text stating: "The use of force, therefore, remains legitimate only to back up the decisions of the Organization at the start of a controversy or during its solution in the way that the Organization itself ordains. The intention of the Norwegian amendment is thus covered by the present text." Doc. 944, I/1/34 (1), 6 U.N.C.I.O. Docs. 459 (1945).

These statements are susceptible of different readings in some respects, but at least they make clear, (a) that the right of self-defense exists under the language of article 2(4) itself and does not depend on the adoption of article 51, (b) that the language of article 2(4) is not to be read as a prohibition against all use of force unless specifically permitted by some other provision of the Charter, and (c) that the thrust of article 2(4) is against the unilateral use of force. *Compare also* Report of the Rapporteur of Committee 1 to Commission I, Doc. 944, 6 U.N.C.I.O. Docs. 451. For a general discussion of the San Francisco conference history of articles 2(4) and 51, see I. BROWNLIE, *supra* note 3, at 266 *et seq.* See also M. McDUGAL & F. FELICIANO, *supra* note 25, at 234-36; 5 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 976-77 (1971).

⁹¹ Summary Report of Fourth Meeting of Committee III/4, May 25, 1945, Doc. 576, III/4/9, 12 U.N.C.I.O. Docs 679, 681. See also *infra* note 142.

⁹² L. HENKIN, *HOW NATIONS BEHAVE* 145 (2d ed. 1979). However, even after the Judgment on the Merits of the International Court of Justice in *Nicaragua v. United States*, issues remain unresolved as to the scope of the lawful use of force within the terms of article 2, paragraph 4. Disagreements on this issue were papered over in the G.A. Resolution 2625 (XXV), which simply provided: "Nothing in the foregoing paragraphs 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." The adviser on legal affairs to the United States Mission to the United Nations reported that this formulation was in fact intended to avoid the disagreements which existed and could not then be resolved. Rosenstock, *supra* note 50, at 723-24.

⁹³ RESTATEMENT, *supra* note 25, § 703, comment e provides:

Humanitarian intervention to rescue victims or suppress human rights violations. It is increasingly accepted that a state may act to rescue victims or potential victims in an action strictly limited to the purpose, in circumstances not likely to involve disproportionate destruction of life or property in the state where the rescue takes place. Whether a state may intervene

section 703 explains that “[m]issions strictly for rescue . . . probably did not violate 2(4), either because they did not involve the ‘use of force,’ or were not against ‘the territorial integrity or political independence’ of the target state, within the meaning of Article 2(4).”⁹⁴ Tentative Draft No. 6, section 905, comment g, also addresses this proposition.⁹⁵ On either ground the Restatement draft recognizes the limited nature of the prohibition on the use of force in article 2, paragraph 4. Either “use of force” does not include all kinds or applications of force, or not all use of force is prohibited. Whether the limitations in article 2, paragraph 4 also allow other cases of humanitarian intervention, and if so, under what limitations, is be-

with military force in the territory of another state without its consent, not to rescue the victims but to prevent, terminate or suppress human rights violations, is not agreed or authoritatively determined. Such intervention might be acceptable if taken pursuant to resolution of a U.N. body or of a regional organization such as the Organization of American States.

⁹⁴ *Id.* § 703, Reporters’ Note 8.

⁹⁵ *Id.* § 905, comment g provides:

Use of force in response to violation. Under this section, the use or threat of force in response to a violation of international law is subject both to the requirements of necessity and proportionality (Subsection (1)) and to the prohibitions of the U.N. Charter (Subsection (2)). Virtually all states are parties to the Charter, and its rules in respect of the use of force are also binding as customary law and are *ius cogens*. See § 102, comment k.

Article 2(4) of the Charter forbids the “threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” However, that provision is subject to “the inherent right of individual or collective self-defense if an armed attack occurs.” Article 51.

Article 2(4) prohibits the threat or use of military force; it does not address the threat or use of economic force or pressure. It prohibits the threat or use of force generally, whether or not in response to a violation of international law. Important issues as to the scope of the prohibition in Article 2(4) have never been authoritatively resolved, but it is clear that it was designed, *inter alia*, to outlaw “gunboat diplomacy” even in response to violations of international law. Violation of the law of the Charter against the use of force, however, permits the use of force in the exercise of the right of self-defense (Article 51), but important issues as to the scope of that right, too, remain unresolved.

It is generally accepted that Article 2(4) does not forbid limited use of force in the territory of another state incidental to attempts to rescue persons whose lives are endangered there, as in the rescue at Entebbe in 1976. However, that interpretation of the Charter would not extend to justify the use of force by one state on its own authority to conquer another state or overthrow its government even if that government had been guilty of persecution of minorities or other gross violations of human rights.

See § 703, comment e and Reporter’s Note 8.

yond the scope of this Article. The point here is that acceptance of the legality of rescue missions has come to be premised on recognition that article 2, paragraph 4 is a limited prohibition on the use of force.

In applying article 2, paragraph 4 to the right of counterintervention, it is necessary to keep in mind that when counterintervention is applied as a remedy to an intervention which itself involved the use of force, its role is to redress action which is a violation of article 2, paragraph 4. The excerpt quoted above from the Report of the Rapporteur of Committee 1 at the San Francisco Conference makes clear that what article 2, paragraph 4 was intended to prohibit was "the *unilateral* use of force."⁹⁶ One would have to strain the limitation language on the use of force in article 2, paragraph 4 to deny a right of necessary and proportionate use of force in counterintervention opposing an intervention involving the use of force. Such use of force in counterintervention cannot be regarded as "against the territorial integrity or political independence of any state."⁹⁷ Such force is in defense of these principles. Nor can it be regarded as "inconsistent with the Purposes of the United Nations."⁹⁸ It is in support of them.

Countering a violation of article 2, paragraph 4 with a necessary and proportional response involving force does not override the prohibition of article 2, paragraph 4. Counterintervention is subject to the article and governed by it. The article within its terms provides the scope for an effective response, a response that is under and in support of the law.

This is not to say that the response to a violation of article 2, paragraph 4 by a threat or use of force not amounting to an "armed attack" within article 51 is a basis for a response against the territory of the offending state. Indeed, leaving aside cases such as the rescue mission, a response involving force in or against the territory of the offending state would in most cases be a use of force "against the territorial integrity or political independence" of the offending state and thus itself would be in violation of article 2, paragraph 4. The International Court of Justice dealt with this issue in part in its 1986 Judgment on the Merits in the Nicaragua case.⁹⁹ Posing the question

⁹⁶ See *supra* note 90 and accompanying text (emphasis added).

⁹⁷ See U.N. CHARTER art. 2, para. 4.

⁹⁸ *Id.*

⁹⁹ *Nicaragua v. United States*, *supra* note 9.

