LEGAL STANDARDS FOR INTERVENTION IN INTERNAL CONFLICTS

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It is not only an honor, but a personal pleasure to have the opportunity to participate in a conference honoring a great American Secretary of State and international lawyer, Dean Rusk. There will be many tributes during the course of this conference to former Secretary Rusk and to the great contributions that he has made to international law and diplomacy, but for me the most important contribution is his service — to use a local analogy — as a silver bell for freedom. In a world of many voices of confusion and doubt, he has served to call attention to the importance of self-determination, democratic freedoms, the rule of law, and the great principles of the United Nations Charter as the foundations for a peaceful world.

It is only fitting that in a conference honoring such a man we look at one of the greatest challenges to the United Nations system for control of coercion in the world: the problem of intervention and counter-intervention in internal conflicts. The primary violence realized in the post-Charter world has been some variant of civil or mixed civil-international conflict, and terrorist, interventionary, and counter-interventionary actions in such conflicts. We can cite too many examples of this kind of violence since World War II: Nigeria-Biafra, Northern Ireland, the Indo-China conflict, the Korean conflict, the Arab-Israeli conflict, and in the setting of current concern, the conflicts taking place in Central America. Developing an effective framework to control intervention and non-intervention in the contemporary world is what we might call a Rubik's cube of international law. The normative aspects of interventionary behavior present a great puzzle, but not one that is incapable of solution.

Before turning to the specifics of the problem of developing norms of intervention, it might be useful to first step back and look at a somewhat broader framework and consider the overall

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evolution of the international law of conflict management, including the establishment of the United Nations Charter. This evolution has developed a number of separate but interrelated strands of conflict management, including norms concerning the separation of permissible from impermissible coercion, the laws of war and human rights in armed conflicts, institutional mechanisms for peaceful resolution of disputes and collective defense, and arms control, among others.

Historically, these strands developed through a number of different periods. The first was the "just war" period, which was associated particularly with the writings of St. Augustine. This period focused on separating permissible from impermissible coercion. The distinction depended on the justness of the war; if the conflict was a "just war" it was permissible. With the passage of time, it became rather evident that the "just war" principle was fundamentally defective. Among other things, opinions differed dramatically as to the justness of particular conflicts. In fact, in the usual form in which lawyers invent fictions to cover up problems in the law, one technically creative legal scholar created the fiction that he called the theory of invincible ignorance.[1] This theory said that though there could only be one objectively just side, invincible ignorance could lead to both sides believing that their cause was just, and therefore, excuse the waging of an unjust war.

From that period we move into a period which saw the development of the nation state. During this period, war was viewed merely as a policy option for nations, and law, I am sorry to say, fell out of favor. Some have called this period simply "war as fact." The notion of "just war" was dropped and international law said nothing about whether coercion was permissible or impermissible. Rather, war was simply a fact that existed and was recognized as such. However, some good came out of this period because it was during this period that the thrust for the development of the law of human rights applicable to armed conflict began. The "war as fact" period lasted until the horrors of World War I. At the end of that conflict, civilized nations agreed that the notion that war is simply a fact of international life was no longer tolerable, and that a normative assessment of an issue so important to the international community was required. But the shift to search for a normative standard more acceptable than the notion of "just war" was

[1] 3 E. VATTEL, THE LAW OF NATIONS § 40 (J. Chitty trans. 1852).

not made very quickly. Rather, in this period normative permissibility was initially conceived as a set of procedural checks under the League of Nations in which, for the most part, war was lawful or unlawful depending on whether one had complied with various waiting periods or procedural checks established in the League Covenant. It was felt, after all, that World War I had largely arisen by accident, and the key to preventing such a conflict was to prevent these accidents from occurring. Along came World War II, however, and war could no longer be rationalized as an accident. World War II seemed to be the result of the deliberate intention of a German government to take the world to war and achieve national objectives through the use of force.

In the wake of that war came a great strengthening of the international law of conflict management. Indeed, and not surprisingly in view of the horrors of this global war, an effort was made to strengthen all of the different strands. The United Nations Charter strengthened the collective defense strand, which was still very weak in the League Covenant, and which has not yet been made sufficiently strong to effectively deal with the real problems in the world. The laws of war were strengthened through a series of conferences, particularly the 1949 Geneva conferences and the protocols following the Indo-China conflict. But most importantly, the Charter framework on conflict management, along with the Kellogg-Briand pact,[2] achieved for the first time a clear focus on the normative principle as to when coercion is permissible and when it is impermissible. The normative principle was not the "just war" notion, but rather the notion that war as an instrument of foreign policy, that is, as a means of value extension, is prohibited in the international system. To somewhat oversimplify, the use of force is permissible only in defense against attacks made in contravention of the Charter's fundamental prohibition on the use of force. Now in my judgment, there has never been a more important principle of international law than this one. The modern world is one in which the capacity for destruction, even in a "minor" conflict involving the Falkland Islands, is simply so great that it does not make sense to use assessments of the justness of a cause as a normative standard or to permit war as an instrument of foreign policy. The use of force should be reserved for the protection of values threatened by forceful and illegal actions.

