PRACTICAL CONSIDERATIONS FOR THE DEVELOPMENT OF LEGAL STANDARDS FOR INTERVENTION

*Michael J. Matheson**

I am delighted to have the opportunity to take part in such a distinguished panel and, I might add, speak before such a distinguished audience, including one of our great former statesmen. I am particularly delighted to have the opportunity to comment upon the presentation by Professor Moore, who was a former colleague and mentor of mine in the Legal Adviser's Office of the State Department.

I think Professor Moore has given us an excellent historical summary of the development of legal principles in the area of intervention. The present law is quite specific as to the circumstances in which states may or may not become involved in civil wars in another country. On one side of the equation, internationally accepted documents such as the United Nations Declaration on Friendly Relations[1] and the Definition of Aggression[2] contain very clear and specific indications that assistance by one government to insurgents fighting against another government is, in fact, an unlawful use of force under the United Nations Charter. This is, of course, quite understandable since any such interference by one government essentially against another government has all the undesirable and destablizing consequences, politically and legally, of any other use of force by one government against another, and could be highly dangerous to the stability of world order. The situation on the other side of the equation, in which assistance is given by one government to another government when violence is occurring within that state, is somewhat less clear than Professor Moore has indicated. Various international documents contain general

---

*Assistant Legal Adviser for Politico-Military Affairs, Department of State.

[1] Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1971), *reprinted in* 9 I.L.M. 1292 (1970).

[2] Resolution on the Definition of Aggression, G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1975), *reprinted in* 13 I.L.M. 710 (1974).

principles, such as the principle of non-intervention, which are stated rather broadly and are susceptible to differing interpretations. These principles, at least in the post-war period, have not been uniformly applied by states so as to indicate that there is a general prohibition on assistance to governments which are faced with insurgent situations in their countries. However, it is certainly true that we, as an international community or as private scholars, do need to address this problem. Quite clearly, foreign intervention in some circumstances, even with the consent of the government involved, can produce destablizing or other undesirable consequences. Therefore, we need to look for a sensible regime which will be generally acceptable in the international community.

I would like to offer a few practical considerations from the point of view of someone who is trying to deal on a day-to-day basis with this kind of problem, considerations which should be given careful attention when trying to develop legal standards to govern this area. First, we have to remember that a government which is considering assisting another government is working not only within the confines of international law, but also within its own domestic law and procedures. This is particularly true with respect to the United States because Congress has had a very persistent interest, particularly in the post-Vietnam period, in the question of limitations on assistance by the United States government to other governments which have violent situations or insurgencies within their boundaries. The body of United States domestic law on this subject primarily consists of the Foreign Assistance Act,[3] the Arms Export Control Act[4] and the annual foreign assistance authorization and appropriation legislation. These pieces of legislation make quite clear that assisting foreign countries in providing for their internal security is a proper object of United States security assistance. In the context of these statutes, internal security refers to violence of an internal character above the level of ordinary law enforcement tasks. However, other statutes place restrictions on situations in which such assistance may be provided. The most prominent restriction is in the area of human rights. The general provisions of section 502(B) of the Foreign Assistance Act[5] and specific limitations and requirements dealing with the individual circumstances of particular countries require that United

[3] 22 U.S.C. §§ 2151-2429 (1976 & Supp. V 1981).
[4] 22 U.S.C. §§ 2751-2796 (1976 & Supp. V 1981).
[5] 22 U.S.C. § 2304 (1976).

States security assistance to foreign countries, including military assistance and the providing of military training personnel, be granted in a manner which enhances and encourages observance by the recipient country of internationally recognized human rights. Under some circumstances, a suspension or termination of assistance may be warranted if these requirements are not met. Although this is just one national model for a description of the circumstances and limitations on involvement in foreign violent situations, it is a particularly relevant one for us, and should be considered as one possible starting point for the development of international standards in this area.