“whether a State has a right to respond to intervention with intervention going so far as to justify a use of force in reaction to measures which do not constitute an armed attack but may nevertheless involve a use of force,” the Court declined to decide what responses might be permitted to the victim state El Salvador.¹⁰⁰ Answering its own question whether “the United States might have been permitted to intervene in *Nicaragua* in the exercise of some right analogous to the right of collective self-defense,” the court limited the use of force “against” the offending state by a state which is not itself the victim to those cases in which “the wrongful act provoking the response was an armed attack.”¹⁰¹

This construction of article 2, paragraph 4 is consistent with the generally accepted principle stated in Resolution 2625 that “States have a duty to refrain from acts of reprisal involving the use of force.”¹⁰² Aside from the questions of whether a non-punitive, specifically corrective action involving the use of force to redress an intervention in violation of international law is a reprisal,¹⁰³ and whether the provision in Resolution 2625 applies to a reprisal responding to a violation of international law which itself involved the use of force,¹⁰⁴ acts of reprisal involving force are generally taken against the territory under the sovereignty of the offending state. Such reprisals would be prohibited under the principle that the right of a third state to respond by acts of force against the territory of the offending state is generally confined to the right of collective self-defense in cases of armed attack under article 51. The provision in Resolution 2625 does not in its terms exclude even article 51 from its application, but, as the International Law Commission has observed: “The fact that armed reprisals are prohibited under modern international law obviously does not prejudice the undeniable collective right of self-defense provided for in Article 51 of the Charter of the United Nations.”¹⁰⁵

¹⁰⁰ *Id.* at para. 210.

¹⁰¹ *Id.* at paras. 210, 211 (emphasis added). See also *id.* at paras. 247-49, 252.

¹⁰² Resolution 2625, *supra* note 6, at 122.

¹⁰³ See Tucker, *Reprisals and Self-Defense: The Customary Law*, 66 AM. J. INT'L L. 586, 589 (1972). See also E. ZOLLER, *supra* note 29, at 40 *et seq.*

¹⁰⁴ Michael Akehurst has argued that this is the one clear case for a right of third states to take forcible reprisals, in *Reprisals by Third States*, 1970 BRIT. Y.B. INT'L L. 1, 15-18.

¹⁰⁵ Report of the International Law Commission, 34 U.N. GAOR Supp. (No. 10) at 319, n.577, U.N. Doc. A/34/10 (1979), reprinted in, [1979] 2(2) Y.B. INT'L COMM'N at 118, n.593.

In applying article 2, paragraph 4 of the Charter, it is important to recognize, as the decision of the International Court of Justice in *Nicaragua v. United States* makes clear, that acts which do not amount to an "armed attack" under article 51 may nevertheless constitute a threat or use of force in violation of article 2, paragraph 4.¹⁰⁶ There are in effect two tiers of uses of force which may be in violation of article 2, paragraph 4: (1) armed attack and (2) uses of force of lesser gravity, which include the provision of arms to insurgents. This analysis has consequences which are important here. First, it has the result that the right of individual and collective self-defense affirmed in article 51 cannot provide a remedy for all violations of article 2, paragraph 4. Second, in circumstances where providing arms to the government is a violation of the post Charter rule of nonintervention, it may also constitute a use of force in violation of article 2, paragraph 4. Third, where providing arms to the government is as a counterintervention response to external aid to insurgents, the counterintervention response avoids being a use of force in violation of article 2, paragraph 4, only because in the circumstances the aid is not "against the territorial integrity or political independence" of the victim state nor "in any other manner inconsistent with the Purposes of the United Nations."

Nothing in this analysis warrants reading article 2, paragraph 4 of the Charter as prohibiting the use of force in the exercise of counterintervention within the victim state. Nor does article 2, paragraph 4 prohibit counterintervention in support of insurgents within the limitations considered in Part X below. In either situation, however, article 2, paragraph 4 presumably imposes additional limitations on counterintervention as remedy. First, the right of counterintervention may not involve the use of force unless (a) the offending intervention itself involved the use of force, and (b) the corrective use of force is such as may reasonably be regarded as necessary in the circumstances to deal with the offending use of force. Second, apart from article 51, a counterintervention response involving force may not be carried against the territory of the offending state. Third, as noted in Part III above, a counterintervention response may not involve military action upon the territory of the victim state without the consent of its recognized government.

This analysis contradicts statements encountered in the literature to the general effect that article 2, paragraph 4 prohibits the use of

¹⁰⁶ *Supra* note 12 and accompany text.

force except in exercise of the right of individual and collective self-defense under article 51.¹⁰⁷ Such statements, unless intended only as imprecise generalizations, ignore the express language of article 2, paragraph 4, the San Francisco Conference history, and the broad acceptance of the legality of rescue missions employing force.

If accepted as law, statements limiting the use of force under article 2, paragraph 4, to "exceptions" found elsewhere in the Charter, also would have serious consequences for the Charter's attempt to create rules of law limiting the use of force. Article 2, paragraph 4, and article 51 do not operate in parallel terms. Article 2, paragraph 4 prohibits "the threat or use of force,"¹⁰⁸ whereas article 51, by its terms, affirms a "right of individual or collective self-defense if an armed attack occurs."¹⁰⁹ It is certainly true that for many violations of international law involving the use of force, resort to article 51 is sufficient to provide a remedy. But to look solely to article 51 to provide a remedy for violations of article 2, paragraph 4 would result in unnecessary and counterproductive alternatives. The direct result would be to deny any remedy by use of force, however necessary and proportionate, except where the violation involves an "armed attack." Thus, to the extent that articles 2, paragraph 4, and 51 are not parallel, looking only to article 51 would hobble the capacity of law to provide legitimate remedies for the violation of law.

If to escape this result reliance is placed on a watered-down construction of "armed attack" under article 51, construing every use of force in violation of article 2, paragraph 4 as an armed attack, the end result would be to create a license for the escalation of force. Such a result would occur because as discussed in Part VI, whenever article 51 permits a counterintervention response involving the use of force, the response may be carried even against the territory of the attacking state. The International Court of Justice in its 1986 Nicaragua Judgment clearly attempts to guard against just such escalation. It held that "armed attack" may include acts by armed bands of sufficient gravity but does not include merely providing "assistance to rebels in the form of the provision of weapons or logistical or

¹⁰⁷ See, e.g., E. ZOLLER, *supra* note 29, at xiv. See also RESTATEMENT, *supra* note 25, § 711, comment h, as originally stated in Tentative Draft No. 6. Compare *id.* § 905, comment g. In addition to the discussion here such statements also need to be considered in relation to the issues concerning regional action under article 52, which are discussed in Part IX of the text.

¹⁰⁸ U.N. CHARTER art. 2, para. 4.

¹⁰⁹ U.N. CHARTER art. 51.

other support," even if such assistance "may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States."¹¹⁰ The dissenting opinion of Judge Jennings shares this caution while differing as to where the line between armed attack and merely providing arms should be drawn.¹¹¹

Nor would the dilemma raised by looking only to article 51 be avoided by construing the prohibition of the "use of force" in article 2, paragraph 4 to apply only to situations that involve an "armed attack" under article 51. That would, to be sure, avoid any obstacle to response by other kinds of direct or indirect uses of force, but it also would be a major retrenchment in the Charter attempt to limit the use of force by rules of law. Fortunately, as noted above, the 1986 Judgment of the International Court of Justice in the Nicaragua case makes clear that an intervention not constituting an armed attack may nevertheless be a threat or use of force in violation of article 2, paragraph 4.

These alternatives are unacceptable. Article 2, paragraph 4 is sufficient within its own terms to allow states to respond to its violation with necessary and proportional force. It would be a work of the greatest folly for those who see in the principles of article 2, paragraph 4 the essential basis of the rule of law to take a position which in the name of law would deny nations the right to support those principles legitimately and effectively. A law which denies even a necessary and proportional response to a violation involving the use of force would be a law which favors those who violate it. It would simply provide a legal sanctuary to the nation which chooses in violation of law to provide the decisive margin of superior force in local contests over authority. It would invite unlawful intervention designed to manipulate the world's power balance.