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[2] Treaty Providing for the Renunciation of War as an Instrument of National Policy, *done* Aug. 27, 1928, 46 Stat. 2343, T.S. No. 796.

This fundamental principle of the Charter is what must be applied to the problem of internal conflict. One of the difficulties in doing so, however, is that the Charter, like the League Covenant before it, is designed to meet the principal, perceived kind of violence of the day. In the case of the Charter, that violence is war across international boundaries which is to be met with collective defense. Instead of such clear cases of aggression, however, we have faced two decades of insurgency, terrorism, mixed civil-international conflict, conflicts within nations divided by a cold war, wars of unification, wars of succession, wars to create states where none previously existed, and competitions among various groups indigenous to the sovereign.

An examination of the language of the Charter reveals a variety of ambiguities as to how to deal with these conflicts. Article 2(4) prohibits the use of force that will violate the territorial or political integrity of a nation. Is it a use of force in violation of the territorial integrity or political independence if you are invited in by a recognized government which is engaged in civil strife in its territory? What happens in humanitarian intervention when the underlying values of the Charter that strongly support human rights conflict with the norms concerning non-use of force? What happens in alleged wars of national liberation when assertions are made that the principles of self-determination underlying the Charter justify setting aside the basic Charter prohibition of the use of force as a modality of change?

Within the framework of the rather loose, overriding normative structure of the Charter for dealing with conflicts, norms of intervention have evolved to fill the gaps. These norms have developed over time in response to different triggering events, but they have developed most rapidly in the post-Charter period. The Spanish Civil War, for example, gave rise to a body of literature on intervention and counter-intervention. An even more influential event was the Indo-China conflict which gave rise to an enormous richness of literature on the same issues. That body of literature has not only substantially clarified what the rules of intervention and counter-intervention are today, but also has provided guidance for determining what they should be.

Our examination of these rules should begin with a look at a number of the earlier rules which were asserted in this area. The traditional rule was that aid to a widely recognized government was lawful and that aid to insurgents was always unlawful. The difficulty with this rule is that it can easily become a Maginot Line

for the status quo. The freedom to aid the widely recognized government in putting down any insurgency whatsoever seems to be one justification for a Brezhnev Doctrine or a notion of "socialist self-determination." Such a notion will always permit intervention in order to put down any movement for self-determination on the part of the people.

As a reaction to this reasoning, a number of scholars developed something they called the neutral non-intervention standard. This standard was particularly supported by Professor Wolfgang Friedmann at Columbia. The neutral non-intervention standard simply said that it was illegal to aid either faction in an internal conflict. This rule, however, had two significant problems. The first was that it did not take into account pre-insurgency assistance: the notion that governments have networks of military assistance around the world which are perfectly permissible under international law. Yet, what happens when an insurgency breaks out? Does one have to freeze levels of assistance? Should they be prohibited from increasing levels of assistance? The issue of the pre-insurgency standard had to be dealt with, and the neutral non-intervention rule failed to do so. But there was an even more fundamental defect in the rule. In situations in which insurgents were receiving substantial external assistance, there could be no assurance that the insurgency was advancing self-determination rather than being manipulated by outside groups to promote their own interests. Prior assistance of this nature was illegal and this problem gave rise to a rather clear consensus in the international literature that a right of counter-intervention on behalf of a recognized government was necessary. This principle of counter-intervention is the counterpart of the defensive right in the norms of intervention contained in article 51 of the Charter, which is precisely the principle that says that nations are not required to stand by helplessly when force is being used in violation of the Charter. Realists recognize that the right to effective defense against covert forms of attack exists just as the right to defense against overt forms of attack exists with armies on the march.

In addition to the traditional principle and the neutral non-intervention principle, a third claim is still heard. It is that claims to aid insurgent movements or wars of national liberation are or should be lawful. This has immediate appeal in some respects because we are aware that the world does have a number of repressive regimes and self-determination requires a change in regime. Thus, the principle can seem attractive at first blush. It has, how-

ever, two fatal defects. The first is that it is nothing more than the old "just war" notion resurrected in the modern setting of the post-Charter period, and it violates that judgmental decision made by the framers of the Charter that war in the modern world is too destructive to allow social change to be brought about in international relations through the use of force. The second fundamental difficulty, which is not frequently recognized, is that if every nation is free to assist insurgent factions, assistance will be not only toward insurgent movements trying to overthrow a government which may be a particularly poor government, but also toward competing insurgent factions for the purpose of influencing the establishment of a different order system within the particular entity after the overthrow. In Angola, for example, the problem can be seen very clearly in the competing factions and the external assistance given to them. The potential for post-insurgency assistance can also be seen in the Nicaraguan situation in which targeted Cuban assistance was particularly effective in strengthening one group that is unfortunately not committed to democratic principles.