As an alternative, or perhaps as a supplement, it has been suggested by Professor Moore and others that there should be a legal regime based essentially on the notion that when the level of violence in a country reaches a certain threshold, which has often been referred to as an insurgency or civil war, then assistance should terminate not only to the insurgents, but also to the government. I would like to suggest a few practical problems which would occur in persuading governments to accept such a general rule, and in ensuring that they follow it even if they are prepared to accept it. First, requiring one government which has a close and friendly relationship with another, and which is providing assistance for a wide variety of purposes, to withdraw that assistance at a certain point in the development of an internal violent situation, perhaps at the point when external assistance is most desired and most necessary, runs counter to the policy thrust and the basic interests of such governments. For example, to take a recent episode in the history of the Salvadoran conflict, the last year of the Carter Administration was marked largely by intermittent suspensions or restrictions on assistance to the Salvadoran government, primarily for human rights reasons. But, in January 1981, the last month of the Carter Administration, there was an immediate resumption and a dramatic increase in the level of United States military assistance. This increase was not the result of any significant change in the human rights situation, but rather the result of a dramatic escalation in the current level of threat to the government because of the so-called final offensive by insurgent forces. This is the normal and natural reaction of a government which has an interest in a continuing relationship with another government, but it would be in this situation that the concept of a threshold would require the withdrawal of assistance. In such a situation, a withdrawal of assistance would never be perceived as a neutral act. To the contrary, it

would be perceived as a political defeat for the government being assisted. Therefore, the concept of a threshold upon which assistance must terminate would probably be difficult to apply in practice because a supplying government which finds strong reasons to continue its relationship will attempt to avoid having to terminate assistance by stretching the facts or stretching the legal rationale. The recipient government, if faced with the prospect of a termination of assistance, may be tempted to take draconian measures to attempt to suppress opposition activities so that the threshold will not be regarded as having been met. It is not clear that in practice such a threshold would produce the right results.

The second practical problem is that military assistance relationships are often used to apply leverage for the purpose of securing better compliance by the recipient government with international norms, particularly those related to human rights and to humane conduct in the conflict. Historically, this has certainly been a feature of United States efforts. A desire to use security assistance programs, at least to some extent, for leverage to increase human rights compliance is a desire shared throughout the United States political community. The effect of an automatic threshold requiring termination of assistance would be, of course, to minimize the possibility of using this aspect of one's relationship for this kind of leverage.

Finally, I would like to address the intriguing question that Professor Moore also addressed: is there a difference between El Salvador and Afghanistan? Without belaboring the obvious, I want to say, first of all, that I agree entirely with the points that Professor Moore made about the fundamental differences between those conflicts. I would like to add a few further observations on the question. First, clearly the conflict in Afghanistan is not an internal conflict at all; it is an international conflict. It is a case of external aggression, external occupation of one state by the armed forces of another. It is a case where the existing government was physically disposed of, a new government was installed, and a convenient invitation to intervene was secured. Under those circumstances, quite clearly the rules of international law which relate to international armed conflicts apply. This includes not only those rules which deal with the use of force, but also those rules which deal with the conduct of armed forces during the conflict — the Geneva

Protocol of 1925,[6] the Geneva Conventions of 1949,[7] and the customary rules of law which apply in international armed conflict. Furthermore, if other aspects of the two situations are compared, fundamental differences can be seen. Consider the level and character of Soviet forces in Afghanistan as compared to United States personnel in El Salvador. In El Salvador we have about fifty training personnel who do not engage in combat functions. In the case of Afghanistan, over 100,000 Soviet combat personnel invaded the country and continue to engage in massive fighting against local insurgents and remnants of government forces. Furthermore, there is a rather radical difference between the conduct of Soviet forces in Afghanistan and the conduct of United States personnel in El Salvador. The body of reports which we now have indicates that Soviet forces in Afghanistan not only have committed systematic violations of the rules of warfare, but also have engaged in indecent human conduct on many occasions, including targeting civilian populations for attack and using weapons prohibited by international law. On the other hand, one of the primary objectives of the training programs being conducted by the United States personnel in El Salvador has been to instill respect for human rights and humane conduct in the personnel of the Salvadoran army and security forces.

The situations in Afghanistan and El Salvador are so fundamentally different that it is not useful to try to consider them in the same light. Nonetheless, there is no room for us to be complacent or self-congratulatory about the El Salvador situation. It clearly is a situation in which violence and human suffering continue on a massive scale. It is necessary for us to seek a peaceful resolution of this conflict in the context of the democratic process, and this is certainly the objective of the United States government.

---

[6] Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacterialogical Methods of Warfare, June 17, 1925, 26 U.S.T. 571, T.I.A.S. No. 8061, 94 L.N.T.S. 65.

[7] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.