VI. THE APPLICATION OF ARTICLE 51

Where a state's illegal intervention in the affairs of another state involves an "armed attack," the provisions of article 51 of the Charter, affirming "the inherent right of individual or collective self-defense if an armed attack occurs,"¹¹² reflect an expanded right of

¹¹⁰ *Nicaragua v. United States*, *supra* note 9, para. 195. See also *id.* at para. 230, 247.

¹¹¹ *Nicaragua v. United States*, 1986 I.C.J. 528, 543-44, 25 INT'L LEGAL MAT. 1280, 1288 (1986) (Jennings, J., dissenting).

¹¹² U.N. CHARTER art. 51.

counterintervention. Action taken by a third state in the right of "collective" self-defense when an armed attack occurs is a form of counterintervention.

As noted above, the occasion for inserting article 51 in the United Nations Charter was not to carve out an exception to article 2, paragraph 4, but to affirm the validity of the collective security arrangements provided for and contemplated in the Act of Chapultepec in 1945.¹¹³ The concern was not with the right of self-defense but with what might have been regarded by some as an extension of it in the Chapultepec documents. At the hearings on the Charter before the Committee on Foreign Relations of the United States Senate, John Foster Dulles, one of the official advisers to the United States delegation at San Francisco, testified:

Now, you have asked me about the Monroe Doctrine. The Monroe Doctrine has to an extent been enlarged or is in process of enlargement as a result of the Mexico Conference and the declaration of Chapultepec, where the doctrine of self-defense was enlarged to include the doctrine of collective self-defense and where the view was taken that an attack upon any of the republics of this hemisphere was an attack upon them all.

At San Francisco, one of the things which we stood for most stoutly, and which we achieved with the greatest difficulty, was a recognition of the fact that that doctrine of self-defense, enlarged at Chapultepec to be a doctrine of collective self-defense, could stand unimpaired and could function without the approval of the Security Council.¹¹⁴

Whether article 51 in fact enlarged or merely affirmed an existing right of collective self-defense, its purpose was to place the issue beyond doubt.¹¹⁵ By categorizing the right of third states to act as a right of "collective self-defense," article 51 made clear that if an armed attack occurs, even third states may respond by force carried to the territory of the offending state. Third states may adopt the same kinds of opposing action as does the state being attacked.¹¹⁶

¹¹³ See *supra* note 91 and accompanying text.

¹¹⁴ Quoted in 5 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 977 (1971).

¹¹⁵ Arguing that in its concept of collective self-defense article 51 enlarged the preexisting right of self-defense are the following: A. MCNAIR, THE LAW OF TREATIES 579 (1961); F. OPPENHEIM, INTERNATIONAL LAW 155 (1952).

¹¹⁶ See Akehurst, *supra* note 104, at 4; I. BROWNLIE, *supra* note 3, at 327; L. HENKIN, *supra* note 92, at 141; J.N. MOORE, *supra* note 3, at 26-27. See also *The Lawfulness of United States Assistance to the Republic of Vietnam*, 112 CONG. REC. 15,519, 15,537-40 (1966) (paper presented by J.N. Moore & J. Underwood in collaboration with M. McDougal).

To the extent that article 51 is an enlargement of a preexisting right of collective self-defense, its application depends on the occurrence of an "armed attack." It is not necessary here to review the conflicting views which others have expressed as to the proper construction of that term.¹¹⁷ If the analysis of articles 2, paragraph 4, and 51 advanced here is correct, what ultimately turns on the issue of construction is that if an "armed attack" occurs, the use of force in counterintervention may be carried to the territory of the offending state, while otherwise it may not.¹¹⁸ If the term "armed attack" is read so loosely as to rob it of objective meaning, the result is to engender a freedom to use force which would exceed the bounds of a necessary and proportional counterintervention within the limits of article 2, paragraph 4 whenever the offending intervention in some arguable way involves the use of force. The right of counterintervention does not need such a license to be a legitimate and effective means of opposing an illegal intervention.

The term "armed attack" is not, however, limited to a conventional military attack. When the United Nations General Assembly finally achieved a consensus definition of aggression in 1974, its resolution included the following as acts of aggression: "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 the acts listed above [e.g., invasion, military occupation, bombardment, blockade], or its substantial involvement therein."¹¹⁹ The 1986 Judgment of the International Court of Justice in the Nicaragua case expressly accepts the acts of aggression described above as within the term "armed attack."¹²⁰ Since aggression, in the words of the preamble of the resolution, is "the most serious and dangerous form of the illegal use of force,"¹²¹ any of the acts included within the definition of aggression presumably may qualify as an "armed attack" under article 51.

¹¹⁷ See L. HENKIN, *supra* note 92, at 294. See generally Report of the International Law Commission, 35 U.N. GAOR Supp. (no. 10) at 125-29, 19-21, U.N. Doc. A/35/10 (1980), reprinted in, [1980] 2(2) Y.B. INT'L L. COMM'N 58-60 (commentary on draft art. 34 - Self-defence).

¹¹⁸ Accord I. BROWNIE, *supra* note 3, at 327; J.N. MOORE, *supra* note 3, at 26. See also Schachter, *supra* note 3, at 1643-44. Compare M. AKEHURST, *supra* note 3, at 244-45.

¹¹⁹ G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 142, 143, art. 3(g), U.N. Doc. A/9631 (1974).

¹²⁰ *Nicaragua v. United States*, *supra* note 9, para. 195.

¹²¹ G.A. Res. 3314, *supra* note 110 at 143.

Not every intervention, not even every intervention involving the use of force, amounts to an "armed attack." Thus, "provision of weapons or logistical or other support" to insurgents, without more, falls short of constituting an armed attack by the intervening state under the law as declared by the International Court of Justice,¹²² and thus does not implicate article 51. By stretching an analogy to concepts by which co-conspirators are equally guilty, an argument might be made in almost any case to charge the state providing military supplies with their use by insurgents. But if supplying the weapon, without further participation in the planning and execution, is equated with its firing by others, the term "armed attack" is drained of any practical meaning and the limitations of article 51 are nullified. The International Court of Justice 1986 Judgment in the Nicaragua case seems to reject any constructive imputation of acts by others to an external state providing support for those acts.¹²³

The right of collective self-defense affirmed in article 51 can be regarded as a special case of counterintervention. To the extent it depends on article 51, it is also a limited case. In the case of an offending intervention not involving any armed attack, the terms of article 51 confer no right of collective self-defense.

It may seem tempting to simply treat every case of intervention involving the use of force as giving rise to an inherent "right of self-defense" involving force, whether or not article 51 is applicable. As applied to a right of counterintervention by a third state, however, it is a temptation without reward. It is true that article 51 provides that nothing in the Charter shall "impair the inherent" right of individual or collective self-defense if an armed attack occurs.¹²⁴ Where there is no armed attack, however, article 51 itself does not apply, and asserting an inherent right of collective self-defense outside the confines of article 51 does nothing in such a case to avoid the necessity of bringing a response by a third state involving the use of force within the terms of article 2, paragraph 4. A right of collective self-defense outside of article 51, like any counterintervention response using force, has to exist within the limitations of article 2, paragraph 4.

The question whether the inherent right of self-defense of the victim state is limited by article 51 is not the issue here. Regardless of what

¹²² See *supra* note 109. and accompanying text.

¹²³ *Nicaragua v. United States*, *supra* note 9, para. 110.