Now let us shift from the history of the development of the norms to an examination of the current rules of international law concerning intervention and non-intervention. The principal 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. However, as we have seen, there are two exceptions to this principal rule.[3] The first deals with the pre-insurgency assistance level problem. The 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. The second exception is by far the most important. When external assistance is being provided to insurgent factions, then providing the military assistance necessary to prevent a takeover by the externally assisted insurgent group is permissible. One is not required to provide such assistance, but in-

[3] A third possible exception is humanitarian intervention, which is the subject of Panel II of this colloquium. Without going into detail I would at least like to say that I believe that certain kinds of *carefully* delineated humanitarian interventions can indeed be lawful under the Charter. However, this issue is controversial.

ternational law allows aid to a widely recognized government if illegal assistance has been given to insurgents. This exception is fundamentally required by the basic principle of collective self-defense found in article 51 of the Charter.

In addition to these normative rules, the Security Council can at any time make a decision respecting an intervention which threatens to or actually does breach the peace. Any such decision validly made under chapter VII of the Charter would be binding on all the parties to the dispute. Furthermore, regional action under chapter VIII of the Charter would also be perfectly permissible if it met the requirements of lawful regional action. To meet these requirements the action must not be inconsistent with the purposes and principles of the Charter and it must not be enforcement action. An example of regional action might be an inter-American peace keeping force which goes into a country such as El Salvador to ensure the holding of free elections in which all factions are permitted to participate. Such an action would indeed be perfectly lawful under the Charter of the United Nations and perhaps a preferable way of dealing with many of these conflicts.

At this point the question may be raised as to how the Brezhnev Doctrine squares with the norms of intervention and non-intervention as set out above. The Brezhnev Doctrine, sometimes called socialist self-determination, is a claim that the Soviet Union can intervene in any system that has adopted a socialist government, for the purpose of preventing any change in that form of government. It is actually the converse of self-determination and clearly violates contemporary international law. Even searching for an acceptable Brezhnev Doctrine which comports with the principles as set out above flatters the doctrine unduly. The fundamental principles of the Charter are what we have and what we must live by. However, in the struggle for legal order taking place in the world, the Soviet Union is actively seeking to have the world accept the applicability of the doctrine in areas within the Soviet's own self-defined sphere of influence. Indeed, the doctrine has yet again been enunciated as the principal legal justification for the Soviet invasion of Afghanistan.

This leads us to the consideration of one of the questions posed at the outset of this colloquium: is there a difference between El Salvador and Afghanistan? The situation with respect to Afghanistan seems to be one in which an external Soviet invasion was immediately followed by a change in the government, and a request by that government for Soviet intervention. Such a situation is not

unheard of in the international arena, but it certainly is not a principle of law that deserves respect. Thus, the Afghanistan situation should most properly be thought of as a case of external aggression in clear violation of the United Nations Charter. Even if the Soviet characterization were accepted that they were invited into that nation under the principle of socialist self-determination, their actions clearly violate the principle that interference in internal conflicts, which prevents self-determination from running its course, is prohibited.

The situation in El Salvador is a great deal more complex. Significant evidence appears to show a highly polarized set of forces on the right and left, with both sides using extreme force to achieve particular objectives. In addition, under the regime of Napolean Duarte, a centrist political force recently has been seeking to provide cohesion through rather radical social reform. Within this setting, external assistance apparently is being provided to the insurgent forces in El Salvador. This assistance consists not only of efforts to organize the insurgent movements, but also includes supplying weapons and training. This assistance has been coming from a variety of "Socialist camp countries." Of course, the political support which is also being given does not enter into the use of force equation.

The United States has responded to this external military assistance with a rather limited form of counter-intervention. This intervention has consisted primarily of providing military advisors and assisting in the holding of relatively free elections. The type of assistance that the United States has provided seems to fit rather squarely within the bounds of permissible counter-intervention.

Thus, the answer to the question posed is yes: El Salvador and Afghanistan are different, fundamentally different. But reflecting a bit more on the question, as Hardy Dillard would say, a shorter and perhaps more accurate answer is no. Why no? As initially posed, the question was intended to focus on whether the United States actions in El Salvador differed from the Soviet Union's actions in Afghanistan. The answer to that question remains an unequivocal yes. However, the question can be viewed from a different perspective: are Soviet actions in Afghanistan fundamentally different from actions of the Soviet Union's client states, particularly Cuba, in El Salvador? From this perspective the situations in Afghanistan and El Salvador appear to be very similar. In both cases an effort seems to be afoot to change the system of a particular country without reference to self-determination and with an un-

willingness to submit to free elections.

Now that we have established the norms for intervention and counter-intervention and examined the situations in El Salvador and Afghanistan, as a final matter we should consider what position the United States should take with respect to El Salvador. First, the United States should unequivocably oppose any outside intervention in civil wars. So far our own involvement has been solely in response to external assistance provided to an insurgent movement. When that assistance is halted, we should no longer feel it necessary to provide military assistance as a countermeasure. Second, we should fully support self-determination. We should make clear that we favor and are prepared to accept internationally supervised elections in which every single faction in El Salvador is freely permitted to participate. We should not, however, accept forced political solutions from the barrel of an externally loaded gun. Furthermore, we should support the full applicability of the law of war guarantees and work for the constructive involvement of the Organization of American States system in the conflict. In short, let us clearly relate our actions to the important principles in which they are deeply rooted.