¹²⁴ U.N. CHARTER art. 51.

may be the right of the victim state outside of article 51 to respond by force against the territory of the offending state where there has been no armed attack, the case for legal grounds outside of article 51 to permit a third state to respond by force against the territory of the offending state faces serious hurdles. Article 51 was negotiated specifically to protect the right of third states to respond under a right of collective self-defense. Where armed attack is absent and article 2, paragraph 4 controls, the right of a third state to initiate a response by force against the territory of the offending state would in any event confront an issue of proportionality.

Thus, the relation of article 51 to the right of counterintervention can be summarized in two propositions: (1) Where an illegal intervention does not involve an "armed attack," a right of counterintervention involving a necessary and proportional use of force is not created by article 51, is not dependent on it, and is not expanded by it; and (2) Where an illegal intervention involves an "armed attack," the right of counterintervention is affirmed to allow the use of force even against the territory of the attacking state.¹²⁵

VII. OBLIGATIONS *Erga Omnes*

Recognizing the right of intervention as a remedy existing under law carries with it the consequences that the law not only defines the right but also determines to what states the right is available. For some violations of international law, a right to take countermeasures inheres in every state. The basic principle was set forth in the much quoted language of the International Court of Justice's *Barcelona Traction, Light and Power Co.* Judgment as follows:

In particular, an essential distinction should be drawn between the obligations of a State towards the international community as

¹²⁵ Under the 1986 Judgment of the International Court of Justice in the Nicaragua case, customary international law requires as preconditions for exercise of this right that (a) the victim state has declared itself to be the victim of an armed attack (para. 195) and (b) the state attacked has addressed to the third state a request for its assistance (paras. 196,199). No doubt these requirements are regarded by the court as safeguards against unwarranted opportunistic invocation by third states of the right of collective self-defense, and presumably they would be excused by impossibility, as where the government of the victim state is destroyed or its leaders imprisoned in the armed attack, or is succeeded (or even preceded) by a puppet regime installed by the attacking state, although the court does not deal with such issues. Compare the related comment of Judge Jennings in his dissenting opinion, *Nicaragua v. United States*, 1986 I.C.J. 528, at 544-45. Article 51 itself requires an immediate report to the Security Council of measures taken.

a whole, and those arising vis-a-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*.

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law . . . others are conferred by international instruments of a universal or quasi-universal character.¹²⁶

In the analysis of the International Court of Justice, the remedy inheres in every state for those offenses which are violations of obligations owed to all states.

The International Law Commission likewise has delineated a distinction between those wrongful acts for which all states are entitled to a remedy and those for which only states having some other required relationship to the wrong are entitled to a remedy. As noted in Part I of this Article, the articles in Part One of the International Law Commission's proposed Articles on State Responsibility reflect a difference between the consequences of acts recognized as international crimes and those which are merely international delicts.¹²⁷ Implementing this concept, the Special Rapporteur proposed in article 5 of Part Two to define the term "injured State" according to the nature of the wrongful act, providing that "if the internationally wrongful act constitutes an international crime," the term "injured state" means "all other States."¹²⁸ At its 1985 session, the International Law Commission provisionally adopted article 5 in revised form and also a commentary to article 5.¹²⁹ Paragraph 3 of article 5 provides:

¹²⁶ 1970 I.C.J. 3, 32. See generally RESTATEMENT, *supra* note 25, § 703, comment b, Reporter's Note 3; § 901 Reporter's Note 1. The standing in court of third states who were members of the League of Nations in relation to enforcement of a League of Nations mandate for which the League of Nations itself was held to have had responsibility presented a different issue. See *South West Africa Cases* (Eth. v. S. Afr.; Lib. v. S. Afr.), 1966 I.C.J. 6, paras. 33-34, 44.

¹²⁷ See *supra* notes 15-17 and accompanying text.

¹²⁸ See *supra* note 20.

¹²⁹ 1985 Report of the International Law Commission, 40 U.N. GAOR Supp. (No. 10) at 51, 53-59, U.N. Doc. A/40/10 (1985). See *id.* at 39, for the Special Rapporteur's draft. For 1984 references see *supra* note 20.

In addition, "injured State" means, if the internationally wrongful act constitutes an international crime [and in the context of the rights and obligations of States under articles 14 and 15], all other States.¹³⁰

The Commission does not attempt to list and define international crimes in article 19 of Part One. It takes a position in article 19, however, broad enough to encompass a serious breach of the rule of nonintervention as an international crime, stating that "a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples" may be recognized as an international crime by the international community as a whole.¹³¹ In such a case all states would have standing as "injured States" under article 5 of Part Two.

Article 5 of Part Two, as provisionally adopted by the International Law Commission, has added a second ground on which a right of counterintervention may be held to inhere in all third states. Sub-paragraph 2(e) includes the provision that if the right infringed by the act of a state arises from a customary rule of international law, the term "injured State" means "any other State . . . bound by the relevant rule of customary international law, if it is established that . . . the right has been created or is established for the protection of human rights and fundamental freedoms."¹³² The Commission's commentary provides that the term "human rights and fundamental freedoms" is meant to cover, among other things, "the right of peoples to self-determination."¹³³

When the self-determination of any people is violated, other nations have a compelling stake in the violation. In the post-World War II era, respect for the independence of states and the principle of self-determination has become the basis upon which maintenance of a balance of power is founded. Interventions directly attack the principles by which all nations exist. And where interventions have balance of power implications, as they generally do, they directly attack the power structure of international relations by which all nations maintain their independence and national security, and ultimately, their freedom, their access to resources, and their opportunities for trade

¹³⁰ 1985 Report of the International Law Commission, *supra* note 129, at 54.

¹³¹ 1976 Report of the International Law Commission, *supra* note 17, at 226, 288, reprinted in, [1976] 2(2) Y.B. INT'L L. COMM'N at 95, 120.

¹³² 1985 Report of the International Law Commission, *supra* note 129, at 54.

¹³³ *Id.* at 58, para. 21.

and development. Thus, all nations have an essential stake in defending the balance of power against illegal interventions and their potential impairment of the balance.

The right of a third state to respond by counterintervention to violation of the rule of nonintervention protects not only the right of self-determination of the people of the offended state, but also the interest of the third state and of all states in maintaining the balance of power against shifts accomplished by violations of the principle of self-determination. The same considerations which dictate a right of collective self-defense under article 51 also dictate a right of counterintervention, subject to applicable limitations,¹³⁴ available to all states where illegal intervention occurs and infringes upon rights of independence, sovereignty and self-determination.¹³⁵

VIII. COUNTERINTERVENTION AND REGIONAL ACTION

Despite some popular impressions to the contrary, the Charter articles dealing with regional action authorize neither intervention nor counterintervention through regional arrangements. They do, however, deal with some kinds of foreign involvement in the region in a different way. For example, article 52, paragraph 1 provides:

Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.¹³⁶

Four points should be observed in the language of article 52, paragraph 1 concerning the provision for regional action. First, the article authorizes action only by "regional arrangements or agencies." Second, it authorizes action only in matters "relating to the maintenance

¹³⁴ These limitations include the restriction applicable in most kinds of intervention, absent armed attack, against carrying a response involving force against the territory of the offending state. This much is certainly clear in the 1986 Judgment of the International Court of Justice in the Nicaragua case. *Nicaragua v. United States*, *supra* note 9, paras. 211, 249, 252. To the extent that paragraph 249 purports to go beyond this and to restrict third states from taking *any* counter-measures to intervention by Nicaragua in El Salvador short of armed attack, even in response to intervention involving a violation of article 2(4), it is dictum only, stated without explanation or foundation. *Id.* at para. 249.

¹³⁵ See Moore, *supra* note 44, at 195.

¹³⁶ U.N. CHARTER art. 52, para. 1.

of international peace and security." Third, it authorizes action only in matters "appropriate for regional action." Fourth, only activities "consistent with the Purposes and Principles of the United Nations" are permitted.

The essential legal position asserted by the United States in the Cuban missile crisis in 1962 was that the "quarantine" action by the Organization of American States was permitted under article 52, paragraph 1.¹³⁷ Similarly, in the 1983 action in Grenada, the United States relied in part on article 52 in asserting the validity of regional action under the Treaty establishing the Organization of Eastern Caribbean States, *at least where* the action was taken at the invitation of the Governor-General of Grenada.¹³⁸

Article 52, paragraph 1 does not provide for intervention by a regional agency. Regional action must respect the equal rights, self-determination, and sovereignty of all nations; the principle of non-intervention must be adhered to. There may, of course, be a counterintervention response through regional action to an illegal intervention whether by a state within the region or by a state outside the region. That right of counterintervention, however, is not derived from article 52.

Article 52 does contemplate a special role for regional arrangements or agencies in matters "appropriate for regional action." This role has a long history. Action for the maintenance of peace and security, potentially involving the use of force, had always been at the root of the Monroe Doctrine and later of the inter-American developments from the Declaration of Lima to the Act of Chapultepec.¹³⁹ Such matters had for a long time been recognized as "appropriate for regional action." The Covenant of the League of Nations had provided in article 21 that nothing in the Covenant should be deemed to affect the validity of "regional understandings like the Monroe Doctrine, for securing the maintenance of peace."¹⁴⁰ As noted in Part

¹³⁷ *Department of State Memorandum: Legal Basis for the Quarantine of Cuba*, reproduced in, A. CHAYES, *THE CUBAN MISSILE CRISIS* app. III (1974); Chayes, *The Legal Case for U.S. Action on Cuba*, 47 DEP'T ST. BULL. 763 (1962).

¹³⁸ Robinson, *supra* note 41, at 384; Leich, *supra* note 41, at 663. See also statement of Deputy Secretary of State Kenneth W. Dam, *supra* note 41, at 203.

¹³⁹ A useful summary is contained in *Memorandum for the Attorney General Re: Legality under International Law of a Remedial Action against Use of Cuba as a Missile Base by the Soviet Union*, reproduced in, A. CHAYES, *supra* note 137, at app. I.

¹⁴⁰ LEAGUE OF NATIONS COVENANT art. 21.

V above,¹⁴¹ the provisions in the United Nations Charter were specifically designed to give approval to the arrangements provided and contemplated in the Act of Chapultepec of 1945.¹⁴²

The kinds of action which article 52 contemplates include the long standing hemispheric concerns over the involvements of outside powers. Whatever else is comprehended within the language of "such matters relating to the maintenance of international peace and security as are appropriate for regional action," this language at least must include the right of the states of the region by collective action to exclude military bases or military forces or other armed involvement in the region by an outside power that endangers the peace and security of the region.¹⁴³ It cannot, of course, include a right to bar an outside power's action in support of a victim of armed attack under article 51 or the legitimate exercise of a right of counterintervention to oppose an illegal intervention. Indeed, the premise for regional action barring outside military bases or military forces requested by a regional state for its own security must be a framework in which the regional powers do not themselves threaten the security of that state by failing to respect the Charter limitations on the use of force.

¹⁴¹ See *supra* note 91 and accompanying text. See also *supra* notes 113-14 and accompanying text.

¹⁴² Summary Report of Fourth Meeting of Committee III/4, May 25, 1945, Doc. 576, III/4/9, 12 U.N.C.I.O. Docs. 679, 681. The specific reference to the Act of Chapultepec was in relation to the collective right of self-defense under what is now article 51 of the Charter. However, the Act of Chapultepec was not limited to dealing with threats or acts of aggression against an American state and organizing the use of armed force "to prevent or repel aggression" (part II). It also reaffirmed the Declaration of Lima in terms stating that in case the peace, security, or territorial integrity of any American republic is "threatened by acts of any nature that may impair them," the American states proclaim their determination to make effective their solidarity "using the measures which in each case the circumstances may make advisable" (preamble, clause [i]). 60 Stat. 1831, T.I.A.S. No. 1543. The accompanying resolution further called for regular meetings of the ministers of foreign affairs and charged them with making decisions on problems "with regard to situations and disputes of every kind which may disturb the peace of the American Republics" (para. 2). 60 Stat. 1847, T.I.A.S. No. 1548. This broad scope is carried forward in articles 3 and 6 of the Rio Treaty of 1947 (62 Stat. 1681, T.I.A.S. No. 1838, 21 U.N.T.S. 93, 43 AM. J. INT'L L. 53 (Supp. Docs. (1949))), and in articles 24 and 25 (now articles 27 and 28) of the 1948 CHARTER OF THE ORGANIZATION OF AMERICAN STATES (2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 48; 1967 Protocol of Amendment, 21 U.S.T. 607, T.I.A.S. No. 6847, 64 AM. J. INT'L L. 996 (1970)).

¹⁴³ The "quarantine" action by the OAS in the Cuban missile crisis would fall within this scope. The OECS action in Grenada would have to depend on a different rationale for being "appropriate for regional action." See position of Prof. Moore, *infra* note 152 and accompanying text.

Article 53, paragraph 1 contemplates a further role for regional arrangements or agencies, providing that “[t]he Security Council shall, where appropriate, utilize such regional arrangements or agencies *for enforcement action under its authority*.”¹⁴⁴ One should not read the limitations of article 52, paragraph 1 into the role of regional action as an instrument of the Security Council. The relevant limitations here are the provisions governing “its authority,” i.e., the Security Council’s authority for “enforcement action” under the Charter. Article 53, paragraph 1 adds: “But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council.”¹⁴⁵ This provision makes clear that regional action in this expanded role, being outside the limitations of article 52, paragraph 1 and carried out as an instrument of the Security Council, requires Security Council authorization.

Article 52, paragraph 1 does not develop the concept to define what matters relating to the maintenance of international peace and security are “appropriate for regional action.” The concept, however, must be based on a regional community of interest, shared even by a dissenting state, though that state may be opposed in the particular case for reasons believed by the dissenting state to be valid. Regional action is not to be used as a device merely to enforce the will of the many against the few. It is to safeguard genuine security interests applicable to the region as a whole.

Regional action conforming to article 52, paragraph 1 is not intervention. To exclude the establishment within a regional state of a military base of an outside power, for example, is not to deny that state the choice of its own form of government, social policy, economic system, or foreign policy. Rather, the purpose of the exclusion is to safeguard the genuine security interests of the region as a whole.

Similarly, the supply of military assistance by an outside power is not necessarily illegal intervention, where it is neither sought, given, nor used to tip the scales of force in a local contest for power. Furthermore, if supplying the assistance is not intervention, the legal ground for precluding it by regional action under article 52, paragraph 1 cannot be counterintervention even though the regional action may be designed to provide a therapeutic insulation against foreign involvement likely to develop into future intervention.

¹⁴⁴ U.N. CHARTER art. 53, para. 1 (emphasis added).

¹⁴⁵ *Id.*

Regional action under article 52 stands apart. Where intervention occurs, the right of regional counterintervention is not dependent on article 52. Where the peace or security of the region is threatened by actions which involve neither "armed attack" under article 51 nor illegal intervention giving rise to a right of counterintervention, the threat may still be dealt with by appropriate regional action within the limitations of article 52, paragraph 1.

IX. REGIONAL ACTION INVOLVING FORCE

It is not within the scope of this Article to define the limits on the use of force in regional action, but it is relevant, as in the previous section, to relate the issues involved in regional action to the right of counterintervention. Different kinds of regional action clearly stand on different legal grounds, and uses of force likewise stand on different grounds.

Four different kinds of legal authority for regional action are relevant. First, when states utilize regional arrangements or agencies under article 53 for enforcement action under the authority of the Security Council, the use of force derives its legality from the provisions governing such action by the Security Council under article 42.¹⁴⁶ Second, when regional action occurs in the exercise of the right of states for individual or collective self-defense against an armed attack, the right to use force is the inherent right affirmed by article 51. Third, where regional action occurs in the implementation of the right of counterintervention without the benefit of article 51, the right to use force is the right of third states. The right lies in the law of remedies for violations of international law and is shaped to conform to the limitations on the prohibition contained in article 2, paragraph 4. Fourth, the issues are different when there is no Security Council authorization, no armed attack, no violation of international law, and the exclusive authority to be invoked for regional action involving force is article 52, paragraph 1. Such use of force must still, of course, conform to the general provisions of article 2, paragraph 4.

¹⁴⁶ U.N. CHARTER art. 42 provides:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

It is fair to say that full agreement does not yet exist as to when, or perhaps whether, regional action under article 52, paragraph 1 in matters relating to the maintenance of international peace and security may involve the use of force. Nor does such agreement exist, as this issue is often perceived, as to when or whether such action requires Security Council authorization under article 53, paragraph 1. The relation between the concept of regional action in matters "appropriate for regional action" under article 52, paragraph 1, and the concept of "enforcement action" for which Security Council authorization is required under article 53, paragraph 1, is crucial in view of the veto available to permanent members of the Security Council under article 27.

The language of article 53, paragraph 1 barring "enforcement action" without Security Council authorization does not stand alone. This language must be reconciled with article 52 allowing regional action for "the maintenance of international peace and security." Moreover, the language must be reconciled with the purpose of articles 51 through 54 to preserve the regional arrangements of the inter-American system and others like it, not to nullify them. To read into article 53 a requirement that allows the big power veto to deny all regional action involving force would be contrary to the general scheme of articles 51 through 54. The purpose of articles 51 through 54 was not to take the teeth out of the collective policies and developing institutions of the nations of the Americas, but to affirm their role, subject to overriding action by the United Nations. As noted above, a role which may potentially involve the use of force in matters relating to the maintenance of peace and security, had for a long time been recognized as appropriate for regional action. The Act of Chapultepec, which the San Francisco Conference attempted to confirm, did not limit the use of force by regional action to situations dealing with acts of aggression in the right of collective self-defense within article 51.¹⁴⁷

There is nothing in the language of article 53, paragraph 1 that explicitly provides that Security Council authorization is needed for any regional action falling within article 52, paragraph 1. This is true whether or not such regional action involves the use of force. As noted in Part VIII above, article 53, paragraph 1 provides a role for regional action as an instrument of the Security Council, defined by

¹⁴⁷ See *supra* note 142.

the authority of the Security Council, and standing apart from and not limited by the authority of regional agencies and arrangements under article 52, paragraph 1. Whether article 53, paragraph 1 does more than this, and, if so, what, is not entirely clear.

From the language of the articles themselves there are at least three alternative ways to relate article 52, paragraph 1, and article 53, paragraph 1. First, the articles can be read together as providing that anything which falls within article 52, paragraph 1, as "appropriate for regional action" is placed within the defined authority for regional action, and is therefore not "enforcement action" dependent upon Security Council authorization under article 53, paragraph 1. Second, the articles can be read together as relating to separate substantive concepts: one, whatever is appropriate for regional action, and two, action defined by its purpose and character to be enforcement action. These are different concepts which may, however, overlap. Either may involve the use of force, but regional action within article 52, paragraph 1, which is also enforcement action under article 53, paragraph 1, requires Security Council authorization. Third, the articles may be read as providing that any action that involves the use of force is necessarily enforcement action under article 53, paragraph 1 requiring Security Council authorization.

The third alternative in effect treats the term "enforcement action" as a catchall term covering every action involving the use of force. This approach encounters textual problems with other provisions of the United Nations Charter. For example, its effect would be to subject regional action to a narrower rule on the use of force than article 2, paragraph 4 provides. Regional action within article 52, paragraph 1 involving the use of force which is not "against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations,"¹⁴⁸ and which is, therefore, not prohibited by article 2, paragraph 4, would nevertheless require Security Council authorization. This would be an unusual requirement for action which conforms to the limitations of article 52, paragraph 1, since action which is within article 52, paragraph 1 is action implementing the purposes of the United Nations. Furthermore, to deny regional action which is not prohibited by article 2, paragraph 4 would preclude even those regional actions which each of the states could take in its own right.

¹⁴⁸ U.N. CHARTER art. 52, para. 4.

It also would come as a surprise to most readers that "enforcement action" under article 53 could have anything to do with the "inherent" right of individual or collective self-defense. Yet, under the third alternative, even the inherent right of individual or collective self-defense affirmed in article 51 would have to be treated as an exception to the requirement of Security Council authorization for enforcement action, since regional action in collective self-defense is regional action involving the use of force. Secretary of State Dean Acheson, in testimony before the Senate Committee on Foreign Relations on the Treaty establishing the North Atlantic Treaty Organization, cogently rejected this relationship in these terms:

Senator, I do not think that article 53 has any application whatever to this problem. There is no question of "getting around" anything in the Charter. We have no desire to get around anything whatever. Article 53 deals with a regional arrangement which has been set up, for whatever purpose it may be, and article 53 says that that regional arrangement shall not, itself, undertake positive coercive enforcement action against any country unless the Security Council asks it to do so and authorizes it to do so. Article 53 has nothing whatever to do with the right of self-defense, individual or collective. Therefore, article 53 is not involved in our discussions in any way whatever.¹⁴⁹

In the Cuban missile crisis, the United States, treating "enforcement action" in article 53 as a term of independent meaning, took the position that regional action which is "recommendatory in character" cannot involve "enforcement action."¹⁵⁰ The United States further asserted that even regional action which is obligatory in character is not necessarily "enforcement action."¹⁵¹

Professor Moore, looking also to a substantive concept of "enforcement action," contends that regional "peacekeeping" actions within the limitations of article 52, not directed against a government as sanctions, are not "enforcement actions" under article 53 even though such actions involve the use of force.¹⁵²

¹⁴⁹ See Mallison, *Limited Naval Blockade or Quarantine-Interdiction: National and Collective Defense Claims Valid Under International Law*, 31 GEO. WASH. L. REV. 335, 375 (1962).

¹⁵⁰ *Department of State Memorandum: Legal Basis for the Quarantine of Cuba*, *supra* note 137, at 146-48. See also J. PERKINS, *supra* note 33, ch. 10.

¹⁵¹ *Department of State Memorandum: Legal Basis for the Quarantine of Cuba*, *supra* note 137, at 146-48.

¹⁵² Moore, *Grenada and the International Double Standard*, 78 AM. J. INT'L L. 145, 154-56 (1984). See also Robinson, *supra* note 41. Compare Schachter, *supra*

A reading of article 53 equating "enforcement action" with any action involving the use of force is unnecessary and unacceptable. Although not a comprehensive definition of the limits of regional action involving force where there is no Security Council authorization, no armed attack, and no illegal intervention involving the use of force, necessary limitations should be indicated.

First, such regional action cannot involve the use of force "against the territorial integrity or political independence" of any state in violation of article 2, paragraph 4. There is nothing in article 52, paragraph 1 to suggest that the standard of what is "appropriate for regional action" overrides article 2, paragraph 4. Second, the regional action cannot involve illegal intervention. This follows both from the article 2, paragraph 4 prohibition on the use of force in any manner "inconsistent with the Purposes of the United Nations" and from the specific provision of article 52, paragraph 1, limiting regional arrangements and agencies to activities "consistent with the Purposes and Principles of the United Nations." Third, Chapter VII of the Charter vests exclusive authority in the Security Council to take binding action outside the limits of article 2, paragraph 4 in dealing with threats to the peace, breaches of the peace, and acts of aggression. This authority is available for regional action only to the extent the Security Council authorizes the regional action under article 53. Whether the requirement of Security Council authorization extends beyond this, it clearly does apply here.

It must be said that agreement is lacking as to whether or to what extent article 53, paragraph 1 impinges on article 52, paragraph 1. The United Nations General Assembly 1970 Declaration on Principles on International Law (Resolution 2625) provided that "[n]othing in the foregoing paragraphs 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."¹⁵³

As to this paragraph, Rosenstock commented:

The final paragraph is a general formulation which avoids the existing disagreements among the Member states. The text thus

note 3, at 1640-41. Compare Akehurst, *Enforcement Action By Regional Agencies, With Special Reference to the Organization of American States*, 1967 BRIT. Y.B. INT'L L. 175, 205, 213. Professor Moore has previously made clear his view that a condition of such a peacekeeping action is "neutrality among factions to the extent compatible with the peace-keeping mission." J.N. MOORE, *supra* note 3, at 27.

¹⁵³ Resolution 2625, *supra* note 6, at 123.

accommodates those who support and those who oppose the residual peacekeeping role of the General Assembly in cases in which the Security Council is unable to act, *those who regard regional organizations as able to authorize the use of force under certain circumstances and those who do not*, those who subscribe to the notion of an inherent right of self-defense against colonialism and those who do not, those who read Article 51 restrictively and place their emphasis on the phrase "if an armed attack occurs," and those who do not. It cannot be gainsaid that the generality of this paragraph diminishes the utility of the text as a whole, since it leaves unanswered so many important questions relating to the use of force. The gaps between governmental positions on the matters in question are, however, so great that it was not possible to contemplate general agreement on any detailed language.¹⁵⁴

X. COUNTERINTERVENTION IN SUPPORT OF INSURGENTS

The urgency for acceptance of a rule of nonintervention that prohibits intervention in support of a recognized government, just as it prohibits intervention in support of insurgents, was noted above in Part III. Only a principle of reciprocal abstention can provide the neutralizing rationale to confine local contests to their local contestants. If this principle is to be respected, the same urgency requires that counterintervention be permissible to oppose illegal intervention in support of a government, just as it is to oppose illegal intervention in support of insurgents. Where manipulation of the balance of power is at stake, a rule which may be violated with impunity on one side cannot command respect.

A right of counterintervention in support of insurgents is subject to the limitations discussed in the foregoing analysis: there must first be an *illegal* intervention in favor of the government; the response must be necessary and proportional as corrective action reasonably tailored to the need; and force cannot be used unless the illegal intervention itself involved the use of force, either directly or indirectly.

¹⁵⁴ Rosenstock, *supra* note 50, at 723-24 (emphasis added). See, e.g., Akehurst, *supra* note 152, at 197-203 (contesting the United States legal position in the Cuban Missile crisis); Franck, *Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809, 824 (1970); Schachter, *supra* note 3, at 1640. Compare L. HENKIN, *supra* note 92, at 296 (summation); A. CHAYES, *supra* note 137, at 149, 152-53 (comment). See generally *supra* note 90.

The application of two other limitations requires further consideration. First, if article 51 allows a third state to carry force against the territory of an offending state only when an armed attack occurs against the victim state, it is going to be an unusual case where article 51 can apply to illegal intervention *in support of* a government. There is no occasion in that case for the intervention to involve an armed attack. Even if the involvement of the intervening state in the local conflict is substantial enough to regard the intervening state as itself involved in an armed attack against the insurgents, this does not meet the requirement of article 51, which refers to an armed attack "against a Member of the United Nations."¹⁵⁵ This is true even though the same principle undoubtedly applies to an armed attack against a state which is not a member of the United Nations. Under the language of article 51, it is an armed attack against the state, rather than the insurgents, which triggers the right of *collective* self-defense under article 51.

This result seems appropriate. It does not deny a right of counterintervention, but merely denies a collective self-defense response by force carried against the territory of the offending state.¹⁵⁶ The requirement of proportionality in any event could rarely, if ever, support an attack on the territory of the offending state as a response to aid to a government against its insurgents. To allow such attack would more likely escalate the resort to force than control it.

The second limitation requiring special consideration involves respect for the sovereignty of the illegally assisted government over its own territory. Under article 2, paragraph 4 of the Charter, force may not be used against "the territorial integrity or political independence of any state."¹⁵⁷ Counterintervention in favor of insurgents and against the recognized government of a state by military action upon its territory would be in violation of article 2, paragraph 4.¹⁵⁸

As in the case of a response of force carried against the territory of an offending third state, this result seems appropriate. To deny

¹⁵⁵ U.N. CHARTER art. 51.

¹⁵⁶ The prohibition of "acts of reprisal involving the use of force" under G.A. Res. 2625, *supra* note 6, may be applicable as discussed in Part V in text.

¹⁵⁷ U.N. CHARTER art. 2, para. 4.

¹⁵⁸ Article 17 (now article 20) of the Charter of the Organization of American States, *supra* note 142, is more explicit, providing: "The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another state, directly or indirectly, on any grounds whatever." 2 U.S.T. 2394, T.I.A.S. No. 2361.

a response by military action within the territory of the aided government is to deny a response which would turn an insurrection into warfare between states. Again, such a resort to force could rarely, if ever, be supported under the requirement of proportionality and, if allowed, would be more likely to escalate resort to force than to control it.

At a 1982 Law Professors' Conference, Professor Moore asserted as "a flat rule" that "there is no right of counter-intervention on behalf of insurgency," contending that "the consequences to world order are simply devastating."¹⁵⁹ This, of course, amounts to denying a remedy in that case even though there has been a violation of the rule of nonintervention under international law. Professor Moore's position goes too far. Under the limitations which follow from the analysis of this Article, the consequences of counterintervention in favor of insurgents are not devastating.¹⁶⁰ They are controlled by law and limited by the necessities of the specific case. A worse danger to world order would ensue if the law itself is allowed to serve as a sanctuary for illegal intervention in favor of the government.

Professor Schachter recognized the necessity of a right of counter-intervention in opposition to illegal intervention in favor of either side. He contends:

The second and more difficult question is whether an illegal intervention on one side permits outside states to give military aid to the other party (whether government or insurrectionists). Such counter-intervention may be justified as a defense of the independence of the state against foreign intervention; it may then be viewed as "collective self-defense" in response to armed attack. True, it may also further "internationalize" a local conflict and increase the threat to international peace. The Vietnam War is the outstanding example. Despite the danger, the law does not proscribe such counter-intervention. It is not that two wrongs make a right but that the grave violation of one right allows a defensive response. The political

¹⁵⁹ *Panel One: General Discussion*, 13 GA. J. INT'L & COMP. L. 231, 234-35 (Supp. 1983). Professor Moore treated assistance to the Afghan people as a different case covered by article 2, para. 4. *Id.* at 236.

¹⁶⁰ In his remarks at the 1982 conference, Professor Moore treats assistance to a widely recognized government to prevent a takeover by an externally assisted insurgent group as, conceptually, one of two "exceptions" to the rule of nonintervention rather than simply as a remedy for the violation of the rule by another state. Moore, *supra* note 44, at 196. It would seem that the "exception" approach would not necessarily absorb the limitations which inhere in counterintervention as a remedy under law.

solution is to avoid its necessity by a strict application of a non-intervention rule applied to both sides.¹⁶¹

Allowing counterintervention in favor of a recognized government while prohibiting counterintervention in favor of insurgents would deny the validity of the modern reciprocal rule of nonintervention. That reciprocal rule, still too widely honored in the breach, is essential to international stability and the maintenance of the balance of power. Without its corollary, the reciprocal right of counterintervention, every internal contest for power has the potential of becoming a confrontation between the major powers.

CONCLUSION: COUNTERINTERVENTION AND THE RULE OF LAW

This is the age of Angola, Ethiopia, Afghanistan, El Salvador, Nicaragua, Lebanon and Grenada. Realism dictates that in a world made up of separate nation-states, we must be prepared to face the omnipresent risk, if not the crisis reality, that some states will be prepared to advance what they perceive to be their strategic advantage however they think they can. International law must be viable in this kind of world.

The prospects for law in a divided world depend on the recognition of a right of counterintervention under law, in support of law, and limited by law. Without such a right providing effective legal remedy for violations of international law, the regime of law itself is put in jeopardy, and nations inevitably will seek recourse in measures and policies outside of law. It should come as no surprise that without an effective remedy, nations will feel free to take actions on grounds transcending law. If, on the other hand, the law can allow effective responses within its framework, there is no need and no justification for setting international law aside in the interests of national security.

¹⁶¹ Schachter, *supra* note 3, at 1642. There are problems with Professor Schachter's categorization of the counterintervention in the form of providing military aid as "collective self-defense" in response to armed attack." Intervention by the provision of military aid may take a variety of forms, and even those involving a substantial violation of article 2, paragraph 4 do not necessarily amount to an armed attack under article 51 or under the right of collective self-defense under customary international law as now declared by the International Court of Justice in *Nicaragua v. United States*. It does not follow that, absent armed attack, no response involving force is permitted, specifically to a violation involving force which can be effectively opposed only by force. Rather, the absence of armed attack has the effect only of precluding a counterintervention response by force against the territory of the offending state. See the discussion in Parts V and VI of the text.

It has been argued that the adoption of article 2, paragraph 4 presupposed that effective remedies, including even the use of force, would be available to deal with violations through action by the Security Council.¹⁶² It has been argued further that with contention between the major powers having in fact paralyzed the Security Council, the rule of article 2, paragraph 4 as it was written must be reinterpreted "to develop a set of criteria for appraising the lawfulness of unilateral resorts to coercion."¹⁶³ The historical premise to these arguments is unfounded. Nor do the intervening developments require a retreat from the rule of article 2, paragraph 4. There were hopes certainly for an effective role for the Security Council, but the risk that Security Council action might be frustrated by big power division and by the veto vested in permanent members of the Council was not ignored. This risk was indeed a foremost concern at the San Francisco Conference, leading to the specific confirmation of the right of collective self-defense in article 51. The risk was addressed also in the Committee report quoted above in Part V asserting that under the language of article 2, paragraph 4, it is the "unilateral use of force or similar coercive measures" which is prohibited, and specifically confirming that the use of arms "in legitimate self-defense remains admitted and unimpaired."¹⁶⁴

The post-World War II United Nations system did not cast its reliance solely on action by a veto-hobbled Security Council. It allowed for a General Assembly capable of shaping the force of collective judgment. It allowed for regional action within limitations. It allowed for individual and collective self-defense in the event of an armed attack. Beyond all this it limited the prohibition on the use of force, allowing remedies by state action where countermeasures are necessary to oppose and redress violations of the law.

It is now clear that the need is broader than the case of "armed attack" dealt with in article 51, and that the remedies appropriate to the need may involve direct or indirect uses of force short of the direct counter-attack against the attacker permitted under the right of "self-defense" affirmed in that article. Under the decision of the International Court of Justice in its 1986 Nicaragua case Judgment,¹⁶⁵

¹⁶² Editorial Comment, Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642, 643 (1984).

¹⁶³ *Id.*

¹⁶⁴ See *supra* note 90 and accompanying text.

¹⁶⁵ *Nicaragua v. United States*, *supra* note 9.

significant violations of article 2, paragraph 4 may not amount to an "armed attack" to which article 51 applies. Countermeasures in support of law rest on the general law of remedies. In regard to violations involving no armed attack, it becomes critical that article 2, paragraph 4 within its formulation allows, as it also limits, the use of force within the law of remedies.

An effective right of counterintervention within a framework of law obviates the perceived need which may underlie resistance by many to the post-Charter rule of nonintervention. To the affirmation of the general prohibition against coercive interference in the internal or external affairs of other states in Resolution 2625¹⁶⁶ must now be added its explicit acceptance as a part of customary international law by the International Court of Justice in *Nicaragua v. United States*.¹⁶⁷ The earlier principle, that military assistance may be provided at the request of the recognized government to deal with cases of genuine and purely indigenous internal conflict, provides no rationale necessary to a peaceful or lawful world order. Whatever action is necessary for those purposes can be implemented within the limits of a legal right of counterintervention. Indeed, the earlier principle would prove too much. There could be circumstances where its effect would be to legitimize what would otherwise be an illegal intervention, and worse, it would have the further legal effect of blocking a legitimate counterintervention response. Any role which an intervention might serve in support of the rule of law is better served by the right of counterintervention. Relying on a right of counterintervention clearly and directly addresses the support of law on the basis of countermeasures under law and limited by law.

We live in a time when for many the rule of law in international affairs is itself rejected as a relevant concept for determining state action. A misunderstanding with potentially tragic consequences seems to persist in the minds of many. This is the conception that realists have to make a choice between the rule of law and the hard policy decisions necessary to deal with the realities of power and contention. This, I submit, is a misconception. The law evolves out of these realities. It responds to the political logic and the security imperatives of this world.

¹⁶⁶ Resolution 2625, *supra* note 6, at 121.

¹⁶⁷ *Nicaragua v. United States*, *supra* note 9.

Law allows the means to address the security concerns created by the expansionist designs of states at a number of diplomatic, political, and legal levels. The law of remedies is a part of law. Serving an essential role in giving force to the rule of law, it allows remedies by state action where countermeasures are necessary to oppose and redress violations of the law.

The right of counterintervention is a part of the means by which law responds to the realities of a world made up of separate nation-states. It is a right existing neither outside of nor transcending the law, but under and in support of law. We need to look within the framework of law for its support, not outside the law for actions which in the end can only undermine and destroy it.

